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The Role Of Mutual Legal Assistance In Returning Assets Results Of Corruption

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Abstract
One of the unresolved legal issues in Indonesia is corruption. The problem is that law enforcement is not optimal until assets resulting from criminal acts of corruption which are often beyond the borders of the country, making it difficult to return them are often a separate problem. The implementation of Mutual Legal Assistance (MLA), abbreviated as MLA, which is expected to help law enforcers, is not yet optimal. As a member country of the United Nations Convention Against Corruption (UNCAC), Indonesia does not yet have a regulatory framework that comprehensively regulates the aspects recommended by the convention. This study aims to find out about the efforts and mechanisms for optimizing the role of MLA in returning assets resulting from corruption in Indonesia, especially those located abroad. This article is the result of a normative juridical research conducted by means of a literature study and interviews with related sources, using a statutory and comparative approach. This article concludes that to optimize the role of MLA, several steps are needed, such as implementing MLA in a more detailed technical format, optimizing the role of law enforcement as its implementer, and adopting the concept of Non-Conviction Based Asset Forfeiture (NCB) as the substance of MLA.
Keywords: Mutual Legal Aid; Non-Conviction Based Asset Forfeiture; corruption.

1. Introduction

This article discusses the role of Mutual Legal Assistance or more popularly called Mutual Legal Assistance (MLA) in the return of assets resulting from criminal acts of corruption and its optimization in the Indonesian context. Discussion of this issue becomes necessary because the issue of corruption is a serious problem, so that various efforts and formulations to resolve or eradicate it are important to be pursued. In this article, these efforts are encouraged through the optimization of MLA and the role of law enforcement, as well as the adoption of the concept of asset forfeiture through the Non-Conviction Based (NCB) Asset Forfeiture approach as the substance of the MLA.

As is known, corruption is still a problem for Indonesia today. Corruption is a crime that causes state financial losses and violates social and economic rights that occur systemically.[1]Corruption is significantly detrimental to the capacity of the state in developing the economy and providing social welfare facilities, so that the return of corrupted state assets and finances certainly 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 Number 7 of

[1]Nyoman Serikat Putra Jaya, *Beberapa Pemikiran ke Arah Pengembangan Hukum Pidana* (Bandung: Citra Aditya Bakti, 2008), p. 57.

2006 concerning Ratification of the 2003 United Nations Convention Against Corruption. a series of guidelines in carrying out corruption eradication, including prevention efforts, formulation of types of crimes including corruption, law enforcement processes, provisions for international cooperation as well as mechanisms for returning assets, especially those that are transnational in nature.[2]

According to Mada Apriandi Zuhir, there are still a number of things related to corruption that have 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 the issue of asset recovery. In the book on Indonesia's commitment to UNCAC and the G20 Anti-Corruption Working Group (ACWG) 2012-2018, it is stated that of the 32 recommendations from the first round of UNCAC reviews, Indonesia has only completed about eight recommendations, while of the 21 recommendations from the second round of reviews, Indonesia has only completed about 13 recommendations. Several priority issues identified by the Corruption Eradication Commission (KPK) that need to be resolved include: finalizing the revision of the Law on Mutual Legal Aid in Criminal Matters (MLA); strengthening the independence and institutions of anti-corruption institutions; and the completion of the Draft Law (RUU) for the confiscation of assets.[3]

Several cases also illustrate that assets placed by corrupt actors abroad as a mode to eliminate traces are also a separate problem.[4]As a result, it becomes difficult to track and return these assets. There is a gap in the law enforcement process because on the one hand the perpetrators of corruption are able to more easily traverse the jurisdictional and geographical boundaries between countries, while law enforcers themselves do not easily penetrate the boundaries of jurisdiction and carry out law enforcement under the jurisdiction of other countries. In an effort to facilitate the process of law enforcement, countries engage in international cooperation, one of which uses a mechanism of mutual legal assistance in criminal matters or what is known as Mutual Legal Assistance in Criminal Matters.

