4-30-2011

Asset Recovery Principles in the United Nations Convention Against Corruption 2003 (UNCAC 2003) to Support Corruption Eradication in Indonesia

Jamin Ginting

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

Recommended Citation

Ginting, Jamin (2011) "Asset Recovery Principles in the United Nations Convention Against Corruption 2003 (UNCAC 2003) to Support Corruption Eradication in Indonesia," *Indonesian Journal of International Law*. Vol. 8 : No. 3 , Article 2.

DOI: 10.17304/ijil.vol8.3.299

Available at: <https://scholarhub.ui.ac.id/ijil/vol8/iss3/2>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

Asset Recovery Principles in the United Nations Convention Against Corruption 2003 (UNCAC 2003) to Support Corruption Eradication in Indonesia

Jamin Ginting¹

Indonesia considers the problem of corruption is one issue that cannot be handled domestically but also internationally. Based on this, international cooperation becomes essential in preventing and combating corruption, especially the attempt of corruptors to hide the corrupted assets through money laundering through an effective international transfers. There is not a small amount of public assets which had been corrupted that was stored in financial centers in developed countries that are protected both by the legal system as well as professionals hired by the corruptors. As such, the determination of International society to combat corruption is implemented through of United Nations Convention Against Corruption, 2003 (UNCAC in 2003) received by the UN General Assembly (UN SMU) on October 31, 2003 through the UN High Resolution A/58/4. This article will discuss about the position of Indonesia with regard to this matter.

Keywords: *corruption, money laundering, asset recovery, UNCAC*

I. Introduction

Indonesia considers the problem of corruption is one issue that cannot be handled domestically but also internationally. Article 1 paragraph (3) of the Constitution Third Amendment of 1945, emphasizes that Indonesia is a *Rechtsstaat*, thus Indonesia guarantees legal certainty (*zekerheids recht*) and ensures the protection of human rights to citizens. Indonesia not only has the capacity to conduct relations with other countries but also cooperate with them in matters relating to the formation and determination of Indonesian laws operate to solve the problem of corruption eradication.

The law does not only function under the view of three parameters to achieve certainty, expediency, and fairness, but also specify what should be

¹ Lecturer, Faculty of Law, Universitas Pelita Harapan (UPH), Karawaci, Indonesia (some parts in this the paper had presented in ASLI Fellows program at NUS). He can be reached at jaminginting@yahoo.com.

and not to be done "because the goal is to target not only people who actually violates the law but also actions that may occur and the state apparatus to act according to law".²

At the international level, Indonesia is bound by various rules and norms of international law that become the basis for relations between countries in various fields of politics, security, social, economic and legal. This is more important with the increasing interaction among nations and the development of globalization³, where various aspects of human life become easier and faster to be facilitated by various forms of cooperation. Important elements are the rapid globalization, the exchange of information, the movement of people, goods, and services.

In connection with this development, the events related to international law can be directly known by those in other countries across the region because the nature of the interaction between states has become increasingly borderless.⁴ One of the important problems that often occur in the international world is the complexity of form of matter which has dimensions and different levels among countries. Thus international cooperation among nations is necessary in solving common problems and issues on corruption.

Various aspects of human life affected by corruption may jeopardize stability and public security, endanger social and political development and destroy democratic values and morality and threaten the cultural ideals of a country towards a just and prosperous society. Corruption has been considered only as a crime that can be tolerated by the various parties than to be eradicated, where this crime can destroy a variety of interests related to human rights, state ideology, economy, finance state, national morale and other aspects that tend to be difficult to overcome.

The United Nations (UN) works not only by establishing of a special organ to handle the narcotics, drugs and criminal activity, but also through the statements given by the president of the UN member countries as well as by Kofi Annan when he was a Secretary General of the United Nations. Kofi Annan during a speech at the UN Headquarters, New York on October 31, 2003, states that:

"Corruption hurts the poor disproportionately by diverting funds

² Evi Hartanti, *Tindak Pidana Korupsi*, (Jakarta: Sinar Grafika, 2005), at. 1.

³ Globalitations are process the country enter to borderless wold. Departemen Pendidikan dan Kebudayaan. *Departemen Pendidikan dan kebudayaan, Kamus Besar Bahasa Indonesia; Edisi Kedua*, (Jakarta: Balai Pustaka, 1995) at. 320.

