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International Efforts to Combat Corruption and States' Concern; a Perspective toward Indonesia-Singapore Extradition Treaty after 4.5 Years of Silence

M. Putra Iqbal *

The United Nation Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC) is a symbol of international community efforts in combating corruption. Most states are state parties to both convention including Indonesia and Singapore. However, domestic politics such as ratification by parliament has influenced states' commitment in combating corruption. Indonesia-Singapore Extradition Treaty was signed in 2007. However, it has not entered into force yet and this is a good example on domestic politics that influences states' policy and even states' commitment on an international issue. This extradition treaty therefore, has no strong legal power toward both states since both states just expressed consent to be bound and subject to ratification. However, both states should show good faith in continuing the treaty and become legally binding.

Keywords: *Indonesia-Singapore Extradition Treaty, Domestic Politics, Consent to be bound and Good Faith.*

I. Introduction

As some scholars argue that ratification by parliamentary is relatively the most difficult and critical stage in treaty-adoption processes since it sometimes take a longer time compared to negotiation process, again seems to be proved. Indonesia-Singapore Extradition Treaty could be a good example for this argument after 4.5 year since been signed. To some extent it describes the international community efforts to combat corruption as a matter of fact determined by States' concern. At the end it will show how important an extradition treaty is in succeeding the international community commitment in combating corruption.

Extradition is an act of a State to surrender a person that accused or convicted of crime to the requesting state to be brought into a trial or punish the convicted under national laws.¹ Extradition itself has three

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¹ Sherryl A Petkunas, "The United States, Israel And Their Dilemma", *Michigan*

purposes. The purposes are: to bring the criminal to justice, to promote good bilateral relations between treaty parties and the last one is to prevent a state from becoming a haven for dangerous person.²

Discussing about Indonesia-Singapore Extradition Treaty, it could not be separated from *Bantuan Likuiditas Bank Indonesia (BLBI)* or Indonesian Central Bank Liquidity Support Case and further will be mentioned as BLBI case. The BLBI case was started around 1997, where around US \$ 14 billion from the Central Bank liquidity support was aimed to strengthen some national-private banks during 1997 economic crisis. However, the support provided had been managed inappropriately by the owners/bankers and then it was sentenced as a crime (corruption) by Indonesian court. Interestingly, according to Transparency International Indonesia and an Indonesia anti-corruption NGO, 13 of these bankers are living in Singapore, either holding permanent resident status or already got Singapore citizenship. 13 of them have been sentenced guilty under Indonesian Anti-Corruption Act and were trialled with *in absentia* procedure.³

Unfortunately none of the verdicts can be executed because the bankers flee abroad such as United States, China, Canada, Australia and Singapore and permanently settle in these states. The next matter was how to bring them back? Extradition was the answer since sovereignty involved and therefore, extradition treaty essentially needed. Related to extradition treaty, Indonesia basically has signed extradition treaty with several states mentioned above including Singapore. However, both states parliaments have not ratified the treaty yet into their own domestic legal system. Consequently, Indonesian prosecutors could not apply the extradition treaty as the basis for extradition request in order to bring the fugitives who live in Singapore to Indonesia to perform the sentences. As a matter of fact, most of them now lives, builds and controls their business from Singapore.⁴ Regarding the US and Australia, both states are no longer the safe-haven for them due to both states have signed extradition treaty with Indonesia.

Journal of International Law, vol. 12, no. 1, 1991, p. 204.

² *Ibid.*

³ Singapore Extradition Treaty and fights Against Corruption, <http://www.antikorupsi.org/eng/mod.php?mod=publisher&op=viewarticle&artid=482>, accessed on 25 October 2010.

⁴ *Ibid.*

Corruption as the core of the case as a matter of fact has so many destructive effects and also undermining the law. It is also threatening democratic consolidation in all states especially in the developing countries. Corruption also jeopardizes the transition from state-controlled to market economies as the spirit of the free trade.⁵ Moreover, corruption is believed has constrained the investment where the flow of investment constrained by bribery issues that stimulated by corruption.⁶ Significantly, in the most vulnerable states in which almost all of them are part of developing countries corruption has influenced all related aspects of life. As the results, corruption is contributing to a 'vicious' cycle of uneconomic decision. In the end, the impact of corruption would increase the number of poverty.⁷

Within the international law regime, the 1980s era was marked as an era where the United Nations against corruption program showed progress.⁸ The background for this argument is grounded on the significant development of economic and globalization within this era in which lead to more attention to combating corruption. Moreover, the changes in the world economy in the late 1980s, including the trend toward globalization have brought the awareness of the UN toward the international criminal activity. The UN then addressed this issue by encouraging international efforts to combat the international criminal activity. Corruption then was brought into the UN's agenda as an issue under the ECOSOC's work. Therefore, the study of corruption then was grouped under the ECOSOC's work against organized crime.⁹

At the end of the UN efforts to combat corruption was marked by the adoption of two prominent conventions that related to corruption. First is the UN Convention against Transnational Organized Crime (UNTOC) that adopted in 2000. And second is the UN Convention

⁵ See the Preamble of the United Nations Convention against Corruption. The Convention approved by the Ad Hoc Committee was adopted by the General Assembly by resolution 58/4 of 31 October 2003.

