Mutual Legal Support For Cross-Jurisdictional Law Enforcement Among Asean Members (Efforts To Abolish International Dimensions Of Money Laundering In Indonesia)

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Article Info

Received: 2024-08-20
Revised: 2024-10-21
Accepted: 2024-12-30

Keywords:
Global economy, money laundering, global issue

Abstract

Transactional crimes, particularly cross-border money laundering, disrupt the global economy. Globalization and scientific and technological advancements have made money launderers able to work across borders and quickly escape to other countries to avoid being prosecuted. In many nations, this scenario leads to the phenomenon of transnational fugitives. Because of this, those who commit crimes against justice and humanity may go unpunished. Cross-border money laundering has grown to be a global issue that calls for a worldwide response. This crime has grown due to globalization, which has also made it simpler for offenders to escape to other countries to avoid being prosecuted. Injustice and impunity may result from this situation. This is because the extradition tool used up to this point has recently lost some effectiveness. Consequently, after the ratification of the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters 2004 (MLAT 2004), a different tool is required through Mutual Legal Assistance (MLA). This is meant to prevent offenders—particularly Indonesian fugitives who are still at large in Singapore—from going free. However, law enforcement against foreign TPPU in Indonesia must also be rebuilt, particularly regarding inbound extradition. It has not addressed human rights (HAM) or offered legal clarity thus far. The ASEAN principle of free movement of judgment is believed to prevent criminals from going unpunished, and the court should decide on overseas extradition to Indonesia. Recommendation: To combat cross-border money laundering, more formal agreements must be signed, and law enforcement and other nations must work together.

I. Introduction

The era of globalization, marked by advances in information technology and the implementation of trade liberalization (free trade) and visa-free policies in various countries, has created a free flow of goods and services between countries and given birth to a flow of human freedom to move across national borders for multiple purposes. This reality brings progress to world civilization while simultaneously negatively affecting human life. One of the adverse effects of globalization is the increasing transnational crime, especially money laundering and cross-border money laundering. Advances in information technology and transportation, for example, are often used by criminals to carry out their actions in various countries. At the same time, criminals can easily cover their tracks by fleeing to the jurisdiction of another country to avoid prosecution in the country where the crime was committed. This reality has given rise to international fugitives in various countries. Law enforcement officers often face difficulties catching the perpetrators because national borders and jurisdictions between countries frequently overlap and clash(Bingham, 2011).

In turn, weak law enforcement against these fugitives can give rise to impunity. The occurrence of impunity is certainly very contrary to justice and human values because the perpetrators of the crime do not receive legal punishment for the crimes they commit. Transnational crimes, including money laundering, are classified as crimes that do not recognize national borders (borderless crime)(Bohnel, n.d). Criminals can operate across jurisdictions worldwide in locations that are difficult to detect, making it difficult for law enforcement to uncover the identity and motives of the crime.4 Today's crime modes are increasingly developing along with the progress of the times. Money laundering activities are classically carried out through placement, layering and integration stages. Placement is the stage of placing or transferring funds from crime into financial institutions through specific methods that apply in the banking system. Layering is the process of separating the proceeds of crime from criminal practices through the use of a complex network of financial transactions. Integration uses legitimate transactions to hide income derived from illegitimate activities(Fukuyama, n.d).

The modus operandi of transnational crime, especially money laundering, is increasingly complex and sophisticated, along with technological advances in the global financial industry. It is no wonder that money laundering has now evolved to be on par with computer crime (high-tech crime), and some have even categorized this crime as an enemy of humanity (hostis humanis generis). Efforts to prevent and eradicate cross-border money laundering are often faced with the absence of a global criminal law system (lack of global criminal law), especially concerning cross-border fugitives. 8 This reality can result in fugitives escaping punishment, which leads to impunity, as happened to several Indonesian fugitives in Singapore due to the absence of extradition instruments between the two countries. Fugitives often use the absence of an extradition instrument to avoid the clutches of the law. Indonesia and Singapore once signed an extradition agreement in Bali on April 27, 2007. The signing was carried out by the Minister of Foreign Affairs of the Republic of Indonesia, Nur Hassan Wirajuda, and the Minister of Foreign Affairs of Singapore, George Yeoh, and witnessed by President SBY and Singaporean Prime Minister PM Lee Hsien Loong. The extradition agreement was signed as a package with defence cooperation. This caused only the Indonesian House of Representatives to ratify the extradition agreement. The extradition instrument has long been used as a legal instrument to hand over cross-border fugitives from the Requested

