

THE INDONESIAN PERSPECTIVE ON CONTEMPORARY MEASURES FOR EFFECTIVE INTERNATIONAL COOPERATION

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I. INTRODUCTION

Cooperation among law enforcement officials in handling and settlement of crimes is extremely essential, particularly for cases which involve foreign jurisdictions. It has been globally recognized that international cooperation is the tool to address the scourge of crime as a global problem.¹ However, issues regarding legal traditions that influence lawyers, including justice sectors and those who are involved in creating national legislation, have become challenges to build effective international cooperation among countries.

The Indonesian government has recognized the need of using international cooperation in fighting crime since the 1970s. Treaties on extradition were made by the Indonesian Government in the era based on the *Koninklijk Besluit* (Staatsblad 1883 -188) – legislation that was enacted during the Dutch colonization of Indonesia. Then in 1979, Indonesia issued its National legislation on Extradition (Law No.1/1979) as the legal framework for requests and treaties of extradition.

After ratifying UNCAC, which, among others, encourages countries to apply mechanisms of mutual legal assistance as a formal model of legal cooperation in criminal matters to obtain overseas evidence, the Indonesian government issued the Law on Mutual Legal Assistance in Criminal Matters (Law No.1/2006). Both pieces of legislation are now in the process of being amended to better accommodate the complexity of cooperation between Indonesia and the relevant foreign jurisdictions.

Apart from *Government to Government* or *formal* mechanisms of cooperation, Indonesian law enforcement has also been employed *non-formal* or *agency to agency* cooperation in handling criminal cases. There have been a number of practices of such non-formal cooperation that have been fruitfully applied, both for general crimes (read: non-corruption crimes) and for corruption offences. However, in any event of legal cooperation in criminal matters, law enforcement must keep in mind that successful prosecution and/or affected justice order is the main objective. Thus, building a competent analysis and consideration of both parties' domestic laws must have become the initial step taken.

Besides describing the measures of formal international cooperation applied in Indonesia, this paper will discuss the legal consideration given by prosecutors as the

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¹ Secretary General Kofi Annan, foreword to United Nations Convention against Transnational Organized Crime and the Protocols Thereto (New York, United Nations, 2004 from the Manual on Mutual Legal Assistance and Extradition, UNODC, 2012, p. 1)

‘guardians’ of the nation’s law, which should have built confidence for enforcement agents to take alternative measures of foreign cooperation. Thus, prosecutors’ roles should be prescribed in the earliest process of international cooperation.

II. NATIONAL MEASURES ON INTERNATIONAL COOPERATION: MECHANISM AND PROCEDURES

A. Law on Extradition

As mentioned above, the first formal mechanism of international cooperation in criminal matters that will be discussed is extradition. Its mechanism and procedures are provided by the Indonesian Law number 1 year 1979 (Law 1/1979) on Extradition. Article 2 of the Law 1/1979 underlines the Indonesian government commitment to process extradition requests from countries which either have a bilateral extradition treaty with Indonesia (treaty countries) or from those without a bilateral extradition treaty with Indonesia (non-treaty countries). Requests from the later country shall be followed up based on a positive bilateral relationship with reciprocity and the Government’s concern principle. This dualism (of facilitating treaty and non-treaty countries) has encouraged more extradition requests to Indonesia.

Any request of extradition must be submitted in writing directly to the Ministry of Justice or through diplomatic channels. There are several principles that serve as grounds for refusal, which shall be pre-examined at the first stage of submission, i.e., political and/or military crimes of Indonesian nationals, offences that occur in Indonesia’s jurisdiction, the person sought is needed for Indonesian court, double jeopardy, lapse of time, death sentence, ethnicity, religion, race related offences/allegations, the person sought is subject to Indonesian prosecution for other offences. Requests for extradition shall also be refused if the requested fugitive is to be given up to a third country for crimes committed before the request.²

As for the dual criminality principle, Indonesia requires that any of the offences be listed on the supplementary sheet of the Law 1/1979 as extraditable offences. The list consists of 32 offences. Among others, it includes corruption, fraud, burglary, false documents, and embezzlement. These extraditable offences can also be expanded to other offences outside the list, as long as such offences have been criminalized in Indonesia (Article 4:2). The ‘open clause’ maintained by this provision has become very positive to catch up with crime development from time to time. This ‘opportunity’, however, leaves the law enforcement and justice sectors to scrutinize whether the principles of dual criminality are satisfied.

