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A BEHAVIORAL APPROACH TO BILATERAL COOPERATION ON CRIMINAL LAWS: A CASE STUDY ON INDONESIA'S EXTRADITION AND MUTUAL LEGAL ASSISTANCE TREATIES

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A BEHAVIORAL APPROACH TO BILATERAL COOPERATION ON CRIMINAL LAWS: A CASE STUDY ON INDONESIA'S EXTRADITION AND MUTUAL LEGAL ASSISTANCE TREATIES

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Abstract

The effectiveness of bilateral agreements in the context of criminal law enforcement remains highly contested. In the Indonesian context, such bilateral cooperation classifies two modalities of indirect law enforcement systems, namely, extradition and mutual legal assistance (MLA) in criminal matters. This article attempts to explain these modalities through a behavioral and rational approach by taking Indonesia's MLA treaty with Switzerland and its extradition treaty with the Russian Federation as a case study. From this approach, we argue that the state's decision to cooperate implies the adoption of control and consensus models. However, these two models were induced by political preferences rather than the sole reliance on the maxim aut dedere aut judicare in criminal laws. At the domestic level, the attitudes of penal entrepreneurship and institutional arrangement showcase the multifaceted state's rationality in deciding a treaty design in criminal law cooperation.

Keywords: behavior, criminal justice cooperation, extradition, mutual legal assistance

Abstrak

Kemangkusan perjanjian kerja sama bilateral antar negara dalam rangka penegakan hukum pidana masih kerap dipertanyakan. Dalam konteks Indonesia, kerja sama bilateral tersebut terbagi ke dalam dua bentuk sistem penegakan hukum tidak langsung, yakni ekstradisi dan bantuan hukum timbal balik masalah pidana. Artikel ini menjelaskan kedua modalitas tersebut melalui pendekatan behavioral dan rasional dengan studi kasus pada dua perjanjian, yakni bantuan hukum timbal balik dengan Konfederasi Swiss dan ekstradisi dengan Federasi Rusia. Dari pendekatan tersebut, studi ini memperoleh gambaran bahwa keputusan negara untuk bekerjasama mencerminkan dua model, yakni kontrol dan konsensus. Kedua model ini cenderung dipengaruhi oleh manfaat dari segi politis ketimbang legal yang berlandaskan pada maxim aut dedere aut judicare. Pada tingkat domestik, sikap penal entrepreneurship dan hubungan institusional juga berperan dalam menjelaskan keputusan negara untuk bekerjasama dengan negara tertentu dalam menegakkan hukum pidana.

Kata kunci: behavior, ekstradisi, kerja sama pidana, mutual legal assistance,

I. INTRODUCTION

On February 4, 2019, Yasonna H. Laoly, the Indonesian Minister of Law and Human Rights, and Karin Keller-Sutter, Switzerland's Minister of Justice, signed a bilateral agreement on mutual legal assistance (MLA) between the two countries. The Indonesian President Joko Widodo himself highlighted this agreement's significance in the fight against corruption and money laundering and in the pursuit of asset recovery. Some regarded this development as a progressive effort as Switzerland has been renowned for its bank and financial safety and security, which appeal to white-collar criminals seeking to keep safe their crimes' proceeds.¹

The *Indonesian* administration has successfully concluded a deal in criminal matters, at least with one country. Under the domestic legal system, a bilateral agreement in criminal matters categorizes two indirect law enforcement modalities: extradition and MLA treaty. Amid these series of efforts, however, the effectiveness of bilateral agreements in criminal matters is still highly contested. Bassiouni argued that these types of indirect criminal law enforcement imply several weaknesses, including the (1) failure to provide an overall framework that integrates all applicable modalities, (2) heavy dependence on the effectiveness of national legal systems, (3) lack of a policy that provides continuity and progressive development, (4) placement of the sole duty on states to act in conformity with treaty obligations without international constraints, (5) overreliance on bilateralism, (6) failure to provide a mechanism for the resolution of conflicts arising between states, and (7) lack of adequate safeguards to ensure "due process."² A number of studies also mentioned several shortcomings of these agreements from a domestic perspective, including the lack of a clear provision in the Extradition Law, inefficiency of procedures among law-related institutions, and uncoordinated measures among indirect criminal law enforcement modalities.³

These contestations against bilateral agreements on criminal matters suggest the need to closely examine why states are still cooperating bilaterally in criminal legal enforcement. Instead of focusing on the doctrinal description of bilateral treaties as a legal instrument, this work explores the state's rationality in domestic legal enforcement *through* these instruments. It employs a rationalist assumption in international law, arguing that

*the state's interests are determined by its political leaders' preferences, who take into account the preferences of citizens and groups according to the particular national political regime under consideration.*⁴

In explaining this rationality from a macro perspective, three interrelated elements

¹ Puteri Hikmawati, "Implikasi Penandatanganan Perjanjian Bantuan Imbal Balik Antara Indonesia Dan Swiss Terhadap Pemberantasan Tindak Pidana Korupsi Di Indonesia," *Info Singkat Bidang Hukum* (Jakarta, 2019).

² M. Cherif Bassiouni, *Introduction to International Criminal Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2014), 530.

³ Alvon Christianto, "Dampak Ekstradisi Terhadap Ekonomi Masyarakat Indonesia: Mahal Atau Manfaat?," *Dialogia Iuridica: Jurnal Hukum Bisnis Dan Investasi* 11, no. 2 (2020): 25–45; Eddy Omar Sharif Hiariej, "United Nations Convention Against Corruption Dalam Sistem Hukum Indonesia," *Mimbar Hukum* 31, no. 1 (2019): 112, <https://doi.org/10.22146/jmh.43968>; Rudy Hendra Pakpahan and Aras Firdaus, "Pembaharuan Kebijakan Hukum Asset Recovery: Antara Ius Constitutum Dan Ius Constituendum," *Jurnal Legislasi Indonesia* 16, no. 3 (2019): 369–78; Pisawat Sukonthapan, "Indonesia & Thailand: 'Maltreatment' / 'Forced Labor' / 'TIP' in Fisheries in Indonesia/Thailand," *Indonesia Law Review* 6, no. 1 (2016): 38, <https://doi.org/10.15742/ilrev.v6n1.206>.

⁴ Anne van Aaken, "To Do Away with International Law? Some Limits to 'the Limits of International Law,'" *European Journal of International Law* 17, no. 1 (2006): 291, <https://doi.org/10.1093/ejil/chi166>.

come into play: law, legalization, and politics. Instead of focusing solely on the legal element, this work considers the legalization in international law, which is the process of bilateral agreement formulation, and the political perspective at the domestic level.