State to the Requesting State. The extradition instrument is even considered an absolute requirement for the surrender of fugitives. With the extradition instrument, fugitives can be handed over to the requesting state(Jessup, 2012). However, if seen in practice, the existence of the extradition instrument does not guarantee the surrender of fugitives to the requesting state, as seen in the Hendra Rahardja case and the Djoko S. Tjandra case. Hendra Rahardja is suspected of committing money laundering in Australia from proceeds allegedly derived from corruption in Indonesia when he served as a shareholder and Bank Harapan Sentosa (BHS) commissioner. Djoko S. Tjandra is a fugitive who fled to Papua New Guinea (PNG) in connection with the Bank Bali case. One day before the verdict, on June 10, 2009, fugitive Djoko S. Tjandra allegedly fled to Port Moresby, Papua New Guinea. Indonesia and Australia have signed an extradition agreement between Indonesia and Papua New Guinea.

Starting from the ineffectiveness of the extradition instrument as a law enforcement instrument against cross-border fugitives, an alternative instrument for extradition is needed, namely through the Mutual Legal Assistance (MLA) instrument or Reciprocal Legal Assistance in the criminal field. This is in line with the existence of the ASEAN Treaty on Mutual Legal Assistance (MLAT 2004), which all ASEAN member countries have ratified. With MLAT 2004, fugitives hiding in ASEAN jurisdictions should have been able to be arrested for trial. However, even though all ASEAN member countries have signed MLAT 2004, MLAT 2004 has never been implemented or enforced, even though this instrument regulates cooperation in localizing and identifying suspects in foreign jurisdictions. This is due to the influence of politics, economics, and other interests that hindered the implementation of MLAT 2004. In order to overcome the deadlock in the implementation of MLAT 2004, in the future, it is necessary to develop a form of cooperation between judicial bodies through the concept of "free-movement of judgment" in criminal matters where the decisions of each ASEAN member country can be recognized and executed in ASEAN jurisdictions reciprocally. Through this concept, it is hoped that law enforcement against criminals wherever they are can be implemented so that impunity can be avoided and universal justice values can be realized (Syahdeini, 2009).

This study uses the classical punishment theory, prioritizing corporal punishment for perpetrators. This theory is a response to the modern purpose of punishment in money laundering, which focuses more on asset recovery by the principle of "follow the money".The theory of the purpose of punishment itself has a plural target, namely combining the Utilitarian view and the Retributivist view, the purpose of punishment that requires beneficial consequences and the purpose that requires the achievement of justice through theological goals with the measurement of the principles of justice(Latifah,2016).

This study also uses the theory of universal jurisdiction because of the issue of money laundering crimes as part of the crime. Transnational crime has been classified as an enemy of humanity (hostis humani generis), so every country, especially in the Southeast Asian region, is interested in enforcing cross-jurisdictional law collectively and together(Kelsen, 1945). This theory is a basis for legal cooperation or integration between ASEAN member countries. It is hoped that with this theory, court decisions between ASEAN member countries can be recognized and implemented in foreign jurisdictions reciprocally so that there is no impunity for perpetrators wherever they are.

2. Research Method

To what extent can the MLA instrument be used as an alternative to the extradition instrument, especially to enforce the law against these cross-border fugitives?

This paper uses a doctrinal and qualitative research methodology, essentially based on the prevailing norms and the meaning of the existing reality. This study was put together using the normative juridical research type, legal research done solely by looking at secondary data or library resources. Secondary data, such as library materials such as official documents, library books, rules and regulations, scientific works, articles, and documents about the author's topic, are the source of data. Data collection and analysis methods are descriptive and rely on library study data collection methods.

3. Results and Discussion

The MLA instrument is an instrument of legal cooperation between countries in investigation, prosecution and court proceedings. Generally, this instrument is used in the framework of mutual legal assistance in the framework of witness exchange, account blocking, asset freezing and the process of proof in court. One of the scopes of cooperation in the framework of MLAT 2004 is cooperation, which includes localizing or identifying suspects (perpetrators) in foreign jurisdictions. This means that the MLA instrument can also be applied to "people" (suspects) so that in the event of the absence of an extradition instrument (lack of extradition), as in the case of relations between Indonesia and Singapore, the MLA instrument functions as an alternative. In other words, when an extradition instrument is available, the MLA can function as a complement to extradition. When an extradition instrument is unavailable, the MLA instrument is an alternative. This is possible because the two instruments coexist and complement each other (co-existence and supplementary instruments). As an alternative and complementary instrument to extradition, MLA is increasingly relevant following the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters 2004 (MLAT 2004), which all ASEAN member countries have signed. Previously, Indonesia had signed a bilateral extradition agreement with Malaysia, the Philippines, and Thailand, so MLAT 2004 strengthened legal cooperation with other ASEAN member countries. With the signing of MLAT 2004, the norms contained in MLAT 2004 become norms that apply and bind all signatory countries so that Indonesian fugitives who are still hiding in Singapore should be able to be handed over to Indonesia or at least the two countries can work together in order to identify and localize the suspects in the island nation. It is hoped that the Indonesian fugitives in Singapore can be tried and that there will be no impunity that hurts the sense of justice. 19

