

THE ROLE OF MUTUAL LEGAL ASSISTANCE IN OBTAINING TESTIMONY FROM FOREIGN WITNESSES

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Abstract

Many countries have researched Mutual Legal Assistance (MLA) extensively, but Indonesia is relatively new to this topic. This article aims to examine MLA from the perspective of law and social contract. The research concentrates on techniques for gathering testimony from foreign nationals who serve as witnesses. The author employs a normative legal research method with a conceptual and legislative approach in this article. The author uses a literature study as an analytical technique. The research findings indicate that foreign nationals have the right to refuse to provide testimony in an Indonesian court without any legal consequences. This phenomenon results in a lack of critical evidence in criminal case investigations, specifically witness testimony.

Keywords: Mutual legal assistance, law and social contract, foreign nationals, witness testimony, Indonesia

Abstrak

Penelitian mengenai Mutual Legal Assistance (MLA) di berbagai negara telah banyak dilakukan, namun bagi Indonesia, hal ini merupakan topik yang relatif baru. Artikel ini bertujuan untuk mengkaji MLA dari perspektif undang-undang dan kontrak sosial. Penelitian ini fokus pada metode yang dapat digunakan untuk memperoleh keterangan dari saksi yang merupakan warga negara asing. Dalam penulisan artikel ini, penulis menggunakan metode penelitian hukum normatif dengan pendekatan konseptual dan perundang-undangan. Teknik analisis yang digunakan adalah studi kepustakaan. Hasil penelitian menunjukkan bahwa warga negara asing memiliki hak untuk menolak memberikan keterangan di depan pengadilan Indonesia tanpa adanya konsekuensi hukum yang berlaku. Fenomena ini menyebabkan adanya kekurangan dalam alat bukti yang sangat penting dalam pemeriksaan perkara pidana, yaitu keterangan saksi.

Kata Kunci: MLA, warga negara asing, keterangan saksi.

1. Introduction

The phenomenon of crime in Indonesian society has evolved in line with societal developments. Initially, crimes in Indonesia were predominantly conventional. However, as society progressed, the nature of crime has shifted, and today, Indonesia is facing not only conventional crimes but also contemporary and transnational crimes (Fasini, 2018). The evolution of crime is shaped by various factors, with globalization and advancements in information and communication technology being the most dominant influences (Finckenauer, 2000). This situation presents new challenges in law enforcement, extending beyond the borders of the country where the crime took place and into the international arena. In the context of international crimes, the methods and resources employed often surpass national boundaries, meaning that tackling transnational crimes requires cooperation between multiple countries (Olii, 2005). For instance, when the perpetrator and evidence are located outside the borders of the country where the crime occurred, enforcing the law using conventional methods becomes challenging. This is primarily due to the conflict with the principle of state sovereignty, which poses a significant obstacle for law enforcement authorities (Apriyani et al., 2023). Specifically, in this context, the challenge lies in how to bring foreign nationals, who are located abroad, to testify and provide information during the trial process in Indonesia.

In effect, international cooperation is essential for addressing both national and transnational crime issues (Supriyanta, 2008). Mutual legal assistance in criminal matters represents a form of international cooperation that facilitates information exchange in law enforcement (Firdaus, 2017). In 2006, Indonesia implemented Law No. 1 of 2006 concerning Mutual Legal Assistance in Criminal Matters, known as the MLA Law, to establish a legal framework for collaboration with other nations in submitting and receiving assistance requests. The MLA Law was introduced as an alternative solution to enhance law enforcement in contemporary contexts; however, challenges persist in its implementation. The law's provisions have not adequately addressed these challenges, resulting in a less effective application than initially anticipated (Lutfi & Putri, 2020).

