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GLOBALISATION AND CRIME: THE CHALLENGES TO JURISDICTIONAL PRINCIPLES

The process of globalisation has rapidly made crime borderless. This poses challenges to existing rules on jurisdiction, particularly of countries like Singapore which, as a result of the common law tradition, have shown a reluctance to deviate from the territoriality principle. This article argues that such states should move away from this position and respond to the new phenomenon of global integration of criminal syndicates by adopting more innovative theories of jurisdiction. It uses money-laundering to explore the alternative strategies that may be adopted.

THE process of globalisation has created distinct challenges to the system of world order. Such an order has the state, with definite territorial borders, as its basic unit. Globalisation and technology have, it has been argued, created spaces outside the territorial state which remain uncontrolled. Much of this space has been the creation of new computer-based technology, which has integrated world financial markets on an unprecedented scale. Trillions of dollars are estimated as circulating in cyberspace. Pornography is sent through internet. Money-laundering is done at incredible speeds through electronic means. As electronic commerce takes hold, the possibility of fraud and other crimes associated with these markets will increase. The control of this new space is regarded as posing challenges to the principles of criminal jurisdiction based on the state system.

This is not the only threat to the system of law and order that is based on the existence of states. Globalisation also has brought new actors onto the international scene.[1] The power of these new actors, like multinational companies and banks on the legitimate side of international business[2] and transnationally organised criminal syndicates on the illegitimate side of international business rivals those of many states.[3] These new actors integrate

1 The pioneering study is that of Susan Strange, *The Retreat of the State* (1992).

2 Jurisdiction over the activities of multinational corporations also presents a problem which is being addressed only in recent cases. There is much case law on the proper forum for litigation in such matters. See generally, A Briggs, *Civil Jurisdiction and Judgments* (1997).

3 It is stated in a recent United Nations Report that just three families controlling stocks in international corporations hold more assets than 47 nation states.

the global economy. Their chief executive officers in the case of multinational companies and the leaders of the organised criminal syndicates wield greater control over international finance than the prime ministers of many states.[4] As much as single individuals in command of large capital assets are credited with precipitating the Asian economic crisis, it is also possible to regard the leaders of multinational criminal syndicates as capable of bringing about similar chaos. With one stroke, they could bring nations to their heels. They operated transnationally as they had done in the past through conventional means of transport and communications.[5] But, what new technology, which is the central feature of internationalisation, has done is to create incredibly speedier methods of action in space that is not territorial in the conventional sense. The global actors operate increasingly in the so-called "cyberspace", a space that lies outside territorial boundaries. Like the multinational corporations exploiting technology to advance legitimate business, criminal groups are able to exploit new technology in non-physical spaces beyond state frontiers and thereby pose a threat to the existing system of territorial states. As much as business can make strategic alliances in the form of joint ventures, so can criminal syndicates in different parts of the world operate in association in the commission of crimes.

There is a view that the phenomenon of transnational crime has always existed. There was piracy, slavery, smuggling, arms trafficking, hijacking and much other criminal activity. The law has always responded to these problems adequately and that it would do so in the case of the new problems that globalisation has created. This view promotes complacency. The need is to address the issues and problems that globalisation has created by presenting the problems and suggesting solutions rather than developing solution in a piecemeal fashion.

This article, in response to that need, examines the extent of the threat which globalisation poses to the existing principles of criminal jurisdiction which are based on sovereignty over state territory and the measures that states should or could take to confront the threat. It uses money-laundering as the prime example of a transnational crime, which is promoted by the trends in globalisation. It analyses how it may be possible to utilise existing jurisdictional principles to deal with the problem where electronic and other speedy means are utilised to transfer proceeds of crime around to different

[4] P Williams, "Transnational Criminal Organisations: Strategic Alliances" in B Roberts (Ed) *Order and Disorder after the Cold War* (1995). See generally, N Passas (Ed), *Transnational Crime* (1999).

[5] The problem of transnational crime existed in the past. The examples of piracy and slavery are held out. These problems were adequately addressed through international law. The hope is held out that the new problems will be similarly dealt with.

destinations in the world. Money-laundering is chosen because it is a relatively new problem which has been spawned by the speedier means of transporting money as well as by the integration of criminal gangs around the world. To that extent, it is the archetypal crime that globalisation has generated. The paper begins with the examination of the existing jurisdictional principles, indicates their inadequacies and shows how organised crime exploits the existing principles to avoid jurisdiction. It argues for changes that would cater to the rapid developments taking place in the international criminal scene. It also examines how international co-operation could be strengthened through the territorial state system – the only instrument available – to combat these new phenomena in crime and the problems associated with such co-operation.

I. The Existing Principles of Jurisdiction

International law recognises five distinct bases on which jurisdiction, including criminal jurisdiction, could be claimed by states.[6] They are (1) the territoriality principle; (2) the nationality principle; (3) the protective principle; (4) the passive personality principle; and (5) the universality principle.

Of these, the most entrenched is the territoriality principle. Two reasons may be adduced for this wide acceptance. Firstly, equality of states and non-interference in domestic affairs of a state are the foundations of the international order. Hence, territoriality was the accepted basis of exercising jurisdiction as it accorded with these organising principles of international law. To extend jurisdiction beyond the territory of a state is to exercise jurisdiction in a space that may belong to another state. This will bring about conflicts. The avoidance of such conflicts required that primacy should be given to the territoriality principle. Secondly, most systems of criminal law developed having regard to crimes committed within definite geographic spaces, seldom extending beyond a village or city. The English criminal law, certainly developed in this fashion. Its procedural rules were also developed in the light of the fact that crimes are community based. The jury trial was instituted because the members of the community in which the offence took place had an understanding of the circumstances in which the offence was committed. When Lord Halsbury stated in *McCleod* v

6 On jurisdiction, generally see American Law Institute, *Foreign Relations Law* (3rd ed, 1987) at 230-383. *The Lotus Case* (1927) PCIJ Rpts, Series A, No 10 is the classic authority on the subject of jurisdiction. But, dicta in the case are capable of broad interpretation to support virtually any theory of jurisdiction. The emphasis was on state sovereignty and the ability of a state to espouse any theory of jurisdiction it wished so long as other states did not protest. The case excluded the idea that territoriality was the only basis of jurisdiction and expressly accepted the passive nationality principle and the effects doctrine.

