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THE POSITION OF INTERNATIONAL LAW WITHIN THE INDONESIAN LEGAL SYSTEM

*Simon Buti**

ABSTRACT

Indonesia's role in international and regional affairs has increased markedly since the fall of Soeharto in 1998. It has, for example, signed many international treaties. However, Indonesian law is silent on the position of international law, whether treaty or custom, in Indonesia's legal system. This has led to a significant unresolved legal debate about whether Indonesia follows monism or dualism. This Article argues that, while Indonesia appears to be dualist in practice, there is some evidence of monism, particularly in the decisions of Indonesia's Constitutional and Supreme Courts. Regardless, the uncertainty has allowed the Indonesian government to, on the one hand, leave the international community to believe that ratified treaties have automatic application, but on the other hand, to refuse to grant any rights to citizens that those international treaties seek to provide, claiming that treaties have no domestic application until incorporated by an Indonesian legal instrument.

INTRODUCTION

Indonesia, the world's fourth most populous country, is an important player in international and regional affairs. Indonesia has signed and ratified many international agreements¹ and is expected to soon ratify more, including the

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¹ These include the key human rights treaties, such as Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY. DOC. No. 95-19, 993 U.N.T.S. 3 (1978); Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Political Rights of Women, Mar. 31, 1953, 193 U.N.T.S. 135. Indonesia is also party to various International Labour Organisation ("ILO") and other international organization sponsored conventions.

Rome Statute.² By 2013, Indonesia had served three terms on the United Nations Human Rights Council and in 2011 chaired the Association of South-East Asian Nations (“ASEAN”). Indonesia’s international position is likely to become only more prominent. Largely unaffected by the recent global financial crisis, Indonesia’s economy has grown by more than six percent *per annum* since 2010 and, by some estimates, could become the world’s fourth largest by 2040.³

Many commentators have criticised Indonesia for failing to comply with international agreements it has ratified, including some concerning human rights⁴ and international trade.⁵ In this Article, I focus on one issue that appears to impede this compliance: the absence of domestic Indonesian legal rules specifying the way that international law, once ratified, enters into force in the Indonesian legal system.

Of course, state sovereignty demands that nations decide how international legal obligations and rights are received into their own domestic legal systems, and “what status and rank in the hierarchy of municipal sources of law to assign to [them].”⁶ Different states have adopted different methods depending

See Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, ILO C111; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 3; International Convention on the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3; Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, ILO C138.

² Bagus BT Saragih & Margareth S. Aritonang, *RI to Ratify Rome Statute*, JAKARTA POST, Mar. 6, 2013, <http://www.thejakartapost.com/news/2013/03/06/ri-ratify-rome-statute.html>; Rep. of the Working Grp. on the Universal Periodic Review: Indonesia, U.N. Human Rights Council, May 21, 2012–June 4, 2012, U.N. Doc. A/HRC/21/7 12, 21st Sess. at 12 (2012).

³ Hugh White, *Indonesia and Australia: The Great Power Next Door*, E. ASIA F. (July 8, 2012), <http://www.eastasiaforum.org/2012/07/08/indonesia-and-australia-the-great-power-next-door/> (last visited Oct 10, 2013).

⁴ *See generally* ANYA JETSCHKE, HUMAN RIGHTS AND STATE SECURITY: INDONESIA AND THE PHILIPPINES (2011); Luke Lazarus Arnold, *Acting Locally, Thinking Globally? The Relationship between Decentralization in Indonesia and International Human Rights*, 2 J. E. ASIA & INT’L L. 177 (2009); Nicola Colbran, *Realities and Challenges in Realising Freedom of Religion or Belief in Indonesia*, 14 INT’L J. HUM. RTS. 678 (2010); Philip Eldridge, *Human Rights in Post-Soeharto Indonesia*, 9 BROWN J. WORLD AFF. 127 (2001).

⁵ HIKMAHANTO JUWANA, TREATY MAKING—INDONESIAN PRACTICE 6–7 (2005), available at http://www.cdi.anu.edu.au/CDIwebsite_19982004/indonesia/indonesia_downloads/2005%2007%20Indo%20Hikmahanto%20paper.pdf; Simon Butt, *Intellectual Property Law in Indonesia: A Problematic Legal Transplant, in INDONESIA: LAW AND SOCIETY* 620 (Tim Lindsey ed., 2nd ed. 2008); Simon Butt & Tim Lindsey, *Intellectual Property, Civil Law and the Failure of Law in Indonesia: Can Criminal Enforcement of Economic Law Work in Developing Countries?*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 391 (Tim Lindsey ed., 2007).

⁶ ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 15 (1986).

on the source of international law in question.⁷ For example, some states provide that, once ratified, international agreements override domestic law to the extent of any inconsistency.⁸ Others deny legal effect to international agreements until they are “transformed” into domestic law.⁹ Yet others allow so-called “self-executing” treaties to be automatically applied.¹⁰ Many countries, but not all, allow customary international law to automatically operate in their domestic legal systems.¹¹ The courts of many countries have adopted presumptions that domestic lawmakers intend to comply with international treaties and custom when making domestic laws.¹² Some of these courts have then had resort to sources of international law to aid them in the interpretation and application of their domestic constitutions and other laws.¹³

Perhaps uniquely, Indonesia appears to have made no explicit choice about how international law enters domestic law. This is a fundamental problem because, as Cassese states:

International law cannot stand on its own feet without its “crutches”, that is . . . international law cannot work without the constant help, co-operation, and support of national legal systems. As the German jurist, H. Triepel, observed in 1923, international law is like a field marshal who can only give orders to generals. It is solely through the generals that his orders can reach the troops. If the generals do not transmit them to the soldiers in the field, he will lose the battle.¹⁴

Indonesian laws covering international agreements focus almost entirely on the processes of entering into and negotiating treaties. Indonesia’s Constitution, for example, is silent on the status of international law within the Indonesian legal system. Its only reference to international agreements is found in Article 11, which states, in my translation:

- (1) The President, with the approval of the National Parliament, declares war and peace and creates agreements with other nations.

