

New Measures of Investigation as Countermeasure against Organized Crime in Indonesia*

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Abstrak

Indonesia sebenarnya telah memiliki berbagai perangkat hukum yang secara terbatas mampu dipergunakan untuk mengungkapkan dan menghukum pelaku-pelaku kejahatan terorganisasi. Namun, berkaitan dengan sifat statis yang terkandung dalam dasar-dasar hukum tersebut, tetap diperlukan kemampuan yang baik dan bahkan keberanian dari penegak hukum untuk melihat terdapatnya elemen-elemen kejahatan terorganisasi dalam suatu kejahatan yang mungkin terlihat biasa. Penulis juga mensinyalir masih terdapatnya persoalan dengan penghukuman dan nasib korban kejahatan terorganisasi yang masih kerap terlupakan.

Introduction

Organized crime has always been a fascinating subject in popular culture and a major criminal justice concern in American life. Books and films about organized crime are plentiful and have a world wide popularity. The names of famous organized criminals, such as Al Capone, as well as their colorful street names or aliases, are almost as well known to the public as they are to law enforcement officials.

Here in Jakarta, every body know who Hercules is, as he is the gang leader of what we called "Preman" in Tanah Abang area, who organized crime, such as loan sharking, debt collector, security fee collector, prostitution, gambling etc. Eventhough, by American standards, Indonesian criminal organizations are relatively small-scale and short lived.

In Europe, organized crime and professional crime as academic terms are largely interchangeable. All professional crime is organized or has

organization behind it. Criminologist in Indonesia also used the term of organized crime to distinguish the professional from the amateur criminal.

Meanwhile, Alfred Lindesmith defined organized crime as "*usually professional crime involving a system of specifically defined relationship with mutual obligations and privileges*" (p.219). Edwin Sutherland and Donald Cressey described it as the "*association of a small group of criminals for the execution of a certain type if crime*".

Under these definitions, any gang or group formally or informally organized to rob banks, stealing automobiles or pickpocketing are also parts of organized crime. Overtime, however, governmental commissions, law enforcement agencies, and the media have used the term to describe a formally structured nationwide conspiracy involving thousands of criminals organized to gain control over the whole sectors of legal as well as illegal activities.

* (Presented at International Workshop on Crime in the Post-Modern Society and Its Counter Measures, Indonesia Association Criminology and International Society of Criminology, Sponsored by: Council of Public Policy, Bali, 1997)

Due to that, Russel L. Bintliff described organized crime as “ a conspiratorial crime that has certain characteristics of formal organizations and sometimes involves hierarchical coordination of several persons in the planning and execution of illegal acts, or in pursuit of legitimate objective by unlawful means.”

Organized crime involves continuous commitment by the key members, although some persons with specialized skills may loosely participate in that ongoing conspiracies. Its primary goal is economic gain, though some of the participants in the conspiracy may aspire either to power or status.

Organized Crime, especially in Indonesia, is not entirely synonymous with the Mafia or La Costra Nostra or Boryokudan. What similar among them is those traditional concepts of organized crime target corporations as their victims. Oftenly, organized crime syndicate or group hierarchy stays within an ethnic framework as a safeguard, believing that “one’s own kind” offers the most reliability and loyalty and lacks the natural prejudice of the human race. We can find that Blok M area in South Jakarta “owned” by Ambon and Madura ethnic, Tanah Abang owned by Timorese ethnic, North Jakarta by Batakesse ethnic. However, as the syndicates expand, they recruit subordinates of all types, especially those who have purely mercenary motives and do not aspire to lead or make strategic decision on behalf of the organized crime syndicate.

Organized criminals have regularly and increasingly attached themselves to legitimate business enterprises. Today, in Jakarta for example, many organized crime syndicates had sprung from a group of people who, years ago, might have chosen to create a shoplifting ring. Now, however, they focus on bilking corporations.

This category of organized crime has found it much easier and more profitable to prey on corporations. The risk factor is almost nonexistent because corporation, even when they know outside parties had tried to embezzle their assets, will be reluctant to bring it to the attention of law enforcement and the public.