Attorney General for New South Wales[7] that "all crime is local", he was articulating a doctrine that was historically and constitutionally accurate. The entrenched nature of this doctrine is evident from the tenacity it has in other common law jurisdictions. A litany of learning was expended to deal with the issue of whether or not the Singapore legislature had the power of passing legislation that applied to a crime committed by a national in Hong Kong in *Taw Cheng Kong* v *PP*.[8] The preoccupation with the territoriality principle is clear in many Malaysian and Singapore cases.[9]

This is not a peculiarity of the Malaysian and Singapore positions. The courts in these states were reflecting the position in other common law jurisdictions. But, there is a clearly evident desire to depart from the strict territoriality principle in the more recent cases. This is particularly clear in cases which have involved offences such as drug-trafficking as these offences are among the ones that have begun to pose global problems as a result of the transnational organisation of criminal groups which engage in them. The law has responded to the situation by extending the territoriality principle. But still, the idea that there must be some territorial nexus with the crime is retained.

The newer common law trends are visible in some Commonwealth decisions. In a Hong Kong case, *AG* v *Yeung Sun-shun*,[10] where a conspiracy to export elephant tusks from Macau into Hong Kong, contrary to the Export Ordinance of the colony was involved, the assistant purser of the ship which transported the tusks was a party to the conspiracy. The Court of Appeal of Hong Kong held that, though the conspiracy was formed in Macau, the Hong Kong courts had jurisdiction. The master of the ship was an innocent agent and the assistant purser was a guilty party and they participated in the performance of the conspiracy within jurisdiction. Roberts CJ also stated

7 [1891] AC 455. The case was really based on imperial constitutional law, denying extraterritorial power to colonial legislatures. It was unfortunately taken, out of context, as indicating a principle of jurisdiction by the colonial courts. There was no doubt, that the British Parliament had plenary powers to pass extraterritorial legislation.

8 [1998] 1 SLR 943.

9 They have so far largely dealt with the rather trivial offence of bigamy and held that no offence is triable if the second marriage took place outside jurisdiction as the courts have jurisdiction only in respect of crimes committed within jurisdiction, unless the legislature expressly specifies otherwise. M Sornarajah, "Extraterritorial Jurisdiction over Crimes in Singapore, Malaysia and the Commonwealth" (1987) 29 Malayan Law Review 200.

10 [1987] HKLR 987. Compare *Stonehouse* [1975] AC 55, where the wife would have acted as an innocent agent in claiming insurance. Also see *R* v *Beard* [1974] 1 WLR 1549. For Australia, see *White* v *Ridley* (1978) 140 CLR 342; *R* v *Skewes* (1981) 7 A Crim R 276. An old case, *Brisac* (1803) 4 East 154 is used to support the theory of agency, the judge there holding that the agents were "mere instruments" in the hands of those who formed the conspiracy outside jurisdiction.

that the court was not "unsympathetic to the view that the territorial basis for jurisdiction is being outmoded".[11] However, the case required some act to be performed within jurisdiction even though trivial. This trend is taken further in the Privy Council decision in *Liangsiriprasert*[12] where the Privy Council held that the common law courts will exercise jurisdiction over a drug offender who was deceived to come into the jurisdiction in order to pay for a shipment of drugs between different states. Lord Griffith stated:[13]

> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity, or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.

But even this is a narrow formulation of the law. What is needed is a statement that is consistent with the facts of the case and an acknowledgement that some act, however, trivial will justify the assumption of jurisdiction.

Most of the offences in which extensive jurisdiction has been claimed also involve drug offences in the suppression of which states share a common interest and hence protests are unlikely. In fact there has been extensive cooperation in the field, states showing a great readiness to extradite offenders to stand trial even in situations where extraterritorial jurisdiction is involved.[14] In fields such as drug trafficking and other drug related offences, conflict will not be generated by wide extraterritorial claims as there is a shared interest in the suppression of such activity which finds expression in international

[11] The Chief Justice referred to *Treacy* v *DPP* [1971] AC 537, the Canadian case, *Libman* v *R* (1985) 21 DLR (4th) 174 and the Zimbabwean case, *Mharapara* v *The State* [1986] LRC (Const) 235.

[12] [1991] 1 AC 225; followed in Australia, in *R* v *Fan* (1991) 56 A Crim R 189 but see *Re Hamilton Byrne* [1995] 1 VR 129.

[13] The case itself is consistent with the terminatory theory as the conspiracy was to export drugs from Thailand into Hong Kong. So, the case can be explained consistently with the territoriality theory. The significance is in the wide dictum in the case which supports the effects doctrine.

[14] Thus, *eg*, the accused in *Chua Han Mow* 730 F 2d 1308, was extradited from Malaysia for a conspiracy formed in Malaysia to export drugs into the United States. He was perhaps lucky that the Malaysian courts adopt a strict territoriality principle as there is capital punishment for drug offences in Malaysia. Compare *Liangsiriprasert* [1990] 2 All ER 866 where the Thai authorities cooperated with the US authorities in the arrest of their national in Hong Kong.

conventions. Thus, referring to the trafficking in drugs and the exercise of jurisdiction, Lord Salmon observed in *DPP* v *Doot*:[15]

> I do not believe that any civilised country, even assuming that its own laws did not recognise conspiracy as a criminal offence, could today have any reasonable objection to its nationals being arrested, tried and convicted by English courts in the circumstances to which I have referred. Today, crime is an international problem – perhaps not least, crimes connected with illicit drug traffic – and there is a great deal of cooperation between nations to bring criminals to justice.

The justification advanced for these extensions is one of public policy. The argument is that if there is a clearly articulated international community policy which requires the deterrence of a behaviour that is transnational in character, then domestic courts should assume jurisdiction over the crime even if the crime has only a trivial contact with the territory of the jurisdiction. The court here acts on behalf of the international community in seeking to deter activity, which is detrimental to the international community as a whole and acts as an agent of the international community. This extension of the basis of jurisdiction is now coming to be accepted in many common law jurisdictions, though judging by *Taw Cheng Kong's* case, the Singapore response to it is not sufficiently vigorous. The developments have taken place so far in the context of rather conventional offences, such as drug-trafficking and smuggling. The courts are yet to grapple with problems raised by transnational frauds through internet or other crimes which technology has generated.

