The dispute between national jurisdiction and the international criminal court for extraordinary and humanity crimes

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ABSTRACT
Where there is society there is law (Ubi Societas Ibi Ius), and when drug crime as an "extraordinary crime" claimed more than 4 million victims (2016) in the Philippines, then President Duterte according to national criminal law declared "War on Drugs Operation", and as a result the perpetrators of crimes died 12,000 people, however, Duterte was instead considered a perpetrator of crimes against humanity (extrajudicial killing) by the International Criminal Court (ICC). Research Methods with Normative Juridical through literature study, and according to the formulation of the problem raised, it was found and concluded that, First, the authority of the Philippines to make a policy of "War on Drugs Operation" tackling extraordinary drug crimes in a reflexive manner with the principle of legality of Article 9 Republic Act 9145 is a lawful policy, Second, in legal jurisdictional disputes, then as long as the enforcement of the national law is carried out based on the applicable criminal law, then the justice that must be put forward is justice in national law, in this case the ICC actually has to reform the law in the Rome Statute because there is still a void in the norms governing such jurisdictional disputes.

Keywords: dispute, jurisdiction, international criminal court, extraordinary crime.

1 INTRODUCTION

Ubi Societas Ibi Ius is a legal principle, which describes the existence of a society engaging in legislation. In connection with this principle, Julian V. Roberts (2015) stated that “...society causes crime and offenders.. no society, no laws, no crime, and no criminals. At the emergence of a society, rules develop, and their violation necessitates a response, otherwise, the rules would lose potency to affect behavior”. This principle and legal maxim attain significance in light of the increasing occurrence of national offenses categorized as international crimes by the international society. It is either based on the Rome Statute or due to their extraordinary nature with numerous global victims, such as drug crimes. This concern leads to the establishment of the United Nations on Drugs and Crime (UNODC).

The increasing interaction between society within states in various fields contributed to the increase in international and transnational drug crimes. There is also a shared concern among the international society regarding these crimes. The United Nations Office on Drugs and Crime (UNODC)
defined drug crimes as "extraordinary." In 2018, 269 million people, ranging from 166 to 373 million, had used a drug at least once in the previous year. This is equivalent to 5.4%, ranging from 3.3 to 7.5% of the global population aged 15 to 64 (UNODC, 2020).

As the prevalence of drug crimes increases at the national, regional, and global levels, various national jurisdictions agreed to label drug crimes as "extraordinary". Subsequently, various national legislation and policies were enacted to perform harsh law enforcement measures in order to eliminate these crimes.

To address the escalation of drug crimes at the regional level, Southeast Asian states also held the 33rd ASEAN Summit in Manila, the Philippines, in 2015. An agreement was reached to sign the Drug-Free ASEAN 2020 declaration with a commitment to eliminate drug production, processing, trafficking, and consumption by 2020.

After being elected as the President of the Philippines on June 30, 2016, Rodrigo Duterte, who is the host of the Drug-Free ASEAN declaration promptly implemented a policy to combat drug crimes known as the War on Drugs Operation. This policy was based on the legal principle of Command Memorandum Circular (CMC) No.16-2016 on double barrel operation. It served as the foundation for the Philippines National Police in the War on Drugs campaign (Novi Asalamu, 2019), and the operation resulted in the deaths of more than 12,000 suspected drug offenders.

There was also an international consensus to eliminate various crimes that occurred within national jurisdictions. The Rome Statute was established as a compelling law (Jus Cogens) to guide states to coexist and maintain world peace. Additionally, the "Statute for the International Criminal Court (ICC)" was enacted to ensure guaranteed protection of Human Rights, serving as an unquestionable legal norm (Jus Cogens) that held a place in the international legal framework.

