

# The Implementation of the Double Criminality Principle in the Extradition Treaty of Corruptors Indonesia

**Lynda Asiana<sup>a</sup>, Supanto<sup>b</sup>, Hari Purwadi<sup>c</sup>**, <sup>a</sup>Students of Ph.D Law Programs Faculty of Law University of Sebelas Maret Surakarta Indonesia, <sup>b</sup>Professor of Criminal Law Faculty of Law, University of Sebelas Maret Surakarta Indonesia, <sup>c</sup>Associate Professor of Faculty of Law University of Sebelas Maret Surakarta, Indonesia, Email: <sup>a</sup>[lyndaasiana@yahoo.co.id](mailto:lyndaasiana@yahoo.co.id), <sup>b</sup>[supanto.8787@gmail.com](mailto:supanto.8787@gmail.com), <sup>c</sup>[hpurwadie@gmail.com](mailto:hpurwadie@gmail.com)

The main issue in the extradition of corruptors who escape overseas and bring away the money is the implementation and enforcement of the double criminality principle. UNCAC 2003 declared that corruption is a serious matter, and attracted international attention for immediate prevention, especially by UNCAC 2003 participating countries. However, the efforts to eradicate corruption through the implementation and enforcement of the double criminality principle face obstacles. These obstacles are related to the sovereignty of the participating countries that are obliged to protect their national interests, and adopt the system for determining extradition on the basis of the double criminality principle and the formulation of criminal acts of corruption made by UNCAC 2003. Some of the participating countries demand expedience in allowing people to come to the country, conduct trade transactions, or travel. In addition, another obstacle is the difference in perceptions regarding what crimes are included in the list that can be extradited. This research used the normal-empirical legal research method. This research is applicative in the implementation and enforcement of the double criminality principle in the case of criminal acts of corruption committed by a runaway corruptor. The conclusions of this research are first: the cause of arising obstacles in the implementation and enforcement of double criminality principle to the perpetrator of runaway corruption is that there is no extradition agreement, no state sovereignty obliged to protect its national interests, the absence of diplomatic relations, jurisdiction issues, and the poor relations between the Requesting State and the Requested State. For this reason, the implementation of the double criminality principle for the

future, especially in Indonesia, requires an extradition treaty, the implementation of the principle of *Aut Dedere Aut Punere*, which needs to be realized, understood, and enforced consistently, diplomatic, reciprocity relations, and that the UNCAC 2003 must immediately define and formulate the criminal act of corruption so that there will be congruity among all participating countries in the UNCAC 2003.

**Key words:** *Double Criminality Principle, Extradition Treaty, Corruption.*

## Introduction

One principle of the law regarding extradition is the double criminality principle, which in Indonesian is called *asas kejahatan ganda*. The double criminality principle is inherent in the norms of extradition law and can always be found in national treaties and legislation on extradition. Even though the formulation is not exactly the same, the spirit is. This principle is inseparable from practical problems that arise and occur in practice (Wayan, 2009). In the history of extradition, the Peace Agreement between King Ramses II of Egypt and Hattusili II of Kheta was written in 1270 BC. It was recognized by scholars that the agreement contained the substance of extradition or the surrender of fugitives. The agreement contained a provision stating that both parties promised to surrender perpetrators fleeing crimes or those found in the territory of another party (Arthur, 1969). In the Criminal Code there is a principle of law called the active national principle. It is contained in Article 5 paragraph 1 sub – 2 of the Criminal Code. The active national principle is the second principle of the enactment of an important national criminal law after the territorial principle. Article 5 paragraph (1) sub-2 of the Criminal Codes states: Criminal provisions in Indonesian legislation are applied to citizens outside Indonesia who have committed one of the acts which, by Indonesian law, is considered a crime according to the state legislation in which that act was carried out. The provision of Article 5 paragraph (1) sub 2 of Criminal Codes adheres to the dual criminality principle, namely the principle of equality of criminal threats or the similarity of certain criminal acts according to the criminal law applied in both countries. If this principle is not fulfilled in the statutory provisions of the two countries, the perpetrator cannot be extradited to the requesting state. In addition to the dual criminality principle, international criminal law has admitted other agreements related to this principle, such as the agreement on the recognition of the validity of foreign judgement or the Treaty on The Transfers of Criminal Proceedings (Romli, 2010).

