

International Cooperation to Surpress Transboundary Corruption in Indonesia

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Indonesia already made some agreements with other countries to cooperate combating corruption, but the process of cooperation to eradicate corruption has not always been smooth. Even though Indonesia has co-operated with other countries in form of legal policy and law enforcement, the formal process takes a long time and high fees. Dual criminality, different legal system and good willingness are some factors that inhibiting law enforcement process. Hence, besides the formal way, good willingness and reciprocal principle, the requesting of extraditing the fugitive to Indonesia can be done by diplomatic channel without formal request.

Keywords: International Cooperation, Corruption, Indonesia

Introduction

In 2016, the Indonesia Corruption Perception Index was at 37 out of 100 as shown by the annual survey released by the Berlin-based Transparency International.^{1,2,3} Indonesia has made some improvement in its bureaucracy and thus the score is slightly improved by one point compared to the score in 2015. But Indonesia performance is still 6 points below the global average score. Corruption in Indonesia mainly happens due to the lack of law enforcement in both the public and private sectors.

Corruption is not an only a domestic issue, but also a transnational issue^{4,5}. Some cases may involve suspect from other country or evidence and asset which is located outside the country. This situation creates more hindrance, in suppressing corruption. Related to trans-



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boundary corruption, until 2016, after successfully arresting three fugitives extradited from overseas^{6,7,8}, there were 33 fugitives of corruption fled from Indonesia to another country. Tracing, finding, and/or extraditing the suspect become more difficult. Recovering assets located in other country is almost impossible.

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To prevent and to suppress transnational corruption, Indonesia ratified United Nation Convention Against Transnational Organized Crimes (UNTOC), United Nation Convention Against Corruption (UNCAC) and some bilateral and multilateral agreements about extradition and mutual legal assistance in criminal matters, those are an example of the attempt to promote international cooperation.

Lack of law enforcement is one factor which allowed the suspects escaped to overseas. To deal with the problem, Indonesian Government law enforcement must have cooperation with other countries in form of legal policy and law enforcement.

Indonesia already made some agreements with other countries to cooperate combating corruption, but the process of cooperation to eradicate corruption has not always been smooth. For example, the suspect of Bank Indonesia Liquidity Assistance (BLBI) corruption case, Adrian Kiki Ariawan, escaped to Australia in 2002 and became Australian Citizen by changing his name to Adrian Adamas. Indonesia and Australia have an agreement of Extradition since 1994, but to return Adrian Kiki to Indonesia needs process more than 5 years since 2008. He finally returned to Indonesia in early 2014. The difference of legal system between Indonesia and the Australian is one factor that makes this case needs a long process, such as the procedure for a request for extradition. Therefore, this paper tries to analyze to what extent the international cooperation could give a contribution and support Indonesia Government to prevent and combat transboundary corruption.

The contribution of international cooperation to prevent and combat transboundary corruption

In recent year, corruption becomes transnational, some perpetrators escaped to abroad including their stolen assets. Transboundary cooperation among States, and between States and international institutions, must be strengthened to prevent and combat transboundary corruption.

The United Nation Convention Against Corruption (UNCAC) and The United Nation Convention Against Transnational Organized

Crimes (UNTOC), are landmark instrument which offers a new framework for effective action and international cooperation among States to prevent and detect corruption and to return the proceeds.⁹ The provision about corruption in UNTOC can be found in article 8 and 9. Those articles stated that the State Party should criminalize corruption through their legislation or other measures. Even though UNTOC already regulated corruption, but UNCAC is the first global legally binding instrument in the fight against corruption.

The purposes of UNCAC are to promote and strengthen measures to prevent and combat corruption through international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery.¹⁰ Extradition, mutual legal assistance, transfer of criminal proceeding, transfer of sentences, joint criminal investigation and asset recovery are form of international cooperation to assist each other in investigating and proceeding in criminal, civil and administrative matters relating to corruption.¹¹ The paragraph 1, Article 43 UNCAC not only regulated cooperation in criminal matters but also broadening the type of cooperation in civil and administrative matters, such as, compensation for harm caused by criminal conduct.¹²

To promote and strengthen cooperation among states, UNTOC and UNCAC, provides that convention can be a legal basis for States Parties which not have an extradition treaty between them.¹³ Article 16, paragraph 4 of UNTOC provides that, in the absence of a treaty and if a State normally insists on a treaty for extradition, it “may consider (UNTOC) the legal basis for extradition in respect of any offence to which this article applies. The use of UNTOC, as a legal basis for extradition, applies to State party which do not require a treaty for extradition.”¹⁴