In a rapidly changing world, the adherence to a strict territoriality principle is not tenable. It is least tenable in an international city-state like Singapore which lies at the cross-roads of commerce and is a host to much financial and stock market activities. It is necessary to make quick changes in attitudes to meet the new challenges of globalisation. What is necessary to cope with the problems of crime which globalisation has spawned is not only attitudinal changes but also an exploration of the need for new techniques to deal with the problems. The rest of the article looks at these problems, using money-laundering, a crime that is aided by the process of globalisation, as the basis of discussion.

[15] [1973] 1 All ER 940. Compare *US* v *Gonzalez* (1985) 776 F 2d 931 where the court in exercising jurisdiction over drug smuggling on the high seas, justified the extension of the jurisdiction on the ground that such conduct is "generally recognised as a crime under the laws of states that have reasonably developed legal systems".

II. The Nature of the Changes

Globalisation has two features.[16] The first is that it is a process that integrates the markets of the world, making financial and other centres open and accessible to all on a global scale. This means access to criminals as well. The second is that the emerging global economy is electronic, integrated through information systems and technology rather than organisational structures. Again, access to this electronic economy is open to all including criminals.

Both processes make the state system organised on the basis of the territorial state and the idea of jurisdictional authority and power confined within the boundaries of the state increasingly obsolete. The state system contemplates that all activity takes place somewhere within the jurisdiction of some state but technology has made this notion progressively irrelevant. Legal transactions of buying and selling through the internet, telemarketing and electronic commerce have made these territorial and state-based notions obsolete. "Cyberspace is not physical, geometric or geographic. The construction of markets as electronic networks renders space once again relational and symbolic, or metaphysical".[17] Whole areas of the law have to be rethought in the light of the growth of cyberspace and jurisdiction over this new space.

This rethinking has to be done in the area of crime as well. Technology, which has brought about the processes of globalisation, has also facilitated the spread of global crime. Two new types of problems have emerged. The first is that new methods of transnational crimes have been created. Pornography was a transnational crime in the sense that it could have been sent by post. But, sending it by internet is easier and provides more effective means of hiding the source as a multitude of locations could be used. Likewise, frauds will emerges as a result of electronic means of selling stocks and shares and as a result of electronic markets for goods. The second, is that the proceeds of crime can be hidden away in different states much faster. Global business can legitimately transfer vast funds from one country into another and exploit tax havens so as to maximise profits. It is equally possible for criminal gangs to exploit the same technology to spirit away funds obtained from drug smuggling, the sale of contraband or smuggled art in one country to safe havens where such money could be kept. Given that technology has facilitated globalisation through business and that the

[16] SJ Korbin, "The Architecture of Globalisation: State Sovereignty in a Networked Global Economy: in Dunning, JH (Ed) *Governments, Globalisation and International Business* (1997) at 146; *ibid*, "Back to the Future: Neomedievalism and the Postmodern Digital World Economy" (1998) 51 J Int Affs 152.

[17] *Ibid*, 51 J Int Affs at 162.

same processes that assist the processes of globalisation of business also assist the globalisation of crime, it is necessary to identify the types of crimes which have been assisted by the rise of new technology. Once this is done, the paper will isolate one of the more important of these crimes-money laundering – for special study from a jurisdictional point of view and from the point of view of procedures for dealing with such crimes. Such a focus on a single crime will aid in devising similar methods for dealing with other types of crimes generated or facilitated by the process of globalisation. Generally, it can be seen that these crimes are interconnected and are practised by the same groups. International relations specialists regard multinational corporations as significant actors on the international scene. They are not averse to regarding the international mafia groups as akin to these corporations as they also exert a tremendous influence on the course of international events. They also have significant control over power, influence and money. Such control exceeds those of small states. It is the fact of this power that poses significant threat to the state system from these criminal groups.

The nature of the changes in the international criminal scene are identified in the literature. They largely involve the speed with which transactions could be made through computers. As much as this new technology facilitates and enhances lawful activity, it has generated much illegal activity. The creation of internet has brought about fresh problems. The instantaneous transfer of money that could be effected through the medium of computers has facilitated money laundering. The space it has created is new space the control over which cannot be based on the existing adherence to strict territoriality. It is not crime alone that has been affected. Issues as to where the contract was made when contracts are made through computer generated means, where defamation takes place where a person is defamed on computer, where copyright violation takes place when such copyrighted material is published on internet, issues of privacy when personal information is stored in computer systems are new problems which have arisen and await solutions.

In the area of jurisdiction over crime which is the main focus of this paper, the computer revolution has led to many problems. The sending of pornography through internet, the hacking of computer systems in other countries, the commission of computer frauds involving foreign computer systems are some of the issues that are raised in the area. Rather than deal with all these situations cursorily, it is best to make a somewhat deeper analysis of one situation, namely moneylaundering and the role of computer technology in assisting the process. The experience derived from moneylaundering is applied to other areas of crime. Transnational organised

crimes feed on each other's experience.[18] To that extent, the experience in tackling one type of such crimes is relevant to the tackling of other crimes.

The issues have to be identified and the possible responses analysed. Money-laundering involves the process of making illegally obtained money appear lawful as a result of having gone through several intermediate seemingly lawful transactions.[19] The money is tainted as usually it is obtained through the sale of narcotic substances, a crime which itself has increasingly become a transnational crime. Technology assists in the process as the necessary transactions can be speedily made several times over through computer assisted means and the money would eventually reach a safe haven. The tracking of the money becomes difficult as a result of the series of transactions having been made and the money moved through several jurisdictions.[20] For a period of time, the money moves through space created by technology over which no single nation has control. The phenomenon is described in a recent work in the following terms:[21]

> ...the world in which the new economy functions is more akin to an electronic commons than it is to an economy. And like any commons, this new electronic space is owned not by governments but by the people who use it. The sheer volume of money in the financial system and the ease with which it can be moved electronically have also made it much easier to obscure, move and clean the profits from illicit activities. The system itself has outrun the development of rules and regulations.

