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United Nations Provisions Against Corruption 2003 and Asset Recovery Efforts in Indonesia

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UNITED NATIONS PROVISIONS AGAINST CORRUPTION 2003 AND ASSET RECOVERY EFFORTS IN INDONESIA

JAMIN **GINTING***

ABSTRACT:

Corruption, which affects all countries, is a major concern in Indonesia. The Indonesian government has initiated a number of measures to deal with the problem, involving both domestic law and international law, the latter in the form of the United Nations Provisions Against Corruption 2003 (UNCAC). This paper considers the various measures, focusing in particular on asset recovery under UNCAC.

I. INTRODUCTION

Indonesia considers that the problem of corruption must be handled internationally as well as domestically. Article 1(3) of the Indonesian constitution[1] emphasizes that Indonesia is a *Rechstaat,* which means that Indonesia guarantees legal certainty (*zekerheids recht*) and ensures the protection of human rights to its citizens. Indonesia has the capacity to conduct relations with other countries and to cooperate with them in matters relating to the formation and determination of Indonesian laws which are aimed at eradicating corruption.

The law seeks to achieve certainty, expediency, and fairness. It also seeks to specify what should and should not be done, "because the goal is to target not only people who actually violate 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 form the basis for relations between countries in various fields – ranging from politics and security to social, economic and legal matters. International law is playing an increasingly important role in this regard, due to the growing interaction between nations and the development of globalization. 3 Cooperation is facilitated by improved communications, exchange of information, and the movement of people, goods, and services. Moreover, the nature of the interaction between states has become increasingly borderless.4 Therefore, international cooperation among nations is necessary in solving common problems relating to corruption.

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[1] *Constitution of the Republic of Indonesia* 1945, 4rd Amendment of 2002.

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

3 "Globalization" seeks to enable countries to enter a borderless world. Tim penyusun Kamus, Pusat Pembinaan dan Pengembangan Bahasa; Harimurti Kridalaksana (dir.), *Kamus Besar Bahasa Indonesa. Edisi Kedua,* 2nd ed. (Jakarta: Balai Pustaka, 1995).

4 "Border" indicates restraints and limits. John M.Echols & Hassan Shadily, *Kamus Inggris Indonesia,* (Jakarta: PT Gramedia Pustaka Utama, 1993).

Corruption may jeopardize stability and public security, endanger social and political development, destroy democratic values and morality, and threaten the cultural ideals of a country. In the past, there has been a tendency to regard corruption merely as a crime to be tolerated, rather than an ill to be eradicated. This is the case even though corruption can destroy a variety of interests related to human rights, state ideology, the economy and national morale to name but a few.

The United Nations (UN) has not only created a special organ to handle narcotics, drugs and related criminal activity, but has also indicated its desire to fight corruption, both through statements by the representatives of UN member countries as well as by Kofi Annan when he was the Secretary General. During a speech at the UN Headquarters in New York on October 31, 2003, he stated that:

> Corruption hurts the poor disproportionately by diverting funds 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 a very accurate observation, since most of those who commit the crime tend to hide their ill-gotten gains in other countries. For example, the Swiss Money Laundering Reporting Office has reported that over US$260 million has been deposited in accounts under the name of Vladimir Montesinos[6] in Switzerland.

Corruption is nowadays a transnational[7] phenomenon.8 Hence, international cooperation becomes essential in preventing and combating corruption, especially with regards to recipients of corruptly obtained funds attempting to hide their assets through money international laundering.9

A sizeable proportion of illegally siphoned public assets have been stored in financial centres in developed countries, protected by both the relevant legal systems and by professionals hired by the illegal recipients of the funds. The effort to track the assets down is complex, because it “is not easy to track, especially for the recovery of these assets."10 For developing countries, where grand corruption[11] normally occurs, this creates

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[5] “The Global Program Against Corruption”, December 2007, online: United Nations Office on Drugs and Crime <http://www.unodc.org>.

[6] Mr Montesinos was a close advisor to President Alberto Fujimori of Peru, who was in office from 28 July 1990 until 17 November 2000, and was known to have several accounts in foreign banks all over the world.

[7] An offence is “transnational” if it is “committed in more than one state; or it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; or it is committed in one state but has substantial effects in another state.” *United Nations Convention against Transnational Organized Crime,* UN GAOR, UN Doc. A/RES/55/25 (2001), Art. 3 No. 2.