⁶ Nancy Zucker Boswell, "Combating Corruption: Are International Institution Doing Their Job?", *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 90, 1996.

⁷ *Ibid.*

⁸ Alejandro Posadas, "Combating Corruption under International Law", *Duke Journal of Comparative and International Law*, vol. 10, no. 2, 2000.

⁹ *Ibid.*

against Corruption (UNCAC) adopted in 2003. In order to affect the states, both conventions as a matter of law need to be ratified by state members. It means, states' consent to be bound by a convention should be implemented by performing such as signing the convention, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.¹⁰

Both Indonesia and Singapore is member to UNTOC and UNCAC.¹¹ The UNCAC itself argues as the broadest in scope, as well as the most detailed, complex, and far-reaching, of any of the international anti-corruption treaties to date.¹² The broad provisions of the UNCAC can be seen from its scope that included criminalizing requirements, prevention requirement, international cooperation in investigation and enforcement, technical assistance measures, and assets recovery provisions. Moreover, scholars also argued compared to other UNCAC predecessors; the UNCAC is more detailed in regulating about the corruption.¹³

Then it comes to another question which is how Indonesia can bring these fugitives back to Indonesia? Is it possible to justify the action based on UNCTOC or UNCAC? Unfortunately Indonesia also cannot hope a lot from the UNCTOC. It is due to the corruption the fugitives done did not fulfil the UNCTOC criteria on transnational crime. The first criterion is it should be committed in more than one state, the second is it is committed in one state but a substantial part of its preparation, planning, direction or control takes places in another states. The third one is committed in one state but involving an organized criminal group that engaging in criminal activities in more than one state, or committed in one state but has substantial effects in another state as the last criteria.¹⁴

¹⁰ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [VCLT], see art. 11.

¹¹ <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>, accessed on Oct 5th 2011.

¹² Lucinda A. Low, "The United Nations Conventions against Corruption: the Globalization of Anti Corruption Standards", paper presented at *Conference of the International Bar Association International Chambers of Commerce, Organization for Economic Cooperation and Development*, London, 2006.

¹³ *Ibid.*

¹⁴ Art. 3(2), *Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 194 (entered into force 29 September 2003)

It seems UNCAC is the answer for the problem, however, as UNCAC requires the States to have mutual legal assistance among the States, extradition then is also required by the UNCAC. Thus after the States do have mutual legal assistance for the purpose of data and evidence gathering, extradition is needed to bring the offender to the request state in order to be trialled. Again extradition treaty plays significant role in international legal regime. Article 44 specifically regulating about extradition. In the first paragraph of Article 44 States are required to apply the extradition to the offences established in accordance with the UNCAC where the person whom is the subject of the request for extradition is present in the territory of the requested State Party.¹⁵

This paper will discuss some aspects related to Indonesia-Singapore Extradition Treaty after its 4.5 years signature. It will portray the international community efforts in combating corruption in which at first stage was considered as a national problem. This paper also attempts to discuss the link between domestic politics with states' concern in succeeding an international community program called combating corruption. Lastly it will discuss states' obligation toward an unratified treaty from international law perspective. To conclude, in this paper I attempt to discuss how important the extradition treaty is and also states' concern is very determining.

II. United Nations' Efforts to Combat Corruption and the Need of Extradition Treaty

A. Corruption as Part of Transnational Crime

The Watergate investigations gave significant contribution in bringing corruption issues into the international level. It had brought bribery issues from US domestic issues to become international issues. The moving of the issues due to the investigations had led to the enquiries about corporate involvement in foreign political campaigns. The investigations also found that there were suspicious payment and contribution made to the foreign government officials. Further, the

[UNTOC].

¹⁵ See Art. 44(1) *United Nations Convention against Corruption*, opened for signature 9 December 2003, 2349 UNTS 2111 (entered into force 14 December 2005). [UNCAC].

investigations also found there were four major companies involved in this case. These companies were Gulf Oil Corporation, Phillips Petroleum Company, Northrop Corporation, and Ashland Oil Inc.¹⁶ From the investigation, it was found that the US companies operated such as in Honduras, Japan, Costa Rica, Italy, Bolivia and the Netherlands involved in bribery practices.¹⁷

Departing from this finding, at this stage bribery issue now has become more popular at international level. The fact that several high-rank officials in several states which involved in bribery practices together with the US companies have made bribery issues become more popular. For instance, the involvement of Prince Bernhard from Netherlands and Japan former Prime Minister Kakuei Tanaka in bribery cases¹⁸ above are a good example to describe how bribery become an international issues which then attracted international attention.

Despite its progress during the Cold War era, after the Cold War the international community efforts in raising international community awareness on corruption impact also came into its down trend. The down trend influenced by new issues raises in the international community.¹⁹ Corruption then shifted from a single issue to be part of other crime which is transnational crime issue. In 1992 the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders also talked about corruption as one of the topics in the meeting. However, the meeting still observed corruption not as an independent issue; it was still viewed as action related to other crime, particularly drug crimes. At this stage the international community still was not able to describe the huge negative effect from the act of corruption, as it was just viewed on its minor negative effect. For instance, it can be seen in 1994, when the UN International Drug Control Program held a ministerial forum.²⁰ Corruption at this stage was considered causing problem for the world. This argument came on a basis because drug crimes especially the one that crossing states border or transnational crime happened due to the corrupt system in a state.

