



PAPUA
Law Journal

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International and National Laws Relations: Interrelated and Interacting Law Source

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Abstract: *The existences of international and national laws are interrelated and interacting. The linkage of International and National laws is depicted in monism and dualism theories. The existence of international and national laws is examined by looking at each other's interdependence and interaction between the two. The object of this paper is related to the disengagement and interaction between international law and national law, using normative juridical methods. The results show that in actual practice between international and national laws need and influence each other, includes: international law is more effective if transformed into the national law; international law will bridge when the national law cannot be applied in the territory of other countries; international law will harmonize the differences in the national law; and international law more grow from the practices of countries. Extradition as one example, in principle contains two dimensions of interrelated international and national.*

Keywords: *International Law; National Law*

INTRODUCTION

Today, the development of law is growing rapidly along with the development of era and human efforts that involved in the field of law continues to conduct legal studies of

various aspects. One aspect that continues to evolve in legal studies and widely studied is the Law System Comparative which it necessary to try to understand some legal conceptions and their development by exploring the

methods and emphases underlying the conception.

Historically, if look back the Law Comparative is science as old as the science of law itself, but its development as a new science in the last centuries, that is in 19th century developed into a special branch of jurisprudence. The study of Law Comparative is a very important and necessary of law science and useful to better understand and develop national law.¹

Law System Comparative can be done on a macro basis, for example by comparing law system based on the family of law systems, such as between *Civil Law System* with *Common Law System*, but can also be done on a micro basis, through specific study of Law Comparative in general besides other specific parts, such as Criminal Law Comparative, Civil Law Comparative and etc.

In relation to the Law System Comparative above, the most important and interesting to be specifically studied is the existence of International (HI) and National (HN) laws are more

increasingly and interrelated between them, as stated by Zweigert and Kotz that the essence of foreign law, country by country, as a basis for a critical comparison that concludes the implementation with some proposals on appropriate policies to be adopted by law.²

As described above, this research specifically attempts to examine the existence of International and National Laws by looking interrelated and interaction between them by demonstrating extradition as a concrete example.

METHOD

The type of research is normative-legal research, which is used to study the rules of law or legal provisions with emphasis on the principles of law that relating to the international and national laws, especially related to the interaction between them.

The technique of data collection used is literature study, by studying various legal materials includes primary, secondary, and tertiary in accordance with the object of study.

¹ Rene David as cited on Barda Nawawi Arief, (2008). *Perbandingan Hukum Pidana*, Jakarta: PT Raja Grafindo Persada.

² Peter de Cruz, *Perbandingan Sistem Hukum Common Law, Civil Law, dan Socialist Law*, Nusa Media, Bandung, p. 12

Data analysis is done by analyzing qualitative data by reducing data, presenting data and drawing conclusion.

ANALYSIS AND DISCUSSION

Supporting Theories

International law (public) is all rules and principles of law governing relations or issues that cross the borders of countries (international relations) that are not civil.³ While, national law is a set of laws consisting of rules and principles that must be obeyed by all societies within a country, also must be obeyed in establishing linkages with one another. This national law applies only in certain countries that live by national law. International and National Laws have a mutual linkages or correlation.

There are 2 (two) theories that can be used as a basis in looking at the linkage of International (HI) and National (HN) laws, namely the theories of monism and dualism.⁴ The theory of *Monism*, embraced by the

school of monism, According to this thought between the International (HI) and National (HN) laws are two legal entities of one larger legal system, namely the law in general. Because it lies in one legal system, then it is very likely there is a conflict between them. In its development, the school of *monism* is divided into two, namely the school of primate monism of International law and primate monism of National law.

According to the primate monism of HN, HI comes from HN. An example is customary law that grows from the practice of States. Since HI originates or comes from HN, then HN is higher than HI, so if there is a conflict then HN is preferred. This thought is considered very dangerous for the implementation of international relations, and this thought is not acknowledged its existence by the school of primate monism of HI.