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[2] Mada Apriandi Zuhir, "United Nations Convention Against Corruption, Kewajiban Internasional dan Diplomasi Indonesia terkait Komitmen anti Korupsi", paper on the United Nations Convention Against Corruption (UNCAC) Dissemination Seminar, organized by the Faculty of Law, Sriwijaya University and the Corruption Eradication Commission, 11 June 2020.

[3]Zuhir, "United Nations Convention Against Corruption".

[4] Some recent cases that were also highlighted were the e-KTP case in 2017 see https://www.lampost.co/berita-kpk-kejar-aset-hasil-korupsi-ktpel-di-luar-negeri.html and the Jiwasraya case 2020 , in https://national. kompas.com/read/2020/01/22/21231531/kejagung-pastikan-ada-assetmilik-tersangka-jiwasraya-di-luar-negeri?page=all. Some of the older case data from Kompas in 2012 revealed, such as the tax mafia case of Gayus Tambunan which the Attorney General said existed in four countries apart from wealth worth Rp. 74 billion in gold, US dollars and Singapore dollars, the case of Wisma Athlete M. Nazarudin that the amount of 5 million US dollars, 2 million euros, and 3 million Singapore dollars in Singapore, Hendra Rahardja in the BLBI case amounted to 493. 647 US dollars in Australia (the Australian side has handed over to Indonesia) and Robert Tantular in the Century Bank bailout case which states that there are Century Bank assets worth more than Rp 6 trillion in Hong Kong allegedly taken by Robert Tantular. See in Ridwan Arifin, Indah Sri Utari, Heri Subondo, "Efforts to Return Assets Located Abroad (Asset Recovery) in Enforcement of Corruption Eradication Laws 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.

MLA is a form of agreement between countries that is generally focused on eradicating organized transnational crir h as narcotics, money laundering, and so on. This shows that operationally law ement through MLA is only possible for crimes that have transnational aspects and fulfill the principle of double criminality. 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]

Meanwhile, if viewed from the aspect of the substance of the regulation, UNCAC also provides an opportunity to make it easier to return assets resulting from corruption that are hindered by the principle of bank secrecy, as long as the country where the money is deposited also ratifies UNCAC. As stated in Article 40 of UNCAC which states that each state party must ensure there is an appropriate mechanism in its national legal system to overcome possible obstacles that arise from the Bank Secrecy Act on the law enforcement process against criminal cases specified in UNCAC.[6]Even the mechanism for confiscation of assets from criminal acts has become one of the norms included in UNCAC 2003 so that states parties maximize efforts to confiscate assets resulting from crimes without going through a criminal prosecution process.[7]

Even though it is listed as one of the countries that have ratified UNCAC, Indonesia still has several problems that must be resolved, such as the regulatory framework that does not adequately regulate asset return schemes and technical regulations. In addition, legal experts are still debating the effectiveness of confiscation of assets without punishment for corruption cases and placing the issue of the relationship between assets resulting from crimes and criminals as one of the fundamental problems. Considering the preparation of the Draft Law on the Confiscation of Criminal Assets which is currently still rolling in Indonesia while there is an urgent need to find alternative ways to recover assets resulting from criminal acts of corruption through an effective mechanism,

Regarding MLA, Muhammad Rustamaji and Bambang Santoso revealed that there is a positive relationship between mutual legal assistance and efforts to recover assets resulting from criminal acts of corruption. This study also tries to provide an overview of the MLA format in an effort to recover assets resulting from corruption based on a penal approach. In addition, this study also provides a review of the importance of optimizing institutions that have a law enforcement function.[8]

Meanwhile, in terms of substance, Dwidja Priyatno views the importance of confiscation of assets through the NCB mechanism or without punishment. According to him, this is an important process to be immediately included in regulations in

[5] Irma Sukardi, "Mekanisme Bantuan Timbal Balik dalam Masalah Pidana (Mutual Legal Assistance) dalam Perampasan Aset Hasil Tindak Pidana Korupsi Berdasarkan Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana (thesis, University of Indonesia, Jakarta 2012), p. 19.

[6] Yasonna H. Laoly, *Diplomasi Mengusut Kejahatan Lintas Negara* (Jakarta: Pustaka Alvabet, 2019),, p. 133.