⁴ Border is a restraint and limited area. Departemen Pendidikan dan Kebudayaan. John M.Echols dan Hassan Shadily, *Kamus Inggris Indonesia*, (Jakarta: PT Gramedia Pustaka Utama, 1993) at 75.

intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.”⁵

This is very reasonable, because most of the corruptors who had committed this crime tend to hide their corrupted money in other countries. Swiss Money Laundering Reporting Office (MROS) found an amount of US\$260 million deposited in accounts by the name of Montesinos in Switzerland or in other words the corrupted assets are stored in an area outside of the jurisdiction of the country concerned.

Corruption is no longer a national problem, but it is a transnational⁶ phenomenon.⁷ Based on this, international cooperation becomes essential in preventing and combating corruption, especially the attempt of corruptors to hide the corrupted assets through money laundering⁸ through an effective international transfers.

There is not a small amount of public assets which had been corrupted that was stored in financial centers in developed countries that are protected both by the legal system as well as professionals hired by the corruptors. The effort to track the asset down is a complex situation because “is not easy to track especially for the recovery of these assets”⁹. Resulting in difficulties to developing countries where grand corruption¹⁰ normally occurs to recover stolen assets and hidden at world financial centers.

II. The Position of Indonesia in UNCAC 2003

⁵ <http://www.unodc.org/new/index.php>, “The Global Program Against Corruption”, 31 October 2003, dated access 1 December 2007.

⁶ “An offence is a transnational if it is committed in more than one state; it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; it is committed in one state but has substantial effects in another state.” (Art. 3 number 2 Convention Against Transnational Organized Crime).

⁷ Fenomenon is is any observable occurrence. In popular usage, a phenomenon often refers to an extraordinary event. In scientific usage, a phenomenon is any event that is observable, however commonplace it might be, even if it requires the use of instrumentation to observe it.

⁸ Money Laundering means an act of placing, transferring, paying, spending, granting, contributing, depositing, transporting/carrying aboard, exchanging, or other act for property that is known to be or should be suspected of being the proceeds of a criminal offense with the intent to conceal or disguise the origin of hte Property in order that as if it were legitimate Property. (article 1 Law No. 15 Year 2002 Concerning The Criminal Offence of Money Laundering).

⁹ “Opinion from (Komisi Hukum Nasional) Indonesian Law Commission about Stolen Asset Recovery Initiative (StAR)”, 30 November 2007, <http://www.khn.go.id/new/index.php>, date access 1 December 2007.

¹⁰ Anti Corruption Resource Centre defines “grand corruption” as “corruption that takes place at the policy formulation. It refers not so much to the amount of money involved as to the level at which it occurs where policies and rules maybe unjustly influenced”, <http://www.u4.no.id/new/index.php>, date access 20 October 2009.

Government as a state apparatus with a set of executive power based on chapter III Article 4-15 Constitution 1945 has a very broad authority in determining policy related to the restoration or improvement of the situation in the country. Government efforts to tackle corruption in Indonesia can be seen with the several laws including the Law No. 31 Year 1999 on Eradication of Corruption, the Law No. 20 Year 2001 concerning Amendment to Law No. 31 Year 1999 on Eradication of Corruption, the Law No. 25 of 2003 on Money Laundering and other legislation that specifically formed to deal in this crime.

In relation to the state authorities, not only the Indonesian government who is determined to overcome these issues but also the international society who consider that there should a firm and be specific international regulation on white-collar crime. The determination of the international society to combat corruption is implemented through of United Nations Convention Against Corruption, 2003 (UNCAC in 2003) received by the UN General Assembly (UN SMU) on October 31, 2003 through the UN High Resolution A/58/4. SMU also stated that the UN Convention is open to be signed by the UN states in a special ceremony in Merida, Mexico on 9-13 December 2003. Until now there has been 140 signatory countries and there have been 107 to prostrate us as a state parties. Convention has come into force since 14 December 2005 and is the First Legally Binding Global Anticorruption Agreement.¹¹

Indonesia is the 57th state party to have signed UNCAC on 18 December 2003 and ratified by Law No. 7 Year 2006 concerning Ratification of the United Nations Convention Against Corruption 2003 On April 18, 2006. In accordance with Law No. 24 of 2000 on International Agreement, ratification of such act is carried out through a process of legislation by the DPR-RI imposing the Convention as national law that bear legal obligation for every institution or individual in Indonesia.