⁷ Dinah Shelton, *Introduction to INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION 1* (Dinah Shelton ed., 2011).

⁸ *Id.* at 10.

⁹ *Id.*

¹⁰ See GILLIAN D TRIGGS, *INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES 11–13* (2nd ed. 2011).

¹¹ *Id.* at 13.

¹² Shelton, *supra* note 7, at 18.

¹³ *Id.* at 19–20.

¹⁴ CASSESE, *supra* note 6, at 15.

- (2) When creating international agreements that give rise to consequences that are broad and fundamental to the life of the people, create financial burdens for the State and/or require amendments to legislation or the enactment of new legislation, the President must obtain the agreement of the National Parliament.
- (3) Further provisions on international agreements are to be regulated by statute.¹⁵

Likewise, Indonesia's Law on International Agreements, enacted in 2000, determines who can negotiate and sign treaties on Indonesia's behalf, and how treaties are ratified under Indonesian law.¹⁶

This Article aims to identify and describe the relationship between international law and domestic law within the Indonesian legal system. Given the regulatory lacuna just described, I examine two additional legal mediums that appear to illuminate the relationship. The first is academic literature, known as *doktrin*, or "doctrine." Doctrine is more influential on the work of lawyers and judges in many civil law countries, such as Indonesia, than in common law countries, with the work of some highly-respected legal scholars considered as a source of law.¹⁷ Part I highlights scholarly debates about whether Indonesia follows "monism," where international law automatically forms part of domestic law, or "dualism," where international law does not form part of domestic law until it is transformed or implemented in domestic law, such as by passage of legislation or another type of regulation. Most Indonesian scholars have focused almost exclusively on the position of treaties,

¹⁵ UNDANG UNDANG DASAR NEGARA REPUBLIK INDONESIA [CONSTITUTION] art. 11.

¹⁶ Law No. 24 of 2000 (Indon.). Prior to this statute, the only additional guidance on the ratification of treaties was provided, rather unusually, in a letter by Indonesia's first President, Soekarno, addressed to the Parliamentary Chairperson, entitled "Creating Agreements with Other Countries." Bagir Manan, *Kekuasaan Presiden Dalam Masalah dan Hubungan Internasional*, 1 MAJALAH PADJADJARAN (1985). The letter declared that, in the opinion of the government, Article 11 of the Constitution did not apply to all types of agreements with foreign states. *Id.* Rather, the letter sought to confine the meaning of "agreements" to only "the most important (*terpenting*) agreements" concerning political issues that could affect alliances and state territory; important economic issues, technical assistance or finance; or matters that must be regulated by statute under Indonesian law. *Id.* As for all other types of international agreements, the National Parliament would be simply informed of them after they had been entered into. *Id.* The letter explained that if the government was required to seek prior parliamentary approval for all agreements, however trifling their subject matter, the government would be unable to properly engage in international relations. *Id.* This, the letter continued, would impede the conduct of international relations, which often required swift action. *Id.* Despite its questionable legal status, the letter was considered valid and was largely followed.

¹⁷ Gary Bell, *The Importance of Private Law Doctrine in Indonesia*, in *INDONESIA: LAW AND SOCIETY*, 363 (Tim Lindsey ed., 2nd ed. 2008).

ignoring other importance sources of international law such as custom. As we shall see, most Indonesian scholars conclude that Indonesia is dualist, at least in respect of treaties, observing that many ratified international treaties lie dormant and unenforceable until they are transformed into domestic law by statute or regulation. I reach a different, albeit tentative, conclusion, arguing that Indonesia may well be monist, at least at law. Whether incorporation is necessary is likely a practical rather than legal matter, and depends on the nature of the international agreement and the types of rights and obligations it imposes. There has, in the literature, emerged no discussion about the extent to which international law can or should be used by courts to interpret Indonesian law.

The second source I examine in this Article is the jurisprudence of Indonesia's highest courts. In several decisions, discussed in Part II of this article, Indonesia's Supreme and Constitutional Courts have either directly applied or been strongly influenced by international law. Although I argue that these decisions appear indicative of monism, my analysis is, again, tentative. As I demonstrate below, the Supreme and Constitutional Courts' use of international law has been inconsistent. Also, like most civil law countries, Indonesia lacks a formal system of precedent. These decisions and the approaches the courts take to international law in them are therefore neither sources of law nor formally binding as they might be in common law countries.

Whatever the true position of international law is within Indonesian domestic law, the result in Indonesia is significant uncertainty and confusion about whether rules contained in international treaties ratified by Indonesia automatically form part of Indonesian law. This has serious ramifications, some of which I consider in my conclusion.