Looking more closely at Article 14, paragraph (2) of the MLA Law, we see that it describes how to handle requests for people to be present in Indonesia to give testimony. The article states: "If the person whose presence is requested, as referred to in paragraph (1), is willing to give testimony and travel to Indonesia, the Minister may make arrangements with the foreign country to: a. bring the person to Indonesia; b. return the person to a foreign country, or c. address other related matters. This provision sets out the conditions under which the Indonesian authorities can collaborate with foreign governments to facilitate the arrival of a person willing to testify. It provides flexibility in managing the logistics of bringing the individual to Indonesia, ensuring their safe return to their home country, or handling other related concerns that may arise during the legal process.

According to this provision, it can be understood that a witness is not obligated to assist in the form of a statement or testimony in an Indonesian trial and is allowed to refuse. Further details are provided in Article 16 of the MLA Law, which grants immunity and special rights to foreign nationals, whether currently in Indonesia or yet to arrive. Specifically, they cannot be penalised under Indonesian law if they choose not to assist. This is because foreign nationals have the right to be governed by the laws of their own country, not Indonesia's. However, if the witness refuses to testify in an Indonesian trial, there are no provisions for penalties from their home country either.

This provision presents a challenge for the requesting country, in this case, Indonesia, in obtaining information or testimony from an individual. Before providing testimony, the witness must first be asked whether they are willing to testify in the trial process in Indonesia. This creates the potential for requests for assistance from Indonesia to go unfulfilled. In contrast, Article 159, paragraph (2) of Law No. 8 of 1981 on the Criminal Procedure Code (KUHAP) states that providing testimony is a "legal obligation" for everyone. Testifying before a court is considered a primary duty or responsibility of a witness. If a witness refuses to fulfil this obligation, they can face criminal penalties under the applicable law. Indeed, every country requires individuals to testify to uncover the facts of a crime. In carrying out this duty, the witness should be afforded protection by their home country (Rondonuwu, 2012). Furthermore, protection must also be provided for witnesses who are also perpetrators (justice collaborators) and foreign nationals. Each country is responsible for ensuring their protection so that the process of uncovering a criminal case can proceed as effectively as possible.

2. Research Methods

This article employs a normative legal research method, characterized by prescriptive analysis. This article employs both a conceptual and a statutory research approach. The technique for analyzing legal materials in this article is through a literature study.

3. Results And Discussion

Crime evolves alongside the advancement of human civilization and technology. The progression of crime can be observed through changes in methods, perpetrators, and the impact it causes. Once conventional crimes have become more modern, often involving sophisticated tools. Individual criminals have transformed into organized groups or syndicates with international networks (Kesuma, 2022). The era of globalization, driven by advancements in science and technology in transportation and telecommunications, brings numerous benefits to humanity. However, it also has negative consequences, particularly in the realm of crime. Criminals and their ill-gotten gains can now move swiftly and easily across borders, affecting the development of criminal activities (Derry Angling Kesuma, 221 C.E.).

To prevent and overcome transboundary crimes that arise, one form of cooperation was born in the form of agreements and laws called "mutual legal assistance in criminal matters." As conceptualized theoretically, mutual legal assistance is a mechanism for international cooperation regarding investigation, prosecution, and examination in court under the provisions of the requested country's laws and regulations (Tobing, 2022). Cooperation based on agreements can be broadly categorized into two main types: those governed by multilateral conventions and those that occur without formal conventions, relying on national legal frameworks and bilateral arrangements. Multilateral conventions, such as the United Nations Convention Against Corruption (UNCAC) and the ASEAN Mutual Legal Assistance Treaty (AMLAT), play a crucial role in facilitating cross-border cooperation in areas like crime prevention, anti-corruption efforts, and the enforcement of justice. These agreements provide standardized legal mechanisms and frameworks for cooperation, ensuring that member states can work together more efficiently to address issues that transcend national borders. For instance, the UNCAC, which has been ratified by numerous countries, provides a comprehensive approach to fighting corruption through preventive measures, criminalization of corrupt practices, and mutual legal assistance between nations.

