



# MUTUAL LEGAL ASSISTANCE (MLA) IN THE RESOLUTION OF NARCOTICS CRIME AS A TRANSNATIONAL ORGANIZED CRIME

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## Abstract

*In the context of enforcing the law on narcotics crime which are transnational, Indonesia since 2006 has enacted Law Number 1 of 2006 on Mutual Legal Assistance in Criminal Matters. Prevention and eradication of various transnational crimes, especially narcotic drugs, a mutual assistance agreement in criminal matters is one of the legal instruments that is needed. Therefore, the presence of bilateral agreements on mutual assistance in criminal matters between Indonesia and other countries will support law enforcement efforts as expected in enforcing the law against transnational narcotics offenders. This study focuses on several indications that become a reference in the handling of narcotics and psychotropic crimes as one of transnational organized crime through the mechanism of Mutual Legal Assistance (MLA). The method used in this study is normative legal research by reviewing and analyzing the provisions of the law governing Mutual Legal Assistance (MLA) in Indonesia, especially against narcotics crime. The results showed that mutual assistance in the problem of narcotics crime as a type of transnational organized crime can be done based on an agreement and in case of the absence of agreement, the assistance is carried out on the basis of good relations.*

## 1. Introduction

The advanced development of technology and science results in a borderless world within countries, people can mobilize easily and quickly from one place to another. This has also impacted criminal acts with an increasingly sophisticated modus operandi, accordingly efforts in preventing it are needed as well as the cooperation of

several countries, for example mutual assistance cooperation and criminal matters.<sup>1</sup>

*Mutual Legal Assistance* (MLA) is an agreement between two countries aiming for the exchange of information in an effort to enforce criminal law.<sup>2</sup> This assistance can be done by examining and identifying people, places and things, custody transfers, and providing assistance with immobilization of the evidence of criminal act. One type of organized transnational crime is narcotics crime. Efforts to tackle drug abuse have been carried out by the government for decades. Eradicating these crimes is not only a national issue, but also an international problem involving the international community.<sup>3</sup> These efforts are not only carried out independently, but by also involving neighboring countries in the Southeast Asian region and other countries that have links with the illegal distribution of narcotics. This type of crime is one of transnational organized crimes, namely crime that involves cross-country networks. The results of the increase of various cases of narcotics abuse in Indonesia mostly involve networks in other countries. Therefore, in the context of strengthening domestic and foreign countering efforts, Law Number 5 of 2009 on the Ratification of the UN Protocol against Organized Transnational Crimes has been adopted, which includes the Narcotics Law.

By ratifying various international agreements in the field of criminal cooperation, particularly mutual assistance in criminal matters, both multilateral and bilateral agreements, Indonesia has an obligation to implement these international agreements, both at the level of concrete field implementation and at the level of legislation. This is in line with the dualism theory which states that international agreements, both bilateral and multilateral, should first be transformed into national law.<sup>4</sup> This means, that at the level of legislation, Indonesia needs to make adjustments or harmonization of the laws and regulations governing mutual assistance in cases of narcotics crime in order to conform it with the provisions or norms of international treaties. As stated by Arifin R. related to the implementation of MLA in the case of corruption, that MLA has a quicker mechanism, provides more legal certainty, is adequate and even allows for extradition.<sup>5</sup> The MLA mechanism can apply the principles and use several legal instruments in the appropriation of assets.

Regarding transnational crimes, it has governed in the Penal Code of Indonesia. This can be seen through the provisions under its articles, *inter alia*:

- a. Article 2 of the Penal Code which governs that criminal provisions in legislation is

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<sup>1</sup>Firdaus, F. (2017). Perjanjian Bantuan Timbal Balik dalam Masalah Pidana Antara Republik Indonesia dan Republik Islam Iran. *Jurnal Penelitian Hukum De Jure*, 17(4), pp. 351-371.

<sup>2</sup>Siswanto, S. (2009). *Ekstradisi dan Bantuan Timbal Balik Dalam Masalah Pidana; Instrumen Penegakan Hukum Pidana Internasional*, Jakarta: Rineka Cipta, p. 133.

<sup>3</sup>Arifin, R. (2016). Analisis Hukum Internasional dalam Perampasan Aset di Negara Kawasan Asia Tenggara Berdasarkan United Nations Convention Against Corruption (UNCAC) dan ASEAN Mutual Legal Assistance Treaty (AMLAT). *Jurnal Penelitian Hukum-Fakultas Hukum Universitas Gadjah Mada*, 3(1), p. 38.