It is also possible to take the money across several countries in the form of stored value cards. This facilitates the taking of smaller amounts of money across boundaries.

[18] Corruption, for example, facilitates all other transnational crimes. The same techniques of moving money used by drug gangs are used by terrorist groups and arms smugglers or those in prostitution rackets.

[19] There is increasing literature on the subject. See WC Gilmour, *Dirty Money: The Evolution of Money Laundering Counter-Measures* (1995); R Bosworth-Davies, *The Impact of Money Laundering Legislation* (1997); C Schaap, *Fighting Money Laundering* (1998).

[20] The process involves three stages. The first stage is the placement of the illicit proceeds of the crime into the financial system through banks. Where there are rules seeking to control large transactions as in the US, the practice of "smurfing", that is depositing small quantities of cash in several transactions is resorted to. The second stage is "layering" which seeks to disguise the origin of the funds and erases the trail. The third is integration of the proceeds into the legitimate economy.

[21] P Williams and EU Savona, *The United Nations and Transnational Organized Crime* (1996) at 10.

The movement of the money through cyberspace into different countries raises several jurisdictional problems relating to the tracking of the money, the investigation of the offence of moneylaundering and the recovery of the money from the jurisdiction which it has entered. Technically the jurisdictional problem is no different from others for money has still to be sent and be received in some state.[22] To that extent, it could be argued that this is a problem of a choice of jurisdiction. Jurisdiction could exist either in the state where the transaction was initiated or where the transaction terminated. Stated in this form, the issue is merely one of deciding whether an initiatory or terminatory theory of jurisdiction should be applied.[23] But, the difficulty arises because of the numerous transactions that are involved in a short space of time. This not only poses problems for investigation of the crime but also as to which of the different states could exercise jurisdiction. It could well be that more significant acts necessary for the transaction to be successfully effected could have taken place in states which were not targeted at all. Such for example would be states where the necessary clearances for the transaction took place.

The fact that these drug cartels are transnationally organised and have political connections with those in power in states[24] as well as financial operators who act as intermediaries in several states also adds to the international dimension of the problem and increases the possibility of jurisdictional conflicts.[25] It has been suggested that the state system maintains a two-faced attitude to the problem. It has come down hard on the drug traffickers but has not been as harsh on the institutions which launder the money, protecting them through bank secrecy and other laws, thereby showing the traditional dislike of the state to deal harshly with white collar offenders.[26]

[22] An early instance of such a transfer involving a crime is *R* v *Thompson* [1984] 1 WLR 962 where a bank clerk transferred money from a client's account in Kuwait into his own account in England on the day he was leaving Kuwait. The English court held it had jurisdiction as the object of the fraud, the receipt of the money in England was committed within the jurisdiction of the English court.

[23] The common law cases seem to favour the terminatory theory over the initiation theory: *Collins* (1987) 42 SASR 47.

[24] The classic instance being the symbiotic existence between political power and the criminal mafia in Italy. In days of military dictatorships and even later, the situation was similar in Latin American states.

[25] A principal state involved may avoid prosecution simply because it favours such crime as it brings in revenue from external sources or because those in power in the state are beneficiaries of the crime.

[26] Thus Susan Strange has observed that money laundering has been tacitly accepted as being on the right side of the law, "inasmuch as only the most feeble attempts have been used to make the banks responsible, as criminal accessories, to the laundering of money acquired by criminal activities-whether bribes, robbery, or illegal trafficking. The contradiction

It has also been suggested that some states break their alliances with criminal groups only because these groups are now able to break out of the state power and form alliances with outside groups by exploiting the forces of globalisation and thereby increase their collective power within the state.[27] The whole of the international system becomes threatened as a result of this rival system of power. The rival system flourishes because some states, at least, are sympathetic to the rival system because it benefits them.[28] Given this situation, the possibility of a wholehearted effort to combat the problem of money-laundering would still be far off. Yet, it is relevant to inquire whether unilateral as opposed to multilateral means or a combination of both would be the best way of dealing with the problem.

III. Multilateral or Unilateral Responses

Faced with this new phenomena of technology based crimes in the new spaces that technically fall outside the jurisdiction of any single state, states have responded in two principal ways. The first is by taking unilateral action. A state having the means and the power to do so would seek to take action unilaterally to ward off what it perceives are dangers to its system resulting from crimes such as drug-trafficking and the associated activity of money-laundering which enables the fruits of such trafficking to be enjoyed by the criminal groups. The second is through multilateral action. Such action can be meaningful only if there is an effective regime that could be brought about between the states to investigate, prosecute and punish the persons involved. A third possible way is through a combination of both forms of action. Neither solution has been pushed to the ultimate ends because of the divergence of attitudes among states or because of jurisdictional constraints.

between the two decisions, that selling drugs is illegal but handling the financial proceeds of the trade is not, is putting the entire system of state authority at risk" S Strange, *The Retreat of the State* (1996) at 119.

27 This again is the analysis of Susan Strange. "..the state (Italy), paradoxically and perhaps shortsightedly, had gone along with the United States in allowing capital to move freely across borders and to find refuge in unregulated offshore banks and tax-havens. The result was that state auhority was threatened-and not only in Italy. It was threatened not just by local organised crime but by a parallel anarchical society of rival authorities, each of them engaged in activities judged by state governments to be the wrong side of the law". (*ibid,* at 120)

28 Certainly, the states which provide havens to money that is laundered benefit from the flow of the money. Sometimes, the parent state may have strict laws but these may not be applied strictly in the former colonial state which is still its part. *Eg,* Holland and the Anitilles. Efforts are made to address these discrepancies.