¹⁶ Alejandro Posadas, *supra* note 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Nancy Zucker Boswell, *supra* note 6.

²⁰ *Ibid.*

The condition where corruption was viewed as a part of transnational crimes also supported by the growing escalation of the transnational crime practices. Among other things, the dynamics of globalization are believed giving significant contribution for the raise. It can be explained the dynamics of globalization have led to a higher integration of the financial and other markets in which resulting the rapid execution of transaction. Moreover, the easier movement of people, goods and capital across national borders also gives influence on the raise.²¹ It can also be argued that as the growing of the transnational legitimate enterprises and as well as their operations have multiplied, should also the illegal one.²² At this stage, transnational crimes have gotten closer attention from the scholars and also from the world leaders. And this attention cannot separated from argument corruption is a 'dark side of globalization'.²³

In 1994 basically there were two significant related events that had a positive impact toward the work that conducted by the UN. First, the Organization for Economic Cooperation and Development (OECD) recommendation and second the Organization of American States (OAS) commitment.²⁴ The OECD recommended that its member countries to criminalize foreign bribery. Meanwhile, the OAS has declared their commitment to stand against corruption and bribery.

As the result of these two products, in 1996 the UN Declaration against Corruption and Bribery in International Transactions was adopted unanimously by the GA. Although it does not have binding power, the Declaration according to Posadas expressed the interest and concern of the international community in the development of anti-corruption measures.²⁵ And the 1996 UN Declaration concludes with a call for states combating corruption to remain respect national sovereignty, territorial jurisdiction, international law, human rights and freedom.²⁶

²¹ N. Pasaas, ed., *Transnational Crime*, Oxford University Press, 1999, p. 2.

²² *Ibid.*

²³ Melvyn Levitsky, "The Dark Side of Globalization", *International Studies Review*, vol. 5, 2003.

²⁴ Alejandro Posadas, *supra* note 8.

²⁵ *Ibid.*

²⁶ *Ibid.*

From the Declaration, a new issue related to corruption was raised. The issue was corruption is against the human rights. Unfortunately, this paper would not be discussing in detail about this aspect. However, a glance of its relation will be discussed in order to show the complexity of corruption issue. Therefore, the international community should work together to eliminate corruption and force the 'safe-haven' state to comply the international community commitment to combat corruption.

Kumar in his article gave explanation on the argument corruption violates human rights. According to Kumar corruption in government undermines the rule of law, as government decisions are not accountable to any systematic checks and balances. In fact, accountability is one of the factors included in the rule of law concept.²⁷ Moreover, the unchecked corrupt actions of government officials also clearly violate the principles of the rule of law. The rule of law, in fact provides the basis for democratic societies development.²⁸

Further, Kumar described government basically exercises certain discretionary powers. And if these powers are not exercised well in a fair, just and reasonable manner then potentially could stimulate corruption.²⁹ Meanwhile, human rights are violated when corrupt actions especially conducted by governments' officers take place in a widespread and systematic manner. Clearly speaking, corruption problems without a doubt violate the human rights, particularly when corruption practices allocate resource on the basis of unfair consideration. Finally, it will be resulting in discrimination which poses a serious threat to the rule of law when inflicted upon society as a whole because of the systematic corruption practices.³⁰

B. United Nations Convention against Transnational Organized Crime

As argued above, the international community is really concerned with the growing number of transnational crimes escalation. Although

²⁷ C. Raj Kumar, "Corruption and Human Rights: Promoting Transparency in Government and the Fundamental Rights to Corruption Free Services in India", *Columbia Journal of Asian Law*, vol. 17, no. 1, 2004.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

the profile may differ from one part of the world to another, transnational crimes have been acknowledged by the states as a common threat. And the UN as one of their representative body also answered this concern with facilitating and forming meetings that discussing the issues among the members. Since 1997, the UN Secretariat that represented by the Office on Drug and Crime had been organizing a series of congresses talking about these issues and the most recent was the Eleventh Congress in 2005.³¹

Finally, after the long process of drafting on 15 November 2000 the GA with resolution 55/25 adopted the United Nations Convention against Transnational Organized Crime (UNTOC).³² The convention is further supplemented by three Protocols. The Protocols are specific for their own field such as human trafficking, people smuggling, and firearms trafficking. The convention itself represents a major step toward the fight against transnational organized crimes. More importantly, states by signing the convention recognize the seriousness of the problems world is facing and recognize the need to foster and enhance a close international cooperation in order to tackle the problems.³³

The provision of corruption in the UNTOC can be found in Article 8 and 9. In the Article 8 paragraph 1 the convention clearly stated that each State Party shall adopt legislative and other measures necessary to establish corruption as criminal offences when committed intentionally.³⁴ From the opening words it clearly states that the offences to be created under this paragraph involve a *men rea* in the form of intention. This paragraph deals with active corruption. It means the activity of the person offering the bribe or other advantages.³⁵ Meanwhile paragraph

³¹ David McClean, *Transnational Organized Crime a commentary on the UN Conventions and its Protocols*, Oxford University Press, 2007, p. 3.

³² The United Nations Convention against Transnational Organized Crime, The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>, accessed on October 5th 2011.

³³ *Ibid.*

³⁴ Art. 8(1), *UNTOC*, *supra* note 14..