8 A “phenomenon” 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.

9 “Money laudering” means “an act of placing, transferring, paying, spending, granting, contributing, depositing, transporting/carrying abroad, exchanging, or other act involving property that is known to be or should be suspected of being the proceeds of a criminal offence with the intent to conceal or disguise the origin of the property in order that it appears as if it were legitimate property.” (Article 1 Law No. 15 Year 2002, concerning The Criminal Offence of Money Laundering).

10 “Opinion from (Komisi Hukum Nasional) Indonesian Law Commission about Stolen Asset Recovery Initiative (StAR)”, November 2007, dated access 1 December 2007.

particular difficulties in recovering stolen assets which have been professionally hidden in world financial centres.

II. THE INDONESIAN POSITION ON THE UN CONVENTION AGAINST CORRRUPTION 2003 (UNCAC)

Governments, as state apparatuses with executive powers under chapter III Article 4-15 of the UN Constitution, [12] have very broad authority to determine policy in a given country. Government efforts to tackle corruption in Indonesia can be seen in several laws, including *Law No. 31 Year 1999* and *Law No. 20 Year 2001* on the eradication of corruption, and *Law No. 25 of 2003* on money laundering.

The Indonesian government is not alone in its determination to overcome corruption. The international community also believes that there should be firm and specific international regulation of white-collar crime. The determination to combat corruption can be seen in UNCAC, which was received by the UN General Assembly on October 31, 2003 through the report of the International Court of Justice.[13] To date, there have been 140 signatories to the Convention, which was marked by a special ceremony in Merida, Mexico on 9-13 December 2003. The Convention came into force on 14 December 2005, and is the first legally binding global anticorruption agreement.

On 18 December 2003, Indonesia became the 57th state party to sign UNCAC. It ratified the Convention on April 18 2006 by *Law No. 7 Year 2006* through a process of legislation, in accordance with *Law No. 24 of 2000*. The Convention is thus implemented as national law, imposing legal obligations on every institution or individual in Indonesia.

UNCAC is extremely valuable to developing countries plagued by acute corruption issues. It provides enforcement (coercion) for the contracting states to implement obligations, including sanctions for countries that do not meet their commitments. One important provision relates to recovery of assets which have been removed from the jurisdiction of origin. This sets a new standard in the global eradication of corruption. In particular, Chapter V Article 51, dealing with the recovery of assets, provides that:

> **Article 51**
> **General Provision**
>
> 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.

This Article clearly implies that member states are expected to work together in the recovery of assets, thus facilitating the efforts of member states, including Indonesia, to retrieve corruptly obtained assets from outside the jurisdiction.

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[11] "Grand Corruption" means corruption that takes place at the level of 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. Online: Anti Corruption Resource Centre <http://www.u4.no>.
[12] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.
[13] UN GA, 58th Sess., 50th Mtg., UN Doc. A/58/4 and Corr.1 (2003).

The importance of asset recovery in the eradication of corruption can also be seen through the World Bank and UN launching a new initiative at the UN headquarters in New York on 18 September 2007. The new initiative seeks to establish the effectiveness of UNCAC. In particular, the Stolen Asset Recovery Initiative (StAR)14 aims to help developing countries to overcome their difficulties in retrieving corruptly obtained assets, which have been hidden in developed countries. It has been reported that "… both the 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 approximately U.S. $ 40 billion or IDR 376 trillion per year."15

Among the most prominent transnational corruption cases with a direct relationship to asset recovery are the Montesinos case, the case of Ferdinand Marcos, who was the President of Philippines from November 1965 to February 1980, and that of a later President of the Philippines, President Joseph Estrada. It is also known that former President Suharto of Indonesia was considered by the World Bank and the UN to be one of the most corrupt former politicians in the world.

Thus, given the problems of corruption and asset recovery, how effective have the relevant provisions ratified by Indonesia been in dealing with the problem?

III. ASSET RECOVERY UNDER UNCAC

Asset recovery is one of the main tenets of UNCAC, although it is not clearly defined. Provisions on asset recovery include Articles 15, 27, 30, 31, 32, 33, 37, 38, 39, 43, 44, 46, 48, 49, as well as the main articles relating to asset recovery in Articles 51, 53, 54, and 57.