[7] Refki Saputra, "Tantangan Penerapan Perampasan Aset Tanpa Tuntutan Pidana (Non-Conviction Based Asset Forfeiture) dalam RUU Perampasan Aset di Indonesia", *Jurnal Antikorupsi Integritas,* 3, 1 (2017),, pp. 118.

[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.

Indonesia. In addition, according to him, technical steps that must be carried out are strengthening international cooperation.[9] In line with this, Ridwan Arifin, Indah Sri Utari, and Heri Subondo put more emphasis on the technical aspects of implementation that efforts can be made through formal or informal channels. The formal path means the formation of regulations and the application of MLA, while the informal path is the diplomatic relations approach.

This paper seeks to complement, confirm and provide other perspectives on what aspects need to be done to optimize the role of MLA in asset recovery. In discussing optimizing the return of assets resulting from criminal acts of corruption abroad by optimizing the role of MLA, this article is focused on discussing concrete efforts in order to optimize the role of MLA in the return of assets resulting from criminal acts of corruption because it is based on the constraints revealed through interviews by MLA implementer. This needs to be done because it is law enforcement officers who in practice use various MLAs, both bilateral and multilateral. The next section discusses the optimization of MLA through the adoption of the principle of Non-Conviction Based (NCB) Asset Forfeiture, namely the return of assets with a civil approach. This final discussion needs to be encouraged because Indonesia has actually ratified UNCAC but does not yet have a comprehensive regulatory framework in regulating the scheme for returning assets without punishment.

2. Discussion

2.1. The Role of Reciprocal Legal Aid in Returning Assets Proceeds from Corruption

This section discusses the role of Mutual Legal Aid (MLA) in recovering assets resulting from corruption. MLA itself is generally pursued through MLA agreements between countries, both bilaterally and multilaterally. Several MLA agreements that are multilateral are relatively difficult to implement due to the issue of imposing more detailed technical clauses, so that the bilateral MLA agreement format is considered more effective. In practice in Indonesia, bilateral MLA agreements involve 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 is binding on the parties so that it must be obeyed and implemented.

Until now, several bilateral agreements related to MLA have been made 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 1999 concerning Ratification of the Agreement between the Republic of Indonesia and Australia

[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.
[10] Marulak Pardede dan Sri Sedjati, "Efektivitas Perjanjian Kerjasama Timbal Balik dalam Rangka Kepentingan Nasional", https://www.bphn.go.id/ data/documents/lit_2012_-_7.pdf,, p. 6.

regarding Mutual Legal Aid in Criminal Matters (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 in Indonesia called the People's Republic of China. This MLA Agreement was signed on July 24, 2000 in Jakarta and ratified by Indonesia through Law Number 8 of 2006 concerning Ratification of Agreements between the Republic of Indonesia and the People's Republic of China regarding Mutual Legal Aid in Criminal Matters (Treaty Between The Republic of Indonesia and The People's Republic of Indonesia). of China on Mutual Legal Assistance in Criminal Matters).

The agreement between Indonesia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China was also signed on April 3, 2008. Four 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 Government of the Hong Kong Special Administrative Region. Kong of the People's Republic of China on Mutual Legal Assistance 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 agreements between Indonesia and South Korea were made on March 30, 2002 and ratified through Law Number 8 of 2014.[11]The same agreement between Indonesia and India was signed on January 25, 2011 and ratified through Law No. 9 of 2014. The agreement between Indonesia and Vietnam was signed on June 27, 2013 and ratified through Law No. 13 of 2015. Agreement between Indonesia and the United Emirates The Arab Republic was signed in Abu Dhabi on February 2, 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 which was signed in February 4, 2019 at the Bernerhof Bern is currently still in the process of ratification.[12]

In the nine MLA Agreements, almost all of them generally aim to increase the effectiveness of prevention and eradication of criminal acts, especially those of a transnational nature, while still implementing the principles of respect for state sovereignty, equality, with reference to the principle of double criminality. However, even though cooperation has been established with several countries, in fact 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]

The difference between common law and civil law legal systems is considered to be one of the obstacles where common law tends to be based on the principle of presumption of guilt, while civil law is more inclined to protect human rights. Likewise,

[11] http://www.interpol.go.id/id/berita/749-menenal-bantuan- Hukumtimbal-balik-mutual-legal-assistance-in-criminal-matters, 16/11/2019.