II. MODELS OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

The question of a state's rationality in making deals with other states in criminal matters could be understood through a socio-legal analysis in international law. Referring to the concept of law and society in the postmodern era exposed by Cotterell, Sally Engle Merry argues that regarding nations' legal systems as stable is impossible.⁵ According to her, fluidity and legal pluralism are contemporary characteristics of international law, particularly amid its fragmentation and social relation mobility.⁶ This process is thus important for us to understand the state's behavior in an international agreement.⁷ By taking Indonesia as a case study, we attempt to fill the gap in the understanding of the behavioral insights in international law by providing cultural context.⁸

Following Merry's line of argument on the socio-legal approach in international law, this article departs from globalization and the *fear of crime* as a backdrop in understanding cooperation in criminal laws. In this sense, globalization is a multifaceted term that involves various aspects of international relations, namely, economics, politics, society, and culture.⁹ In simple terms, Held defines globalization as "the growing interconnectedness of states and societies" and "the progressive enmeshment of human communities with each other."¹⁰ From a constructivist point of view, Giddens emphasizes that globalization is "the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa."¹¹

The nexus between distant localities affects social spaces between one state and another.¹² Specifically, the surfacing of the culture of the fear of crime becomes relevant as the intensification of interaction moves linearly with the propagation of this culture. Before one describes the crime phenomenon in globalization, a short explanation about the *fear of crime* is relevant. Garofalo defines the fear of crime as

⁵ Sally Engle Merry, "International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism," *Studies in Law, Politics, and Society* 41, no. Special Issue Law and Society Reconsidered (2015): 151–52, [https://doi.org/10.1016/S1059-4337\(07\)00006-3](https://doi.org/10.1016/S1059-4337(07)00006-3).

⁶ Merry, 152; Harold H Koh, "Why Do Nations Obey International Law?," *Yale Law Journal* 106 (1997): 2599–2659; Atip Latipulhayat, "New Face of International Law From Western to Global Construct," *Padjajaran Jurnal Ilmu Hukum* 7, no. 1 (2020): 43–63.

⁷ Ary Aprianto, "World Heritage Convention and Transnational Legal Process to Protect Indonesian Nature," *PADJAJARAN Jurnal Ilmu Hukum* 6, no. 3 (2019): 489–510, <https://doi.org/10.22304/pjih.v6n3.a4>.

⁸ Doron Teichman and Eyal Zamir, "Nudge Goes International," *Hebrew University of Jerusalem Legal Studies Research Paper Series* No. 20-09, 2020, <https://doi.org/10.2139/ssrn.3530123>.

⁹ Katja F. Aas, *Globalization and Crime* (London: SAGE Publications, 2007).

¹⁰ David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: Stanford University Press, 1995); David Held, "The Changing Contours of Political Community: Rethinking Democracy in the Context of Globalisation," *Theoria* 46, no. 94 (2007), <https://doi.org/10.3167/004058199782485811>.

¹¹ Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990), 64.

¹² Sally Engle Merry, "New Legal Realism and the Ethnography of Transnational Law," *Law and Social Inquiry* 31, no. 4 (2006): 975–95, <https://doi.org/10.1111/j.1747-4469.2006.00042.x>; Paul Schiff Berman, "Global Legal Pluralism," *Southern California Law Review* 80, no. 6 (2007): 1155–1237, <https://doi.org/10.1146/annurev.lawsocsci.4.110707.172311>.

“an emotional reaction characterized by a sense of danger and anxiety.”¹³ Conceptually, Garofalo elucidates two elements of the *fear of crime*, namely, fear and physical harm and actual and anticipated fear. Determining the rate of the *fear of crime* in specific populations involves several variables that cover the position in a social environment (related to socioeconomic structure); information and image about crimes; risk assessment; costs, choices, and responses to the *fear of crime*; feedback effect; and social outcomes.¹⁴

Extradition and MLA in criminal matters make up two distinct legal regimes. The first regime is related to an indirect enforcement system, which is a term that implies the enforcement of international criminal law through the domestic system.¹⁵ The second regime reflects the cooperation between states in criminal and penal matters that is essentially a modality of cooperation based on bilateral relations to enforce the states' domestic legal systems.¹⁶ The fundamental principle in both modalities lies in the maxim *aut punire aut judicare*, defined as the duty to prosecute criminals. This principle obligates states to prosecute and try international crime perpetrators and create cooperation with other states to detain, prosecute, and try individuals.

The practice of extradition and MLA varies between states. On the basis of Heymann's observation, Harfield categorizes two distinct models that could explain the state's legal attitudes about interstate cooperation in criminal law enforcement. The first model is the prosecutorial model. In this model, law enforcement apparatuses create a highly pragmatic structure specifically designed to fulfill the necessities in legal enforcement procedures.¹⁷ This model works on every stage or phase of the criminal justice system, and according to Harfield, it is often cited as the philosophy of practical policing. The second model is the international law model, which seeks to explain the relationship between states and the states' organs or institutions with a highly different attitude toward law enforcement. This model is based on strict international rules, including the criteria for the rejection of requests.¹⁸

On the basis of these two models, Harfield further formulates two models of bilateral agreements on MLA: the control model and consensus model. The control model finds its argumentation rooted in the United States' political stance regarding transnational organized crimes being a threat to its national security. After the 9/11 World Trade Center attack, the security terminology has been redefined in the military, political, economic, social, and environmental areas, based upon which transnational organized crimes could operate.¹⁹ One particular consequence of this perspective is reflected by the United States' positions toward MLA treaty negotiations.²⁰ The benefit of concluding agreements with other states individually, which reciprocally imposes obligations, is the United States' flexibility in fulfilling the specific and detailed obligations of each state.²¹ Harfield argues that the relations between individual

¹³ James Garofalo, “The Fear of Crime: Causes and Consequences,” *Journal of Criminal Law and Criminology* 72, no. 2 (1981): 840.

¹⁴ Garofalo, 842–53.

¹⁵ Bassiouni, *Introduction to International Criminal Law*, 487.

¹⁶ *Ibid.*, 487.

¹⁷ Clive Harfield, “A Review Essay on Models of Mutual Legal Assistance: Political Perspectives on International Law Enforcement Cooperation Treaties,” *International Journal of Comparative and Applied Criminal Justice* 27, no. 2 (2003): 221–41, <https://doi.org/10.1080/01924036.2003.9678710>.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*, 226.

²¹ Christopher C Joyner, “International Extradition and Global Terrorism: Bringing International Criminals to Justice,” *Loyola of Los Angeles International and Comparative Law Review* 25 (2003): 493–541.