According to the primate monism of HI, that HN comes from HI, so HI is higher than HN. HI should take precedence if occurs conflict between HI and HN. This thought is very idealistic and that is what should happen if the international community

³ Mochtar Kusumaatmadja, (1982). *Pengantar Hukum Internasional*, Buku I Bagian Umum, Jakarta: Bina Cipta, p. 1.

⁴ Sefriani, (2010). *Hukum Internasional Suatu Pengantar*, Jakarta: PT RajaGrafindo Persada, p. 86.

wants an international law. Criticism of this thought is a mismatch of the fact that in reality HI is mostly sourced on HN, as in the practice of State.

The theory of *Dualism* is embraced by the school of dualism. This thought suggests that between HI - HN are two very different legal systems with each other. These differences are:⁵

- a. Subject, subject HI is countries while HN is individual
- b. Sources of law, HI derived from the joint will of the State, HN derived from the will of State.
- c. HN has a more complete integrity than HI

According to Anzilotti⁶ the difference between HI and HN according can be drawn from two fundamental principles. HN bases itself on the principle that State legislation must be obeyed, while HI is based on the principle that interstate treaty should be respected based on the principle of *pacta sunt servanda*, which is interstate treaty should be upheld.

Due to HI and HN are completely separate, two different legal systems

then the problem arises is not a hierarchy problem, which should take precedence if there is a conflict between them, but the problem of transformation. HN can only be applied after being transformed into HN, and vice versa.

National Law before the International Tribunal

Practices in International tribunals indicate that:⁷

- a. A State cannot use its National Law that is contrary to the International Law as a reason to justify violations of International Law committed on the other.
- b. A State cannot use the reason for the absence of its National Law to justify violations of International Law committed on the other.
- c. International responsibility arises only when the State fails to fulfill its international obligations. For example, Britain is not held accountable for refusing to change its National Law, but for failing to provide protection to diplomatic agents that is obligatory of International Law.⁸
- d. National law can only be filed before an International tribunal as long as it is not contrary to the International law.

⁵ *Ibid.* p.87

⁶ J.G. Starke, (2008). *Pengantar Hukum Internasional Jilid 1*, Jakarta: Sinar Grafika, p. 97

⁷ Sefriani, *Op Cit.* p. 88

⁸ Marthin Dixon, (2000). *Textbook on International Law*, Blackstone Press Limited fourt edition, p. 87.

- e. National law may be filed before the International tribunal as evidence of habitual practice of international law.
- f. National law may be used by the International tribunal in cases where there is a choice of law by prior parties.
- g. International tribunal may decide that a National Law does not adequately fulfill International law obligations. However, an international tribunal is not entitled to state that the National Law of a country is valid or invalid because it is the domestic affairs of the country concerned. Perhaps the National Law that contrary to the International law will be effective at the international level.⁹

As mentioned above it appears that in international tribunal the position of International law is higher than National law. This is due to the National law can only be used before an international tribunal if it is not contrary to International law. This is famous for *the theory of opposability*. For example, Indonesia cannot use Presidential Instruction No. 2 of 1996 on National Car to justify violations of the MFNs principle in GATT/WTO's treaties against Japan and America in

front of *Dispute Settlement Body* of WTO.¹⁰

International Law before the National Tribunal

The status of treatment of International law differs in practice between one country and another. The majority of countries have a written constitution or document as a fundamental provision of how international law before their national tribunal.¹¹ It said that in practice there are 2 (two) doctrines that many countries follow:

The first doctrine is *the doctrine of incorporation* which states that International law will be valid automatically as part of the National law without prior adoption. Adoption is necessary only when there are other decisive policies. Thus, signed or ratified treaty will be binding directly to local citizens without having to first establish their National law. This doctrine is a logical consequence of the theory of monism which states that International and National Laws are part of a larger legal system.