I. DOCTRINE

Indonesian scholarly discourse about the position of international law within the Indonesian legal system is undeveloped—leading one scholar to urge others academics to turn their attention to this issue.¹⁸ Many Indonesian international law texts have chapters entitled “international law and domestic law” or something similar, but most of them, like the Constitution and the Law

¹⁸ DJENAL SIDIK SURAPUTRA, HUKUM INTERNASIONAL DAN BERBAGAI PERMASALAHANNYA: SUATU KUMPULAN KARANGAN 229 (2004).

on International Agreements mentioned above, focus on the technical aspects of treaty-making, including negotiation, acceptance, signature, exchange of documents, ratification, accession and reservation¹⁹ Many also outline monism and dualism and the differences between them, but only some then consider which of these prevails in Indonesia.²⁰ Again, although Indonesian scholars distinguish between the various sources of international law in other chapters of their texts, they tend to focus exclusively on how treaties enter Indonesian law, ignoring the other sources, such as custom.

Most authors point to two grounds indicating that Indonesia is fully or partially monist. The first is the work of Professor Mochtar Kusumaatmadja. Formerly Dean of the Faculty of Law at University of Padjadjaran in Bandung, Indonesian Justice Minister (1973-78), and Indonesian Foreign Minister (1978-83), Kusumaatmadja is a prominent and widely-respected proponent of monism and the lead author of Indonesia's foremost international law text, *Pengantar Hukum Internasional (Introduction to International Law)*, which is prescribed for international law classes in many Indonesian law schools.²¹ Kusumaatmadja observes that, while most countries specify the position of international law in their domestic laws or even their constitutions, Indonesia does not.²² However, Kusumaatmadja argues that this does not necessarily mean that international law is inferior to domestic law in Indonesia.²³ Pointing to Indonesia's continental European legal heritage, he concludes that Indonesia is monist.²⁴ Even in the absence of formal ratification or implementing

¹⁹ SUNARYATI HARTONO, ANALISIS DAN EVALUASI HUKUM TENTANG RATIFIKASI PERJANJIAN INTERNASIONAL DI BIDANG HAK ASASI MANUSIA DAN URGENSINYA BAGI INDONESIA (2000); WAYAN PARTHIANA, BEBERAPA MASALAH DALAM HUKUM INTERNASIONAL DAN HUKUM NASIONAL INDONESIA 128 (1987).

²⁰ See BOER MAUNA, HUKUM INTERNASIONAL: PENGERTIAN, PERANAN DAN FUNGSI DALAM ERA DINAMIKA GLOBAL 50 (2000); SEFRIANI, HUKUM INTERNASIONAL: SUATU PENGANTAR 86 (2nd ed. 2011); ROMLI ATMASASMITA, PENGANTAR HUKUM PIDANA INTERNASIONAL 97 (Ed. 2. ed. 2000); Damos Dumoli Agusman, *Status Hukum Perjanjian Internasional Dalam Hukum Nasional RI Tinjauan Dari Perspektif Praktik Indonesia*, 5 INDONES. J. INT'L L. 488 (2007).

²¹ MOCHTAR KUSUMAATMADJA & ETTY R AGOES, PENGANTAR HUKUM INTERNASIONAL (2003). Kusumaatmadja sole-authored the first edition in 1976. See Mochtar Kusumaatmadja, TOKOH INDON. www.tokohindonesia.com (last accessed May 1, 2014); Prof. Dr. Mochtar Kusumaatmadja, KEPUSTAKAAN PRESIDEN-PRESIDEN, http://kepuustakaan-presiden.pnri.go.id/cabinet_personnel/popup_profil_pejabat.php?id=293&presiden_id=2&presiden=suh (last accessed May 1, 2014)

²² KUSUMAATMADJA & AGOES, *supra* note 21, at 88–89.

²³ *Id.*

²⁴ *Id.* at 92.

regulations, he states: “[W]e should consider ourselves bound by treaties and conventions approved (*disahkan*) by Indonesia.”²⁵

Kusumaatmadja’s influence in legal circles should not be underestimated. Damos Dumoli Agusman, who served as Director of Economic and Social-Cultural Treaties at the Foreign Affairs Ministry from 2006 to 2010, was involved in early deliberations on the Draft Law on International Agreements, which ultimately became Law No. 24 of 2000, discussed above.²⁶ According to Agusman, Law No. 24 did not seek to clarify the status of international treaties ratified by Indonesia within domestic law because drafters and the Indonesian Foreign Ministry assumed that Indonesia was monist, following Kusumaatmadja’s views.²⁷

The second indication of monism to which many scholars point is a Supreme Court Directive issued in 2006, in which the Court applied the 1961 Vienna Convention on Diplomatic Relations (“Vienna Convention”).²⁸ The Vienna Convention had been formally ratified by Indonesia’s National Parliament through Law No. 1 of 1982, but the Convention’s provisions had not yet been transformed into national law. Yet in its Directive, the Indonesian Supreme Court applied the diplomatic community principle in Article 31 of the Convention to a domestic land dispute involving the Saudi Arabian embassy in Indonesia.²⁹

Agusman, whose work provides perhaps the most detailed examination of whether Indonesia follows monism or dualism, lists additional indications of monism.³⁰ First, he points to Article 13 of the International Agreements Law, which stipulates that every statute or presidential regulation that ratifies an

²⁵ *Id.*

²⁶ DAMOS DUMOLI AGUSMAN, HUKUM PERJANJIAN INTERNASIONAL: KAJIAN TEORI DAN PRAKTIK INDONESIA 104 (2010). *See generally* Agusman, *supra* note 20.

