

Application of Reciprocal Law in Returning Assets Resulting from Corruption

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Abstract

One of the unresolved legal issues in Indonesia is corruption. The problem of law enforcement is not yet optimal so that the assets resulting from criminal acts of corruption which are often more than national territory make it difficult to return. Mutual Legal Assistance in Criminal Matters, abbreviated as MLA, which is expected to help law enforcement is not yet optimal. Indonesia, as a participant country of the United Nations Convention Against Corruption (UNCAC), does not yet have a regulatory framework that comprehensively regulates the aspects recommended by the convention. This study aims to find out about efforts and mechanisms to optimize the role of MLA in the recovery of assets resulting from criminal acts of corruption in Indonesia, especially those abroad. This research is normative juridical research conducted by library research and interviews with informants related to the legislation and comparison approach. This article concludes that optimizing the role of MLA requires several steps such as implementing MLA in a more detailed technical format, optimizing the role of law enforcement

as the implementer, and adopting the concept of Non-Conviction Based Asset Forfeiture (NCB).

Keywords: Mutual Legal Assistance; Non-Conviction Based Asset Forfeiture; corruption.

INTRODUCTION

This article discusses the role of Mutual Legal Assistance (MLA) in the return of assets from corruption and its optimization in the Indonesian context. Discussion of this issue becomes necessary because of the problem of corruption which is a serious problem so that various efforts and formulations to solve or eradicate it are important to be pursued. In this article, the effort was encouraged through the optimization of MLA and its law enforcement role, and the adoption of the concept of asset grabbing through the best approach.

As is known, corruption is still a problem for Indonesia until now. Corruption is a criminal offense that causes state financial losses and violates social and economic rights that occur systemically.¹ Corruption is significantly detrimental to be able to reduce the capacity of the state in developing the economy and provide social welfare facilities so that the return of assets and state finances that are corrupted naturally needs to be a consensus as an effort to optimize law enforcement in corruption.

As a form of commitment to eradicating corruption, Indonesia has ratified the United Nations Convention Against Corruption (UNCAC) through Law No. 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption 2003. This UNCAC is important because it contains a

¹ Nyoman Putra Putra Jaya, *Some Thoughts Towards the Development of Criminal Law* (Bandung: Citra Aditya Bakti, 2008), p. 57.

series of guidelines in implementing corruption eradication, including prevention efforts, formulation of types of crimes including corruption, law enforcement processes, provisions for international cooperation, and asset recovery mechanisms especially those that are cross-country in nature.²

According to Mada Apriandi Zuhir, there are still several things related to corruption that has not been regulated by Indonesia even though some have been included in the national legislation program (Prolegnas) in the House of Representatives (DPR), one of which is an issue related to asset recovery. In the book on Indonesia's commitment to UNCAC and the G20 Anti-Corruption Working Group (ACWG) for 2012-2018, it is mentioned, from 32 recommendations from the first round of UNCAC review, Indonesia has only completed about eight recommendations, while from 21 recommendations from the second round review, Indonesia has only completed around 13 recommendations. Some priority issues identified by the Corruption Eradication Commission (KPK) that need to be resolved include the completion of the revised Reciprocal Legal Aid Act in Criminal Issues (MLA); strengthening the independence and institutions of anti-corruption institutions; and completion of the Asset Seizure Bill (RUU).³

Some cases also illustrate that assets placed by corruptors abroad as a mode of eliminating traces are also a problem.⁴ As a

² Mada Apriandi Zuhir, "United Nations Convention Against Corruption, International Obligations and Indonesian Diplomacy related to Anti-Corruption Commitments", paper on the Dissemination Seminar of the United Nations Convention Against Corruption (UNCAC), held by the Faculty of Law of the University of Sriwijaya and the Corruption Eradication Commission, 11 June 2020.

³ Zuhir, "United Nations Convention Against Corruption".

⁴ Some recent cases that have also been highlighted are the e-KTP cases in 2017 see <https://www.lampost.co/berita-kpk-kejar-aset-hasil-korupsi-ktpel-di-luar-negeri.html> and the Jiwasraya 2020 case, in national <https://www.lampost.co/berita-kpk-kejar-aset-hasil-korupsi-ktpel-di-luar-negeri.html>

result, it is difficult to track and return these assets. There is a gap in the law enforcement process because on the one hand corruption perpetrators can more easily cross-jurisdictional and geographical boundaries freely, while law enforcement itself does not easily penetrate jurisdictional boundaries and enforce the law under the jurisdiction of other countries. To facilitate this law enforcement process, countries mutually cooperate internationally, one of which uses mutual legal assistance mechanisms in criminal matters or what is referred to as Mutual Legal Assistance in Criminal Matters.