⁹ *Ibid.* p. 88.

¹⁰ Sefriani, *Op Cit.* p. 89

¹¹ *Ibid.* p. 91.

The second doctrine is *the doctrine of transformation* which states that International law does not become a National law unless or until it is implemented in the National law first. For example, if country A is part of treaty, the treaty will not result in legal consequences in national tribunal until country A implements it in the National law.¹² After the International law in question is transformed into National law, its status becomes the National law. The tribunal may use it as a legal source to decide upon a case. This doctrine of transformation is basically a logical consequence of the theory of dualism which views International and National laws as two distinct and separate legal systems, International law cannot be applied domestically unless it is transformed in a National law.¹³

Interdependence of International and National Laws

National law has no influence on the obligations of States at the International level, but International law does not completely ignore the

National law,¹⁴ but in practice both need and affect each other.¹⁵

First, International law will be more effective when it has been transformed into the National law. For example, although it has ratified a treaty GATT/WTO 1994, but Indonesia has never been able to use *anti-dumping* or *safeguards* to protect Indonesian trade because at that time the government has not yet established a Committee mandated by GATT/WTO. This proves that International law will be more effective when it has been transformed into National law.

Second, International law will bridge when the National law cannot be applied in the territory of other countries. For example, when the Indonesian police cannot arrest a fugitive who fled the country, Indonesia needs an extradition treaty with the country where the fugitive is located. Similarly, for the Indonesian government able to take the assets of the country ridden by corruptors abroad then Indonesia entered into bilateral

¹² John O' Brien, (2001). *International Law*, Great Britain: Cavendish Publishing Limited, Great Britain.

¹³ Sefriani, *Op Cit.* p. 92.

¹⁴ Michael Akehurst, (1983). *A modern Introduction to International Law*, George Allen & Unwin Publishers Ltd, p. 14

¹⁵ Sefriani, *Op Cit.* p. 98.

treaty for asset recovery with the country where the assets are stored. Furthermore, when the decision letter of Indonesian court requires a coercive attempt to confiscate the assets of an existing debtor abroad, Indonesia needs an treaty on the recognition and execution of a foreign verdict with the State where the debtors' assets are located. These examples prove that the limitation of State's jurisdiction in the implementation of its national law requires the assistance of International law to overcome it, bridging the application of the National law in International.

Third, International law will harmonize the differences in the National law. For example, the rule of sea pollution threshold is different from country to country. In order to have similarity and legal certainty if there is a foreign ship that spills oil on the beach then the ASEAN's group of countries can formulate treaty containing parameters or oil pollution threshold on ASEAN beach.

Fourth, International law more grew out of the practice of the National law of States. The Convention of Diplomatic Relations, for example,

grew out of the practice of States against foreign envoys that had been discovered its embryo since ancient Greece before the Middle Ages.

Fifth, although the State has a *prescription jurisdiction*, the authority to enact legislation in its national law, but in practice the State cannot make the rules of the legislation without looking at the rules of international law that already exist.

Extradition as an Example

The term "*extradition*" refers to a process whereby under a treaty or on the basis of a country's reciprocity submits to another country upon the request of a person accused or convicted of a crime committed against the law of the requesting State, the country requesting extradition has the competence to adjudicate such accused. Usually the alleged crime is committed within a territory or on board that hoist flag of the claimant and usually the accused is within the territory of the country which submits to seek refuge. Extradition requests are usually published and answered through diplomatic track.¹⁶

¹⁶ J.G. Starke, *Op Cit.* p. 469

Extradition has international and national dimension as well as a linkage or relationship between them.

International Dimension of Extradition

Extradition deals with the issue of inter-state (two countries) namely the requesting and requested countries. In some cases extradition may involve more than two countries, for example, if two or more countries submit a request to the requested country of the requested person. Although involving more than two countries, the problem remains in a position between two opposing parties.