UNCAC 2003 is a breath of fresh air for the developing countries with acute corruption issues for this Convention orders and provides enforcement for the contracting states to implement the obligations stated, including sanctions for countries that do not perform the duty. An important point in the Convention is regarding asset recovery of assets that had been taken out of the jurisdiction of origin through international cooperation. This is a new paradigm in the global eradication of corruption. In particular, the

¹¹ Ibid.

return of assets contained in Chapter V Article 51 Asset Recovery, General Provision, UNCAC provides that:¹²

“The return of assets pursuant to this chapter is a fundamental principle of this Convention, and Parties shall afford one another the widest measure of cooperation and assistance in this regard.”

The article above clearly states that the return on assets is a fundamental principle of the convention which member states are expected to work together in the recovery of assets referred to in this Convention. The efforts of member states including Indonesia in returning assets of corruption that are outside of jurisdiction would be facilitated by provision that clearly states effort of the asset recovery is a fundamental principle that must be respected and implemented by member states.

The importance of asset recovery can also be seen through effort from the World Bank and United Nations in launching a new initiative to establish the effectiveness of UNCAC at UN headquarters in New York on 18 September 2007 in the eradication of corruption, especially both developing and developed countries, called Stolen Asset Recovery Initiative (StAR).¹³ Stolen Asset Recovery Initiative (StAR) is established to help developing countries with difficulties to retrieve corrupted assets hidden in developed countries. Based on the above reasons, “both world bank and UN will build a system to help developing countries to return stolen assets, or those being sent abroad by corrupt leaders, worth of approximately U.S. \$ 40 billion or IDR 376 trillion per year.”¹⁴

One transnational corruption case that have direct relationship to asset recovery is the montesinos case, the right hand official of President Alberto Fujimori who reigned since 28 July 1990 until 17 November 2000 in Peru who was known to having several accounts in foreign banks in the world; and the case of Ferdinand Marcos, President of Philippines from November 1965 to February 1986 who was know to have committing massive corruption and had hid the stolen assets at foreign banks in the world. The results of interview with the World Bank United Nations on 24 September 2007 stated that Suharto had been set by the United Nations and the World Bank as the most corrupt people in the world on 2006. Followed by an-

¹² United Nation Convention Against Corruption 2003.

¹³ United Nations and The World Bank Group Hand Book, “Stolen Asset Recovery (StAR) Initiative :Challenges, Opportunities, and Action Plan, (The International Bank for Reconstruction and Development/The World Bank, 2007), at. 2.

¹⁴ “Bank Dunia dan PBB Lacak Aset Koruptor”, Tuesday 18 September 2007, <http://www.tempointeraktif.com/new/index.php>, access dated 30 November 2007.

other most corrupt 9 people in the world such as Ferdinand Marcos of the Philippines which ranked second until Joseph Estrada who was tenth in rank also from Philippines.

With regard to the fundamental principles these assets recovery, it should also be seen how far the effectiveness of an international legal provisions that have been ratified by Indonesia may be executed in accordance with prevailing regulations.

III. Asset Recovery Theory in the UNCAC Regime

Asset Recovery is a basic and main principle as well as new principle which is the most suitable to the UNCAC, although it is not clearly defined in this convention. The dimension of asset recovery in accordance with the provisions regarding asset recovery in the UNCAC include Article 15, Article 27, Article 30, Article 31, Article 32, Article 33, Article 37, Article 38, Article 39, Article 43, Article 44, Article 46, Article 48, Article 49, as well as the main articles of Asset Recovery that is Article 51, Article 53, Article 54, and 57.

Base on the articles mentioned above, the elements of Asset Recovery referred in the conventions can be found. These elements include:

1. Asset Recovery is a law enforcement mechanism which can be done in two ways namely criminal and civil procedures. Generally, the assets are hidden within the jurisdiction of the corruptor and outside of the jurisdiction of the corruptor;
2. The procedures in both jurisdictions are able to trace, freeze, seize, confiscate and return stolen asset to state of victim of corruption;
3. Implementation of points elaborated the previous element is carried out the state apparatus as a law enforcement institutions;
4. Asset recovery aims to restore stolen assets of corruption and to provide deterrent effect for others who intend to commit the similar crime.

Referring to these elements can be concluded that the asset recovery is a form of law enforcement carried out by state officials as law enforcement, which includes a long and complex process in order to recover stolen assets of corrupt and to provide deterrent effect on others will intend to commit the similar crime. Asset Recovery is the latest and positive innovation in the development of anti-corruption focused on the asset recovery.

Asset Recovery emphasize on the prevention system and detection of corruption (Article 52), direct asset recovery in Article 53, indirect asset

recovery system and international cooperation for the purpose of confiscation in Article 55.

