**A Light Notes on Asset Recovery in the Indonesian Anti-Corruption Law**

by

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**Abstract**

Corruption in Indonesia has been serious and violates the citizen’s rights of social, economic, and political despite of financial state loss and economy of Indonesia. Corruption has been widespread, threatened, and endangered to countries. This condition has warned Indonesia to start the perspective that to tackle corruption it needs to use all of the extraordinary measurements. The Corruption Perception Index 2019 of Indonesia put Indonesia in the rank 85 out of 180 countries, with a score of 40 out of 100. Corruption is still a serious crime in Indonesia. Though Indonesia has released several methods categorized as extraordinary measurements, such as the existence of Corruption Eradication Commission as a focal point in corruption eradication, the establishment of the special court on corruption through Law Number 46 of 2009, the use of reversal of the burden of proof in particular corruption such as gratuity, public officials wealth report (known as LHKPN), and many more. Indonesian law on anti-corruption did not give a specific mechanism of asset recovery as mandated by the United Nations Convention against Corruption (so-called UNCAC), but implicitly in the law. Indonesia has already the Integrated Asset Recovery System (IARS) but for a criminal asset in general, as regulated in the Prosecutor Regulation Number 9 of 2019 concerning the amendment of the Prosecutor Regulation Number 027/A/JA/10/2014 concerning Guideline of Asset Recovery. The ideal law enforcement for economic crime and trans-organized crime is not only punished crime offenders but also returning assets of crime and/or related to the crime to the entitled parties. It means that law enforcement in corruption must be set the goal in prevention, eradication, and asset recovery. Thus in the corruption context in Indonesia, law enforcement has adhered to the anti-money laundering charge to the forfeited criminal asset itself.

Keywords: Corruption, Asset Recovery, Law Enforcement, and Obstacles

**Indonesian Anti-Corruption Regime in the Perspective of UNCAC’s Compliance**

Law Number 20 of 2001 concerning the amendment of Law Number 31 of 1999 did not explain the definition of corruption act. The legal definition of corruption can be found in Law Number 19 of 2019 concerning the second amendment of Law Number 30 of 2002 concerning the Corruption Eradication Commission (so-called Law on Corruption Eradication Commission). Article 1 number 1 of the Law on Corruption Eradication Commission defines that the corruption act is a criminal act as mentioned in the primary law that arranges eradication of corruption. It means corruption has no definition but more categorization of corruption acts as mentioned in primary law on corruption. Article 1 number 4 of the Law on Corruption Eradication Commission then explain that Corruption eradication is a set of activities to prevent and eradicate the occurrence of corruption through coordination, supervision, monitoring, preliminary investigation, investigation, prosecution, examination in the proceeding with the public participation following the provision of laws and regulations. Therefore according to the law on Corruption Eradication Commission, corruption eradication is not yet inserting any kind of asset forfeiture embedded in the process of tackling corruption itself. However, the primary material law on corruption has been elaborating on the perspective of asset recovery.

Global Corruption Barometer 2019[[1]](#footnote-1) in its survey mention that 65% of people thought corruption in Indonesia increased in the previous 12 months, and 24% of public service users paid a bribe in the previous 12 months. The World Justice Project (WJP)[[2]](#footnote-2) released the reports on Rule of Law 2020, and mention that Indonesia is in the rank 59 of 128 countries, with a score of 0.53 on a scale 0 – 1. While from the surveys on the absence of corruption, Indonesia is in a score of 0.39 with a score rank 92 of 128 countries. Indonesia has a score of 0.55 with rank 49 of 128 countries and territories for the Open Government. This result shows that there is serious homework for Indonesia to give concern in the upgrading the profile of the absence of corruption in Indonesia.

There are 3 (three) institutions that appointed to be the investigator of corruption cases namely Police, Prosecutor, and Corruption Eradication Commission (= as a focal point), and two of them appointed to be the prosecutors in corruption cases namely Prosecutor and Corruption Eradication Commission. Corruption Eradication Commission has been established since 2002 and acts as the focal point in corruption cases.

As it is well understood, to get an effective anti-corruption regime, a country must be conformed to the International Standards. It needs national law and regulation harmonization to the International principles and standards that have been set by the International Community. Indonesia has ratified United Nations Convention against Corruption since 2006 through Law Number 7 of 2006 concerning the ratification of the United Nations Convention against Corruption. Through this law, Indonesia has been politically located as one of Asia’s countries that have a commitment to the eradication of corruption through International Cooperation. Corruption in its nature has been a widespread and systemic crime. It harms and damages pillars of the economic life of the country. UNCAC is the International treaty-based crime that promotes equality of sovereignty principle, equality of rights, the integrity of the territory, and non-intervention in the domestic affairs of other states principle as mentioned in article 4 of UNCAC. Chapter V concerning Asset Recovery and Article 31 concerning freezing, seizure, and confiscation become one of the main important provisions in the regime of anti-corruption nowadays. UNCAC reminds us also about the links between corruption and other forms of crime in particularly organized crime and the economic crime, including money laundering. Through UNCAC, it can be understood how is the impact of corruption, and how corruption will link to other organized and economic crime itself. In its preamble, UNCAC mentioned that cases of corruption are involved in vast quantities of assets. It may constitute a substantial proportion of the resources of States. Corruption is threatening the development of the State.