The interest of requesting country to the requested person is in order to prosecute and punish him if he is found guilty of committing a crime or is requested to be a convicted person, the interest of the requesting country is to impose a sentence or continue the execution of his remaining sentence.

While the interest of the requested country to the requested person (crime perpetrator) is about its presence in the territory of a country may be through legal or illegal procedures, the requested country certainly has territorial jurisdiction over himself by

imposing its national law. The requesting country surely cannot directly arrest and bring back the requested person in the territory of requested country, because direct arrest is a violation of the sovereignty of the requested country, unless the requested country has permitted it. The legal way is through the regulation of extradition law by requesting the requested country to extradite the requested person to the requesting country.¹⁷

With regard to the crime that has been committed and which is the basis of the requesting country to request it from the requested country, it may the crime contain the territory of the requested country and cause the victim in the requesting country or requested country or in the territory of third country, in which each has criminal jurisdiction over the crime and the perpetrator. This problem leads to conflict or linking criminal jurisdiction.

In the case of a crime there is already a country that judges the person in question under its national criminal law, then other country shall respect the judicial proceedings and judgment

¹⁷ I Wayan Parthiana, (2009). *Ekstradisi Dalam Hukum Internasional Modern*, Bandung: Yrama Widya, p. 64.

of the country concerned, or the country shall no longer prosecute for a second time for its crimes. This is in accordance with the principle of *ne bis in idem* which is a universally recognized principle of criminal law.

Another international dimension is¹⁸ the procedure of requesting for the requested person extradition by the requesting country and the notification procedure upon the granting or rejection of requesting country by requested country which must be done through a diplomatic track as a sign that extradition is a problem between country. If the request is granted then proceeding to the extradition process by the requested country to the requesting country, upon the determination of place and time of extradition or other requirements, as well as to the officials who will receive and who will extradite from both countries as well as the transportation used.

Another international dimension is the evidence related to the crime committed and used as the basis for requesting or extradite it, where the evidence is located in the territory of

requested country, but is urgently needed as evidence by the requesting country. Likewise with the personal property, such as clothing, jewelry, cash and so on. That should be treated in accordance with the national law of both parties. In practice both may be included in the process of extradition of the requested person although not always, so the requested country besides extradite its person may be accompanied by evidence of non-prohibited moving objects to be taken out of the territory of requested country and technically and concretely may be handed over and the property his personal property to the requesting country.

Once the requested person is in the territory of the requesting country, the issue is entirely in the requesting country to be subsequently processed in accordance with its national law. While, the requested country is no longer bear responsibility. But sometimes the international dimension still arises, that is, when the requesting country intends to prosecute the person (perpetrator) for another crime. In this case the requesting country must seek requested country's consent and if it is

¹⁸ *Ibid.*

agreed then the requesting country may prosecute the person concerned in addition to the offense used as the basis for his extradition as well as for other crime.

Another issue that remains at the international level is the possibility of the requesting country's intention to extradite the person to another country or third country which also intends to prosecute either the same crime or other crimes. Thus, the requesting country does not adjudicate the person (perpetrator) for the crime as the basis of the requested country to extradite it to the requesting country. In this case, the position of the requesting country is only an intermediary. This cannot be justified because it is contrary to the intent and purpose of extradition itself, namely to adjudicate and/or punish the perpetrator under the national law of the requesting country as a country with criminal jurisdiction.

Another case if the person concerned after being tried and decided by a court ruling that has a permanent legal force and the decision has been executed by the requesting country. If the verdict is a verdict of acquittal because it is not proven guilty, then

after the verdict has a binding/definite power it must be released and thus it is like any other person in general. Similarly, if the verdict was a punishment and the law had been completed. If then there is another country that requests for extradition of itself to the country but for other crimes this can be justified because in this case the problem is a new extradition bilaterally between the two parties because there is no violation of the principle of *ne bis in idem*.