MLA is a form of agreement between countries that are generally focused on combating organized transnational crime, such as narcotics, money laundering, and so on. This shows that operationally law enforcement through MLA is only possible for crimes that have transnational aspects and meet the principle of double crime. The purpose of the principle of double criminality is a crime or criminal event that is both recognized as a crime by the parties.⁵

///. kompas.com/read/2020/01/22/21231531/kejangung-certain-ada-asetmilik-terangka-jiwasraya-in-outside-negeri?page=all. Some older Kompas case data in 2012 revealed, such as the tax mafia case of Gayus Tambunan, the Attorney General's Office said that there were in four countries besides wealth worth Rp 74 billion in gold, US dollars, and Singapore dollars, the homestead of athlete M. Nazarudin that a total of 5 million US dollars, 2 million euros, and 3 million Singapore dollars in Singapore, Hendra Rahardja in the BLBI case amounted to 493. US \$ 647 in Australia (Australia has been surrendered to Indonesia) and Robert Tantular in the Century Bank bailout case which stated that there were Century Bank assets worth more than Rp 6 trillion in Hong Kong, allegedly by Robert Tantular. See Ridwan Arifin, Indah Sri Utari, Heri Subondo, "Efforts to Return Assets Abroad (Asset Recovery) in Law Enforcement to Eradicate Corruption in Indonesia", Indonesian Journal of Criminal Law, 1, 1 (2016), p. 110 Indonesian Journal of Criminal Law, 1, 1 (2016), p. 110 Indonesian Journal of Criminal Law, 1, 1 (2016), p. 110

⁵ Irma Sukardi, "Mutual Legal Assistance Mechanisms in Appropriation of Assets resulting from Corruption under Law Number 1 of 2006 concerning Reciprocal Assistance in Criminal Issues (thesis, Universitas Indonesia, Jakarta 2012), p. 19

Meanwhile, when viewed in terms of its regulatory substance, UNCAC also provides an opportunity to make it easier to return assets that have been hindered by corruption due to the principle of bank secrecy, as long as the country where the money is deposited also ratifies UNCAC. As stated in Article 40 of the UNCAC which states that each state party ensures that there is an appropriate mechanism in its national legal system to overcome possible obstacles arising from the Bank Secrecy Act over the law enforcement process for criminal cases specified in UNCAC.⁶ Even the mechanism of appropriation of assets of criminal offenses is one of the norms included in UNCAC 2003 so that states parties maximize efforts to seize assets resulting from crime without going through a criminal prosecution process.⁷

Although it is listed as one of the countries that ratified UNCAC, Indonesia still has several issues that must be resolved such as a regulatory framework that has not yet adequately regulated the asset return scheme and its technical regulations. Also, among legal experts, they are still debating the effectiveness of appropriation of assets without criminal punishment for corruption cases and placing the issue of the relationship of assets resulting from crime with perpetrators as one of the fundamental problems. Looking at the preparation of the Criminal Asset Seizure Draft Bill which is currently still rolling in Indonesia while there is an immediate need to find alternative ways to recover assets resulting from criminal acts of corruption through an effective mechanism,

⁶Madonna H. Laoly, *Diplomacy Investigating Transnational Crime* (Jakarta: Reader Alvabet, 2019), p. 133.

⁷ Refki Saputra, "The Challenge of Implementing Non-Conviction Based Asset Forfeiture in the Asset Seizure Assault in Indonesia", *Anti-Corruption Integrity Journal*, 3, 1 (2017), p. 118.

Regarding MLA, Muhammad Rustamaji and Bambang Santoso revealed that there was a positive relationship between mutual legal assistance and efforts to recover assets resulting from corruption. This study also tries to provide an MLA format to recover assets resulting from corruption based on a penal approach. This study also provides an overview of the importance of efforts to optimize institutions that have a law enforcement function.⁸

Whereas in terms of substance, Dwidja Priyatno views the importance of asset confiscation through the NCB mechanism or without punishment. According to him, it became an important process to be immediately outlined in regulations in Indonesia. Besides the technical steps that must be implemented according to him is to strengthen international cooperation.⁹In line with this, Ridwan Arifin, Indah Sri Utari, and Heri Subondo put more emphasis on the technical aspects of implementation that the efforts made could be through formal or informal channels. The formal channel means the path of formation of regulations and the application of MLA, while the informal path is the approach of diplomatic relations.

This paper seeks to complement, confirm to provide other perspectives on what aspects need to be done to optimize the role of MLA in returning assets. In discussing optimizing the return of assets from corruption offshore assets by optimizing the role of MLA, this article is focused on discussing concrete efforts in the context of optimizing the role of MLA in returning assets resulting from corruption because they are based on obstacles revealed through interviews by MLA implementers. This needs to be done because law enforcement officials who in the praxis level use various MLAs in both bilateral and multilateral forums.

⁸ Muhammad Rustamaji and Bambang Santoso, "The Study of Mutual Legal Assistance Model and Asset Recovery in Corruption Affair", *Indonesian Journal of Criminal Law*, 4, 2 (2019), p. 160.

⁹ Dwidja Priyatno, "Non-Conviction Based (NCB) Asset Forfeiture for Recovering the Corruption Proceeds in Indonesia", *Journal of Advanced Research in Law and Economics*, 9, 1 (2018), p. 219.

The next section discusses optimizing MLA by adopting the principle of Non-Conviction Based (NCB) Asset Forfeiture, namely, return on assets with a civil approach. The discussion of this final section needs to be encouraged because Indonesia actually has ratified UNCAC but does not yet have a comprehensive regulatory framework for regulating the return of assets without the criminal procedure.