On the other hand, cooperation without a formal convention relies heavily on the provisions of mutual legal assistance (MLA) that exist in the national laws of each participating country. These provisions allow for the exchange of information, evidence, and other forms of legal support in criminal matters. Countries may also rely on letters of rogatory, a formal request made by a court in one jurisdiction to a court in another jurisdiction for the performance of specific judicial actions, such as serving documents, gathering evidence, or executing search warrants. This process, although sometimes slower and more cumbersome than formal agreements, still offers a critical pathway for legal cooperation when multilateral treaties or conventions are not in place or do not cover the specific circumstances at hand. However, in both cases, the essence of international legal cooperation lies in the recognition of shared interests and the willingness of states to collaborate in the fight against transnational crime, uphold human rights, and ensure the rule of law. Whether through formal multilateral conventions or more informal, case-specific arrangements, such cooperation is indispensable in a world where crime, corruption, and justice increasingly cross borders, requiring concerted efforts for their resolution.

In response to this, Indonesia enacted Law No. 1 of 2006 on Mutual Legal Assistance in Criminal Matters (MLA Law), which has been in effect since March 3, 2006 (Hikmawati Putri, 2019). In this context, Mutual Legal Assistance (MLA) plays a pivotal role in extending the efforts to gather evidence for criminal investigations and prosecutions, especially in cross-border cases. Traditionally, the Criminal Procedure Code in Indonesia, under Article 184, has regulated the procedures for obtaining and presenting evidence in domestic legal proceedings. Article 184 has long been the cornerstone for ensuring that evidence such as documents, objects, and testimonies from witnesses are admissible in court. However, as crime has increasingly become more transnational, the need for international cooperation in criminal matters has led to significant expansion and refinement of the legal provisions related to evidence gathering.

The evolution of MLA in Indonesia reflects an enhanced recognition of the need for cooperation with foreign jurisdictions. While Article 184 primarily focuses on the domestic scope of criminal investigations, MLA extends these efforts to a broader international level. In particular, it has been expanded to facilitate the presence and testimony of foreign witnesses in Indonesian legal proceedings, a development that has proven crucial for addressing the challenges posed by crimes with cross-border elements such as corruption, organized crime, terrorism, and money laundering. Under the umbrella of MLA, Indonesia can request the presence of witnesses from other countries, ensuring their participation in trials or investigations even when they are not physically within the country's borders. Therefore, this expansion aligns with Indonesia's growing commitment to international legal cooperation, particularly through multilateral frameworks such as the United Nations Convention Against Corruption (UNCAC) and bilateral treaties like the ASEAN Mutual Legal Assistance Treaty (AMLAT). With these provisions in place, Indonesia has been able to engage in more efficient exchanges of legal and judicial assistance, such as requesting the testimony of witnesses located abroad, obtaining evidence stored in foreign jurisdictions, or securing the cooperation of foreign law enforcement agencies to track criminal activities that span multiple countries. Moreover, the inclusion of witness testimony as a crucial element of MLA acknowledges the vital role that firsthand accounts play in criminal investigations and prosecutions. Witnesses, particularly those who can provide critical evidence

related to the commission of a crime or corroborate other pieces of evidence, often are in a position to bridge gaps in investigations that span multiple jurisdictions. Their testimony can become indispensable, especially in complex cases such as corporate fraud, international trafficking, and cybercrime.

The legal framework for MLA in Indonesia has not only broadened the scope of evidence gathering but also created the necessary legal pathways for ensuring that witnesses from other countries can testify in Indonesian courts, whether through physical presence, video conferencing, or written statements. This innovation significantly enhances the ability of Indonesian authorities to pursue justice in cases that would otherwise be hindered by geographical and legal boundaries. In addition, the establishment of the MLA was driven by the practical reality that differences in criminal law systems between countries often led to a lack of action in criminal investigations (Sarayar, 2020). For example, differences in the legal systems of countries around the world can be seen in their approaches to criminal justice. Some countries follow the "Due Process Model," which prioritizes the protection of human rights for suspects but results in lengthy bureaucratic procedures in the criminal justice system. On the other hand, the "Crime Control Model" focuses on the efficiency and effectiveness of criminal justice, operating under the assumption of guilt, which contrasts with the emphasis on safeguarding individual rights (Packer, 1964).