Implementing this MLA instrument is important to support economic integration within the ASEAN Free Trade Area (AFTA) framework and synergize law and economics to realize legal certainty and just order in the ASEAN region. This is important because of the increasing prevalence of money laundering crimes today; every country in the region must foster cooperation in cross-border law enforcement.

Indonesia itself has enacted various provisions for preventing and eradicating money laundering crimes in the country, such as Law No. 15 of 2002 as amended by Law No. 25 of 2003 and most recently by Law No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes. In addition, Indonesia is active in the Financial Action Task Force/FATF activities. The FATF20 recommendations are implemented by Indonesia even though Indonesia still needs to become a member of the FATF. For example, the FATF recommendation that requires national laws to meet international standards set by the FATF is also met by Indonesia. This is inseparable from the fact that money laundering is cross-border and part of transnational crime, so cooperation between countries, both bilaterally, regionally and multilaterally, is necessary.

The provisions that are used as a reference by Indonesia in the framework of cross-jurisdictional law enforcement cooperation related to transnational crime include:

a. Law No. 1 of 1979 concerning Extradition Treaties adopts a "volunteer" approach as seen in Article 2 paragraphs (1) and (2), which state that:
   (1) Extradition is carried out based on an agreement.
   (2) If there is no agreement, as referred to in paragraph (1), then extradition can be carried out based on good relations and if the interests of the Republic of Indonesia require it.
b. Law No. 1 of 2006 concerning Mutual Legal Assistance in Criminal Matters. This provision is generally used in the context of evidence and court proceedings.
c. Law No. 15 of 2008 on the Ratification of the Treaty on Mutual Legal Assistance in Criminal Matters. This law is a ratification of the MLAT 2004.

The debate on the effectiveness of the extradition instrument has recently grown, and some have even reached the point of the conclusion that the extradition instrument has proven ineffective because even though the extradition has been signed, it often finds difficulty in returning fugitives, as seen in the cases of Hendra Raharja and Djoko Chandra as mentioned above. On the other hand, without an extradition agreement, the fugitive can be handed over without any obstacles, as seen in the case of M. Nazarrudin, who was successfully handed over by the Colombian authorities to Indonesia even though the two countries do not have an extradition agreement.

As is known, extradition is a legal institution for various countries to cooperate in eradicating cross-border crimes, primarily to hand over perpetrators who have fled abroad (fugitives). Extradition treaties are seen as a form of "agreement" from a country to allow another country's sovereignty to be manifested against perpetrators of crimes in another country. In other words, a country may not take actions that are manifestations of its sovereignty (act of sovereignty) in another country except with the consent of the country concerned, which usually manifests as an extradition treaty. Starting from this understanding, the existence of an extradition instrument seems very decisive and absolute. Without an extradition instrument, fugitives seem impossible to hand over. This assumption is still strong today, even though the handover of fugitives often occurs without an extradition instrument.

Historically, a perpetrator of a crime must be handed over by the country where the perpetrator is located or hiding in the country where the crime was committed. This principle is based on the teachings pioneered by Hugo de Groot (Grotius), which are based on moral principles in international law and the teachings of natural law. This principle is known as the term “aut punere aut dedere", which is universal. This principle requires that every perpetrator of a crime must be tried and punished wherever they are. In practice, criminals who flee to foreign jurisdictions are often returned outside the extradition mechanism. For example, expulsion and deportation can be used, as well as the Interpol cooperation mechanism (red notice), including non-formal approaches such as cooperation between law enforcement. These mechanisms are channels used by many countries so that no criminal is free from punishment(Leasa,2010).