A. *Unilateral Solutions*

This idea is based on the premise that state sovereignty is still the most important factor in dealing with crimes in new spaces like cyberspace. This being so, the premise is that the state which is most affected by the behaviour should be able to deal with the problem. Advocates of this solution would reason that conduct must still occur within state territory for crimes in the so-called new spaces to be committed. They must originate or have effects in definite states. A crime like money-laundering or computer fraud should have a place of initiation and a place of effect. On this basis, it is possible to argue that the state having an interest to prosecute the crime should not be hindered from such prosecution. Those who take this view would regard cyberspace as new space which is not subject to any state control as mere technological hype. The other states should willingly cede jurisdiction to states which are willing to go after these offenders so that the offender should be punished. This argument is a sovereignty centred argument. In international relations theory, it reasserts the supremacy of the state and rejects the idea that new actors like the criminal groups or multinational corporations have grown up as parallel bases of power within the international system.

It enables the strong state to take action in these matters. To that extent, it is a power-based justification for the use of extraterritorial jurisdiction. The United States is the best expositor of this argument in the manner in which it justifies the use of its law. The exercise of such jurisdiction may be justified in theoretical terms through the effects doctrine or the protective principle. Another justification that could be used is that some of the crimes, particularly drug-trafficking and the associated crime of money-laundering are so universally condemned that they are subject to the universality principle of jurisdiction. This argument would have it that in seeking to suppress such crimes, the state is addressing conduct that harms the whole of the international community.[29] Universal condemnation of the conduct is indicated through treaties and resolutions of bodies like the General Assembly of the United Nations. On drug-trafficking and its related offences, it is easy to show that there is international consensus that these offences should be suppressed. Hence, though it is generally accepted that the exercise of extraterritorial jurisdiction is not favoured, in the limited instance in which it would be possible to show the existence of international consensus in the suppression of particular types of conduct, such jurisdiction may be permissible.

[29] M Sornarajah, "Extraterritorial Criminal Jurisdiction: American and Commonwealth Perspectives" (1998) 2 SJICL 1.

Unlike Commonwealth courts which show restraint in extending the territoriality doctrine, the US courts do not suffer from any similar restraint. The inference to be drawn from the American cases is that where there are drug-related or fraudulent offences committed abroad, the United States courts will exercise jurisdiction provided that there is some link, however slender, with its jurisdiction. The American courts have generally adopted a functional approach to the problem of criminal jurisdiction often sacrificing theoretical purity in order to justify the assumption of jurisdiciton over offences committed overseas.[30]

The situation is complicated when applied to money-laundering which is a crime associated with drug trafficking. Technology is supposed to complicate the situation of discovery of such laundering due to the manner in which money can be transferred around the world. One position would be that American jurisdiction or the jurisdiction of any state willing to exercise such jurisdiction should be engaged if that jurisdiction is affected even in some slender way by the process of laundering. As with piracy, the state having the means and the willingness to suppress the crime should be permitted to exercise jurisdiction.

Two attitudes could be taken to this position. It could be welcomed as it means that the strongest existing state with power, resources and the technological capacity to investigate and prosecute such crimes is playing a role in their suppression. As the technological resources for investigating such sophisticated crimes is possessed by advanced states, it is necessary that these states be given such latitude. Such a state acts as a proxy to the international community to meet a distinct threat that is posed to the whole community. There would be a need to match the technological capacity of the criminal gangs which are able to purchase qualified persons. Such matching can only be done by a large and powerful state which is prepared to invest the resources into the suppression of such crime. Besides, the argument runs, the United States Courts have the requisite predisposition as well as the experience to deal with these matters. They have sophisticated rules on discovery. They have dealt with universal crimes such as torture in an increasing number of cases. Hence, American courts are, unlike other domestic courts, well suited for the role of dealing with novel problems in transnational crimes. These are the arguments which support the unilateralist answer to the problem.

The criticisms against it are that it allows the hegemonistic state a free rein in the area as to what should be done. It would mean that this state

[30] C Blakesley, "United States Jurisdiction over Extraterritorial Crime" (1982) 73 J Criminal Law & Criminology 1109.

could freely intervene in the sovereign realm of other states on the ostensible basis that there is a need to suppress crime. There is also the problem that such enforcement may disregard the rights of the citizens of other states who may be innocent. There may be a tendency to hit at the least powerful states in order to give the image that something is being done by the enforcement authorities of the big state. It will arouse nationalist sentiments particularly where the laws of other states contain principles which may be violated as a result of the intrusion.[31]

The dilemma, of course, is that the role of the powerful state in this area is important whether the solution devised is a multilateral one or an unilateral one. Even in the situation of a multilateral regime, the leadership for devising it and the resources for the regime will have to be provided by the hegemonist power. The role of the big power in issues of this sort cannot be denied and in the last resort, the reality has to be faced that the big state will act in its own interest rather than in the interests of the world at large.

Those who advocate the unilateral solutions regard the views relating to cyberspace as new space as an exaggeration. They do not think that the new technologies have created spaces that cannot be controlled by sovereign states. Computer systems have to be operated from somewhere and the money sent through these means will have to be received and enjoyed within state jurisdiction. This being so, the argument is that state power could be used either unilaterally or collectively to deal with this issue which should not be regarded as uniquely new. The unilateralist solution will permit the use of extraterritoriality without consent of states whose sovereignty may be affected.

It is interesting to pursue the argument in relation to money-laundering. The idea that technology has constructed markets both economic and financial in cyberspace is first debunked as a myth.[32] The significance of electronic money that has been created by new technology is regarded as having been overstated. The impact of the new technology has been possible only because there has been a simultaneous liberalisation of the financial markets by the states. It is the coincidence of new technology and the liberalisation

[31] *Eg,* Bank secrecy laws, which some states consider vital to their national interests.