The issue is the disparity between the envisioned (das sollen) and the actual law (das sein) in the "War on Drugs Operation." The enforcement of the War on Drugs in the Philippines based on the legal foundation of CMC No.16-2016 is valid under national law. However, it clashes with the Rome Statute of 1998 designating Genocide and crimes against humanity committed in a structured and systematic manner as "extraordinary crimes." The ICC categorized the War on Drugs campaign as an invalid law enforcement action and a systematic attack on civilians. Therefore, the issues raised in this study are as follows. First, how does the Philippines have the authority to implement the War on Drugs policy to combat the extraordinary crimes of drug abuse? Second, regarding the jurisdiction dispute where both the ICC and Duterte claimed to address crimes against humanity, which justice should be prioritized in the legal domain? Which nexus of jurisdiction holds stronger significance?
2 LITERATUR REVIEW

International crimes refer to offenses with characteristics and international dimensions, and their occurrence can take place in one or more states. Consequently, jurisdiction to prosecute such crimes is connected to either the national or the ICC, depending on the elements of the perpetrator, crime type, and governing laws.

The term "jurisdiction" originates from the Latin word "jurisdictio," with "yuris" meaning "legal authority" or "authority according to law," and "dictio" referring to "utterance" or "designation" (I Wayan Parthiana, 1990). In the Encyclopedia Americana, “jurisdiction” in law is a term for power or authority. It is usually applied to courts and quasi-judicial bodies, describing the scope of their right to act. As applied to a state or nation, it denotes the authority to declare and enforce the law. Meanwhile, according to D.P. O’Connel (1970), jurisdiction is "the power of a sovereign to influence the rights of individuals, through legislation, executive decree, or the judgment of a court". Jurisdiction can be understood as the "power to adjudicate in a court," signifying its indispensability in the enforcement of international criminal law.

Drug crimes constitute organized crimes involving money laundering with extensive impacts on a wide range of victims and result in extremely harmful negative effects. These crimes exhibit significant multidimensional impacts on social, cultural, economic, and political aspects. Consequently, they are categorized as extraordinary, transnational, and organized crimes, necessitating extraordinary punishment to address crimes with exceptional characteristics. Drug crimes were classified as organized due to their secretive organization with a structured, hierarchical, planned, and sustainable system (Zainab Ompu Jainah, 2013).

The issue of territoriality as a principle or basis has been discussed by previous studies. Rollin M. Perkins, in the study "The Territorial Principle in Criminal Law," discussed the territorial theory stating that criminal jurisdiction depends on the place of perpetration. According to Topo Santoso (2020), the state where the crime is committed has jurisdiction over the crime.

The International Agreement known as the Rome Statute of 1998 was reached during the Diplomatic Conference on July 17, 1998, in Rome. In this Statute, genocide, crimes against humanity, war, and aggression were categorized as "extraordinary crimes" under the ICC jurisdiction.

The term "jus cogens" means "the compelling law," and it holds the highest hierarchical position among all other norms and principles. Therefore, jus cogens norms are deemed to be "peremptory" and non-derogable (M. Cherif Bassiouni, 1996). In cases involving criminal jurisdiction with international dimensions, the ICC needs to ensure the application of the lex loci delicti commissi, dictating that the law of the place where the crime occurred is applied for the enforcement of the ICC jurisdiction.
The ICC jurisdiction can be divided into four categories. **First**, territorial jurisdiction (*ratione loci*) applies only to international crimes that occur within the territory of a state party to the Rome Statute. This includes crimes committed on ships or aircraft registered in a state party to the Rome Statute and within the territory of a non-party state that recognized the ICC jurisdiction based on an Ad Hoc declaration. **Second**, material jurisdiction (*rationae materiae*) consists of crimes against humanity, war crimes, genocide, and aggression, as mentioned above. **Third**, temporal jurisdiction (*ratione temporis*) covers crimes regulated after the Rome Statute took effect on July 1, 2002. Crimes committed before the date fall outside the ICC jurisdiction. **Fourth**, personal jurisdiction (*ratiionae personae*) is exercised over perpetrators of crimes within the ICC jurisdiction. This involves holding the perpetrators personally accountable for their criminal actions, irrespective of their status, which may include government officials and military or civilian commanders. These individuals are subjected to prosecution based on their role and capacity in criminal events.