Another problem in the extradition of runaway criminals is that if the crimes committed are political crimes, crimes that are subject to capital punishment, and military crimes. People who have committed such crimes, according to international law, cannot be extradited to other countries (non-extraditable crimes). In the context of international criminal law enforcement,

the implementation of the double criminality principle deals with the rights of another country, which are called the exclusive rights of a country. Exclusive rights are the rights of a country to carry out state jurisdiction in the territory of the country concerned, in the sense that a person must be punished when the person concerned commits a crime. This exclusive right is an absolute right of a country. The exclusive right of a country with the principle of *Aut dedere aut penere* obliges each country to prosecute and punish every criminal who is in the territory of the country concerned (Romli, 2010). The principle of *Aut dedere aut penere* is Grotius doctrine that requires every criminal who escapes from a country that has jurisdiction over his crime, regardless of whether his crime contains political motives, intentions and objectives, to be transferred back to the country concerned. The principle of *Aut dedere aut penere* still has a huge influence in the world of extradition theory and practice, including corruption.

Corruption as an Extra Ordinary Crime (Barda, 2005) (implied in the Consideration of Law Number 31 of 1999 and Law Number 20 of 2001 along with the Explanation of the both laws) has become an international concern. This was proven in the 2003 United Nations Convention Against Corruption (UNCAC). UNCAC encouraged participating countries to fight corruption, which was increasingly rampant. In accordance with the background of this convention, the general principle contained in the United Nations Convention Against Corruption is that corruption is a very serious problem and has become an international problem that requires prevention and joint handling. The corporation remains a principle of equality and territorial integrity so that there is no intervention in domestic problems of other countries. However, efforts to eradicate corruption listed in UNCAC, especially regarding the principle of double criminality, deals with obstacles in the practice of its implementation, in addition there is no clear regulation in UNCAC. The UN Convention, in combating corruption, is focused on fighting corruption through criminal proceedings.

### **Statement of the Problem**

From an international perspective, corruption is classified as a white-collar crime (Muladi dan Barda, 1992). As such, it is complex and draws the attention of the international community. White Collar Crime is formulated as a crime committed by people who have a high social position and are respected for their work. The term white-collar crime contains two elements, namely the status of the perpetrator, and that the crime committed is related to the character of a particular job or position. These two elements distinguish it from the blue-collar crime (Muladi dan Barda, 1992). The 8th United Nations Congress on Prevention of Crime and Treatment of Offenders, which adopted the resolution of Corruption in Government in Havana in 1990, formulated the effects of corruption. This was also strengthened later by the 2003 UNCAC in the form of:

1. Corrupt activities of public officials:
  - a. can destroy the potential effectiveness of all types of governmental programmes.
  - b. hinder development.
  - c. victimize individuals and groups.
2. There is a close relation between corruption and some forms of economic crime, organized crime, and illicit money laundering (Barda, 1998).

Another problem related to the double criminality principle is if the state expects the statutory provisions of both the Requested Country and the Requesting State to be similar. The demand for such problems can be unrealistic and counterproductive. It is now generally accepted that when the laws of the Requesting State and the laws of the Requested State appear to be the same basic crime, this is enough to form the basis of double criminality. Based on the description above, the main problem that will be examined is how the double criminality principle in the extradition treaty against the perpetrators of corruption can be implemented. To answer this question there are several problems formulated as follows:

1. What obstacles are related to the implementation and enforcement of the double criminality principle in the extradition process against runaway corruption perpetrators in Indonesia?
2. What is the implementation of a double criminality principle to perpetrators of corruption in the future?

### **Research Objectives**

The purpose of this study is to establish the implementation of double criminality principle on corruption committed by runaway corruption perpetrators who often cause legal problems, especially for the sovereignty and national interests of other countries, and particularly in regard to the efforts to recover national assets the perpetrators had taken abroad. With the concept of the implementation of the double criminality principle in the extradition treaty on the perpetrators of corruption, which is based on national sovereignty and interests between countries (the requested state and the requesting state), there will be a synergy between the implementation of the double criminality principles, state sovereignty, as well as the national interests of the state. Thus, a harmonious collaboration between countries will be created in order to maintain world order based on independence, lasting peace and social justice as formulated in paragraph IV of the opening of the 1945 Constitution.