Recently, the extradition instrument's ineffectiveness has increasingly shown its reality in some instances, as mentioned above, showing an anomalous condition and inconsistency of the extradition instrument itself. This cannot be separated from the views of some legal experts who view the extradition instrument as a political instrument where the fugitive can or cannot be handed over to the requesting country depending on the political considerations of the country concerned (Requested State). Second, related to the nature and characteristics of the extradition instrument, some are mandatory, and some are optional. This means that the surrender of fugitives is a non-binding choice.

Given the nature of extradition, some experts have concluded that the extradition process will be increasingly complex and less effective. Starting from the ineffectiveness of the extradition instrument recently, the existence of the MLA has become essential and strategic to be used as an alternative to extradition along with the existence of MLAT 2004, which applies as a rule for all ASEAN member countries. However, although perpetrators of crimes can use the MLAT 2004 instrument to identify and localize fugitives in foreign jurisdictions, it turns out that this instrument has not been implemented as expected. This creates an anomalous condition which shows that although MLAT 2004 has been signed by all ASEAN member countries, including Indonesia and Singapore, and has been in effect as a rule that binds members, it turns out this instrument has never been used and implemented. This is due to political factors, the national economic interests of each ASEAN member, and the sentiments of and sovereignty—of different members, so MLAT 2004 is challenging to implement(Kusuma, 2001).

This is evident from the tug-of-war process between Indonesia and Singapore for the handover of fugitive Hartawan Ali; where in 2007, the fugitive's passport was revoked by the Indonesian Government, but this fugitive instead received Permanent Residence status in Singapore. This fugitive was only handed over to Indonesia more than 9 (nine) years later, even then because of the Sarinah bombing incident in 2016, which "forced" Singapore to hand over this fugitive to Indonesia in the hope that the Sarinah bombing incident would not have an impact on the island nation.

According to Singaporean law, foreign fugitives hiding in the country have the same rights as Singaporean citizens, namely the right to legal protection and Permanent Residence status. As long as the fugitive does not commit a crime in the country, the existence of the fugitive is not a problem for Singapore. The request for a fugitive to be handed over to the requesting country can only be approved by Singapore as long as it can be proven based on a final and binding court decision that the person concerned has been sentenced, which in Singaporean terms is called "the rule of law".

The negative impact on the world economy from this transnational crime is so significant that through a universal jurisdiction approach, especially against cross-border money laundering crimes, which requires that the perpetrators must be arrested and tried wherever they are, it is very necessary regardless of the existence or absence of an extradition instrument. In international customary practice, several doctrines or general principles can be applied as a breakthrough to the absence of an extradition instrument, namely:

a. Common interest

This principle is based on the existence of common interests between nations based on the reality that transnational criminals are already a common concern and even a common enemy of humanity (hostis humanis generis), which must be eradicated collectively. Therefore, whether or not there is an extradition agreement, morally and according to the principles of international law, criminals, wherever they are or are hiding, must be handed over from the country where the perpetrator of the crime is located to the country where the crime was committed. This is to the teachings of natural law and the principle of international law that every perpetrator of a crime must be punished wherever they are (aut punire aut didere).

b. Principle of Good Neighborhood

Good relations between two friendly countries can penetrate the absence of an extradition agreement. The absence of an extradition agreement is not an obstacle to handing criminals to the country where the crime was committed. The principle of

reciprocal good relations emphasizes the political will of the two countries governments concerned and is also a determinant factor for the surrender of fugitive criminals.

c. Principle of Pacta Sunt Servanda

Relationships and cooperation between countries are usually formalized through agreements, conventions, protocols, contracts or charters.25 Extradition agreements, for example, usually bilateral or Mutual Legal Assistance (MLA), are usually multilateral and broader than Extradition Agreements, which are forms of an agreement. The agreement contains the principle of pacta sunt servanda (agreements must be respected and obeyed), which contains rights and obligations. N legal norms in an international treaty containing rights and obligations require transforming into national law through legislative acts. 26 Through this process, legal consequences arise for its implementation. The binding power of an international treaty is strengthened by the act of ratification by the contracting states based on their respective national laws. The essence of an agreement is the existence of rights and obligations of each party to comply with the agreement's contents. Therefore, refusing to hand over a criminal who fled to the country where the crime was committed is a form of denial of the principle of pacta sunt servanda. Denial of norms in international law can even be seen as a denial of order, a delict in international law.27 Thus, the principle of pacta sunt servanda contained in MLAT 2004 is a legal norm in the ASEAN regional order that must be obeyed and complied with by each member, especially in enforcing the law against fugitives abroad.