²⁷ AGUSMAN, *supra* note 26, at 104; Agusman, *supra* note 20, at 490. However, there appears to be more uncertainty within government than Agusman suggests. In the *ASEAN Charter Case* the government even called an expert, Dr Wisnu Aryo Dewanto, to give an opinion about whether treaties ratified in Indonesia automatically became part of Indonesian law and could be applied by national courts. Witness Testimony, Reviewing Law 38 of 2008 on the Ratification of the Charter of the Association of Southeast Asian Nations, PERKARA NO. 33/ PUU-IX/2011, at 4–11 (Constitutional Court, Aug. 23, 2011), available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20No.%2033.PUU-IX.2011,%20tgl.%2023%20Agustus%202011.pdf. His testimony—that Indonesia is dualist, at least as a matter of practice—appears to be the dominant scholarly view, discussed below. *Id.*

²⁸ Agusman, *supra* note 20, at 492.

²⁹ *Id.*

³⁰ AGUSMAN, *supra* note 26, at 39; Agusman, *supra* note 20, at 490.

international agreement must be published in the State Gazette.³¹ The Elucidation to Article 13 states that: “[T]he placement of the laws that ratify an international agreement in the State Gazette is intended so that everyone can know about agreements made by the government and binding all Indonesian citizens.”³²

Second, Agusman points to Article 7 of Law Number 39 of 1999 on Human Rights, which states that:

- (1) Every person has the right to use all national legal avenues and international fora in respect of all breaches of human rights, the protection of which is guaranteed by Indonesian and international human rights law that has been received (*diterima*) by the Republic of Indonesia.
- (2) Provisions of international law that relate to human rights, and that have been received by the Republic of Indonesia, become national law.³³

Third, Agusman mentions the *Truth and Reconciliation Commission Case*, in which the Constitutional Court refers to “practice and universal customary international law” in coming to its decision.³⁴

These three indicators are hardly convincing arguments for monism. The Elucidation to Article 13 of the International Agreement Law is not clearly expressed. Importantly, it does not say that a treaty itself becomes binding by the inclusion of its ratifying law in the State Gazette. Rather, it appears to merely require publication of ratified treaties. On my reading, Article 7 of the Human Rights Law in fact appears to indicate that Indonesia usually follows dualism. If Indonesia followed monism, then there would be no need to specifically prescribe that international human rights received by Indonesia become part of national law.³⁵ Finally, the Constitutional Court did not give

³¹ Agusman, *supra* note 20, at 490 (citing Law No. 24 of 2000, art. 13).

³² Law No. 24 of 2000, art. 13. All Indonesian statutes and many other types of laws have official elucidations (*penjelasan*). Although they are not formally part of the law they purport to elucidate, in practice, they are usually treated as providing determinative interpretations of the statute’s main text.

³³ Law No. 39 of 1999, art. 7.

³⁴ Decision, Reviewing Law 27 of 2004 on the Truth and Reconciliation Commission (*Truth and Reconciliation Case*), PERKARA NO. 006/PUU-IV/2006, at 122 (Constitutional Court, Dec. 4, 2006).

³⁵ Similarly, Article 26 of the 1999 Law on International Relations states that asylum is to be granted to foreigners in accordance with national laws after considering international law, custom and practice. Law No.

independent authority to a rule of international law in the *Truth and Reconciliation Commission Case*. Rather, the Court referred to international norms to support its own interpretation of Indonesian law. The Court commonly uses international law in this way—an issue to which I return below.

Given the paucity of evidence for monism provided in the literature, it is unsurprising that most Indonesian scholars conclude that Indonesia is dualist. Many of these scholars refer to two examples to support this conclusion. The first is the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”).³⁶ Indonesia’s Parliament formally ratified the Convention by Law No. 17 of 1985.³⁷ However, this ratification did not disturb Law No. 4 of 1960 on Indonesian Waters, which remained in force for more than ten years after the ratification.³⁸ Only when Law No. 6 of 1996 was enacted to implement UNCLOS was Law No. 4 of 1960 finally replaced.³⁹

The second example is the entry-into-force of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.⁴⁰ This was ratified by Presidential Decree in 1981.⁴¹ However, the Supreme Court refused to apply the Convention to enforce foreign arbitral awards in Indonesia—including in a famous 1984 case⁴²—until its Chief Justice issued a Supreme Court Regulation in 1990, which permitted judges to enforce foreign awards and established procedures for them to follow.⁴³

From these examples, scholars have extrapolated principles along the following lines: Ratification of a treaty will, in itself, be insufficient to render

37 of 1999 on International Relations, art. 26. Again, if Indonesia followed monism, Article 26 would be superfluous.

³⁶ United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

³⁷ Law No. 17 of 1985.

³⁸ Law No. 4 of 1960.

³⁹ SARI AZIZ & RANYTA YUSRAN, INDONESIA & RANYTA YUSRAN FOR CIL RESEARCH PROJECT ON INTERNATIONAL MARITIME CRIMES 10 (2011) (“It was law No. 6/1996 (the implementing legislation of UNCLOS), and not Law No. 17 of 1985 (instrument of ratification of UNCLOS) which replaced Law No. 4 of 1960 on Indonesian Waters..”).

⁴⁰ Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

⁴¹ Presidential Decree No. 34 of 1981 (Indon.).

⁴² Decision, No. 294K/Pdt/1983 (Supreme Court, Aug. 20, 1984).