The most important provisions of this Asset Recovery is specifically addressed to the corruptor who kept his corrupted assets outside of the jurisdiction to avoid being tracked down. Various forms of International cooperation have been establish to support implementation of asset recovery as mentioned in UNCAC that is clearly expressed in International cooperation in article 43-50. It contains regulations regarding extradition,¹⁵ Mutual¹⁶ Legal Assistance, transfer of criminal proceedings, transfer of sentenced and joint investigation.

∴ Asset Recovery in the UNCAC can be done through two channels namely, criminal channel (criminal recovery) and private channel (civil recovery). Referring to the name, civil recovery is carried out through civil lawsuits against property owners who allegedly derived from criminal acts of corruption and that property is in another country. The criminal channel, through Asset Recovery usually goes through four stages:

1. First, tracking down the asset identifying assets, proof of ownership, and asset storage location;
2. Second, freezing or seizure of assets according to Chapter I, Article 2 letter (f) of UNCAC. These aspects include the prohibition to transfer, convert, or move disposition wealth or to temporarily bear the burden and responsibility of managing, maintaining and overseeing its wealth based on a court decision or ruling authority;
3. Third, the seizure of assets according to Chapter I, Article 2 letter g is defined as the removal of wealth for good based on court decision or ruling authority;
4. Fourth, the last process is recovery and transfer of assets to state victim.

Asset Recovery is regulated directly in Article 53 of UNCAC which contains 3 (three) phases that can be taken. In short, the 3 stages include:

1. First, Article 53 letter (a), each participating country is obliged to provide legal means to other countries who filed a civil lawsuit to the local state courts and assign ownership of the property which has been

¹⁵ Extradition: The official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of fugitive from justice, regardless of consent, by the authorities where the fugitive reside. (Bryan Garner, "Black's Law Dictionary", pocket 2nd Edition (ST. Paul Minnesota: West Group, A Thomson Company, 2001) at. 266.

¹⁶ Ibid., at. 463, Mutual: 1. Generally, directed by each toward the other or others; reciprocal, 2. (Of a condition, credit, covenant, promise, etc.) reciprocally given, received, or exchanged, 3. (Of a right, etc.) belongings to two parties; common.

obtained from the corruption. A civil lawsuit filed in accordance with the procedures applicable in local country;

2. Second, Article 53 letter (b), allowing the local state courts to order the perpetrators of corruption to pay compensation or indemnity to other countries affected by the crime.
3. Third, to take action to allow the local court or authorized institution's to acknowledge the third-party claims for ownership that made the seizure.

Asset Recovery is also provided indirectly in Article 54-55 that Asset Recovery is done through a process of international cooperation or cooperation in the case of confiscating. Procedures that are listed in Indirect asset recovery includes:

1. Taking necessary action to allow the authorized power to enforce order to confiscate issued by courts of other party countries;
2. Taking appropriate required to allow the authorities, that they have jurisdiction to order the confiscation of wealth that comes from abroad based on the decision of the court for the crimes of money laundering or other crimes as well as in their jurisdiction or by other procedures based on national law;
3. Considering taking necessary action to allow confiscation of criminal assets in the case of death or the perpetrator, or the truth is unknown, or in other special things.

The implementation of Chapter V of UNCAC on Asset Recovery does not necessarily provide solutions in solving corruption, although with the whole implementation, there are still barriers and obstacles in the practice of Asset Recovery. Chapter V does not explicitly identify what solutions can be offered in the difficulty of proof in the case of an investigation towards the state leader.

Another dimension related to the Asset Recovery is Asset Forfeiture. Seizing of assets in corruption cases is not decided by criminal decision or often referred to as "non-conviction based asset forfeiture" contained in Article 51 paragraph (4) letter (c). This regime is very useful because in practice it is difficult to fully prove the elements of corruption because the suspects have legal immunity, died, escaped, or do not have enough evidence. The purpose of this regime is to break the immunity possessed by the most corrupt current of former state leader. This

legal regime is practiced in various countries such as South Africa, USA, Australia, Ireland, England, Italy, Columbia, and Slovenia.

These mechanisms are basically divided into namely two mechanisms of assets recovery outside the jurisdiction of countries (Article 53 and 54), while mechanisms of domestic assets recovery (Article 51 paragraph (4) letter (c)).

Practically, Indonesia has implemented Article 53 in the case of Tommy Soeharto in Guernsey, United Kingdom, and Article 54 in the case and Irawan Salim Nelo in Switzerland. Meanwhile the implementation of Article 51 paragraph (4) letter (c) is being conducted by drafting a law on the seizure of assets of various crime such as corruption, money laundering, drugs and other criminal acts.