³⁵ David McClean, *supra* note 31, p. 119.

1 point (b) deals with passive corruption issues. However, scholars still view the UNCTOC has a weakness in terms of criminalizing corruption.

The weakness especially can be found in paragraph 2 of Article 8. 'Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption'.³⁶ The weakness of this provision according to McClean due to there is no obligation to criminalize the acts described in this paragraph, it is just using the word 'consider'. Therefore, in his opinion States can accept this provision but with intention to enact legislation that criminalized corruption according to paragraph 1.³⁷

However, this weakness is not the one that going to be discussed related to the main concern of this paper. The main concern of the paper is the corruptions that were done in Indonesia and the fugitives are living in Singapore. Aspects that have relation to this convention are just the essences of transnational organized crime forms itself. On the other hand, these provisions are just giving impacts toward Singapore national affairs, especially efforts to combat corruption in Singapore.

There are four criteria to categorize an offence as an organized crime according to the UNCTOC. First 'committed in more than one state', second 'committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state', third 'committed in one state but involves an organized criminal group that engages in criminal activities in more than one state', or fourth 'committed in one state but has substantial effects in another state'.³⁸

From this provision, the UNCTOC as argued by McClean offers a broad but exclusive definition of a transnational crime offence and deploying four connection factors.³⁹ The convention is stressing the notion of where the offences take place whether in a particular state or in several states. The significance stressing about the place of offences is related to jurisdiction issues. At the end, jurisdiction will decide

³⁶ Art. 8(2), *UNTOC*, *supra* note 14.

³⁷ David McClean, *supra* note 31, p. 119.

³⁸ See art. 3 (2), *UNTOC*, *supra* note 14.

³⁹ David McClean, *supra* note 31, p. 52.

whether a state have jurisdiction over a particular case or not so it would not become a problematic problem.

Applying the four criterions of a transnational organized crime into the *BLBI case*, we should examine the criteria one by one. This action is in order to know whether the *BLBI case* can be categorized as a transnational organized crime or not. First it should be committed in more than one state. The fugitives of the *BLBI case* as we know conducted the offences or corruptions while they were still leading their banks in Indonesia. Basically the fugitives were the owner of the banks or the executive of the banks that received the liquidity support from the Indonesian Central Bank / *Bank Indonesia*. Their banks were located in Indonesia, controlled from Indonesia and operating in Indonesia as well. Differs from other transnational organized crime which involving more than one state, the *BLBI case* are not involving other state such as Singapore. It just pure one state involved in it which is Indonesia. As a matter of fact, the *BLBI case* is not fulfilling the first criteria of a transnational organized crime. Therefore, it cannot be classified as a transnational organized crime under this criterion.

The second criterion is committed in one state but a substantial part of its preparation, planning, and direction or control takes places in another state. Does the *BLBI case* fulfil this criterion? The Asia economic crisis without a doubt was unpredicted. Indonesia before the crisis was known as a state in Asia region that having a good progress in economic. The progress of its economy growth was significant compare to several Asia states especially within the South East Asia region.

Moreover, the fugitives also known as some of the Indonesian tycoons, they have groups of business that owned banks, insurance company and many other companies. Importantly, they gained they success based on their hard work. Many of them and we should salute about this, even started their business from zero until as big as before the crisis. Unfortunately, many scholars believe because among other things influenced by corruption practices, they controlled their business 'improperly'. Finally, at the end they faced problem when the crisis happen. Controlling business 'improperly' here means they tend to use the public money that was saved in their banks to support their other business. The process to support the other branch of their groups also conducted wrongly. At the end, because of mismanaged, the business

collapsed when the Asia financial crisis hit Indonesia.

From this perspective, it is clear they did not prepare their offences from Singapore, nor planning or giving direction or control. What they did just received assistances from the central bank and brought the money to Singapore. Since the second criteria of a transnational organized crime is not fulfilled in this case, therefore, again the UNCTOC can be said does not apply to the case.

Third is committed in one state but involves an organized criminal group that engages in criminal activity in more than one state. Differs from the organized criminal group such as *yakuza* and China gangsters, these fugitive did not plan their criminal activity from Indonesia or Singapore. They were ordinary businessman who got the financial assistances. However, they used the assistances wrongly and it was used for their own benefit.

And fourth is committed in one state but has a substantial effect in another state. The offences clearly speaking were committed in Indonesia and the effects were also experienced by the Indonesian. Singapore as argued above has no relation directly with the conduct of the offences which is corruption. Singapore just 'enjoys' the result of the corruption that being invested in Singapore. As committed and the effect also in Indonesia, therefore, the case also does not fulfil the fourth criteria of a transnational organized crime.

Concerning the analysis above, it is clear that the Indonesian government cannot expect too much from the UNTOC. Although Singapore has ratified the UNTOC, none of the criteria from transnational organized crime is fulfilled by the *BLBI* fugitives. In case Indonesia uses the UNCTOC as the basis to request cooperation from Singapore, clear it will be rejected by Singapore easily. Therefore, Indonesia should seek other convention that matches with the offences that they had done. Without a doubt, the convention that should be looked by Indonesia is the UNCAC that will be analyzed further below.