Organized crime features the characteristic of a formal business organization, including a division of labor, coordination of activities through rules and codes, and an allocation of task to various roles to achieve certain goals. The organization seeks profit from crime (although today the acts often do not appear to be crimes) and tries to preserve itself in the face of external and internal threats.

Although in year past organized crime focus primary on overtly illegal activities such as debt collector, illicit gambling, narcotics and psychotropic substances, loan sharking and others, today these pursuits are used mostly as source of steady cash flow.

One of the glaring examples of organized crime in business is the collusion of Bapindo with Golden Key Group scandal. See also the case of Bank Harapan Santosa. Traditional thinking blames the collapse on management. However, if we look further we find clearly that management did not operate alone in this scheme.

Organized crime syndicate considers various aspects of potential embezzlement targets. Their scrutiny includes the form and value of property (including money, securities, information, or materials) and the vulnerability of the intended victim company. Some company or entities will prove more prone to victimization than others because they have characteristics or situations that make them especially vulnerable.

How syndicate infiltrate corporations. Surpassingly, corporations rarely recognize that an organized crime

syndicate has elected them to become their victim. The crime of embezzlement, especially when engineered by an organized syndicate targeting a corporation will normally have a long-term goal of siphoning money or materials that covert to money, as opposed to short-term objectives.

So it is not only fighting organized crime, but now we faced organized crime who have infiltrate a corporate. They use corporate to make a corporate crime. The use of the criminal sanction against corporate executives remains limited. In spite the harm that their actions engender, corporate offenders simply are not viewed in the same manner as are ordinary offenders. For the most part, when reference is made to the regulation of corporate behavior by measures directed at key corporate personnel, it must be realized that such action are in all probably going to be taken, if at all, only in the most blatant cases (not necessarily those with the most adverse total impact upon society).

The investigation and prosecution of organized criminal groups have seldom been conducted in continuous, coordinated, or institutionalized manner. In the last month the Arm Forces in Jakarta, mostly in Pasar Tanah Abang and its surrounding. They try to crack the domination of "premans" group who dominate Pasar Tanah Abang. Public interest has been aroused sporadically, creating a demand for concerted action and causing the level of law enforcement response to rise, only to be followed by diminishing public attention and by a corresponding decline in application of law enforcement resource.

Several issues are involved. **First**, some actions of corporate executives are more likely than others to be regarded as criminal in nature, particularly bribery of officials, price fixing, and the manufacture and shipment of harmful product. On the

other hand, action related to defective product or products that adversely affect the environment are less likely to lead to criminal penalty. **Second**, the use of criminal sanction against corporate officers is limited by the fact that they project a certain profile, one likely to be judge harshly except where irresponsibility and bad faith are undeniable. The officers are usually community leaders with good educational backgrounds and high status. **Third**, the argument is often presented that corporate executives should not be subjected to criminal sanction for violating legal standards because they are responsible for advances in industry that have continuously raised living standard and the caliber of life in our society; it is understandable that they make mistakes or act unwisely on occasion. **Fourth**, the difficulties involved in investigation leading to criminal prosecution have been, and remain, biased in favor of the corporate offender. It also places your company in control while eliminating the probability of creating liability with hasty countermeasures or actions not supported by evidence. Your investigation also confirms or disproves the suspicion of a dishonest employee.

Legal difficulties are also encountered in the criminal prosecution of executives due, **First**, to the division of tasks and responsibilities within a corporation. **Second**, corporate violations are usually far more complex than conventional crimes. Antitrust cases, for example, generally involve complicated economic statistics, as well as proof of written or unwritten conspiracy among individuals. Furthermore, the complexity of the legal proof required allows businessman to attempt legal brinkmanship. **Third**, the effects of the violations are extremely diffuse. Antitrust conspiracies, pollution, substandard food or drugs often have such subtle effects that compensation may be too little and too late even when

they are discovered. Only in rare cases of corporate executive offenders are treated is the availability of *nolo contendere* plea, in which the offender does not confess the charges.

