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Enforcing transnational non-conviction-based confiscation orders: comparing the United Nations, European Union, Australian, and Indonesian legal frameworks

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Abstract: The present article compares and critically examines the enforcement of transnational non-conviction-based confiscation (NCBC) orders in the United Nations (UN), European Union (EU), Australian, and Indonesian legal frameworks utilising comparative legal and document analyses. The results serve as a reference for regulating a fair and effective framework for transnational NCBC enforcement in Indonesian law. This research compares the nature of NCBC, adaptive response conceptualisation, mechanisms facilitating transnational NCBC enforcement, and procedural safeguards in the transnational enforcement stage. It concludes that the relevant UN, EU, and Australian legal frameworks can serve as benchmarks for transnational NCBC enforcement in Indonesia, specifically regarding norm formulation of NCBC, international cooperation for effecting transnational NCBC orders, and the corresponding procedural safeguards to ensure fairness. However, the research findings indicate that practices of transnational NCBC enforcement in these jurisdictions have yet to generate significant references for empirical effectiveness benchmarking. Furthermore, this article discovers crucial implications for the criminological theory of adaptive response. Lastly, reconceptualisation of the Indonesian NCBC regime and proposals for reforming the Criminal Assets Confiscation Bill and the Mutual Legal Assistance in Criminal Matters Act are recommended.
Keywords: non-conviction-based confiscation; transnational confiscation; adaptive response; asset recovery

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Introduction

The rise of acquisitive transnational crimes entails the cross-border movement of criminal assets being relocated, hidden, transferred, and laundered outside domestic jurisdiction by criminal perpetrators. In the European Union (EU) alone, recent estimation indicates that the total circulating proceeds of crime amount from approximately EUR 92 billion to EUR 188 billion annually (Europol, 2023). Similarly, the prevalence of transnational criminal asset recovery is depicted in a report by the Conference of the States Parties to the United Nations Convention against Corruption (COSP UNCAC). From 2010 to 2023, the total value of reported proceeds of crime recovery amounted to more than USD 4.3 billion from 153 corruption cases (COSP UNCAC, 2023).

One crucial aspect of asset recovery is confiscation, through which assets of criminal origin are expropriated with a final court judgment. This article focuses on non-conviction-based confiscation (NCBC). Unlike traditional criminal confiscation, NCBC is specifically devised to ensure the appropriation of criminal assets in the wake of unfeasible prosecution and conviction of a perpetrator (Schunke, 2017; Boucht, 2019). The establishment of NCBC is encouraged by several international and supranational organisations, as illustrated in the adoption of the UNCAC and Directive (EU) 2024/1260.

The wave of regulating NCBC touched the shores of Indonesia with the adoption of an elementary form of NCBC by the Anti-Money Laundering Act in 2010. After more than a decade of public advocacy (Husein, 2019), the Indonesian government submitted the more comprehensive

Criminal Assets Confiscation Bill to the House of Representatives in May 2023 (Purnamasari and Sulistyo, 2023).

Recognition of transnational NCBC orders is essential for executing judicial decisions to recover criminal assets in foreign countries. In other words, cross-jurisdictional asset recovery can only be effective if NCBC orders are factually enforceable (Greenberg et al., 2009; CoE, 2020). This effectiveness question is not a country-specific problem, since the complexity of enforcing NCBC orders in foreign jurisdictions is regarded as one of the most frequent impediments to transnational asset recovery (COSP UNCAC, 2023).

In light of this, regulating an adequate framework for transnational NCBC enforcement in Indonesian law becomes crucial. Only with a fair and effective framework will the objective of expropriating criminal assets located abroad be satisfied and the NCBC law reform not be a missed opportunity. Therefore, this article aims to address the following research question: To what extent can the relevant United Nations, European Union, and Australian legal frameworks on non-conviction-based confiscation (NCBC) serve as benchmarks for enforcing transnational NCBC orders under Indonesian law?

These frameworks have been chosen for specific reasons. First, one comparable trait or tertium comparationis (Kestemont, 2018; Örücü, 2007; Husa, 2015) is that each of the four jurisdictions has an NCBC law, and the UN, EU, and Australian legal frameworks permit the enforcement of transnational NCBC orders. Second, Indonesia, Australia, and the EU have ratified the UNCAC, which is the only UN treaty explicitly encouraging its States Parties to adopt NCBC in their domestic law. Third, EU law establishes mutual recognition as a distinct cooperation mechanism for enforcing transnational confiscation orders. Fourth, Australia is selected not only because it has an MLA treaty with Indonesia but also because both countries have different legal systems: Indonesia is a civil law country, whereas Australia is a common law jurisdiction.

This topic is particularly significant and timely. From a national perspective, it is novel and relevant since Indonesia is considering enacting a comprehensive NCBC law. This article will also fill a major gap in the international literature, none of which considers the Indonesian context of cross-border NCBC cooperation.

Theoretical Framework

Non-Conviction-Based Confiscation

The conventional method of confiscation is criminal confiscation, which follows the conviction of a perpetrator (Boucht, 2019). In contrast, NCBC is a procedure for expropriating assets of criminal origin without conviction (Rui, 2015; Greenberg et al., 2009). Differences between NCBC and criminal confiscation include the following (Greenberg et al., 2009; Vogel, 2015; Cassella, 2015; Boucht, 2022; King and Hendry, 2023). First, criminal confiscation requires a criminal trial and conviction of a perpetrator, two matters not necessary in NCBC. Second, criminal confiscation proceedings are brought against the individual offender, while NCBC targets criminal assets. Third, in some jurisdictions, the standard of proof in NCBC is significantly lower than in criminal confiscation, for example, by using the civil standard "balance of probabilities". For clarity, the terms "confiscation" and "forfeiture" are to be read as having the same meaning in this article.

As an overarching concept, NCBC comprises different models. Two of the relevant models are classic/criminal NCBC and civil confiscation. Classic/criminal NCBC is closely linked to criminal proceedings and can only be commenced contingent upon the unfeasibility of prosecution/conviction due to reasons such as the offender's death or absconding (King, 2022). Civil confiscation is indirectly connected to a criminal offence, follows the civil procedure framework, and uses a lower standard of proof than the criminal standard (King, 2022; Boucht, 2022).

Inherent to confiscation is the principle that people should not be allowed to obtain profits from unlawful conduct to which they have no legal rights (Alldridge, 2003; Boucht, 2017; Simonato and Fernandez-Bertier, 2019). One plausible justification for NCBC is "restoration," which seeks to restore the original state before a criminal incident by dispossessing the offenders

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of any criminal benefits derived from the crime—restitutio ad integrum (Boucht, 2017; Bowles et al., 2005).

NCBC as an Adaptive Response to Crime

Analysing the use of NCBC to tackle organised crime, Hendry and King (2015) argue that recourse to NCBC signifies a failure of ordinary criminal law measures, which are deemed inadequate to eradicate organised crime. Since NCBC, particularly civil confiscation, is conceptualised as a criminal measure adopting a civil standard, procedural safeguards embedded in the criminal process do not apply to the proceeding due to its lower standard of proof and less strict procedural guarantees (Hendry and King, 2015; Rui and Sieber, 2015; Luna, 2020; Lea, 2004; Millington and Williams, 2007).

From a criminological point of view, the utilisation of NCBC signifies the state's adaptive response to crime (Campbell, 2007; 2013). Through adaptive responses, the state reckons the limits of the criminal justice system and its conventional measures in tackling high crime rates (Garland, 2001; 1996). Casu quo, the constraint of conviction-based confiscation is acknowledged for its inapplicability in complex acquisitive crimes where convicting the offender is impossible. The limitations are particularly apparent in the context of organised crimes, where (1) it may not be feasible to prosecute the leaders of criminal groups due to lack of evidence and diffusion of criminal liability in crimes committed by street-level members; and (2) sophisticated criminal methods are deployed to escape justice (Campbell, 2007; 2010; Goldsmith et al., 2014; Bell, 1999; Simser, 2009). To respond to the predicament, some states introduce creative and realistic policies (Garland, 2001) by, casu quo, enacting NCBC provisions.

As elaborated by Garland (2001), the six forms of adaptive response are professionalisation and rationalisation of the justice system, privatisation of criminal justice undertakings, defining deviance down, reinvention of accomplishment, emphasis upon consequences, and relocation of responsibilities. Whether NCBC falls within this typology remains to be analysed.

Fairness and Procedural Safeguards in NCBC

While acknowledging its usefulness and practicality for law enforcement authorities (Boucht, 2022), the pragmatic nature of NCBC (specifically civil confiscation) regarding efficiency, civil character, and the consequent circumvention of procedural safeguards in criminal proceedings may undermine due process compliance (Hendry & King, 2015; King & Hendry, 2023), as well as fairness and legitimacy. Boucht (2017) notes three aspects regarding procedural rights protection in NCBC proceedings. First, the standard of proof on the basis of which judges render the confiscation orders. In a civil NCBC regime, Boucht (2017; 2022) argues that the applicable standard of proof should be an enhanced balance of probabilities, where the likelihood of the criminal origin of assets under investigation shall be >0.7-0.8 rather than >0.5 as in the traditional "balance of probabilities". Second, in regard to the burden of proof, the reversed burden of proof should be used only in restrictive circumstances (Boucht 2017; 2022). Third, the following general procedural guarantees must be upheld: (a) interested/bona fide parties shall be entitled to argue their case to competent authorities, including the court, to challenge the confiscation against their assets obtained in good faith; (b) the ability to present evidence; (c) the right to a reasoned judgment; and (d) where applicable, access to legal representation (Boucht, 2017). In contrast with Boucht, several authors such as King and Hendry (2023) and Gray (2012a; 2012b) advocate for an even more definitive position, that NCBC should be regarded as a criminal proceeding, therefore requiring all fundamental rights protections inherent in the criminal process to apply to NCBC.

Method

This mixed methods research is undertaken using comparative legal and document analyses. For the comparative legal analysis, this research employs functional and law-in-context approaches. Using the functional approach (Kestemont, 2018; Van Hoecke, 2015; Husa, 2013; Palmer, 2005; Örücü, 2007; Siems, 2018), the present article compares and analyses legal provisions in the UN, EU, Australia, and Indonesia that serve the functions of regulating NCBC and transnational NCBC

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enforcement. The commonalities, differences, and good practices (Pakes, 2019) are identified. Further, the law-in-context approach is utilised to obtain detailed expositions on the empirical and historical aspects of the legal framework being compared (Van Hoecke, 2015). For the empirical facet, practices of transnational NCBC enforcement in the four jurisdictions, along with domestic NCBC exercises in Indonesia, are examined. The historical origins of Indonesian legal provisions related to the NCBC regime and transnational NCBC enforcement are extensively re-searched. To mitigate the risks of ethnocentrism (Nelken, 2010) and Western bias in comparative law (Zoumpoulakis, 2023; Peters & Schwenke, 2000; Menski, 2007; Twining, 2011), all legal provisions in the four jurisdictions are examined critically as equal legal sources.

Document analysis is used for analysing the Indonesian context by systematically evaluating relevant printed/electronic materials regarding transnational NCBC enforcement to obtain and construe valuable information (Bowen, 2009; Dalglish et al., 2020). Subsequently, the information is organised and examined (Bowen, 2009; Morgan, 2022; Jones & Newburn, 2007) to provide empirical and historical contexts of the Indonesian legal framework.

Results and Discussion

The Nature of NCBC

UN	EU	Australia	Indonesia
UNCAC: - Directly linked to a criminal investigation or prosecution. - Supplementary character, only instituted when prosecution is unfeasible.	Directive (EU) 2024/1260: - Comprises NCBC and unexplained wealth confiscation (UWC). - NCBC is directly related to investigation or prosecution. - UWC is an independent proceeding against illicit assets, linked to a prior criminal investigation and contingent upon the unavailability of other forms of confiscation. It seeks confiscation of criminal property.	POCA: - Comprises, *inter alia*, civil forfeiture and unexplained wealth order (UWO), conducted according to the civil procedure framework. - Civil forfeiture is a proceeding against illicit assets, whereas UWO dictates a payment of a sum commensurate with an individual's unlawful wealth.	Anti-Money Laundering Act: - Directly linked to a criminal investigation. CAC Bill: - Although claimed by the Bill as a civil forfeiture procedure, the NCBC approach is strongly connected to criminal investigation or prosecution. - Supplementary to the criminal confiscation; to be commenced in the event of impossibility of obtaining a conviction.

Figure 1. Comparison of the Nature of NCBC

UN

The UNCAC is the only internationally binding anti-corruption treaty (Rose, 2015; UNODC, n.d.). As the EU, Indonesia, and Australia are all Parties to the UNCAC, they are obliged to implement UNCAC provisions in their legal systems. Although the scope of application is restricted to corruption and money laundering offences, UNCAC provisions are relevant because these offences are among the dominant and prevalent forms of acquisitive transnational crimes (Nessi, 2015). Article 54(1)(c) UNCAC presents a norm for the establishment of NCBC in States Parties' domestic system.

The provision shall be comprehended in two ways. *First*, as a non-mandatory provision, it encourages States Parties to enable confiscation without conviction in cases of the offender's death, flight, absence, or other appropriate cases. This normative aspect of the provision is highlighted by some literature (Ivory, 2019; Greenberg et al., 2009; COSP UNCAC, 2021; Desterbeck

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and Schantz, 2009). As regards its characteristics, a COSP UNCAC publication (2021) contends that the provision resembles a more "criminal" NCBC regime for its supplementary role to classic criminal confiscation. In UNCAC's approach, NCBC may be instituted only when prosecuting an offender is not viable. However, it does not restrict the States Parties from adopting other approaches in which NCBC is undertaken independently of criminal proceedings (COSP UNCAC, 2021).

> "*Each State Party, **in order to provide mutual legal assistance** pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party; ... (c) Consider taking such measures as may be necessary to allow **confiscation of such property without a criminal conviction** in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases* (emphasis added)."

Figure 2. Article 54(1) UNCAC

Second, the establishment of NCBC law must be read in accordance with the aim of providing mutual legal assistance (MLA) related to the confiscation of proceeds and instrumentalities of crime. UNCAC Technical Guide (2009) emphasises that this provision primarily seeks to allow a State Party to confiscate illicit assets originating from a corruption offence committed abroad but relocated to its jurisdiction. Viewed this way, Article 54(1)(c) was originally conceived as a procedure for enabling transnational NCBC cooperation. In other words, NCBC law is to be instituted with a view to enhancing MLA in recovering criminal assets. Nevertheless, the UNCAC's MLA mandate for effectuating transnational civil confiscation is discretionary, not compulsory, upon the States Parties.

EU

Directive (EU) 2024/1260 on Asset Recovery and Confiscation was issued to replace Directive 2014/42/EU. The new Directive imposes obligations on the Member States to regulate several forms of confiscation. Since the EU Directive is binding as to the result, the Member States have the discretion to select the appropriate forms and methods to implement it (EU, 2012). Regarding NCBC, Directive (EU) 2024/1260 enhances the previous confiscation regime by widening the scope of NCBC and introducing unexplained wealth confiscation (UWC).

Compared to Directive 2014/42/EU, Directive (EU) 2024/1260 expands the conditions giving rise to NCBC. While the previous Directive stipulates that grounds for instituting NCBC are restricted to the impossibility of criminal confiscation due to illness or absconding of the suspected/accused person (Grandi, 2019), Article 15 of Directive (EU) 2024/1260 includes two more conditions, which are (1) the death of the suspected/accused person, and (2) the expiration of the statute of limitation below 15 years. The provision conceptualises an NCBC approach that is closely related to criminal proceedings (Sakellaraki, 2022) and complementary to criminal confiscation. This is affirmed by Article 1, which states that the Directive covers confiscation orders issued "within the framework of proceedings in criminal matters". Moreover, Article 15(1) indicates that NCBC must be carried out only in cases where, *first*, it would have been possible to obtain a conviction if the case was triable, and *second*, the court deems plausible that the criminal assets are indeed derived from, or linked to, the corresponding criminal offence.

Article 16 mandates Member States to establish UWC to secure assets derived from organised crime, dependent upon the unavailability of other forms of confiscation, including NCBC (Ochnio, 2024). One condition for UWC is a significant disproportion between the assets and the

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individual's legal income. UWC can be categorised as a form of NCBC (Boucht, 2019) because the mechanism does not require the offender to be convicted.

Australia

Article 7 of the Proceeds of Crime Act (POCA) 2002 (last amended by Act No. 54, 2024) regulates five mechanisms to apprehend criminal assets: conviction-based forfeiture, non-conviction-based forfeiture, pecuniary penalty orders, literary proceeds orders, and unexplained wealth orders (Goldsmith et al., 2014; Bartels, 2010). This article focuses on NCBC and unexplained wealth orders (UWO).

Article 315 asserts that NCBC proceedings follow the civil procedure framework. NCBC may be instituted in serious offences and indictable offences. NCBC in serious offences does not require the court to find that the commission of an offence has been proven. To render NCBC orders for indictable offences, the court does not need to find that a criminal offence has occurred and a person has been proven guilty of committing the offence.

Furthermore, in UWO proceedings (Article 179A), which also use a non-conviction-based system, the court renders an order that compels a person to pay a portion of his/her total wealth, which cannot be proven to be lawfully acquired (Goldsmith et al., 2014). The Australian approach differs from Directive (EU) 2024/1260; the former orders a person to *pay* an amount of unlawfully acquired wealth, whereas the latter dictates *confiscation* of unlawfully obtained property.

Indonesia

Anti-Money Laundering Act

A rudimentary form of NCBC is promulgated in Articles 67 and 79 of Law No. 8/2010 on the Prevention and Eradication of Money Laundering Offences (Husein, 2019). Article 67 concerns NCBC in the investigation stage, while Article 79(4) deals with NCBC in the court examination stage. The NCBC approach in Article 67 is rather minimalistic with no detailed procedural rules. To fill the incomplete procedural norms, Supreme Court Regulation No. 1/2013 was enacted as an implementing policy.

The NCBC scheme adopted by Article 67 has a direct link to a criminal investigation. It starts with the temporary freezing of a suspicious financial transaction by the Indonesian Financial Transaction Reports and Analysis Centre (INTRAC) before being submitted to the investigator [Article 67(1)]. Upon criminal investigation, if no alleged perpetrator is found, the investigator may then lodge a request to the court to decide whether the asset in question (*casu* quo, frozen financial transaction) shall be declared as a state asset or to be returned to the rightful owner [Article 67(2)]. The involvement of INTRAC in freezing the financial transaction is confirmed by Supreme Court Regulation No. 1/2013, which requires the application for confiscation to enclose the document of transaction freezing based on INTRAC's request (INTRAC, 2021).

The use of NCBC is very rare. According to available resources, approximately no more than four domestic NCBCs have been concluded based on the Anti-Money Laundering Act and Supreme Court Regulation No. 1/2013 (Husein, 2019; APG, 2018; NLDA, 2022). A 2021 NCBC practice offers an interesting insight as its implementation deviates from the law-in-books. In this case, a perpetrator in a money laundering case related to a narcotics crime absconded and could not be arrested (PPS, 2022; Lintas Nasional, 2022; Bireuen D.C., 2021; NLDA, 2022). Two departures from the positive law are identified. *First*, in the verdict issued by the Bireuen District Court, the confiscated assets comprise a sum of money, a truck, two motorcycles, and seven land areas. *Second*, based on the available references, it appears that in its investigation, the investigators froze a sum of money in bank accounts without any involvement of the INTRAC. It is inferred that in this case, the National Narcotics Agency investigators applied Article 67(2) independently by detaching it from the general context set out by Article 67(1). By doing so, they proceeded to 1) handle the case on its own without prior submission of the frozen transaction from INTRAC and 2) confiscate a broad scope of criminal assets, comprising not only frozen financial transactions originally governed by Article 67(1), but also other forms of illicit assets.