C. The United Nations Convention against Corruption (UNCAC)

In December 2003, the UN successfully passed its first major sweeping resolution on corruption after several years of drafting proposals. The adoption of UNCAC is a culmination of a decade of pressure by the international agencies on the need to bring corruption

as an independent issue in order to get the world attention on this matter. The adoption process also cannot be separated from programs that were developed by countries in order to educate the world's leader about the consequences of corruption and methods to combat it.⁴⁰ This development also marked that corruption has become a single and separated issue from transnational organized crime.

State parties as mandated in Article 5 of the UNCAC should enact preventive anti-corruption policy. 'Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promoted the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability'.⁴¹ This provision is the first provision on the requirement to establish policies by state parties in order to prevent corruption. Further, the policies also describe the significant effect of the State Parties' consent to fight against corruption.

Although corruption can be prosecuted, States give significant influence to achieve the aims of the UNCAC. In another word, States' consent is very demanded by the UNCAC in order to achieve its aims. First, as argued above the State Parties are required to perform the prevention acts. After that it is followed by criminalizing the corruption. The UNCAC requires the State Parties to establish criminal and other offences to cover a wide range of corruption acts. This criminalization action is needed in case a state did not criminalize the crimes such as the UNCAC regulates as a crime under its national law. In some cases, States are legally obliged to establish offences. While in other cases the State in order to take into account differences in domestic law, State are required to consider to do so.⁴² This provision as can be found in Articles in Chapter III. The UNCAC is stressing the uniformity of State Parties practices by requiring them 'to adopt such legislative and other measures as may be necessary to establish as a criminal offence'.⁴³

⁴⁰ Gerald E. Caiden, "A Cautionary Tale: Ten Flaws in Combating Corruption", *Southern Journal of Laws & Trade in the Americas*, vol. 10, 2004.

⁴¹ Art. 5 (1), *UNCAC*, *supra* note 15.

⁴² "Background of the UNCAC", available at: <http://www.unodc.org/unodc/en/treaties/CAC/background/index.html>, accessed on 21 September 2011.

⁴³ See Articles in Chapter III, *UNCAC*, *supra* note 15.

There are several kinds of offence that basically the UNCAC requires State Parties to declare as a crime. These crimes are basically not only the basic forms of corruption such as bribery and embezzlement of the public funds but also other forms of corruption. And these forms are trading in influence and the concealment and laundering of the proceeds of corruption. Moreover, offences committed in supporting of corruption, including money-laundering and obstructing justice also classified as forms of corruption under the UNCAC provision.⁴⁴

Analyzing about money-laundering, basically money-laundering is one of the UNCAC concern. This concern moreover, will be the stressing point of this paper especially related to corruption and laundering the money resulted from corruption. Money-laundering generally regulated in Article 14 of the UNCAC where it requires States to prevent money-laundering. The *BLBI case* furthermore, is so much related to money-laundering issue especially those are conducting in Singapore. The Indonesian government believes the *BLBI* offenders are laundering the money in Singapore. Therefore, the Indonesian government is seeking how to bring the offenders back to Indonesia and perform the court sentences and recover the Indonesia Central Bank loss. However, Indonesia found difficulties in bringing them back to Indonesia. Among other things the 'weak' obligation that Singapore has toward the UNCAC and Singapore national law are the obstacles in returning the fugitives. Regarding Singapore's law and practices of money-laundering, it will be analyzed in the next chapter.

Regarding the relation between corruption and money-laundering, it should be noted that The UN Office on Drugs and Crime even argued money-laundering empowers corruption and organized crime.⁴⁵ The *BLBI* fugitives need to launder the bribes and other related-corruption crime they have done in order to be freed from law. In fact, corruption they have done has tremendous negative effects toward the community especially in the developing countries such as Indonesia. Basically the money they get from corruption will be transferred into a 'safe haven' state where they feel save and among other things investment will be a

⁴⁴ "Background of the UNCAC", *supra* note 42.

⁴⁵ "Introduction to Money-Laundering", available at:

<http://www.unodc.org/unodc/en/money-laundering/introduction.html>, accessed on 25 September 2011.

good choice in laundering the money. The 'safe haven' state on the other hand also gets benefit from this action. It can develop its economic field by benefiting the huge amount of money from the fugitives through investments they did. Therefore, money-laundering should be fight by all State Parties who concern about the tremendous negative effects of corruption as stated in the UNCAC preamble.

Meanwhile in Chapter IV the UNCAC stresses on the importance of the international cooperation in order to fight against corruption. The international cooperation is believed can be very effective method to fight the corruption and other related crimes such as money-laundering. The cooperation among the State should cover every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders.⁴⁶ Importantly, the UNCAC although requires the States to do international cooperation, but it also remain respecting the States national laws as a form of respecting the States' sovereignty.⁴⁷

It seems the UNCAC did aware about the problems that could exist on the implementation of the UNCAC. Among other things, different national laws could be one of the obstacles in implementing the UNCAC. However, this problem if we analyze further into the UNCAC provision has been minimized. As argued above, the UNCAC in Chapter III requires the States to adopt in their national laws several offences that agreed as criminal in the UNCAC. With this provision, it should build uniformity among the States' practice and eliminate problem such argued before.