⁴³ Supreme Court Regulation Number 1/1990. See AZIZ AND YUSRAN, *supra* note 39, at 10 (citing SUDARGO GAUTAMA, HUKUM DAGANG DAN ARBITRASE INTERNASIONAL (2001)); AK Syahmin, HUKUM KONTRAK INTERNASIONAL 186 (2006).

an international agreement enforceable in Indonesia. At a minimum, the treaty's principles, rights and obligations—or perhaps even a translation of the treaty provisions themselves—need to be included in an Indonesian domestic law.⁴⁴ Importantly, however, these scholars base their conclusion that Indonesia is dualist entirely on an examination of *practice*. There appears to be less discussion, let alone agreement, about whether the evidence of dualist practice means that Indonesia is also dualist *in theory*, or at law, with most scholars simply not making the distinction.⁴⁵ Few observe, for example, that international law is not mentioned on Indonesia's hierarchy of laws,⁴⁶ which seems to imply that it is not formally recognised as expected in a monist system.⁴⁷

In my view, it is at least arguable that Indonesia is at least partly monist as a matter of law. Given there are no rules about the operation of international law within Indonesian domestic law, reference should be had to the Dutch law applicable at the time of Indonesia's independence, declared on August 17, 1945. Indonesia's Constitution declares that all existing laws and institutions remained in force, until they are replaced by laws and institutions made by the independent state.⁴⁸ Indonesia thereby inherited Dutch laws and institutions, and even the civil law tradition. The Netherlands is well-known for being at least “moderately monistic,” since the beginning of the twentieth century.⁴⁹

⁴⁴ Professor Hikmahanto Juwana provides, as an example, the entry of the Capetown Convention on International Interests in Mobile Equipment into Indonesian law. HIKMAHANTO JUWANA, HUKUM INTERNASIONAL DALAM PERSPEKTIF INDONESIA SEBAGAI NEGARA BERKEMBANG 97–98 (2010). Juwana explains that after the Convention was ratified, there was debate over whether the Convention could be applied directly without transformation by way of implementing regulation. *Id.* To end that debate, Indonesia's Aviation Law of 1999 was replaced in 2009. *Id.* Articles 71 through 82 of the 2009 Law sought to transform the Convention into Indonesian law, but according to Juwana, this was flawed. *Id.* Details of the Convention were lost in the translation. *Id.* Also, aspects of the Convention should have been reflected in amendments to other Indonesian statutes. *Id.* For example, provisions on bankruptcy inserted into the 2009 Law were inconsistent with Indonesia's Bankruptcy Law. *Id.* This resulted in uncertainty because judges needed to decide whether to apply the Aviation Law or the Bankruptcy Law when airlines became bankrupt. *Id.*

⁴⁵ For a variety of views, see *id.* at 74–76; SS ADMAWIRIA, PENGANTAR HUKUM INTERNASIONAL 1, 135 (1966); MAUNA, *supra* note 20, at 13; HARTONO, *supra* note 19, at 16.

⁴⁶ The “hierarchy of laws” is a list of types of laws within the Indonesian legal system indicating their relative authority. Law No. 12 of 2011 on Law-Making, art 7(1) (listing the hierarchy of laws).

⁴⁷ See AGUSMAN, *supra* note 20.

⁴⁸ Constitution of 1945, Transitional Provisions, Part II; Government Regulation No. 2 of 1945.

⁴⁹ FV Hoof, *The Impact of International Law in the Legal Order of the Netherlands: The Role of the Judiciary*, in COURTS OF FINAL JURISDICTION: THE MASON COURT IN AUSTRALIA 195–96 (Cheryl Saunders ed., 1996); E. A. Alkema, *International Law in Domestic Systems*, 14 ELECTRON. J. COMP. LAW 1 (2010) (“[T]he Netherlands system has been qualified as “moderately monistic”). See *Indische Staatsregeling Algemeene Maatregelen van Bestuur* [General Regulations of Governance] art. 91(1a), *reprinted in* G KARTASAPOETRA & RG KARTAPUTRA, INDONESIA DALAM LINGKARAN HUKUM INTERNASIONAL (DARI ABAD

How then to explain that many, if not most, international treaties need to be replicated in an Indonesian law in order to be applied and domestically enforced? Much appears to depend on the nature of the international agreement. On one hand, if an international agreement introduces new legal concepts or contradicts pre-existing Indonesian law, then most police, prosecutors, public servants and even judges will not usually apply them directly without “transformation.” There are various possible practical explanations for this disinclination which I do not examine in this Article, including lack of knowledge about the agreement, politics, budgetary limitations, lack of initiative and bureaucratic insularity. Many of the treaties falling into this category are multilateral and well-known, at least amongst Indonesia’s legal community, and failure to implement them often leads to calls for the government to issue domestic implementing laws. On the other hand, treaties with more specific and detailed subject matter are, in fact, likely to be routinely followed by those to whom they pertain as if they were binding, particularly if there is no relevant contradictory Indonesian law. Many of these are bilateral and largely uncontroversial, and their existence and application garner relatively little public attention. They are very rarely called upon to be enforced by courts, as occurred in the case involving the Saudi Arabian embassy.⁵⁰

It is quite possible, then, that treaties ratified by Indonesia might become formally binding under Indonesian law but will, as a practical matter, lie dormant until their principles are “picked up” in a domestic law. This approach appears to be consistent with the view of Kusumaatmadja, which is expressed later in his book but often ignored by other Indonesian scholars. He admits that even though the international agreements that Indonesia has signed are formally binding, if those agreements require changes to domestic law, they will often go unheeded by officials until those changes are made.⁵¹ Kusumaatmadja accepts that “enactment is absolutely necessary if, for example, it requires changes to national statutes that directly touch on the rights of citizens as individuals.”⁵² He reasons that new laws or amendments will be required if, for example, international law creates offences not previously known in Indonesian criminal law.⁵³

KE ABAD) 13 (1984)); *see also* Henry Schermers, *Netherlands*, in 7 THE EFFECT OF TREATIES IN DOMESTIC LAW 109 (Francis Jacobs & Shelly Roberts eds., 1987).