<sup>4</sup>Arifin, R. (2016). *Ibid*, p. 41

<sup>5</sup>Arifin, R. (2016). *Ibid*, p. 54; See also, Yuningsih, H. (2013). Pengembalian Aset Negara Hasil Tipikor Melalui Kerjasama Timbal Balik Antar Negara, Laporan Penelitian Fundamental, Fakultas Hukum Universitas Sriwijaya, p. 92

valid for everyone who commits a crime in Indonesia.<sup>6</sup> This provision does not only show the compliance with the principle of territoriality where criminal law applies to anyone who commits a crime in the territory of a particular country, in this case Indonesia, but it also means that the person who commits the crime does not have to be physically in Indonesia, but the offense (*strafbaar feit*) occurred in the territory of Indonesia.

- b. Likewise, a person or any legal subjects committing the act is not limited to Indonesian citizens. As stipulated in Article 3 of the Penal Code, criminal law applies to anyone outside Indonesian committing criminal acts in Indonesia. Likewise, this provision does not only show the territoriality principle in which Indonesian law applies in Indonesian territory, including "Indonesian ships" outside Indonesia, but also shows that the enforcement of national law also applies for criminal act beyond the border or transnational borders.
- c. Likewise, other provisions contained in the Penal Code, namely Article 4 of the Penal Code which is broadened by Law No. 4 of 1976 on Aviation Crime shows that the regulation of crimes beyond national borders has been regulated for a long time even though it has not been referred to as transnational terminology.
- d. Article 5 of the Penal Code also regulates the enforcement of Indonesian laws and regulations, for Indonesian citizens who commit crimes outside the territory of Indonesia.<sup>7</sup>

The provisions of transnational crime as contained in the Criminal Code is based upon the principles of the enforcement of criminal law,<sup>8</sup> in this case 4 (four) principles of enforcement of national criminal law comprises of the territorial principle (Articles 2 & 3), active national principle (Article 5), passive national principle (Articles 4 on 1, 2 and 4) and universal principle (Article 4 on 2 and 4). However, the principles of the enforcement of criminal law based on the Penal Code are also limited to the application of international legal provisions recognized by Indonesian government in accordance with the provisions of Article 9 of the Penal Code. The sound provisions of Article 9 of the Criminal Code contain a deep and broad meaning, in the sense, that law enforcement practitioners in Indonesia including the legislators must fully understand the legal binding force of an international treaty that has been ratified by Indonesia.<sup>9</sup>

Based upon the aforementioned background, the issue raised in this research is : How are the indications of the resolution of transnational crime, particularly the narcotics

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<sup>6</sup>Regulation under Article 2 of the Penal Code stipulates that "the criminal law of Indonesia applies to all persons committing the act of crime within the territory of Indonesia"

<sup>7</sup>Article 5 of the Penal Code stipulates that: Criminal provisions in Indonesian law applicable to citizens outside Indonesia who commit: (1) one of the crimes in Chapters I and II of the Second Book of the Penal Code and Articles 160, 161, 240, 279, 450 and 451, (2) One of the act which under the criminal law of Indonesia is considered as a crime, whereas in the laws of the State where the act was committed threatened with criminal sanction. Prosecution of the case referred to in item 2 can also be done after the accused becomes a citizen following the committing acts of crime.

<sup>8</sup>Jan Remeling in "Hukum Pidana" Gramedia Jakarta halaman 355-389 uses the terminology on the application of criminal law as "Enforcement of criminal law" which is distinguished into two things, namely the enforcement relating to the time the crime was committed (*tempus delicti*) and the enforcement relating to the place that the crime was committed (*locus delicti*).

<sup>9</sup> Article 9 of the Penal Code stipulates that "the enforcement of Article 2-5, 7 and 8 is subject to exception recognized under international law".

crime, through mutual legal assistance (MLA)?