The problems as mentioned above are set out in extradition treaties, either bilateral or multilateral. With the presence of the extradition treaty, the bilateral international level already has a guarantee of legal certainty if the parties face extradition case.

National Dimension of Extradition

Due to extradition is related to persons and crimes committed and regulated in the national law of each country, extradition also contains national dimensions. Concerning a person as an offender will be related to his/her nationality, whether he is a national of the country in which he is domiciled or flees, dwi-nationality, citizenship of a third country or a

stateless person. This issue is governed by the laws or legislation on the citizenship of each country. However, because people are outside the territory of the country that has criminal jurisdiction over people and their crimes, so he also reveals his international dimension. Because it becomes an object for both parties that is requesting and requested countries.¹⁹

The issue of citizenship is important especially to the requested country, whether the person being asked is its own nationality or not. This is wholly determined within the national law of the requested country, especially in the legislation of its citizenship. If he is his own citizen, the requested country may reject the request of the requesting country for extradition of him.

Another national dimension is the regulation of the crime itself, it regulated in the national criminal law of each country. Crimes regulated in the national criminal law of each country, there are same and different. Strictly speaking an act there is declared as a criminal offense both under requesting country criminal law

as well as the requested country criminal law. On the contrary, there is also an act declared as a criminal offense under the requesting country criminal law but is not a criminal act under requesting country criminal law.

Although the types of crime are governed by the national criminal law of each country, the crime itself also contains an international dimension, that is, a crime that serves as a basis or reason for requesting the extradition of the requested person, shall constitute a crime or act of jurisdiction in accordance with national criminal law of both parties/both countries. This relates to the principle of *double criminality* as one of the principles of extradition which will be one of the decisive factors for granting or not the demand of requesting country by the requested country for requested person or the perpetrator.

Still related to his crime, other issues are about where the crime is committed or place of its victims. Of these, there are various possibilities: *First*, crime is fully committed within the territory of one country, as well as its consequences and therefore entirely a domestic matter of the country.

¹⁹ *Ibid.* p. 67

Second, the crime is committed within the territory of one country but the consequences or its victims occur in another country. *Third*, the crime occurs somewhere outside the territory of any country and the consequences or casualties occurs in more than one country. *Fourth*, the crimes committed in some countries and cause the consequences or victim in each country between one crimes and other are interrelated. *Fifth*, the combination of second, third, and fourth. In this case the problem is very complicated because one is interrelated with other.

If the first is entirely national, the second to the fifth is highly visible of its international dimensions. However, all variations of crimes are fully regulated in the national criminal law of States. In many cases, there are countries that have established their criminal jurisdiction over those crimes and some have not yet established them. This depends on the sooner or later the States regulate it in their respective national criminal law. Although various variations of crime contains international dimensions, but because they are subjugated to the criminal jurisdiction (national) of each

country as it is regulated in its national law, it can be said that such crimes are crimes of international dimension and also dimension national.

Regarding to the presence of requested person within the territory of the requested country to be submitted to the requesting country when the requesting of requesting country is granted, then it also related to the criminal procedure law of the requested country. The requested country is faced with the seeking process, and if found later arrested then detained, and finally handed over to the requesting country. For all must be done in accordance with the criminal procedure law of requesting country.

Even previously also related to the criminal procedure law of requesting country, starting from the time of preparing requests for extradition of requested persons to requested country. They should be based on the criminal procedure law of requesting country, such as the alleged crime against the requested person and the evidence as supporting in the submission of a request for extradition to requested country. Likewise, after the requested person is extradited by the requested

country to the requesting country, strictly speaking after the requested person in the territory of the requesting country with the status of being accused or defendant, then the national criminal procedure shall be enacted, starting from the police investigation process and prosecution and proceedings before his/her judicial body if he/she is proven until the prosecution process. If the person previously concerned has a status as a convict, then he or she must undergo punishment or rest of the punishment that is also done under the national law of the requesting country.