Not all countries have agreed to make UNTOC and UNCAC as the legal basis for extradition, some countries declared that UNTOC and UNCAC would not be the basis for extradition treaties.¹⁵ To make cooperation among State’s, bilateral agreement is an option, international cooperation still can going. The reciprocity principle is a tool can use in a situation in which there is no treaty. The reciprocity principle is a promise that the requesting State will provide the requested State with the same type of assistance in the future.¹⁶ This principle is usually incorporated into treaties, memorandum of understanding and domestic law. some countries use their domestic legislation as a basis for extradition and apply the principle of reciprocity as a precondition to considering extradition to another state.¹⁷

That convention also mandate the establishment of Central Authority. The benefit of central authority is that a State has more control over the request of international cooperation.¹⁸

Indonesia regulations about corruption and international cooperation against corruption

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Preventing and combating corruption is the main priority of Government of Indonesia at global levels and national. In the global level, Indonesia is a signatory to the United Nations Convention Against Corruption 2003 (UNCAC). The convention was signed on 31 October 2003 and ratified by the Indonesian parliament, in Law No. 7 of 2006 regarding Ratification of UNCAC on 18 April 2006. Indonesia is also a signatory to the United Nations Convention against Transnational Organized Crime, 2000 (UNTOC). This convention was ratified by the Indonesian parliament in 2009 in Law No. 5 of 2009.

In the national level, there is some regulation relating to prevent and combat corruption. There are:

- a. Law No. 11 of 1980 on Bribery (Anti-Bribery Law);
- b. Law No. 28 of 1999 on State Management that is Clean and Free from Corruption, Collusion and Nepotism (Good Governance Law);
- c. Law No. 31 of 1999 on Corruption Eradication (last amended by Law No. 20 of 2001) (Anti-Corruption Law);
- d. Law No. 30 of 2002 on the Corruption Eradication Commission (the KPK);
- e. Law No. 46 of 2009 on the Corruption Court;
- f. Law No. 8 of 2010 on the Prevention and Eradication of Money Laundering

Individual and corporate can be prosecuted for corruption offence. The sanction for corruption under Anti-Corruption Law are imprisonment, fines, and in some special circumstances, the perpetrator the court may order life imprisonment or the death penalty. Besides, primary sanction, there are also additional penalties as set out under the Anti-Corruption Law, namely:

- a. confiscation of tangible or intangible moveable goods or immoveable goods that are used for or obtained from corruption, including a company owned by the defendant in which the corruption is committed, and also goods that replace the relevant goods as mentioned above;

- b. payment of compensation, the maximum amount of which is the same as for any property gained from corruption;
- c. permanent or temporary closure of the company for a maximum period of one year; and
- d. revocation of all or part of certain rights or nullification of all or part of any benefit that has been or may be given by the government to the defendant.

Indonesia is a party state of UNTOC and UNCAC, with the ratification of those conventions Indonesia agree to cooperate with another in every aspect of the fight against corruption. Chapter IV of UNCAC focus on state cooperation and emphasis on mutual legal assistance and extradition. Countries should enter into bilateral agreements or be able to refer directly to UNCAC in making a request for legal assistance or extradition.¹⁹ The state party also required to undertake measures to support the tracing, freezing, seizure, and confiscation of an asset from the corruption through joint investigation, transfer of criminal proceeding and/or transfer of sentenced person²⁰

To promote cooperation among countries Indonesia already has national regulation about extradition and mutual legal assistance in criminal matters. There are Law No 1/1979 on Extradition²¹ and Law No 1/2006 on MLA²² on Criminal Matters. Besides that, Indonesia has some regional and bilateral agreement related to extradition and MLA.

There are:

Bilateral extradition agreements:

1. Malaysia
2. Philippines
3. Thailand
4. Australia
5. Hong Kong
6. Republic of Korea
7. Singapore²³

Regional & Bilateral MLA agreements:

1. ASEAN Treaty on MLA in Criminal Matters
2. Australia
3. Hong Kong
4. India
5. South Korea
6. People's Republic of China

7. UAE
8. Vietnam

The barrier of international cooperation against corruption in Indonesia perspective

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Indonesia, since 19 September 2006 has been ratified UNCAC in Law No. 7 the Year 2006 concerning the Legalization of UNCAC 2003. Despite still have some reservation over article 66 paragraph 2, the signing and the ratification clearly prove Indonesia as a part of international cooperation against corruption.