## 2. Research Method

Method used for this research is a normative legal research, or literary research relating to the normative legal substance, in which normative legal research is a scientific research method to find the truth based on scientific logic in terms of its normative aspects.<sup>10</sup> Normative legal research is legal research carried out by examining mere library or secondary material.<sup>11</sup> Legal research in this case is related to Mutual Legal Assistance (MLA) in the Resolution of Narcotics as Transnational Organized Crime. In accordance with its method, normative legal research is a legal research carried out by examining mere library materials or secondary data. Secondary data in the field of law (in terms of its binding power) according to Ronny Hanitijo Soemitro,<sup>12</sup> can be broken down into:

- a). Primary legal sources. Including the 1945 Constitution of Indonesia, Penal Code, Law No. 1 of 2006 on Mutual Legal Assistance in Criminal Matters.
- b). Secondary legal sources, which are sources with strong relation with the primary ones, and are able to assist the analysis and provides further explanation on the primary sources, which includes: literature books on narcotics crime, legal essence, Transnational Crimes, etc;
- c). Tertiary legal sources, which are sources providing information on the primary and secondary legal sources, which includes any sources providing information concerning the primary and secondary legal sources, for example: Law Dictionary. articles, newspapers, and<sup>13</sup>.

## 3. Result and Discussion

### 3.1. Mutual Legal Assistance (MLA) in Relation with The Prevention and Eradication of Transnational Organized Crime

Along with the large amount of cooperation between states and the open access to people and goods from one country to another, the potential for transnational criminal offenses is also greater. In the context of handling and anticipating the aforementioned criminal offenses, instruments of international cooperation in the field of interstate law enforcement are needed.<sup>14</sup>

*Mutual Legal Assistance* (MLA) is basically a form of mutual agreement in criminal matters. The establishment of Mutual Legal Assistance is motivated by the factual conditions that as a result of differences in the criminal legal system between several countries resulting in inaction in the investigation of crime. Oftentimes, each country

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<sup>10</sup>Johny, I., (2005) *Teori dan Metodologi Penelitian Hukum Normatif*, Surabaya: Bayu Media Publishing, p. 46.

<sup>11</sup> Soerjono Soekanto dan Sri Pamudji, 2013, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, PT Raja Grafindo Persada, Jakarta, p.13

<sup>12</sup> Ronny, H.S., (1994). *Metodologi Penelitian Hukum dan Jurimetri*, Jakarta: Ghalia Indonesia, h.12, Dalam bukunya Suratman dan Philips Dillah, 2012, *Metode Penelitian Hukum*, Alfabeta, Bandung, pp.66-67

<sup>13</sup> Michael, P., (2009). *Kamus Hukum Internasional dan Indonesia*, Jakarta: Widyatamma.

<sup>14</sup>Kemenkumham, BPHN, (2017). *Naskah Akademik Rancangan Undang-Undang Pengesahan Perjanjian Antara Republik Indonesia Dan Republik Islam Iran Tentang Ekstradisi (Treaty Between The Republic Of Indonesia And The Islamic Republic Of Iran On Extradition)*, Jakarta, p. 1

wants the absolute use of its own legal system in handling crime, the same thing happens to other countries, so that the resolution of the crime becomes slow and complicated.

*Mutual Legal Assistance* appears as one of the efforts in preventing and eradicating various transnational crimes.<sup>15</sup> This is very reasonable to happen, considering in the crime of a national dimension, in a sense of the impact of the crime is of a national nature, and the perpetrators of the crime are only local citizens, which is adequate to be handled nationally without the need to involve other countries. Mutual Legal Assistance has a very broad scope/room (as regulated in Article 18 Transnational Organized Crime) starting from the process of finding evidence or information relating to the crime being investigated to the implementation of the decision, so this will facilitate the disclosure of various form of crime.

Cooperation between countries or organizations and relevant actors is needed in relation to transnational crime. In addition to using the MLA principle, it also uses the principle of Shared Responsibility. As is the case between the United States and Mexico in dealing with narcotics crime, in realizing a peaceful, safe and stable region.<sup>16</sup>

It is unfortunate that, despite the role of Mutual Legal Assistance in the prevention and eradication of organized transnational crime is quite important, the Indonesian government has not established many Mutual Legal Assistance partnerships with other countries, eventhough organized transnational crime is increasing, both in terms of quality and quantity.