The Role of Reciprocal Legal Aid in Corruption Assets Return

This section discusses the role of Mutual Legal Aid (MLA) in the return of assets resulting from corruption. MLA itself is generally pursued through MLA agreements between countries, both bilaterally and multilaterally. Some MLA agreements which are multilateral in nature are relatively difficult to implement due to the issue of pouring out more detailed technical clauses so that the format of the MLA agreement on a bilateral basis is considered more effective. In practice in Indonesia, the MLA agreement formed bilaterally involves a joint team consisting of various agencies such as the Ministry of Foreign Affairs, the Ministry of Law and Human Rights, the Police, and the Attorney General's Office to negotiate the contents of the agreement. An agreement in this agreement based on MLA regulations binds the parties so it must be obeyed and implemented,

Until now, several bilateral agreements relating to MLA have been established by the Indonesian government with several countries.¹⁰ One of them is the agreement between Indonesia and Australia. This agreement was signed in Jakarta on 27 October 1995, but was only ratified in 1999 through Law Number 1 of

¹⁰ Marulak Pardede and Sri Sedjati, "Effectiveness of Reciprocal Cooperation Agreements in the Framework of National Interest", [https://www.bphn.go.id/data / documents / lit_2012 _ _ 7.pdf](https://www.bphn.go.id/data/documents/lit_2012_7.pdf), accessed on 28/10/2019, p. 6

1999 concerning Ratification of the Agreement between the Republic of Indonesia and Australia on Legal Aid for Reciprocity in Criminal Issues (Treaty Between the Republic of Indonesia and Australia on Mutual) Legal Assistance in Criminal Matters).

After the Agreement between Indonesia and Australia, Indonesia also entered into a bilateral agreement with the People's Republic of China (PRC), or what is now called the People's Republic of China in Indonesia. This MLA agreement was signed on July 24, 2000, in Jakarta and ratified by Indonesia through Law Number 8 of 2006 concerning Ratification of the Agreement between the Republic of Indonesia and the People's Republic of China concerning Reciprocal Legal Aid in Criminal Issues (Treaty Between the Republic of Indonesia and The People's Republic of China on Mutual Legal Assistance in Criminal Matters).

The agreement between Indonesia and the Government of the Special Administrative Region of Hong Kong of the People's Republic of China was also signed on April 3, 2008. 14teen years later, this agreement was only ratified through Law Number 3 of 2012 concerning Ratification of the Approval of the Government of the Republic of Indonesia and the Regional Administration of Special Administration the Hong Kong People's Republic of China concerning Reciprocal Legal Aid in Criminal Matters (Agreement Between the Government of the Republic of Indonesia and The Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Legal Assistance in Criminal Matters).

After that successive Indonesia agreement with South Korea on March 30, 2002, and ratified through Law No. 8 of 2014.¹¹The same agreement between Indonesia and India was signed on January 25, 2011, and ratified through Law Number 9 of 2014. The agreement between Indonesia and Vietnam was signed on

¹¹ <http://www.interpol.go.id/id/berita/749-engenal-bantu-hukumtimbal-balik-mutual-legal-assistance-in-criminal-matters>, 11/16/2019.

June 27, 2013, and was ratified through Law Number 13 of 2015. The Agreement between Indonesia and the United Arab Emirates Arabs was signed in Abu Dhabi on 2 February 2014 and ratified by Law Number 6 of 2019. The agreement between Indonesia and Iran was signed on December 14, 2016, in Tehran and ratified through Law Number 10 of 2019. The agreement between Indonesia and the Swiss Confederation signed on February 4, 2019, at Bernerhof Bern is still in the process of ratification.¹²

Almost all of the nine MLA agreements generally aim to increase the effectiveness of prevention as well as the eradication of criminal acts, especially those that are transnational in nature, while maintaining the principle of respecting state sovereignty, equality, concerning the principle of double criminality. However, despite cooperation with several countries, there are still obstacles so that the return of assets through the MLA agreement is not optimal, especially if the agreement is not stated in a bilateral format.¹³

Differences in the common law and civil law systems are considered to be one of the obstacles in which the common law tends to be the presumption of guilt while civil law is more inclined to protect human rights. Likewise differences in terminology and definitions and elements of a criminal act in Indonesia with other countries. In defining the crime of bribery which is included in the category of corruption, for example, there are differences in the meaning of bribery, money laundering, and corruption. Related to this issue, what needs to be done is to renegotiate the MLA agreement. Especially if there is a

¹² <http://www.kemenkumham.go.id/berita/media-release-mark-babakbaru-kerja-sama-hukum-menkumham-sign-hand-agreement-agreement-mutual-legal-assistance-in-criminal-matters>, 17/11 / 2019.

¹³ Deddy Candra and Arifin, "Obstacles to Returning Assets as a Result of Transnational Corruption Crime", BPPK Journal, 11, 1 (2018), p. 44

misinterpretation of the demand clause in MLA. This is important to avoid MLA agreements that are not implemented due to differences.

Another problem is the relationship between assets and criminal acts which also do not yet have certainty. Therefore, this issue requires a court decision in which it explains the relationship between the assets concerned and the crime committed. Assets resulting from corrupt acts held in other countries can be frozen and / or returned if there are specific names and information about these assets that are usually not listed in court decisions. The problem of conflict of interest is also seen as coloring the constraints in the implementation of asset recovery, especially related to the establishment of supporting regulations. It is considered that there is an indication of abuse of power that drags the upper-class economy with politics as an upper-class power that is sustainable with political, economic,¹⁴

From some description of the problem, this article focuses on one main point related to the non-optimal MLA agreement, namely the absence of an MLA agreement in a bilateral format. Based on the description of Danardi Haryanto from the Directorate of Law and Political and Security Treaties, the Ministry of Foreign Affairs of the Republic of Indonesia, it is known that the incompleteness and inaccuracy of the MLA agreement clause often make the respondent's country refuse to help. Therefore, technically a request must be explained in detail about the things that are desired and adjusted to the existing clause. For example, if the applicant's country requires assistance in freezing bank accounts of perpetrators of crime in the requested country,¹⁵ This means that even though there is an

¹⁴Candra and Arifin, "Obstacles to Returning Assets", p. 44

¹⁵ Interview with I. Danardi Haryanto, Head of the Subdirector of Politics and Law Enforcement Cooperation, Directorate of Law and Political and Security Agreements, Ministry of Foreign Affairs of the Republic of Indonesia, Jakarta, 12/12/2019.