⁵⁰ *See* text accompanying *supra* note 28–29.

⁵¹ KUSUMAATMADJA & AGOES, *supra* note 21, at 94.

⁵² *Id.*

⁵³ *Id.*

Kusumaatmadja also maintains that:

[Implementation in domestic law] is not very necessary if the issue [about which the treaty relates] does not affect many people or if the issue is very technical and its scope is limited. Examples of such treaties or conventions are the Convention on the Law of Treaties, the Convention on Diplomatic Relations and the ICAO Convention. In the event of inconsistency between domestic law (that has not yet been amended) for judges or the relevant person, the only criterion [to determine] whether a state is bound or not, is whether the agreement legally binds us or not.⁵⁴

Another well-known Indonesian legal scholar, Professor Saudargo Gautama, appears to take a similar view, arguing in the following passage that the Supreme Court should have applied the New York Convention in the 1984 case⁵⁵ even before implementing regulations were issued:

[S]ome Indonesian laws require formal implementing regulations as a condition precedent to their effectiveness, but it is not normally the case with respect to the treaties to which Indonesia has adhered, especially not with regard to the New York Convention 1958 which has been expressly adhered to by Presidential Decree 1981 No 34. No implementing rules have indeed been enacted so far and therefore the procedure how to request for enforcement in Indonesia of foreign arbitral awards may not be entirely clear. However, the New York Convention itself has regulated in Art. III that . . . “each contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure in the territory where the award is relied upon, under conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies that are imposed on the recognition or enforcement of domestic arbitral awards . . . The enforcement has to be effected in the same manner as execution of domestic arbitral awards.”⁵⁶

II. INDONESIA JUDICIAL TREATMENT OF INTERNATIONAL LAW

Supporting the argument that Indonesia follows monism, or a variation of it, is the scope that some Indonesian courts have given to international law in

⁵⁴ *Id.* at 93–94.

⁵⁵ Decision, No. 294K/Pdt/1983 (Supreme Court, Aug. 20, 1984); *see* text accompanying notes 40–43.

⁵⁶ SUDARGO GAUTAMA, *INDONESIAN BUSINESS LAW* 479–80 (1995).

their decision-making. The Indonesian Supreme Court—the final court of appeal, or *cassation*, for most types of disputes in Indonesia⁵⁷—has directly enforced international law in at least two reported cases.⁵⁸ The Constitutional Court, which has powers of constitutional review,⁵⁹ makes regular reference to international law in its decisions. Although, to my knowledge, the Constitutional Court has not used international law as a source of law independent of domestic sources, it has in some cases, treated international law as a highly persuasive guide when interpreting provisions of Indonesia's Constitution. In this way, the Constitutional Court has allowed international law to permeate Indonesian law.

A. *The Supreme Court*

In addition to the Vienna Convention case mentioned above, the Indonesian Supreme Court appears to have applied international law in the *Landslide case*.⁶⁰ This case began in the District Court of Bandung in 2003.⁶¹ The applicants were victims of a landslide in West Java.⁶² They filed a class action against Perhutani (a state-owned forestry company) arguing that the forest area had been mismanaged, causing the landslide; and against the government, arguing that the government failed to monitor Perhutani's activities.⁶³ The defendants' response was that a natural disaster had caused the landslide.⁶⁴ Presented with conflicting testimony, the lower court found that there was scientific uncertainty about the landslide's exact cause.⁶⁵ To resolve the case, the court resorted to the precautionary principle adopted in Principle 15 of the Rio Declaration, acknowledging that the principle had not yet been adopted in

⁵⁷ Simon Butt & Tim Lindsey, *Judicial Mafia: The Courts and State Illegality in Indonesia*, in *THE STATE AND ILLEGALITY IN INDONESIA* 189 (G Van Klinken & Edward Aspinall eds., 2010). See generally Simon Butt & Tim Lindsey, *Unfinished Business: Law Reform, Governance and the Courts in Post-Soeharto Indonesia*, in *INDONESIA, ISLAM AND DEMOCRATIC CONSOLIDATION* (Mirjam Kunkler & Alfred Stepan eds., 2013).

⁵⁸ There may well be more examples, but the Supreme Court has published only a small portion of its decisions.

⁵⁹ TIMOTHY LINDSEY & SIMON BUTT, *THE INDONESIAN CONSTITUTION: A CONTEXTUAL ANALYSIS* 107–28 (2012).

⁶⁰ Andri Wibisana, *The Development of the Precautionary Principle in International and in Indonesian Environmental Law*, 14 (2011), <http://papers.ssrn.com/abstract=2131666> (last visited Oct 10, 2013); Dedi v Perhutani, 1794K/Pdt/2004 (Supreme Court of Indonesia, 2007).