## Literature Review

Theoretically, the entry of international law into national law can be achieved through ratification, adoption, and customary International law. With the act of ratifying the UN Convention Against Corruption, Indonesia commits and applies the UN Convention Against Corruption in Indonesia. Indonesia signed the UN Convention Against Corruption (UNCAC 2003) with the issuance of Law No. 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption, 2003 (United Nations Convention, 2003). In the UN Convention Against Corruption (the United Nations Convention Against Corruption / UNCAC), it is stated that there are three groups of people who can be involved in a criminal act of corruption, namely: government officials, foreign government officials and people who lead or work in the capacity of the private sector. The significance of ratification via Law No. 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption, 2003 is:

- a. To enhance international cooperation, especially in tracking, freezing, confiscating, and returning assets resulting from corrupt acts located abroad;
- b. Increasing international cooperation in realizing good governance;
- c. Increasing international cooperation in the implementation of extradition agreements, mutual legal assistance, transfer of prisoners, transfer of criminal processes, and law enforcement cooperation;
- d. Encouraging technical cooperation and information exchange in prevention under the economic development cooperation and technical assistance at the bilateral, regional and multilateral scope, and
- e. Harmonization of national legislation in the prevention and eradication of criminal acts of corruption in accordance with this convention.

In accordance with the concept of international law, sovereignty has three main aspects, namely (Nkambo, 1968)

1. External aspects of sovereignty, namely the right for every country to freely determine its relationship with various countries or other groups without pressure or supervision from other countries;
2. Internal aspects of sovereignty, namely the exclusive right or authority of a country to determine the forms of institutions, the way the institutions work and the right to make laws and actions to comply; and
3. Territorial aspects of sovereignty, which means full and exclusive power that is owned by the state over individuals and objects contained in the territory of the country.

The problem becomes different if it is linked to the sovereignty of the state and the national interest of the state is requested (requested state). Even though it has fulfilled the double

criminality principle, extradition can be carried out. However, if the extradition of the requested person (and return) of the assets of the country are taken away abroad through Mutual Legal Assistance, interferes with national interests, or does not comply with the geographical and socio-cultural conditions of the country requested, these conditions can complicate the extradition process (and the process of returning the country's assets that were taken away from the country). A concrete example is that of Singapore.

#### **A. Principle of Non-Extradition of Political Criminal**

Political crimes are closely related to the recognition of human rights contained in the declaration of human rights, which is that every person has the right to seek and enjoy political protection from other countries. This is related to the granting of political asylum by the recipient country as a political asylum.

#### **B. Principle of Non-Extradition Nationality**

The Requested State is given the power not to surrender its citizens to the Requesting State in connection with the crimes committed in the country with the consideration that each country is obliged to protect its citizens, because it is feared whether the Requesting State will try honestly and fairly.

#### **C. Regional Principle**

A crime that has been committed in a whole or in an area that is included or deemed not to be included in the jurisdiction of the Requested State, this country may refuse an extradition request.

### **Results and Discussion**

#### **A. *The inhibiting factors of the implementation of the double criminality principle in the extradition treaty of perpetrators of corruption in Indonesia***

##### **1. State sovereignty factor**

State sovereignty is defined as the highest power possessed by a country to freely carry out various activities in accordance with its interests provided that such activities do not conflict with international law. The necessity of the submission of the state to international law governing international relations as a condition of the realization of an international order, including the international economic field, is something that cannot be avoided anymore. Example: the arrest of Gayus Tambunan in Singapore. Even though Singapore ratified the 2003 UNCAC into its national legal system, the Singaporean Government refused the Indonesian Government's request to hand over Gayus Tambunan to the Indonesian Government to be prosecuted by the Indonesian Court. The reason for the refusal of the Indonesian Government's request was related to the life of the Singapore economy. Singapore's economic life relies heavily on world trade and tourism, and for this reason the

Singapore Government wants to allow people to come to their countries and conduct trade transactions or just to travel. In view of this, Singapore considers that extradition agreements with Indonesia will not support Singapore's national interests, especially if you remember that the number of Indonesians who stopped in Singapore was far higher than the number of Singaporeans who came to Indonesia.