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Criminal Assets Confiscation Bill

Compared to the NCBC scheme under the Anti-Money Laundering Act, the Criminal Assets Confiscation (CAC) Bill is developed to establish a comprehensive NCBC procedure applicable to a broad range of criminal offences and illicit assets. While the government has officially submitted it to the House of Representatives, the parliamentary deliberation of the Bill has not been initiated.

Article 2 of the CAC Bill affirms that the confiscation is not based on the conviction and punishment of a perpetrator. The Statutory Explanation of this Article states that the confiscation under the Bill is a "civil forfeiture" regime that is *in rem* in nature. *In rem* forfeiture is defined as a legal action against the criminal assets, not against an individual offender (*in personam*) like that in criminal prosecution. The choice of civil forfeiture is made clear in the 2022 Academic Paper and its previous versions, where its advantages are elaborated extensively (NLDA, 2022; 2015; 2012). The authors of the Academic Paper denote that foreign NCBC models which may serve as references are the civil forfeiture systems implemented in the US, Australia, and the Philippines (NLDA, 2022).

Regarding the grounds for instituting NCBC, Article 7(1) stipulates that NCBC proceedings can be brought against the alleged criminal assets in cases where the suspect or the accused is dead, absconding, suffering from permanent illness, whose whereabouts cannot be identified, or has been discharged by the court. It can also be conducted if a criminal case cannot be tried and if other criminal assets are found after the accused has been found guilty [Article 7(2)]. Article 5 promulgates that assets subject to confiscation include, *inter alia*, proceeds and instrumentalities of crime, as well as disproportionate illicit assets compared to an individual's lawful income.

While it is claimed that the CAC Bill adopts a civil forfeiture regime, it is argued that the NCBC procedure stipulated by the Bill is, in fact, more directly linked to criminal proceedings and complements criminal confiscation. This stance is supported by four arguments. *First*, Article 3(1) affirms that NCBC does not eliminate the authority to prosecute an offender. Further, Article 4 states that an NCBC proceeding must be suspended if there is a pending criminal prosecution dealing with the same assets. If the *res judicata* decision in the prosecution declares that the assets are to be confiscated by the state, the NCBC proceeding shall be terminated. These provisions signify the supplementary nature of the NCBC proceedings. *Second*, as opposed to the pure civil forfeiture scheme, which can be carried out even in the absence of a criminal case (Cassella, 2019; 2021), NCBC proceedings in the CAC Bill may only be exercised if the prior criminal investigation/prosecution is unviable to be continued. *Third*, the CAC Bill does not apply a civil standard of proof like that in civil forfeiture. On the contrary, it adopts a substantive standard of proof (Valerian, 2024) where the confiscation is justified if the impugned assets are proven to be indeed criminal [Article 43(1)]. *Fourth*, the court examination procedures for the NCBC do not strictly follow traditional civil procedure law, as the Bill stipulates new, specialised procedural rules for NCBC proceedings. Therefore, the CAC Bill adopts a hybrid procedural framework.

Adaptive Response Conceptualisation

UN

UNCAC Legislative Guide (2012, p.212) denotes that Article 54 UNCAC contains a novel approach to overcoming barriers in transnational confiscation by introducing "the use of creative measures." One of these creative measures is encapsulated in Article 54(1)(c), through which the UNCAC encourages the establishment of NCBC in a Party's domestic system, becoming the first UN treaty to do so (Nessi, 2015). Another way to identify the characteristics of adaptive response in the UNCAC's NCBC regime is by assessing its objective, that is to overcome a predicament as regards the unfeasibility of securing confiscation of criminal assets in cases where the prosecution cannot be commenced due to the offender's death, absence, or flight, or other appropriate cases.

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UN	EU	Australia	Indonesia
UNCAC: creative measure to overcome barriers in transnational confiscation and to secure confiscation in corruption cases where the offender is dead, absent, or absconding, or in other appropriate cases.	- Directive (EU) 2024/1260: refinement of previous NCBC regime. - Regulation (EU) 2018/1805: providing the legal basis for enhanced EU-wide cooperation regarding confiscation orders.	- POCA: adaptive measure in response to the failure of criminal forfeiture. - MACMA: adaptive legal reform to facilitate the enforcement of transnational NCBC governed by POCA.	CAC Bill: adaptive measure in response to the limits of conviction-based confiscation in criminal asset recovery.

Figure 3. Conceptualisation as an Adaptive Response

EU

The conceptualisation of Directive (EU) 2024/1260 as an adaptive response is illustrated by Recital (6), which contemplates that the previous framework (Directive 2014/42/EU) needs to be refined to fully accomplish the aim of combatting organised crime through proceeds of crime recovery. Moreover, Regulation (EU) 2018/1805 on the Mutual Recognition of Freezing Orders and Confiscation Orders can also be perceived as an adaptive response to facilitate the enforcement of cross-border confiscation orders, since it is the first EU regulation that lays down a mutual recognition mandate for enforcing freezing and confiscation orders within the EU [Recital (4)]. Taking the form of a Regulation, it is binding in its entirety and directly applicable in all EU Member States (EU, 2012). The Regulation is aimed at resolving the inefficiencies often encountered in the conventional MLA procedure (Pavlidis, 2019).

Australia

Australian civil forfeiture regime is an adaptive response promulgated to address the failure of criminal confiscation. The enactment of the POCA in 2002 was driven by the need to introduce a civil forfeiture regime for confiscating unlawfully obtained assets without a criminal conviction. Its Explanatory Memorandum denotes that the procedure facilitates criminal assets forfeiture through a "simpler civil process" and adopts a civil standard of proof (Parliament of Australia, 2002a). Several scholars explain that the shift from exclusive use of conviction-based confiscation to NCBC was pushed by a report of the Australian Law Reform Commission, which concluded that "conviction-based forfeiture had failed to achieve its objectives" (Goldsmith et al., 2014: 121) and recommended the introduction of civil forfeiture provisions at the federal level (ALRC, 1999).

The Mutual Assistance in Criminal Matters Act (MACMA) 1987 (last amended by Act No. 63, 2023), can also be characterised as an adaptive response for enabling the enforcement of transnational NCBC orders from and to foreign jurisdictions. MACMA, for the first time, incorporated the provisions facilitating foreign forfeiture order enforcement (including NCBC) in 2002 through the enactment of the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act. As such, the MACMA was revised at the same time as the passing of the POCA. Its Explanatory Memorandum even clarifies that the MACMA is amended to reflect the provisions of the POCA (Parliament of Australia, 2002b), especially regarding NCBC/civil forfeiture.

Indonesia

Reflecting on the current criminal confiscation regime, the CAC Bill points out the need to regulate NCBC in its recital since the existing system for confiscating criminal assets has not been effective in supporting equitable law enforcement undertakings. The Statutory Explanation describes that the NCBC is utilised to widen the possibility of criminal assets recovery without being impacted by the success or failure of criminal prosecution. Therefore, the NCBC regime in the CAC Bill is also an adaptive response to overcome the limits of conviction-based confiscation.

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Mechanism Facilitating the Enforcement of Transnational NCBC Orders

UN	EU	Australia	Indonesia
UNCAC: - MLA in criminal matters is only mandatory for confiscation orders issued by a court with criminal jurisdiction. - States Parties have discretion to recognise and enforce the purely civil NCBC orders. - Requires an *exequatur* decision by the requested state.	Regulation (EU) 2018/1805: - Mutual recognition of confiscation orders, entailing automatic recognition and enforcement in the executing state. - Applicable to NCBC orders issued within the framework of proceedings in criminal matters; does not apply to purely civil NCBC with no connection to a criminal offence. - While the executing state does not have NCBC regime in place, it is still obliged to recognise and enforce NCBC orders issued by another EU Member State.	MACMA: - The enforcement of transnational NCBC orders is enabled by MLA. - Restricted to NCBC orders issued in relation to a foreign serious offence. - Requires an *exequatur* decision through registration of foreign NCBC orders before a court. After registration, the orders can be directly enforced.	- The existing MLA Act and Anti-Money Laundering Act do not accommodate the enforcement of transnational NCBC orders through the MLA in criminal matters. - The CAC Bill does not stipulate clear and detailed provisions to facilitate transnational enforcement; it only specifies international cooperation on the basis of a treaty or good relation. - However, there is an allusion in the 2022 Academic Draft that, to some extent, resembles the framework of MLA in criminal matters.

Figure 4. Comparison of Mechanism Facilitating Transnational NCBC Enforcement

UN

Under Article 46(1) UNCAC, the mutual legal assistance that States Parties must afford to one another is carried out following these conditions: *first*, the assistance is directly related to the offences stipulated by UNCAC, and *second*, it is provided within the framework of investigations, prosecutions, and judicial proceedings of those offences (Chrysikos, 2019). UNCAC's MLA mandate includes the recovery of criminal assets via transnational confiscation (UNODC, 2012). Article 54(1)(a) obliges a State Party to effectuate a foreign confiscation order issued by another State Party's court through the MLA avenue.

However, the official interpretative notes of the UNCAC define that the term "confiscation" in Article 54(1)(a) shall not be construed to include a confiscation order issued by a court without criminal jurisdiction (UNODC, 2010). As recorded in the *Travaux Préparatoires*, during the draft negotiation phase, some delegations expressed their concern that legal issues may arise if the term "confiscation" is to be interpreted as including civil confiscation (Ivory, 2019; UNODC, 2010). To settle this, it was agreed during the negotiation that the confiscation order must be issued by a competent court in criminal jurisdiction (UNODC, 2010). Thus, States Parties have discretion but are not compelled by the UNCAC to enforce foreign civil confiscation orders (Ivory, 2019).

EU

Compared to the traditional MLA mechanism applied universally outside of the EU, which often necessitates the issuance of an implementing decision (*exequatur*) produced by the assisting state (Ronsfeld, 2023), the mutual recognition principle requires the EU Member State to directly execute a confiscation order transmitted by another Member State. According to Article 18(1) Regulation (EU) 2018/1805, the executing Member State must enforce the confiscation order from the issuing Member State "in the same way" it enforces a domestic confiscation order.

The Regulation applies to a broad range of confiscation orders, including NCBC, provided that they are made "within the framework of proceedings in criminal matters" [Article 1(1)]. Mirandola (2020) construes that "proceedings in criminal matters" may refer to judicial proceedings that (1) are related to a criminal offence, from which the criminal assets derive; and (2)

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implement similar procedural safeguards like those applicable in criminal proceedings. Following this argument, only the entirely civil or administrative confiscation not linked to a criminal offence falls outside the Regulation's scope (Mirandola, 2020; Maugeri, 2024), which is also reflected in Article 1(4). While acknowledging that the provisions allowing for NCBC might not be present in a Member State's domestic system, the Regulation still obliges the Member State to recognise and enforce the NCBC order issued by another Member State (Recital 13). Yet, in this situation, the general requirements still prevail: *first*, the NCBC must be issued related to proceedings in criminal matters, and *second*, there are no grounds for non-recognition and non-execution (Article 19), as well as grounds for potponement of execution (Article 21).

Australia

The MACMA enables Australia, as a requesting state, to request assistance from a foreign country to enforce an Australian forfeiture order (including NCBC/civil forfeiture) related to a serious offence against a property located in the country thereof. In the role of an assisting state, Australia may accept a foreign forfeiture order to be registered in a competent Australian court (Goldsmith et al., 2014). As MACMA does not require the conviction of an offender underlying a confiscation, the foreign order may be conviction- or non-conviction-based.

One requirement Australia applies is that the foreign forfeiture order must relate to a serious offence in the requesting country's law. Steps to be taken after receiving a foreign forfeiture order comprise registration and enforcement. In the registration stage, the Australian authority registers the foreign order in a competent court. The registered foreign forfeiture order may be enforced and has an equivalent effect to a (domestic) forfeiture order issued under the POCA.

Indonesia

Anti-Money Laundering Act

Article 91 promulgates a general approach for the prevention and eradication of money laundering through MLA in criminal matters. There is no specific international cooperation rule concerning NCBC. Since Article 91 emphasises MLA "in criminal matters," it is doubtful that this provision covers NCBC procedure under Article 67.

MLA Act

Law No. 1/2006 on MLA in Criminal Matters (MLA Act) serves as a legal basis for Indonesia in requesting and providing MLA to other countries in relation to an investigation, prosecution, and examination before the court (Articles 2 and 3). Article 5 specifies that the assistance may be provided based on treaties with other countries. In the absence of a treaty, the assistance may still be afforded on the basis of a good relation under the reciprocity principle.

In the role of a requesting state, Article 22 regulates that Indonesian authorities may convey the request for assistance to another state to execute a *res judicata* judgment. Further, Article 23 specifies that the court judgment may contain confiscation of seized assets, imposition of criminal fines, or payment of compensation. In the role of a requested state, Indonesia may follow up a foreign *res judicata* judgment containing similar orders [Article 51(1)].

Article 52 stipulates procedural steps for executing foreign court judgments mandating the confiscation of criminal assets in Indonesian territory. In this scheme, the enforcement of foreign confiscation orders comprises two steps: (1) provisional seizure; and (2) final confiscation. The Prosecutor General or the appointed officer must initially apply for a seizure warrant from a court. Based on the warrant, the prosecutor conducts a seizure. The owner of the assets or the harmed third party may lodge an opposition to the court to challenge the seizure. If no opposition is lodged within the given period, the competent court may issue the final confiscation order based on the prosecutor's request. Although not explicitly stipulated by the MLA Act, it can be construed that in cases where the seizure is challenged, the court is to decide whether the opposition is justified before issuing the confiscation order.

The general rule provides that MLA in criminal matters is to be afforded in relation to investigation, prosecution, and court examination. Since no prosecution and court examination leading to a criminal conviction occurs in NCBC proceedings, it is inferred that NCBC falls outside

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the scope of the MLA Act. Through systematic interpretation, a reading of Articles 6 and 7 regarding grounds for mandatory and optional refusals of MLA leads to a similar conclusion. Most of these grounds refer to the investigation, prosecution, court examination, or sentencing of a person for a criminal offence.

Further, Article 1.5 defines "confiscation" as "*a coercive measure to expropriate the right on assets or profits that have been obtained or may have been obtained by a person from a criminal offence he/she committed, based on a court judgment in Indonesia or a foreign state.*" The provision indicates that only conviction-based confiscation falls within the scope of MLA. This is because a formal decision defining whether a criminal offence, from which illicit assets are derived, is proven, and whether someone is guilty and can be held liable for the offence he/she committed, must always take the form of a criminal conviction.

Upon studying the chronicle of parliamentary deliberation preceding the enactment of the MLA Act, no discussions regarding NCBC were identified. This absence might be reasonable because the UNCAC had yet to be ratified by Indonesia when the MLA Act was discussed. The legislators and the government's representatives appeared to conceptualise confiscation enforcement in the framework of a conviction-based system. For example, when deliberating Articles 22 and 23, it is highlighted by the chairperson of the meeting that "confiscation" was regarded as an additional criminal sanction supplementing the primary sentence, *casu quo* imprisonment (SGHR, 2005a). Furthermore, in discussing Articles 51 and 52 as regards requests for assistance from another country concerning the enforcement of foreign confiscation judgment, the chairperson denoted that, given the nature of the order as a criminal judgment, it must be final and binding (*res judicata*) to be executed in Indonesia (SGHR, 2005b). The lawmakers also observed that, as the provisional seizure and confiscation orders are to be executed by the Prosecutor General, the judgment must be criminal in nature since only the public prosecutors who are authorised to execute such judgments (SGHR, 2005b).

Criminal Assets Confiscation Bill

In the CAC Bill, matters regarding international cooperation are governed in Chapter V: International Cooperation, which comprises Articles 63 and 64. In essence, Article 63 promulgates that the government may conduct transnational cooperation related to assistance in the tracing, freezing, seizure, and confiscation of criminal assets on the basis of a treaty or good relations under the reciprocity principle. Article 64 states that the government may conclude a treaty with other jurisdictions to equitably share the result/profit from transnational asset recovery.

"*(1) The government may conduct international cooperation regarding assistance for tracing, freezing, seizure, and confiscation of (criminal) assets.*

(2) The cooperation, as referred to in paragraph (1), is carried out based on a treaty with other countries, whether bilateral, regional, or multilateral, or on the basis of good relation under the reciprocity principle."

Figure 5. Article 63 CAC Bill

"*(1) The government can conclude a treaty with the government of another country to obtain result/profit sharing, including reimbursement of costs, regarding the result of (criminal) assets confiscation involving that country, whether carried out in Indonesia or another country.*

(2) The result/profit sharing treaty, as referred to in paragraph (1), is conducted in accordance with the laws and regulations."

Figure 6. Article 64 CAC Bill

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Article 63 of the 2023 CAC Bill does not specify which form of international cooperation should be implemented to facilitate the enforcement of transnational NCBC orders. While it, to some extent, may resemble the MLA mechanism under the MLA Act (especially regarding the reference to the "reciprocity principle"), there is no explicit mention of "mutual legal assistance." For a legislative proposal quite concerned with criminal assets being relocated and laundered outside domestic jurisdiction, the CAC Bill's rather superficial and general approach towards transnational cooperation for NCBC is perplexing.

The 2022 Academic Paper highlights several times the difficulties of tracing and recovering criminal assets relocated to foreign jurisdictions (p. 10, 16). Moreover, international cooperation is lauded as a crucial aspect in the confiscation of criminal assets located abroad (pp. 79-80). An explicit reference to the UNCAC is made in the CAC Bill's Statutory Explanation, where it is observed that the existing confiscation system does not comprehensively regulate procedures for confiscation in accordance with the UNCAC's asset recovery provisions. Further, the Statutory Explanation highlights that the Bill is devised to facilitate the government's cooperation with other countries through asset return.

Intriguingly, the 2022 Academic Paper includes some sections that examine the existing MLA regime. It even mentions that MLA is the "most convenient way" to facilitate the return of criminal assets to the jurisdiction of origin (pp. 79-80). The Academic Paper, upon analysing the current MLA Act, recommends expanding the scope of MLA to civil forfeiture since the existing regime only covers MLA in the criminal field (p. 151). It is even asserted that if the current MLA Act is not reformed, it could impede the effectiveness of transnational NCBC enforcement (pp. 151-152).

Although the Academic Paper reviews the MLA Act thoroughly and even points out the limits of the current MLA regime, the Academic Paper does not seem to take the initiative to find a solution for facilitating effective enforcement of transnational NCBC orders. The CAC Bill does not, for example, expand the scope of MLA by formulating that the enforcement of transnational NCBC orders to be conducted pursuant to the MLA procedure. Instead of providing a procedure to ensure the enforceability of transnational NCBC orders, Article 63 appears to resort to a vague, uncertain form of cooperation on the basis of a treaty or good relations. However, it is also reckoned that CAC Bill drafters' hesitation to incorporate the MLA mechanism into Article 63 may arise from realising the constraints of the existing MLA Act.