B. Law on Mutual Legal Assistance

Secondly, mutual legal assistance in criminal matters (MLA) is the other formal mechanism of international cooperation provided by the Indonesian Law number 1 year 2006 (Law 1/2006) to enable law enforcement to obtain evidence from the relevant jurisdiction for the purpose of investigation or prosecution. Assistance such as identifying and locating persons, taking evidence or statements from persons, effecting service of judicial documents or court order, or executing searches and seizures of items or assets related to crime are those that can be facilitated by the Indonesian government according to the Law 1/2006.

² Article 4 to Article 17 of the Law No. 1/ 1979 concerning Extradition.

Similar to the commitment shared for extradition, the Indonesian government will not only facilitate requests from countries with MLA bilateral treaties, but also from countries without binding treaties with Indonesia. However, an MLA request shall be refused when the assistance requested is related to political or military offences, national/public interest concern, double jeopardy, non-prosecutable offences, failure to give assurance to prosecute, as well as failure to assure the return of requested evidence.

III. NATIONAL MEASURES SUPPORTING UNCAC IMPLEMENTATION

The Indonesian government ratified the United Nations Convention Against Corruption (UNCAC) on 18 April 2006. It soon entered into force by the stipulation of the Law No.7/2006 on Ratification of the UNCAC. Accordingly, there are some distinguished approaches adopted in line with the Convention, such as joint investigation (Article 49 of the Convention), special investigative techniques (Article 50 of the Convention), and measures on asset recovery (Article 51 of the Convention).

With regard to the spirit of compliance with the Convention, the Indonesian Asset Recovery Centre (ARC) was initiated in the Indonesian Attorney General's Office. This centre aims to work together with law enforcement, as early as the investigation process until a criminal proceeding is initiated concerning the tracing, securing, forfeiting, maintaining and recovery of the proceeds of crime. In its operation, the ARC also develops cooperation with international networks, such as the Asset Recovery Inter-agency Network Asia Pacific (ARIN-AP), CARIN, and the Stolen Asset Recovery Network (StAR).

IV. INTERNATIONAL COOPERATION PRACTICES IN CORRUPTION CASES

Corruption is classified as one of the major criminal cases in Indonesia. The corrupt conduct based on the Indonesian Anti-Corruption law may include fraud, abuse of public office and/or bribery.³ Thus, in fighting corruption, the Attorney General's Office of the Republic of Indonesia (the AGO) and the Corruption Eradication Commission (KPK), which both have authority to conduct investigation and prosecution, engage in significant efforts to battle the crime. Such efforts have included some extraordinary approaches such as maintaining legal cooperation with the international community.

Based on Law No.16/2004 on the Indonesian Attorney General, the office has its duties and authorities from conducting pre-investigation and investigation of certain crimes as governed by law, such as corruption, money laundering (in which corruption is a predicate crime), or crimes against humanity, prosecution of all crimes, as well as execution to the court orders. It also conducts judicial intelligence activities and provides intelligence service for the state in coordination with the primary intelligence agency—the Indonesian State Intelligence Agency.

³ Corruption in the Law number 31/1999 as amended by the Law no.20/2001 defines as: "...an act to enrich himself or another person or a corporation which may cause loss to the state finance or state economy..."(Article 2), or "...intentionally earning profit for himself or another person or a corporation, abuses the authority, opportunity, or facilities given to him on account of his post or position which may cause loss to the state finance or state economy..."(Article 3), also "giving presents or promises to a Government employee in relation to the power or authority vested in the post or position or by giving gifts or promises considered as vested in the post or position..."(Article 13).

Meanwhile, the Corruption Eradication Commission (KPK) was established to investigate and prosecute⁴ certain types of corruption crime, i.e., those which involve law enforcement, public officials, and other persons related to crimes of corruption committed by law enforcement or public officials; cases of corruption which attract and disturb the public; and/or cases in which corruption involves a minimum of a Rp.1 billion (approx. US\$ 100,000) state loss.

For the AGO, besides handling its own investigation and prosecution derived from a nationwide scope of cases by the Special Task Force of Anti Corruption of the AGO, this office administers 31 provincial-level prosecution offices, 419 district public prosecution offices and 65 branches of district public prosecution offices all over the Indonesian archipelago. Data shows that for the past 3 years, the office has been dealing with not less than 1,500 investigations and 2,000 prosecutions of corruption cases per-year.