The Main Subjects in Basic Balanced Principles between Basic Legality Principle and *Mens-rea* Principle, along with the Attitudes against Formal Law and the Material Law.

- a. The Penal Law who is planned before the main subject of monodualistic balance, refereed to bring to notice the balance of two interest, they are the community interest and the individual interest. The monodualistic point of view is also known for “Daaddoder Strafrecht”, that is the Penal Law which emphasize on the objective side of “Deed” (Daad) and also the subjective sides of “The Producer / Maker” (Dader).
- b. Taking the monodualistic balance principle as a point of departure, makes the concepts of defending 2 principles which is very fundamental in Penal Law, they are the Legality Principles and the *Mens-rea* Principles. These two principles are known as “The Community Principle” and “The Humanity Principle”. Different from the Penal Law, who is in effect now, it only formulates the Legality Principles. The concept formulates both of the principles explicitly in article 1 (for Legality Principle) and article 35 (for *Mens-rea* Principle).
- c. Different from the formulation of Legality Principles in the Penal Law, which is now in effect, the concept extended its formulation by admitting the existence of the Living Law (Unwritten Law / Traditional Law) as a basic of punishing some deeds as long as the deeds don’t have any similarity or not regulated in the Constitution. The expansion of formulated Legality Principle can not be released from the main subject to

make and also to secure the balance principles between The Individual Interest and The Community Interest, including between The Law and Justice.

- d. The expansion of formulated Legality Principle in the concept 1991/1992 can be found in article 1 (3). It says :

In the first article stipulation, there are no decrease in the Living Law that determines according to the Traditional Law, somebody deserves to be condemned, if their deeds don’t have the similarity in the rules of construction.

Note: The formulation above is in the concept 1987/1988 molded into article 1 verse 4.

The presence of those formulation, showed the characteristic of Legality Principle conducted by the Indonesia point of view, which is not quite formalistic and separable The beginning of those point of views that deals with the basic formulation above, actually is quite old, and spreaded over some of legislative product over the years, it can be seen in:

1. Article 5 verse 3 sub. B Constitution No. 1 Drt 1951 “...that the deeds according to the Living Law, must considered a crime, but have no equal in the Civilian Book of Penal Code, so it is considered threatened by penalties which is not more than 3 months in jail, or a Rp. 500,00 fine, for the substitution, whenever the traditional penalties are being considered suitable by the Judge according to the personal foul...that the deeds which by the Living Law must be considered a crime, and having the equality in the Civilian Book of Penal Code, it is considered threatened by punishment that has the most similarity to the crime itself.”

2. The Constitution of Judicial Authority (UU No. 14/1970) draws up a regulation :

- Article 14

The court should not refuse to check and held a hearing on a case, which is submitted with an excuse of an unclearance of The Law, rather it was responsible to check and held a hearing on the case.

- Article 23 (1)

“Every court order besides consisting reasons and basics of the verdict, also have to consist the definite articles form the specific regulation or the unwritten source of Law.”

- Article 27 (1)

“Judge as the defender of the Law and Justice have the duty of searching, following, and understanding the value of the Living Law.”

- e. With expansion of formulated Legality Principle in the above concept, here by the limits of crime action also been expanded. Not only it was clearly formulated in the constitution; it was also consisting the deeds, which is considered an offence by the Living Law. So the limits of crime action is not only based on the formal criteria according to the Living Law. The path of specific consideration is still continued by the concept maker, explaining the submittance of opinion about attitude against the Material Law. This matter is clarified by article 15. It says:

“The deeds which is convicted must be the deeds that forbidden and threatened criminal regulation of the Constitution. To convict the deeds by criminal action, they have to be against the Law.”

The formulation of article 15 above, followed by the article 16, which clarify that every crime action considered to be against the Law, except if there is a justifiable cause submitted by the producer. Following with the article 17, it was clarified that the judge always have to go over the case, if the deeds which is convicted really is against the law or the law or the realization of the Community Law.