MLA treaties could be described as a bicycle wheel, with the United States being the center or hub and with the spokes representing the treaties. Thus, this model aligns the control exercised by the hub with “the view of mutual legal assistance as an instrument in an armory intended to protect a single nation from the external threats posed by transnational organized crime.”²²

The second model on MLA treaties is the consensus model. It departs from the common understanding among the European Union states that consider transnational crimes as a collective threat toward Europe’s security and economic integration. As a result, these states view transnational organized crimes as a domestic problem that ought to be resolved through regional instruments and mechanisms.²³ Practically speaking, the European Union has promoted forums and meetings, studies, capacity building, and even multilateral treaty formulation.²⁴ The advantage of this approach is that any concluded norms regionally might not be addressed by bilateral treaties as these individual instruments were formed to accommodate particular conditions in two countries as an attempt to provide great flexibility to the power broker in the bilateral relationship.²⁵ Moreover, this model creates established relationships, including the uniformity of the procedure of cooperation between countries, which is often absent from MLA bilateral treaties.²⁶ This approach is understood as a way to reduce public expenditure for negotiating with many states individually.²⁷

The control model is preferable to the consensus model if the bilateral economic relationship is asymmetric.²⁸ This model, exercised through a bilateral treaty on MLA, implies an equal formal legal obligation between state parties. In the absence of a supranational body or agency to enforce international law and faced by the violation or infringement of treaties, states with high economic resources could unilaterally impose sanctions against their counterparts.²⁹ Nevertheless, the control model tends to promote unilateralism rather than cooperation.³⁰ However, Nadelmann, as quoted by Harfield, states that “the principal incentive for many foreign governments to negotiate MLATs with the United States was, and remains, the desire to curtail the resort by U.S. prosecutors, police agents, and courts to unilateral, extraterritorial means of collecting evidence from abroad.”³¹ Meanwhile, many less powerful states are prone to focusing on endorsing regularity when negotiating with more powerful states. According to Harfield, “[I]t is the setting of internationally agreed norms that is a particular advantage of the consensus model.”³² Specifically, Harfield’s consensus model and Heymann’s international law model illustrate “the mechanisms by which the citizen is protected against the abuse of state authorities exceeding their powers.”³³ The international law model explicates how to regulate the relations between jurisdictions, and the consensus model depicts how to achieve expected values by

²² Harfield, “A Review Essay” 227.

²³ *Ibid.*, 228.

²⁴ Ananya Chakraborty, *Extradition Laws in the International and Indian Regime: Focusing on Global Terrorism* (Singapore: Palgrave Macmillan, 2019), 49–55, <https://doi.org/10.1007/978-981-13-6397-9>.

²⁵ Harfield, “A Review Essay on Models of Mutual Legal Assistance: Political Perspectives on International Law Enforcement Cooperation Treaties,” 230.

²⁶ Harfield, 230.

²⁷ *Ibid.*, 230.

²⁸ *Ibid.*, 231.

²⁹ *Ibid.*, 230–31.

³⁰ *Ibid.*, 231.

³¹ *Ibid.*, 231.

³² *Ibid.*

³³ *Ibid.*, 232.

promoting them among many possibilities between signatories.³⁴

III. RATIONAL CHOICE AND INTERNATIONAL LAW

As mentioned in the discussion of international cooperation in criminal law enforcement, the two models are not enough to understand the rationality of a state's decision to conclude a bilateral treaty in criminal law enforcement. Arguably, the models should be accompanied by the rational choice approach in international law. Prior to tackling this approach, we should first understand the discourse of the rationalist approach in international relations. From this approach, we briefly examine the logic of rational choice theory in international law. In doing so, we may construct a clear analytical framework for explaining why a state is willing to conclude a bilateral agreement in enforcing its domestic criminal laws.

Rationality in international relations is a construction of time or space in which a state's actions are being calculated, *raison d'état* (i.e., main political reason of a state in making decisions based on national interest), and a reflection of power balance caused by these interactions.³⁵ In the application of the concept of rationality to international relations, rational choice theory explains why and how states take one particular action. However, this process is not strictly intended to provide a scientific explanation or be conducted merely for the sake of science. This process could justify any actions taken as it indicates a predictive dimension by considering actions and existing environmental settings and then comparing them with those of any previously taken actions.

The concept of rationality in policymaking and policy choices has a fundamental assumption that actors interact because they have a purpose, that is, to determine their specific goals and how to achieve them. They then choose particular actions that could maximize their utility in achieving their purpose. Rational choice theory does not see the end but focuses on the means to achieve the end.³⁶ This theory's complimentary application is that it could describe, explain, and predict an actor's behavior. Within the assumption that every actor always takes the most optimal action, rational choice theory guides us in understanding that every choice that has been or will be taken by an actor is based on this actor's purpose, beliefs, and relevant environmental constraints, such as information availability and counteraction from other actors.

In employing a rationalist approach in foreign policymaking, Allison offers the following three models:

- The rational actor model emphasizes that foreign policy is a purposive act of unified governments;³⁷
- The organizational process model emphasizes that foreign policy is the output of large organizations functioning according to regular patterns of behavior; and³⁸
- The governmental politics model emphasizes that foreign policy is a result of

³⁴ *Ibid.*, 232.

³⁵ Judith Goldstein *et al.*, "Introduction: Legalization and World Politics," in *Legalization and World Politics*, ed. Judith Goldstein *et al.* (Cambridge, Massachusetts, London: The MIT Press, 2001), 1–16.

³⁶ Alexander Thompson, "Applying Rational Choice Theory to International Law: The Promise and Pitfalls," *The Journal of Legal Studies* 31 (2002): 285–306; Alexander Thompson, "The Rational Enforcement of International Law: Solving the Sanctioners' Dilemma," *International Theory* 1, no. 2 (2009): 307–21, <https://doi.org/10.1017/S1752971909990078>.

³⁷ Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crises* (Boston: Little, Brown and Company, 1971), 5.

³⁸ *Ibid.*, 6.

various bargaining games among players in the national government.

These models are not flawless, but each of them tends to focus on one aspect while neglecting others. Therefore, how should we examine the rationality behind a foreign policy? One might employ multiple models in the same case to gain a rich understanding. In this article, with the limited source of information from high-ranking individuals, we only employ the first and second models of analysis, namely, the rational actor and organizational process models. We should note that the rationalist approach derives from the realist tradition of international relations that emphasizes the security perspective and the accumulation of power by actors engaged in international interactions.