MLA agreement that is bilateral in nature, it still requires clarity of clause so that it does not become a technical obstacle in the future implementation.

Based on these problems, there are at least two sequential steps that need to be taken in preparing the MLA agreement to be more optimal. First, it is not enough for Indonesia to commit itself to the multilateral MLA agreement. Apart from the obstacles of varying systems and understanding of certain terminology, MLA agreements are relatively more difficult to elaborate in detail, so efforts to further enhance the effectiveness and optimization of the role of MLA need to be made in a bilateral format. Second, based on the description of technical constraints related to clauses that are not detailed and detailed in the bilateral agreement, the next optimization step is to win the MLA agreement clauses in a detailed and accurate manner.

Optimizing the Role of Law Enforcement Officers in the Implementation of MLA

In addition to the aspects of contract formation and implementation in the form of national regulations (legal substance), what needs to be optimized is also the role of law enforcement officials as a legal structure such as the Police, Attorney's Office, Corruption Eradication Commission and several other relevant institutions. The police in the implementation of MLA is limited to requests for assistance with searches and seizures.¹⁶ This authority will certainly not be operational technically because there will certainly be a conflict of jurisdiction with the authority of a similar institution in the respondent's country as the owner of the jurisdiction. So that in this context the role of the police can be further optimized in the

¹⁶ Law Number 1 of 2006 concerning Reciprocal Assistance in Criminal Matters, Article 3 paragraph (2) letter (f).

function of prevention cooperation, one of which is by applying automatic inter-state information exchange standards.

The scope of the MLA covers the efforts of the investigation, prosecution, and justice process. In the process of implementing the MLA, NCB-Interpol Indonesia plays a role in the investigation process such as the examination or summons of witnesses, search, and seizure. The examination or summons of witnesses is an attempt to present people to identify and search for people or provide information or to assist the investigation process.¹⁷ It also depends on the regulations in force in the country requested by NCB-Interpol whether it can directly fulfill or require that requests for assistance be submitted by the Minister of Justice and Human Rights through diplomatic channels.

Also, the implementation of MLA within the Prosecutor's Office is carried out by the Legal and Foreign Relations Bureau, under the authority of the Attorney General for Development.¹⁸ As stipulated in the Reciprocal Assistance Act (MLA), the scope of the RI Attorney's Office in submitting requests for assistance includes submitting requests for assistance; providing information related to an alleged person participating in a case that is in the process of investigation, prosecution, or trial; providing information about evidence in a foreign country; examination of someone who has provided information or submitted evidence relating to MLA; bring someone related to a case in MLA to Indonesia to facilitate the provision of information and the delivery of evidence; and applying to the execution of a court decision which can take the form of confiscation of assets, the imposition of fines, or surrender of replacement money.

¹⁷ Law Number 1 of 2006 concerning Reciprocal Assistance in Criminal Matters, Article 3 paragraph (2) letters (a) and (d).

¹⁸ Regulation of the Attorney General of the Republic of Indonesia Number PER-009 / A / JA / 01/2011 concerning the Organization and Work Procedures of the Attorney General of the Republic of Indonesia.

In the context of criminal acts of corruption, the KPK has the authority to conduct investigations, investigations, and prosecutions. The authority is the same as the authority of the Police at the level of investigation and the authority of the Prosecutor's Office at the level of prosecution in corruption.¹⁹ The KPK as one of the law enforcement institutions has the authority to seize assets resulting from criminal acts of corruption abroad by submitting requests for assistance through the Ministry of Justice and Human Rights, which acts as the coordinator in submitting MLA requests to foreign countries and handling requests for foreign MLA assistance to Indonesia.²⁰

In addition to the Police, the Attorney General's Office and the Corruption Eradication Commission, the Ministry of Law and Human Rights is the Central Authority in handling MLA issues in Indonesia.²¹ The job description is based on the Minister of Law and Human Rights Decree Number M.HH.04. AH.08.02 of 2009 concerning Executing Tasks in the Field of Extradition and Reciprocal Assistance in Criminal Matters in the Ministry of Law and Human Rights. Another ministry that also plays an important role is the Ministry of Foreign Affairs. The roles undertaken include the establishment of bilateral, regional, and international MLA agreements; negotiator for the formulation of the MLA agreement clause; diplomatic channel; preparation and submission of MLA; and monitoring in MLA requests.²² Although it has no connection to law enforcement, the Ministry of Foreign Affairs in the process of implementing MLA has a

¹⁹ Law Number 30 of 2002 concerning Corruption Eradication Commission, Article 51.

²⁰ Law Number 1 of 2006 concerning Reciprocal Assistance in Criminal Matters, Article 1 number 10.

²¹ Ika Yuliana Susilawati, "Confiscation of Assets resulting from Corruption Crime Abroad through Mutual Legal Assistance", *IUS Journal of Law and Justice Studies*, 4, 2 (2016), p. 147.