From the point of the significance of international cooperation, the UNCAC encourage the State Parties to have mutual legal assistance in gathering and transferring evidence to be used in the court and to extradite the offenders as well. Mutual legal assistance is required under the UNCAC for a wide range of activity especially in gathering evidence. However, confidentiality requirements and limited use of principles may be applied; it depends on treaty between parties. Generally states will reject the mutual legal assistances requested if related to several things. The basis for the refusal included sovereignty, security, public order, and other essential interest that should be discussed in the negotiation.⁴⁸

⁴⁶ *Ibid.*

⁴⁷ See art. 43(1), *UNCAC*, *supra* note 15.

⁴⁸ Lucinda A. Low, *supra* note 12.

However, bank secrecy is no longer can be used by states to refuse to have mutual legal assistance in fighting corruption and other related crime.⁴⁹

Meanwhile, as the UNCAC requires the States to have mutual legal assistance among the States, extradition is also required by the UNCAC. So after the States do have mutual legal assistance in order for data and evidence gathering, extradition is needed to bring the offender to the request state in order to be trialled. Article 44 specifically regulates the extradition. The article itself was purposed to create a mechanism for extradition within the treaty, without having to resort to other treaties or national laws.⁵⁰ In the first paragraph of Article 44 States are required to apply the extradition to the offences established in accordance with the UNCAC where the person who is the subject of the request for extradition is present in the territory of the requested State Party.⁵¹

In addition, the UNCAC provided the legal basis for extradition in three ways. First, offenses that are established in accordance with the UNCAC are deemed to be included in any existing bilateral treaty between State Parties. It also must be included by the State Parties in any future bilateral extradition treaties that they signed. Second, if a State Party requires a treaty as a precondition to extradition, it may consider the UNCAC as the requisite treaty. And third, if a State Party does not require a treaty as a precondition to extradition, it shall consider the offenses in the UNCAC as extraditable offenses.⁵² Then the question is what about states that have not ratified the UNCAC yet? As we might notice the legal basis that is provided by the UNCAC for extradition all are toward the State Parties of the UNCAC. As argued in the introduction, Singapore is not a party of the UNCAC yet; it has signed the convention but has not ratified it yet. Regarding the consequences from Singapore action, it will be discussed in the next chapter specifically using the VCLT 1969.

However, the UNCAC also regulated that a request for extradition should be rejected in any of the following circumstances. The circumstances are if the extradition request due to sex, race, religion,

⁴⁹ See Art. 46(8), *UNCAC*, *supra* note 15.

⁵⁰ Lucinda A. Low, *supra* note 12.

⁵¹ See art. 44(1), *UNCAC*, *supra* note 15.

⁵² "Background of the UNCAC", *supra* note 42.

nationality, ethnic origin or political opinions reason in which could cause prejudice to that person's position.⁵³ With these provisions, the scholars argument about the UNCAC is the broadest convention to fights the corruption is proven. Concerning the *BLBI case*, the UNCAC provision related to money laundering, mutual legal assistances and extradition suppose can be used by Indonesia to proceed its legal actions against the fugitive. These provisions pretty much concern with the fact and background of the case. However, ratification of extradition treaty is another independent variable that seems considered as another obstacle in ending the BLBI case with Indonesia's preference.

III. Domestic Politics and Treaty Obligation

A. Influence of Domestic Politics toward Treaty Implementation

Without a doubt domestic politics significantly influence international cooperation.⁵⁴ Furthermore, consensual nature is believed as one of striking features of international law.⁵⁵ To a large degree international law is very much depend on consent of the states⁵⁶ and it is different from national law that determined by domestic politics on the first stage.⁵⁷ To some degree, both are showing interconnection between the first and the second aspect. When domestic politics influence the domestic/national law, the state's policy whether national or international aspect is most likely would reflect domestic politics' paradigm.

International law in one hand could foster the international cooperation by causing state to take any action that they would probably not. However, on the other hand states also could refrain from taking any action that they could be affected by as a consequence from an international law.⁵⁸ Sometimes relations between states even face an up and down trend due to domestic political situations.

⁵³ See art. 44(15), *UNCAC*, *supra* note 15.

⁵⁴ Joel P. Trachman, "International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law", *Chicago Journal of International Law*, vol. 11, no. 1, 2010.

⁵⁵ Matthew Lister, "The Legitimizing Role of Consent in International Law", *Chicago Journal of International Law*, vol.11, no.2, 2011.

⁵⁶ *Ibid.*

⁵⁷ Joel P. Trachman, *supra* note 54.

⁵⁸ *Ibid.*

There are several fundamental rights of states recognized by international law such as independence, equality and peaceful co-existence rights.⁵⁹ However, sovereignty as the highest and the most fundamental rights of states and even the basic of states practice. Sovereignty also argued as the basis of justifying an action by state either in joining into an international law or decides not to join into an international law. As sovereignty by constitutional law scholars argue as the highest rights among other rights, it always appears on each discussion on state matters and it only bear by states. Often by using claim over sovereignty states could postpone or even decline its citizen human rights claim.