[12] http://www.kemenkumham.go.id/news/media-release-tandai-babakbaru-kerja-sama- Hukum-menkumham-signs-hand-perjuangan-mutuallegal-assistance-in-criminal-matters, 17/11/ 2019.

[13] Deddy Candra dan Arifin, "Kendala Pengembalian Aset Hasil Tindak Pidana Korupsi Transnasional", *Jurnal BPPK*, 11, 1 (2018), p. 44.

the difference in terminology and definitions as well as the elements of a criminal act in Indonesia and other countries. In defining the crime of bribery which falls into the category of corruption, for example, there are different meanings in bribery, money laundering, and corruption. Regarding this issue, what needs to be done is to renegotiate the MLA agreement. Especially if there is a misinterpretation of the request clause in the MLA. This is important to do to avoid the MLA agreement not being implemented due to differences.

Another problem is regarding the relationship between assets and criminal acts which also do not have certainty. Therefore, this issue requires a court decision in which it explains the relationship between the assets in question and the crime committed. Assets resulting from criminal acts of corruption stored in other countries can be frozen and/or returned if there is a name and specific information about the asset which is usually not listed in court decisions. The issue of conflict of interest is also considered to be an obstacle to the implementation of asset recovery, especially related to the formation of supporting regulations. It is considered that there is an indication of abuse of power that drags the upper class economy with politics as a continuous upper class power with political, economic, and social power.[14]

From several descriptions of the problem, this article focuses on one main point related to the non-optimality of the MLA agreement, namely the absence of an MLA agreement in a bilateral format. Based on information from Danardi Haryanto from the Directorate of Law and Political and Security Agreements, Ministry of Foreign Affairs of the Republic of Indonesia, it is known that the incompleteness and lack of detail in the clauses of the MLA agreement often make the respondent state refuse to help. Therefore, in technical terms, a request must be explained in detail about the things desired and adapted to the existing clauses. For example, if the applicant country requires assistance in freezing the bank account of the perpetrator of a criminal act in the requested country,[15]This means that even though there is an MLA agreement that is bilateral in nature, it still requires clarity of the clause so that it does not become a technical obstacle to its implementation in the future.

Based on these issues, there are at least two sequential steps that need to be taken in drafting the MLA agreement to make it more optimal. First, it is not enough for Indonesia to be bound by the multilateral MLA agreement. Apart from the barriers to various systems and understanding of certain terminology, MLA agreements are relatively difficult to spell out in detail, so efforts to further increase the effectiveness and optimize the role of MLA need to be made in a bilateral format. Second, based on the description of technical constraints related to the clauses that are not detailed and detailed in bilateral agreements, the next optimization step is to think about the clauses of the MLA agreement in detail and carefully.

[14] Candra dan Arifin, "Kendala Pengembalian Aset",, p. 44

[15]Interview with I. Danardi Haryanto, Head of the Sub-Directorate of Politics and Law Enforcement Cooperation, Directorate of Law and Political and Security Agreements, Ministry of Foreign Affairs of the Republic of Indonesia, Jakarta, 4/12/2019.

2.2. Optimizing the Role of Law Enforcement in the Implementation of MLA

In addition to the aspect of agreement formation and implementation in the form of national regulations (legal substance), what needs to be optimized is the role of law enforcement officers as a legal structure such as the Police, the Prosecutor's Office, the Corruption Eradication Commission and several other relevant institutions. Police in the implementation of MLA are limited to requests for assistance in conducting searches and confiscations.[16]This authority will certainly not be operational technically because of course there will be a jurisdictional conflict with the authority of a similar institution in the respondent's country as the owner of the jurisdiction. So in this context, the role of the police can be optimized in the function of prevention cooperation, one of which is by implementing automatic information exchange standards between countries.