The elements of asset recovery include the following:

a) Asset recovery may be achieved through both criminal and civil law;
b) Under both criminal and civil provisions, procedures are available to trace, freeze, seize, confiscate and return stolen assets to state victims of corruption;
c) Implementation is carried out through the state apparatus and law enforcement institutions;
d) Asset recovery aims to restore stolen assets of corruption and to provide a deterrent effect for others who might be inclined to commit a similar crime.

Asset recovery – the latest and most positive aspect of the various anti-corruption measures – can be a long and complex process. It emphasizes the prevention and detection of corruption (Article 52), direct asset recovery (Article 53), and the indirect recovery of assets through international cooperation for the purpose of confiscation (Article 55).

14 "*Stolen Asset Recovery (StAR) Initiative :Challenges, Opportunities, and Action Plan*, (The International Bank for Reconstruction and Development/The World Bank, 2007) at 2, online: The World Bank <http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf>.

15 "Bank Dunia dan PBB Lacak Aset Koruptor" (The New York Times, 18 September 2007), online: Situs Berita Online Indonesia <http://www.tempointeraktif.com>.

Various forms of international cooperation have been established to support implementation of asset recovery, as specifically provided for under Articles 43 to 50. These Articles contain regulations regarding extradition,[16] mutual[17] legal assistance, transfer of criminal proceedings, transfer of sentences and joint investigations.

Asset recovery in UNCAC can be done through two channels – the criminal channel (criminal recovery) and the private channel (civil recovery). Civil recovery is carried out through civil lawsuits against property owners; those who have allegedly derived benefits from criminal acts of corruption and those who hold property in another country. The criminal channel usually consists of:

a) Identifying and tracking down assets, proving ownership, and determining the asset storage location;
b) Freezing or seizing assets according to Chapter I, Article 2(f). This may involve the prohibition of transferring, converting or moving assets, or temporarily bearing the burden of managing, maintaining and overseeing wealth based on a court decision or ruling authority;
c) The confiscation of assets according to Chapter I, Article 2(g), defined as the removal of wealth for good based on a court decision or ruling authority;
d) The recovery and transfer of assets to a state victim.

Asset recovery is regulated directly in Article 53 of UNCAC, which contains three phases:

a) Article 53(a) provides that each participating country is obliged to provide legal access to another country which has filed a civil lawsuit, and to assign ownership of corruptly obtained property. A civil lawsuit must be filed in accordance with the procedures applicable in the relevant country;
b) Article 53(b) provides that local courts may order the perpetrators of corruption to pay compensation or indemnity to the country affected by their crime;
c) Article 53(c) provides that action may be taken to allow the local court or authorized institution to acknowledge third-party claims to ownership following the seizure.

Asset recovery is also indirectly provided for under Articles 54-55, and may be achieved through a process of international cooperation and/or confiscation. Procedures for indirect asset recovery include:

a) Taking necessary action to allow the authorized power to enforce an order to confiscate issued by the courts of other party countries;
b) Taking appropriate measures to allow authorities the jurisdiction to order the confiscation of corruptly obtained wealth from abroad where crimes such as money laundering have been committed;

[16] *Black's Law Dictionary*, 7th ed. (West Group, 1999), defines "extradition" as "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 resides."

[17] *Black's Law Dictionary, ibid.*, defines "mutual" as "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), belonging to two parties; common."

c) Considering taking necessary action to allow confiscation of criminal assets where there are special factors such as the death of the perpetrator, or where it is impossible to prove the alleged corruption.

Implementation of Chapter V of UNCAC does not necessarily provide exhaustive solutions to solving corruption. There are still barriers and obstacles to asset recovery. For example, Chapter V does not explicitly identify solutions to the difficulties of proving corruption in the case of an investigation of a state leader.

Another dimension of asset recovery is asset forfeiture. Seizing of assets in corruption cases is not always applied in criminal situations. However, it may be dealt with by what is often referred to as "non-conviction based asset forfeiture," contained in Article 51 paragraph (4)(c). Although asset forfeiture is a very useful remedy, in practice it is often difficult to prove all the elements of corruption, because the suspects may have legal immunity, or have run away, or be dead. The purpose of asset forfeiture is to overcome the immunity of corrupt current of former state leaders. It has been applied in various countries, such as South Africa, the USA, Australia, Ireland, the UK, Italy, Columbia, and Slovenia.

There are basically two mechanisms for recovering assets outside a country's jurisdiction (Articles 53 and 54) and for domestic recovery (Article 51(4)(c)).