UNCAC is not only an International Standards or Guidance, but it is used also as an instrument for the countries who become a member to achieve purposes as constituted in Article 1 (Statement of Purpose) of this Convention as:

1. To promote and strengthen measures to prevent and combat corruption;
2. To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
3. To promote integrity, accountability, and proper management of public affairs and public property

Refer to the explanation above, UNCAC is having the purpose to promote any kind of good shape of an instrument to make corruption decrease and law enforcement of it become more effective.

Related to the criminalization, the table below will show the comparative provision between Indonesian Law on Corruption and UNCAC, as:

**Table 1: Criminalization of Corruption’s Comparison**

|  |  |  |  |
| --- | --- | --- | --- |
| **Law Number 31 of 1999 in conjunction with Law Number 20 of 2001** | | **United Nation Convention Against Corruption (UNCAC)** | |
| **Category** | **Art** | **Category** | **Art** |
| State financial loss | Art 2, 3 | Bribery of national public officials | Art 15 |
| Bribery | Art 5 sub (1) a;  Art 5 sub (1) b; Art 13; Art 5 sub (2); Art 12 a; Art 12 b; Art 11; Art 6 sub (1) a; Art 6 sub (1) b; Art 6 sub (2); Art 12 c; Art 12 d | Bribery of foreign public officials and officials  of public international organizations | Art 16 |
| Embezzlement in office | Art 8; Art 9; Art 10 a; Art 10 b; Art 10 c | Embezzlement, misappropriation or  other diversions of property by a public official | Art 17 |
| Extortion | Art 12 e to Art 12 g | Trading in influence | Art 18 |
| Fraudulence | Art 7 sub (1) a – d; Art 7 sub (2); Art12 h | Abuse of functions | Art 19 |
| Conflict of Interest in Procurement | Article 12 i | Illicit Enrichment | Art 20 |
| Gratuity | Art 12 B in conjunction with Art 12 C | Bribery in the private sector | Art 21 |
| **Other Crime Related to Corruption** | | Embezzlement of property in the private sector | Art 22 |
| Category | Art | Laundering of proceeds of crime | Art 23 |
| Obstruction of the process of corruption examination / Obstruction of justice | Art 21 | Concealment | Art 24 |
| Does not provide information or provide false information | Art 22 in conjunction with Art 28 | Obstruction of justice | Art 25 |
| The Bank that did not provide the suspect’s account information (Secrecy of customer’s account) | Art 22 in conjunction with Art 29 |  |  |
| Witnesses or experts who do not provide information or provide false information | Art 22 in conjunction with Art 35 |  |  |
| The person who is holding the secret of the office that does not provide information or provide false information | Art 22 in conjunction with Art 36 |  |  |
| The witness who disclosed the reporter’s identity | Art 24 in conjunction with Art 31 |  |  |

Further, UNCAC introduces the new forms of international cooperation that domestic law shall adopt, such as transfer of a sentenced person (inter alia Article 45), transfer of criminal proceeding (inter alia Article 47). Based on table 1 above, it can be understood that there are different points of view and emphasizes the criminalization. The main characteristic of corruption in Indonesia is the violation of Article 2, and Article 3. Those two articles must not be replaced or eliminated due to the request to fulfill to UNCAC compliance. Regarding Article 2 and Article 3, Romli Atmasasmita[[3]](#footnote-3) explain as follow:

Article 2 and Article 3 of the Anti-corruption Law constitute genuine corruption. And specifically in Indonesia must be interpreted not only as physical punishment but also as financial punishment and social punishment which leads to a “cost and benefit” approach. Hence the State will not be harmed and the offender receives a fair punishment but still maintained the legal certainty.

There should be no doubt that Article 2, Article 3 must be maintained in the future law on anti-corruption. In this regard, Muladi[[4]](#footnote-4) re-emphasize the relationship between corruption criminalization and the Indonesian Bill of Criminal Law as follow:

1. Core crimes will follow Law Number 20 of 2001 concerning the amendment of Law Number 31 of 1999 concerning Eradication of Corruption, Article 2 and Article 3 of the Law on Anti-corruption
2. All specialties related to corruption remain apply, both related to material criminal law and procedural criminal law while.....
3. The upcoming challenge is to implement the renewal of the Law on Anti-corruption in regarding with ratification of UNCAC 2003 through Law Number 7 of 2006.