- f. By clarifying about every crime action considered to be against the law (look at the article 16 above), the concept stands for the attitude against the law form a valid substance of crime action. It means, however it was not clarified in the offence formulation, the presence of a substantial against the law, but some deeds which has been formulated as a crime action in the constitution has to be considered against the law. So the formal formulation in the constitution have to be seen as a factor or an objective measure itself still have to tested materially to the procedure. To see if there is a justifiable cause submitted or not, and the deeds actually against with the realization of Public Law (look at the article 16 & 17 above).

In that case, it is obvious here the presence of balance principle between formal standard (the assurance of law) and material standard (justice value). Realizing that in concrete events, both of these values (the assurance of law and justice) may insist on each other. So, on the next article (article 18) it is clarified, that the judge have to consider the value of justice as most important, compare to the value assurance of the law. The clarifying just like it was formulated in article 15-18, the conception above can not be found in the formulation of the book of Penal Law which is now in effect.

- g. About the criminal responsibility, it has been said before that different from the penal law which is in effect now, the conception formulate explicitly in culpability principle in article 35, it says: *“there is no crime without culpability, is the principle in being responsible of producer for committing a crime,”*

The explicit formulation above has not been existed in the conceptions before (concept 1964, 1966 and concept 1971/1972). These matters also showed some new aspect in the new conception of the penal law.

- h. In spite of the explicit assurance of culpability principle, even conception in some forms can possibly give other divergences or exceptions. It is already known as common law system, explaining about a strict liability (liability without fault) and vicarious liability (the legal responsibility of one person for wrongful acts of another). We can look up in article 37 about strict liability, and about vicarious liability in article 36. For further information we will take a quotation of the following article:

Article 37

“As an exception from article 35, the constitution can determine that for specific crime action, the criminal shall be punished only because of a criminal substance in his/her deeds, without paying further attention on their fault in doing offence.”

Article 36

“In specific matter, people also responsible for others if its is regulated in the constitution.”

Both the formulation above are considered something new, because they are not familiar in the Book of Penal Law (KUHP) which in effect now. There some opinion and comments coming from the Dutch

Professors (Prof. Nico Keizer and Prof. Dr. Schaffmeister) about the strict liability doctrine and vicarious liability doctrine are contradiction with the mens-rea principle.

Since there is an anxiety among the members of United Nations on the danger of organized transnational crime, so on 21-23 November 1994 there was a world ministerial conference on Organized transnational crime, in Napoli Italy. The delegate of Indonesian attended this conference. This conference discussed various efforts that should be done for overcoming organized transnational crime and it had agreed on the following steps:

- a. Enhancing international cooperation, allocating adequate fund and human resources for overcoming organized international crime.
- b. Encouraging countries to ratify the result of the United Nations Convention 1988 on the overcoming of illicit narcotics and psychotropic drugs trafficking.
- c. Enhancing the countries ability to overcome the organized transnational crime by following ways : (1) Preparing the acts on overcoming the organized transnational crime. (2) Enhancing the international cooperation on the prosecution, trial system and investigation.
- d. Preparing the technical aid for countries, which put priority over the overcoming of organized transnational crime.
- e. Enhancing the contribution to United Nations Commission on Crime Prevention and Criminal Justice.
- f. Support Italy's opinion for opening the international training center for law enforcer from the members.

In this conference, there has not been an agreement on the formal definition of organized transnational

crime but United Nations Commission on Crime Prevention and Criminal Justice has taken inventory some kinds of crime, which are classified as organized transnational crime:

- a. money laundering
- b. terrorist activities
- c. theft of art and cultural objects
- d. theft of intellectual property rights
- e. illicit traffic in arms
- f. aircraft hijacking
- g. sea piracy
- h. land hijacking
- i. insurance fraud
- j. computer crime
- k. environment crime
- l. traffic in persons
- m. traffic in human body parts
- n. illicit drug trafficking
- o. fraudulent bankruptcy
- p. infiltration of legal business
- q. corruption and bribery of public officials as defined in national legislation
- r. corruption and bribery of public officials and elected representatives as defined in national legislation
- s. And other crimes that are done by group of organized transnational crime.