Yet, a reading of the 2022 Academic Paper offers an interesting insight. It is explained that international cooperation is to be performed based on the reciprocity principle, which requires that mutual cooperation between countries be conducted in an organised manner. The cooperation also serves as a basis for law enforcement officials to receive and afford mutually beneficial legal assistance (pp. 243-244). While not explicitly specifying "MLA in criminal matters," this elucidation appears to allude to the concept of MLA. Unfortunately, since this explanation is only included in the Academic Paper and is not incorporated into the formulation of Article 63, or at least embedded into its statutory explanation, it does not possess a binding, normative power. It is then inferred that although the 2022 Academic Paper appears to indicate the use of MLA for international cooperation, the 2023 CAC Bill does not provide an explicit and certain form of cooperation to enforce transnational NCBC orders.

Further examination of the 2015 Academic Paper yields another compelling fact that is not present in the 2012 and 2022 versions. The 2015 Academic Paper states *expressis verbis* that the international cooperation conducted by the Indonesian government includes "mutual legal assistance in the matters of criminal assets" and/or "other forms of cooperation" based on a treaty or the reciprocity principle (p. 264). However, as is the case in the 2022 Academic Paper, this elucidation exists only in the 2015 Academic Paper and is not transposed into the formulation of Article 73 of the 2015 Bill.

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Procedural Safeguards in the Transnational Enforcement Stage

UN	EU	Australia	Indonesia
UNCAC: - International cooperation for confiscation shall not prejudice the rights of *bona fide* third parties. - Request for assistance must enclose a statement concerning measures taken to sufficiently notify *bona fide* third parties and ensure due process.	Regulation (EU) 2018/1805: - The executing authority must inform the affected persons regarding the confiscation orders. - The affected persons have the right to effective legal remedies against the confiscation orders. - Grounds for non-recognition and non-execution incorporate some rights-related conditions.	MACMA: - Australian authority must notify persons suspected of having an interest in the property to be forfeited. - The persons who claim an interest in the property may lodge an application to challenge the forfeiture order. - The court decides either to transfer the interest, or pay a compensation order, to the applicant.	MLA Act: - Regarding foreign criminal confiscation orders, the asset owner and harmed third party may lodge an opposition to the court. - No obligation of the law enforcement authorities to proactively identify and give formal notice to the affected parties other than the asset's owner. CAC Bill: No specific and detailed provisions regarding procedural safeguards in transnational NCBC enforcement.

Figure 7. Comparison of Procedural Safeguards in the Transnational Enforcement Stage

UN

Articles 31(9) and 55(9) of the UNCAC affirm that provisions on domestic confiscation and international cooperation for confiscation shall not be interpreted as prejudicing the rights of *bona fide* third parties. Further, Article 55(3)(b) urges the State Party to enclose a statement regarding the measures it has taken to provide sufficient notification to *bona fide* third parties and to ensure due process in the requests for assistance regarding confiscation enforcement.

EU

Article 32(1) Regulation (EU) 2018/1805 obliges the executing authority to inform the affected persons regarding the recognition and enforcement of cross-border confiscation orders. The affected persons have the right to effective legal remedies against the confiscation, which shall be exercised before a court in the executing state. Moreover, grounds for non-recognition and non-execution of confiscation orders include some rights-related conditions, such as 1) the execution would constitute a breach of the *ne bis in idem* principle, 2) the rights of affected persons would make the execution of confiscation order impossible, and 3) in exceptional situations, the execution of the confiscation order would entail a breach of rights as enshrined in the EU Charter of Fundamental Rights, particularly the effective remedy, fair trial, and defence rights (Article 19).

Australia

In the course of foreign forfeiture order registration, MACMA obliges the Australian authority to notify persons suspected of having an interest in the property or other persons as directed by the court (Article 34A). Article 34C provides a basis for a person, who claims an interest in the property to be appropriated through a foreign forfeiture order, to lodge a claim to the court. If it is found that 1) the applicant is not involved in a foreign serious offence giving rise to the forfeiture order, and 2) the property is not proceeds or instrumentalities of crime, the court shall issue an order regarding the legal nature of the applicant's interest in the property. Subsequently, the court may order the state to transfer the interest to the applicant or pay an amount of compensation commensurate with the value of the interest.

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Indonesia

Within the context of transnational conviction-based confiscation, the MLA Act provides a basis for specific parties to lodge an opposition/complaint to the court within (1) three months since receiving the seizure notification, for the owner of assets subject to provisional seizure, and (2) six months since the seizure announcement, for the harmed third party. However, the MLA Act does not assert an obligation to law enforcement authorities to proactively identify and give formal notice to all (potentially) affected parties.

Furthermore, Articles 19 and 31 of the CAC Bill stipulate that a person who perceives that their right is harmed by NCBC is entitled to file an objection/opposition to the court. Nevertheless, this objection/opposition shall not be submitted by the suspected/accused who is absconding. No specific procedural safeguards regarding transnational NCBC enforcement are identified in the CAC Bill.

Practice of Transnational NCBC Enforcement

UN	EU	Australia	Indonesia
Lack of transnational NCBC enforcement at the international level under the UNCAC framework.	No specific data regarding cross-border NCBC enforcement within the EU.	- Up until 2018, Australia has never enforced any foreign confiscation order (including NCBC) in relation to corruption investigation. - No specific recent MLA data regarding transnational NCBC/civil forfeiture enforcement.	- Indonesia-Russia MLA Treaty accommodates the enforcement of civil confiscation. - Indonesia has afforded an assistance regarding seizure of a criminal asset in relation to a civil forfeiture proceeding in the US.

Figure 8. Comparison of Transnational NCBC Enforcement Practice

UN

A COSP UNCAC publication (2023) reports that only six (4%) of the total 153 cases of transnational criminal asset returns under UNCAC in 2010-2023 involved the enforcement of foreign NCBC orders. This small number reflects one of the most prevalent hindrances encountered by States Parties regarding international asset recovery, where 50 States Parties recorded that they had difficulties in effectuating NCBC in foreign jurisdictions. Interestingly, NCBC is reported to be used in 45 (30%) of the total cases of asset returns. It can be construed that these are the instances in which the jurisdictions where the criminal assets are located resort to exercising self-initiated NCBC proceedings against the assets, to be subsequently returned to the jurisdictions where the offence initially occurred.

EU

A recent European Commission study (2023) records that the data on cross-border confiscation within the EU in 2017-2019 indicate low rates of cross-border asset recovery cooperation between Member States, constituting less than 1% of the total EU-wide confiscation orders annually, including domestic confiscation (European Commission, 2023). There is no specific statistical data on cross-jurisdictional enforcement of NCBC orders within the EU, as the available statistics only provide general information for all forms of confiscation (European Commission, 2023; 2022).

Australia

The 2018 UNCAC Implementation Review records that Australia has not registered any foreign confiscation order (either criminal confiscation or NCBC) resulting from the investigation of corruption offences at the time of reporting (UNODC, 2018). The 2023 Annual Report from the Attorney-General's Department indicates that in 2022-2023, 234 MLA requests from Australia were finalised by foreign countries, while 320 foreign MLA requests were concluded by Australia.

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However, there is no specification regarding the substance of MLA requests (including as regards "enforcement of NCBC orders") provided or requested by Australia in the Annual Reports (AGD, 2021; 2022; 2023).

Indonesia

As elaborated in detail above, legal and historical interpretation concludes that the MLA Act does not cover the enforcement of transnational NCBC orders. However, recent empirical developments portray some intriguing insights. *First*, as recorded in the FATF Mutual Evaluation Report of Indonesia (2023), the MLA Treaty between Indonesia and Russia (Republic of Indonesia, 2019; 2021) provides an explicit basis for the enforcement of confiscation orders in relation to criminal, administrative, and civil proceedings. The Treaty, therefore, enables civil confiscation enforcement.

Second, it is reported that Indonesia has accommodated one foreign MLA request based on a non-conviction-based order (FATF, 2023). This is a case regarding assistance afforded by Indonesia in the provisional seizure of the Equanimity luxury yacht in July 2018 (NST Online, 2018). The yacht was identified as a proceed of crime from the 1MDB graft case in Malaysia and the related money laundering probes in the US (Hui, 2018). In 2017, the US authority filed an *in rem* forfeiture/civil confiscation against the yacht in a federal court (US DOJ, 2017; USDC Cent. Dist. of California, 2017). Indonesian authorities exercised the seizure for eventual civil confiscation of the property based on an MLA request from the US (NST Online, 2018; Malaysiakini, 2018a). After being seized by Indonesian authorities, the yacht was transported to Malaysia, where it was subsequently secured according to Malaysian law (Malaysiakini, 2018b; StAR, 2020; COSP UNCAC, 2023).

It is important to highlight that before the seizure in July 2018, there was a prior seizure targeting the same property carried out in February 2018. However, it was invalidated in a pre-trial proceeding before a court (Alhadjri, 2018). The plaintiff argued that, *inter alia*, the seizure must be annulled because it is based on a civil *in rem* forfeiture proceeding, not on the basis of criminal process. Interestingly, the judge nullified the seizure not because it was related to a civil forfeiture proceeding, but because it was not conducted pursuant to the MLA Act. While the MLA Act requires the assistance request to be sent to the Minister of Law and Human Rights, the US authorities sent the request directly to the Indonesian National Police (South Jakarta D.C., 2018). Thus, it can be construed that, in this particular case, the judge implicitly comprehends that the MLA Act may accommodate a seizure order related to an NCBC (specifically civil forfeiture) proceeding.

Conclusion

Main Conclusion

As regards the research question, the present work concludes that the relevant UN, EU, and Australian legal frameworks can serve as benchmarks for transnational NCBC enforcement in Indonesia, particularly regarding the norm formulation of NCBC, international cooperation mechanisms, and procedural safeguards. However, considering the scarce instances of cross-border NCBC enforcement under the UNCAC framework, no exercise of transnational NCBC orders related to corruption offences in Australia, and the lack of equivalent statistics in the EU and Australia relative to the UNCAC data, significant insights regarding empirical effectiveness that can be taken as exemplary good practices for benchmarking have yet to be identified.

Since the Indonesian CAC Bill aims to harmonise with UNCAC's asset recovery ideals, it is crucial to correctly understand UNCAC's mandate. NCBC provision under the UNCAC is envisaged not only to encourage the enactment of NCBC law in States Parties' domestic systems but also with a view to providing MLA to other States Parties. However, UNCAC's obligation to afford MLA requests for foreign confiscation orders is not compulsory for orders issued by a court without criminal jurisdiction. Following that, it is observed that there are possibilities of embedding the enforcement of transnational NCBC orders into the imperative MLA mandate insofar as the domestic NCBC is substantially linked to criminal proceedings. To optimally utilise this potential,

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the Indonesian NCBC regime needs to be repositioned to its true "criminal" nature from the current "civil forfeiture" regime, which ought to be interpreted as issued by a court with civil jurisdiction thus falling outside the UNCAC's compulsory MLA mandate.

Although the EU mutual recognition principle does not apply to Indonesia, there are several positive features observed in Regulation (EU) 2018/1805. *First*, it compels the EU Member State to recognise and enforce NCBC orders issued by another Member State, even if the executing state does not have NCBC legislation in place. *Second*, since the Regulation restricts its scope of application to NCBC orders "issued within the framework of proceedings in criminal matters," only confiscation with a significant link to a criminal case can be effectuated. *Third*, it provides a comprehensive set of procedural guarantees for those affected by NCBC orders.

Australia limits the enforcement of foreign NCBC only to orders related to foreign serious offences. Furthermore, an important practice in Australia is the simultaneous reform of the MLA law imminently after the establishment of civil forfeiture provisions in POCA. This indicates that the Australian lawmakers envisioned from the outset that their NCBC regime must be rounded off by ensuring the legal modality to enforce transnational NCBC orders issued by Australia and foreign jurisdictions. Australian law also guarantees the rights of persons affected by the confiscation orders.

Theoretical and Practical Implication

NCBC: A Different Kind of Adaptive Response

Following Campbell's conceptualisation of NCBC in Ireland as an adaptive response (2007; 2010), this article found that the NCBC regimes in the four jurisdictions also embody the characteristics of an adaptive response to crime. In particular, NCBC is devised to circumvent the limits of criminal confiscation when confronted with the unfeasibility (or rather "difficulty" in the Australian context) of prosecuting an offender.

However, the advent of NCBC law cannot be seamlessly categorised according to Garland's typology of adaptive response. As such, the following analyses contribute a significant implication to the criminological theory of NCBC. *First*, the establishment and operationalisation of NCBC, it is asserted, signify the state's expansion of the legal modalities and coercive powers of criminal justice agencies to secure the expropriation of criminal assets. This proliferation of the criminal justice system's legal capacities through confiscation law reform may be thought of as a divergent variant of adaptive response.

Second, although the construction of NCBC may stem from the logic behind the "professionalisation and rationalisation of criminal justice," they do not share entirely similar tenets. While professionalisation strategies are manifested through practical improvements in information technologies, organisational management, as well as system integration and monitoring (Garland, 2001), NCBC is enabled by the scaling up of coercive legal powers under the virtue of international and national laws. Moreover, professionalisation strategies may be conducted based on self-initiated internal policy reforms by criminal justice agencies, whereas the establishment of NCBC law necessitates the harnessing of state power through the issuance of legislation.

Third, following the reasoning above, the enactment of NCBC law may be perceived as a measure taken by the state to assert, reclaim, and reinforce its crime control power in response to the criminal justice system's limits. Thus, its "state power consolidation" ideology is radically different from one of the established types of adaptive response, that is the repositioning of crime control and prevention responsibilities to non-state actors, including communities and private entities (Garland, 2001).

Fourth, the incorporation of norms under international legal frameworks such as the UNCAC and Directive (EU) 2024/1260, promoting the adoption of NCBC law in States Parties' domestic legal systems, indicates that the urgency of NCBC is conceptualised as transcending borders. Hence, it may be regarded as an adaptive response with a transnational character. This is exceptional because Garland (2001: 194) originally discerns that practices of adaptation mostly come into being as "local solutions" to concrete, contextual problems.

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Fifth, as regards the "emphasis on consequences," Garland (2001) portrays the shifting of state agencies' concentration from tackling the causes of crime to addressing its aftermath. This readjustment of priorities focuses on, *inter alia*, providing for the victims' needs and reducing public fear of crime. In contrast to these examples, NCBC represents an emphasis on a distinct type of consequence (or harmful effect) of crime, as it targets the removal of criminal profits rather than tackling crime through the conventional avenue of prosecution.

The emergence of NCBC as a paragon of the consolidation and expansion of the state's crime control power must be watched with vigilant eyes. For the sake of fairness and in the furtherance of justice, it must be balanced by prudently ensuring efficacious procedural safeguards.

Research into Transnational NCBC Enforcement Practices

Taking into consideration the findings as regards transnational NCBC enforcement practices in the UN, EU, and Australia, this article views that more extensive research on the factors promoting and undermining the effectiveness of transnational NCBC enforcement in fulfilling its objective can only be conducted if more transnational exercises of NCBC are carried out and publicly reported.

Reconceptualising the Indonesian NCBC Regime

Viewed from a comparative law perspective, Indonesia exemplifies a unique instance of NCBC law reform. Although Indonesia is traditionally a civil law jurisdiction, the examples of foreign NCBC regimes referenced in the Academic Paper of the CAC Bill are the civil forfeiture systems adopted by the US, Australia, and the Philippines. Two of these countries, the US and Australia, are classic common law jurisdictions.

Intriguingly, although the CAC Bill's Statutory Explanation claims that the adopted NCBC regime is of a civil forfeiture nature and considerable references are made to the civil forfeiture framework, its actual characteristics resemble an NCBC approach that is strongly linked to criminal investigation/prosecution, and therefore more "criminal" in nature. Reaffirming the true identity of the NCBC regime will help Indonesia in embedding the enforcement of its NCBC into the UNCAC's compulsory mandate to effectuate transnational confiscation orders in corruption and money laundering cases.

A Pressing Need for a Comprehensive NCBC Regime

Insight into the Indonesian recent practices of domestic NCBC and MLA in facilitating NCBC-related proceedings shows that the law-in-action departs from the law-in-books. Although these practices may be seen as proactive and responsive law enforcement endeavours to find a way around the substantive limits of positive law regarding NCBC and MLA, they are utterly problematic from a rule of law perspective. Procedural elements of the rule of law emphasise the importance of rule-by-law and formal legality (Bedner, 2010; Tamanaha, 2004). State actions, *casu quo* the exercise of NCBC, are subject to law. To satisfy formal legality, the substance of NCBC and MLA laws must be clear and certain, as well as accessible and predictable so that people can predict the consequences of their conduct (Bedner, 2010; Stein, 2019).

The absence of comprehensive NCBC provisions in the existing Anti-Money Laundering Act is not in line with the rule of law, for there is a lack of certainty regarding the scope of assets to be confiscated, as well as the steps of NCBC proceedings to be taken and the respective competent agencies to conduct such proceedings. This is also the case with the absence of a normative basis for transnational NCBC enforcement in the current MLA Act. All of these instances result in the unpredictable practices of NCBC and exert potentially unfettered discretionary powers to the state, due to the uncertain and incomplete law. In the context of NCBC, this could be detrimental to the affected persons and *bona fide* third parties, whose fundamental rights are protected by the rule of law (Bedner, 2010; Tamanaha, 2004).

Therefore, there is an urgent need for the institutionalisation of a comprehensive NCBC regime by passing the CAC Bill . This also necessitates reforming the MLA Act to integrate the mandate of transnational NCBC enforcement. Not least important is the need to uphold fairness by incorporating more robust procedural safeguards in the CAC Bill and the MLA Act revision.

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Utilising MLA as the Appropriate Mechanism

Transnational asset recovery is enabled by and operates on the principle of extraterritoriality, which underlines the exercise of a state's law outside its jurisdiction (Gutterman, 2023; Hock, 2023; Colangelo, 2023). The extraterritoriality principle refers to prescriptive jurisdiction [the extraterritorial outstretch of a state's power to apply its national law on persons and events (Takeuchi, 2023; Colangelo, 2023)] and adjudicative jurisdiction [the power to adjudicate matters on the basis of a state's national law (Clark, 2014; Hazim, 2020)]. The enforcement of transnational confiscation orders relies more on judicial cooperation mechanisms such as mutual legal assistance rather than through unilateral exercise of extraterritoriality (Cochrane 2022).

Since the exercises of investigative, prosecutorial, and judicial powers in the field of criminal justice are primarily territorial, states must rely on mutual legal assistance to enforce coercive measures in foreign jurisdictions (Boister, 2018; Vervaele, 2014; *Böse, 2019; Hazim, 2020; 2022*). Further, given that every form of confiscation (including NCBC) is a breach of an individual's fundamental rights (Hofmann, 2024), particularly property rights, it constitutes a coercive measure. Thus, in the context of the CAC Bill, there must be an explicit provision specifying that international cooperation for criminal assets seizure, freezing, and especially NCBC, is to be carried out according to the MLA framework.

Types of Foreign NCBC Orders to Recognise and Enforce

This article posits that there are two types of foreign NCBC orders to be accommodated by Indonesian law. *First*, the NCBC orders issued by jurisdictions that adopt an NCBC regime with similar features to the Indonesian regime: (1) directly linked to criminal investigation/prosecution; (2) supplementary to criminal confiscation; and (3) adopting a hybrid (criminal/civil) procedural framework. *Second*, to widen the possibility of recognising and enforcing foreign NCBC orders, Indonesia may also accommodate NCBC orders from jurisdictions that adhere to the civil confiscation system, insofar as the assets to be confiscated are linked to a criminal offence.