Domestic politics relatively related to individual and collective (coalition) interest. Individual and a coalition group therefore, gave significant efforts in pursuing their states either to become parties of an international law or not. As a matter of fact, international law allows the formation of such coalitions.⁶⁰ An example to describe the point of what we call as the 'direct beneficiaries and indirect beneficiaries'⁶¹ can be seen from the international trade area. There will be at least two groups that considered as the main supporter and also the direct beneficiaries of the international trade. Firstly is a group of consumers who love imported products and secondly is a group producer of export products. For consumer group, they would benefit from the reduce barrier of imported product while for the exporter, they would benefit from reduced foreign barriers.⁶²

In states' practice context, politics also has important position and function as well. Scholars even argue that law and politics can never be separated clearly and influence each other.⁶³ The separation or distribution of power concept basically aims to prevent a concentration of too much power within one branch of government.⁶⁴ As a matter of fact, the domestic law made resulted by a series of political branch'

⁵⁹ Malcolm N. Shaw, *International Law*, 6th ed, Cambridge University Press, 2010, p. 211.

⁶⁰ *Ibid.*

⁶¹ Malcolm N. Shaw, *supra* note 59.

⁶² *Ibid.*

⁶³ Malcom N. Shaw, *supra* note 59, p.11.

⁶⁴ *Ibid.*

works and also it creates the legal system.⁶⁵

Groups of individual or other groups as described above to some extent believed could influence their states policy. These groups could influence states' policy either through political party or other forms of influenced group that has 'pressure power or negotiation power' to their parliament. Parliament is significant for three reasons. Firstly, parliament is the originator of what is probably named as the single most important modern source of law that is called statute law. Secondly, through its legislative powers parliament is able to give law-making powers to other body such as local parliaments etc. And the last one is parliament's delegatory powers are being increasingly used to create sets of informal rules which operate within formal rules framework that created by the statute.⁶⁶

In regard to Indonesia-Singapore Extradition Treaty, domestic politics is considered as the causal factor of delay in ratification by both parliaments. As discussed before the treaty was a package of deal together with the Defence Force Agreement (DFA). In the DFA, Indonesia will have to give permission for the Singapore Army to use agreed zone for military exercises. Without a doubt, the extradition treaty is benefiting Indonesia meanwhile, the DFA is benefiting Singapore. Benefiting Singapore due to in the DFA Singapore can conduct military exercise together with other states within Indonesia territory which has been agreed. Among other things there are three important clauses included in the extradition treaty. First is listing several economic crimes including corruption in the subject of extradition. Second, the extradition will cover crimes that conducted within past 15 years ago. And third both states agreed to transfer the assets of the offenders after found guilty at the court.⁶⁷

From this point, after the signature in 2007 it seems Indonesian government efforts to bring back *the BLBI* offenders and other economic crime-related suspects into Indonesia soon could be implemented. However, it should be noted that both states' constitution requires

⁶⁵ *Ibid.*

⁶⁶ James Holland and Julian Webb, *Learning Legal Rules*, 6th ed, Oxford University Press, 2006, p.4.

⁶⁷ See *Extradition Treaty between the Government of Republic of Indonesia and Government of Republic of Singapore*, signed 27 April 2007.

ratification. In order to affect the treaty needs to be approved by the parliament of both states and until October 2011 there is no signal of ratification. Among other things, the objection of former Singapore Prime Minister Lee Kuan Yu to the extradition treaty and also the objection of Indonesian Parliament toward the DFA to some extent are considered as the primary factors of delay in ratification. Therefore, due to domestic politics such described above the extradition treaty will fail to be implemented because failure of ratification by both parliaments.

B. Consent to Be Bound and Obligation Not to Defeat the Agreement

The Vienna Convention on the Law of Treaty 1969 (VCLT) is the source for studying all legal aspects related to relation between States and treaties. In Article 11 until 17 of the VCLT 1969, we can find the provision of the expression of consent to be bound by a treaty. Article 11 states 'the consent of a State to be bound by a treaty may be expressed by signature, exchange of instrument constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'.⁶⁸ Scholar argued the role of the expression of consent by states to be bound by a treaty is to constitute a mechanism by which the treaty becomes a judicial act.⁶⁹

Further, scholars argued the basic structure of Article 11 involves two essences of the article. First is listing a number of particular means of expressing consent to be bound. Second is general provision that allowing the States to adopt any other means to which they may agree.⁷⁰ Moreover, the consent to be bound by a treaty is regulated further in Articles 14 to 15 of VCLT 1969.

∴ By expressing its consent through methods described in Article 11 of VCLT in principal a state has been bound by the treaty and it receives 'contracting state' status.⁷¹ Contracting state means 'a state which took

⁶⁸ Art, 11, VCLT, *supra* note 10.

⁶⁹ Malgosia Fitzmaurice, "Expression of Consent to be Bound by a Treaty as Developed in Certain Environmental Treaties", in Jan Klabbers and Rene Lefeber, eds., *Essay on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, Kluwer Law International, 1998, p. 59.

⁷⁰ *Ibid.*

⁷¹ Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed, Cambridge University Press, 2010, p. 94

part in the drawing up and adoption of the text of the treaty'.⁷² Consent itself argues as 'the most significant' positive act which a state can take in relation to any treaty.⁷³ Therefore, consent to be bound is considered as 'the gate of obligation', it means by performing an action a state will be bind a treaty although it is not automatically means obligation to perform the treaty. A state at least will bind by obligation not to defeat the object and the purpose of the treaty.