Further, the result of this world ministerial conference on organized transnational crime November 1994 was followed by the United Nations Congress IX about "The Prevention of Crime and The Treatment of Offenders" which was held in Cairo, Egypt, on April 29 to May 8 1995.

The congress has succeeded in finding the agreement on the need of international convention on the organized transnational crime with the following subject/topics:

1. The problem and danger of organized transnational crime.

2. The harmony of laws of each country in combating/overcoming organized crime
3. The development of rules that can make the economic and banking sectors more transparent and can be responsible so that it will be very difficult to be adjusted by organized transnational crime.
4. The agreement on the combating of money laundering and the use of crime result.
5. The exchange of information for helping the investigation, arrest and lawsuit of organized transnational crime.
6. The corruption that involves public officials.

As it is stated that one of the effective ways for making the operation of organized transnational crime in a certain country is by doing bribery to the public/government officials including law enforcers. So, the corruption that involves public/government officials was discussed especially in the congress when delegates informed the development of the corruption in their own country and effort on how to prevent, control and do some effective activities to each corruption especially that is related with organized transnational crime.

We see that the area of Asia-Pacific has grown so fast that influence us to be in the middle of trade liberalization as discussed in APEC 15 November 1994. The anticipative preparation for facing the problems in accordance with the agreement of APEC especially the negative impact of trade liberalization has to be given attention for managing the national development.

We aware the progress of national development that is followed by the development of negative growth in many kinds of crime that are done by modus operandi which are getting more

qualitative and wider organizational spectrum.

This condition has to be faced soloed seriously through the establishment of comprehensive crime policy supported by the professional ability and tough integrity of law enforcer and the active role of society.

By knowing the condition, problem and the tendencies completely in the field of law enforcement, may be we can arrange a direction, planning an activity for achieving the goal and nationally accepted purpose by determining a policy that is followed by the strategy in law enforcement.

The policies, which are stated in the law enforcement, are the followings:

- a. Comprehensive approach in law enforcement that is juridical approach for realizing law establishment, philosophical approach for realizing law establishment, philosophical approach for enforcing justice and sociological approach for realizing the benefit for society.
- b. Law enforcers have to understand, know and carry out the development of law which are directed for being able to guarantee the assurance, orderliness, law enforcement and protection which contain justice and truth and is able to save and supported the national development which is supported by the law material, adequate apparatus and the society that is aware of law and faithful to law.
- c. The effort for improving the quality of human resources for law enforces so that they will own high professionalism and personal integrity.
- d. Develop social culture

The nation's culture as the expression of creation, art and sense is very important for law enforcement (internalize the law norms). The law development

especially law enforcement is difficult to be done without the support form the conducive social culture.

Later, as the implementation of the stated policy so there is a need to arrange a strategy in law enforcement by considering the strategic problem that is how to increase the followings:

1. The application and enforcement of law which give law assurance and justice assurance to the society especially justice seeker.
2. The involvement of law enforcers in the process of law information so that resulted law products will be oriented more on its applications and enforcement.
3. Professionalism, personal integrity and disciplined human resources in law enforcement so that they will be more useful and effective in doing their duties/responsibilities.
4. The awareness of society for the law has to be better so that it will be able to express and enforce the national disciplines.
5. The internal and external coordination in order to enforce law in a more directed way.
6. The internal and external communication for developing the accurate system of law information and document network.
7. The implementation of functional and stick control in order to guarantee the efficiency and effectively of the duties implementation by the law enforcers.

How the realize the form and function of management system and strong law enforcers organization and is able to support the implementation of its own duties and responsibilities. How to use the limited human resources for increasing the law means and infrastructure.