²² Susilawati, "Confiscation of Assets resulting from Crimes", p. 148.

role as an agency of government representation before foreign countries.

In addition to these agencies, the Center for Report Analysis of Trans-Finance witnesses (PPATK) are also institutions that play an important role. PPATK's role is to provide information on financial transactions in the context of tracing assets both during the analysis of financial transactions and during the investigation, prosecution, and trial processes.²³ Special database access is given by the National Police and Interpol to PPATK is very important in enriching and sharpening PPATK's analysis of suspicious financial transactions.²⁴ Then the information that has been obtained is handed over to law enforcement for an investigation, the investigation continues, and the judicial process.

About optimizing the role of law enforcement officers and their functions as described, several issues that still need to be resolved are, first, the lack of willingness of developed countries to assist in the process of recovering assets in addition to the slow inter-institutional cooperation related to asset recovery. For this reason, a joint agreement is needed to submit a request from the Police, the Prosecutors' Office and the Corruption Eradication Commission to the Ministry of Law and Human Rights as the central authority. In reaching this agreement sometimes obstructed sectoral problems that followed the political interests of each institution made the time required was too long.²⁵

Second, as one of the concepts that have been applied in several other countries, supporting principles such as Non-Conviction Based (NCB) Asset Forfeiture has not been applied in Indonesian regulations. So that the application of the NCB asset forfeiture mechanism that is considered to be an alternative step

²³ Susilawati, "Confiscation of Assets resulting from Crimes", p. 151.

²⁴ Suliswati, "Confiscation of Assets resulting from Crimes", p. 149.

²⁵ Candra and Arifin, "Obstacles to Returning Assets", p. 44

in optimizing asset returns cannot be significantly optimized by law enforcement in corruption cases.²⁶

The banking secrecy system (bank secrecy) is also still considered an obstacle. Every bank in all countries has rules that can protect the assets and identity of customers so that it is often difficult for law enforcement agencies to track down corrupt assets because the proceeds of crime are protected by bank secrecy rules. This was assessed as a result of the 2003 UNCAC which had not been implemented through the laws and regulations in Indonesia even though it had been ratified through Law Number 7 of 2006. The gap analysis study showed that some adjustments needed to be done immediately in fulfilling the clauses in UNCAC 2003 specifically in the field of criminalization. and statutory regulations. Also, the process of returning assets resulting from criminal acts of corruption abroad uses a long mechanism and procedure, a large cost,²⁷

From the description done, there are at least two main issues that have the potential to interfere with the optimal role of law enforcement officers. First is the potential for friction that occurs between law enforcement officials because they have overlapping authority. For this, the steps that need to be taken must be of course inter-agency coordination or in the later stages, a specific regulation is made that regulates the implementation of the relevant issues if necessary. Second is the weakness of the MLA agreement as to the basis for the implementation of law enforcement officers. As explained earlier that the implementation of the MLA agreement is often constrained due to reasons that are not detailed MLA clause so it can not be implemented.

²⁶Candra and Arifin, "Obstacles to Returning Assets", p. 44

²⁷ Candra and Arifin, "Obstacles to Returning Assets", p. 44

Prospect of Non-Conviction Based (NCB) Asset Forfeiture in Asset Return

One alternative that can be encouraged in the effort to recover state assets in criminal acts of corruption including in Indonesia is the application of the principle of Non-Conviction Based (NCB) Asset Forfeiture, as well as Convicted Based Asset Forfeiture,²⁸ which can be used as a substantive charge in the MLA agreement. NCB Asset Forfeiture is one of the asset return mechanisms with a civil approach that does not require a permanent court decision. This mechanism is considered to be more effective than the criminal approach (criminal forfeiture) which has a very high standard of proof in the trial process. In its implementation, NCB Asset Forfeiture uses a reverse verification system to prove a corruption case by requiring the defendant to be able to prove that his assets are not the result of a crime.²⁹

The concept of NCB asset forfeiture is essentially a mechanism of appropriation of assets without any legal proceedings. In this case, a seizure is carried out civilly (in rem) and aimed at the assets of the perpetrators of the crime. The important thing about this mechanism is that the existence of clarity of the property is legally tainted property or is obtained through crime. The birth of the concept of NCB asset forfeiture was motivated by a shift in the paradigm of law enforcement that was initially oriented or led to the perpetrators (follow the suspect) to lead to money or loss (follow the money). This is important because corruption and money laundering crimes cause financial losses to the state. Therefore, the proceeds of the crime must be returned to the state, which on the other hand often

²⁸Bismar Nasution, "Returning Assets resulting from Corruption through Civil Forfeiture", [https://jurnal.kpk.go.id/Document/SEMINAR_ROADSHOW / Asset-recovery-through-civil-forfeiture-Bismar-Nasution.pdf](https://jurnal.kpk.go.id/Document/SEMINAR_ROADSHOW/Asset-recovery-through-civil-forfeiture-Bismar-Nasution.pdf) accessed 05/05/2020.

²⁹Romli Atmasmita, *Around the Corruption Problem National Aspects and International Aspects* (Bandung: Mandar Maju, 2004), p. 58.

shows that the perpetrators cannot be tried first.³⁰ This mechanism is taken separately from the criminal justice process with evidence that states that a property has been contaminated by a criminal offense. This pollution rests on the taint doctrine, which is a doctrine that believes that crime is considered to pollute the property used or obtained from the crime.