On the other hand, the legal system also involves differences in the definitions of crimes, such as the principle of dual criminality (Hayes et al., 2020). Given the example of differing legal systems, the MLA serves as a solution through cooperation between countries or the creation of laws for those wishing to regulate it. Article 5 of the MLA Law also states that if no agreement exists, assistance can be provided based on the principle of reciprocity or the goodwill between the two countries. The MLA is a key aspect of modern law enforcement processes that involves not just one country but potentially two or more countries working together. These countries share a common commitment to combating crime, even when it occurs in another country, by offering various forms of requested assistance. Articles 11 through 17 of the MLA Law govern the assistance for testimony from foreign nationals located abroad at the request of the Indonesian government. In addition to the MLA, Indonesian law enforcement also maintains international cooperation networks with agencies from other countries, often referred to as agency-to-agency cooperation. Examples include Interpol, the Asset Recovery Inter-Agency Network Asia Pacific managed by the Attorney General's Office, and others. This type of collaboration is informal but has proven to be faster, more efficient, and more accurate in obtaining evidence. To ensure that the evidence is admissible in court, informal requests can be followed up through formal channels, such as the MLA. However, for this to happen, the requesting country must first have complete and well-organized data from the investigation to strengthen the case, making the requested country more likely to provide the necessary assistance. Therefore, the MLA plays a crucial role in preventing and combating transnational crime, serving as an alternative means of presenting evidence, such as securing the attendance of witnesses abroad in Indonesian trials.

Based on the three indicators mentioned above, it can be observed that the MLA generally serves at least three key functions in the law enforcement process in Indonesia. However, it is important to understand that the entire MLA system is essentially a request for assistance. Therefore, the decision to grant the request ultimately rests with each country, especially the one seeking assistance. When you look at the MLA Law, it's clear that it doesn't have any specific sections or articles that explain how to ask for witnesses or how to present witnesses in court in Indonesia. The MLA Law offers only a general framework for the procedures that must be followed and the types of assistance that can be requested. Articles 9: Paragraphs (2) to (d) and Article 15 of the MLA Law explain how to ask for witnesses to testify and how to try to present witnesses during the trial. These provisions state that Indonesian law enforcement authorities can request a statement or testimony from an individual by having them travel to the requesting country during the investigation phase. In contrast, during the prosecution or trial phase, Indonesian authorities can request the voluntary appearance of a witness to testify before an Indonesian court. However, if a witness is unwilling to attend the trial in Indonesia, the law provides alternatives. The witness can choose to provide their statement via teleconference or submit a written statement, which would then be read aloud by the public prosecutor during the trial. This flexibility guarantees the presentation of testimony, even in cases where the witness is not physically present. Additionally, the MLA Law grants special protections and immunity to witnesses. Article 16 stipulates that Indonesian law cannot subject a witness to sanctions if they refuse to comply with the

assistance request. This protection aligns with the principle of respecting the sovereignty of the witness's home country and the understanding that foreign nationals are not automatically subject to Indonesian law.

While these provisions are intended to facilitate international cooperation, they also present challenges. The absence of an obligation for witnesses to testify or attend trials means that requests for assistance can potentially go unfulfilled. There is no legal provision within the MLA Law or the MLA agreements between Indonesia and other countries that mandates a witness to provide testimony or attend court proceedings. Furthermore, there are no criminal sanctions prescribed for witnesses who refuse to testify or appear before the court. This lack of enforceability can limit the effectiveness of the MLA mechanism, particularly when dealing with witnesses who are critical to the resolution of a case but are unwilling to cooperate. The absence of such provisions poses significant obstacles for law enforcement authorities in Indonesia, as it may undermine the reliability and completeness of international cooperation. In cases where testimony from foreign witnesses is crucial, the inability to compel their participation could hinder the progress of investigations and trials. Additionally, the lack of criminal consequences for non-compliance may lead to a situation where witnesses choose not to cooperate, further complicating the pursuit of justice in transnational criminal cases.