2. Differences in the legal system and the concerns of the Requesting State to act discriminatively in the court (unfair trial)

The duration of extradition to Hendra Raharja was due to differences in the legal system between Indonesia and Australia. The legal system adopted by Indonesia is Continental European and is in the form of a Unitary State. In the continental European legal system, the law was created by the executive body with the approval of the legislature. Legalized laws will apply throughout the territory of Indonesia.

Australia combines two (2) legal systems namely Common Law and Statute Law. In the Common Law system, the Judge creates laws (Judge Made Law) and the Judge's decision is based on previous cases (Precedent). Judge made law and precedent apply throughout Australia. The Statute Law System is the law produced by parliament which is manifested in the form of legislation.

The implementation of Hendra Raharja's extradition was rejected on the grounds that in addition to differences in the legal system, there were also strong concerns that the Indonesian Court would act in a discriminatory manner because he was of Chinese descent. He feels that he will not get justice in the judicial process in Indonesia.

3. Differences in the perception of criminal acts included in the list of crimes that can be extradited

This difference occurs between the Government of Indonesia and the Government of Singapore. For Singapore, smuggling is not a criminal act, because all goods that enter Singapore (though unofficially) must be reported, so for Singapore the item is legal. This is reinforced by Singapore's extradition law that smuggling is not included among the crimes that can be extradited. For Indonesia, smuggling is detrimental to the economic interests of the country and is included in the category of corruption as in the case of Gayus Tambunan. This means that between Indonesia and Singapore the double criminality principle is not fulfilled, because it is not included in the list of crimes that can be extradited through the extradition law.

Against the obstacles mentioned above, there are exceptions to the implementation of the double criminality principle, namely in terms of fulfilling the principle of reciprocity.

Example: the case of arresting M. Nazarudin. Indonesia and Colombia have no extradition agreements and no diplomatic relations, but between the Governments of Indonesia and Colombia there is a good relationship. Thus, for fulfilling Indonesia's request to arrest M. Nazarudin, who was then handed over to Indonesia, the Colombian Government takes expulsion or deportation as an instrument extradition. A person is expelled or deported to a country that is looking for him because the person has committed a crime according to the law. This situation is referred to as de facto extradition or often called disguised extradition. According to O'Connell, disguised extradition occurs when extradition cannot be conducted in the normal way. In this case the application of the double criminality principle is based on an unregistered crime system (O'Connell, 1970).

B. The implementation of the double criminality principle to criminal acts of corruption in the future. To overcome the obstacles and problems related to the extradition of escape criminals and the return of state assets or assets carried away by these criminals, the implementation of the double criminality principle in the extradition treaty of future perpetrators of corruption in Indonesia must meet the following conditions:

1. Each country must have an extradition treaty with other countries.
2. The principle of *aut dedere aut punere* that underlies the extradition treaty must be fully understood and realized by all countries, especially the UNCAC participating countries. For this reason, there needs to be an international convention that recommends that each country has an extradition treaty with another.
3. International cooperation in the field of eradicating crime, especially corruption needs to be improved in view of the progress of science and technology, especially in the field of international transportation and communication. On that basis the crime classification system does not need to use a list system because the dynamics of international development are very fast and accelerative.
4. There needs to be a legal instrument that allows an asset resulting from corruption or other crimes to be confiscated by the state without having to undergo legal proceedings through a court beforehand. This is known as a non-conviction based (NCB) asset forfeiture in rem forfeiture.
5. UNCAC 2003 immediately defines and formulates criminal acts of corruption so that there is similarity regarding corruption in countries participating in the UNCAC convention. This similarity is important in the implementation of the Double Criminal Principle on criminal acts of corruption, so that the Requested State can no longer refuse the extradition of runaway corruptors because of the non-fulfillment of the Double Criminal Principle.



## **Conclusion**

- a. The implementation of the double criminality principle faces obstacles caused by the sovereignty of the state is requested, the absence of good relations on the basis of reciprocity, the disruption of the national interests of the state requested, and the absence of obligations regarding the state asked to catch a perpetrator of corruption.
- b. The implementation of the double criminality principle to perpetrators of corruption in the future must meet the requirements set by UNCAC 2003, specifically the formulation of criminal acts of corruption for countries participating in the 2003 UNCAC convention.



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