Even though in the same category, there is a fundamental difference between Art 2 and Art 3 of the Anti Corruption Law. Art 2 regulates that:

|  |  |
| --- | --- |
| Article 2 (1) | Article 3 |
| * Anyone; * unlawfully enriching himself and/or other persons or a corporation; * in such a way as to be detrimental to the finances of the state or the economy of the state; * shall be liable to life in prison, or a prison term of not less than 4 (four) years and not exceeding 20 (twenty) years and a fine of not less than IDR 200,000,000 (two hundred million rupiahs) and not exceeding IDR 1,000,000,000 (one billion rupiahs) | * Anyone; * To enrich himself or other persons or a corporation; * abusing the authority, the facilities, or other means at their disposal due to rank or position; * in such a way that is detrimental to the finances of the state or the economy of the state; * shall be liable to life imprisonment or a prison term of not less than 1 (one) year and not exceeding 20 (twenty) years and/or a fine of not less than IDR 50,000,000 (fifty million rupiahs) and not exceeding IDR 1,000,000,000 (one billion rupiahs) |

Concerning to Art 2 (1), then subparagraph (2) of Art 2, mention that the punishment can be increased in the form of Capital Punishment as a weighting of punishment’s reason whenever the corruption is conducted under certain circumstances such as there is a natural disaster, repetition of a criminal offense of corruption, or a State is in the monetary and economic crisis.

On January 18th, 2020, one online newspaper, Kompas[[5]](#footnote-5), release an Info-graphic concerning 7 (seven) biggest corruption cases in Indonesia

1. Jiwasraya Case. The estimation of the financial state loss in the case is IDR 13.7 Trillion. After carrying out investigations since 17 December 2019, the Attorney General’s Office declare 5 people as accused, namely:

* President Director PT. Hanson International Tbk: Benny Tjokrosaputro
* Former Finance Director PT. Asuransi Jiwasraya: Harry Prasetyo
* President Commissioner PT. Trada Alam Minera Tbk: Heru Hidayat
* Former President Director PT. Asuransi Jiwasraya: Hendrisman Rahim
* Retired person of PT. Asuransi Jiwasraya: Syahmirwan

1. Century Bank case. In this case, the country of Indonesia suffered a loss of IDR 7 Trillion. This case dragged several big names. One of them is Budi Mulya that has been sentenced to 15 years of imprisonment.
2. Case of Pelindo II. Indonesian State Audit Bureau issued a report on state losses due to alleged corruption at Pelindo. It involved four projects at PT. Pelindo II, and caused state losses of up to IDR 6 Trillion. This case dragged the name of the former president director of PT. Pelindo, RJ Lino, and has been determined as accused since 2015.
3. Kotawaringin Timur Case. It is a corruption case that dragged the Regent of Kotawaringin Timur, Supian Hadi, that caused the State to suffer IDR 5.8 Trillion. The Regent is suspected of abusing his authority in issuing business permits to PT. Fajar Menyata Abadi, PT. Billy Indonesia, PT. Aries Iron Mining in 2010 – 2012
4. BLBI (Bank Indonesia Liquidity Assistance) happened in Indonesia during the economic crisis in 2008. Based on the calculation of the State Audit Bureau in the case of the Bank Indonesia Liquidity Assistance certificate, the State suffered a loss of IDR 4.58 Trillion.
5. E-KTP Case (electronic Social Security Number) has created the state financial loss for IDR 2.3 Trillion based on the calculation of the State Audit Bureau. This case is involving big politicians, name Indonesian Former Chairman of House Representatives, Mr. Setyo Novanto, then Andi Narongong, and Irman Gusman.
6. The Hambalang Case, that happened during the leadership period of previous President. The result of the State Audit Bureau said that the case of the Hambalang athlete homestead project caused state losses to IDR 706 Billion. Several important high political profiles were involved. They are the former chairman of the Democratic Party; former treasurer of the Democratic Party; former minister of youth and sports and one member of the Indonesian House of Representative from the Democratic Party.

According to the cases mentioned above actually shows that corruption and the state financial losses are very serious to be handled since the financial loss of Indonesia reached trillions of rupiahs. The corruption has involved central government and local government. Corruption creates suffer for Indonesia. There are several difficulties also to calculate the total loss of state finance itself. For example in the case of Pelindo II a case that starts to investigate in 2015). The Corruption Eradication Commission finds difficulty to count the state finance loss since the Government of China’s authority does not give Corruption Eradication Commission to access the data of QCC (Quay Container Crane) produced by Wuxi Huangdong Heavy Machinery (HSHM) who operate in China. The accused in this case is ex-President Director of Pelindo II, Richard Joost Lino (RJ Lino) and some other accused.

Art 4 of Anti-Corruption Law states that:

Compensation for losses inflicted upon the finances of the state or the economy of the state shall not annul the punishment of the perpetrator of a criminal act of corruption as referred to in Article 2 and Article 3.

Thus, Article 4 explains in the way to understand how is the position of compensation for the losses caused by corruptors in the process of punishment itself. It means that compensation from the corruptor may only bring impact for judges to consider that compensation is an obligation for corruptor to give back the state financial assets to the Indonesian State, and the judge will consider it as a reason to reduce punishment, not to annul. According to Romli Atmasasmita, Article 2 and Article 3 have been in line with the UNCAC 2003 strategy in terms of eradication and asset recovery.[[6]](#footnote-6) While Article 4 has been contrary to the objective of corruption asset recovery and prevention strategies because there will be no suspect who intends to return the state asset while surrendering himself to be prosecuted and on trial.[[7]](#footnote-7) The analysis of Article 4 aforementioned is logical, but it can be illogic when connecting it to a reason that anyone steals someone’s money, they have to return or repay, and they have to be punished still as a deterrence effect, but it can be used by judges to give leniency for the offender. Article 4 can be used to put as a mechanism to ensuring assets of the state that have been lost will be returned to State.