International cooperation to suppress corruption is not easy, many factors can cause barriers. The barriers are:

1. Dual criminality. The main principle of extradition and MLA is dual criminality, which means the alleged crime can be extradited if it is punishable in both the requested and requesting state.²⁴ Dual criminality is a primary requirement for an extradition and MLA. Corruption has a broader meaning, UNCAC put a lot of categorization of crimes which can put in term of corruption. There are bribery of national or foreign public officials,²⁵ embezzlement/misappropriation of property by a public official,²⁶ trading in influence,²⁷ abuse of function,²⁸ illicit enrichment,²⁹ private sector bribery,³⁰ and private sector embezzlement.³¹ Even though, Indonesia is a party of UNCAC, the ratification does not automatically criminalize the crime listed on the UNCAC, to enforce those crime, Indonesia regulation need implementing legislation through criminalization with domestic law. The crimes such as trading in influence and private sector bribery are not yet criminalized by domestic law and it can influence the treaty's force of law in practice especially extradition and MLA. Another case are ECW Neloe. Neloe is former president director of Bank Mandiri. He has USD \$ 5.2 million and still blocked by the Swiss Government. However, the request of MLA by Indonesia government can not be executed, because the action that Neloe did in Indonesia which categorize as corruption only recognized as administrative infringements in Switzerland.
2. Different legal system and legal tradition related to different procedures. If the requested state does not aware and clear about the procedure in requesting state, can cause the requesting of extradition or MLA rejected.³² There are three major legal traditions in

the world, civil law tradition, common law tradition and Islamic legal tradition.

Based on legal tradition, Indonesia legal tradition is civil law rather than common law, which is derived from French and German models. Indonesia used codification of laws and legislation as the primary source of law rather than common law where the law developed through precedent or law made by the judge.

Eq:

- ◇ Djoko Tjandra was convicted of misusing Bank Indonesia Liquidity Support (BLBI) funds in Bank Bali Case in 1999. He flew off to Papua New Guinea on June 10, 2009, just one day before the Supreme Court issued a verdict against him. The Supreme Court found Joko guilty and sentenced him to two years in prison and fined Rp 15 million (around US\$1,500). In Papua New Guinea, Joko has been found to own a property business. Djoko Tjandra has double citizenship Indonesia and Papua New Guinea. Indonesia Government requesting Papua New Guinea Government to extradite Djoko Tjandra, however, The Papua New Guinea government still has not revoked Joko's citizenship status and there will be a trial for the citizenship case in Papua New Guinea.³³
 - ◇ Adrian Kiki Ariawan was extradited to Indonesia after the Australian High Court approved the Indonesian government application for his extradition on December 18, 2013. Adrian Kiki Ariawan, was President Director of PT Bank Surya, in the trial in-absentia has been sentenced to life imprisonment by the Central Jakarta District Court on November 13, 2002. He has been found guilty of corruption (misappropriation of funds BLBI) and defrauding the state of Rp 1,5 trillion. Adrian Kiki escaped to Australia since 2002 and has been an Austrian citizen with changing his name to Adrian Adamas.³⁴ The extradition process took more than 5 years. Adrian had submitted an application to Australia not to be extradited to Indonesia.
3. Good willingness. As mention above, UNTOC and UNCAC provide those conventions can be a legal basis for international cooperation to suppress corruption³⁵, but some countries, particularly in ASEAN such as Singapore, Malaysia, Myanmar and Laos, made a declaration for that clause.³⁶ The declaration for that clause can

make the process to extradite or MLA will be a delay, except the requested state does not require treaty for extradition or MLA process.

4. Central Authority. Central authority is an important body to make simple international cooperation. Article 18, paragraph 13, specifically references the creation of the central authority. The functions of central authority are to ensure the speedy and proper execution or transmission of request received. The benefit of having a central authority is that a State has more control over incoming and outgoing requests and begins to create a centre of expertise with respect to international cooperation.³⁷

To handling cooperation on extradition and mutual legal assistance, Indonesia has established the central authority unit under the Ministry of Law and Human Rights, at the Directorate of International Law and Central Authority. For corruption, besides the Ministry of Law and Human Rights, Indonesia has special agents which have authority there are Attorney's General and Corruption Eradication Commission (KPK). But in other countries, such as Malaysia and Australia, the central authority is the Attorney's General. The difference institution of central authority can cause delay and miss communication among State or even among law enforcement itself when they have issues about extradition and MLA.