Ensuring More Robust Procedural Safeguards

In addition to formalising the use of MLA procedure to facilitate transnational NCBC enforcement, procedural safeguards reform must be integrated into the CAC Bill or the MLA Act revision. As elucidated above, the CAC Bill is currently silent on procedural safeguards in the enforcement stage of transnational NCBC. On the other hand, the MLA Act, while regulating that the affected party is entitled to challenge the foreign (criminal) confiscation orders, does not oblige the law enforcement authorities to identify and notify all potentially affected persons (not only the asset's owner) as regards the confiscation orders. In the current system, for third parties other than the asset's owner, the competent authorities must only publicly announce the provisional seizure for eventual confiscation. This is not the case in the EU and Australia where the competent agencies are obliged to notify the parties who may have an interest or may be affected by the transnational confiscation orders. These good practices, along with other procedural safeguards, can be adopted in the CAC Bill or the MLA Act revision.

Proposed Revisions to the CAC Bill and the MLA Act

This comparative study is tilted towards the idea of law reform (Grande, 2012). Reiterating the objective of regulating a fair and effective framework for transnational NCBC enforcement in Indonesian law, the present work calls for substantive reforms to the CAC Bill and the MLA Act by striking a balance between the interests of fairness and effectiveness. Clarifying the true nature of the Indonesian NCBC regime (which is strongly linked to criminal investigation/prosecution) does not require exhaustive revision to the CAC Bill. This aim can be attained by revising the Statutory Explanation of Article 2 which currently specifies that the Bill adopts a "civil forfeiture regime." Reconceptualising the NCBC regime only requires the phrase "civil forfeiture" to be deleted. This should be followed by reexamining the references to "civil procedure" in several sections of the Statutory Explanation.

Articles 63 and 64 of the CAC Bill shall explicitly mention that the coercive measures targeting criminal assets in foreign jurisdictions, including assets freezing, seizure, and especially NCBC, are

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to be exercised according to the MLA in criminal matters. Considering the Australian example, this proposed revision to the CAC Bill also requires reforming the MLA Act since the current MLA regime only accommodates the enforcement of transnational criminal confiscation.

The most ideal avenue is revising the MLA Act to expand the MLA mandate to the enforcement of transnational NCBC orders against the proceeds and instrumentalities of crime. The scope of foreign NCBC orders to be recognised and enforced must be comprehensively described. Moreover, for fairer proceedings, relevant procedural safeguards for the affected parties shall be guaranteed. These include but are not limited to: (1) the obligation of law enforcement agencies to proactively identify and formally notify the parties potentially affected by an NCBC order; (2) the affected parties' rights to challenge the confiscation and to receive an effective remedy; (3) fair trial rights; and (4) where possible, the right to legal counsel.

Another option is to incorporate the MLA procedure for transnational NCBC enforcement into the CAC Bill, along with the corresponding procedural safeguards. In so doing, the enacted CAC Bill, having equal legal power to the MLA Act as a legislative act, advances to formulate a specialised provision (*lex specialis*) by expanding the MLA mandate to transnational NCBC enforcement. It is argued that this proposal is sound and legally reasonable, as the "criminal" nature of Indonesian NCBC yields a high potential to immerse its enforcement into the framework of MLA in criminal matters. However, pertaining to the recognition and execution of foreign NCBC orders, it is reckoned that this proposition will better facilitate NCBC orders with a significant connection to criminal investigation/prosecution, rather than civil confiscation orders.

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Menegakkan putusan perampasan tanpa pemidanaan transnasional: Perbandingan kerangka hukum Perserikatan Bangsa-Bangsa, Uni Eropa, Australia, dan Indonesia

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Abstrak: Artikel ini membandingkan dan mengkaji secara kritis penegakan putusan perampasan tanpa pemidanaan (*non-conviction-based confiscation*) transnasional dalam kerangka hukum Perserikatan Bangsa-Bangsa (PBB), Uni Eropa (EU), Australia, dan Indonesia menggunakan analisis perbandingan hukum dan analisis dokumen. Hasil kajian menjadi rujukan dalam mengatur kerangka hukum yang adil dan efektif untuk penegakan putusan perampasan tanpa pemidanaan (PTP) transnasional dalam hukum Indonesia. Riset ini membandingkan sifat PTP, konseptualisasi respon adaptif, mekanisme yang memfasilitasi penegakan PTP transnasional, dan pelindungan prosedural dalam tahap penegakan hukum transnasional. Penelitian ini menyimpulkan bahwa kerangka hukum PBB, Uni Eropa, dan Australia yang relevan dapat menjadi tolok ukur bagi penegakan PTP transnasional di Indonesia, khususnya mengenai perumusan norma PTP, kerja sama internasional untuk pelaksanaan putusan PTP transnasional, dan pelindungan prosedural untuk memastikan keadilan. Namun, temuan penelitian mengindikasikan bahwa praktik penegakan PTP transnasional di yurisdiksi-yurisdiksi tersebut belum memberikan rujukan yang signifikan untuk tolok ukur efektivitas empiris. Lebih lanjut, artikel ini menemukan implikasi penting untuk teori kriminologi mengenai respon adaptif. Terakhir, riset ini merekomendasikan rekonseptualisasi sistem PTP Indonesia dan usulan perubahan RUU Perampasan Aset terkait dengan Tindak Pidana serta UU Bantuan Timbal Balik dalam Masalah Pidana.
Kata Kunci: perampasan tanpa pemidanaan; perampasan transnasional, respon adaptif; pemulihan aset

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Pendahuluan

Peningkatan kejahatan transnasional yang bersifat akuisitif berimplikasi pada pergerakan lintas batas dari aset pidana yang dipindahkan, disembunyikan, ditransfer, dan dicuci di luar yurisdiksi domestik oleh para pelaku kejahatan. Di Uni Eropa saja, estimasi terkini menunjukkan bahwa total hasil kejahatan yang beredar berkisar antara EUR 92 miliar hingga EUR 188 miliar per tahun (Europol, 2023). Prevalensi pemulihan aset hasil kejahatan transnasional juga diterangkan dalam laporan *United Nations Convention against Corruption* (COSP UNCAC). Dari tahun 2010 hingga 2023, total nilai pemulihan hasil kejahatan yang dilaporkan mencapai lebih dari USD 4,3 miliar dari 153 kasus korupsi (COSP UNCAC, 2023).

Salah satu aspek penting dalam pemulihan aset adalah perampasan, yaitu proses pengambilalihan aset pidana dengan putusan pengadilan berkekuatan hukum tetap. Artikel ini berfokus pada perampasan tanpa pemidanaan (*non-conviction-based confiscation*). Berbeda dari perampasan pidana tradisional, perampasan tanpa pemidanaan (PTP) secara khusus dibentuk untuk memastikan perampasan aset pidana dalam keadaan tidak dimungkinkannya penuntutan dan pemidanaan terhadap pelaku (Schunke, 2017; Boucht, 2019). Pengaturan PTP didorong oleh beberapa organisasi internasional dan supranasional, seperti diilustrasikan dalam adopsi *UN Convention against Corruption* dan *Directive (EU) 2024/1260 on Asset Recovery and Confiscation*.

Arus pengaturan PTP menyentuh Indonesia dengan pelembagaan suatu bentuk dasar PTP dalam UU Tindak Pidana Pencucian Uang pada tahun 2010. Setelah lebih dari satu dekade

advokasi publik (Husein, 2019), pemerintah Indonesia mengajukan RUU Perampasan Aset terkait dengan Tindak Pidana (RUU Perampasan Aset) yang bersifat lebih komprehensif ke DPR pada Mei 2023 (Purnamasari & Sulistyo, 2023).

Pengakuan (*recognition*) atas putusan PTP transnasional sangat penting untuk mengeksekusi putusan pengadilan dengan tujuan pemulihan aset pidana di luar negeri. Dengan kata lain, pemulihan aset lintas yurisdiksi hanya dapat efektif jika putusan PTP benar-benar dapat dilaksanakan secara faktual (Greenberg *et al*., 2009; CoE, 2020). Isu efektivitas ini bukanlah masalah yang hanya berlaku spesifik di satu negara karena kerumitan penegakan putusan PTP di yurisdiksi asing dipandang sebagai salah satu hambatan yang paling sering terjadi dalam pemulihan aset lintas negara (COSP UNCAC, 2023).

Berdasarkan uraian tersebut, adanya pengaturan kerangka hukum yang memadai untuk penegakan putusan PTP transnasional dalam hukum Indonesia menjadi amat krusial. Hanya dengan kerangka hukum yang adil dan efektiflah tujuan perampasan aset pidana di luar negeri dapat tercapai dan pembaruan hukum PTP tidak menjadi peluang yang terlewatkan. Artikel ini bertujuan untuk menjawab pertanyaan penelitian berikut:

Sejauh *manakah kerangka hukum PBB, Uni Eropa, dan Australia yang relevan mengenai perampasan tanpa pemidanaan (PTP) dapat menjadi tolok ukur dalam penegakan putusan PTP transnasional di hukum Indonesia?*

Kerangka-kerangka hukum tersebut dipilih karena alasan-alasan spesifik. *Pertama*, salah satu ciri/karakter yang dapat dibandingkan atau *tertium comparationis* (Kestemont, 2018; Örücü, 2007; Husa, 2015) adalah bahwa setiap yurisdiksi tersebut memiliki hukum yang mengatur PTP, dan kerangka hukum PBB, Uni Eropa, serta Australia mengizinkan penegakan putusan PTP transnasional. *Kedua*, Indonesia, Australia, dan Uni Eropa telah meratifikasi UNCAC, sebagai satu-satunya kerangka hukum PBB yang secara eksplisit menganjurkan Negara-negara Pihak untuk mengatur PTP dalam hukum domestik. *Ketiga*, hukum Uni Eropa mengatur "pengakuan timbal balik" (*mutual recognition*) sebagai mekanisme kerja sama yang berbeda dalam penegakan putusan perampasan transnasional. *Keempat*, Australia dipilih bukan hanya karena memiliki perjanjian bantuan timbal balik (*Mutual Legal Assistance Treaty*) dengan Indonesia, namun juga karena kedua negara dimaksud memiliki sistem hukum yang berbeda: Indonesia adalah negara dengan sistem *civil law*, sedangkan Australia adalah negara *common law*.

Topik ini sangat penting dan tepat waktu. Dari perspektif nasional, topik tersebut memiliki kebaruan dan relevansi karena Indonesia sedang mempertimbangkan untuk memberlakukan suatu undang-undang PTP yang komprehensif. Artikel ini juga akan mengisi kesenjangan besar dalam literatur internasional, yang sejauh ini tidak ada yang membahas tentang konteks Indonesia dalam kerja sama PTP lintas yurisdiksi.

Perampasan Tanpa Pemidanaan

Metode perampasan konvensional adalah perampasan pidana, yang mengikuti/berdasarkan pemidanaan terhadap pelaku (Boucht, 2019). Sebaliknya, PTP (*non-conviction-based confiscation*) adalah prosedur untuk mengambil alih aset pidana tanpa adanya putusan pemidanaan (Rui, 2015; Greenberg *et al*., 2009). Perbedaan antara PTP dan perampasan pidana adalah sebagai berikut (Greenberg *et al*., 2009; Vogel, 2015; Cassella, 2015; Boucht, 2022; King & Hendry, 2023). *Pertama*, perampasan pidana mensyaratkan adanya pengadilan pidana dan penjatuhan pidana terhadap pelaku, dua hal yang tidak diperlukan dalam PTP. *Kedua*, proses perampasan pidana dilakukan terhadap individu pelaku, sementara PTP menargetkan aset pidana. *Ketiga*, di beberapa yurisdiksi, standar pembuktian dalam PTP lebih rendah secara signifikan daripada standar pembuktian perampasan pidana, misalnya dengan menggunakan standar perdata "keseimbangan kemungkinan" (*balance of probabilities*). Untuk kejelasan, dalam artikel ini istilah "perampasan" digunakan sebagai padanan istilah "*confiscation*" atau "*forfeiture*" dalam bahasa Inggris.

Sebagai suatu konsep bercakupan luas, PTP terdiri dari beberapa model yang berbeda. Dua model yang relevan adalah PTP klasik/pidana dan perampasan perdata. PTP klasik/pidana terkait erat dengan proses pidana dan hanya dapat dilaksanakan jika penuntutan/pemidanaan tidak dapat dilakukan karena alasan-alasan seperti pelaku meninggal atau melarikan diri (King, 2022). Sementara itu, perampasan perdata tidak secara langsung terhubung dengan tindak pidana,

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mengikuti kerangka hukum acara perdata, dan menggunakan standar pembuktian yang lebih rendah daripada standar pidana (King, 2022; Boucht, 2022).

Prinsip inheren dalam perampasan adalah bahwa orang tidak boleh mendapatkan keuntungan dari tindakan melawan hukum, yang terhadap keuntungan tersebut ia tidak memiliki hak hukum (Alldridge, 2003; Boucht, 2017; Simonato & Fernandez-Bertier, 2019). Salah satu justifikasi rasional untuk PTP adalah "restorasi", yaitu justifikasi yang bertujuan mengembalikan/memulihkan keadaan semula sebelum terjadinya tindak pidana dengan cara merampas keuntungan yang diperoleh pelaku dari tindak pidana—*restitutio ad integrum* (Boucht, 2017; Bowles *et al.,* 2005).

PTP sebagai Respon Adaptif terhadap Kejahatan

Menganalisis penggunaan PTP untuk mengatasi kejahatan terorganisasi, Hendry dan King (2015) menyatakan bahwa penggunaan PTP menandakan kegagalan berfungsinya tindakan hukum pidana konvensional, yang dianggap tidak memadai untuk memberantas kejahatan terorganisasi. Karena PTP, khususnya perampasan perdata, dikonseptualisasikan sebagai tindakan hukum pidana yang mengadopsi standar perdata, pelindungan prosedural yang ada pada peradilan pidana tidak berlaku dalam mekanisme ini karena standar pembuktian yang lebih rendah dan jaminan prosedural yang tidak begitu ketat (Hendry & King, 2015; Rui & Sieber, 2015; Luna, 2020; Lea, 2004; Millington & Williams, 2007).

Dari perspektif kriminologi, penggunaan PTP dapat digolongkan sebagai respon adaptif negara terhadap kejahatan (Campbell, 2007; 2013). Melalui respon adaptif, negara mengakui batas-batas sistem peradilan pidana dan tindakan-tindakan hukum pidana konvensional untuk mengatasi tingkat kejahatan yang tinggi (Garland, 2001; 1996). Di sini, ada pengakuan terhadap kendala perampasan berbasis pemidanaan yang tidak dapat diterapkan dalam kejahatan akuisitif bersifat kompleks, dalam mana penghukuman pelaku tidak memungkinkan. Keterbatasan ini secara khusus tampak dalam konteks kejahatan terorganisasi, yang (1) tidak memungkinkan untuk menuntut pidana pada pemimpin kelompok kriminal karena kurangnya bukti serta difusi pertanggungjawaban pidana dalam kejahatan yang dilakukan oleh anggota jalanan (*street-level members*), dan (2) menggunakan metode kriminal canggih untuk lepas dari peradilan. Untuk merespon kendala ini, beberapa negara mengatur kebijakan yang kreatif dan realistis (Garland, 2001) dengan, *casu quo*, memberlakukan ketentuan PTP.

Sebagaimana diuraikan Garland (2001), enam bentuk respon adaptif adalah profesionalisasi dan rasionalisasi sistem peradilan pidana, privatisasi tindakan-tindakan peradilan pidana, *defining deviance down*, penentuan kembali kriteria pencapaian, penekanan pada konsekuensi kejahatan, dan relokasi tanggung jawab. Mengenai apakah PTP termasuk dalam tipologi ini masih perlu dianalisis.

Keadilan dan Pelindungan Prosedural dalam PTP

Meskipun memiliki kegunaan praktis bagi otoritas penegakan hukum (Boucht, 2022), sifat pragmatis PTP (khususnya perampasan perdata) dalam hal efisiensi, karakter perdata, dan pengelakan (*circumvention*) atas pelindungan prosedural dalam proses pidana dapat mengurangi kepatuhan pada *due process* (Hendry & King, 2015; King & Hendry, 2023), serta keadilan dan legitimasi. Boucht (2017) menerangkan tiga aspek pelindungan hak-hak prosedural dalam proses PTP. *Pertama*, standar pembuktian yang menjadi dasar hakim untuk memutus perampasan. Dalam rezim PTP bersifat perdata, Boucht (2017; 2022) berpendapat bahwa standar pembuktian yang berlaku seharusnya adalah "keseimbangan kemungkinan yang ditingkatkan" (*enhanced balance of probabilities*); bahwa kemungkinan asal-usul/sifat kriminal dari suatu aset haruslah >0,7-0,8 dan bukan >0,5 seperti dalam standar *balance of probabilities* tradisional. *Kedua*, mengenai "beban pembuktian", pembalikan beban pembuktian hanya dapat digunakan dalam keadaan-keadaan terbatas (Boucht 2017; 2022). *Ketiga*, jaminan-jaminan prosedural umum harus ditegakkan: (a) pihak yang berkepentingan/beritikad baik berhak memperjuangkan posisi/argumennya kepada pihak berwenang, termasuk pengadilan, untuk menantang/melawan perampasan terhadap aset yang diperoleh dengan itikad baik, (b) kemampuan untuk mengajukan bukti, (c) hak untuk mendapatkan putusan yang beralasan, dan (d) jika berlaku, adanya akses terhadap pen-

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dampingan hukum (Boucht, 2017). Berbeda dengan Boucht, beberapa penulis seperti King & Hendry (2023) serta Gray (2012a; 2012b) mengadvokasi posisi yang lebih definitif bahwa PTP harus dianggap sebagai proses pidana, dan oleh karenanya mensyaratkan semua pelindungan hak-hak dasar yang inheren dalam proses pidana juga berlaku pada PTP.

Metode

Penelitian dengan metode campuran (*mixed methods research*) ini dilaksanakan dengan analisis perbandingan hukum dan analisis dokumen. Dalam analisis perbandingan hukum, penelitian ini menggunakan "pendekatan fungsional" (functional approach) dan "pendekatan hukum-dalam-konteks" (*law-in-context approach*). Dengan functional approach (Kestemont, 2018; Van Hoecke, 2015; Husa, 2013; Palmer, 2005; Örücü, 2007; Siems, 2018), artikel ini membandingkan dan menganalisis ketentuan-ketentuan hukum PBB, Uni Eropa, Australia, dan Indonesia yang memiliki fungsi mengatur PTP dan penegakan putusan PTP lintas negara. Kesamaan, perbedaan, dan praktik-praktik baik (Pakes, 2019) diidentifikasi. Selanjutnya, *law-in-context approach* digunakan untuk mendapatkan uraian rinci tentang aspek empiris dan historis dari kerangka hukum yang dibandingkan (Van Hoecke, 2015). Untuk aspek empiris, dilakukan kajian atas praktik-praktik penegakan putusan PTP transnasional di empat yurisdiksi serta pelaksanaan PTP domestik di Indonesia. Asal-usul historis mengenai ketentuan hukum Indonesia terkait sistem PTP dan penegakan putusan PTP transnasional juga diteliti secara ekstensif. Untuk memitigasi risiko etnosentrisme (Nelken, 2010) dan bias Barat dalam perbandingan hukum (Zoumpoulakis, 2023; Peters & Schwenke, 2000; Menski, 2007; Twining, 2011), seluruh ketentuan hukum di keempat yurisdiksi dianalisis secara kritis sebagai sumber hukum yang setara.