**Regulations on Asset Recovery in Corruption Cases.**

Corruption eradication shall be focused on three main areas; those are prevention, eradication, and asset recovery. As it is well understood, corruption is a serious crime with serious impact on society, not only for domestic but also threatens other country. It is well understood that corruption is not a local phenomenon, but also a transborder crime. It is needed to make effective the regime of asset recovery itself. This development shall focus not only on its prevention effort and eradication effort by punished corruptors but also actions to recover state financial losses resulted by Corruption. The mindset must be not only to use “Follow the offender/perpetrator” only but must use the “Follow the money” approach. The success to bring and return the stolen asset resulted from corruption will bring a successful meaning of punishment for corruptor itself. Since it is not easy to return the Stolen state assets return to Indonesia. Corruptors have extraordinary and difficult layers of protection in hiding or carrying out money laundering resulting from corruption.

Indonesian Corruption Watch explains that the success of corruption punishment can be seen from 2 (two) things, name: (i) The amount of state asset losses caused by corruption cases return to Indonesia; and (ii) Heavy or light the verdict given by Judges. Indonesian Corruption Watch in its report has findings that the total losses of state financial resulting from corruption in 2019 are the amount of IDR 12 Trillion, but the fine substitute money only IDR 748.1 Billion[[8]](#footnote-8)

In its yearly report, Indonesian Corruption Eradication Commission[[9]](#footnote-9) claimed that from the repression effort, Corruption Eradication Commission has contributing non-tax revenue. One of the efforts is to do asset recovery inflicted by corruption. Corruption Eradication Commission was a success in recovery the asset from abroad for the first time. Corruption Eradication Commission is developing international cooperation with the Corrupt Practices Investigations Bureau (CPIB) of Singapore. The asset recovery is the amount of SGD 200,000 from Singapore to Indonesia on the 17th of June 2019. Further, Corruption Eradication Commission reports that there were several actions have been taken to recover the state assets losses as served in this info-graphic below:

|  |  |  |
| --- | --- | --- |
|  |  | Amount (IDR) |
| **Gratuity**  The gratuity revenue that has determined by the Corruption Eradication Commission becomes State Property |  | 3.3 Billion |
| **Confiscated Revenue**   * Confiscated revenue from the corruption that has been decided by Court * Confiscated money from the proceeds of money laundering that has been decided by Court |  | 173.67 Billion |
| **Substituted Money Revenue**  Substituted money revenue for corruption that has been decided by Court |  | 121.9 Billion |
| **Sales Revenue from the auction** | | |
| Sales revenue from the auction from proceeds of money laundering |  | 43.6 Billion |
| Sales revenue from the auction of corruption |  | 3.2 Billion |
| Fine revenue from proceeds of corruption |  | 17.8 Billion |
| Total | | 363.47 Billion |

The report was given by one of three institutes that handled corruption as appointed by the Law in Indonesia. The total asset that has been recovered by the Corruption Eradication Commission above still below the number of the state finance losses suffered by State of Indonesia itself. So, the effort must be optimized more.

The Indonesian Law on Anti-corruption arranges the mechanism or procedure of asset recovery using criminal lane and/or civil lane. Indonesia has been ratified UNCAC through Law Number 7 of 2006 concerning the Ratification of UNCAC 2003 follows the norms mentioned by UNCAC. It is that asset recovery can be conducted through Civil recovery as direct asset recovery, and through criminal recovery as indirect asset recovery. UNCAC arranges the mechanism of asset recovery can be used direct asset returned from court proceedings based on “negotiation plea” or “plea bargaining” system, and through indirect asset return using confiscate process based on a court decision. Each model of asset recovery for corruption in Indonesia will be discussed below.

Regarding Civil Proceedings for Asset Recovery, Oliver Stolpe, as quoted by Rustam[[10]](#footnote-10), explains that:

Countries such as Italy, Ireland, and the United States provide, under varying conditions, for the possibility of civil or preventive confiscation of assets suspected to be derived from certain criminal activity. Unlike confiscation in criminal proceedings, such forfeiture laws do not require proof of illicit origin “beyond reasonable doubt”. Instead, they consider proof on a balance of probabilities or demand a high probability of illicit origin combined with the inability of the owner to prove the contrary.

By definition, Asset Recovery is series of activities that includes the process of tracking, securing, maintaining, confiscating, and returning assets related to criminal acts and/or other assets to the entitled State or entitled party (vide Regulation of the Indonesian Attorney General Number 9 of 2019 concerning the amendment of Regulation of the Indonesian Attorney General Number 006/A/JA/3/2014 concerning Asset Recovery Directives). This whole process or activity on Asset Recovery is a pattern of Integrated Asset Recovery System/IARS. Further, the Directive has also constituted about Asset Safeguard. In this regulation, the Attorney General as one of the parties in the Center of Integrated Criminal Justice System) has the right to rescue State Assets.