[32] This idea is put forward by influential thinkers in international relations. They suggest that new technology has eroded state sovereignty and brought about a situation in the world akin to that which existed prior to the rise of the state system after the Peace of Westphalia. See for such analysis, SJ Korbin, "Back to the Future: Neomedievalism and the Postmodern Digital World Economy" (1998) 51 J of Int Affs 146. It is usually constructed in terms of the globalisation phenomenon and the role that computer technology has played in it. J Dunning (Ed) *Governments, Globalization and International Business* (1997) at 146-171. S Korbin, "Electronic Cash and the End of National Markets" (1997) 107 *Foreign Policy* 89.

of markets by states which has created the problem. While a state may not have control over developments in technology, it can still decide against liberalisation and close its markets to foreign flows of capital. Malaysia demonstrated this possibility during the Asian financial crisis. As a result, it would be wrong to look at the present phenomenon only in terms of new technology. Theoretically, the states could scotch all the negative activities accompanying the new technology by instituting restrictions on the process of liberalisation. Or they could take co-operative action to control the negative effects. This they have done. An example is the OECD's Financial Action Task Force which sought to recommend measures against money-laundering. It is also suggested that the new technology may enhance rather than diminish state power to control illegitimate transfers of money as electronic money flows leave a record whereas carrying real money across borders does not.[33] Wire transfers are subject to careful scrutiny by states. Electronic money has to move through several "choke points" at which the flows can be monitored.[34] This indicates that electronic money does not move entirely in cyberspace but is dependent on certain geographical centres. These centres may provide the basis for state control and jurisdiction. Though this would mean that the United States and the United Kingdom governments which control these centres have a particular power, it is better that there be control than there be no control. Technology can assist in the identification of suspicious transactions. On the basis of these arguments, Helleiner concludes:[35]

> While IT may have enhanced the potential mobility of money, it has also given states new tools and mechanisms for asserting their sovereign power and authority in the financial sector if they chose to do so. Indeed, there are some reasons to believe that the IT revolution may actually enhance state regulatory power. To be sure, states whose territories are used as central locations for electronic financial activity, such as the United States and Britain, will have more power than others. Moreover, not all states have the resources or capacity to introduce advanced monitoring systems. But the case of the international anti-moneylaundering initiative suggests that even weaker states may experience enhanced regulatory power as powerful states are encouraged to offer them technical and legal assistance in order to enhance the efficacy of international control regimes.

[33] Which may be why criminals prefer to deal with real money.

[34] The CHIPS and SWIFT networks have to clear the money.

[35] E Helleiner, "Electronic Money: A Challenge to the Sovereign State?" (1998) 51 J Int Affs 361.

Such writers also regard the use of stored valued cards or electronic purses as posing no problem. There are inbuilt limitations in these methods of transferring money as the possibility of fraud ensures that issuing institutions exercise the necessary care. Also the amounts permitted to be stored are small.

This is an interesting academic debate on whether state sovereignty is so eroded that a state cannot cope with the new technology making it necessary to devise new supranational institutions to deal with the problem. One must now look at the evidence that is available to determine what the scene truly is.

Such evidence must be gathered from the official sources such as the reports of the Financial Action Task Force.[36] Regarding banking through internet, the report said that there had been no cases of laundering detected in the sector. But, this may be due to the success of laundering through this medium. Such success cannot be discounted in view of "the several features of these technologies such as the rapitidity of transaction performance, the numerous opportunities for anonymity that are offered, and the risk of a break in the audit trail and withdrawal from the traditional banking system". The Report refers to jurisdictional problems twice. In relation to internet banking, it refers to the "difficulty of locating a site, which may be different from the one where the illegal practices were identified."[37] As regards the electronic purse systems, it stated that it would increase the practice of "smurfing" across borders. This will "certainly pose problems of international co-operation as regards jurisdictional competence and the site of legal proceedings". The report concedes that as much as technology gives rise to these problems, it could also provide effective means of record keeping and facilitate controls over the practice. In the concluding section, the Report states that "with regard to new technology, much work still has to be done before all the related laundering dangers are clearly identified and before any possible counter-measures can be considered".[38] The impression created is that the area is still an uncharted one. But, it also indicates that many of the problems could in fact be dealt with through creative uses of the existing jurisdictional principles. This option, though, is open to the larger states with sufficient resources to deal with such crimes on a global basis. The possibility of jurisdictional coflicts still remains.

[36] FATF, *1997-1998 Report on Money Laundering Typologies* 12 Feb 1998.

[37] The report refers to the Antigua based European Union Bank Case as the only case so far on this.

[38] *Supra*, note 36 at para 88.

IV. Co-operative Responses

The rationale for international co-operation is simply that unilateral measures cannot work in the face of the organised might of transnational criminal syndicates. Where such measures become stringent, they would simply relocate and function in state where control is less stringent and continue to affect other states. Except in the case of the very large states with the power of extraterritorial reach, unilateral measures are ineffective. The problem must be looked upon as affecting the international community as a whole and co-operative, multilateral measures be taken to combat a common threat.

But, sovereignty has been an obstacle in devising co-operative responses in the area.[39] Criminals themselves will exploit nationalism and state sovereignty to safeguard themselves from international efforts to combat their activities.[40] Unless there is the recognition that transnational crime also undermines sovereignty, effective international cooperation to combat them cannot emerge. The cooperative schemes that have been devised so far through the OECD and other institutions carefully avoid the problem of sovereignty as these bodies serve merely advisory functions indicating what states could or should do to deal with the problems, including jurisdictional problems, involving crimes such as money-laundering and the role of technology in facilitating them. Obviously voluntary co-operation is better than compulsory co-operation. The generally suggested solution is that there should be agreements for mutual co-operation in these fields. But, there are difficulties which attend this solution as well.[41] Corruption of officials, advantages in turning a blind eye to the problem in "sanctuary states" which profit from such crimes and nationalism will hinder efforts at co-operation. The problem has to be addressed having regard to the various stages of the criminal process in mind.

[39] As it has been pointed out, "in spite of the imperatives for cooperation, criminal law has long been not only a matter of national jurisdiction but also one of the main expressions of national sovereignty – the key assumptions of which are that the state recognizes no higher legal and constitutional authority than itself and has a monopoly on the legitimate use of force". Williams, PH and Savona UE, *The United Nations and Transnational Organised Crime* (1996), at 83.

[40] In an earlier age, pirates like Francis Drake were national heroes. It would appear that there is a considerable amount of official corruption which hides the activities of transnational crimes. The political culture in some states condones this situation.

[41] Williams, PH and Savona UE, The United Nations and Transnational Organised Crime (1996) at 83-85. Also see JR Richards, *Transnational Criminal Organisations, Cyber-crime and Money-Laundering* (1999).