Nonetheless, international law studies tend to be suspicious of political manipulation in the assumption and definition of the law's economic analysis. Is the state rational? What is the nature of such rationality? In answering these questions, one might seek to employ "narrow" rationality. Narrow rationality is a framework in which states are rational in their behavior and pursue their interests with some sets of particular preferences, which they decided not on the basis of an objective standard of utility or efficiency but, idiosyncratically, on the basis of their own emotional, cultural, and historical considerations that are difficult to be comprehended by parties outside the state.³⁹

The behavioral approach in international law is established through cognitive psychology and behavioral economics, which principally examines individual action as a unitary actor.⁴⁰ One must further justify how this approach could be applied to the study of international law at the state level. Broude offers three relevant explanations. The first one is the state as a unitary actor.⁴¹ Veering away from the traditional view of realists, law and economic analysis, and international law practitioners positing that states are equal to individual agents, Broude argues the need for an exclusion in the general provisions of human behavior captured through the concept of "bounded rationality." According to Broude, a state's behavior should be exempted from a perfect rationality point of view. In brief, a lenient behavioral approach to the states must be adopted because actions taken at the state level are formed by individual and collective agents.⁴² He also identifies two ways to explain how states overcome this bounded individual rationality within them. The first way is to see beyond the state. He mentioned that "even if states naturally acted according to bounded rather than ideal rationality, the international political and legal environment in which states act would somehow have a corrective effect, leading them to become more perfectly rational."⁴³ Through this lens, a behavioral analysis in international law could focus on the examination of the decisions made by the state on different circumstances and events from a behavioral perspective instead of solely applying the behavioral theory of states.⁴⁴ The second way is to see within the state. This approach differs from the current economic analysis of international law, which accepts that the state is a unitary, even monolithic, actor. Arguably, the state's behavior toward international law is an outcome of complex social, political, administrative, and legislative processes.⁴⁵ These

³⁹ Tomer Broude, "Behavioral International Law," *University of Pennsylvania Law Review* 163, no. 4 (2015): 1108–9, <https://doi.org/10.2139/ssrn.2320375>.

⁴⁰ Anne van Aaken, "Behavioral International Law and Economics," *Harvard International Law Journal* 55, no. 2 (2014): 421–81, <https://doi.org/10.2139/ssrn.2342576>.

⁴¹ Broude, "Behavioral International Law," 1122.

⁴² *Ibid.*, 1122.

⁴³ *Ibid.*, 1122.

⁴⁴ *Ibid.*, 1124.

⁴⁵ *Ibid.*, 1125.

processes, categorized as cognitive biases and heuristics evident, become the factors that causes the bounded rationality to be manifested at the international level.

The second explanation for the behavioral approach toward state level analysis is through seeing the behavioral aspects of collective decision making at the state level and other relevant entities, such as nonstate actors and international bureaucracy, which produce outcomes in international law.⁴⁶ Therefore, this view attempts to shift from methodological statism to decision making at people's collective level. Various psychology studies on collective decision making have explained the existence of behavioral bias in group thinking when deciding politics and foreign policies, particularly in combination with prospect theory.⁴⁷ This logic could be applied in understanding the rationality of group decisions in international law, in which the group has a certain level of bias and heuristics.⁴⁸ On the basis of several experiments, van Aaken argues that group thinking has "a tendency to believe either (1) that the characteristics of an individual group member are reflective of the group as a whole... or (2) that a group's decision outcome must reflect the preferences of individual group members, even when information is available suggesting otherwise."⁴⁹ The third explanation refers to the individual as a subject and decision maker in international law. Broude states that "individuals are increasingly direct addressees and beneficiaries of international law, especially in the areas of investment protection, international human rights, international criminal law, and international humanitarian law..."⁵⁰

In the context of criminal law enforcement cooperation, rational choice theory may open up a venue to showcase how domestic penal policies affect the government's decision at the state level. The following sections elaborate a case study on two distinct bilateral treaties and how they reflect the multifaceted fields of interaction in deciding on a particular treaty design.

IV. MUTUAL LEGAL ASSISTANCE AND EXTRADITION TREATIES: A CASE STUDY

Under the rational choice framework, the state's decision to form a design for extradition and MLA treaties could be regarded as a public policy. Through this lens, we could consider three public policy-oriented categories.⁵¹ The first category is the law and public policy. In this sense,

*the position of the states concerned depends on the legal basis of extradition, that is, whether in the particular case extradition is based: (i) on a treaty, (ii) on reciprocity, or (iii) on comity. The choice among these bases stems from the original choice of two hypotheses to justify the practice, namely civitas maxima or mutual cooperation between states.*⁵²

The relation between law and public policy enshrines several concerns: (i) the choice of jurisdictional theory; (ii) the requirements of extraditable offenses, interpreted either *in concreto* or *in abstracto*; (iii) the limitations on the extraditability of certain types of offenses, such as political, fiscal, economic, and military offenses (which

⁴⁶ *Ibid.*, 1126.

⁴⁷ *Ibid.*, 1127.

⁴⁸ *Ibid.*, 1129.

⁴⁹ van Aaken, "Behavioral International Law and Economics," 446.

⁵⁰ Broude, "Behavioral International Law," 1130.

⁵¹ M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 6th ed. (Oxford: Oxford University Press, 2014), 49.

⁵² *Ibid.*, 55.

stem more often from policy than from humane considerations even if an element of the latter is implicit in the formulation of the policy); and (iv) the protection of the rights of the relator, which includes an inquiry into how jurisdiction was obtained, the sufficiency of the charge and the evidence presented, and the defenses available to refute the charges or oppose the grant of extradition.⁵³ The second category comprises political factors. These factors indicate that the extradition implementation could be discerned according to political themes and, even to a certain extent, performed by nonstate actors.⁵⁴ Based on rational choice theory, these factors are relevant in understanding the state's reputation, reciprocity, and retaliation costs.⁵⁵ The third category is the consideration of human rights and humanity. The discourse about human rights protection has been pervasive in direct and indirect international criminal law enforcement. The most common issues include the non-extraditable clauses, rights protection in custody, and fair trial. Many countries have adopted this rule of *noninquiry*, in which "courts may not examine the requesting country's justice system or human rights record in determining whether to extradite an individual."⁵⁶

The theoretical construction of rational choice in international law also helps us understand the two models' logic in bilateral agreements related to criminal law. By taking a case study on two treaties, namely, the MLA treaty with Switzerland and the extradition treaty with the Russian Federation, this article argues that both formal agreements depict the consensus and control models. However, from a behavioral point of view, we find the distinction between the two models as somewhat superficial because the rationality is formed through collective decision making at the group level within the state. In the Indonesian context, a concluded international treaty should be legalized domestically through an act by the parliament.⁵⁷ Hence, the government bears a signatory or ratification power, thus leaving the domestic legalization to the national parliament's political discussion process.⁵⁸ In the context of treaty ratification, the government can provide academic/background paper during the deliberation process at the parliament. Therefore, one could argue that the academic/background paper reflects interagency interests or calculations toward the consequences of a bilateral treaty in criminal matters.⁵⁹

A. Mutual Legal Assistance Treaty with Switzerland

Long before signing the MLA agreement in 2019, Indonesia and Switzerland have cooperated against criminal activities using the MLA mechanism. Both countries have worked since 2005 to recover assets from criminal activities hidden in Switzerland. A prominent case is related to the effort to repatriate ECW Neloe's assets.⁶⁰ ECW Neloe was convicted of corruption by Indonesia's Court, and since 2005, Indonesia

⁵³ *Ibid.*, 56.