Asset recovery is actually including the whole process or activity that performed both through criminal proceedings and civil proceedings to search, freeze, and recovery the stolen and/or criminal assets. Through criminal law, one of the asset recovery processes can be conducted by punishing the accused first followed with forfeit the asset (or called conviction-based asset forfeiture). Moreover, it can be criminally processed simultaneously between predicate crime and money laundering (inter alia Article 75 of the Indonesian Anti-Money Laundering law).

Based on existing law, though Indonesia is having not yet a specific law on Asset Recovery, asset recovery through criminal mechanism can be conducted:

* through conviction based asset forfeiture (punish the accused first then forfeit the asset)
* Through non conviction based asset forfeiture. For example, Article 67 of the Indonesian Law on Anti-Money Laundering, without punished the accused first. Article 67 of the Indonesian Law on Anti-Money Laundering states that:

1. If there is no one or the third party who proposes for the objection within 20 (twenty) days since the date of temporary discontinuity of transaction, INTRAC submits the handling of Assets of which are known or are reasonably alleged the result of criminal crime to the investigator to be investigated.
2. If the alleged perpetrator of the criminal crime is not found within 30 (thirty) days, the investigator could propose to the local court to decide such Assets as the State’s treasury or returned to the entitled person.
3. The Court as outlined in section (2) should decide within 7 (seven) days.

This article is regulated more in the Regulation of Supreme Court Number 1 of 2013 concerning Procedures for handling TPPU assets, and Circular Letter of Supreme Court Number 3 of 2013 concerning Case Handling Instructions: Procedures for Settlement of Requests for Assets in TPPU and other criminal activity.

As an earlier explanation, the ideal law enforcement is to punish the offender of crimes and return assets of crime and/or assets related to those crimes to the entitled parties. Law enforcement shall not be focused on “follow the offender or perpetrator” only and forget the assets, but it must be balanced implement both “follow the offender” and “follow the money”. The effort to rescue the state finance losses affected by the corruption act is one of the important steps to heal or restore the condition of state finance and/or state economy, also to punish offenders of corruption. Thus, in the Indonesian law on anti-money laundering (Law Number 8 of 2010), Article 75 of the Law on anti-money laundering, can be implemented to balance follow the offender and follow the money. Article 75 regulates:

If the investigator finds sufficient initial evidence on the presence of the criminal act of money laundering and the origin criminal action, the investigator combines the criminal action of money laundering and the origin criminal action and notifies to Indonesian Transaction Report and Analysis Center (INTRAC).

Through this article, it can be maximizing the tackling of predicate crime and money laundering itself. Almost each corruption case has adhered to a money laundering charge to get the assets recovery.

Thus, the asset recovery regime to the corruption cases is using Corruption law and anti money laundering law, through criminal charge procedure and civil suit procedure.

The whole process of Asset Recovery for Corruption cases, explained by M. Yusuf[[11]](#footnote-11) (former head of INTRAC), as below:

Preliminary

Investigation

Prosecution

Inkracht

Execution

Art 28, 29

Art 37A

Art 33, 34

Art 38B

Art 38C

TRACING

RECOVERY

Article 28 of Law on Anti Corruption mentions that:

For the interests of an investigation, a suspect shall be obligated to provide statements regarding his entire wealth and the wealth of his spouse and children, and the wealth of persons or corporations known or suspected of being connected with acts of corruption allegedly committed by the suspect.

This article is stressing to an obligation by the suspect to provide statements regarding his entire wealth and/or his spouse and children and/or persons or corporations known or suspected. Then Article 29 (1) of the Indonesian Anti-Corruption said that

For purposes of an investigation, prosecution, or hearing in a court of justice, investigators, public prosecutors, or judges shall be authorized to request statements from banks regarding the financial condition of the suspect or defendant.

Based on this article, the preliminary investigation that has been conducted by collecting data from many sources starts the investigation by authorizing a request statement from the Bank regarding the financial condition of the offender. Further in Article 29 subparagraph (2) and (3) explains that Requests for information shall be submitted to the Governor of Bank Indonesia by the applicable laws and regulations. After that request, the Governor of Bank Indonesia obliged to comply with the request aforementioned request documents no later than 3 (three) working days. Investigators, public prosecutors, or judges may request that banks freeze any accounts in the name of the suspect or defendant if said accounts are thought to contain the proceeds of criminal acts of corruption (vide Article 29 subparagraph (4)). If the examination of the suspect or the accused does not produce adequate evidence, at the request of the investigator, public prosecutor, or the judge, on that very day the bank also revokes the freezing (Article 29 (5)). This process can be called early asset recovery.

Article 37A subparagraph (1) of Law on Anti-Corruption gives a framework of asset tracing, as below:

The defendant shall be required to provide information on his/her entire wealth and the wealth of his wife or her husband, and his/her children, as well as the wealth of any individual or corporation, believed to have linkage with the case of which the defendant is accused.