5. *In absentia*. In absentia, is one of reason to reject extradition and MLA process. In some case, the fugitive used in absentia clause as part of the argument to refuse extradition from another country. Indonesia at present well recognize and apply in absentia in the case of corruption.³⁸ *In absentia trial* is a trial where the defendants have been summoned legally but they can't attend the trial without a legitimate reason, so the court tried them without their existence. Article 196 and Article 214 Criminal Law Procedures Code (KUHAP) regulates in absentia trial for faster investigation.

Eq: Hendra Rahardja and Adrian Kiki are some fugitives whose sentenced with in absentia trial after they had fled. Hendra, the former owner of now-defunct Bank Harapan Sentosa, and his son, Eko Edy Putranto, were convicted of embezzlement in absentia in 2002. Adrian, the former director of Bank Surya, was convicted in absentia in 2002 of embezzlement and sentenced to

life in jail. A lawyer of Adrian, questioning whether prosecutors had taken proper steps to summon the former bank director to Indonesia for the trial connected with the legality of the in absentia trial that resulted in Adrian's conviction.

CEJISS Besides extradition and mutual legal assistance, the international
4/2018 cooperation done by Indonesia to catch is through joint investigation.

◇ Nunun Nurbaeti, a wife of the former deputy chief of the National Police and now legislator Adang Daradjatun, is alleged to have distributed the bribes to the politicians, who were serving on the parliamentary financial commission that selects senior central bank officials, allegedly received travellers' cheques worth between 150 million rupiah (\$16,610) and 1.45 billion rupiah (\$160,600) in exchange for nominating Miranda Goeltom as the Bank Indonesia senior deputy governor in 2004. Corruption Eradication Commission (KPK), asked the National Police to forward the request for arrest, known as a red notice, to the Interpol. Nunun fled to some countries, such as Singapore and Cambodia, Nunun finally arrested in Bangkok, Thailand with the assistance of NCB Interpol.

◇ Nazaruddin was implicated in 31 graft cases in various ministries. Nazaruddin was charged with accepting a Rp 23 billion bribe from construction firm PT Duta Graha Indah and Rp 17 billion from PT Nindya Karya for several projects for the education and health ministries during his time as party treasurer and legislator. In April 2012, Nazaruddin was sentenced to four years and 10 months in prison for accepting Rp 4.6 billion linked to the construction of the SEA Games athletes' village in South Sumatra.¹ To return Nazaruddin back to Indonesia was a complex operation. The National Police cannot make an arrest in a foreign country, neither can other [Indonesian] agencies. So the Indonesia Government asked help from Interpol. Nazaruddin was arrested by Interpol in Cartagena, Colombia. From passport M. Syafruddin or Nazaruddin saw before landing in Colombia, has been landed in Malaysia, Singapore, Vietnam, Cambodia, Germany, Caribbean, and Colombia. The local police arrested Nazaruddin after seeing a red notice issued by Corruption Eradication Commission (KPK). After assuring that the new Nazaruddin carried out arrests, the local police then report to the government of Indonesia.

International Asset Recovery

The legal actions for pursuing asset recovery are various. They include the following mechanism:³⁹

- domestic criminal prosecution and confiscation, followed by an MLA request to enforce orders in foreign jurisdictions;
- NCB (non-conviction-based) confiscation, followed by an MLA request or other forms of international cooperation to enforce orders in foreign jurisdictions;
- private civil actions, including a formal insolvency process;
- criminal prosecution and confiscation or NCB confiscation initiated by a foreign jurisdiction (requires jurisdiction over an offence and cooperation from the jurisdiction harmed by the corruption offences); and
- administrative confiscation.

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Indonesia should avoid problems of investigating cross-border corruption by dedicating the necessary resources to pursue the stolen assets abroad. It should be a special agency or unit dealing with the investigation, and asset recovery consists of financial investigators, prosecutors, state attorneys, auditors, forensic accountants and other competent authorities involved in asset recovery issues. Specialized agencies or units within existing agencies should be given the resources to satisfy their mandate to facilitate asset recovery, bearing in mind that the central authority does not become involved in financial investigations or in criminal proceedings but is mainly an administrative authority.⁴⁰

Assets of Garnet Investments Limited, of which Mr Suharto was identified as the beneficial owner, remain restrained in Guernsey. In 2002, the BNP Paribas (Suisse) Bank - Guernsey branch disclosed to the Guernsey financial intelligence unit that Tommy Suharto was the beneficial owner of the Garnet Investments Limited account and sought the FIS's consent to transfer the funds, as requested by Garnet Investments. The FIU denied consent and the Government of Indonesia was informed and given the opportunity to join the proceedings between the Bank and Garnet Investments. The Guernsey court cited the lack of progress by Indonesia to institute proceedings against Suharto in Indonesia as justification for not extending the freeze of the funds but the FIU continued to deny consent to transfer the funds.