Analisis dokumen digunakan untuk menelaah konteks Indonesia dengan mengevaluasi secara sistematis bahan-bahan cetak/elektronik yang relevan menyangkut penegakan putusan PTP transnasional untuk mendapatkan serta menafsirkan informasi yang berharga (Bowen, 2009; Dalglish et al., 2020). Selanjutnya, informasi tersebut disusun dan dianalisis (Bowen, 2009; Morgan, 2022; Jones & Newburn, 2007) untuk menjelaskan konteks empiris dan historis dari kerangka hukum Indonesia.

Hasil dan Pembahasan

Sifat Perampasan Tanpa Pemidanaan

PBB	Uni Eropa	Australia	Indonesia
UNCAC: - Terkait secara langsung dengan penyidikan atau penuntutan pidana. - Bersifat pelengkap (*supplementary*) dari perampasan pidana; hanya dilaksanakan jika penuntutan tidak dapat dilakukan.	*Directive (EU) 2024/1260*: - Terdiri dari perampasan tanpa pemidanaan (PTP) dan *unexplained wealth confiscation* (UWC). - PTP terkait langsung dengan penyidikan atau penuntutan pidana. - UWC merupakan proses independen melawan aset ilegal, terkait dengan penyidikan pidana yang telah ada sebelumnya, dan pelaksanaannya bergantung pada tidak dapat dilaksanakannya bentuk-bentuk perampasan lain. Target UWC adalah perampasan atas aset kriminal.	POCA: - Terdiri dari, antara lain, perampasan perdata (*civil forfeiture*) dan *unexplained wealth order* (UWO), yang dilaksanakan berdasarkan hukum acara perdata. - Perampasan perdata adalah proses untuk mengambil alih aset ilegal, sementara UWO memerintahkan pembayaran sejumlah uang yang setara dengan harta seseorang yang bersifat melawan hukum.	UU TPPU: - Terkait langsung dengan penyidikan pidana. RUU Perampasan Aset: - Walaupun RUU mengklaim sistem PTP adalah prosedur perampasan perdata, sistem PTP sebenarnya terhubung kuat dengan penyidikan atau penuntutan pidana. - Bersifat pelengkap dari perampasan pidana; hanya dilaksanakan dalam keadaan terdapat ketidakmungkinan menjatuhkan pemidanaan terhadap pelaku.

Gambar 1. Perbandingan sifat perampasan tanpa pemidanaan

PBB

UN Convention against Corruption (UNCAC) adalah satu-satunya traktat antikorupsi yang berlaku mengikat secara internasional (Rose, 2015; UNODC, n.d.). Sebab Uni Eropa, Indonesia, dan

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Australia merupakan anggota UNCAC, ketiga yurisdiksi ini berkewajiban untuk menerapkan ketentuan-ketentuan UNCAC dalam sistem hukumnya. Meskipun ruang lingkup penerapannya terbatas pada tindak pidana korupsi dan pencucian uang, aturan UNCAC tetap relevan karena kedua tindak pidana tersebut merupakan dua bentuk kejahatan transnasional yang dominan dan sering terjadi (Nessi, 2015). Pasal 54(1)(c) UNCAC menyediakan norma untuk pengaturan PTP dalam sistem domestik Negara Pihak.

> *"Each State Party, **in order to provide mutual legal assistance** pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party; ... (c) Consider taking such measures as may be necessary to allow **confiscation of such property without a criminal conviction** in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases* (penekanan dari penulis)."

Gambar 2. Pasal 54(1) UNCAC.

Ketentuan Pasal 54(1)(c) UNCAC perlu dipahami dalam dua cara. *Pertama*, sebagai ketentuan tidak wajib (*non-mandatory provision*), norma ini menganjurkan Negara-negara Pihak untuk mengatur perampasan tanpa pemidanaan dalam kasus-kasus yang pelakunya meninggal, melarikan diri, absen, atau dalam kasus-kasus lain yang sesuai. Aspek normatif dari Pasal 54(1)(c) UNCAC tersebut digarisbawahi oleh beberapa literatur (Ivory, 2019; Greenberg *et al*., 2009; COSP UNCAC, 2021; Desterbeck & Schantz, 2009). Mengenai sifat PTP dalam UNCAC, publikasi COSP UNCAC (2021) menerangkan bahwa Pasal 54(1)(c) UNCAC mencerminkan rezim PTP yang lebih bersifat "pidana" karena berperan sebagai pelengkap dari perampasan pidana klasik. Dalam pendekatan UNCAC, PTP hanya dapat dilakukan jika penuntutan terhadap pelaku tidak memungkinkan. Namun demikian, UNCAC tidak membatasi Negara Pihak untuk mengatur pendekatan lain yang PTP-nya dilaksanakan secara independen dari proses pidana (COSP UNCAC, 2021).

Kedua, pembentukan hukum PTP harus dimaknai sesuai dengan tujuan pemberian bantuan timbal balik (*mutual legal assistance*/MLA) berkenan dengan perampasan hasil dan instrumen pidana. UNCAC *Technical Guide* (2009) menekankan bahwa Pasal 54(1)(c) UNCAC terutama bertujuan untuk memungkinkan Negara Pihak merampas aset ilegal dari tindak pidana korupsi yang dilakukan di luar negeri, namun asetnya dipindahkan ke wilayah yurisdiksi Negara Pihak tersebut. Ditilik dari sudut pandang ini, Pasal 54(1)(c) sebenarnya disusun sebagai prosedur untuk mendukung kerja sama transnasional. Dengan kata lain, pengaturan hukum PTP bertujuan untuk memperkuat bantuan timbal balik dalam pemulihan aset pidana. Namun demikian, mandat bantuan timbal balik UNCAC dalam pelaksanaan perampasan perdata transnasional bersifat diskresioner, bukan wajib, bagi Negara Pihak.

Uni Eropa

Directive (EU) 2024/1260 on Asset Recovery and Confiscation diterbitkan untuk menggantikan *Directive 2014/42/EU*. *Directive 2024* mengatur kewajiban bagi Negara Anggota Uni Eropa untuk mengatur beberapa bentuk perampasan. Karena *Directive* Uni Eropa berlaku mengikat dalam hal hasil (*binding as to the result*), Negara-negara Anggota memiliki diskresi untuk memilih bentuk dan metode yang sesuai untuk mengimplementasikan *Directive* (EU, 2012). Mengenai PTP, *Directive (EU) 2024/1260* menguatkan rezim perampasan sebelumnya dengan memperluas lingkup PTP dan memperkenalkan *unexplained wealth confiscation* (UWC).

Dibanding *Directive 2014/42/EU*, *Directive (EU) 2024/1260* memperluas aturan mengenai kondisi-kondisi yang menimbulkan PTP. Sementara *Directive 2014* menentukan bahwa dasar-dasar untuk melaksanakan PTP terbatas pada ketidakmungkinan perampasan pidana karena alasan tersangka/terdakwa sakit atau melarikan diri (Grandi, 2019), Pasal 15 *Directive (EU) 2024/1260* mencakup dua kondisi tambahan, yaitu (1) kematian tersangka/terdakwa, dan (2) berakhirnya masa daluwarsa di bawah 15 tahun. Ketentuan tersebut mengkonseptualisasi suatu pendekatan PTP yang sangat terhubung dengan proses pidana (Sakellaraki, 2022) dan bersifat pelengkap perampasan pidana. Hal ini ditegaskan dalam Pasal 1 *Directive 2024* yang menyatakan bahwa *Directive* tersebut mencakup putusan perampasan yang ditetapkan dalam "*framework of proceedings in criminal matters*". Lebih lanjut, Pasal 15(1) mengatur bahwa PTP harus dilaksanakan hanya dalam kasus-kasus yang, *pertama*, adalah memungkinkan untuk mendapatkan penja-

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tuhan pidana (*conviction*) jika perkara itu dapat disidangkan/dituntut pidana, dan, *kedua*, pengadilan menganggap beralasan/masuk akal bahwa aset pidana tersebut benar-benar diperoleh dari atau terhubung dengan suatu tindak pidana.

Pasal 16 memandatkan kepada Negara-negara Anggota agar mengatur UWC untuk merampas aset yang didapatkan dari kejahatan terorganisasi, bergantung pada tidak tersedianya bentuk-bentuk perampasan lain, termasuk PTP (Ochnio, 2024). Satu kondisi yang menjadi syarat UWC adalah ketidakseimbangan yang signifikan antara suatu aset dengan pendapatan sah seseorang. UWC dapat dikategorikan sebagai suatu bentuk PTP (Boucht, 2019) karena mekanisme UWC tidak mempersyaratkan pemidanaan terhadap pelaku.

Australia

Pasal 7 *Proceeds of Crime Act (POCA) 2002* (terakhir diubah dengan *Act No. 54, 2024*) mengatur lima mekanisme untuk mengejar aset kriminal: *conviction-based forfeiture*, *non-conviction-based forfeiture*, *pecuniary penalty orders*, *literary proceeds orders*, dan *unexplained wealth orders* (Goldsmith *et al.,* 2014; Bartels, 2010). Artikel ini berfokus pada PTP (*non-conviction-based forfeiture*) dan *unexplained wealth order* (UWO).

Pasal 315 menegaskan bahwa proses PTP mengikuti kerangka hukum acara perdata. PTP dapat dilaksanakan dalam tindak pidana serius dan tindak pidana yang dapat didakwakan (*indictable offences*). PTP dalam tindak pidana serius tidak mensyaratkan pengadilan untuk menemukan bahwa tindak pidana telah terbukti. Untuk menetapkan putusan PTP dalam tindak pidana yang dapat didakwakan, pengadilan tidak perlu menemukan bahwa tindak pidana telah terjadi dan seseorang telah terbukti bersalah melakukan tindak pidana itu.

Kemudian, dalam proses UWO (Pasal 179A), yang juga menggunakan sistem berbasis non-pemidanaan, pengadilan menetapkan putusan yang memaksa seseorang untuk membayar sebagian dari total kekayaannya yang tidak dapat dibuktikan diperoleh secara sah (Goldsmith *et al*., 2014). Pendekatan Australia berbeda dengan *Directive (EU) 2024/1260*; hukum Australia memerintahkan seseorang untuk membayar sejumlah kekayaan yang diperoleh secara tidak sah, sementara hukum Uni Eropa memerintahkan perampasan terhadap aset yang diperoleh secara tidak sah.

Indonesia

UU Tindak Pidana Pencucian Uang

Suatu bentuk sederhana PTP telah diatur dalam Pasal 67 dan Pasal 79 UU No. 8/2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang (Husein, 2019). Pasal 67 mengatur PTP pada tahap penyidikan, sedangkan Pasal 79(4) mengatur PTP pada tahap pemeriksaan di sidang pengadilan. Pendekatan PTP dalam Pasal 67 cukup minimalis, tanpa aturan prosedural yang rinci. Untuk melengkapi norma-norma prosedural, Peraturan Mahkamah Agung No. 1/2013 diterbitkan sebagai peraturan pelaksanaan.

Skema PTP yang diatur Pasal 67 memiliki kaitan langsung dengan penyidikan pidana. Prosesnya dimulai dengan penghentian sementara terhadap transaksi keuangan yang mencurigakan oleh Pusat Pelaporan dan Analisis Transaksi Keuangan (PPATK) sebelum diserahkan kepada penyidik [Pasal 67(1)]. Setelah dilakukan penyidikan, jika terduga pelaku tindak pidana tidak ditemukan, penyidik dapat mengajukan permohonan ke pengadilan untuk memutuskan apakah aset yang bersangkutan (*casu quo*, transaksi keuangan yang dihentikan) dinyatakan sebagai aset negara atau dikembalikan kepada yang berhak [Pasal 67(2)]. Keterlibatan PPATK dalam penghentian transaksi keuangan dikonfirmasi oleh Peraturan Mahkamah Agung No. 1/2013, yang mensyaratkan permohonan penanganan aset untuk melampirkan dokumen penghentian transaksi berdasarkan permintaan PPATK (PPATK, 2021).

Penggunaan PTP sangat jarang. Berdasarkan sumber yang tersedia, sekitar tidak lebih dari empat PTP domestik telah diselesaikan berdasarkan UU TPPU dan Peraturan Mahkamah Agung No. 1/2013 (Husein, 2019; APG, 2018; BPHN, 2022). Praktik PTP tahun 2021 menawarkan wawasan yang menarik karena implementasinya berbeda dari *law-in-books*. Dalam kasus ini, seorang pelaku pencucian uang terkait tindak pidana narkotika melarikan diri dan tidak dapat

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ditangkap (Kejaksaan RI, 2022; Lintas Nasional, 2022; PN Bireuen, 2021; BPHN, 2022). Terdapat dua perbedaan dari hukum positif yang dapat diidentifikasi. *Pertama*, dalam putusan yang diterbitkan Pengadilan Negeri Bireuen, aset yang dirampas terdiri dari sejumlah uang, satu truk, dua sepeda motor, dan tujuh bidang tanah. *Kedua*, berdasarkan referensi yang tersedia, tampak bahwa dalam proses penyidikan, penyidik memblokir sejumlah uang di rekening bank tanpa melibatkan PPATK. Dapat disimpulkan bahwa dalam kasus ini, penyidik Badan Narkotika Nasional menerapkan Pasal 67(2) secara independen dengan melepaskannya dari konteks umum yang diatur dalam Pasal 67(1). Dengan demikian, penyidik BNN, (1) menangani perkara ini sendiri tanpa penyerahan transaksi yang dihentikan sebelumnya dari PPATK, dan (2) merampas aset pidana dengan lingkup luas, tidak hanya terdiri dari transaksi keuangan yang diblokir/dihentikan sebagaimana dimaksud Pasal 67(1), melainkan juga bentuk-bentuk aset ilegal lainnya.

RUU Perampasan Aset terkait dengan Tindak Pidana

Dibandingkan dengan skema PTP dalam UU TPPU, RUU Perampasan Aset terkait dengan Tindak Pidana (RUU Perampasan Aset) dikembangkan untuk mengatur prosedur PTP yang komprehensif dan dapat diterapkan pada berbagai tindak pidana dan aset ilegal. Meskipun pemerintah telah secara resmi mengajukan RUU Perampasan Aset ke DPR, pembahasan RUU tersebut masih belum dimulai.

Pasal 2 RUU Perampasan Aset menegaskan bahwa perampasan tidak didasarkan pada pemidanaan terhadap pelaku. Penjelasan Pasal ini menyatakan bahwa perampasan dalam RUU merupakan rezim perampasan aset secara perdata (*civil forfeiture*) yang bersifat *in rem*. Perampasan *in rem* diartikan sebagai tindakan hukum yang melawan aset pidana, bukan terhadap pelaku secara perorangan (*in personam*) seperti dalam perkara pidana. Pilihan perampasan perdata (*civil forfeiture*) diperjelas dalam Naskah Akademik 2022 dan versi-versi sebelumnya, yang menguraikan secara ekstensif keuntungan-keuntungan perampasan perdata (BPHN, 2022; 2015; 2012). Penulis Naskah Akademik menjelaskan bahwa model PTP di negara asing yang dapat dijadikan referensi adalah sistem perampasan perdata yang diterapkan di Amerika Serikat, Australia, dan Filipina (BPHN, 2022).

Mengenai dasar-dasar pelaksanaan PTP, Pasal 7 (1) mengatur bahwa proses PTP dapat dilakukan terhadap aset pidana dalam hal tersangka atau terdakwa meninggal dunia, melarikan diri, menderita penyakit permanen, tidak diketahui keberadaannya, atau telah diputus lepas dari segala tuntutan hukum oleh pengadilan. PTP juga dapat dilaksanakan jika perkara pidana tidak dapat disidangkan dan jika aset pidana lain ditemukan setelah terdakwa diputus bersalah [Pasal 7 (2)]. Pasal 5 menyatakan bahwa aset yang dapat dirampas termasuk, antara lain, hasil dan instrumen pidana, serta aset ilegal yang tidak proporsional dibandingkan dengan pendapatan sah seseorang.

Meskipun RUU Perampasan Aset mengklaim bahwa sistem yang diadopsi sistem perampasan perdata, artikel ini berpandangan bahwa prosedur PTP dalam RUU secara faktual sebenarnya lebih terhubung dengan proses pidana dan melengkapi perampasan pidana. Posisi ini didukung oleh empat argumen. *Pertama*, Pasal 3(1) menegaskan bahwa PTP tidak menghapuskan kewenangan penuntutan pidana terhadap pelaku. Lebih lanjut, Pasal 4 menyatakan bahwa proses PTP harus ditunda jika ada penuntutan pidana menyangkut aset yang sama. Jika putusan *res judicata* dalam penuntutan menyatakan bahwa aset dirampas oleh negara, proses PTP harus dihentikan. Ketentuan-ketentuan ini menandakan sifat pelengkap dari proses PTP. *Kedua*, berbeda dengan skema perampasan perdata murni, yang dapat dilakukan meskipun tanpa adanya perkara pidana (Cassella, 2019; 2021), proses PTP dalam RUU Perampasan Aset hanya dapat dilakukan jika penyidikan/penuntutan pidana (yang telah ada surat perintah sebelumnya) tidak dapat dilanjutkan. *Ketiga*, RUU Perampasan Aset tidak menerapkan standar pembuktian perdata seperti dalam perampasan perdata (*civil forfeiture*). Sebaliknya, RUU menggunakan standar pembuktian yang bersifat substantif (Valerian, 2024), bahwa perampasan hanya dibenarkan jika suatu aset benar-benar terbukti sebagai aset pidana [Pasal 43(1)]. *Keempat*, prosedur pemeriksaan pengadilan dalam proses PTP tidak secara ketat mengikuti hukum acara perdata tradisional, sebab RUU Perampasan Aset mengatur ketentuan prosedural khusus dan baru untuk proses PTP. Oleh karena itu, RUU Perampasan Aset menggunakan kerangka hukum acara hibrid.

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Konseptualisasi Respon Adaptif

PBB	Uni Eropa	Australia	Indonesia
UNCAC: tindakan kreatif untuk mengatasi halangan-halangan dalam perampasan transnasional dan untuk mengamankan perampasan dalam kasus korupsi yang pelakunya meninggal, absen, melarikaan diri, atau dalam kasus lain yang sesuai.	- *Directive (EU) 2024/1260*: penyempurnaan atas rezim PTP yang berlaku sebelumnya. - *Regulation (EU) 2018/1805*: menyediakan dasar hukum untuk peningkatan kerja sama terkait putusan perampasan di Uni Eropa.	- POCA: tindakan adaptif untuk merespon kegagalan perampasan pidana. - MACMA: pembaruan hukum yang adaptif untuk memfasilitasi penegakan putusan PTP transnasional sebagaimana diatur POCA.	RUU Perampasan Aset: tindakan adaptif untuk merespon keterbatasan perampasan berbasis pemidanaaan untuk memulihkan aset pidana.

Gambar 3. Konseptualisasi respon adaptif

PBB

UNCAC Legislative Guide (2012: 212) menjelaskan bahwa Pasal 54 UNCAC mengandung pendekatan baru untuk mengatasi hambatan dalam perampasan transnasional dengan memperkenalkan "penggunaan langkah-langkah kreatif" (*the use of creative measures*). Salah satu langkah kreatif ini dirumuskan dalam Pasal 54(1)(c), dengan mana UNCAC mendorong pengaturan PTP dalam sistem domestik Negara Pihak. UNCAC adalah traktat PBB pertama yang menganjurkan hal tersebut (Nessi, 2015). Satu cara lain untuk mengidentifikasi karakter respon adaptif dalam rezim PTP UNCAC adalah dengan meninjau tujuan Pasal 54(1)(c), yaitu untuk mengatasi halangan berkenaan dengan ketidakmungkinan melakukan perampasan aset pidana dalam hal penuntutan tidak dapat dilakukan sebab pelaku meninggal dunia, absen, atau melarikan diri, atau dalam keadaan-keadaan lain yang sesuai.