d. Principle of Interdependence

Every country has the quality to be "interdependent". Interdependence between countries accommodates the birth of reciprocal rights and obligations. Therefore, the obligation to hand over fugitives to the requesting country can be carried out based on reciprocal interdependence. This is a manifestation of accepting the concept of dependence to maintain the international legal order. At a more implementation level, the existence of the MLA instrument that can function as an alternative to (the absence of) an extradition agreement is very strategic and very important. Not only because the ab, absence of extradition has also often been used as a reason to refuse the surrender of fugitives to the requesting country, but the exhibit stance about the existence of MLA alsoomel and MLA and tradition also coexist and complement each other (co-existence and supplementary instruments). In this context, if an extradition instrument is not available, MLA functions as an alternative. When an extradition instrument is available, MLA functions to complement the extradition instrument. As seen in practice, fugitives are surrendered based on an extradition agreement, but to present witnesses, confiscation, and the judicial process of the MLA instrument are vital. That is the essence of co-existence and complementarity.

The existence of MLA as an instrument that coexists and complements each other (co-existence and supplementary instruments) to extradition is essentially in line with the theory of the purpose of classical extradition, which emphasizes the importance of body law for the perpetrator. With the MLA covering the aspect of "identifying and locating suspects", this instrument can later be used as an instrument to enforce the law against the perpetrators, so the reason for Singapore's rejection of the surrender of fugitives from Indonesia based on the absence of an extradition instrument cannot be justified, especially with the existence of MLAT 2004 in ASEAN.

However, even though the MLA is positioned as an instrument that functions as an alternative, especially in the absence of an extradition instrument, various difficulties have been found at the implementation level. Once again, the influence of politics and economics, as well as the sentiment of sovereignty among ASEAN member countries, which is still very strong, especially the existence of a kind of doctrine of "non-

interference" in the affairs of each ASEAN member country, has caused MLAT 2004 to become a "dead" rule because it has never been implemented. MLAT 2004 should have been used to capture and repatriate fugitives across countries, or at least it could be used as an instrument to cooperate to identify and localize people in foreign jurisdictions(Kelsen, 1945).

Therefore, an international regime that can be enforced internationally, in line with the global trend, is needed through the concept of "free movement of judgment" in criminal matters. This concept requires that criminal court decisions from ASEAN member countries can be recognized and enforced. Children in foreign jurisdictions on a reciprocal basis. This concept allows Indonesian court decisions against fugitives abroad to be implemented in foreign jurisdictions. This concept is based on the principle of universal jurisdiction in international law, where every country is obliged to arrest international fugitives universally wherever they are based on the common concern of humanity. The application of universal jurisdiction is intended so that legal events not covered by other jurisdiction concepts are free of legal reach. This concept is undoubtedly extended to perpetrators of transnational crimes, including those who commit cross-border money laundering(Tianotak, 2011).

However, applying the concept of "free movement of judgment" requires political will from the leaders of ASEAN member countries. Because, after all, even though it is by the principle of international law that perpetrators of crimes must be tried wherever they are (aut punire aut dedere), the political will to implement the concept of "free movement of judgment" is imperative as part of the process towards "legal integration" in ASEAN. This is by the theory of universal jurisdiction, which states that future decisions between ASEAN countries can be recognized reciprocally in the jurisdiction of each ASEAN member. Thus, impunity against perpetrators can be overcome and avoided.

4. Conclusion

Extradition is a legal institution or instrument in international law to establish cooperation in law enforcement across jurisdictions to hand over fugitive criminals who have fled to countries with criminal jurisdiction over the perpetrators. However, the existence of an extradition treaty often does not guarantee that fugitives will be handed over to the requesting country, so extradition is seen as increasingly ineffective. Therefore, Mutual Legal Assistance (MLA) can be an alternative to extradition. This is possible because MLA and extradition are side by side and complementary (co-existence and supplementary instruments), so cross-jurisdictional law enforcement against fugitives can still be carried out without an extradition agreement. Cross-jurisdictional law enforcement against fugitives with Mutual Legal Assistance (MLA) instruments needs to be implemented regardless of whether there is an extradition instrument. The obstacles to implementing MLAT 2004, which have political, economic, and other dimensions, must be considered a reality that can be overcome through good relations. Applying the concept of "free movement of judgment" in criminal matters is a breakthrough that can be used in moving towards "legal integration". This concept needs to be promoted so that in the future, Indonesian court decisions can be implemented on a reciprocal basis, and impunity for money laundering perpetrators can be prevented and avoided.

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