In international fora, the AGO Indonesia has become a member of various types of prosecutors' international organizations, such as the International Association of Prosecutors (IAP) and the forum of China-ASEAN Prosecutor Generals. Also, it actively contributes to the International Association of Anti-Corruption Authorities (IAACA) as an international forum aiming specifically to share commitments among member states to fight corruption. As for the *prosecutor to prosecutor* cooperation framework, the AGO Indonesia has signed memoranda of understanding in legal cooperation with the Supreme Prosecution Offices or Departments of Justice of many neighboring countries, such as: the AGC of Malaysia, the AGO of Thailand, the SPP of Korea, the SPP of China, the AGO of the Russian Federation, the Department of Justice of the United States, as well as the AGO of the Netherlands. But, to sustain the Government commitment in bringing corruption perpetrators to justice, cooperation with foreign jurisdictions, as well as cooperation with all domestic relevant stakeholders, should always be seen as a way of thinking and working.

In this sense, any tools of cooperation that offer efficiency and effectiveness in terms of the least time spent and reasonable execution costs would be much preferable. For that reason, there have been many practices in Indonesia where speed is of the utmost consideration to decide what mechanism to choose. This has almost always been the case, in particular with regard to returning criminals from overseas.

A. International Cooperation in Surrendering Fugitives of Corruption: Extradition and Non-Extradition Schemes

The only example of surrender by extradition is the Kiky Adrian Ariawan case. He was a convict of the Indonesia Bank liquidity support (BLBI) case who was found guilty and sentenced by the Central Jakarta Court *in absentia* in November 2002. He was sought by the AGO Indonesia since 2005. On 28 November 2008, the Indonesian Government made a formal request of extradition to the Australian Government after finding out that the sought-after person was residing in Perth. After the appeals process exhausted, Kiky Adrian Ariawan was finally extradited to Indonesia in January 2014.

⁴ The Law does not allow KPK to recruit an independent prosecutor, and thus Prosecutors who work for KPK are those that are seconded from the AGO.

On the other hand, there were many instances of alternative exercises in surrendering of fugitives for corruption cases by the AGO Indonesia, i.e., Sherny Kojongian⁵, Totok Ary Prabowo⁶ and Samadikun Hartono⁷. The main reason was mostly because of legislative impediments. In the above examples, the legal issue was that each requested country, i.e., the United States, Cambodia and Singapore, are treaty-based countries,⁸ which meant it was impracticable for Indonesia who has no extradition treaty with any of those requested countries to apply the extradition scheme. Then, based on good relationships and understanding between countries involved and excellent national inter-agency cooperation, an *informal* mechanism was finally agreed to be executed, of course, because it was legally admissible for both parties.

The other exercise of informal channels to achieve the return of suspects of corruption crime is by using *police to police* cooperation. Some examples of the said exercise were the arrest of Nazaruddin⁹ from Columbia, Nunun Nurbaeti¹⁰ from Thailand, and La Nyalla Mattalitti¹¹ from Singapore. Diffusion from Interpol was sent for the three suspects. In these cases, the *non-formal* mechanism of surrender was immediately taken for each suspect, once information received by the Indonesian law enforcement authority from each country where they resided. Again, such an exercise saved time. However, pre-consultation with prosecutors who were in charge of the cases prior to the execution date, had apparently become a significant step taken.

B. International Practices in Obtaining Evidence

In exercising MLA, where overseas evidence is the subject of requests for legal assistance to carry out either investigation or prosecution of corruption cases, the AGO and KPK have also applied formal and informal mechanisms of obtaining evidence. Last year, the KPK was also moving forward to use the MLA scheme to identify, freeze, seize and confiscate the proceeds of corruption.

From the practices either in extradition or MLA, we learned that understanding the foreign legal traditions and systems is basic knowledge for the country's decision makers before making any requests. Law enforcement must also bear in mind that although the

⁵ Sherny Kojongian is an AGO defendant of corruption at the Indonesia Bank liquidity support (BLBI) case. She ran away from the court proceeding in 2002. In March 2002, the Central Jakarta Court found her guilty and put her into 20 years of imprisonment with in absentia hearing. The corrupt conduct caused Rp.1.95 trillion (US\$190 million). She was deported by the United States' immigration authority to Indonesia in June 2012.