However, it is not sufficient if its implementation in national law is only based on the criminal procedural law, because there are still other problems of extradition not regulated therein, whether the position of a country as a requesting or requested countries, such as a State institution or which government organs are responsible for preparing everything required in making requests for the extradition of the requested person, whether the police, the prosecutors' office, the minister of justice, the foreign minister or all of them must cooperate, and if

they must cooperate whatever their respective duties and authorities. Likewise, if the request of requesting-country is granted, where State institution or government organ is obliged to be a representative of the State to take the person concerned and subsequently bring it back to the requested country.

In contrary, if the country is a requested country, the problem in its national law is which government institution or organ that processes the request of the requesting country to extradite the requested person, is it the same as when the country is domiciled as the requesting country when it will make a request for extradition?. On what basis will the State undertake the extradition of the requested person, is it only on the basis of an existing extradition treaty between the parties, or is it on the basis of the extradition treaty also on the basis of a mutually acceptable linkages? Which State institutions or organs are authorized to make a final decision on the request of the requesting country? If, for example, the request of the requesting country is rejected, what are the reasons for the rejection? What kinds of crimes or

offenses can be used to make a request for the requested person or for his extradition? If for some reason, the requested state must delay the extradition of the requested person, it is also an important issue not regulated in its criminal procedural law.

On that basis the issue of extradition is also regulated in the laws or regulations of each country's national legislation. Therein, in addition to being regulated on the issues mentioned above, it is also regulated on the principles of extradition which is a generally accepted principle on the international or global level. With the existence of national extradition legislation, on the national level there is a guarantee of legal certainty for the State and its citizens or foreigners within the territory of the country which at some time may be involved in the case of extradition.

The Linkage Between International and National Dimensions of Extradition

In formal, the international and national dimension of extradition appears different, but substantially both are interconnected. The international

dimensions of extradition can be said to be a connection of its national dimensions and vice versa.²⁰

In the position of a State as a requesting country, when it wishes to make a request for the extradition of the requested person to the requested country, it must first of all be observed that the law or legislation should be subject to the issue of extradition. Furthermore, the extradition treaty between the requesting country and the requested country if it already exists, or if it does not exist, whether there is a willingness of both parties to extradite based on mutual linkages.

Conversely, in a position of requested country, about its notification process whether the request of requesting country is rejected or granted. Furthermore, if granted on the process of surrender of requested person by the requested country to the requesting country, this is an international dimension of extradition. All of this, cannot be separated from its national dimension, namely the national extradition legislation of both parties, the law or its material criminal law in the form of a crime or its own

²⁰ *Ibid.*, p. 71

offense or a national criminal law of requested country in respect of the finding, discovery, arrest and detention of the requested person.²¹

Similarly, if the person concerned is already in the territory of the requesting country, then it is prosecuted in accordance with national criminal law, such as national criminal law, as well as a formal criminal law such as criminal procedure law. Therefore, in order to obtain a complete and comprehensive picture of extradition, the discussion must be conducted from both dimensions simultaneously and integrated. If the discussion only focuses on its international dimension and ignores its national dimension and vice versa, there will be no complete and comprehensive picture of extradition.

CONCLUSION

Theoretically, the linkage of International (HI) and National (HN) laws are depicted in the theories of *monism* and *dualism*. In actual practice between the International and National laws are need and influence each other. HI is more effective when transformed

into HN, HI will bridge when HN is not applicable in the territory of other countries, HI will harmonize the differences in HN, and HI more grows from the practice of countries.

Extradition as an example, in principle contains 2 (two) dimensions of international and national. The international dimension can be understood because extradition is an inter-state problem whose regulation is at the level of international law either in the form of customary international law or international treaty. While, the national or domestic dimension is due to the requested person in the territory of the requested country and if then extradited then he/she is in the territory of the requesting country. Thus, substantially the international and national dimensions of extradition are interconnected with one another.

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²¹ *Ibid.*

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