Inter alia with Article 37 A subparagraph (2), if the defendant cannot prove his/her disproportional wealth to the amount of his/her income or any additional income from his/her wealth, it shall be used to strengthen the existing evidentiary material that the defendant has committed a corruption offense.

These articles have been used as an extraordinary measurement through the reversal burden of proof. Since corruption is known as one of the difficult crimes to prove, it needs a breakthrough in optimization eradication of corruption without contradicting to other principles such as the presumption of innocence (non self-incrimination). It has been stated in Article 37 A subparagraph (3), that public prosecutor is remaining obliged to prove their accusation (specific provision in Article 2, Article 3, Article 4, Article 13, Article 14, Article 15 and Article 16 of Law Number 31 of 1999 and Article 5 to Article 12 of Law Number 20 of 2001.

Article 37A has the purpose to confiscate the defendant’s wealth derived from Corruption by then the defendant has no right to mastering and own that wealth unless it gains legally by the defendant.

After asset tracing, the process will enter asset recovery can be seen from some articles in Law on Anti Corruption. In the stage of an investigation, Article 33 and Article 34 describe the process. Article 33 states:

If the suspect dies at the time of investigation while loss has been concretely established for state finance, the investigator shall submit the dossier of the case resulting from the indictment to the prosecutor/state attorney or to the office suffering the loss to enable the filing of a civil suit against the heirs.

Article 34 states:

If the accused dies at the time of the examination during a court session, while loss has been concretely established for state finance, the public prosecutor immediately submits to the copy of the official report on the session to the session to the agency which shoulders the financial burden to file the civil lawsuit to the heirs.

Article 38B Law on anti-corruption has been designed as one of the extraordinary measures.

Article 32 of Law on Anti-corruption Asset Recovery through Civil Lawsuit explains when there is insufficient evidence on one or more elements of corruption crime, but the investigator through its investigations believe there is state finance loss concretely establish, the investigator shall turn over the files of investigations to the prosecutor as state attorney to take civil suit or submit to aggrieved institutions to file a lawsuit (Vide Article 32 of the Indonesian Law on Anti-corruption). Some critics addressed this article since it creates problems. Rustam[[12]](#footnote-12) said, one of the essential problems is the unclear status of the person being suit whether it is as offender, suspect, or defendant. Further, Article 38 C of the Indonesian Law on Anti-corruption regulates that:

If after a decision had been made the Court has already gained fixed legal strength, and it is known that there still exists wealth owned by the convict believed to have originated from corruption offenses, which has not been confiscated for the state as referred to in Article 38B subparagraph (2), the state shall file a civil indictment against the convict and/or his/her beneficiary.

Aforementioned in Article 38B subparagraph (1), in essence to specific forms of corruption as referred to Article 2, Article 3, Article 13, Article 14, Article 15, and Article 16 of Law Number 31 of 1999, and Article 5 to Article 12 of Law Number 20 of 2001, an accused person who commits one of the corruption offense shall prove otherwise his/her wealth for which he/she has not been indicted but is believed to have originated from corruption offense. Thus, subparagraph (2) explicitly reaffirmed once the accused person failed to prove that the wealth does not originate from a corruption offense, the wealth shall be considered as originating from corruption. Then judge authorized to decide that the wealth shall be partially or entirely confiscated for the State (Vide Article 38B subparagraph (2)). This article has strengthened the mechanism of state finance loss returns by giving the obligation to the accused person to prove his/her wealth that has not yet been charged does not derive from corruption. The claim for the confiscation of assets is filled by the public prosecutor when the charges are read out in the main case.

Article 38 C of Law on Anti-corruption explain if after a decision had been made the Court has already gained fixed legal strength, and it is known that there still exists wealth owned by the convict believed to have originated from corruption offenses, but it has not yet confiscated for State, then the State shall file a civil indictment against the convict and/or his/her heirs. It is the last effort to rescue the asset of State which has gone by the corruption by filing a civil suit to forfeit that asset.

The existence of Asset Recovery Center through the Indonesian Regulation of Attorney General Number 9 of 2019 concerning the amendment of the Indonesian Regulation of Attorney General Number Per-027/A/JA/10/2014 concerning Asset Recovery Directive must be promoted to all of the law enforcement. Once again, by considering that the law enforcement of criminal law, in essence, is not only aimed to punish offenders but to recover losses suffered by the victim financial as an impact of the crime conducted by the offender of the crime itself. This is following the principle of *Dominus Litis*, that it is the duty and responsibility of the prosecutor’s office as a public prosecuting and executor. This regulation of Attorney General has put the standard for Prosecutor’s office in handling the asset recovery issues (not specific to corruption asset), and effort to create an effective, efficient, transparent, and accountable Integrated Asset Recovery Systems, conducted by implementing Good Governance/good corporate governance through involving supervision by society (transparent), accountable and responsible. Unfortunately, it is not yet integrated into other institutions that have the responsibility of asset recovery of crime. Indonesia is still draft the Law on proceeds of crime asset deprivation Bill that will be implemented by all institutions.