According to the March 1, 2005 Judgment by Australia's New South Wales Supreme Court, "It was contended that the crimes of the de-

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ceased Rahardja produced a total loss to the Central Bank of Indonesia of A\$390 million of which some A\$38.5 million came to Australia.” According to a January 23, 2008, Jakarta Post article posted on the website of the Indonesian Embassy in Ottawa and citing an official of the Indonesian Justice and Human Rights Ministry, \$3 million was returned from Australia. Australia was said to also be helping repatriate another \$3 million from Hong Kong. Hendra Rahardja had fled to Australia and was convicted in absentia in 2002 by Indonesia for misuse of Bank of Indonesia liquidity support funds. Indonesia had ordered him to pay \$280 million in indemnities. An Australian court decision in 2008 cited a 2003 affidavit by the Australian Federal Police investigator, who contended that some \$26 million in Hendra Rahardja’s criminal proceeds were found to have come to Australia. The website of the Attorney General of Australia noted that as part of Australia’s Equitable Sharing Program established under United Nations Convention Against Corruption (UNCAC) provisions as well as Australia’s Proceeds of Crime Act, \$493,647.07 was provided to the Indonesian Government for assistance in the Hendra Rahardja matter. Besides the \$3 million that has been returned, the ministry said that, based on Indonesia’s request, Australia was helping the country to return another \$3 million worth of Hendra’s assets from Hong Kong.

Beside Hendra Rahardja case, Indonesia is also asking the Swiss government to freeze a total of \$14.9 million worth of assets belonging to former Mandiri Bank president director ECW Neloe, currently in a Swiss bank account. Indonesia Government has requested that the Swiss government freeze an account containing \$9.9 million deposited by Irwan Salim, who fled justice in late 2004 after being implicated in a fraudulent mutual fund business while he served as director of Bank Global, according to documents released by the AGO and obtained by the Jakarta Globe. However, there is a major stumbling block, Irwan has not been convicted of any crimes in Indonesian courts.

Solutions

The formal agreement needs more time and complex bureaucracy, sometimes involved political issues. Transboundary corruption needs an efficient and effective process of return fugitives and assets. Direct cooperation among law enforcement agencies can simplify the process of formal cooperation, such as to obtain information or intelligence in

a corruption case. Indonesia's anti-corruption commission (KPK) has directly coordinated with a number of counterpart agencies abroad without the involvement of Indonesia's central authority ⁴¹

In some cases, with good willingness and reciprocal principle, the requesting of extraditing the fugitive to Indonesia can be done by diplomatic channel without formal request.

Notes

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- 10 See Article 1 (b) UNCAC
- 11 See Article 43 (1) UNCAC
- 12 Technical Guide UNCAC, page 139.
- 13 See article 16 UNTOC para 4 and Article 44 para 5 UNCAC.
- 14 See Article 16, paragraph 6 UNTOC.
- 15 https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf
- 16 Manual on Mutual Legal Assistance and Extradition, page23; See article 18, paragraph 1 UNTOC
- 17 *idem*

- 18 Manual on Mutual Legal Assistance and Extradition, page 30.
- 19 <http://www.ethicos.net/wp-content/uploads/2016/04/UNCAC-highlights-by-GTZ.pdf>
- 20 See Chapter IV, article 43 – article 50 UNCAC.
- 21 Law No 1/1979 on Extradition regulates the principle, guidance and proceedings in handling extradition.
- 22 Law No 1/2006 on MLA regulates the assistance related to criminal investigations, prosecutions and examinations before the court specifically in criminal matters.
- 23 Indonesia and Singapore already signed Extradition Treaty Act, but Indonesia does not ratified until now.
- 24 The Model Treaty on Extradition.
- 25 See article 15 & 16 UNCAC
- 26 See article 17 UNCAC.
- 27 See article 18 UNCAC.
- 28 See article 19 UNCAC.
- 29 See article 20 UNCAC.
- 30 See article 21 UNCAC.
- 31 See article 22 UNCAC.
- 32 Manual of Mutual Legal Assistance and Extradition, page 16, https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf,
- 33 <https://en.tempo.co/read/news/2013/06/20/055489980/Joko-Tjandra-Extradition-Hampered-by-PNG-Citizenship-Status>
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