### **3.2. Conformity between The Provisions under the Law No. 35 of 2009 on Narcotics with Other Laws Relating to International Cooperation**

Referring to the principle of equality before the law and government, several findings related to the provisions of international cooperation are contained in the following regulations:<sup>17</sup>

1. Clarity on the rules regarding coordination, Law No. 35 of 2009 on Narcotics with Government Regulation No. 40 of 2013 on the Implementation of Law No. 35 of 2009 on Narcotics has been conformed between Article 30 paragraph (2) and:
  1. Article 11 paragraph (2) Law No. 24 of 2000 on International Treaties; and
  2. Article 7 paragraph (2) Law No. 37 of 1999 on Foreign Relations;
2. Clarity on the rules regarding conflict resolution, Law No. 35 of 2009 on Narcotics with Government Regulation Government Regulation No. 40 of 2013 on the

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<sup>15</sup>Transnational crimes are crimes fulfilling the requirements of (a) an act affecting more than one states; (b) an act involving nationals of more than one states; and (c) uses tools or methods which goes beyond territorial border. See also, Romli, A., (1997). *Tindak Pidana Narkotika Transnasional dalam Sistem Hukum Pidana Indonesia*, Bandung: Citra Aditya Bakti.

<sup>16</sup>Aryanti, J. E., & Leksono, H. (2017). Penerapan Prinsip Shared Responsibility Sebagai Upaya Dalam Penanggulangan Kejahatan Transnasional Di Kawasan Asia Tenggara. *Belli Ac Pacis*, 3(2), pp. 27-36.

<sup>17</sup>Pusat Analisis dan Evaluasi Hukum Nasional badan Pembinaan Hukum Nasional Kementerian Hukum dan Ham RI, 2017, pp.32-33.

- Implementation of Law No. 35 of 2009 on Narcotics found to be in conformity with Article 6 paragraph (3) of Law No. 37 of 1999 on Foreign Relations;
3. Clarity on sanctions against violations, Law No. 35 of 2009 on Narcotics with Government Regulation No. 40 of 2013 on the Implementation of Law No. 35 of 2009 on Narcotics has been conformed between Article 61 paragraphs (1) and (2) with the provisions of Article 18 paragraph (1) Government Regulation No. 99 of 2016 on Government Regulation concerning the Carriage of Cash and/or Other Payment Instruments into or outside the Indonesian Customs area;
  4. Clarity of rules regarding the parties conducting supervision and law enforcement, Law No. 35 of 2009 on Narcotics with Government Regulation No. 40 of 2013 on the Implementation of Law No. 35 of 2009 on Narcotics found to be in conformity with the provisions of Article 67 of Law No. 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering.
  5. Clarity of rules regarding guidelines on working relations, Law No. 35 of 2009 on Narcotics with Government Regulation No. 40 of 2013 on the Implementation of Law No. 35 of 2009 on Narcotics found to be in conformity with:
    - (1) Article 19 paragraph (1) of the Law No. 1 of 1979 on Extradition; and
    - (2) Article 79 of Law No. 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering.

When referring to the principle of order and legal certainty, several findings related to the content of international cooperation in promoting the precautionary principle, Law No. 35 of 2009 on Narcotics is found to be in conformity with Articles 140, 149 and Article 26 paragraph (2) Government Regulation No. 40 of 2013 on the Implementation of Law Number 35 of 2009 concerning Narcotics with the provision of Article 7 letter d of Law No. 1 of 2006 on Mutual Assistance in Criminal Matters.

### **3.3. Jurisdictional Competence of the Central Authority in Appointing the Implementing Institution of *Mutual Legal Assistance* (MLA) in Indonesia**

Indonesia regulates mutual assistance through Law No. 1 of 2006 on Mutual Assistance in Criminal Matters, which entered into force on March 3, 2006. In the Mutual Assistance Act, assistance that can be requested or provided can be in the form of assistance in identifying and searching for people; obtaining statements or other forms; providing documents or other forms; seeking the presence of people or providing information or assisting in investigations; delivering a letter; carrying out a search and foreclosure request; confiscation of proceeds of crime; obtaining financial sanctions in the form of cash in relation with a crime; prohibition of wealth transactions; freezing assets that can be released or confiscated, or which may be required to meet the sanctions imposed fines, in connection with criminal offenses; looking for assets that can be released, or any measures needed to meet the criminal sanctions imposed, in relation with a criminal offense.<sup>18</sup> In the Mutual Assistance Act, it is stated that the party responsible for receiving and sending mutual assistance requests is the Ministry in charge of the legal sector, or in this case the Ministry of Justice and Human Rights.<sup>19</sup>

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<sup>18</sup>Regulation under Article 3 paragraph (2) of Law No. 1 of 2006 on Mutual Legal Assistance in Criminal Matters.

<sup>19</sup>General comment of Law No. 1 of 2006 on Mutual Legal Assistance in Criminal Matters.