The methods of expressing consent as described above basically are provided in order to give states options regarding approach they can take. This approach purposes to make the states easier in joining and implementing a treaty. Regarding the extradition treaty as same as other convention, states approach is totally needed.⁷⁴ The methods of state consent itself will then be followed by implementing the convention through the national law as well as the national enforcement by the State Parties. Therefore, the VCLT requires the States parties prior to treaty implementation to show their consent to be bound through one of methods provided.

Generally speaking, a multilateral treaty such as UNCAC requires ratification in addition to signature. Ratification itself involving a process of sending the instrument of ratification to the depositary of the convention/treaty and in this case is the UN Secretary-General.⁷⁵ Meanwhile, by signing a convention States already have obligation to meet the commitment of that particular convention. However, it should be noted that signatories and ratifying States should be distinguished. Most international treaties are made at international conferences where the text is adopted and often signed, but it will legally have binding power when States do ratification or accession.⁷⁶

Expressing consent to be bound through signature is a quite common action conducted by states nowadays.⁷⁷ In regard to signature there are

⁷² Art. 2(f), VCLT, *supra* note 10.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Donald K. Anton, Penelope Matwew and Wayne Morgan, *International Law: Cases and Materials*, Oxford University Press, 2005, p. 288.

⁷⁶ Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law*, 3rd ed, Blackstone Press Limited, 2000, p. 67.

⁷⁷ Anthony Aust, *supra* note 71, p. 96.

two types of signatures. Firstly is definitive signature where signature meant as consent to be bound expression. Secondly is simple signature that means approval however subject to ratification.⁷⁸ Contrary to simple signature, definitive signature often practiced in bilateral treaty or in a multilateral treaty that involving only a small number of states and constitution of this state does not require parliament approval and new legislation also does not necessary.⁷⁹ On the other hand, a state may be legally bound by a treaty upon the signature of the treaty by that state, but only if the treaty provides so. Moreover, a state may also legally bind if it is the intention of the state or of the parties to the treaty that signature would bind the states.⁸⁰

Both Indonesia and Singapore under VCLT are classified as contracting states. Since both states have not ratified the treaty yet, it is clear that the treaty is not yet come into force. Since the treaty is not come into force yet consequently both state could not request their counterpart to perform particular action that derived from the treaty. However, since both states have showed their consent to be bound, both are bind by obligation not to defeat the object and the purpose of the treaty.

In regard to obligation not to defeat the object and the purpose of the treaty scholar argues the obligation such as regulated in Article 18 is 'weak' due to using the 'refrain' word.⁸¹ Anthony Aust argues that a state is not required to comply in any general sense with a treaty or its object and purpose before the treaty comes into force.⁸² Further he argues that the ratification would be meaningless or even has no purpose or little purpose⁸³ when a state is bind by a treaty as a consequence of consent to be bound. However, he proposes a contracting state not to do anything which would prevent it from being able to fully comply with the treaty once the treaty has become enter into force.⁸⁴ Depart from this discussion we probably could say there is no strong legal obligation toward both states in regard to the treaty (extradition and Defence

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Donald K. Anton, eds., *supra* note 75, p. 293.

⁸² Anthony Aust, *supra* note 71, p. 118.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

Force Agreement). However, a relatively weak legal obligation exist that derived as a consequence of signing the treaty. It then brings us to a customary international law principle which is named good faith principle.

Good faith although described as the most difficult to define, O'Connor describes good faith as the foundation of all law or a fundamental principle of law.⁸⁵ ICJ declares that each legal entity has obligation to act with good faith and good faith being a general principle of law as well as part of international law.⁸⁶ Furthermore, although originally derived from Roman law⁸⁷ good faith is recognized and has become fundamental principle of law such described by O'Connor. We can see the adoption process of good faith principle by the international community into several prominent international law instruments. There are some examples of this; it has been incorporated into the United Nations Charter, the International Court of Justice Statute and also in the VCLT itself.

IV. Conclusion

The international community after a long process has successfully brought corruption issues into an international level. Corruption is not just national problem but also international problem and requires international cooperation in combating it. Two conventions have been adopted and ratified by most states including Indonesia and Singapore. Transnational organized crimes including money laundering is one of aspects covered by the UNTOC. Meanwhile for combating corruption, a convention called UNCAC produced to deal with this type of crime. As a matter of law, there are several obligations that have to be performed by state members after ratifying the convention.

Domestic politics always become a determining factor in state's policy practice. Either individual or groups benefit from state's policy whether to join in an international law or not including extradition treaty. There are various backgrounds for this aspect such as economics,

⁸⁵ *Ibid.*

⁸⁶ Andrew D. Mitchell, "Good Faith in WTO Dispute Settlement", *Melbourne Journal of International Law*, vol. 7, issue 2, 2006.

⁸⁷ *Ibid.*

politics or even security factors. Sovereignty is considered as the basis for each policy and sometimes domestic politics forcing states against international community commitment. In regard to Indonesia-Singapore Extradition Treaty, economics aspect tends to be seen as the background of rejection to ratify the treaty. Meanwhile, national security is considered as the background of rejection to ratify the treaty by Indonesian parliament.

From international law perspective, both states have a weak obligation toward the treaty. This weak obligation is derived from expressing states' concern to be bound through signature. However, little can be expected from this legal action. Both states oblige to refrain from defeating the object and purpose of the treaty. Although relatively weak however, both states as a matter of maintaining friendship and neighbouring relation needs to show their good faith in their cooperation.

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