Indonesia has implemented Article 53 in the case of recovering Tommy Suharto's assets in Guernsey (UK), and Article 54 in the case of recovering Irawan Salim Neloe's assets in Switzerland. In addition, a law to implement Article 51(4)(c), allowing seizure of assets for crimes such as corruption and money laundering, is currently being drafted.

IV. THE ROLE OF AN INTEGRATED CRIMINAL JUSTICE SYSTEM IN ASSET RECOVERY

The role of an integrated criminal justice system in asset recovery is to ensure that all the relevant organs of state are well-coordinated. The issue of authority is a matter of institutional prestige, because there will always be issues of power reduction. Power reduction can create false perceptions, such as the perception that institutions are unable to perform given tasks or to provide adequate accountability in accordance with community expectations. Institutional arrogance and structural egoism may even disrupt the comprehensive process of an integrated criminal justice system.[18]

In the implementation of supervision duties, according to Article 8 paragraph 3 of Act 30 of 2002, the Corruption Eradication Commission (KPK) is authorized to take over the investigation and prosecution of perpetrators of corruption from the police and prosecutors (the latter via the Attorney General). This can lead to friction between the various institutions – as is the case, too, in the investigation of general crimes, where the police and prosecutors often come into conflict.

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

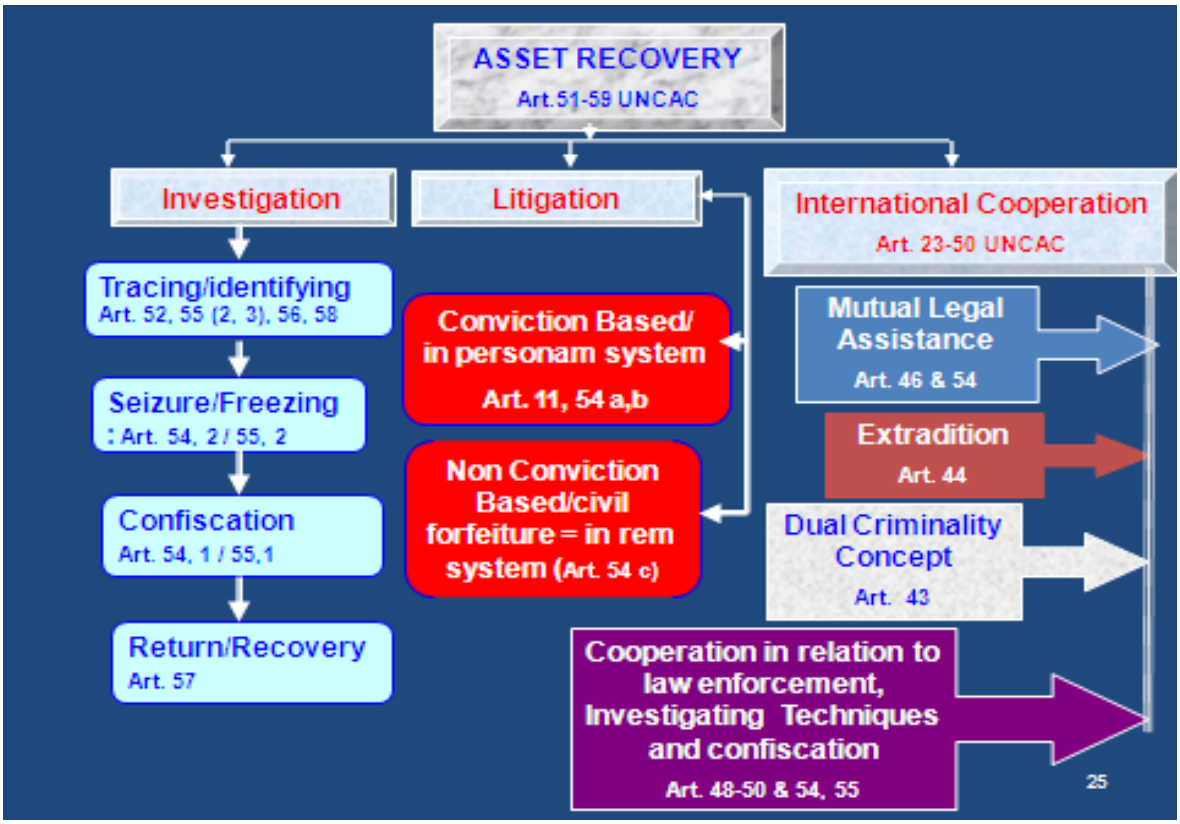
Implementation of supervision by the KPK over the police and prosecutors begins with inter-institutional coordination. Its authority in carrying out the task of coordination resembles the operational action of a supervisor over employees or officials who are being supervised. The success of coordination is crucial to the KPK's supervision.[19]