The Ministry of Justice and Human Rights has duties to receive and send requests for mutual criminal assistance to be forwarded to the institution responsible for law enforcement, namely the police and prosecutors. In its development, there were additional institutions that could submit and process requests for mutual assistance in Indonesia, such as the Corruption Eradication Commission (KPK) and the National Narcotics Agency (BNN), both of these institutions have authority based on international conventions that had been ratified by Indonesia.<sup>20</sup>

#### **3.4. Indications on the Resolution of Transnational Narcotics Crime through Mutual Legal Assistance**

Law No. 1 of 2006 on Mutual Legal Aid (MLA Law) regulates several principles, procedures and requirements for assistance requests, and the process of legal proceeding to provide a strong legal basis for cooperation between countries in the form of mutual assistance in criminal matters. As a principle in giving mutual assistance in handling narcotics crime cases, it can be done through an agreement. If there is no agreement, assistance can be carried out on the basis of good relations based on the principle of reciprocity.

Denial of assistance can be done if:<sup>21</sup>

- a. The crime carried out by the person is considered as political crime, crime under the military law, or if the person has been released or given clemency, or if the person carried out an act which cannot be sued under Indonesia's law;
- b. To prosecute or to adjudge a person, if it is based upon ethnic, gender, nationality, or political view, or anything that may harm national sovereignty, security, interest, and law.
- c. In relation to a foreign state, if a state does not give any guarantee that the legal assistance is going to be used to settle the matter in request and guarantee of returning evidences;
- d. If the criminal conduct is done outside of Indonesia, such act is not considered as a crime;
- e. The crime conducted by the person requires death sentence;
- f. If it will harm the investigation, prosecution, and proceeding before the court in Indonesia which may harm the security of persons or burdens the wealth of the nation.

In international conventions such as UNCAC and UNTOC which are used as legal basis, MLA does not explicitly appoint a central authority in the process of mutual criminal assistance. The state is given freedom in determining which institutions are considered appropriate to the necessities.

In international conventions serving as the legal basis of mutual criminal assistance, *inter alia* UNCAC and UNTOC, it does not explicitly govern the specific party to be appointed in becoming the central authority in mutual legal assistance in law. At least there are three practices of appointing institution to be a central authority within Asia

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<sup>20</sup>Article 1 point 10 of Law No. 1 of 2006 on Mutual Legal Assistance in Criminal Matters.

<sup>21</sup> Badan Pembinaan Hukum Nasional, (2012). Laporan Penelitian *Central Authority* dan Mekanisme Koordinasi Dalam Pelaksanaan Bantuan Timbal Balik Dalam Masalah Pidana, p. 30.

Pacific, which occurred in a country with single central authority, a country with more than one central authority, and a country with no central authority through diplomatic way. Based on that, each state has freedom to choose the governmental institution it deems fit with the current condition and needs.<sup>22</sup>

Request for Mutual Assistance in the case of narcotics crime, of which the Government of the Republic of Indonesia is the Requesting Party. In this case, the Minister of Law and Human Rights as the central authority directly submits requests for assistance. Other institutions still have authority in implementing this MLA in accordance with their duties and functions.<sup>23</sup>

#### 4. Conclusion

Mutual assistance in the case of narcotics crime as a type of transnational organized crime can be done based on an agreement or on the basis of good relations in case of the absence of agreement. Law No. 1 of 2006 on Mutual Assistance in criminal matter does not give the authority to conduct extradition, arrest and detention with a view to extradition or surrender of persons, transfer of convicts or transfer of cases. Law No. 1 of 2006 on Mutual Assistance in criminal matters also provides a legal basis for the Minister responsible in the field of Law and Human Rights as an authority holder who acts as coordinator in submitting requests for mutual assistance in criminal matters to foreign countries or handling requests for mutual assistance in criminal matters from foreign countries.

#### 5. Recommendation

Indonesia needs to increase its institutional capacity and professionalism of human resources, for instance the synchronization in the resolution and enforcement of laws on narcotics crimes through Mutual Legal Assistance.

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<sup>22</sup>Latifah, M. (2017). Penunjukan Otoritas Pusat Dalam Bantuan Timbal Balik Pidana Di Indonesia (The Appointment of The Central Authorities In Mutual Legal Assistance In Criminal In Indonesia). *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan*, 7(1), p. 66.

<sup>23</sup>Latifah, M. (2017). *Ibid.*, p. 67



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