The MLA Law, while a useful tool for international legal cooperation, reveals a key gap in addressing the enforcement of witness obligations. This gap highlights the need for more robust provisions within future MLA agreements or reforms to ensure that critical testimony is not hindered by the voluntary nature of cooperation, especially in cases involving serious transnational crimes. As globalization and cross-border crimes continue to rise, the need for more binding and enforceable mechanisms for witness participation in foreign trials becomes increasingly important. Article 159 paragraph (2) of the Criminal Procedure Code states that serving as a witness is a legal obligation. If an individual refuses to testify in a court hearing (which is one of the formal requirements for providing testimony), they may face criminal penalties in accordance with the applicable laws (Sitoesmi, 2015). To ensure that witnesses who are abroad can still participate in the trial, they are allowed to provide their testimony virtually via teleconference, as outlined in Article 13 of the MLA Law. However, it is preferable if the witness is willing to appear in person during the judicial process in Indonesia. This would allow court officials such as judges, legal counsel, prosecutors, and defendants to directly cross-examine the witness. Additionally, this in-person appearance would enable court officials to ensure that the witness is giving their testimony freely, without any interference or threats, with the support that has been arranged between the two countries.

The obligation of foreign nationals to serve as witnesses and be present in Indonesian courts can be analyzed through the lens of social contract theory, as proposed by Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. According to these theorists, the social contract involves citizens agreeing to surrender part of their rights to their leaders in exchange for protection and governance. In this context, the leaders, or the state, delegate their authority to law enforcement. When law enforcement acts as representatives of the state to uphold the law, they still require the cooperation of citizens. This cooperation is not limited to Indonesian citizens alone; it also extends to foreign nationals, who can be called upon with the assistance of the foreign government (Wicaksono, 2021). Consider a situation where a witness in country A is unwilling to attend or testify due to concerns related to the COVID-19 pandemic. If country A wants to continue receiving the witness's testimony, the witness requests a teleconference or an examination in country B. In this case, a written statement is prepared and signed by both the witness and law enforcement officials from country A so that the witness's testimony can later be read out during the trial in country A. The witness, in this scenario, argues that by being a citizen, they have surrendered certain rights to their government—such as the right to request specific accommodations—and, for example, by paying taxes, they are entitled to such facilitation.

Based on the social contract theory, this line of thinking can be seen in the context of the Mutual Legal Assistance (MLA) Law. This theory says that the state has the power to protect and regulate the rights of its citizens, but not to expand that power outside of its borders. Foreign nationals, therefore, are not subject to the laws of another country, and they cannot be sanctioned by the legal system of a foreign nation unless they are subject to that country's jurisdiction. Instead, their own country, which can choose to cooperate voluntarily with the requesting nation, protects the rights of foreign nationals. This concept highlights that the social contract applies within the boundaries of a single nation, but not across international borders. However, if the

witness is unwilling to testify or attend the trial, the requesting country's request for assistance may not be fulfilled. The act of giving testimony should, therefore, be seen as an obligation tied to the citizen's social contract with their own country. When citizens fulfill such obligations, their country must ensure that they are protected and provided with the necessary resources or facilities to do so.

For a foreign national witness to be willing to attend and give testimony at a trial in another country, the requesting country must carefully convince the witness by providing detailed information about the case. This should include:

- a. The nature and relevance of the case: Clearly explaining why the witness's testimony is crucial to the proceedings.
- b. Specific assistance being requested: Identifying the facilitation required, such as teleconference testimony or other accommodations.
- c. The purpose of the request: Explaining the goal of the assistance and how it contributes to the legal process.
- d. Identity and function of the investigating bodies: Clearly stating who is requesting the assistance (e.g., law enforcement, prosecutors, or judicial authorities) and the roles of these entities in the investigation and trial.
- e. Facilities and protection: Assuring the witness of the protection measures in place, such as guarantees against threats or intimidation and any other necessary provisions to ensure the witness's safety and well-being during the process.