The scope of MLA includes the efforts of the investigation, prosecution, and judicial processes. In the process of implementing the MLA, NCB-Interpol Indonesia plays a role in the investigation process such as examination or summoning witnesses, searches, and confiscations. Examination or summoning witnesses is an effort to bring 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 requested country with NCB-Interpol whether it can comply directly or require the request for assistance to be submitted by the Minister of Law and Human Rights through diplomatic channels.

In addition, the implementation of MLA within the Prosecutor's Office is carried out by the Bureau of Law and Foreign Relations, under the authority of the Attorney General for Development.[18]As stipulated in the Law on Mutual Assistance (MLA), the scope of the Indonesian Attorney's Office in submitting requests for assistance includes submitting requests for assistance; providing information regarding a person suspected of participating in a case that is in the process of being investigated, prosecuted, or at trial; providing information regarding evidence located in a foreign country; examination of a person who has given information or submitted evidence relating to MLA; bring someone related to the case in the MLA to Indonesia for the smooth provision of information and submission of evidence; and submission of applications for execution of court decisions which may take the form of confiscation of assets, imposition of fines, or delivery of replacement money.

In the context of corruption, the Corruption Eradication Commission has the authority to conduct investigations, investigations and prosecutions. This authority is the same as the authority of the Police at the investigation level and the authority of the Prosecutor's Office at the prosecution level in criminal acts of corruption.[19]The KPK as one of the law enforcement institutions has the authority to confiscate assets

[16]Law Number 1 of 2006 concerning Mutual Assistance in Criminal Matters, Article 3 paragraph (2) letter (f).
[17]Law Number 1 of 2006 concerning Mutual 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 Procedure of the Attorney General's Office of the Republic of Indonesia.
[19]Law Number 30 of 2002 concerning the Corruption Eradication Commission, Article 51.

resulting from criminal acts of corruption abroad by submitting requests for assistance through the Ministry of Law and Human Rights which acts as a coordinator in terms of submitting MLA applications to foreign countries and handling requests for MLA assistance from foreign countries to Indonesia.[20]

In addition to the Police, the Prosecutor's Office and the KPK, the Ministry of Law and Human Rights is the Central Authority in dealing with MLA problems in Indonesia.[21]The job description is based on the Decree of the Minister of Law and Human Rights Number M.HH.04. AH.08.02 of 2009 concerning Acting in the Field of Extradition and Mutual Assistance in Criminal Matters at the Ministry of Law and Human Rights. Another ministry that also plays an important role is the Ministry of Foreign Affairs. The roles carried out include the establishment of bilateral, regional and international MLA agreements; negotiator for formulating MLA agreement clauses; diplomatic channels; preparation and submission of MLA; and monitoring in MLA requests.[22]Although it has no relation to law enforcement, the Ministry of Foreign Affairs in the process of implementing the MLA has a role as a government representative institution in front of foreign countries.

In addition to these agencies, the Financial Transaction Analysis Reporting Center (PPATK) is also an institution that plays an important role. PPATK plays a role in providing financial transaction information in the context of asset tracing, both during the financial transaction analysis process and during the investigation, prosecution, and trial processes.[23]Special access to the database granted by the Chief of Police and Interpol for PPATK is very important in enriching and sharpening PPATK's analysis of suspicious financial transactions.[24]Then the information that has been obtained is transferred to law enforcement for investigation, which will continue with the investigation, and the judicial process.

In relation to 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 in assisting the process of asset recovery, in addition to the slow pace of inter-institutional cooperation regarding asset recovery. For this reason, a mutual agreement is needed to submit applications from the Police, the Prosecutor's Office, and the KPK to the Ministry of Law and Human Rights as the central authority. In reaching this agreement, sectoral problems are sometimes hindered, followed by the political interests of each institution, making the time it takes too long.[25]

Second, as a concept that has been applied in several other countries, supporting principles such as Non Conviction Based (NCB) Asset Forfeiture have not been implemented in Indonesian regulations. So that the application of the NCB asset