Investigation of crimes is an area in which mutual cooperation is possible and several formal and informal agreements exist for such cooperation. But, there are occasions when the triggering of the procedures involved for such cooperation is time consuming and may hinder investigations. Crimes involving the computer assisted transfers of money would require search of computer data banks in different countries. Data stored in one country may have to be examined to examine the evidence of crime. The question arises whether the investigating authorities may penetrate the database by direct access, without the intervention, knowledge or agreement of the state in which the data are located. Preservation of evidence may be necessary as the offenders may seek to delete them. Speed becomes of paramount importance. But, the possibility that sovereignty is violated when such data sources in another country are accessed remains. Referring to this a report concludes: "the view that the deliberate investigation of on-line data constitutes a violation of the sovereignty of the other state is probably correct, whether it is done by the investigating authorities from the premises of the suspect or from their own terminals".[42] This view is strictly correct. The suggested solution to overcome the problem is to require the consent of the state in which the data bank exists but this would require time whereas speed is the main factor in ensuring that the evidence is not destroyed at the push of a button.[43] The conclusion of agreements among states to provide for the situation is a possibility but such agreements do not exist. A doctrine of necessity may be used to justify the action. Where it is necessary to access the data bank to preserve the evidence which could be destroyed, it could be argued that the interference with sovereignty is justified. Such interference is minimal. The investigation of the crime and the punishment of the criminal are higher values secured by the intervention. There must be some curb on the unilateral freedom of the state seeking the data and this could be found in proportionality and good faith. A complete denial of the right to intervene cannot be accepted for this would facilitate the criminal groups rather than the interests of states in crime prevention. The interference is in no way akin to physical interference. So, though domestic sovereignty is technically violated by the interference, it must be balanced against the globally beneficial ends which are secured. Yet, the counter to this would be that if there could be such interference, then, a foreign state may also search other sensitive data banks storing military or commercial information. The issue does have potential for being a touchy one. Technically, it would be possible to subvert the

[42] International Review of Criminal Policy – United Nations Manual on the Prevention and Control of Computer-related Crime, Para 264.

[43] Such intervention is no different from physical intervention of the type used in the *Alvarez-Machain Case* (1992) 112 S Ct 2188. The decision has been condemned by most commentators.

interests of states by sending computer viruses without ever entering the state. If it is permitted to enter data, then, the argument is that it may lower the protective standards of the law to such an extent that it may become permissible to undermine the computer systems and thereby the economies of states through such interference.[44] Regard must be had to the nature of the crime that was sought to be prevented and the extent of the intervention in obtaining evidence in deciding on the issue. Where possible, the target state should be informed and its consent sought. In days of instant communication, there should be no difficulty in satisfying this requirement.

Again, the problem is one of jurisdiction. If the strict territoriality principle is to be adhered to its full extent, only the criminal will profit. The rule becomes a hindrance rather than a help in crime prevention. Yet, one has to be cautious in seeking extensions, as sovereignty issues are implicated.

The dual criminality rule is also an hindrance to investigations. Many of the cooperative solutions made through agreements contain the requirement that both states should regard the act being investigated as criminal. The co-operation mechanisms will not be triggered unless this condition is satisfied. Harmonization of the principles relating to money-laundering and related offences will eventually help in overcoming the problem created by the rule. Such harmonisation should proceed on the basis of a uniform model accepted universally. But differences in legal culture and different perceptions as to the urgency for such legislation have hampered harmonization.[45] There could also be procedural limitations. Bank secrecy laws may hinder the examination of records and data banks. Here again, it is necessary to convince states which maintain strict laws on bank secrecy to give up such laws in the global interests of crime prevention.

The freezing of assets present in another state is another important step facilitating the investigation of the crime. The extent to which Mareva injunctions could be used extraterritorially is relevant in these instances. Where the criminal assets are identified in another jurisdiction, it would become important to ensure that such assets are frozen so that they may not be spirited away before the criminal prosecution is completed. Courts should be ready to issue such injunctions. In the interests of comity, courts of other countries should recognise such injunctions which are issued.

[44] International law has hitherto concentrated only on transborder incursions of a military kind. But, it is equally possible to cause destruction of the assets of a state through undermining its computer networks and systems without the use of military force. So, far the literature on the area has not addressed this issue.

[45] It has been pointed out that even among developed European countries, there is no uniformity on drug laws despite the Convention on the Illicit Traffic in Narcotic Drugs.

The problems associated with freezing orders were illustrated by *Nanus Asia Co Inc* v *Standard Chartered Bank*.[46] This was an insider trading case and therefore is different. The allegation was that profits obtained through insider trading in the US were deposited with Standard Chartered in Hong Kong. The US Securities and Exchange Commission (SEC) obtained a freeze order on the funds of the plaintiff. Some of the funds were held in Hong Kong. The Standard Chartered Bank at first refused to obey the freeze order on the basis that the order made by the New York courts could not operate extraterritorially in Hong Kong. The New York Court then threatened to hold the New Yourk branch of Standard Chartered in contempt and demanded that the money held in Hong Kong by the plaintiff be paid over to the SEC. The money was paid under protest to the SEC. The plaintiff brought the action in Hong Kong against the Bank for complying with the order of the New York court. The Hong Kong court got over the difficulties in the case cleverly. It held that the moment Standard Chartered in Hong Kong had notice of the fact that the monies were obtained through illegal transactions in the US, it became a constructive trustee of the monies and they ceased to owe a primary duty to their depositor, the plaintiff. On this analysis, the court discarded the issue of extraterritoriality and regarded the issue as being subject to Hong Kong law.

The case also raised the issue of the responsibility of banks and other professional advisers in these matters. The Criminal Justice Act in the UK[47] now casts a duty upon such advisers not to turn a "Nelsonian blind eye" when banks and similar institutions deal with suspicious money.[48] The role of banks becomes important here. FATF recommended measures regarding the role of banks in familarising themselves with their clients activities. But, these measures have met with limited success.[49] Faced with this, a convention was drafted to ensure the confiscation of money that was the subject of money-laundering.[50]

Confiscation of assets. Legislation now provides for the confiscation of assets subject to money-laundering. Such legislation has been made more

46 (1990) 1 HKLR 396.