⁵⁴ William Magnuson, "The Domestic Politics of International Relations," *Virgi* 52, no. 52 (2012): 839, <https://doi.org/10.4324/9781315189734>.

⁵⁵ Andrew T. Guzman, *How International Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008); Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), 88-91.

⁵⁶ Roderic Alley, "The Domestic Politics of International Relations," *Virginia Journal of International Law* 52 (2012): 886, <https://doi.org/10.4324/9781315189734>.

⁵⁷ Simon Butt, "The Position of International Law within the Indonesian Legal System," *Emory Int'l L. Rev.* 28, no. 95 (2014): 1.

⁵⁸ Butt, 10-11.

⁵⁹ Goldsmith and Posner, *The Limits of International Law*, 91-95.

⁶⁰ Paku Utama, "Gatekeepers' Roles as a Fundamental Key in Money Laundering," *Indonesia Law Review* 6, no. 2 (2016): 180, <https://doi.org/10.15742/ilrev.v6n2.215>.

had been trying to repatriate his assets from Switzerland.⁶¹ Only in 2009 did the case proceed with the freezing of his ECW Neloe's assets in Switzerland's banking system⁶². After four years of extension, Switzerland authorities opened his account because of a lack of evidence. In the judicial process, the opening happened because Indonesia authorities could not confirm whether those assets were obtained through criminal activities. The conviction for money laundering against ECW Neloe was also added after Switzerland authorities informed Indonesian authorities that they found irregularities in ECW Neloe's accounts.⁶³

The legal process in Indonesia showcases the inability of authorities to trace crime-related assets. In July 2005, Switzerland authorities were informed about irregularities, and Indonesia requested the MLA a year after. For asset repatriation, Switzerland authorities require the proceeds to be stated in a court verdict from the requesting country; such requirement was not met in ECW Neloe's case.⁶⁴ Switzerland authorities can only freeze assets within a fixed time limit on a request basis; freezing assets to obtain evidence is inadmissible.⁶⁵ Issues also arise in linguistics and terminologies, with terms such as "corruption" not being legally accepted in Switzerland.⁶⁶ Repatriating assets could become an obstacle if the interpretation of crimes related to such assets does not fall under the principle of dual criminality. In the process, the two countries consented to limit transnational crimes through the United Nations Convention Against Corruption (UNCAC) framework. Nevertheless, both countries faced challenges with regard to the conduct of cooperation. Thus, both countries agreed to formalize their cooperation through a bilateral agreement.

In 2015, the negotiation to formalize the cooperation started with the objective to create a binding foundation for the cooperation between the two countries' judicial authorities in relation to the prosecution and punishment of criminal offenses and the effective combat of international crimes.⁶⁷ As stated in the treaty, the agreement focused on fiscal offenses that "the Contracting Parties provide each other the widest measure of MLA in criminal matters concerning fiscal offenses in accordance with their respective national law."⁶⁸ As stated in a report from the Ministry of Law and Human Rights of the Republic of Indonesia, corruption and financial crimes such as tax crimes and corporate crimes are crimes with a high possibility of being transnationalized between both countries.⁶⁹ The agreement also stated that "... both

⁶¹ Baskoro, L.R., Maria Hasugian, Erwin Daryanto. "A bank Account Enigma", *Majalah Tempo English*, 2006 (online). [magz.tempo.co/read/12750/a-bank-account-enigma] Accessed in June 29th 2020

⁶² A. Sabar, "Penanganan Korupsi di Indonesia Pasca Ratifikasi United Nations Convention Against Corruption (UNCAC)". *eJournal Ilmu Hubungan Internasional*, 2019, 7(3). p.1134

⁶³ Baskoro, L.R., Dianing Sari, Desy Pakpahan. "Next for Neloe?" *Majalah Tempo English*, 2006 (online). [<https://magz.tempo.co/read/15341/next-for-neloe>] Accessed in June 29th 2020

⁶⁴ *Ibid.*

⁶⁵ Gossin, P. "International Mutual legal assistance in Switzerland". *Visiting Expert's Papers on 138th International Senior Seminar, United Nations Asia and Far East Institute*. 2009. p. 21

⁶⁶ R. Arifin, Indah Sri Utari, Herry Subondo. "Upaya Pengembalian Aset Korupsi yang Berada di luar Negeri (Asset Recovery) Dalam Penegakan Hukum Pemberantasan Korupsi di Indonesia". *Indonesian Journal of Criminal Law Studies I* (1) (2016). P.131

⁶⁷ Federal Department of Justice and Police FDJP Switzerland Confederation, "Annual Activity Report 2017 Mutual Legal Assistance", 2018 p. 22

⁶⁸ Ministry of Law and Human Rights Republic of Indonesia, "Draft Treaty on Mutual Legal Assistance in Criminal Matters Between the Switzerland Confederation and The Republic of Indonesia". (Unpublished) §2

⁶⁹ Ministry of Law and Human Rights Republic of Indonesia, "Laporan Hasil Kajian "Urgensi Pengesahan Perjanjian Timbal Balik dalam Perkara Pidana (Mutual Legal Assistance in Criminal Matters) Antara Indonesia-Switzerland", 2018. (Unpublished) p.

Contracting Parties places the alleged conduct within the same category of an offense or denominates the offense by the same terminology...⁷⁰ This agreement would grant both countries control over the building of a common interpretation regarding criminal activities for which assistance can be requested. To bridge the domestic law enforcement of the two countries, the agreement also detailed how to conduct investigations, prosecutions, or judicial proceedings, such as verdict details, request forms, and transmission channels.

For Switzerland, the agreement may provide a legal framework for law enforcement institutions to conduct an asset recovery operation against foreign criminals.⁷¹ For Indonesia, the agreement provides norms for law enforcement in conducting legal actions abroad.⁷² Moreover, this instrument would accelerate the enactment of laws in the sectors covered in the agreement but are yet to be regulated under domestic laws, such as appropriating assets and individual data protection. This agreement thus provides a mutual framework to advance law enforcement practice against criminal activities for both countries.

B. Mutual Legal Assistance and Extradition Treaties with the Russian Federation

The discussion to conclude the extradition and MLA treaties on criminal matters with the Russian Federation commenced in 2016. Several political commitments between the two countries were formulated since the signing of the joint statement between the Indonesian Coordinating Ministry on Politics, Law, and Security and the Russian Federation Secretariat of the Council on Security Affairs Cooperation. In the joint statement framework, both countries agreed on a number of suitable measures that cover several aspects of the security field, including maritime security, terrorism (including terrorist funding and cyber abuse for terrorists' aims), cybersecurity, defense, transnational crimes, intelligence, law, and natural disaster management.⁷³ In the legal cooperation section, both countries are "mindful of a need to establish a strong and firm legal framework in countering law and security problems effectively." With regard to this pronouncement, both parties agreed to "find possibilities in strengthening legal cooperation between the two countries, including by creating bilateral agreements such as MLA in criminal matters and extradition."⁷⁴ This paragraph instead shows the context in which the two agreements were made from 2018 to 2019. The legal enforcement cooperation is placed under threat to the security approach that could be settled cooperatively between the two countries through the establishment of legal instruments based on the framework statement.