[20]Law Number 1 of 2006 concerning Mutual Assistance in Criminal Matters, Article 1 number 10.
[21] Ika Yuliana Susilawati, "Perampasan Aset Hasil Tindak Pidana Korupsi di Luar Negeri Melalui Bantuan Timbal Balik (Mutual Legal Assistance)", *Jurnal IUS Kajian Hukum dan Keadilan,* 4, 2 (2016), p. 147.
[22] Susilawati, "Perampasan Aset Hasil Tindak Pidana", p. 148.
[23] Ibid. p. 151.
[24] Ibid., p. 149.
[25]Candra and Arifin, Op.cit., p. 44.

forfeiture mechanism which is considered to be an alternative step for optimizing asset returns has not been significantly optimized by law enforcement.
in corruption cases.[26]

The banking secrecy system is also still considered an obstacle. Every bank in all countries has regulations that can protect the assets and identities of customers so that law enforcers often find it difficult to track down the assets of corruptors because the proceeds of crime are protected by bank secrecy rules. This is assessed as a result of UNCAC 2003 which has not been implemented through laws and regulations in Indonesia even though it has been ratified through Law Number 7 of 2006. The gap analysis study shows that there are several adjustments that need to be made immediately in fulfilling the clauses in UNCAC 2003 specifically in the field of criminalization. and laws and regulations. In addition, the process of returning assets resulting from criminal acts of corruption abroad uses long mechanisms and procedures, high costs,[27]

From the description carried out, there are at least two main problems that have the potential to interfere with the optimization of the role of law enforcement officers. First is the potential for friction that occurs between law enforcement officers because they have overlapping powers. For this, the steps that need to be taken are of course inter-institutional coordination or in a further stage specific regulations are made that regulate the implementation of related issues if needed. The second is the weakness of the MLA agreement as the basis for the implementation of law enforcement officers. As previously explained, the implementation of the MLA agreement is often hampered due to reasons that the MLA clause is not detailed so that it cannot be implemented.

2.3. Prospects of Implementing Non-Conviction Based (NCB) Asset Forfeiture in Return of Assets

One alternative that can be encouraged in efforts to recover state assets in 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 actually be used as a substantive content in the MLA agreement. NCB Asset Forfeiture is one of the asset return mechanisms with a civil approach that does not require a court decision with permanent legal force. This mechanism is considered to be more effective than the criminal forfeiture approach, which has a very high standard of evidence in the trial process. In its implementation, NCB Asset Forfeiture uses a reverse proof system to prove corruption cases, namely by requiring the defendant to be able to prove that his assets are not the result of a crime.[29]

The concept of the NCB asset forfeiture is basically a mechanism for confiscation of assets without any criminal proceedings first. In this case, the confiscation is carried

[26] Ibid., p. 44.

[27]Ibid. p. 44.

[28] Bismar Nasution, "Pengembalian Aset Hasil Tindak Korupsi melalui Civil Forfeiture", https://jurnal.kpk.go. id/Dokumen/SEMINAR_ ROADSHOW/Asset-recovery-melalui-civil-forfeiture-Bismar-Nasution. pdf

[29]Romli Atmasasmita, *Sekitar Masalah Korupsi Aspek Nasional dan Aspek Internasional* (Bandung: Mandar Maju, 2004), p. 58.

out in a civil manner (in rem) and is aimed at the assets of the perpetrator of the crime. The important thing about this mechanism is that it is clear that the property is legally tainted property or obtained
through crime. The birth of the NCB asset forfeiture concept was motivated by a paradigm shift in law enforcement which was initially oriented or directed at the perpetrator (follow the suspect) to lead to money or losses (follow the money). This is important because criminal acts of corruption and money laundering cause financial losses to the state, therefore the proceeds of these crimes must be returned to the state, which on the other hand often appears to be the condition of the perpetrators who cannot be tried first.[30]This mechanism is pursued separately from the criminal justice process with evidence stating that a property has been contaminated by a criminal act. This pollution is based on the taint doctrine, which is a doctrine that believes that a crime is considered to pollute the property used or obtained from the crime.