In some countries, such as Switzerland, asset returns are regulated both based on punishment and not on penalties. The two methods are contained in the main source of law in Swiss criminal law, the Penal Code dated December 21, 1937 (Act 1937) as stated in Article 123 Paragraphs 1 and 3 of the Federal Constitution (Amendment Number 1 dated 30 September 2011).³¹ Deprivation with conviction or without punishment under Article 70 to Article 72 of the 1937 Law. Foreclosure assets are assets resulting from the crime. As long as the asset can be traced, the asset can be confiscated if it has been proven to be related to crime. However, if this is not proven then the robbery is no longer possible. Also, in terms of proof, Switzerland applies double standard criminal evidence in the case of asset confiscation. This is different from the application of evidence in common law countries which are more likely to apply the standard of proof of civil balances probabilities.³²

Whereas in the UK, the asset seizure law is based on the 2002 Criminal Act Results (Proceeding of Crime Act 2002). By the Law, an order for seizure will be carried out if the crown court requests it. In the Proceedings of Crime Act 2002, the

³⁰ July Wiarti, "Non-Conviction Based Asset Forfeiture as a Step to Restore State Losses (Perspective of Economic Analysis of Law)", UIR Law Review, 1, 1 (2017), p. 104.

³¹ Supardi, Appropriation of Corruption Results from a Just Criminal Law Perspective (Jakarta: Prenadamedia Group, 2018), p. 205.

³² Supardi, Expropriation of Corruption Results, p. 207. 33 Supardi, Confiscation of Corruption Results, p. 212.

United Kingdom introduced a return on assets that allowed law enforcement officials to repossess assets that represented "assets obtained by unlawful acts" .33

In practice, the NCB Asset Forfeiture mechanism in the UK is enforced that assets can be frozen related to foreclosure cases that are not based on belief. This was done by obtaining the determination of the prohibition order from the relevant assets from the High Court. A British court can make a prohibition order regarding an asset if it believes that: a) the asset is relevant to the identification that is in the request; b) the process of taking assets for recovery has not yet been determined by way of civil returns in the UK.³³

Assets are considered as relevant assets if there is a reason that the asset failed and there is a lack of evidence to initiate a criminal suit.³⁴ The civil lawsuit is carried out by using a reverse proof mechanism by which the government submits evidence to explain the asset is the result, related, or used in a crime.³⁵

The period is deemed appropriate for a third party to know that an asset confiscation will be carried out through the court. If during this time there is a third party who objects to the plunder, then the person concerned can submit a remedy to court by presenting evidence with reasonable and credible criteria. Confiscation orders by NCB Asset Forfeiture must be based on alleged criminal behavior which is also recognized as a criminal offense in the UK.

Whereas in Australia, the use of civil plunder is a provision in the Amendment to the latest Criminal Law (Serious and

³³ Stolen Asset Recovery Initiative (StAR), "Obtaining Assistance from the UK in Asset Recovery: A Guide for International Partners", p. 13, see https://star.worldbank.org/sites/star/files/ar_guide_uk_updated_dec_2017.pdf, accessed on 10/24/2019

³⁴ Anthony Kennedy, "An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom", *Journal of Money Laundering Control*, 10, 1 (2007), p. 37.

³⁵ Anthony Kennedy, "Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators", *Journal of Financial Crime*, 13, 2 (2006), p. 140.

Organized Crime) which is the result of an amendment to the Proceeds of Crime Act 2002 (Australian Law). However, most states have their version of law relating to civil deprivation, and some refer directly to Australian legislation.³⁶

Some of the substances regulated in the regulation are contained in section 179 B of the Proceeds of Crime Act 2002 which states that the court must make an initial order regarding unexplained wealth orders that require someone to appear to explain it to enable the Court to decide whether will make or not an order of wealth that cannot be explained about that person in which the Commonwealth Public Prosecutors Director (DPP) has requested the order. Also, the Court must be sure that the competent authority in the DPP has reasonable reasons to suspect that the total wealth of a person exceeds the value of the wealth obtained legally.

In section 179 E, the court will decide if the property cannot be explained requiring the person to pay to the Commonwealth if the Court has made an initial sequence of assets that cannot be explained by the person concerned. If the Court has made a final order, it is determined how much the person must pay to the Commonwealth. The amount represents the difference between total wealth and the number of assets that the Court believes does not violate the law.

In the context of international treaties, since 2003 the pursuit of illegal profits has been regulated further in UNCAC. Article 54 Paragraph (1) of the UNCAC regulates the provisions that all participating countries should consider taking actions that are considered urgent so that the return of assets resulting from corruption with the possibility of no criminal proceedings in a case cannot be prosecuted for reasons of death, escape or related

³⁶ Anthony Davidson Gray, "Forfeiture Provisions and the Criminal / Civil Divide", *New Criminal Law Review*, 15, 1 (2012), p. 34.

to another case. According to UNCAC, the NCB asset forfeiture mechanism can be used as a means to seize and recover assets resulting from criminal acts of corruption in all jurisdictions.