⁶¹ Wibisana, *supra* note 60, at 17.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

Indonesian environmental law.⁶⁶ The court found the defendants strictly liable and ordered them to pay compensation. An appeal by the government to the provincial High Court was rejected.⁶⁷

The government appealed to the Supreme Court in Jakarta.⁶⁸ One ground for appeal was that the lower courts had been wrong to apply the precautionary principle because the Indonesian government had not ratified the Rio Declaration, and the precautionary principle had not been adopted in Indonesian law.⁶⁹

The Supreme Court rejected this argument, holding that:

[T]he [lower court] judges did not erroneously apply the law by adopting rules of international law. The application of the precautionary principle in environmental law was to fill a legal vacuum . . . the view of the cassation applicant that Article 1365 of the Civil Code could be applied in this case cannot be justified because the enforcement of environmental law is to be performed by the standards of international law. National judges can use rules of international law if they view it as *jus cogens*.⁷⁰

The Supreme Court's reference to "a legal vacuum" in the above passage is likely a reference to a provision contained in the numerous "Judiciary Laws" (*Undang-undang Pokok Kekuasaan Kehakiman*) since at least 1970.⁷¹ Article 10 of Indonesia's Judiciary Law of 2009 is the current iteration.⁷² It prohibits courts from "refusing to examine, adjudicate and decide cases brought before them on the basis that the law does not exist or is not clear. Rather, [they are] required to examine and adjudicate them."⁷³ If no Indonesian law applies to a dispute before a judge, this provision appears to provide an avenue through which he or she could apply international law directly to the case.

⁶⁶ *Id.*; see Law No. 23 of 1997 on Environmental Management.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Dedi v Perhutani, 1794K/Pdt/2004 (Supreme Court of Indonesia, 2007).

⁷⁰ *Id.* at 85. Indonesia's lower courts have also sought to apply international law, but in limited circumstances. Wibisana, *supra* note 60 (citing *Wiwiek Awiati v Minister of Agriculture* (District Administrative Court of Jakarta Decision 71/G.TUN/2001/PTUN-JKT, 2001) (applying the precautionary principle in lower courts); *Wiwiek Awiati v Minister of Agriculture* (Administrative Court of Appeals of Jakarta Decision 120/2001/Bd.071/G.TUN/2001/PTTUN-JKT, 2002) (applying the precautionary principle in lower courts)).

⁷¹ See, e.g., Law No. 14 of 1970; Law No. 4 of 2004.

⁷² Law No. 48 of 2009, art. 10.

⁷³ *Id.*

B. *The Constitutional Court*

The Constitutional Court has referred to international law in many of its judicial review decisions. However, to my knowledge, in its decisions the Constitutional Court has explained neither the circumstances in which it will use international law, nor how it will use international law principles. In the following discussion, I seek to demonstrate that the Constitutional Court has used international law primarily to help it interpret the Indonesian Constitution and Indonesian laws. However, the weight the Constitutional Court has given to international law appears to be inconsistent from case to case, and the Constitutional Court has not yet explained these inconsistencies.

I have discerned three approaches to international law in the Constitutional Court's decisions. The first—the weak-use approach—sees the Constitutional Court refusing to use international law as a reference point, and ignoring or dismissing out-of-hand arguments based on international law from the parties.⁷⁴ This approach is encapsulated in the statements of former Justice Roestand, who warned against over-reliance on international law in several dissents. Although political and international law developments might be relevant in some cases, he emphasised that the Constitution was the highest source of validity for statutes and trumps international law.⁷⁵ As Roestand wrote extramurally, “[m]y task as a constitutional court judge is to review the constitutionality of a statute as against the Constitution, not to review the Constitution against international law.”⁷⁶

In some of these cases, the Constitutional Court has explicitly rejected international norms, even though the Court may have, in fact, been influenced

⁷⁴ See, e.g., Decision, Reviewing Law 30 of 2002 on the Corruption Eradication Commission (*KPK Law Case*) at 25–26 (Constitutional Court 37-39/PUU/VIII/2010); Decision, Reviewing Law 44 of 2008 on Pornography (*Pornography Law Case*) at 136–37 (Constitutional Court 10-17-23/PUU-VI/2009). See Diana Zhang, *The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003–2008* (2010) (unpublished M.A. thesis, The University of Melbourne) (on file with The University of Melbourne), for an excellent analysis of the Constitutional Court's use of foreign legal materials, including international law.

⁷⁵ Achmad Roestand, *Mengapa saya Mengajukan Dissenting Opinion*, in MENJAGA DENYUT KONSTITUSI: REFLEXI SATU TAHUN MAHKAMAH KONSTITUSI, 51 (Refly Harun, ZAM Husein, & Bisariyadi eds., 2004); Decision, Reviewing Law 26 of 2000 on the Human Rights Court (*Soares case*), at 63–64 (Constitutional Court 065/2004); Decision, Reviewing Law 12 of 2003 on General Elections for Members of the DPR, DPD and DPRD (*PKI case*), at 40–41 (Constitutional Court 011-017/2003).

⁷⁶ Roestand, *supra* note, at 51.

by them. In the *Children's Court Law Case*,⁷⁷ for example, the applicants raised several international law arguments⁷⁸ to challenge the validity of several provisions that made the age of criminal culpability eight years old for some offenses.⁷⁹ In its decision, the Court lifted that age to twelve, which was in line with the UN Committee on the Rights of the Child.⁸⁰ However, the Court emphasised that in adopting this as the age of criminal responsibility, it was not using the “these instruments and recommendations . . . [as] a gauge to assess the constitutionality of the age of responsibility for children.”⁸¹ Similar sentiments were expressed by Arief Hidayat, who was appointed to the Court in 2013. During his “fit and proper” test before the National Parliament, he said that “Indonesia should implement human rights appropriate to the “local context” instead of unconditionally appointing the standards of the United Nations.”⁸²

The Constitutional Court's second approach gives more credence to international law, but attributes no real influence to it. Under this approach, the Court refers to international law, but only to support a decision the Court seems to have already arrived at, based on an interpretation of the Constitution and Indonesian law that the Court claims as its own.