In some countries, such as Switzerland, the return of assets is regulated both on a criminal basis and not on a criminal basis. These two methods are contained in the main source of law in Swiss criminal law, namely the Penal Code of 21 December 1937 (Law of 1937) as stated in Article 123 Paragraphs 1 and 3 of the Federal Constitution (Amendment Number 1 dated 30 September 2011).31 Confiscation by punishment or without punishment based on Article 70 to Article 72 of the Law of 1937. Assets that can be confiscated are assets resulting from crime. As long as assets can be traced, they can be confiscated if they are proven to be related to a crime. However, if this is not proven, it is no longer possible for confiscation to occur. In addition, in terms of evidence, Switzerland applies a double standard of criminal evidence in asset confiscation cases. This is different from the application of evidence in common law countries which tend to apply the standard of proof of civil balances probabilities.32

Whereas in the UK, the law for confiscation of assets is based on the Proceeds of Crime Act 2002 (Proceed of Crime Act 2002). In accordance with the law, an order for confiscation will be made if the court (crown court) requests it. In the 2002 Proceeds of Crime Act, the UK introduced asset returns which allow law enforcement officials to recover property that represents “property acquired unlawfully”.[31]

In practice, the NCB Asset Forfeiture mechanism in the UK is enforced that assets can be frozen in connection with confiscation cases that are not based on conviction. This is done by obtaining a prohibition order determination of the relevant assets from the High Court. A UK court may issue a prohibition order with respect to an asset if it believes that: a) the asset is relevant to the identification on request; b) the process of taking assets to be recovered has not been determined by way of civil returns in the UK.[32]

[30] July Wiarti, “Non-Conviction Based Asset Forfeiture sebagai Langkah untuk Mengembalikan Kerugian Negara (Perspektif Analisis Ekonomi terhadap Hukum”, *UIR Law Review*, 1, 1 (2017)
[31] Supardi, *Perampasan Harta Hasil Korupsi*, p. 212.
[32] Stolen Asset Recovery Initiative (StAR), “Obtaining Assistance from the UK in Asset Recovery: A Guide for International Partners”, p. 13, see in https://star.worldbank.org/sites/star/files/ar_guide_uk_updated_ dec_2017.pdf, accessed on 24/10/2019

Assets are considered as relevant assets if there are reasons that the assets failed and there is a lack of evidence to initiate a criminal lawsuit.[33]Civil lawsuits are carried out using a reverse proof mechanism by which the government submits evidence to explain that the assets are the proceeds, are related to or used in a crime.[34]

This period of time is deemed appropriate for third parties to know that the seizure of assets will be carried out through the court. If within that time there is a third party who objected to the confiscation, then the person concerned may file a legal action to the court by presenting evidence with reasonable and trustworthy criteria. A foreclosure order pursuant to the NCB Asset Forfeiture must be based on a suspected criminal conduct which is also recognized as a felony in the UK.

While in Australia, the use of civil confiscation is contained in the latest Amendment to the Crime Act (Serious and Organized Crime) which is the result of an amendment to the Proceeds of Crime Act 2002 (Australian Act). However, most states have their own version of the law dealing with civil forfeiture, and some draw directly on Australian legislation.[35]

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 unexplained wealth order that requires someone to appear to explain it so as to allow the Court to decide whether will create or not order unexplained wealth with respect to that person for which the Commonwealth Director of Public Prosecutions (DPP) has requested such an order. In addition, the Court must believe that the competent authority in the DPP has reasonable grounds to suspect that a person's total wealth exceeds the value of legally acquired assets.

In section 179 E, the court will make a determination if the property cannot be explained requiring the person to be obliged to pay to the Commonwealth if the Court has made an initial order of wealth that the person concerned cannot explain. When the Court has made a final order, it determines how much the person must pay to the Commonwealth. This amount is the difference between the total wealth and the amount of assets that the Court believes is not unlawful.