In the position paper concluded by the central authority, the decision to design treaties with the Russian Federation was more of a preventive measure in anticipation of future crimes than a solution to the ongoing domestic legal enforcement. The

⁷⁰ Ministry of Law and Human Rights Republic of Indonesia, "Draft Treaty on Mutual Legal Assistance in Criminal Matters Between the Switzerland Confederation and The Republic of Indonesia". (Unpublished) §6

⁷¹ Federal Department of Justice and Police FDJP Switzerland Confederation, "Annual Activity Report 2017 Mutual Legal Assistance", 2018 p. 12

⁷² Ministry of Law and Human Rights Republic of Indonesia, "Laporan Hasil Kajian Urgensi Pengesahan Perjanjian Timbal Balik dalam Perkara Pidana (Mutual Legal Assistance in Criminal Matters) Antara Indonesia-Switzerland, 2018. (Unpublished) p. 63

⁷³ Joint Statement between the Indonesian Coordinating Ministry of Politics, Law, and Security and the Secretary of Security Council of the Russian Federation in 2016.

⁷⁴ Joint Statement between the Indonesian Coordinating Ministry of Politics, Law, and Security and the Secretary of Security Council of the Russian Federation in 2016. (§12)

penal entrepreneurs highlighted several anticipated crimes from legal enforcement interests, such as transnational organized crimes, cybercrime, corruption, and money laundering.⁷⁵ This situation shows a lack of prosecutorial approach from Indonesia's perspective despite some criminal cases involving Russian citizens, such as fraudulence, people smuggling, and the 2012 Sukhoi Superjet 100 crash incident at Gunung Salak, Indonesia.⁷⁶ From a political point of view, Russia's reputation in international forums and organizations seems to be direct leverage for Indonesia's credibility at the global scale. In relation to this characteristic, the multipolarity of today's international relations pushes Indonesia to be a part of the equation outside the western-centric perspective.⁷⁷ This condition is presumably supplemented by the historical perspective on the long-time relation between the two countries.

In both treaties, we can conclude that Guzman's 3Rs, namely, reputation, reciprocity, and retaliation, could be the cornerstone for the rationality behind states' willingness to engage in penal cooperation. All parties state that it is through their respective treaties that reputation could be preserved. The intensification of cooperation through penal entrepreneurship makes reputation increasingly valuable and allows for an upward spiral of cooperation, thereby making the states willing to compromise some aspects of their sovereignty for international commitments.⁷⁸ A state with a good reputation for honoring its commitment would be seen as a reliable partner by other states. This type of reputation made Switzerland willing to sign the treaty even if they received less benefit than their economic terms. Reputation weighs in the economic benefits because with a better reputation, the easier it is to enter another form of cooperation, the easier it is to extract concessions in future cooperation, and the more states become willing to cooperate.⁷⁹

Reciprocity in bilateral relations is often sufficient to generate continuous cooperation in a prisoner's dilemma situation.⁸⁰ In the first phase of cooperation, reciprocity acts as the first evaluation that will give a state more benefit, work bilaterally, or unilaterally? Reciprocity is closely associated with reputation as the state matches their expectation of reciprocity with another state on the basis of its reputation. Both treaties reflected that the states acted on reciprocity based on their reputations: for Switzerland, it was its financial reputation; for Russia, it was its security reputation. Formalizing their cooperation into treaties means that all parties agreed for reciprocity such that other parties could not afford to defy it in the future because of the reputation they sought to build. Reciprocity produces a situation in which continuing cooperation is more beneficial than terminating it.

The final cornerstone is the retaliation that the state could bear when defying international commitments. In a rational approach, the state is rational, that is, all actions are calculated on the basis of benefits. When the state engages in cooperation, all parties calculate the costs and benefits of defying commitments and determine the types of retaliation the parties are capable of. Under this description, retaliation only

⁷⁵ Lily Evelina Sitorus, "State Capture: Is It a Crime? How the World Perceived It," *Indonesia Law Review* 1, no. 2 (2011): 45, <https://doi.org/10.15742/ilrev.v1n2.82>.

⁷⁶ Ministry of Law and Human Rights Republic of Indonesia, "Laporan Hasil Kajian Urgensi Pengesahan Perjanjian Ekstradisi antara Indonesia-Federasi Rusia, 2019. (Unpublished)

⁷⁷ *Ibid.*

⁷⁸ Andrew T. Guzman, *How International Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008); Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), 15

⁷⁹ Lahno 1995 by Guzman, *Ibid*, 34

⁸⁰ *Ibid*, 43

takes place if it generates some payoff to the retaliating state.⁸¹ In retaliation, the state also hopes to build its reputation on international commitment, and by retaliating, the state could gain another tool to enforce the treaty. In Switzerland's treaty, the asymmetrical relations in economic terms put Switzerland in a higher position than Indonesia. This condition can explain why Switzerland remained willing to engage in the treaty despite Indonesia reaping most of the economic benefits.

V. DOMESTIC RATIONALITY: IN DEFENSE OF A TREATY AND THE ROLE OF PENAL ENTREPRENEURSHIP

The behavioral approach prompts us to further examine the rationality of penal entrepreneurs as a form of group thinking.⁸² In terms of indirect international criminal law enforcement, we could categorize the actors into two authorities: the central and competent authorities. In MLA and extradition, the Ministry of Law and Human Rights acted as the central authority. The competent authority comprises several actors, including the National Police, Interpol, Anti-Corruption Commission, Court, Attorney General, and Center of Financial Report and Transaction. Outside the two categories are the parliament, whose role is to represent the public during the ratification process; the Ministry of Foreign Affairs, whose role is to facilitate communication with the state counterpart; and the civil society, which is known as the peer group advocating and campaigning for the fight against crimes.

In the 2014–2019 agenda, the legal system reform prioritized six areas: (1) enhancing the fair legal enforcement; (2) corruption prevention and eradication; (3) overcoming illegal logging, illegal fishing, and illegal mining; (4) combating narcotics and psychotropics; (5) land ownership legalization; and (6) protecting the rights of children, women, and marginal groups.⁸³ Within the foreign policy sector, a number of important priorities are maritime diplomacy, the regional arrangement in the Southeast Asia region, cooperation to resolve transnational organized crimes, and the significance of participation in the G20 forum.⁸⁴ Under the security and defense agenda, the government set the agenda to address border and maritime crime control, as well as drug abuse and illegal trade.⁸⁵ However, one should note that the five-year agenda specifically cited a plan to rediscuss the issue of extradition with Singapore and the agenda to reclaim the flight information region management above the Riau Islands from the country. As part of the administration, the central authority is the sole institution with the mandate and performance target to annually establish at least one bilateral treaty on extradition and MLA on criminal matters.