**Snapshot of Asset Recovery Effort in Indonesian Well-known Corruption Case in Practices: Learn the Barrier**

Assets resulted from corruption abroad return’s effort is more difficult to implement. The efforts to return the assets resulting from corruption abroad are more difficult to implement. One of the difficulties is that a country that holds other state assets from the outcome of corruption is an external responsibility in exercising the sovereignty of a state to maintain its relations with other countries.

Yunus Husein[[13]](#footnote-13) (former head of INTRAC) in his presentation gave information about the constraint of having optimized state asset return as:

* The amount of substitution money that has been saved is still less.
* The laws that support the return of assets have not been optimally used, for example, Law of Anti-Money Laundering, and the provisions of reversal burden of proof to the improper wealth (vide Article 77-78 Law on Anti-Money Laundering and Article 38B Law on Anti-corruption).
* Tracing, Safeguarding, and returning of Assets are not yet been optimized used.
* The quality of Mutual Legal Assistance request is not good yet, the length of processing time (there is a request that responded after 6 months), the rate of its success is low, weak coordination between institution, etc. Mutual Legal Assistance is normally hampered by bank secrecy provisions.
* Law enforcement practices are still weaknesses
* Asset management is not optimal (confiscated items are not well maintained, broken, lost, replaced, etc)
* Sales of assets have not been optimal. The auction process does not refer to a fair price, slow process, etc.

Based on the analysis given by Yunus Husein above, it can be said that these constraints must be eliminated to get the maximized asset recovery.

Several big cases that involved corruption cases where the assets of corruption were located abroad. The briefcase summary can be accessed on the website of star world bank[[14]](#footnote-14). In this paper, we can learn from the case of Hendra Rahardja, President/CEO of PT. Bank Harapan Sentosa, one of the banks that got a bailout from Bank Indonesia Liquidity Assistance. Jurisdiction of assets was located in Australia and Hong Kong. Hendra Rahardja was a fugitive after the Court in Indonesia decided in absentia that he is guilty to conduct corruption, and died in Australia (in 2003). The asset recovery process (to a bank in Australia) was started in 1998 and ended in 2008. In its note, the World Bank gave analysis that contributing factors in Asset Recovery were that The Australian court decision noted that the Government of Hong Kong had provided evidence according to Australia’s Mutual Legal Assistance Treaty request. The status of asset recovery was completed. According to the March 1, 2005, Judgment by Australia’s New South Wales Supreme Court, “it was contended that the crimes of the deceased Rahardja produced a total loss to the Central Bank of Indonesia of A$390 million of which some AUS$38.5 million came to Australia”. The website of the Attorney General of Australia noted that as part of Australia’s Equitable sharing program established under United Nations Conventions Against Corruption provisions as well as Australia’s proceeds of Crime Act, $493,647.07 was provided to the Indonesian Government for assistance in the Hendra Rahardja matter.

While the asset of crime located in Hong Kong has difficulty. According to the International Center for Asset Recovery, in February 2009, an official of the “Hong Kong Ministry of Justice” would confirm only that ISD 3 million was frozen in Hong Kong, despite press reports of larger amounts concealed in that jurisdiction”. Unfortunately, at the time of the case that happened in Indonesia, Hong Kong and Indonesia did not have a bilateral Mutual Legal Assistance Treaty. Indonesia and Hong Kong have signed one in 2008. The lack of a Mutual Legal Assistance treaty between the two jurisdictions cited as one of the reasons Australia was acting as the intermediary.

In the process of asset recovery of state finance loss in Hendra Rahardja’s case, there is an obstacle related to the sharing request from Hong Kong. According to the responsible person of asset hunter, Muchtar Arifin[[15]](#footnote-15), the legal problem regarding the asset of Hendra Rahardja was final or decided. It was because the court in Australia has declared that the asset of Hendra Rahardja must be returned to the Government of Indonesia. But the Hong Kong party has requested a share.

From the case of Hendra Rahardja’s corruption, the problem of asset recovery is difficult. It needs goodwill both from Victim State and State where the asset is located. It needs to give highly respects that each other must assist, and hand in eradicate corruption.

**Closing Notes**

Asset recovery has taken place as the important emphasized together with the prevention and eradication of corruption. UNCAC has been reminded of Asset Recovery. The process towards recovering state financial losses due to corruption through conventional criminal law lanes as regulated the existing laws has not been efficient and effective, though the provision and regulations exist already. The problem appears still is between state losses and the return of losses has not been balanced. Therefore, a more effective legal arrangement must be considered accompanied by steps of coordination and harmonization of relations between law enforcement institutions domestic and abroad, the community, NGOs, and all parties.