In the context of international agreements, since 2003 this form of illegal profit pursuit is further regulated in UNCAC. Article 54 paragraph (1) of the UNCAC regulates the provision that all participating countries must consider taking actions that are considered urgent so that the return of assets resulting from corruption with the possibility that there is no need for a criminal process in the case, as a result of not being able to prosecute perpetrators with reasons of death, flight or related to other matters. 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 easy way to implement the NCB asset forfeiture mechanism is to start with assets that are suspected of being the proceeds

[33]Anthony Kennedy, "An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom", Journal of Money Laundering Control, 10, 1 (2007), p. 37.
[34]Anthony Kennedy, "Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators", Journal of Financial Crime, 13, 2 (2006), p. 140.
[35]Anthony Davidson Gray, "Forfeiture Provisions and the Criminal/Civil Divide", New Criminal Law Revies, 15, 1 (2012), p. 34.

of crime are blocked and withdrawn from the economic flow through confiscation to the court which was previously requested. The court then decided that the property was tainted property. After being declared as tainted property, the court announced through the public media for a sufficient period of no more than 30 days.[36]The civil confiscation (in rem) is an action taken if the criminal process followed by confiscation of assets cannot be carried out because the owner of the asset has died; criminal proceedings which ended because the defendant was declared acquitted; the criminal prosecution is declared successful, however, the expropriation is legal to prove that he is the one who owns the property along with an explanation of how to obtain it.[37]

For Indonesia, in the context of international agreements, several fields related to legal politics and security can only be implemented after ratification which in Indonesia is carried out through a process of transformation into national law first. In the system of laws and regulations in force in Indonesia, the regulation regarding NCB Asset Forfeiture is not sufficient enough so that the application of the NCB Asset Forfeiture mechanism cannot be optimized by law enforcers, especially in cases of corruption, although according to Yunus Husein it does not mean that it cannot be practiced at all. . According to him, several regulations can be the basis for implementing these principles, although they are not optimal.[38]

As one of the efforts to further optimize the implementation of the NCB, a discussion of the Draft Law on the Confiscation of Criminal Assets was rolled out. In the Academic Paper of the Bill on Asset Forfeiture for Crime, the substance of the implementation of the NCB asset forfeiture is one of the UNCAC recommendations.[39]Law 24 of 2000 concerning International Agreements provides stipulations that in the context of the formation of new legal rules, the ratification of international agreements must be stated in the form of a law. However, as a draft legal product, the Criminal Act Asset Confiscation Bill, even though it has been ratified later, is still a unilateral claim. If you look at the prospects for its implementation, especially related to assets located abroad, of course you still have to use additional regulatory instruments because it will be closely related to the jurisdiction of other countries. For this reason, one of the important things besides the formation of national regulations is the formation of a more technical legal instrument, namely the MLA, whether bilateral, trilateral, or multilateral.

[36]Sudarto and Hari Purwadi, "Mechanism of Asset Confiscation by Using Non-Conviction Based Asset Forfeiture as an Effort to Recover State Losses Due to Corruption", UNS Postgraduate Law Journal, 5, 1 (2017), pp. 112; Yenti Garnasih, "The Asset Recovery Act as a Strategy in Returning Assets Proceeds from Crime", Indonesian Legislation Journal, 7, 4 (2010), p. 630.
[37]Bismar Nasution, "Returning Assets Proceeds from Corruption".
[38]Yunus Husein, "Legal Explanation on Asset Confiscation Without Criminalization in Cases of Criminal Acts of Corruption", Research Report of the Center for Research and Development of Law and Policy and the Center for Research and Development of Law and Judiciary of the Supreme Court of the Republic of Indonesia, 2019,https://pshk.or.id/wp-content/uploads/2019/04/Restatement_Pecepatan-Aset-Tanpa-Penidanaan 2019. pdf, accessed 25/10/2019, p. 65-66.
[39]Husein, "Legal Explanation on Asset Confiscation", p. 81.

3. 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 bilateral format and a more detailed and detailed technical elaboration, as well as an alternative to include the concept of Non-Conviction Based Asset Forfeiture (NCB) as a substantive content in each MLA agreement. Indonesia is a party to UNCAC, and currently has an Asset Confiscation Bill in which it also offers an NCB asset forfeiture mechanism as a way out that can be taken in the asset recovery process so that national regulations and MLA must first be made to support implementation. In addition, optimizing the role of law enforcement is also a must, among others, changing the perspective of law enforcement from in personam to in rem; intensive cooperation between law enforcement agencies both nationally and internationally. For this reason, the alignment of national laws and regulations based on international provisions in conventions as the legal basis for implementing them is also important.

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