**3 METHODOLOGY**

This study used the Normative Juridical method, through a literature study by interpreting various secondary legal materials, such as books, journals from legal experts, and others, as well as primary materials found in International Criminal Law and the Philippines Criminal Law. These materials were analyzed systematically and coherently. The entire writing process was aimed at collecting legal materials, relating them to legal concepts, and presenting the results in the form of legal thoughts.

**4 DISCUSSION**

The issue of drugs and narcotic substances in the Philippines has evolved into a serious challenge, attributed to both technical and weak political issues. The prevalence of drug and narcotics trafficking in the Philippines is part of the dynamics of drug circulation in the Southeast Asian region. Hydrochloride methamphetamine or "shabu" is the most widely used illicit drug in the Philippines, and the society also consumed marijuana. The Philippines became a major hub for illicit drugs in Southeast Asia due to its geographical location (Brenda Jacobs, et al., 2021).

According to Ilyas et al. (2019), the prevention regulation of drug crimes is ineffective in practice. Sociological studies showed that many factors related to drugs, such as psychological, sociological, and economic factors, were significantly interconnected, leading to increased crimes. Therefore, drug crimes could be categorized as crimes against humanity with progressive growth, causing concerns for society worldwide, necessitating a repressive eradication approach.

The nature of drug crimes became worthy of being declared extraordinary because of the victims and the threat to the economy and security of the Philippines. This designation arises from the degradation
of human values and humanity, necessitating its eradication through extraordinary repressive means. According to Luye Mou (2021), different jurisdictions may have different ways to achieve truth. Therefore, President Rodrigo Duterte promptly implemented a new policy for drug eradication called the War on Drugs Operation, based on the Philippines Criminal Law. According to Human Rights Watch (2021), the repressive anti-drug law enforcement campaign of Duterte caused the death of more than 12,000 individuals, with 2,555 people linked to the Philippines National Police. Consequently, the Philippines government succeeded in significantly reducing drug abuse from 4 million in 2016 to 1.67 million in 2019.

The legal implications of Duterte law enforcement became a paradox and a subject of scholarly discourse. This was because the repressive law enforcement on drug crimes by Duterte, based on the provisions of Article 9 of Republic Act 9145, was considered a crime against humanity (extrajudicial killing) by the ICC under Article 5(1)(d) and Article 7 of the Rome Statute. As a result, the criteria to be considered an International Criminal Offense was fulfilled, subjected to the ICC jurisdiction. The ICC judges also agreed to initiate an official investigation into alleged human rights violations in Duterte anti-drug campaign.

Considering that the enforcement of the law is legitimately based on the Philippines Criminal Law, the Philippines President Rodrigo Duterte firmly would not cooperate with the ICC or allow the ICC members to gather evidence regarding the matter, in response to the statement of the ICC. Moreover, it was argued that the Anti-Drug Campaign was carried out in accordance with the law. According to Duterte, the Philippines had already withdrawn from the Rome Statute at the time of its implementation, thereby eliminating the ICC jurisdiction over the issue.

Various disparities exist between the ideal law (das sollen), such as the Philippines Criminal Law and the Rome Statute, as Duterte "extraordinary crime" Anti-Drug Campaign is a policy based on the Philippines Law, reviving the provision of Article 9 of Republic Act 9145. However, in reality (das sein), this situation became a paradox because it is also considered a crime against humanity, which is an "extraordinary crime" and conflicts with human rights according to the ICC, as evident in Articles 5(1)(d) and 7 of the Rome Statute.

4.1 THE AUTHORITY OF THE PHILIPPINES TO IMPLEMENT THE WAR ON DRUGS POLICY IN ADDRESSING EXTRAORDINARY CRIME: DRUG ABUSE

Globally, the law, guided by a humanistic approach, has regulated the right of every individual to live and be treated equally in law enforcement. This is because every human life is precious, as it is inherently endowed with rights, a principle that extends universally to criminal offenders and law-abiding
citizens. However, since the rights of an individual are limited by others, the State must ensure and make efforts to maintain a balance by enforcing its national laws.