In facing and overcoming the transnational/international crime there is a strategy which is focused on the following efforts:

1. Managing the harmonious laws and avoiding the juridical and law conflicts that cause the high class transnational criminal free from punishment.
2. Managing the similar perception from each nation that gets involved in creation kinds of activities that can be punished so that it can reduce the imbalance in laws.
3. Cooperating among countries /nations in law enforcement, information exchange, special education and training programs for law enforcers in transnational crime.
4. Reevaluating the conventional principles of international cooperation so that it will be more useful and effective such as in extradition, reciprocity and double crime.
5. The development of regional centers for improving the materials such as literature, research document, research result as the law consideration for the nations in the area involved.
6. Managing the similar perception on the principle that all nations, without considering to what extent they are influenced by transnational crime, share the information authority in order to accelerate the formation and plan of policy and international strategy.
7. Integrating some kinds of international cooperation that have been done so far so that we can find a new form of cooperation that can give better and more efficient result.

As we know, in the sixth five-year development, the development

policy, which is done, is based on the development trilogy. And one of its basis is strong and dynamic national stability which is necessary to be develop orderly, integratedly and to strengthen each other with two other things that is development distribution and its result and high economic growth.

The effort of development distribution and its result are not realized without the high economic growth, the high economic growth cannot be achieved without strong, and dynamic national stability will not be achieved without the development distribution and its result since the inavailability of distribution will emerge or arise the social hindrances and fluctuation.

The element of development distribution and its result are always placed as the first element of development trilogy. The government has stated eight ways of distribution and one of them is the distribution of opportunity for getting justice.

Conclusion

1. From the law material point of view, there is an acts that rules the organized crime such as UU No. 3/1971 about the elimination of criminal act of corruption and for other crimes are in UU No. 3/1976 about narcotics.
2. The organized crime, the quality of the doer is educated person, has skill, ability and knowledge in certain things by using the IPTEK progress. They are able to change modus operandi, which is complicated, difficult and soft, so that it will be difficult to be detected so that his criminal actions seem to be untouchable by the acts.
3. Since the acts are static, so far catching the organized crime/white collar crime, there is a need of good ability and policy bravery of law enforcers that has authority to guess that a criminal act is

included in the element of valid act. So, that how sophisticated the modus operandi is, but it is still touchable and anticipated by this act.

In this case, jurisprudence places an important role both in the existence of act or as one of the law resources for the formation of the next act.

4. It is realized that for protecting the national development especially in implementing penal policy to the organized crime, it is demanded the readiness and professionalism of good law enforcers who are intelligent and have high personal integrity.
5. In overcoming and avoiding the organized crime, as stated by Marc Ancel, only can be done by many parties and these various parties. And these various parties from various fields and knowledge or educational background have to work together, and the role of law experts as theorists (including they who are involved in this panel forum) and practitioners is really needed.

Finally, for avoiding the anxiety of panel forum attendants and from all parties on the steps of panel policies that have been done, are doing and will be done, so we are necessary to express the following:

1. The penal policy or criminal law policy cannot be separated from the integral conception of law development, which is a part of national development, that is development of the whole Indonesian people and the development of all Indonesian society.
So, if “criminal law policy” is used as a means for realizing this goal, we have to pay attention on the humanistic approach. By humanistic approach it does not

mean only that condemnation (punishment) as a sorrow, which the value of fair and civilized humanity/humanism, but it has to be useful for making the offender wary and encourage the offender's awareness on the value of social life.

2. The implementation of punishment sanction to the offender basically is the human right expropriation, so the penal policy has to be oriented on the social defense and in general meaning it means for the sake of tranquility, safety and prosperity in social life, so the other function of criminal law as *ultimum remedium* has to be applied if other effort for crime prevention and combating are unable to be done anymore.
3. Related with the stated thing above, so the panel policy has to be based on the main principles of criminal law, that is:
 - Principle of legality
 - No penalties without fault
 - Principle of presumption and other principles that are basically the protection guarantee for human right.
4. Respecting these principles, Indonesia has also to look on for the protection if crime victims as individual.