Hence, regarding existing bilateral agreements as patterns of behavior is difficult. On the basis of these existing documents, the decision to create a bilateral agreement on criminal matters reflects the uncoordinated aims and targets among governmental

⁸¹ *Ibid*, 46

⁸² Alley, "The Domestic Politics of International Relations," 893–901; Marion Fourcade and Joachim J. Savelsberg, "Introduction: Global Processes, National Institutions, Local Bricolage: Shaping Law in an Era of Globalization," *Law and Social Inquiry* 31, no. 3 (2006): 513–19, <https://doi.org/10.1111/j.1747-4469.2006.00021.x>; Joachim Savelsberg, "Punitive Turn and Justice Cascade: Mutual Inspiration from Punishment and Society and Human Rights Literatures," *Punishment and Society* 20, no. 1 (2018): 73–91, <https://doi.org/10.1177/1462474517737049>.

⁸³ Indonesia, "Peraturan Presiden Tentang Rencana Pembangunan Jangka Menengah Nasional Tahun 2015-2019 (Presidential Regulation on the National Medium-Term Development Plan 2015-2019), Perpres No. 2 Tahun 2015, LN No.3 Tahun 2015 (Presidential Regulation 3/2015, SG No." (n.d.).

⁸⁴ *Ibid*.

⁸⁵ *Ibid*.

sectors. Incoherency appears to exist between sectoral plans and the decision to conclude extradition or MLA with individual countries. Domestic institutional arrangements have instead been focused on transnational crimes' materiality rather than the strategic ways to deal with them internationally.⁸⁶

Nevertheless, an interesting view is that international agreements represent an alternative effort to join an international forum. Indonesia is currently joining the Financial Action Task Force (FATF), an international organization that aims to develop and promote national and international policies to combat money laundering and terrorist funding. To become a member, Indonesia needs to pass a series of mutual evaluations, which cite extradition and MLA implementation as part of the recommendations. According to the 2018 Mutual Evaluation Report, Indonesia has been largely compliant with extradition and MLA measures. The only minor shortcoming is that "the need for appraisal by several authorities, which may cause delays, and the legislation does not provide for simplified extradition mechanisms."⁸⁷

In the MLA treaty between Indonesia and Switzerland, the economic relation between both countries is *relatively* asymmetric. This relation is viewed not only from the economic development sector but also from Switzerland's reputation as a leading financial center manifested by its banking secrecy practices and precarious but superior management and technological approaches to its financial system, which has allowed many assets obtained from criminal activities stored safely in Switzerland.⁸⁸ As a developing country, Indonesia is in dire need of revenues for its development agenda, especially given its reputation as a prominent place for tax evasion. The case of ECW Neloe highlighted how Indonesia's lack of proper knowledge and infrastructure could have hindered its asset recovery effort, with Switzerland halting such effort even with international frameworks in place. Thus, Indonesia was willing to engage in bilateral agreements instead of relying on the international framework to combat transnational crimes between both countries.

From a rationalist paradigm, these situations drive Indonesia to employ the MLA and extradition mechanism as a primary modality as it provides a steady and predictable outcome, including assistance in exchange for the reformation of domestic law and law enforcement practices. Strategically, the mechanism benefits Indonesia more than its counterpart because of the relatively asymmetrical relationship. For Switzerland, this agreement enhances its reputation as a leading financial center with good practices; for Russia, it might improve its global commitment to fight transnational organized crimes.⁸⁹ For Indonesia, along with asset recovery, the agreement could also enhance its reputation and fulfill its obligation identified by the G20 Commitment Against Corruption. By seizing these opportunities, Indonesia can upgrade its capability of combating transnational criminal activities.⁹⁰

⁸⁶ Maskun, "Combating Corruption Based on International Rules," *Indonesia Law Review* 4, no. 1 (2014): 55, <https://doi.org/10.15742/ilrev.v4n1.74>.

⁸⁷ Asia/Pacific Group on Money Laundering (APG), "Anti-Money Laundering and Counter-Terrorist Financing Measures: Indonesia Mutual Evaluation Report," 2018.

⁸⁸ Ministry of Law and Human Rights Republic of Indonesia, "Laporan Hasil Kajian "Urgensi Pengesahan Perjanjian Timbal Balik dalam Perkara Pidana (Mutual Legal Assistance in Criminal Matters) Antara Indonesia-Swiss", 2018. (Unpublished) p.4

⁸⁹ Federal Department of Justice and Police FDJP Swiss Confederation, "Annual Activity Report 2017 Mutual Legal Assistance", 2018 p. 12. Ministry of Law and Human Rights Republic of Indonesia, "Urgensi Pengesahan Perjanjian Ekstradisi antara Indonesia dengan Federasi Rusia, 2019.

⁹⁰ Ministry of Law and Human Rights Republic of Indonesia, "Urgensi Pengesahan Perjanjian Timbal Balik dalam Perkara Pidana (Mutual Legal Assistance in Criminal Matters) antara Indonesia dengan Swiss", 2018. p.61

The assessment made herein indicates that engagement in a bilateral agreement is a plausible option for Indonesia in combating transnational crimes. When international frameworks such as the UNCAC failed to help Indonesia, as seen in the ECW Neloe case, Indonesia was left with no other option. The asymmetrical relation between its financial position and the weakness of domestic institutions' capabilities led Indonesia to conclude that the benefits from the agreement would make up for the cost of conforming to domestic law and law enforcement practices.⁹¹

When the rationalist approach is employed, the whole process can be regarded as two single unit-rational actors interacting with one another. At the domestic level, the process was actually led by dominant authorities in the financial and fiscal sectors, that is, the Ministry of Law and Human Rights as the central authority and the Center of Financial Report and Transaction backed by the Directorate General of the Tax Ministry of Finance as the competent authority. In a report by the Ministry of Law and Human Rights related to the MLA agreement with Switzerland, much emphasis was placed on the roles of both authorities. For the Ministry of Law and Human Rights, this agreement would strengthen its position as the central authority for international law enforcement cooperation, which had been contested by the Office of the Attorney and Ministry of Foreign Affairs. As for the Center of Financial Report and Transaction, the agreement would strengthen its position when pursuing Indonesia's membership in the FATF. For the ECW Neloe case, the Center was the first Indonesian authority to be contacted by the Switzerland authorities about the irregularities and henceforth discussed the freezing of ECW Neloe's assets.⁹² The agreement was organizational output from the Ministry of Law and Human Rights and the Center for Financial Report and Transaction. Both organizations pushed for the agreement because their routines tended to employ relatively predictable policies. The agreement also highlighted the root of the shared responsibility and coordination in intersectoral cooperation, which is limited. Thus, the two organizations pushed the agreement not only to produce the desired output for their respective goals but also to strengthen their position at the domestic level.