Law No. 8 of 1981 of the *Criminal Procedure Code* establishes that the institutions covered by the system are:

a) Police investigators and detectives, as stated in *Law No. 2 of 2002*, police function bearers, assisted by special police forces, and the civil investigator;
b) The Attorney General, as stated in *Law No. 16 Year 2004*. This grants additional authority to conduct investigations of certain criminal offences such as corruption;
c) The courts, as stated in the *Supreme Court Act No. 4 Year 2005*. This includes the general courts, state administrative courts, military courts and religious courts;
d) Prisons, including detention centres.

V. SYNCHRONIZATION REGULATIONS IN ASSET RECOVERY

Under UNCAC, various factors need to be taken into consideration with respect to asset recovery. These include investigation, litigation and international cooperation:



[19] Mohammad Fajrul Falaakh, *Kebijakan Reformasi Hukum: Suatu Rekomendasi; Jilid II 2007* (Jakarta: Komisi Hukum Nasional, 2007) at 72.

A. Investigation

Investigation with respect to corruptly gained assets can be achieved through: 1) tracing / identification; 2) seizure and freezing; 3) confiscation and 4) return / recovery.

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

1. Tracing/Identification

Tracking and identifying assets gained through corruption is necessary to determine which assets can be saved. Mary Jane Schirber and Frank Hydoski explain that:

> commonly starting to 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]

In Indonesia, it is the role of the police, prosecutors and the KPK to track and identify corruptly acquired assets. Asset tracking in finance and banking transactions can also be conducted by the PPAT (Financial Transaction Report and Analysis Centre).

2. Seizure and Freezing

There are three types of freezing procedures available:[21]

a) Criminal freezing, based on a domestic procedure in the financial centre or a mutual legal assistance request by the victim state;
b) A freezing executive, under which an order will be necessary to supplement the ordinary legal instruments – either before a formal request has been filed or where a state has been unable to pursue a domestic case in a timely fashion due to a lack of effective institutions;
c) Internal freezing, by a financial institution in anticipation of money laundering.

The KPK has the authority to use international cooperation to conduct confiscations. In this matter, the KPK is authorized to confiscate and place a temporary freeze on assets located in both Indonesia and overseas.[22]

3. Confiscation/Forfeiture

[20] Mary Jane Schirber & Frank E. Hydoski. "Identification and Quantification" in Mark Pieth, ed., *Recovery of Stolen Asset*s (Bern: Peter Lang, 2008) at 219.
[21] Mark Pieth, "Recovering Stolen Assets- A New Issue" in Mark Pieth, ed., *Recovery of Stolen Asset*s, *ibid*. at 11-12.
[22] Art. 1(h), 6 (c), 12, 38, Law No. 41. 30/2002.

Confiscation of assets where a suspect has died, fled, or is absent for some other reason has not yet been the subject of regulation. Thus, civil cases like that of former President Suharto cannot be completed, because there has been no criminal verdict.

According to the civil law system of procedure, confiscation can take place only after a criminal verdict has been reached, and if these assets have not yet been frozen or confiscated. This relates only to assets held in Indonesia by Indonesian offenders, and only the Indonesian authorities have the power to confiscate.

B. Litigation

Litigation cannot be separated from the activities of investigation, and particular rules apply depending on whether the action is *in rem* or *in personam*.

1. *In Personam* System (Criminal Forfeiture)

An *in personam* action can affect the defendant's personal rights, 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 may give effect to a foreign confiscation order under Article 54 (1a) or to a confiscation order for foreign property under Article 54 (1b). The confiscation follows a criminal conviction against the person.