Technically, the most appropriate and easiest way to implement the NCB asset forfeiture mechanism is, to begin with, assets suspected of being the result of a crime being blocked and withdrawn from the economic flows through confiscation to a court that was previously appealed for. Next, the court decided the property was tainted. After being declared as tainted property, the court announced through the public media for a sufficient time of not more than 30 days.³⁷ Deprivation of civil lines (in rem) is an action taken if the criminal process is followed by confiscation of assets (confiscation) cannot be done because the owner of the asset has died; criminal proceedings which ended because the defendant was declared free; criminal prosecution was declared successful, however, a legitimate takeover to prove that he owned the property accompanied by an explanation of how to obtain it.³⁸

For Indonesia, in the context of international treaties, several fields related to the politics of law and security can only be implemented after the ratification in Indonesia has been carried out through the process of transformation into national law first. In the system of laws and regulations in force in Indonesia, the regulation of NCB Asset Forfeiture is indeed not sufficient enough so that the application of the NCB Asset Forfeiture mechanism cannot be optimized by law enforcers, especially in corruption cases, although according to Yunus Husein it does not mean that it cannot be practiced at all. According to him, some

³⁷ Sudarto and Purwadi Day, "Asset Deprivation Mechanism Using Non-Conviction Based Asset Forfeiture as an Effort to Recover State Losses Due to Corruption Crimes", *Post-Graduate Journal of Law UNS*, 5, 1 (2017), p. 112; Yenti Garnasih, "Asset Recovery Act as a Strategy in Returning Assets resulting from Criminal Acts", *Indonesian Legislation Journal*, 7, 4 (2010), p. 630.

³⁸ Bismar Nasution, "Returning Assets resulting from Corruption".

regulations can be the basis for the implementation of these principles, although not optimal.³⁹

As one of the forms of efforts to further optimize the implementation of NCB, the discussion of the Draft Act on Asset Deprivation of Laws was rolled out. In the Academic Paper on the Criminal Asset Seizure Draft Bill on the substance of the implementation of NCB asset forfeiture which is one of the recommendations of UNCAC.⁴⁰ Law 24 of 2000 concerning International Treaties provides that in the context of the establishment of new legal rules, the ratification of international treaties must be stated in the form of a law. However, as a draft legal product, the Criminal Asset Seizure Draft Bill, even though it has been ratified, is still a unilateral claim. If you look at the prospect of implementation, especially related to assets that are abroad, of course still have to use additional regulatory tools because it will be very related to the jurisdiction of other countries. For this reason, one of the important things besides forming national regulations is the establishment of more technical legal instruments, namely MLA that are bilateral, trilateral, and multilateral.

Conclusion

This article concludes Mutual Legal Assistance (MLA) is one of the important tools in the process of returning assets resulting from corruption abroad. However, optimizing the role of MLA still requires several steps such as implementing MLA in a

³⁹ Yunus Husein, "Explanation of the Law on Asset Deprivation without Criminalization in Corruption Cases", Research Report on the Law and Policy Research and Development Center and the Research and Development Center for Law and Justice of the Supreme Court of the Republic of Indonesia, 2019, https://pshk.or.id/wp-content/uploads/2019/04/Restatement_Possession-Assets-Without-Criminalization_2019.pdf, accessed 10/25/2019, p. 65-66.

⁴⁰Husein, "Explanation of the Law on Asset Deprivation", p. 81.

bilateral format and more detailed and detailed technical elaboration, as well as alternatives to include the concept of Non-Conviction Based Asset Forfeiture (NCB) as substantive content in each MLA agreement. Indonesia is a UNCAC party, and currently has an Asset Seizure Bill, which also offers an NCB asset forfeiture mechanism as a solution that can be taken in the asset return process, so that national regulations and MLAs must be made in support of implementation. Optimizing the role of law enforcement is also a must, including changing the perspective of law enforcement from in-person to in rem; intensive cooperation between national and international law enforcement agencies. For this reason, the alignment of national laws and regulations based on international provisions in the convention as the legal basis for implementing also becomes important.

References

Articles, Books and Reports

- Atmasasmita, Romli. *Around the Corruption Problem National Aspects and International Aspects*. Bandung: Mandar Maju, 2004.
- Arifin, Ridwan, Indah Sri Utari, and Heri Subondo. "Efforts to Return Assets Abroad (Asset Recovery) in Law Enforcement to Eradicate Corruption in Indonesia". *Indonesian Journal of Criminal Law*, 1, 1 (2016): 105-137. DOI: 10.15294 / ijcls.v1i1.10810.
- Candra, Deddy and Arifin. "Obstacles to Returning Assets as a Result of Transnational Corruption Crime ". *BPPK Journal*, 11, 1 (2018): 28-55.
- Garnasih, Yenti. "Asset Recovery Act as a Strategy inReturn of Assets resulting from criminal offenses ". *Journal of Indonesian Legislation*, 7, 4 (2010): 629-643.
- Husein, Yunus. "Explanation of the Law on Asset Deprivation Without Criminal Justice in Corruption Cases". *Research*