Uni Eropa

Konseptualisasi *Directive (EU) 2024/1260* sebagai respon adaptif diilustrasikan oleh Resital (6), yang mempertimbangkan bahwa kerangka hukum terdahulu (*Directive 2014/42/EU*) perlu disempurnakan untuk secara penuh mencapai tujuan memberantas kejahatan terorganisasi melalui pemulihan hasil kejahatan. Lebih lanjut, *Regulation (EU) 2018/1805 on the Mutual Recognition of Freezing Orders and Confiscation Orders* juga dapat dipandang sebagai respon adaptif untuk memfasilitasi penegakan putusan perampasan lintas yurisdiksi. *Regulation (EU) 2018/1805* merupakan regulasi Uni Eropa pertama yang mengatur mandat *mutual recognition* untuk menegakkan putusan pembekuan dan perampasan di Uni Eropa [Resital (4)]. Mengambil bentuk *Regulation*, *Regulation (EU) 2018/1805* berlaku mengikat secara keseluruhan dan langsung berlaku di semua Negara Anggota Uni Eropa (EU, 2012). *Regulation* tersebut bertujuan untuk menyelesaikan masalah inefisiensi yang sering dihadapi dalam prosedur bantuan timbal balik (MLA) konvensional (Pavlidis, 2019).

Australia

Rezim perampasan perdata (*civil forfeiture*) Australia merupakan suatu respon adaptif yang dibentuk untuk menangani kegagalan sistem perampasan pidana. Pemberlakuan POCA pada tahun 2002 didorong oleh keperluan mengatur sistem perampasan perdata untuk merampas aset yang diperoleh secara melawan hukum tanpa adanya putusan pemidanaan. *Explanatory Memorandum* POCA 2002 menekankan bahwa prosedur perampasan perdata memfasilitasi perampasan aset pidana melalui "proses perdata yang lebih sederhana" dan mengadopsi standar pembuktian perdata (Parliament of Australia, 2002a). Beberapa sarjana menjelaskan bahwa pergeseran dari penggunaan perampasan pidana secara eksklusif ke PTP didorong oleh laporan *Australian Law Reform Commission* yang menyimpulkan bahwa "perampasan berbasis putusan pemidanaan telah gagal mencapai tujuannya" (Goldsmith *et al*., 2014, p.121) dan merekomendasikan pengaturan perampasan perdata di tingkat federal (ALRC, 1999).

Mutual *Assistance in Criminal Matters Act (MACMA) 1987* (diubah terakhir dengan *Act No. 63, 2023*) juga dapat dikategorikan sebagai respon adaptif untuk memungkinkan penegakan

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putusan PTP transnasional dari dan ke yurisdiksi asing. MACMA, untuk pertama kalinya, mengatur ketentuan yang memfasilitasi penegakan putusan perampasan asing (termasuk PTP) pada tahun 2002 melalui pemberlakuan *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act*. Dengan demikian, MACMA direvisi pada waktu yang sama dengan pengesahan POCA. *Explanatory Memorandum* revisi MACMA bahkan menguraikan bahwa MACMA memang diamendemen untuk merespon ketentuan POCA 2002 (Parliament of Australia, 2002b), terutama mengenai PTP/perampasan perdata.

Indonesia

Berefleksi pada rezim perampasan pidana yang berlaku saat ini, RUU Perampasan Aset dalam bagian konsideransnya menggarisbawahi keperluan mengatur PTP karena sistem yang ada untuk merampas aset pidana belum efektif dalam mendukung penegakan hukum yang adil. Penjelasan RUU mendeskripsikan bahwa PTP digunakan untuk memperluas kemungkinan pemulihan aset pidana tanpa dipengaruhi keberhasilan atau kegagalan penuntutan pidana. Oleh karena itu, rezim PTP dalam RUU Perampasan Aset juga merupakan respon adaptif untuk mengatasi keterbatasan perampasan berbasis putusan pemidanaan.

Mekanisme yang Memfasilitasi Penegakan Putusan PTP Transnasional

PBB	Uni Eropa	Australia	Indonesia
UNCAC: - Bantuan hukum timbal balik dalam masalah pidana hanya berlaku wajib untuk putusan pemidanaan yang diterbitkan pengadilan dengan yurisdiksi pidana. - Negara Pihak diberikan diskresi untuk mengakui dan menegakkan putusan perampasan yang sepenuhnya bersifat perdata. - Mensyaratkan keputusan *exequatur* oleh negara diminta.	Regulation (EU) 2018/1805: - *Mutual recognition* terhadap putusan perampasan berkonsekuensi pada pengakuan dan penegakan otomatis di negara pelaksana. - Berlaku bagi PTP yang diputuskan dalam "*framework of proceedings in criminal matters*"; tidak berlaku terhadap PTP yang sepenuhnya bersifat perdata tanpa keterkaitan dengan tindak pidana. - Walaupun negara pelaksana tidak memiliki undang-undang PTP, negara tersebut tetap diwajibkan mengakui dan menegakkan putusan PTP dari Negara Anggota Uni Eropa lain.	MACMA: - Penegakan putusan PTP transnasional berdasarkan prosedur bantuan timbal balik. - Terbatas pada putusan PTP yang diterbitkan berkaitan dengan tindak pidana serius di luar negeri (*foreign serious offences*). - Mensyaratkan keputusan *exequatur* melalui registrasi putusan PTP asing di pengadilan Australia. Setelah didaftarkan, putusan perampasan dapat ditegakkan.	- UU Bantuan Timbal Balik dan UU TPPU tidak mengakomodasi penegakan putusan PTP transnasional melalui bantuan timbal balik dalam masalah pidana. - RUU Perampasan Aset tidak mengatur ketentuan yang jelas dan rinci mengenai fasilitasi penegakan PTP transnasional; RUU hanya menyebutkan kerja sama internasional atas dasar perjanjian atau hubungan baik. - Namun, terdapat referensi dalam Naskah Akademik 2022 yang sampai batas tertentu mencerminkan kerangka bantuan timbal balik dalam masalah pidana.

Gambar 4. Perbandingan mekanisme yang memfasilitasi penegakan putusan PTP transnasional

PBB

Berdasarkan Pasal 46(1) UNCAC, bantuan hukum timbal balik yang harus diberikan oleh Negara Pihak kepada satu sama lain dilakukan dengan memenuhi syarat-syarat: *pertama*, bantuan tersebut terkait langsung dengan tindak pidana yang diatur UNCAC, dan *kedua*, bantuan itu diberikan dalam kerangka penyidikan, penuntutan, dan pemeriksaan pengadilan atas tindak pidana yang diatur UNCAC (Chrysikos, 2019). Mandat bantuan timbal balik UNCAC melingkupi pemulihan aset pidana melalui perampasan transnasional (UNODC, 2012). Pasal 54(1)(a) mewajibkan Negara Pihak untuk melaksanakan putusan perampasan asing yang diterbitkan oleh pengadilan Negara Pihak lain melalui jalur bantuan timbal balik.

Namun demikian, catatan interpretasi resmi atas UNCAC mendefinisikan bahwa istilah "perampasan" (*confiscation*) dalam Pasal 54(1)(a) tidak dapat ditafsirkan untuk mencakup juga putusan perampasan yang ditetapkan oleh pengadilan tanpa yurisdiksi pidana (UNODC, 2010).

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Sebagaimana direkam dalam *Travaux Préparatoires*, selama tahap negosiasi draf, beberapa delegasi negara menyatakan perhatian mereka bahwa dapat muncul isu hukum jika istilah "perampasan" (*confiscation*) ditafsirkan sebagai mencakup pula "perampasan perdata" (Ivory, 2019; UNODC, 2010). Untuk menyelesaikan hal ini, telah disepakati dalam negosiasi bahwa putusan perampasan harus ditetapkan oleh pengadilan yang berwenang dalam yurisdiksi pidana (UNODC, 2010). Dengan demikian, Negara-negara Pihak memiliki diskresi, tetapi tidak diwajibkan UNCAC, untuk menegakkan putusan perampasan perdata asing (Ivory, 2019).

Uni Eropa

Dibandingkan mekanisme MLA tradisional yang diterapkan secara universal di luar Uni Eropa, yang sering kali mengharuskan penerbitan keputusan pelaksanaan (*exequatur*) oleh negara yang membantu (Ronsfeld, 2023), prinsip "*mutual recognition*" mewajibkan Negara Anggota Uni Eropa untuk mengeksekusi secara langsung putusan perampasan yang dikirimkan oleh Negara Anggota lain. Menurut Pasal 18(1) *Regulation (EU) 2018/1805*, Negara Anggota yang melaksanakan putusan harus menegakkan putusan perampasan dari Negara Anggota yang menerbitkan putusan "menggunakan cara yang sama" dengan pelaksanaan putusan perampasan domestik.

Regulation (EU) 2018/1805 berlaku untuk pelbagai jenis putusan perampasan, termasuk PTP, sepanjang putusan tersebut ditetapkan "*within the framework of proceedings in criminal matters*" [Pasal 1(1)]. Mirandola (2020) menafsirkan bahwa "*proceedings in criminal matters*" dapat bermakna proses peradilan yang (1) terkait dengan tindak pidana, yang darinya aset pidana berasal, dan (2) menerapkan pelindungan prosedural yang serupa dengan standar yang berlaku dalam proses pidana. Mengikuti pendapat ini, hanya perampasan yang sepenuhnya bersifat perdata atau administratif dan tidak terkait dengan tindak pidanalah yang berada di luar cakupan *Regulation (EU) 2018/1805* (Mirandola, 2020; Maugeri, 2024), hal mana juga tercermin dalam Pasal 1(4). Meskipun menyadari bahwa dapat saja pengaturan mengenai PTP tidak ada dalam sistem domestik Negara Anggota, *Regulation* tetap mewajibkan Negara Anggota untuk mengakui dan menegakkan putusan PTP yang dikeluarkan oleh Negara Anggota lain (Resital 13). Namun, dalam situasi ini pun, persyaratan umum tetap berlaku: *pertama*, PTP harus terkait dengan proses dalam masalah pidana, dan *kedua*, tidak ada alasan *non-recognition* dan *non-execution* (Pasal 19) serta alasan untuk penundaan eksekusi (Pasal 21).

Australia

MACMA mengatur bahwa Australia, sebagai negara peminta, dapat mengajukan permintaan bantuan kepada negara asing untuk menegakkan putusan perampasan Australia (termasuk PTP/perampasan perdata) yang terkait dengan tindak pidana serius terhadap properti yang terletak di negara tersebut. Dalam perannya sebagai negara yang membantu, Australia dapat menerima putusan perampasan asing untuk didaftarkan di pengadilan Australia yang berwenang (Goldsmith *et al*., 2014). Sebab MACMA tidak mensyaratkan adanya pemidanaan terhadap pelaku sebagai dasar perampasan, putusan asing tersebut dapat berbasis pemidanaan (perampasan pidana) atau tanpa pemidanaan (PTP).

Satu persyaratan yang Australia terapkan adalah bahwa putusan perampasan asing harus berkaitan dengan tindak pidana serius menurut hukum negara peminta (*foreign serious offences*). Langkah-langkah yang harus dijalankan setelah menerima putusan perampasan asing terdiri dari "pendaftaran" dan "penegakan". Pada tahap pendaftaran, otoritas Australia mendaftarkan putusan asing tersebut di pengadilan yang berwenang. Putusan perampasan asing yang telah didaftarkan dapat ditegakkan dan memiliki efek yang setara dengan putusan perampasan (domestik) yang ditetapkan berdasarkan POCA.

Indonesia

UU Tindak Pidana Pencucian Uang

Pasal 91 mengatur ketentuan umum mengenai pencegahan dan pemberantasan tindak pidana pencucian uang melalui bantuan timbal balik dalam masalah pidana. Tidak ada aturan spesifik mengenai kerja sama internasional menyangkut PTP. Karena Pasal 91 menekankan

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bantuan timbal balik "dalam masalah pidana," cukup diragukan apakah ketentuan ini berlaku untuk prosedur PTP dalam Pasal 67 UU TPPU.

UU Bantual Timbal Balik

UU No. 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana (UU Bantuan Timbal Balik) menjadi dasar hukum bagi Indonesia dalam meminta dan memberikan bantuan timbal balik kepada negara lain terkait dengan penyidikan, penuntutan, dan pemeriksaan di sidang pengadilan (Pasal 2 dan 3). Pasal 5 menyebutkan bahwa bantuan tersebut dapat diberikan berdasarkan perjanjian dengan negara lain. Jika tidak ada perjanjian, bantuan tersebut tetap dapat diberikan atas dasar hubungan baik berdasarkan prinsip resiprositas.

Dalam peran sebagai negara peminta, Pasal 22 mengatur bahwa otoritas Indonesia dapat menyampaikan permintaan bantuan kepada negara lain untuk melaksanakan putusan *res judicata*. Lebih lanjut, Pasal 23 menentukan bahwa putusan pengadilan dapat berisi perampasan barang sitaan, denda pidana, atau pembayaran uang pengganti. Dalam peran sebagai negara diminta, Indonesia dapat menindaklanjuti putusan *res judicata* asing yang berisi perintah serupa [Pasal 51 (1)].

Pasal 52 mengatur langkah-langkah prosedural untuk mengeksekusi putusan pengadilan asing yang memerintahkan perampasan aset pidana di teritori Indonesia. Dalam skema ini, penegakan putusan perampasan asing terdiri dari dua langkah: (1) penyitaan, dan (2) perampasan akhir. Di tahap awal, Jaksa Agung atau pejabat yang ditunjuk harus mengajukan permohonan izin penyitaan kepada pengadilan. Berdasarkan surat izin tersebut, jaksa melakukan penyitaan. Pemilik aset atau pihak ketiga yang dirugikan dapat mengajukan perlawanan/keberatan ke pengadilan untuk melawan penyitaan. Jika tidak ada perlawanan/keberatan yang diajukan dalam jangka waktu yang ditentukan, pengadilan yang berwenang dapat mengeluarkan penetapan perampasan akhir berdasarkan permohonan kejaksaan. Meskipun tidak secara eksplisit diatur dalam UU Bantuan Timbal Balik, dapat ditafsirkan bahwa dalam hal terdapat perlawanan/keberatan terhadap penyitaan, pengadilan harus memutuskan terlebih dahulu apakah perlawanan/keberatan tersebut dibenarkan sebelum mengeluarkan penetapan perampasan.

Aturan umum menentukan bahwa bantuan timbal balik dalam masalah pidana diberikan berkaitan dengan penyidikan, penuntutan, dan pemeriksaan di sidang pengadilan. Karena dalam proses PTP tidak ada penuntutan dan pemeriksaan pengadilan yang berujung pada penjatuhan pidana, dapat disimpulkan bahwa PTP berada di luar cakupan UU Bantuan Timbal Balik. Melalui penafsiran sistematis, pembacaan atas Pasal 6 dan Pasal 7 mengenai alasan-alasan penolakan bantuan timbal balik yang bersifat wajib dan opsional jug mengarah pada kesimpulan yang sama. Sebagian besar alasan-alasan ini merujuk pada penyidikan, penuntutan, pemeriksaan pengadilan, atau pemidanaan terhadap seseorang atas tindak pidana.

Kemudian, Pasal 1.5 mendefinisikan "perampasan" sebagai "*upaya paksa pengambilalihan hak atas kekayaan atau keuntungan yang telah diperoleh, atau mungkin telah diperoleh oleh orang dari tindak pidana yang dilakukannya, berdasarkan putusan pengadilan di Indonesia atau negara asing*." Ketentuan ini menggariskan bahwa hanya perampasan berbasis putusan pemidanaanlah yang termasuk dalam ruang lingkup UU Bantuan Timbal Balik. Hal ini karena putusan formal yang menentukan apakah suatu tindak pidana, yang darinya aset ilegal berasal, terbukti, dan apakah seseorang terbukti bersalah dan dapat dikenakan pertanggungjawaban pidana atas tindak pidana yang dilakukannya, harus selalu berbentuk putusan penjatuhan pidana.

Setelah mempelajari risalah pembahasan di Dewan Perwakilan Rakyat terhadap Rancangan UU Bantuan Timbal Balik, tidak ditemukan adanya pembahasan mengenai PTP. Ketiadaan ini mungkin beralasan karena UNCAC belum diratifikasi oleh Indonesia ketika Rancangan UU Bantuan Timbal Balik dibahas. Para legislator dan perwakilan pemerintah tampaknya mengkonseptualisasikan penegakan perampasan dalam kerangka sistem berbasis pemidanaan (*conviction-based*). Sebagai contoh, dalam musyawarah Pasal 22 dan Pasal 23, pimpinan rapat menekankan bahwa "perampasan" merupakan pidana tambahan yang melengkapi pidana pokok, *casu quo* pidana penjara (Setjen DPR, 2005a). Lebih lanjut, dalam membahas Pasal 51 dan Pasal 52 mengenai permintaan bantuan dari negara lain mengenai penegakan putusan perampasan asing, pimpinan rapat menyatakan bahwa, mengingat sifat putusan tersebut sebagai putusan pidana maka

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putusan tersebut harus bersifat final dan mengikat (*res judicata*) untuk dapat dieksekusi di Indonesia (Setjen DPR, 2005b). Para legislator juga mengobservasi bahwa karena penyitaan dan putusan perampasan harus dilaksanakan oleh Jaksa Agung, putusan itu harus bersifat pidana karena hanya jaksa yang berwenang mengeksekusi putusan tersebut (Setjen DPR, 2005b).

RUU Perampasan Aset

Hal-hal mengenai kerja sama internasional dalam RUU Perampasan Aset diatur dalam Bab V: Kerja Sama Internasional, yang terdiri dari Pasal 63 dan Pasal 64. Pada pokoknya, Pasal 63 mengatur bahwa pemerintah dapat melakukan kerja sama internasional terkait dengan bantuan penelusuran, pemblokiran, penyitaan, dan perampasan aset pidana berdasarkan perjanjian atau atas dasar hubungan baik berdasarkan prinsip resiprositas. Pasal 64 menyatakan bahwa pemerintah dapat membuat perjanjian dengan yurisdiksi lain untuk mendapatkan bagi hasil dari pemulihan aset transnasional.

> *"(1) Pemerintah dapat melakukan kerja sama internasional mengenai bantuan untuk Penelusuran, Pemblokiran, Penyitaan, dan Perampasan Aset.*
> *(2) Kerja sama sebagaimana dimaksud pada ayat (1) dilakukan berdasarkan perjanjian dengan negara lain, baik bilateral, regional, maupun multilateral atau atas dasar hubungan baik berdasarkan prinsip resiprositas."*

Gambar 5. Pasal 63 RUU Perampasan Aset.

> *"(1) Pemerintah dapat membuat perjanjian dengan pemerintah negara lain untuk mendapatkan bagi hasil termasuk penggantian biaya atas hasil Perampasan Aset yang melibatkan negara tersebut baik yang dilakukan di Indonesia maupun di negara lain.*
> *(2) Perjanjian bagi hasil sebagaimana dimaksud pada ayat (1) dilakukan sesuai dengan ketentuan peraturan perundang-undangan."*

Gambar 6. Pasal 64 RUU Perampasan Aset.