2. *In Rem* System (Civil Forfeiture)

The forfeiture action is against the property, not against a particular defendant, and civil forfeiture has long been understood to be independent of criminal punishments. It does not impose an *in personam* penalty for the criminal defendant's wrongdoing. The theory is that the property, whether or not it is illegal or dangerous in nature, is hazardous in the hands of the owner because he either uses it wrongly or allows others to do so. The owner can be held accountable for the misuse of the property, and can be deprived of such property through forfeiture proceedings.[23]

The return of assets is possible under Articles 11, 54 (c) and 53, but there are few provisions relating to the bringing of actions, beyond a requirement to facilitate the State in accordance with national laws. Civil forfeiture requires only the standard of reasonable cause to believe that the accused's assets are connected with a crime. If the preponderance of evidence supports the view that a crime has occurred and an asset has been corruptly acquired, the owner of the asset must then show that his acquisition of the assets was not the result of corruption.

C. International Cooperation

1. The 'Dual Criminality' Concept

The 'dual criminality' principle (in some countries it is referred to as the 'double criminality' priciple) is a rule prohibiting the extradition of a fugitive unless the offence

[23] Linda M. Samuel, *Addressing the Weaknesses of U.S. Non-Conviction Based Forfeiture* (2007), *at* 7.

involves conduct that is criminal in both countries. A crime can be categorized as the same criminal act in more than one country if the crime is carried out in one country and is recognized as a crime in another country. Where anti-corruption provisions are concerned, the planning, preparation, execution, and the flow of money, goods, and services can all be relevant.

Since UNCAC does not explicitly define corruption in the same form as that stipulated by Indonesian law, 'dual criminality' involves a comparison of Indonesian law and the law of other states. Hence, to consider whether there is corruption as defined by UNCAC, it is also necessary to consider whether there is corruption according to the laws of both Indonesia and that of another country. This can create problems when the laws of Indonesia and the laws of another country have similar but not identical regulatory provisions.

2. Extradition

Extradition relates primarily to the transfer of criminals or suspected criminals from one country to another. It is the delivery either by agreement, or by reason of reciprocity of a person accused of a crime, or by someone who has been sentenced for a crime, by the state to which he has fled to a state with the jurisdiction to prosecute or punish him.

Indonesia's legislation governing extradition is *Act 1 of 1979*. *Law No. 1/1997* on extradition acknowledges the 'dual criminality' principle as applying to extradition. In 2007, Indonesia had bilateral extradition agreements with Malaysia,[24] the Philippines,[25] Thailand,[26] Australia,[27] Hong Kong,[28] South Korea,[29] and Singapore.[30]

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 in order to bring the perpetrators of corruption to justice.[31] Apart from the reference to permit civil action by one state to be brought in another, there is no provision within the Convention for mutual legal assistance to be given in civil proceedings. In other words, such assistance continues to be envisaged only in the context of criminal proceedings. One of the consequences of this omission is that 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, is a signatory to the ASEAN *Treaty on Mutual Legal Assistance in Criminal Matters*, and has agreements with Australia, Hong Kong, India and South Korea. The substance of *Law No. 1/2006* does not

[24] Ratified by *Law No. 9 of 1974.*
[25] Ratified by *Law No. 10 of 1976.*
[26] Ratified by *Law No. 2 of 1978*.
[27] Ratified by *Law No. 8 of 1994*.
[28] Ratified by *Law No. 1 of 2001*.
[29] Signed in 2001.
[30] Signed on 27 April 2007.
[31] Tim Daniel & James Maton, "Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials" in Mark Pieth, ed., *Recovery of Stolen Asset*s, *supra* note 20 at 250-251.

fully comply with UNCAC, particularly the exception to dual criminality and the applicable law with respect to certain offences between requesting and requested state parties. Indonesia should consider this exception and insert it in the new revision of the law on mutual assistance.

4. Cooperation in Law Enforcement, Investigation Techniques and confiscation

KPK, with its investigative mandate, should be provided with better access to international cooperation networks. It should explore training cooperation with other countries, including established institutions such as the CPIB (Singapore), the ICAC (Hong Kong) and other similar institutions.

VI. FINAL NOTE

UNCAC has had a tremendous impact on KPK's strategies in preventing and combating corruption in Indonesia under *Law No. 31 Year 1999*, *Law No. 20 Year 2001* and *Law No. 30 Year 2002*. To this end, the Government should seriously consider the compatibility of UNCAC 2003 within the Indonesian criminal system, so as to fundamentally change all the relevant laws and regulations addressing corruption and asset recovery in Indonesia – particularly the vice of corruption which is transnational in nature.