The government needs to formulate various policies to anticipate and prevent an increase in the level of crime within a state. This starts with preemptive measures, such as creating various legal regulations to combat crime. In the presence of potential crimes, the government proceeds with preventive actions within society. However, when the crime rate becomes alarming and troubling for society, it becomes the obligation of the government to conduct responsive and measured law enforcement to ensure order. When crimes have become uncontrollable and have been declared "extraordinary" on a global scale, it becomes necessary to institute a regime of "extraordinary repressive" law enforcement. This strategic approach will create a deterrent effect and consequentially reduce the crime rate. Therefore, the law enforcement policy of the War on Drugs Operation conducted by Duterte in the Philippines is theoretically very legal. This is consistent with statistical data that “Around 1.67 million or two out of one hundred Filipinos aged 10 to 69 are current users of drugs, according to the results of the 2019 National Household Survey on the Patterns and Trends of Drug Abuse, released by the Dangerous Drugs Board (2019)”.

The success of Duterte campaign against drugs is effective, evident from the significant difference in the number of drug abuse victims compared to the casualties of the war against drug syndicates. During this period, the estimated number of drug users was 4 million in 2016. However, after the drug war campaign, the casualties of suspected criminals were only 12,000, decreasing drug abuse victims to 1.67 million in 2019. This clearly showed the proactive policy of the government in effectively protecting society.

4.2 DISPUTE BETWEEN THE PHILIPPINES NATIONAL JURISDICTION AND THE INTERNATIONAL CRIMINAL COURT (ICC)

As previously mentioned, the rise in crimes is influenced by sociological, psychological, and economic developments in society. Therefore, legal policies should be developed to adapt to these developments, and in this context, the state should not be defeated by any form of crime. The emergence of International crimes within national jurisdictions is founded in the intricacies of the societal evolution of a state. As these crimes gradually extend their reach to affect a broader range of victims and have international dimensions, the International Society agreed to establish various Conventions, resulting in International Criminal Law and its enforcement institutions, such as the ICC.

Jurisdiction is crucial in international criminal law to determine which party has the authority to prosecute a case. In the case of the anti-drugs war campaign, the reintroduction of Article 9 of Republic Act 9145 became significant. This article imposes penalties for drug abuse, including life imprisonment
and the death penalty, as well as fines ranging from 500,000 to 10,000,000 pesos. Duterte ordered the police to carry out the execution of drug abusers who refused to surrender (Gabriel Mallatang Sianturi, Anak Agung Sri Utari, 2021).

The Anti-Drug Campaign policy, which is aimed at cleansing all areas affected in the Philippines is an expression of the effort to uphold the law as the state must not be defeated by crimes. This policy is also consistent with the concept of Cesare Beccaria thinking, where each individual surrendered some of their freedom/independence to the state to ensure the continuity of society. Therefore, the Philippines Anti-Drugs policy existed to protect society from the actions of crime perpetrators.

There is a connection between the Philippines Anti-Drugs policy, being a member of the ICC member, and its impact on society. The policy had a positive effect in curbing drug abuse, resulting in a decline in the number of victims from 4 million (2016) to 1.67 million (2019), but caused the loss of 12,000 lives of drug crimes syndicate members. Consequently, the ICC considered this policy to meet the criteria in Article 5 of the Rome Statute as 'the most serious crimes' and 'crimes against humanity'. This is because it involves killing, imprisonment, or deprivation of physical freedom by systematically violating fundamental rules of international law against a civilian group in the Philippines. According to the current international law, a state has certain limitations in applying jurisdiction to cases involving the interests of other states (Stephen Wilske and Theresa Schiller, 1997). Therefore, Duterte should be tried in the domestic courts of the Philippines for his actions.

According to the ICC, the threat of punishment against Duterte as a perpetrator of crimes against humanity has led to new legal issues in the fight against drugs as extraordinary crimes. Based on the principles of legality and territoriality in criminal law, each state is obligated to establish jurisdictional rules to prosecute and enforce criminal responsibility within its territory. The jurisdiction of the Philippines to prosecute is subject to its domestic legal provisions and recognized universal principles.