**References**

Atmasasmita, Romli. 2018. *Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan* ***Geen Straf Zonder Schuld****.* Jakarta: Gramedia Pustaka Utama

Atmasasmita, Romli, and Kodrat Wibowo. 2016. *Analisis Ekonomi Mikro Tentang Hukum Pidana Indonesia*. Jakarta: Prenadamedia Group

Muladi, and Diah Sulistiyani RS. 2020. *Catatan Empat Dekade Perjuangan Turut Mengawal KUHP Nasional (Bagian I, 1980-2020)*. Semarang: Universitas Semarang Press

“ICW sebut pemidanaan Koruptor di Tahun 2019 masih lemah” <https://nasional.kompas.com/read/2020/04/19/23531171/icw-sebut-pemidanaan-koruptor-di-2019-masih-lemah>, retrieved date: November 9th, 2020

“Penyitaan Aset Hendra Rahardja Terganjal Uang Komisi”, article, <https://www.republika.co.id/berita/breaking-news/nasional/08/12/26/22558-penytaaan-aset-hendra-rahardja-terganjal-uang-komisi>, 26th of December 2008, retrieved date: November 9th, 2020

https://star.worldbank.org

<https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf>, retrieved date November 9th, 2020

<https://www.kpk.go.id/images/pdf/Laporan-Tahunan-KPK-2019-Bahasa.pdf>, retrieved date: November 9th, 2020

<https://www.transparency.org/en/countries/indonesia>, retrieved date: November 8th, 2020

Husein, Yunus. *“Pengembalian Aset Hasil Tindak Pidana (Asset Recovery) and Corporate Criminal Liability”*, **Powerpoint presentation**, STIH Jentera, Jakarta, 22 February 2017

Infografik: 7 kasus korupsi dengan kerugian terbesar di Indonesia”, <https://www.kompas.com/tren/read/2020/01/18/090500465/infografik-7-kasus-korupsi-dengan-kerugian-terbesar-di-indonesia>, retrived date: November 9th, 2020

Rustam, ***Asset Recovery: Hasil Tindak Pidana Korupsi***, Opini Cendekia (n.d.).Rustam, p,18

Yusuf, M. *“Implementasi dan Pengaturan Illicit Enrichment Dalam Delik Korupsi”*, **Powerpoint presentation**, presented in National Workshop “Kajian Penerapan UNCAC di Indonesia – implementasi dan Pengaturan Illicit Enrichment Dalam Delik Korupsi”, Jakrat 18th of February 2014

1. <https://www.transparency.org/en/countries/indonesia>, retrieved date: November 8th, 2020 [↑](#footnote-ref-1)
2. <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf>, retrieved date November 9th, 2020 [↑](#footnote-ref-2)
3. Romli Atmasasmita and Kodrat Wibowo. 2016. **Analisis Ekonomi Mikro Tentang Hukum Pidana Indonesia**. Jakarta: Prenadamedia Group, p. 208 [↑](#footnote-ref-3)
4. Muladi and Diah Sulistiyani RS. 2020. **Catatan Empat Dekade Perjuangan Turut Mengawal KUHP Nasional (Bagian I, 1980-2020)**. Semarang: Universitas Semarang Press, p. 204 [↑](#footnote-ref-4)
5. Infografik: 7 kasus korupsi dengan kerugian terbesar di Indonesia”, <https://www.kompas.com/tren/read/2020/01/18/090500465/infografik-7-kasus-korupsi-dengan-kerugian-terbesar-di-indonesia>, retrieved date: November 9th, 2020 [↑](#footnote-ref-5)
6. Romli Atmasasmita. 2018. **Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan *Geen Straf Zonder Schuld***. Jakarta: Gramedia Pustaka Utama, p. 133 [↑](#footnote-ref-6)
7. **Ibid**, p. 134 [↑](#footnote-ref-7)
8. “ICW sebut pemidanaan Koruptor di Tahun 2019 masih lemah” <https://nasional.kompas.com/read/2020/04/19/23531171/icw-sebut-pemidanaan-koruptor-di-2019-masih-lemah>, retrieved date: November 9th, 2020 [↑](#footnote-ref-8)
9. <https://www.kpk.go.id/images/pdf/Laporan-Tahunan-KPK-2019-Bahasa.pdf>, retrieved date: November 9th, 2020 [↑](#footnote-ref-9)
10. Rustam, ***Asset Recovery: Hasil Tindak Pidana Korupsi***, Opini Cendekia (n.d.).Rustam, p,18 [↑](#footnote-ref-10)
11. M. Yusuf. *“Implementasi dan Pengaturan Illicit Enrichment Dalam Delik Korupsi”*, **Powerpoint presentation**, presented in National Workshop “Kajian Penerapan UNCAC di Indonesia – implementasi dan Pengaturan Illicit Enrichment Dalam Delik Korupsi”, Jakrat 18th of February 2014 [↑](#footnote-ref-11)
12. Rustam. ***Op.Cit***, p.19 [↑](#footnote-ref-12)
13. Yunus Husein. *“Pengembalian Aset Hasil Tindak Pidana (Asset Recovery) and Corporate Criminal Liability”*, **Powerpoint presentation**, STIH Jentera, Jakarta, 22 February 2017 [↑](#footnote-ref-13)
14. https://star.worldbank.org [↑](#footnote-ref-14)
15. “Penyitaan Aset Hendra Rahardja Terganjal Uang Komisi”, article, <https://www.republika.co.id/berita/breaking-news/nasional/08/12/26/22558-penytaaan-aset-hendra-rahardja-terganjal-uang-komisi>, 26th of December 2008, retrieved date: November 9th, 2020 [↑](#footnote-ref-15)