IV. An Integrated Criminal Justice System in Asset Recovery

This theory is an applied theory that provides an integrated criminal justice system theory so that the organs in the system will be able to operate well coordinated and mutually. The problem of authority can become a institutional which polemic concerns us all. The issue of conflicts among authorities is a matter of institutional prestige, because there will always be prevention of power reduction. Power reduction can be a cause of false perceptions of the institutions that receive these reductions. Institutions can be considered unable to perform a given task, not competent in implementing power, never even considered able to provide adequate accountability in accordance with community expectations. Moreover, this authority is related to power, just like a saying "the elimination of power is a show of power". Resulting an institutional arrogance and structural egoism that will disrupt the comprehensive process of integrated criminal justice system.¹⁷

In the implementation of the supervision duties, according to Article 8 paragraph 3 of Act 30 of 2002 on Corruption Eradication Commission, the Commission is authorized to take over the investigation and prosecution of perpetrators of corruption which is carried out police and prosecutors. These issues are not as easy as it sounds, because this takeover is an authority problem that can cause friction between institutions associated with this authority, which will create broad implications towards the issue of institutional arrogance and egoism. Just take a look on historical problem between the police and prosecutors about the authority to investigate

¹⁷ Indiryanto Seno Adji. *Korupsi dan Pembalikan beban Pembuktian*. (Jakarta: Prof. Oemar Seno Adji, SH & Rekan, 2006). at. 58.

general crime, is also related to specific criminal acts such as corruption cases.¹⁸

Implementation of supervision by the Commission towards Police and Attorney General begins with the inter-institutional coordination. The authority of the Commission in carrying out coordination task, based on the management aspect can said as a operational action of a supervisor to employees or officials who are being supervised. Therefore supervisor by commission toward Police and Attorney General cannot be removed from the conduct of coordinated tasks. The success of implementing coordination task is crucial for the supervision by commission towards Police and General Attorney of the Commission made to the police and prosecutors.¹⁹

Law No. 8 of 1981 on Criminal Procedure Code has set up how the integrated form of the Integrated Criminal Justice institutions system included in this law are:

- a. Police Investigators and Detective as stated in Law No. 2 of 2002 regarding Police, the Police function bearers, assisted by special police force, civil investigator and security forms;
- b. The prosecutor is Attorney General as stated in Law No. 16 Year 2004 regarding Attorney General is given additional authority to conduct investigations of certain criminal offenses such as criminal act in the economy and corruption;
- c. Court as mentioned in the Supreme Court Act No. 4 Year 2005 on judicial power of court consisting of General Court, State Administrative Courts, Military Courts and Religious Courts;
- d. Detention (Penitentiary) institute, managing penitentiary regard of in prosecution and management of Detention Center and Home for confiscated goods.

V. Harmonization Between Indonesian Laws and UNCAC 2003 Concerning Asset Recovery

Things that need to be considered in UNCAC 2003 regarding Asset Recovery of corruption is how the law in Indonesia can incorporate the provisions outlined in the UNCAC 2003, and how such can be used to save the assets result of corruption as provided in UNCAC 2003 through : 1)

¹⁸ Ibid.

¹⁹ Komisi Hukum Nasional (KHN). (Kebijakan Reformasi Hukum: Suatu Rekomendasi. (Jakarta: KHN RI, 2007). at. 72.

Investigation; 2) Litigation; and 3) International Cooperation:

A. Investigation

Line of investigation towards the assets of corruption can be done through: a) Tracing/Identification; b) the seizure and Freezing; c) Confiscation and d) Return / Recovery.

These steps can be taken in order to accelerate the recovery of assets and avoid the decreasing value of the assets of corruption.

1. Tracing/Identification

Tracking and identifying asset of corruption is necessary to perform the mapping on assets that can be saved. Marry Frank JS and EH explained that "commonly starting investigate in the victim country and requesting mutual assistance, particularly in a financial center with strict bank secrecy law, require not only the necessary initial funding, but a sound description of the facts and detailed primary evidence. Techniques for indentifying and tracing assets include background checks on individuals, searches of public records, and interviews with sources familiar with the fraudulent scheme. Verbal or written volunteered or obtained through legal procedures, also help, as does liaising with governmental bodies, such as regulatory agencies or units Investigation"²⁰ (Marry JS and Frank E.H)

In 2003 UNCAC these are mentioned in Article 52, 55 (2.3) 56 and 58, whereas in the applicable laws in Indonesia, it has been given to police, prosecutors and the Commission to track and identifying asset of corrup-