4.3 THE NATIONAL CRIMINAL JURISDICTION OF THE PHILIPPINES

In a situation where the jurisdictional dispute is examined from the perspective of the universally applicable territorial principle, the enforcement jurisdiction based on Article 9 of Republic Act 9145 in the Philippines becomes stronger. The territorial principle indicates that anyone suspected of committing a crime within the territory of a state is subject to the criminal law of that state. Therefore, given the strength of nexus elements, such as locus delicti or locus criminis, tempus delicti, and the victim, favoring the jurisdiction of the Philippines, the applicable criminal law should be the law of the Philippines, namely lex loci delicti commissi.

According to I Wayan Partiana (2004), a state possesses sovereignty with two sides, namely the internal and external. The internal side of state sovereignty gives rise to territorial sovereignty. On the
other hand, the external side denotes the coexistence of states, establishes equality in status, rights, and reciprocal obligations, as well as the ability to establish relationships and equal positions. The opinion of Rollin M. Perkins above presented the territorial theory that criminal jurisdiction depends on where the crime is committed and the jurisdiction belongs to the state of occurrence.

Drug crimes, along with their cross-border distribution and control by international syndicates, as well as the increasing number of victims causing global concern, fulfill the criteria of international crimes. Therefore, it is appropriate to declare these crimes as a common enemy of international society. In response, many states within their national jurisdictions are enforcing the law extraordinarily against such crimes, as evident in the actions of the Philippines President Rodrigo Duterte.

The existence of a nexus in law enforcement based on the Philippines national law regarding drug crimes categorized as "extraordinary," potentially conflicts with the jurisdiction of the ICC, constitutes a new legal fact. However, in such cases where a nexus occurs, provided that the national law enforcement is carried out accordingly, the focus should be on justice and legal fairness within the Philippines national law. This is particularly significant following the withdrawal of the Philippines from the Rome Statute, thereby removing the jurisdiction of the ICC over the matter. In this situation, the ICC should update the Rome Statute to address the nexus that was not detected at its creation or any legal gaps in the Statute related to this matter.

Based on the argument that the Philippines withdraw from the ICC during the "War on Drugs" campaign, the ICC no longer has the authority to adjudicate on the matter. The Rome Statute does not regulate the existence of an excuse for an act where law enforcement is carried out based on valid law. Therefore, the jurisdiction of the ICC can only be pursued through a request for surrender assistance, requiring a state that does not carry out its obligations under international law concerning the diplomatic immunity of an individual from a third state. This condition applies as long as that state is the ICC member.

In this context, the effectiveness of national jurisdiction resides in law enforcement within the state. In essence, a law is considered effective when it can be enforced and obeyed by society. A law that cannot be enforced due to a lack of accountability for crimes will result in chaos within the national jurisdiction. According to Lawrence M. Friedman, law enforcement is an integral part of the legal system. Without law enforcement (formeel recht), substantive legal rules (materieel recht) would merely be piles of paper (ee pupieren muur) (Malik, 2013).

5 CONCLUSION

In conclusion, the authority of the Philippines to implement the “War on Drugs” Operation in combating extraordinary crimes was based on law because it was founded on the principle of legality. This was evident in Article 9 of Republic Act 9145, which prescribed life imprisonment to the death
penalty for drug offenders. Furthermore, the policy had proven effective in reducing drug abuse during the period 2016-2019 and contributed significantly to society order. The jurisdiction dispute between the ICC and Duterte claiming to work to address crimes against humanity represented a new legal fact. It showed that law enforcement based on national jurisdiction over "Drug Crimes" categorized as "extraordinary" contradicted the jurisdiction of the ICC. In such cases, provided the enforcement is carried out in accordance with the law, the nexus that should be emphasized is justice within the national legal system. The ICC should update the Rome Statute, which was considered unable to detect the nexus or, at least, address potential legal deficiencies inherent to the Statute related to this matter. Moreover, since the Philippines had withdrawn from the Rome Statute, the ICC had no jurisdiction over this matter.
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