47 S 93(c) (2).

48 *Agip Africa Ltd* v *Jackson* [1990] Ch 265; *Abdul Ghani El Ajou* v *Dollar Land Holdings Ltd* (1993) 2 All ER 717. On issues relating to tracing money, see Sir Peter Millet, "Tracing the Proceeds of Fraud" (1991) 107 LQR 71.

49 Gilmore, *Dirty Money,* at 136.

50 The work of a European Commission Committee, the Convention, nevertheless was drafted as not confined to Europe. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990). Text can be found in Appendix 3 to Gilmore, *Dirty Money*, at 273. Zagaris and Kingma, "Asset Forfeiture: International and Foreign Law" (1991) Emory ILR 445.

effective in the different jurisdictions. The Convention on Money Laundering sponsored by the EC contains provisions on this subject. But, the more innovative ideas on this is to be found in the judgments of different courts in the common law jurisdictions which have used their existing powers to bring about meaningful possibilities of cooperation as regards the attachment of assets belonging to money-launderers or other fraudsters. Here, the approach has been to lump all the associated crimes together and develop principles which could be applied equally to the different types of trans-border crimes.

Tracing of money subject to fraud and other offences. This is another area in which the common law courts have been active. Again, the task is done without any assistance from an convention but unilaterally by courts which exercise jurisdiction both territorially and extraterritorially with the consent of the other jurisdictions affected. In this sense, there is an informal judicial co-operation which has evolved. It could well be argued that left to themselves, the major courts of the world will work out a system of assets seizures which will deter transnational crime. But, this is a matter for conjecture at the moment, though one can detect signs of it happening in many cases. It could well be that in areas where there is sufficient unanimity among states, their courts would show vigour in developing responses faster to suit new situations than can be done through negotiations resulting in treaties. This is an interesting theory which has been developed by some writers who argue that in international matters, national courts converse among themselves and come to an acceptable solution.[51]

Extradition of offenders is already provided for in bilateral treaties. But, many states show reluctance to extradite nationals. Also, the double criminality rule has to be satisfied and haven states which profit from financial transactions do not have stringent rules prohibiting illegitimate financial transactions in the same way that other states do. This hinders extradition and those who make such transactions take full advantage of such loopholes in the law. It could well be that multilateral treaties will be successful but states have shown little desire to conclude such multilateral treaties.

Multilateralism or Unilateralism: It is obvious that there has been no consensus on whether strong multilateral responses should be taken to the problem. States do not seem to be in agreement to bring about such uniform measures on a global scale despite the fact that there have been efforts to show that these measures may be mutually beneficial. The reluctance has much to do with surrender of sovereign control over events that take place within the territory of the state to institutions or machinery which

[51] Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 EJIL 503.

may have to be set up in order to control the criminal behaviour. Thinking on these matters is dominated by national self-interest. While powerful states feel that they can cope with the situation through extraterritorial measures, weaker states may either profit from the situation or may fear that if institutional machinery is created to deal with the situation, such machinery would be dominated by the powerful states which have the resources to use. As a result, the consensus necessary to bring about firm rules through treaties seems to be lacking. Cooperation, however, comes about in areas where the measures are stated as recommendatory and not binding and are informal. A state must assess the costs and benefits involved in co-operation. Where it is convinced that its sovereignty is undermined by transnational crime, it is likely to co-operate in international institutional mechanisms to suppress such crimes. But, where it feels that it may profit as a result of such transfers, then, it is not likely to take these measures seriously even though it may make a show by joining with the others in participating in such institutional efforts. This presents the dilemma in the area. States profit from their bank secrecy laws and other rules which at present protect the transnational criminal groups. To ween them away from the present situation into whole-hearted participation may prove difficult. Sovereignty concerns continue to play a role in such situations.

Whatever the regime that is constructed in this area for co-operative action, the fact is that the regime would be dominated by a state or states having sufficient resources and technological power to meet the challenge of transnational crime. Such a state or states must have the sophistication to match or overcome the sophisticated technology and capacity that transnational gangs can through into their criminal ventures. If the regime that is constructed depends on such leadership by the technologically powerful states, the question arises as to why they should not be allowed to act alone and permit them to use extraterritorial powers. Such states are going to do this in crimes which affect them with or without an international regime. The advantage of the regime is that it would give legitimacy to such extraterritorial action and their could be consultation among states prior to such action. Also, there is the possibility that the resources of the powerful states could be made use of by the less advanced states where there is machinery for international co-operation. As these issues are looked upon as creating problems that affect common international interests, the case for stronger international regimes to deal with the situation will emerge.[52]

[52] This would be so where any international co-operative effort is required. For a study in the area of international insolvency, see Uni, L, "International Relations and International Insolvency Cooperation: Liberalism, Institutionalism and Transnational Legal Dialogue" (1997) 28 L&P in Int Bus 1037.

The offender's perspective: The chaos which exists in the area permits much opportunity for the criminal gangs to structure their activities so as to exploit the confusion. This again is not a new phenomenon for even in the past international offenders sought safe havens, very much like pirates or freedom fighters (or terrorists) in the old days. There were ports which profited from pirates. As in the past, the criminal gangs will exploit different attitudes in different jurisdictions in order to continue with their activities. They will part their assets in countries which are soft towards enforcement of laws or resent scrutiny by international agencies. They will use technology to go through several jurisdictions so as to loose the trail of the assets they have got through crime. These are unavoidable factors and will deter the bringing about of an effective international regime. Yet, as with piracy in the past, if the need is demonstrated that such offences can undermine the international system, there will be sufficient international responses to deal with the issues presented.

V. Conclusion

This paper has demonstrated that the adherence to strict principles of jurisdiction may deter efforts to deal with the new forms of crimes which globalisation has thrown up. The solutions that have been advanced so far have been haphazard. Truly, global solutions are yet to be worked out. This may be because of the fact that these crimes are not seen as presenting a sufficiently global threat as yet to bring about a united response as in the case of the offences like piracy or slavery in the past. Until this happens, all that is possible is to utilise existing principles of jurisdiction creatively to deal with the new problems. But, such an approach is only possible for states which have the sophistication and the resources necessary to embark on a venture to act as global policemen. Whether the conversion of the domestic courts into international courts is desirable and whether encroachments on sovereignty that this entails should be regarded as permissible are issues that are yet to be addressed.

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