²⁰ Mary Jane Schirber and Frank E. Hydoski. Identification and Quantification. In Mark Pieth. Recovery Stolen Assets. (Bern:Peter Lang,2008) at 219.

tion. Other than the authorized agency asset tracking in finance and banking transactions can be conducted by PPAT (Financial Transaction Report and Analysis Center)

Chapter IV: Reporting; Part One: Obligation to Reporting; Part Two: Identity of Customer, Chapter V: Reporting Center and Analysis of Financial Transactions (the Law No. 15/2002 as amended by the Law No. 25/2003 on Money Laundering)

2. Seizure and Freezing

There are 3 types of Freezing procedures available (Mark Pieth):²¹

- Criminal Freezing, based on a domestic procedure in the financial center or on a mutual legal assistance request by the victim state;
- Freezing Executive, that an order will be necessary to supplement the ordinary legal instruments: either before a formal MLA request has been filed or where a State has been failing unable to pursue a domestic case in a timely fashion due to a lack of effective institutions;
- Internal Freezing, by Financial Institution exp. Anticipation of notifying Suspicion of money laundering.

KPK (Corruption Eradication Commission) has authority to conduct International cooperation in order to conduct a confiscation. In this matter the Commission is authorized to conduct confiscation and Freezing (temporary) on assets, which is assumed as corruption assets located in both Indonesia and Overseas (Art. 6 (c), art. 12, 1 (h), art. 38 and art. 41 Law No. 30/2002 on Corruption Eradication Commission).

3. Confiscation/Forfeiture

Based on the Eradication of Corruption Law, confiscation of the proceeds of corruption from which a suspect or defendant has passed away or fled or is absent or by other reason he/she can not be tried at court, is not regulated yet. Thus, cases like former president Suharto cannot be finished through civil procedure, because there is no criminal verdict.

According to civil law system of procedure, a confiscation can be conducted only after a criminal verdict for assets resulting from corruption, if these assets resulting from corruption, if these asset have not been frozen or confiscated yet. This is only applicable for assets in Indonesia by Indo-

²¹ Mark Pieth. *Recovery Stolen Assets-A New Issue*. (Bern: Peter Lang, 2008) at. 11-12

nesia offenders and can only be confiscated by Indonesian authorities.

B. Litigation

Litigation is a part that cannot be separated from the activities of investigation, if the data required in the investigation was enough to do litigation, but litigation can not only be done through the criminal with the concept of in personam, but also with civil lines (civil forfeiture) with concept in brake, following our basic prosecution through the criminal and civil process is.

1. In Personam System (Criminal Forfeiture)

An in personam action can affect the defendant's personal rights and interests and substantially all of his or her property. It is based on the authority of the court, or jurisdiction, over the person as an individual rather than jurisdiction over specific property owned by the person. This system purpose to give effect to a foreign confiscation order, 54 (1a) (mandatory), To order confiscation of foreign property, 54 (1b) (mandatory), The confiscation follows a criminal conviction against the person.

2. In Rem System (Civil Forfeiture)

The forfeiture action as a proceeding against the property, and not against any particular defendant, civil forfeiture has long been understood as independent of criminal punishments. It does not impose an in personam penalty for the criminal defendant's wrongdoing. The action is against the property, not against the person. The theory is that the property, whether or not illegal or dangerous in nature, is hazardous in the hands of the owner because either he uses it the hands of or allows others do so. The owner can be held accountable for the misuse of the property and can be deprived of such property through forfeiture proceedings against the property.²²

The recovery of assets of corruption is possible on the basis of Article 11, 54 (c) and 53 UNCAC 2003, but technically UNCAC 2003 does not regulate about civil lawsuit explicitly. UNCAC 2003 only requires the participating states to facilitate the other states in accordance with national laws of each comparison between the procedural risk regulated in national law (the Indonesian legal system) and civil forfeiture, in ways that made in Indonesia or Indonesia legally very conventional, so that inefficient, even difficult to achieve the expected results.

²² Linda M. Samuel, *Addressing the Weaknesses of U.S. Non-Conviction Based Forfeiture*, (Bali:2007) at 7.

Civil Forfeiture does not require plaintiffs to prove elements and those mistakes are committing a crime (personal culpability). Plaintiff sufficiently proves the existence of probable cause or a suspicion that the assets of the accused have connection with a crime. Plaintiff sufficiently proved by preponderance of evidence standard (the formal proof) that one crime has occurred and an asset has been produced, used or involved with crime. The owner of these assets must then be proved with the same standards that the assets which are not contested the result, use or related crime is prosecuted.