Unlike the agreement with Switzerland, which showed horizontal coordination from relatively equal government organizations, the Russian deal showed vertical coordination from the Coordinating Ministry of Politics, Law, and Security to the Ministry of Law and Human Rights. These organizations did not cooperate to produce their respective outputs but rather shared the output of combating crimes. We should note that rather than being a reaction against the existing problem, the Russian agreement emphasized the anticipation of the future. The securitization of transnational crimes thus put the agreement under the Coordinating Ministry's domain. This development was then followed by the established routine to share the responsibility among the respective ministries under its coordination, namely, the Ministry of Foreign Affairs in the political sector and the Ministry of Law and Human Rights in the justice sector.

Within this backdrop, how would we identify the rationality of the legalization of the state's obligation in a treaty? Why does Indonesia prefer to be bound by a bilateral treaty rather than rely on the informal agency-to-agency mechanism? First, we should move our analysis away from the binary variance between hard and soft laws in international agreements. On the basis of Abbott and Snidal's rationalist-institutional approach, legalization in international relations could be defined in three

⁹¹ *Ibid.* 61

⁹² Baskoro, L.R., Maria Hasugian, Erwin Daryanto. "A bank Account Enigma," *Majalah Tempo English*, 2006 (online). [magz.tempo.co/read/12750/a-bank-account-enigma] Accessed in June 29th 2020

dimensions: (1) precision of provisions, (2) obligation, and (3) delegation to a third party decision maker.⁹³ These dimensions are continuum to determine the category of hard law, which refers to the legally binding obligations that were made precisely and that delegates the authority to interpret and implement the law; and soft law, which is seen as a residual category that emerges when the legal provisions are weakening in one or more dimensions of obligation, precision, and delegation. However, they argue, *if an agreement does not delegate any authority to a third party to monitor its implementation or to interpret and enforce it, then the agreement again can be soft (along a third dimension) because there is no third party providing a focal point around which parties can reassess their positions; thus the parties can discursively justify their acts more easily in legalistic terms with less consequence, whether in terms of reputational costs or other sanctions.*⁹⁴

The three dimensions may help us understand further the choice of design in an international agreement.⁹⁵ One particular approach that could be fruitful in examining the issue at hand is the distributive approach. This approach stands against the functionalist basis on the prisoner's dilemma as it "ignores another important obstacle to successful cooperation: namely, conflicts among states with different interests over the distribution of the costs and benefits of cooperation."⁹⁶ The prisoner's dilemma appears to narrow the choices into binary options on whether the state will obey or violate the agreement. From the game theory lens, international relations have multiple equilibria, and the state faces the challenge of choosing among many possible agreements.⁹⁷ The state can choose from among many status quo scenarios or Pareto coefficients. In line with this scenario, Shaffer and Pollack argue, "The most important question is not whether to move toward the Pareto frontier of mutually beneficial cooperation, but rather which point on the Pareto frontier will be chosen."⁹⁸

The efforts to theorize state cooperation have eventually moved toward the concept of regime complexity and forum shopping. These concepts are based on the arguments that international cooperation is neither a form of prisoner's dilemma nor a game as it is a bargaining stage between states. According to Raustiala, regime complexity is "an array of partially overlapping and non-hierarchical institutions governing a particular issue-area."⁹⁹ Hence, we may understand that any form of legal choices made by states is not exclusively based on their functions in resolving cooperation issues and problems as it is also based on states and various other actors' preferences about a certain clause in a particular cooperation.¹⁰⁰

From this point of view, this article encapsulates four premises:

- The choice of treaty design stems from penal entrepreneurship and institutional arrangement at the domestic level. In particular, several salient crimes addressed in

⁹³ Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421–56, <https://doi.org/10.1162/002081800551280>.

⁹⁴ Gregory Shaffer and Mark A. Pollack, "Hard and Soft Law," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 200.

⁹⁵ Shaffer and Pollack, 202.

⁹⁶ Shaffer and Pollack, 205.

⁹⁷ Shaffer and Pollack, 205.

⁹⁸ Shaffer and Pollack, 206.

⁹⁹ Kal Raustiala and David G. Victor, "The Regime Complex for Plant Genetic Resources," *International Organization* 58, no. 2 (2004): 279, <https://doi.org/10.1017/S0020818304582036>; Karen J. Alter and Kal Raustiala, "The Rise of International Regime Complexity," *Annual Review of Law and Social Science* 14, no. 1 (2018): 329–49, <https://doi.org/10.1146/annurev-lawsocsci-101317-030830>.

¹⁰⁰ Shaffer and Pollack, "Hard and Soft Law," 206–7.

national development planning have contributed to penal institutions' knowledge and priorities. Indonesia's current democratization has been argued to contribute to the democratization of knowledge insofar as it allows civil society to influence the decision making process.

- The indirect international criminal law enforcement through MLA and extradition reflects a bargaining stage between states. In the case study, we might see that foreign policy and international organization membership priorities appear to shape the government's eagerness to enter into bilateral agreements in criminal matters and limit its prioritization of the implementation issue. As a consequence, reputation at the international level is crucial in explaining such rationality.
- These findings affirm that the state's rationality comprises decisions made by several other collectivities. Rather than solely resorting to the function of resolving transnational organized crimes or the maxim *aut punire aut judicare*, these bilateral treaties reflect a form of institutionalization of the state and nonstate actors' preferences in combating crimes at the domestic level. Such is especially true when the focus is on the decentralization and coordination of responsibilities among respective institutions.
- Given the high reliance on reciprocity rather than third party enforcement provision, we could argue that both treaties are soft laws aimed at resolving the coordination game between countries. The bilateral treaties were formulated behind the "compliance uncertainty" variable, a situation in which "states are uncertain what actions count as compliance with treaty obligations."¹⁰¹ Instead of the calculation from a binary lens of compliance or cooperation, the treaties were chosen to safeguard reputational and normative consequences in the future.

VI. CONCLUSION

This article seeks to explore the state's rationality in indirect international criminal law enforcement. We employ the control and consensus model of international agreement accompanied by a rationalist perspective through the behavioral approach lens. Notably, we examine Indonesia's practices in establishing the extradition treaty with the Russian Federation and the MLA treaty with Switzerland. The case study reveals that Indonesia applied the consensus model to deal with the former treaty and the control model to tackle the latter case. However, assessing these decisions through a rationalist lens conveys that the two instruments hardly reflect a behavior pattern. Therefore, this article concludes that in international criminal law agreement, the state's decision is determined by domestic penal entrepreneurship, that is, the collectivities among state institutions' decisions and the politics of crimes are self-reinforced in understanding the rationality of the state.

¹⁰¹ Alley, "The Domestic Politics of International Relations," 897.

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