In this way, the social contract between a citizen and their home country is respected, and the country can ensure that its citizens, even when abroad, can participate in legal proceedings if needed, without fear of undue burden or risk. By adhering to the principles of the MLA Law, the requesting country can obtain the cooperation of foreign nationals while ensuring their rights are safeguarded by their government. Ultimately, this system respects both the social contract of the citizen and the legal framework that governs international cooperation in criminal matters. It encourages voluntary assistance, acknowledges the jurisdictional limitations of each country, and ensures that the international legal process remains fair and equitable for all parties involved.

4. Conclusions

In Indonesia's law enforcement process, Mutual Legal Assistance (MLA) plays a crucial role and serves at least three main functions. First, it serves as a method to respond to the evolving dynamics of crime, particularly in an era where criminal activities increasingly transcend national borders. Second, MLA acts as a solution to bridge the differences in legal systems between countries, ensuring that legal cooperation is possible even when national laws and procedures may vary significantly. Third, MLA embodies the joint efforts of countries in dealing with global or cross-border crime, such as organized crime, corruption, terrorism, and human trafficking, where collective action is necessary to effectively address these issues. However, it is important to understand that the MLA system is fundamentally a "plea for help" from one country to another. This means that while a country may request assistance from another in the form of evidence gathering, witness testimony, or other legal cooperation, the decision to grant or deny the request ultimately depends on the laws, policies, and willingness of the requested country. This introduces a level of uncertainty and discretion in the MLA process, as there is no guarantee that a request will be fulfilled, even if it complies with the general legal requirements.

In the procedure for witness testimony during the trial, one key issue arises: if a witness refuses to appear in court, that individual cannot be subjected to sanctions under Indonesian law. This presents a challenge when it comes to obtaining the testimony of foreign nationals, particularly when those witnesses are located outside of Indonesia. While MLA can facilitate the presence of foreign witnesses by allowing them to provide testimony remotely or through legal channels, the success of such arrangements hinges on several factors. Specifically, the willingness of the witness to cooperate, the permission of the country in which the witness resides, and the provision of adequate facilities to facilitate the testimony all play crucial roles in ensuring that the MLA process functions smoothly. Thus, it is clear that when MLA serves as a bridge for obtaining the testimony of foreign witnesses who are located abroad, Indonesia's legal system must account for the social contract between countries involved in the process. This requires the cooperation and

consent of the country where the witness is located, as well as the provision of necessary legal mechanisms to facilitate the witness's participation. This often includes ensuring that the witness is granted safe passage, providing technical support for remote testimony, or establishing diplomatic and legal agreements that enable the process to proceed efficiently.

Given these complexities, there is a pressing need to reformulate the obligations of witnesses in law enforcement processes, particularly in the context of international cooperation. The MLA idea should be considered as an addition to the evidence process, and the Draft Criminal Procedure Code (RUU KUHAP) should include rules for cross-border witness testimony. By doing so, the Indonesian legal framework would be better equipped to handle the challenges of obtaining and presenting foreign witness testimony in criminal trials. The reformulation could clarify the procedural steps, rights, and obligations of witnesses, as well as set out clear guidelines for cooperation between countries. Furthermore, we hope that these reforms will result in a more consistent and effective fulfillment of MLA requests. By creating a more comprehensive and transparent system for witness testimony in international criminal cases, Indonesia can improve its ability to obtain crucial evidence and ensure that justice is served in cases involving cross-border crimes. The ultimate goal is to ensure that requesting countries' assistance requests are legally sound and practically executable, with the requested country's cooperation being essential.

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