UNCAC 2003 allows for the actions of deprivation of property without a criminal prosecution (without a criminal conviction), in which case the perpetrator can not be prosecuted by reason dies, run (run) or not present, or in other cases the same. Principle are set out in Article 54 (1) (c) of the UNCAC. This principle indicates that conducted a civil lawsuit when the criminal justice mechanism fails to prosecute because of the conditions of the defendant dies, run (run), or in absentia. Another expression contained in Article 54 (1) (c) of the UNCAC recommends that States Parties to use / manage non-criminal systems of confiscation.

C. International Cooperation

1. Dual Criminality Concept

The "dual criminality" principle (in some countries such as in Africa and England is referred to as "double criminality") is a rule prohibiting the extradition of a fugitive unless the offense involves a conduct that is criminal in both countries."²³ See from dual criminality act site, a crime can be categorized as the same criminal act recognized in more than one country if the crime happens in one country is recognized as a crime in another country. The elements covered by the state conducted a second, third or other countries for instance when in the act there is a second element, or third parties who perform activities in the area of jurisdiction of another country or not. Both the activities of planning, preparation, execution, flow of money, goods, services and people do outside the jurisdiction of another country.

Fundamental connection between the dual criminality with corruption is that if the crime had been filled with elements that may be against the law imprisoned by more than one country to the corrupt who are believed to act. This has been one of necessity in addressing transnational crime since

²³ Black's Law Dictionary, op. cit. at 222.

the scope of crimes committed outside their jurisdiction limits must be met by more than one country in order to follow-up treatment was a crime happening. Corruption provided for in UNCAC did not explicitly explain the definition of corruption as stipulated in the law of corruption in Indonesia. When viewed from the perspective of the perpetrator, the corrupted assets, state the victim, and the losses of all countries in accordance with the criteria that corruption is the corruption statute with those referred to in UNCAC.

The dimension of corruption which dual criminality can demonstrate not only between the national laws but also the laws of other countries concerned (where the hidden assets are). This means that a corrupt act shall be considered as criminal acts of corruption by the UNCAC, and also meets the elements of corruption by both countries.

Dual criminality is a problem in determining an action can be expressed as a crime or not. Given that corruption has become transnational organized crime, this principle is often met by many countries because it has a similar regulatory provision, although not the same.

2. Extradition

Extradition term is more generally known or used primarily in the transfer of criminals from one country to the ongoing state.²⁴ Extradition is the delivery done formally either by agreement or previously held on the principle of reciprocity of a person accused of a crime (suspects, defendants, defendants), or someone who has been sentenced for crimes that have been done (prisoner, convict), by the state where he fled to the country that accuse or punish a country that has jurisdiction to prosecute or punish the request of these countries in order to prosecute or enforce the law.

The authors conclude that extradition essentially refers to a process whereby treaty or on the basis of reciprocity a State submit to other countries at his request a person who is accused or punished for committing a crime.

Indonesia's legislation governing extradition is Act 1 of 1979. Until 2007, Indonesia has extradition agreements with seven countries, and all such agreements bilaterally agreed. Indonesia already has about seven bilateral extradition treaties, namely extradition treaty with Malaysia, which was ratified by Law No. 9 of 1974, the Philippines ratified by Law No. 10 of 1976, with Thailand ratified by Law No. 2 of 1978. Then, Indonesia to sign extradition treaty with Australia ratified by Law No. 8 of 1994, with

²⁴ Ibid, at 167.

Hong Kong was ratified by Law No. 1 of 2001, with South Korea was signed in 2001, and with Singapore was signed on 27 April 2007.

Points to note in Law No. 1/1997 on Extradition is that Law No. 1/1997 acknowledge the dual criminality principle which strictly applies to extradition. Nothing in the said law permits an exception such as in article 44 UNCAC 2003 and the revision on extradition law should address to add articles on the principle of *lex specialis* to the general principle on extradition

3. Mutual Legal Assistance (MLA)

MLA is the formal mechanism for obtaining evidence in one country to assist in criminal investigations or proceedings in another. UNCAC is centered on the concept of states assisting one another through mutual legal mechanisms to bring to justice the perpetrators of corruption.²⁵ Apart from the reference of permitting civil action by one State to be brought in another, there is no provision within the Convention for mutual legal assistance to be given for civil proceedings. In other words, such assistance continues to be envisaged only in the context of bringing criminal proceedings. The result of this is that, for example, the wide heads of assistance listed under Article 46 of UNCAC are, on the face of it, simply unavailable to a requesting State contemplating civil proceeding to recover acquired assets located overseas.