Pasal 63 RUU Perampasan 2023 tidak menyebutkan bentuk kerja sama internasional apa yang harus diterapkan untuk memfasilitasi penegakan putusan PTP transnasional. Meskipun pengaturan tersebut, sampai batas tertentu, mungkin mirip dengan mekanisme bantuan timbal balik dalam UU Bantuan Timbal Balik (terutama mengenai rujukan ke "prinsip resiprositas"), tidak ada penyebutan eksplisit tentang "bantuan timbal balik" (*mutual legal assistance*). Untuk sebuah RUU yang sangat perhatian dengan aset pidana yang direlokasi dan dicuci di luar yurisdiksi domestik, pendekatan RUU Perampasan Aset yang agak umum dan tidak mendalam terhadap kerja sama transnasional untuk PTP ini cukup mengherankan.

Naskah Akademik 2022 dalam beberapa bagian menyoroti kesulitan dalam menelusuri dan memulihkan aset pidana yang dipindahkan ke yurisdiksi asing (hlm. 10, 16). Selain itu, kerja sama internasional disebut sebagai aspek krusial dalam perampasan aset pidana yang berada di luar negeri (hlm. 79-80). Rujukan eksplisit kepada UNCAC juga terdapat dalam Penjelasan RUU Perampasan Aset, yang mengobservasi bahwa sistem perampasan yang berlaku saat ini tidak secara komprehensif mengatur prosedur perampasan sesuai dengan ketentuan *asset recovery* dalam UNCAC. Lebih lanjut, Penjelasan RUU menekankan bahwa RUU dirancang untuk memfasilitasi kerja sama pemerintah dengan negara lain melalui pengembalian aset.

Yang menarik, Naskah Akademik 2022 meliputi beberapa bagian yang mengkaji sistem bantuan timbal balik yang sekarang berlaku. Naskah Akademik bahkan menyebutkan bahwa bantuan timbal balik adalah "cara paling mudah" untuk memfasilitasi pengembalian aset pidana ke yurisdiksi asal (hlm. 79-80). Naskah Akademik, setelah menganalisis UU Bantuan Timbal Balik, merekomendasikan untuk memperluas cakupan bantuan timbal balik ke perampasan perdata karena rezim yang ada sekarang hanya mencakup bantuan timbal balik dalam masalah pidana (hlm. 151). Bahkan ditegaskan bahwa apabila UU Bantuan Timbal Balik tidak direvisi, hal tersebut dapat menghambat efektivitas penegakan PTP transnasional (hlm. 151-152).

Meskipun Naskah Akademik mereviu UU Bantuan Timbal Balik secara komprehensif dan bahkan menggarisbawahi batasan rezim bantuan timbal balik yang sekarang berlaku, Naskah Akademik tampaknya tidak mengambil inisiatif menemukan solusi untuk memfasilitasi penegakan putusan PTP transnasional yang efektif. RUU Perampasan Aset, misalnya, tidak memperluas ruang lingkup bantuan timbal balik dengan merumuskan bahwa penegakan putusan PTP transnasional agar dilakukan mengikuti prosedur bantuan timbal balik. Alih-alih menyediakan

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prosedur untuk memastikan dapat dilaksanakannya (*enforceability*) putusan PTP transnasional, Pasal 63 tampaknya menggunakan bentuk kerja sama yang tidak jelas dan tidak pasti berdasarkan perjanjian atau hubungan baik. Namun begitu, dapat dipahami bahwa keraguan para perumus RUU Perampasan Aset untuk memasukkan mekanisme bantuan timbal balik ke dalam Pasal 63 mungkin timbul karena menyadari batasan-batasan dari UU Bantuan Timbal Balik sebagaimana dijelaskan sebelumnya.

Namun, pembacaan terhadap Naskah Akademik 2022 menawarkan pemahaman yang menarik. Dijelaskan dalam Naskah Akademik bahwa kerja sama internasional dilakukan berdasarkan prinsip resiprositas, yang mensyaratkan kerja sama timbal balik antar negara dilakukan dengan cara yang terorganisasi. Kerja sama ini juga menjadi dasar bagi aparat penegak hukum untuk menerima dan memberikan bantuan hukum yang saling menguntungkan (hlm. 243-244). Meskipun tidak secara eksplisit menyebutkan "bantuan timbal balik dalam masalah pidana", penjelasan ini tampaknya merujuk pada konsep bantuan timbal balik. Sayangnya, karena penjelasan ini hanya dicantumkan dalam Naskah Akademik dan tidak dimasukkan ke dalam rumusan Pasal 63, atau setidaknya dicantumkan dalam penjelasan undang-undang, penjelasan tersebut tidak memiliki kekuatan normatif yang mengikat. Dapat disimpulkan bahwa meskipun Naskah Akademik 2022 tampaknya mengindikasikan penggunaan bantuan timbal balik untuk kerja sama internasional, RUU Perampasan Aset 2023 tidak mengatur bentuk kerja sama yang eksplisit dan pasti untuk menegakkan putusan PTP transnasional.

Pemeriksaan lebih lanjut terhadap Naskah Akademik 2015 memunculkan fakta menarik lain yang tidak ada dalam dokumen 2012 dan 2022. Naskah Akademik 2015 menyatakan secara *expressis verbis* bahwa kerja sama internasional yang dilakukan oleh pemerintah Indonesia meliputi "bantuan hukum timbal balik dalam masalah aset tindak pidana" dan/atau "kerja sama lainnya" berdasarkan perjanjian atau asas resiprositas (hlm. 264). Namun, seperti halnya Naskah Akademik 2022, penjelasan ini hanya ada dalam Naskah Akademik 2015 dan tidak ditransposisikan ke dalam rumusan Pasal 73 RUU Perampasan Aset 2015.

Pelindungan Prosedural pada Tahap Penegakan Transnasional

PBB	Uni Eropa	Australia	Indonesia
UNCAC: - Kerja sama internasional menyangkut perampasan tidak boleh merugikan (*prejudice*) hak-hak pihak ketiga beritikad baik. - Permintaan bantuan harus melampirkan pernyataan mengenai tindakan-tindakan yang telah diambil untuk menotifikasi pihak ketiga beritikad baik secara patut dan memastikan *due process*.	*Regulation (EU) 2018/1805*: - Otoritas pelaksana harus menginformasikan orang-orang yang terdampak mengenai putusan perampasan. - Orang-orang terdampak memiliki hak *effective legal remedies* terhadap putusan perampasan. - Dasar-dasar *non-recognition* dan *non-execution* memasukkan beberapa keadaan terkait hak.	MACMA: - Otoritas Australia harus menotifikasi orang-orang yang diduga memiliki kepentingan dalam properti yang akan dirampas. - Orang-orang yang mengklaim suatu kepentingan pada properti dapat mengajukan permohonan/gugatan untuk melawan putusan perampasan. - Pengadilan memutuskan apakah akan mentransfer kepentingan, atau memerintahkan pembayaran kompensasi, kepada pemohon/penggugat.	UU Bantuan Timbal Balik: - Sehubungan dengan putusan perampasan pidana asing, pemilik aset dan pihak ketiga yang dirugikan dapat mengajukan perlawanan ke pengadilan. - Otoritas penegakan hukum tidak berkewajiban untuk mengidentifikasi dan menyampaikan pemberitahuan formal secara proaktif kepada pihak terdampak di luar pemilik aset. RUU Perampasan Aset: Tidak ada ketentuan spesifik dan rinci mengenai pelindungan prosedural dalam penegakan putusan PTP transnasional.

Gambar 7. Perbandingan pelindungan prosedural pada tahap penegakan transnasional.

PBB

Pasal 31(9) dan 55(9) UNCAC menegaskan bahwa ketentuan mengenai perampasan domestik dan kerja sama internasional untuk perampasan tidak boleh ditafsirkan sebagai merugikan hak-hak pihak ketiga beritikad baik (*prejudicing the rights of bona fide third parties*). Kemudian,

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Pasal 55(3)(b) meminta Negara Pihak untuk melampirkan pernyataan mengenai langkah-langkah yang telah diambil untuk memberikan notifikasi yang memadai kepada pihak ketiga beritikad baik dan untuk memastikan *due process* dalam permintaan bantuan mengenai penegakan perampasan.

Uni Eropa

Pasal 32 (1) *Regulation (EU) 2018/1805* mewajibkan otoritas pelaksana (*executing authority*) untuk menginformasikan orang-orang terdampak mengenai pengakuan dan penegakan putusan perampasan lintas yurisdiksi. Orang-orang terdampak memiliki hak atas ganti rugi hukum (*legal remedies*) yang efektif terhadap perampasan, yang harus diajukan pada pengadilan di negara pelaksana (*executing state*). Lebih lanjut, alasan-alasan *non-recognition* dan *non-execution* atas putusan perampasan mencakup beberapa kondisi yang berhubungan dengan hak, seperti (1) eksekusi perampasan dapat melanggar prinsip *ne bis in idem*, (2) hak-hak orang-orang terdampak akan membuat eksekusi perampasan tidak mungkin dilakukan, dan (3) dalam situasi yang eksepsional, eksekusi perampasan dapat menyebabkan pelanggaran terhadap hak-hak yang tercantum dalam *EU Charter of Fundamental Rights*, khususnya hak atas ganti rugi (*remedy*) yang efektif, peradilan yang adil, dan hak-hak pembelaan (Pasal 19).

Australia

Dalam proses registrasi putusan perampasan asing, MACMA mewajibkan otoritas Australia untuk memberitahukan orang yang diduga memiliki kepentingan (*interest*) atas properti atau orang lain sebagaimana diperintahkan oleh pengadilan (Pasal 34A). Pasal 34C mengatur dasar bagi seseorang, yang mendaku memiliki kepentingan atas properti yang akan dirampas melalui putusan perampasan asing, untuk mengajukan klaim ke pengadilan. Jika pengadilan menemukan bahwa (1) pemohon tidak terlibat dalam tindak pidana serius di luar negeri (*foreign serious offences*) yang menimbulkan putusan perampasan, dan (2) properti tersebut bukan merupakan hasil atau instrumen pidana, pengadilan mengeluarkan putusan mengenai sifat hukum dari kepentingan pemohon atas properti. Selanjutnya, pengadilan dapat memerintahkan negara untuk mentransfer kepentingan tersebut kepada pemohon atau membayar sejumlah kompensasi yang sepadan dengan nilai kepentingan tersebut.

Indonesia

Dalam konteks perampasan pidana transnasional, UU Bantuan Timbal Balik mengatur dasar bagi pihak-pihak tertentu untuk mengajukan keberatan/perlawanan ke pengadilan dalam waktu (1) tiga bulan sejak menerima pemberitahuan penyitaan, untuk pemilik aset yang terkena penyitaan, dan (2) enam bulan sejak pengumuman penyitaan, untuk pihak ketiga yang dirugikan. Namun, UU Bantuan Timbal Balik tidak menegaskan kewajiban bagi otoritas penegak hukum untuk secara proaktif mengidentifikasi dan memberikan notifikasi resmi kepada semua pihak yang (berpotensi) terkena dampak penyitaan/perampasan.

Lebih lanjut, Pasal 19 dan 31 RUU Perampasan Aset menetapkan bahwa seseorang yang merasa haknya dirugikan oleh PTP berhak mengajukan keberatan/perlawanan ke pengadilan. Namun demikian, keberatan/perlawanan ini tidak boleh diajukan oleh tersangka/terdakwa yang melarikan diri. Tidak ditemukan adanya pelindungan prosedural yang spesifik pada tahap penegakan PTP transnasional dalam RUU Perampasan Aset.

Praktik Penegakan Putusan PTP Transnasional

PBB

Publikasi COSP UNCAC (2023) melaporkan bahwa hanya enam (4%) dari total 153 kasus pengembalian aset pidana transnasional berdasarkan UNCAC pada tahun 2010-2023 yang melibatkan penegakan putusan PTP asing. Jumlah yang kecil ini menunjukkan salah satu hambatan paling sering terjadi yang dihadapi oleh Negara Pihak berkenaan dengan pemulihan aset internasional, yaitu bahwa 50 Negara Pihak tercatat mengalami kesulitan dalam mengeksekusi putusan PTP di yurisdiksi asing. Menariknya, dilaporkan bahwa PTP digunakan dalam 45 (30%) dari total kasus pengembalian aset. Dapat ditafsirkan bahwa ini adalah kasus-

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kasus di mana yurisdiksi tempat aset pidana berada menggunakan proses PTP yang diprakarsai sendiri (*self-initited NCBC proceedings*) terhadap aset, dan kemudian mengembalikan aset tersebut ke yurisdiksi tempat tindak pidana terjadi.

PBB	Uni Eropa	Australia	Indonesia
Kurangnya penegakan putusan PTP transnasional pada tingkat internasional berdasarkan kerangka UNCAC.	Tidak ada data spesifik mengenai penegakan putusan PTP lintas yurisdiksi di Uni Eropa.	- Hingga 2018, Australia belum pernah menegakkan putusan perampasan (termasuk PTP) asing berkaitan dengan penyidikan tindak pidana korupsi. - Tidak ada data spesifik mengenai praktik bantuan timbal balik terkini menyangkut penegakan PTP/perampasan perdata transnasional.	- Perjanjian Bantuan Timbal Balik Indonesia-Rusia mengakomodasi penegakan perampasan perdata. - Indonesia telah memberikan bantuan dalam penyitaan aset pidana terkait proses perampasan perdata di Amerika Serikat.

Gambar 8. Perbandingan praktik penegakan putusan PTP transnasional.

Uni Eropa

Studi *European Commission* (2023) mencatat bahwa data perampasan lintas yurisdiksi di Uni Eropa pada tahun 2017-2019 menunjukkan rendahnya tingkat kerja sama pemulihan aset lintas yurisdiksi di antara Negara-negara Anggota, yaitu kurang dari 1% dari total putusan perampasan di seluruh Uni Eropa setiap tahunnya, termasuk perampasan domestik (European Commission, 2023). Tidak ada data statistik khusus tentang penegakan putusan PTP lintas negara di Uni Eropa, karena statistik yang tersedia hanya menyediakan informasi umum untuk semua bentuk perampasan (European Commission, 2023; 2022).

Australia

UNCAC Implementation Review 2018 merekam bahwa Australia belum pernah meregistrasi putusan perampasan asing (baik perampasan pidana maupun PTP) yang berasal dari penyidikan tindak pidana korupsi pada saat pelaporan (UNODC, 2018). *Annual Report* 2023 dari *Attorney-General's Department* menunjukkan bahwa pada tahun 2022-2023, 234 permintaan bantuan timbal balik dari Australia diselesaikan oleh negara asing, sementara 320 permintaan bantuan timbal balik dari negara asing diselesaikan oleh Australia. Namun, tidak ada perincian mengenai substansi permintaan bantuan timbal balik (termasuk dalam hal "penegakan putusan PTP") yang diberikan atau diminta oleh Australia dalam *Annual Report* (AGD, 2021; 2022; 2023).

Indonesia

Sebagaimana dielaborasi secara rinci tersebut, interpretasi hukum dan historis menyimpulkan bahwa UU Bantuan Timbal Balik tidak mencakup penegakan putusan PTP transnasional. Namun, perkembangan empiris terkini menawarkan beberapa wawasan menarik. *Pertama*, sebagaimana dicatat dalam *FATF Mutual Evaluation Report of Indonesia* (2023), Perjanjian Bantuan Timbal Balik antara Indonesia dan Rusia (Republik Indonesia, 2019; 2021) mengatur dasar eksplisit untuk penegakan putusan perampasan terkait dengan proses pidana, administratif, dan perdata. Oleh karena itu, Perjanjian ini memungkinkan penegakan putusan perampasan perdata.

Kedua, laporan FATF (2023) menyebutkan bahwa Indonesia telah mengakomodasi satu permintaan bantuan timbal balik dari negara asing berdasarkan putusan/perintah berbasis non-pemidanaan. Ini adalah kasus terkait bantuan yang diberikan Indonesia dalam penyitaan kapal pesiar mewah Equanimity pada Juli 2018 (NST Online, 2018). Kapal tersebut diidentifikasi sebagai hasil kejahatan dari kasus korupsi 1MDB di Malaysia dan penyidikan pencucian uang yang terkait di Amerika Serikat (Hui, 2018). Pada tahun 2017, otoritas Amerika Serikat mengajukan perampasan *in rem*/perdata terhadap kapal itu di pengadilan federal (US DOJ, 2017; USDC Cent. Dist. of California, 2017). Pihak berwenang Indonesia melakukan penyitaan sebagai dasar perampasan perdata final atas properti tersebut berdasarkan permintaan bantuan timbal balik dari Amerika Serikat (NST Online, 2018; Malaysiakini, 2018a). Setelah disita oleh otoritas Indonesia,

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kapal tersebut dipindahkan ke Malaysia, di mana kapal itu kemudian diamankan sesuai dengan hukum Malaysia (Malaysiakini, 2018b; StAR, 2020; COSP UNCAC, 2023).

Penting untuk digarisbawahi bahwa sebelum penyitaan pada bulan Juli 2018, terdapat penyitaan terdahulu yang menyasar properti tersebut pada bulan Februari 2018. Namun, penyitaan tersebut dinyatakan tidak sah dalam proses praperadilan (Alhadjri, 2018). Pemohon praperadilan mendalilkan bahwa, antara lain, penyitaan tersebut harus dinyatakan tidak sah karena didasarkan pada proses perampasan perdata *in rem*, bukan berdasarkan proses pidana. Menariknya, hakim menyatakan penyitaan tidak sah bukan karena penyitaan itu terkait dengan proses perampasan perdata, tetapi karena pelaksanaannya tidak dilakukan berdasarkan UU Bantuan Timbal Balik. Walaupun UU Bantuan Timbal Balik mengharuskan permintaan bantuan timbal balik dikirimkan kepada Menteri Hukum dan Hak Asasi Manusia, otoritas Amerika Serikat mengirimkan permintaan bantuan timbal balik secara langsung ke Kepolisian Negara Republik Indonesia (PN Jakarta Selatan, 2018). Dengan demikian, dapat ditafsirkan bahwa dalam perkara spesifik ini, hakim secara implisit memahami bahwa UU Bantuan Timbal Balik dapat mengakomodasi perintah penyitaan yang terkait dengan proses PTP (khususnya perampasan perdata).

Simpulan

Kesimpulan Utama

Untuk menjawab pertanyaan penelitian, artikel ini menyimpulkan bahwa kerangka hukum PBB, Uni Eropa, dan Australia yang relevan dapat menjadi tolok ukur bagi penegakan putusan PTP transnasional di Indonesia, khususnya menyangkut perumusan norma PTP, mekanisme kerja sama internasional, dan pelindungan prosedural. Namun demikian, mempertimbangkan masih sedikitnya contoh penegakan PTP lintas yurisdiksi dalam kerangka UNCAC, tidak adanya pelaksanaan putusan PTP transnasional terkait tindak pidana korupsi di Australia, dan kurangnya statistik yang sepadan di Uni Eropa dan Australia dibandingkan dengan data UNCAC, rujukan signifikan mengenai efektivitas empiris yang dapat dijadikan contoh praktik baik sebagai tolok ukur masih belum dapat diidentifikasi.