- Report on the Research and Development Center for Law and Policy and the Research and Development Center for Law and Justice of the Supreme Court of the Republic of Indonesia in 2019. https://pshk.or.id/wp-content/uploads/2019/04/Restatement_Possession-Assets-Without-Criminalization_2019.pdf. Accessed 10/25/2019.
- Jaya, Nyoman Serikat Putra. *Some Thoughts in the Direction of the Development of Criminal Law*. Bandung: Citra Aditya Bakti, 2008.
- Kennedy, Anthony. "An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom". *Journal of Money Laundering Control*, 10, 1 (2007): 33-46. DOI: 10.1108 / 13685200710721854.
- Kennedy, Anthony. "Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators". *Journal of Financial Crime*, 13, 2 (2006): 132-163. DOI: 10.1108 / 13590790610660863.
- Laoly, Yasonna H. *Diplomacy Investigating Transnational Crimes*. Jakarta: Alvabet Library, 2019.
- Nasution, Bismar. "Returning Assets resulting from Corruption Through Civil Forfeiture". [https://jurnal.kpk.go.id/Dokumen/SEMINAR_ROADSHOW / Asset-recovery-through-civil forfeiture-Bismar-Nasution.pdf](https://jurnal.kpk.go.id/Dokumen/SEMINAR_ROADSHOW/Asset-recovery-through-civil-forfeiture-Bismar-Nasution.pdf). Accessed 05/05/2020.
- Pardede, Marulak, and Sri Sedjati. "The Effectiveness of Reciprocal Cooperation Agreement in the Context of National Interest". BPHN Research Report 2012. [https://www.bphn.go.id/data/documents / lit_2012 _- _7.pdf](https://www.bphn.go.id/data/documents/lit_2012_-_7.pdf). Accessed 10/28/2019.
- Priyatno, Dwidja. "Non-Conviction Based (NCB) Asset Forfeiture for Recovering the Corruption Proceeds in Indonesia". *Journal of Advanced Research in Law and*

- Economics, 9, 1 (2018): 219-233. DOI: 10.14505 // Jarle.v9.1 (31) .27.
- Rustamaji, Muhammad, and Bambang Santoso. "The Study of Mutual Legal Assistance Model and Asset Recovery in Corruption Affair". Indonesian Journal of Criminal Law, 4, 2 (2019): 155-160. DOI: 10.15294 / ijcls.v4i2.18719.
- Saputra, Refki. "The Challenge of Implementing Non-Conviction Based Asset Forfeiture in the Asset Seizure Asset in Indonesia". Journal of Anti-Corruption Integrity, 3, 1 (2017): 115-130. DOI: 10.32697 / integrity.v3i1.158.
- Stolen Asset Recovery Initiative (StAR). "Obtaining Assistance from the UK in Asset Recovery: A Guide for International Partners".
https://star.worldbank.org/sites/star/files/ar_guide_uk_updated_dec_2017.pdf. Accessed 10/24/2019.
- Sudarto and Hari Purwadi. "The Mechanism of Appropriation of Assets by Using Non-Conviction Based Asset Forfeiture as an Effort to Recover State Losses Due to Corruption Crime". UNS Postgraduate Law Journal, 5, 1 (2017): 109-118.
- Sukardi, Irma. "Mutual Legal Assistance Mechanisms in Recouping Assets resulting from Corruption Crimes Under Law Number 1 the Year 2006 concerning Reciprocal Assistance in Criminal Matters". Thesis, University of Indonesia, Jakarta, 2012.
- Supardi Confiscation of Treasury Corruption Results from a Just Criminal Law Perspective. Jakarta: Prenadamedia Group, 2018.
- Susilawati, Ika Yuliana. "Confiscation of Assets resulting from Corruption Crime Abroad through Mutual Legal Assistance". IUS Journal of Law and Justice Studies, 4, 2 (2016): 138-151. DOI: 10.12345 / ius.v4i2,281.
- Wiarti, July. "Non-Conviction Based Asset Forfeiture As A Step To Restore State Losses (Perspective of Economic Analysis of Law". UIR Law Review, 1, 1 (2017): 101109. DOI: 10.25299 / ulr.2017.1.01.154.

Zuhir, Mada Apriandi. "United Nations Convention Against Corruption, International Obligations and Indonesian Diplomacy related to Anti-Corruption Commitments". Dissemination Seminar Material United Nations Convention Against Corruption (UNCAC), organized by the Faculty of Law of the University of Sriwijaya and the Corruption Eradication Commission, 11/6/2020.

Legal Regulations

The Republic of Indonesia. Law Number 2 of 2002 concerning the Indonesian National Police. State Gazette of 2002 Number 2, Supplement to the State Gazette of the Republic of Indonesia Number 4168.

The Republic of Indonesia. Law Number 30 of 2002 concerning Corruption Eradication Commission. Statute Book Number 137 of 2002, Supplement to Statute Book Number 4250.

The Republic of Indonesia. Law Number 1 of 2006 concerning Reciprocal Assistance in Criminal Matters. State Gazette of the Republic of Indonesia Year 2006 Number 18 Supplement to the State Gazette of the Republic of Indonesia Number 4607.

The Republic of Indonesia. Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003, (United Nations Convention Against Corruption, 2003), State Gazette of 2006 Number 32 Supplement to the State Gazette of the Republic of Indonesia Number 4620.

The Republic of Indonesia, Attorney General's Office. Attorney Regulation Number PER009 / A / JA / 01/2011 concerning the Organization and Work Procedures of the Attorney General's Office of the Republic of Indonesia.

Republic of Indonesia, National Police. Police Chief Regulation Number 21 of 2010 concerning the Organizational Structure

and Work Procedures of Organizational Units at the Headquarters of the Republic of Indonesia National Police Headquarters.

Interview result

Results of an interview with I. Danardi Haryanto, Head of the Subdirector of Politics and Law Enforcement Cooperation, Directorate of Law and Political and Security Treaties, Ministry of Foreign Affairs of the Republic of Indonesia, Jakarta, 12/12/2019.