Indonesia has enacted Law No. 1/2006 on MLA in Criminal Matters and also a member signed of ASEAN 2004 MLA Treaty, Indonesia had agreement with Australia, Hong Kong, India and South Korea. The substance Law No. 1/2006 is not fully complying with UNCAC 2003, and some of it refers to the exception about principle of dual criminality and of the applicable law on certain offences between requesting and requested state parties. Indonesia should consider this exception and insert it in the new revision to the new law on mutual assistance.

4. Cooperation in Law Enforcement, Investigation Techniques and confiscation

KPK with its investigative mandate should be provided with more adequate access to International cooperation network. KPK should be exploring training cooperation in such highly specialized matters with other countries, include with the established institution: CPIB (Singapore), ICAC

²⁵ Tim Daniel & James Maton. "Civil Proceeding to recover corruptly acquired assets of public officials", in Mark Pieh, *Recovery Stolen Assets*, (Bern: Peter Lang, 2008) at. 250-251.

(Hong Kong) and other similar institutions.

VI. Concluding Remarks

UNCAC 2003 substantially sets forth a tremendous impact on the strategy of prevention and combating corruption in Indonesia which has been designed in the Law No. 31 Year 1999 and Law No. 20 Year 2001 as well as in the Law No. 30 Year 2002 on the Corruption Eradication Commission. To this end, the Government should seriously consider the existence of the UNCAC 2003 within the Indonesia Criminal System so as to change fundamentally all laws and regulations which are relevant to address the prevention and combating corruption in Indonesia, particularly corruption which is transnational in nature and asset recovery.

References

- Bryan Garner, "Black's Law Dictionary", pocket 2nd Edition (ST. Paul Minnesota: West Group, A Thomson Company, 2001)
- Evi Hartanti, *Tindak Pidana Korupsi*, (Jakarta: Sinar Grafika, 2005)
- Departemen Pendidikan dan Kebudayaan. Departemen Pendidikan dan kebudayaan, *Kamus Besar Bahasa Indonesia*; Edisi Kedua, (Jakarta: Balai Pustaka, 1995)
- Indiriyanto Seno Adji. *Korupsi dan Pembalikan beban Pembuktian*. (Jakarta: Prof. Oemar Seno Adji, SH & Rekan, 2006).
- John M.Echois dan Hassan Shadily, *Kamus Inggris Indonesia*, (Jakarta: PT Gramedia Pustaka Utama, 1993)
- Komisi Hukum Nasional (KHN). *(Kebijakan Reformasi Hukum: Suatu Rekomendasi*. (Jakarta: KHN RI, 2007)
- Linda M. Samuel, *Addressing the Weaknesses of U.S. Non-Conviction Based Forfeiture* (Bali:2007)
- Mark Pieth. *Recovery Stolen Assets-A New Issue*. (Bern:Peter Lang, 2008)
- Mary Jane Schirber and Frank E. Hydoski. *Identification and Quantification*. In Mark Pieth. *Recovery Stolen Assets*. (Bern:Peter Lang, 2008)
- Tim Daniel & James Maton. *Civil Proceeding to recover corruptly acquired assets of public officials*. In Mark Pieth. *Recovery Stolen Assets*. (Bern:Peter Lang, 2008)
- United Nations and The World Bank Group Hand Book, "Stolen Asset Recovery (StAR) Initiative : Challenges, Opportunities, and Action Plan, (The International Bank for Reconstruction and Development/The World Bank, 2007)
- <http://www.unodc.org/new/index.php>, "The Global Program Against Corruption", 31 October 2003, dated access 1 December 2007
- <http://www.khn.go.id/new/index.php>, "Opinion from (Komisi Hukum Nasional) Indonesian Law Commission about Stolen Asset Recovery Initiative (StAR)", 30 November 2007, dated access 1 December 2007
- <http://www.u4.no.id/new/index.php>, "Anti Corruption Resource Centre", Grand Corruption: corruption that takes place at the policy formulation. It refers not so much to the amount of money involved as to the level at which it occurs where policies and rules maybe unjustly influenced. Date access 20 October 2009
- <http://www.tempointeraktif.com/new/index.php>, "Bank Dunia dan PBB Lacak Aset Koruptor", Tuesday 18 September 2007, access dated 30 November 2007