Karena RUU Perampasan Aset Indonesia bertujuan untuk menyelaraskan dengan cita-cita pemulihan aset UNCAC, menjadi sangat penting untuk memahami dengan benar mandat UNCAC. Ketentuan PTP dalam UNCAC tidak hanya dirumuskan untuk mendorong pemberlakuan hukum PTP dalam sistem domestik Negara Pihak, melainkan juga untuk menyediakan bantuan timbal balik kepada Negara Pihak lain. Namun, mandat UNCAC kepada Negara Pihak untuk memenuhi permintaan bantuan timbal balik menyangkut putusan perampasan asing tidak bersifat wajib/memaksa untuk putusan perampasan yang dikeluarkan oleh pengadilan yang tidak memiliki yurisdiksi pidana. Berkaitan dengan hal tersebut, dapat diobservasi bahwa terdapat kemungkinan untuk menyematkan penegakan putusan PTP transnasional ke dalam mandat bantuan timbal balik UNCAC yang bersifat imperatif, sepanjang sistem PTP domestik terhubung secara substansial dengan proses pidana. Untuk memanfaatkan potensi ini secara optimal, sistem PTP Indonesia perlu direposisi ke sifat aslinya sebagai sistem PTP berkarakter "pidana" dari klaim "rezim perampasan perdata" dalam RUU Perampasan Aset saat ini; putusan perampasan perdata harus ditafsirkan sebagai putusan pengadilan dengan yurisdiksi perdata sehingga tidak termasuk mandat wajib UNCAC mengenai bantuan timbal balik.

Meskipun prinsip *mutual recognition* Uni Eropa tidak berlaku di Indonesia, ada beberapa fitur positif *Regulation (EU) 2018/1805*. *Pertama*, *Regulation* ini mewajibkan Negara Anggota Uni Eropa untuk mengakui dan menegakkan putusan PTP yang diterbitkan oleh Negara Anggota lain, bahkan jika negara pelaksana tidak memiliki undang-undang PTP. *Kedua*, karena *Regulation* ini membatasi ruang lingkup penerapannya pada putusan PTP yang diterbitkan "*within the framework of proceedings in criminal matters*," hanya perampasan yang memiliki kaitan signifikan dengan perkara pidana saja yang dapat dieksekusi. *Ketiga*, *Regulation* ini memberikan jaminan prosedural yang komprehensif bagi pihak-pihak yang terdampak putusan PTP.

Australia membatasi penegakan PTP asing hanya untuk putusan perampasan terkait dengan tindak pidana serius di luar negeri (*foreign serious offences*). Selain itu, praktik penting di Australia adalah pembaruan undang-undang bantuan timbal balik (MACMA) secara simultan segera setelah

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berlakunya aturan perampasan perdata dalam POCA. Hal ini menunjukkan bahwa legislator Australia memiliki visi sejak awal bahwa rezim PTP Australia harus disempurnakan dengan memastikan modalitas hukum untuk menegakkan putusan PTP transnasional yang ditetapkan oleh Australia dan yurisdiksi asing. Hukum Australia juga menjamin hak-hak pihak terdampak putusan perampasan.

Implikasi Teoritis dan Praktis

Perampasan Tanpa Pemidanaan: Suatu Jenis Respon Adaptif yang Berbeda

Mengikuti konseptualisasi Campbell mengenai PTP di Irlandia sebagai respon adaptif (2007; 2010), artikel ini menemukan bahwa rezim PTP di empat yurisdiksi juga memiliki karakter respon adaptif terhadap kejahatan. Secara khusus, PTP dirancang untuk menghindari (*circumvent*) keterbatasan perampasan pidana ketika dihadapkan pada ketidakmungkinan (atau lebih tepatnya "kesulitan" dalam konteks Australia) untuk menuntut pelaku pidana.

Namun, kehadiran hukum yang mengatur PTP tidak dapat dikategorikan secara penuh sesuai dengan tipologi respon adaptif Garland. Oleh karena itu, analisis berikut memberikan implikasi yang signifikan terhadap teori kriminologi tentang PTP. *Pertama*, pembentukan dan operasionalisasi PTP menandakan perluasan modalitas hukum dan kewenangan koersif negara pada badan peradilan pidana untuk mengamankan perampasan aset pidana. Proliferasi kapasitas hukum sistem peradilan pidana melalui pembaruan hukum perampasan ini dapat dipandang sebagai varian yang berbeda dari respon adaptif.

Kedua, meskipun konstruksi PTP mungkin berasal dari logika di balik "profesionalisasi dan rasionalisasi peradilan pidana", keduanya tidak memiliki karakter yang persis sama. Sementara strategi profesionalisasi diwujudkan melalui peningkatan praktis dalam teknologi informasi, manajemen organisasi, serta integrasi sistem dan pemantauan (Garland, 2001), PTP diaktifkan melalui penguatan kewenangan hukum yang bersifat memaksa berbasis hukum internasional dan nasional. Selain itu, strategi profesionalisasi dapat dilakukan berdasarkan reformasi kebijakan internal yang diinisiasi sendiri oleh badan peradilan pidana, sedangkan pembentukan hukum PTP memerlukan pemanfaatan kekuasaan negara melalui penerbitan undang-undang.

Ketiga, melanjutkan uraian tersebut, pemberlakuan undang-undang PTP dapat dipandang sebagai suatu langkah yang diambil negara untuk menegaskan, mengklaim kembali, dan memperkuat kekuasaan pengendalian kejahatan (*crime control power*) untuk merespon keterbatasan sistem peradilan pidana. Dengan demikian, ideologi "konsolidasi kekuasaan negara" ini berbeda secara mendasar dengan salah satu jenis respon adaptif yang mapan, yaitu reposisi tanggung jawab pengendalian dan pencegahan kejahatan kepada aktor non-negara, termasuk masyarakat dan entitas privat (Garland, 2001).

Keempat, pengaturan norma-norma dalam kerangka hukum internasional seperti UNCAC dan *Directive (EU) 2024/1260*, yang mempromosikan pembentukan hukum PTP dalam sistem hukum domestik Negara-negara Pihak, mengindikasikan bahwa urgensi PTP dikonseptualisasi sebagai suatu urgensi yang melampaui batas yurisdiksi. Oleh karena itu, PTP dapat dipandang sebagai respon adaptif yang memiliki karakter transnasional. Hal ini eksepsional karena Garland (2001, p.194) aslinya memahami bahwa praktik-praktik adaptasi sebagian besar hadir sebagai "solusi lokal" untuk masalah-masalah konkret dan kontekstual.

Kelima, mengenai dengan "penekanan pada konsekuensi" (*emphasis on consequences*), Garland (2001) menerangkan pergeseran konsentrasi badan-badan negara, dari menangani penyebab kejahatan menjadi menangani akibat kejahatan. Penyesuaian prioritas ini berfokus pada, antara lain, pemenuhan kebutuhan korban dan reduksi rasa takut publik terhadap kejahatan (*fear of crime*). Berbeda dengan contoh-contoh tersebut, PTP merepresentasikan penekanan pada jenis konsekuensi (atau efek merugikan) yang berbeda dari kejahatan, karena PTP menargetkan penghapusan keuntungan kriminal daripada menangani kejahatan melalui jalur penuntutan konvensional.

Kehadiran PTP sebagai eksemplar konsolidasi dan perluasan kekuasaan negara dalam pengendalian kejahatan (*crime control*) harus diawasi secara hati-hati dengan mata yang waspada.

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Demi keadilan, pengaturan PTP harus diimbangi dengan memastikan secara bijaksana adanya pelindungan prosedural yang efektif.

Riset mengenai Praktik Penegakan PTP Transnasional

Dengan mempertimbangkan temuan-temuan mengenai praktik penegakan PTP transnasional di PBB, Uni Eropa, dan Australia, artikel ini memandang bahwa penelitian yang lebih ekstensif mengenai faktor-faktor yang mendorong dan menghambat efektivitas penegakan PTP transnasional dalam memenuhi tujuannya hanya dapat dilakukan jika lebih banyak praktik PTP transnasional yang dilaksanakaan dan dilaporkan kepada publik.

Rekonseptualisasi Rezim Perampasan Tanpa Pemidanaan Indonesia

Dipandang dari perspektif perbandingan hukum, Indonesia menunjukkan contoh pembaruan hukum PTP yang unik. Meskipun Indonesia secara tradisional adalah yurisdiksi *civil law*, contoh-contoh rezim PTP di negara asing yang dirujuk dalam Naskah Akademik RUU Perampasan Aset adalah sistem perampasan perdata di Amerika Serikat, Australia, dan Filipina. Dua dari negara-negara tersebut, Amerika Serikat dan Australia, adalah yurisdiksi *common law*.

Yang menarik, meskipun Penjelasan RUU Perampasan Aset mengklaim bahwa rezim PTP yang diadopsi adalah rezim perampasan perdata, serta terdapat banyak rujukan mengenai kerangka hukum perampasan perdata dalam Penjelasan RUU, karakter aktual sistem PTP dalam RUU Perampasan Aset lebih mencerminkan pendekatan PTP yang sangat terkait dengan penyidikan/penuntutan pidana, dan oleh karena itu lebih bersifat "pidana". Penegasan kembali atas identitas sebenarnya dari rezim PTP ini akan membantu Indonesia dalam menyematkan penegakan PTP ke dalam mandat wajib UNCAC mengenai pelaksanaan perintah perampasan transnasional pada kasus-kasus korupsi dan pencucian uang.

Kebutuhan Mendesak untuk Mengatur Rezim Perampasan tanpa Pemidanaan yang Komprehensif

Pemahaman terhadap praktik-praktik PTP domestik dan bantuan timbal balik di Indonesia dalam fasilitasi proses penyitaan terkait PTP menunjukkan bahwa *law-in-action* berbeda dengan *law-in-books*. Meskipun praktik-praktik ini dapat saja dianggap sebagai upaya penegakan hukum yang proaktif dan responsif untuk memperoleh jalan keluar dari keterbatasan substantif hukum positif terkait PTP dan bantuan timbal balik, praktik-praktik ini bermasalah menurut perspektif *rule of law*/negara hukum. Elemen prosedural dari *rule of law* menekankan pentingnya *rule-by-law* dan legalitas formal (Bedner, 2010; Tamanaha, 2004). Tindakan negara, *casu quo* pelaksanaan PTP, harus tunduk pada hukum. Untuk memenuhi legalitas formal, substansi undang-undang yang mengatur PTP dan bantuan timbal balik harus jelas dan pasti, serta dapat diakses dan diprediksi sehingga orang bisa memperkirakan konsekuensi dari tindakannya (Bedner, 2010; Stein, 2019).

Ketiadaan aturan PTP yang komprehensif dalam UU TPPU tidak sejalan dengan prinsip *rule of law*/negara hukum, karena kurangnya kepastian mengenai ruang lingkup aset yang dapat dirampas, langkah-langkah proses PTP, serta lembaga yang berwenang melakukan proses tersebut. Begitu juga dengan ketiadaan dasar normatif untuk penegakan putusan PTP transnasional dalam UU Bantuan Timbal Balik. Semua hal ini mengakibatkan praktik PTP menjadi tidak dapat diprediksi dan memberikan kewenangan diskresi yang berpotensi tak terawasi (*potentially unfettered discretionary powers*) kepada negara, oleh sebab undang-undang yang tidak pasti dan tidak lengkap. Dalam konteks PTP, hal ini dapat merugikan orang-orang terdampak dan pihak ketiga beritikad baik yang hak-hak fundamentalnya dilindungi oleh prinsip *rule of law* (Bedner, 2010; Tamanaha, 2004).

Oleh karena itu, terdapat kebutuhan mendesak untuk melembagakan rezim PTP yang komprehensif dengan mengesahkan RUU Perampasan Aset. Juga diperlukan pembaruan UU Bantuan Timbal Balik untuk mengatur mandat penegakan putusan PTP transnasional. Tidak kalah penting adalah kebutuhan untuk menegakkan keadilan dengan memasukkan pelindungan prosedural yang lebih kuat dalam RUU Perampasan Aset dan revisi UU Bantuan Timbal Balik.

Menggunakan MLA sebagai Mekanisme yang Tepat

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Pemulihan aset transnasional dimungkinkan oleh dan beroperasi berdasarkan prinsip ekstrateritorialitas, yang menjelaskan soal penerapan hukum suatu negara di luar yurisdiksinya (Gutterman, 2023; Hock, 2023; Colangelo, 2023). Prinsip ekstrateritorialitas mengacu pada yurisdiksi preskriptif [jangkauan ekstrateritorial dari kekuasaan negara untuk menerapkan hukum nasionalnya terhadap orang dan peristiwa (Takeuchi, 2023; Colangelo, 2023)] serta yurisdiksi yudisial [kekuasaan mengadili perkara berdasarkan hukum nasional suatu negara (Clark, 2014; Hazim, 2020)]. Penegakan putusan perampasan transnasional lebih bergantung pada mekanisme kerja sama yudisial seperti bantuan timbal balik daripada melalui eksekusi ekstrateritorialitas secara unilateral (Cochrane, 2022).

Karena pelaksanaan kewenangan penyidikan, penuntutan, dan yudisial di bidang peradilan pidana pada dasarnya bersifat teritorial, negara-negara harus bergantung pada bantuan timbal balik untuk melakukan upaya paksa di yurisdiksi asing (Boister, 2018; Vervaele, 2014; Böse, 2019; Hazim, 2020; 2022). Lebih lanjut, mengingat setiap bentuk perampasan (termasuk PTP) merupakan pelanggaran terhadap hak-hak fundamental individu (Hofmann, 2024), terutama hak atas properti, maka perampasan juga termasuk upaya paksa. Oleh karena itu, dalam konteks RUU Perampasan Aset, harus ada ketentuan eksplisit yang menyatakan bahwa kerja sama internasional untuk penyitaan, pembekuan/pemblokiran, dan terutama perampasan tanpa pemidanaan terhadap aset pidana dilakukan berdasarkan kerangka prosedur bantuan timbal balik dalam masalah pidana.

Tipe-tipe Putusan PTP Asing untuk Diakui dan Ditegakkan

Artikel ini berargumen bahwa terdapat dua jenis putusan PTP asing yang dapat diakomodasi oleh hukum Indonesia. *Pertama*, putusan PTP yang ditetapkan oleh yurisdiksi yang memiliki sistem PTP bersifat mirip sistem PTP Indonesia: (1) terkait langsung dengan penyidikan/penuntutan pidana; (2) merupakan pelengkap perampasan pidana, dan (3) mengadopsi kerangka hukum acara hibrid (pidana/perdata). *Kedua*, untuk memperluas kemungkinan pengakuan dan penegakan putusan PTP asing, Indonesia juga dapat mengakomodasi putusan PTP dari yurisdiksi yang menganut sistem perampasan perdata, sepanjang aset yang hendak dirampas terkait dengan tindak pidana.

Memastikan Pelindungan Prosedural yang Lebih Kuat

Selain memformalkan penggunaan prosedur bantuan timbal balik untuk memfasilitasi penegakan putusan PTP transnasional, pembaruan pelindungan prosedural juga harus diintegrasikan ke dalam RUU Perampasan Aset atau revisi UU Bantuan Timbal Balik. Sebagaimana diuraikan di atas, RUU Perampasan Aset saat ini tidak mengatur mengenai pelindungan prosedural dalam tahap penegakan putusan PTP transnasional. Di sisi lain, UU Bantuan Timbal Balik, meskipun mengatur bahwa pihak terdampak berhak untuk melawan putusan perampasan (pidana) asing, tidak mewajibkan otoritas penegakan hukum untuk mengidentifikasi dan memberi tahu semua orang yang berpotensi terkena dampak (tidak hanya pemilik aset) mengenai suatu putusan perampasan. Dalam sistem yang berlaku sekarang, terhadap pihak ketiga selain pemilik aset, otoritas berwenang hanya harus mengumumkan secara publik mengenai penyitaan yang menjadi dasar perampasan final. Tidak demikian di Uni Eropa dan Australia, yang otoritas berwenangnya wajib memberi tahu pihak-pihak yang mungkin memiliki kepentingan atau terdampak oleh putusan perampasan transnasional. Praktik-praktik baik ini, bersama dengan pelindungan prosedural lain, dapat diadopsi dalam RUU Perampasan Aset atau revisi UU Bantuan Timbal Balik.

Usulan Perubahan terhadap RUU Perampasan Aset dan UU Bantuan Timbal Balik

Studi perbandingan ini berkhidmat ke arah gagasan pembaruan hukum (Grande, 2012). Dengan menegaskan kembali tujuan mengatur kerangka hukum yang adil dan efektif untuk penegakan PTP transnasional dalam hukum Indonesia, penelitian ini menyerukan pembaruan substantif terhadap RUU Perampasan Aset dan UU Bantuan Timbal Balik, dengan menyeimbangkan kepentingan keadilan dan efektivitas. Memperjelas dan menegaskan sifat sebenarnya dari rezim PTP Indonesia (yang terhubung kuat dengan penyidikan/penuntutan pidana) tidak memerlukan revisi yang menyeluruh terhadap RUU Perampasan Aset. Tujuan ini dapat dicapai

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dengan merevisi Penjelasan Pasal 2 yang menyebutkan bahwa RUU tersebut mengadopsi "rezim perampasan aset secara perdata (*civil forfeiture*)." Rekonseptualisasi rezim PTP hanya membutuhkan penghapusan frasa "perampasan aset secara perdata (*civil forfeiture*)." Lebih lanjut, rujukan-rujukan mengenai "prosedur keperdataan" di beberapa bagian dari Penjelasan RUU juga harus ditinjau ulang.

Pasal 63 dan Pasal 64 RUU Perampasan Aset harus secara eksplisit menyebutkan bahwa upaya paksa yang menargetkan aset pidana di yurisdiksi asing, termasuk pembekuan/pemblokiran, penyitaan, dan terutama perampasan tanpa pemidanaan, harus dilakukan berdasarkan kerangka bantuan timbal balik dalam masalah pidana. Mempertimbangkan contoh Australia, usulan revisi RUU Perampasan Aset ini juga membutuhkan pembaruan UU Bantuan Timbal Balik karena rezim bantuan timbal balik saat ini hanya mengakomodasi penegakan perampasan pidana transnasional.

Jalan yang paling ideal adalah merevisi UU Bantuan Timbal Balik untuk memperluas mandat bantuan timbal balik agar mencakup penegakan putusan PTP transnasional terhadap aset hasil dan instrumen pidana. Ruang lingkup putusan PTP asing yang akan diakui dan ditegakkan harus dijelaskan secara komprehensif. Selain itu, untuk proses yang lebih adil, pelindungan prosedural yang relevan bagi pihak-pihak terdampak harus pula dijamin. Pelindungan ini termasuk namun tidak terbatas pada: (1) kewajiban badan penegakan hukum untuk secara proaktif mengidentifikasi dan secara resmi memberitahukan pihak-pihak yang berpotensi terkena dampak putusan PTP, (2) hak-hak pihak terdampak untuk melawan perampasan dan menerima pemulihan yang efektif, (3) hak-hak peradilan yang adil, dan (4) dalam hal berlaku, hak atas pendampingan hukum.

Pilihan lainnya adalah memasukkan prosedur bantuan timbal balik untuk penegakan PTP transnasional ke dalam RUU Perampasan Aset bersamaan dengan pelindungan prosedural yang sesuai. Dengan demikian, RUU Perampasan Aset yang nanti disahkan, yang memiliki kekuatan hukum setara sebagai undang-undang dengan UU Bantuan Timbal Balik, merumuskan aturan khusus (*lex specialis*) yang memperluas mandat bantuan timbal balik untuk penegakan PTP transnasional. Usulan ini beralasan secara hukum, karena sifat "pidana" dari sistem PTP Indonesia memiliki potensi tinggi untuk dimasukkan ke dalam kerangka bantuan timbal balik dalam masalah pidana. Namun, berkaitan dengan pengakuan dan pelaksanaan perintah PTP asing, disadari bahwa usulan ini akan lebih baik dalam memfasilitasi putusan PTP yang memiliki hubungan signifikan dengan penyidikan/penuntutan pidana daripada putusan perampasan perdata.

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