⁶ Totok Ary Prabowo is an AGO convict of two corruption cases in public sector: mis-use of local government budget worth Rp.1,8 billion and fraud in general election worth Rp.2,3 billion. He was sought by the executor from the AGO since 2010, then was apprehended on 8 December 2015, in Cambodia by luring mechanism.

⁷ Samadikun Hartono is an AGO convict of corruption at the Indonesia Bank liquidity support (BLBI) case worth Rp.2.5 trillion (US\$ 250 million). He was sentenced by the court of cassation (the Indonesian Supreme Court) in 2003, but this court verdict was unable to be executed for he ran away. Samadikun Hartono was finally detained in April 2016 in Shanghai, China, and returned to Indonesia through deportation scheme.

⁸ Treaty based country means country that can only cooperate with any country which sign affected extradition treaty with it.

⁹ Nazaruddin, a KPK suspect of corruption cases for bribery at the Ministry of Youth and Sport, had been sought since May 2011 and was apprehended in August 2011 in Cartagena, Columbia. He was deported by the Columbian Police.

¹⁰ Nunun Nurbaeti is a KPK suspect of corruption case for fraud/bribery at the election of Deputy of Indonesian Central Bank, fugitive since February 2011. She was apprehended in December 2011 by KPK using luring mechanism in Bangkok, Thailand.

¹¹ La Nyalla Mattalitti is an AGO suspect of corruption cases who was sought since March 17, 2016 and deported from Singapore on 31 May 2016.

requests were sent at the stage of investigation, the ultimate goal of the whole process is to ascertain the guilt or innocence of the accused person.

In other transnational crime cases, such as terrorism, people smuggling, or trafficking in persons, the AGO Indonesia has also applied successful informal cooperation with its counterparts. For instance, in UMAR PATEK case—one of the major perpetrators of the Bali Bombing who was prosecuted in 2013, prosecutors of the AGO Indonesia managed to convince the panel Judges in admitting the voluntary presence of 3 (three) foreign victims who arrived from Australia and the United States to deliver their testimony before the court. In the trial proceeding, prosecutors also presented a factual witness from the United States who testified to his knowledge of the defendant's involvement in Camp Moro in the Philippines. Those witnesses appeared before the court without formal MLA requests.

Another example of informal cooperation in obtaining evidence for court proceedings was conducted at a session of prosecution in a people smuggling case by the AGO. At that time, in cooperation with the Australian authorities, victims of people smuggling from the Australian detention centre for illegal migrants on Christmas Island were brought before the Indonesian panel of judges to deliver their testimony against the defendant.

Both cases of terrorism and people smuggling have become models of successful practices by the AGO Indonesia in maintaining good legal cooperation in criminal matters with its foreign counterparts. At the same time, such models of cooperation confirm that prosecutors' recommendations for cooperation taken at the initial step are worth all the efforts put in by both countries.

V. CONCLUSION

Finally, in striving for effective legal cooperation in criminal matters, satisfaction of the domestic legal requirements should be placed as the top priority. An alternative mechanism could have been anticipated earlier, when we wish to save time, if the government attorneys, i.e., the prosecutors responsible to uphold the domestic law, are involved at the earliest point in the decision-making process. They should give initial legal input, which at least consists of the admissibility of evidence in court, on the alternative mechanisms to be taken, the principle of dual criminality, as well as other expected legal questions regarding the request.

In the end, flexibility in engaging in foreign cooperation would be the expected solution to achieve efficient *country to country* cooperation. But decisions on when or whether to exercise alternative mechanisms must be made on a case-by-case basis, and in light of the fact that such actions might have been ruled as illegal in some jurisdiction and, thus, they should be scrutinized with great prudence. For this reason, after maintaining good communication with foreign counterparts to understand their legal traditions, the next important step in the process is to make a competent decision about the technicalities. Here, legal advice from prosecutors as the Government attorneys must be relied on because of their competent skills and experience in court.

REFERENCES:

- ❖ The Law Number 1/1979 on Extradition;
- ❖ The Law Number 1/2006 on Mutual Legal Assistance in Criminal Matters;
- ❖ UNODC, Manual on Mutual Legal Assistance and Extradition, 2012.