The third approach sees the Court relying quite heavily on international legal principles and interpretations from international bodies to help it construe the Indonesian Constitution, the statute being reviewed in the case, or both.⁸³ This approach is well-expressed by one judge in a case involving employment rights: “[I]n order to understand the right to work” in the Constitution, “it is best to carefully study” various rights in international labour conventions.⁸⁴ What appears to distinguish this category of use from the second approach is

⁷⁷ Decision, Reviewing Law No. 3 of 1997 on Children's Courts (*Children's Court Law Case*) (Constitutional Court 1/PUU-VIII/2010).

⁷⁸ For an example, see *id.* at 26–27.

⁷⁹ *Id.* at 9–10.

⁸⁰ *Id.*

⁸¹ *Id.* at 151.

⁸² Ina Parlina, *Minorities wary of Mixed Signals From Court*, JAKARTA POST, (May 3, 2013), <http://www.thejakartapost.com/news/2013/05/03/minorities-wary-mixed-signals-court.html>.

⁸³ For examples of cases in which the Constitutional Court extensively refers to international treaties, see Decision, Reviewing Law 7 of 2004 on Water Resources (*Water Resources Law case*), at 486 (Constitutional Court 058-059-060-063/PUU-II/2004); Decision, Reviewing Law 23 of 2003 on General Election of President and Vice President (*Abdurrahman Wahid Case*) (Constitutional Court No. 008/PUU-II/2004).

⁸⁴ Decision, Reviewing Law 39 of 2004 on Placement and Protection of Indonesian Overseas Workers (*Overseas Workers case No. 1*) (Constitutional Court 019-020/PUU-III-2005, (citing ICCPR, *supra* note 1, art. 2; Universal Declaration of Human Rights, December 10, 1948 UNGA Res 217 A(III) Art 2.

that the Court might not have arrived at its decision without using international law.⁸⁵

What follows are selected case examples of the Court's use of international law in interpretation—that is, of the second and third approaches. As we will see, the Court sometimes uses both approaches in the same case.

1. *Discrimination Cases*

The Constitutional Court has used international law as a reference point in several discrimination cases.⁸⁶ Some of these cases have involved challenges to statutes preventing particular categories of citizens from standing for election.⁸⁷ Perhaps the most famous was the *Abdurrahman Wahid Case* in 2004.⁸⁸ In this case, former Indonesian President Abdurrahman Wahid, along with several others, challenged the constitutional validity of Article 6(1) of the 2003 Election Law, which required candidates to be “spiritually and physically capable of performing the duties and responsibilities of President or Vice President.”⁸⁹ The applicants argued that this was discriminatory and thus breached several constitutional provisions, including Article 27(1), which grants all citizens the right to equality before the law, a right that the government must protect “without exception.”⁹⁰ The applicants also argued that Article 6(1) breached Indonesia's international obligations under the International Convention on Civil and Political Rights (“ICCPR”), which Indonesia had ratified.⁹¹ Article 25 of the ICCPR states: “Every citizen shall have the right and opportunity . . . [t]o take part in the conduct of public

⁸⁵ Worryingly, however, in some important cases, the Court appears to have misunderstood the international law it used to interpret the Constitution, leading to outcomes that might perplex some international lawyers.

⁸⁶ See, eg, Decision, Reviewing Law 32 of 2002 on Broadcasting (*Broadcasting Law Case*), at 82 (Constitutional Court 005/PUU-I-2003).

⁸⁷ Decision, *PKI case*; Decision, Reviewing Law 27 of 2007 on National Oil and Gas (*Migas Law case*) (Constitutional Court Decision 016/PUU-V-2007); Decision, Reviewing Law 12 of 2003 on General Elections for the National Parliament, Regional Representative Council and Regional Parliament (*Election Law case No 1*), at 79, 82 (Constitutional Court Decision 016/PUU-V-2007); Decision, reviewing Law 10 of 2008 on General Elections for the National Parliament, Regional Representative Council and Regional Parliament (*Election Law Case No. 2*), 129–30 (Constitutional Court Decision 003/PUU-VII-2009) (citing ICCPR, *supra* note 1).

⁸⁸ Decision, *Abdurrahman Wahid Case*.

⁸⁹ Law No. 23 of 2003 on Presidential and Vice Presidential Elections, art 6.

⁹⁰ Decision, *Abdurrahman Wahid Case*, at 6.

⁹¹ ICCPR, *supra* note 1, art. 25.

affairs . . . and to be elected at genuine periodic elections which shall be by universal and equal suffrage,” without unreasonable restrictions.⁹²

The Court observed that the applicants should have referred to Article 2 of the ICCPR, which contains various prohibited grounds for discrimination.⁹³ However, the Court found that Article 6(1) of the 2003 Election Law did not in fact discriminate on any of these grounds.⁹⁴ Instead, the Court identified the 1975 Declaration on the Rights of Disabled Persons as the international instrument most relevant to the case at hand. Article 4 of the Declaration, which the Court sets out, states:

Disabled persons have the same civil and political rights as other human beings; paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of those rights for mentally disabled persons.⁹⁵

Article 7 of the 1971 Declaration on the Rights of Mentally Retarded Persons states:

Whenever mentally retarded persons are unable, *because of the severity of their handicap*, to exercise all their rights *in a meaningful way* or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguard against every form of abuse (emphasis in original Court citation).⁹⁶

The Court’s reference to these Declarations was problematic. Quite apart from the fact that they are non-binding resolutions of the UN General Assembly, the Court did not explain why it used Article 7 of the latter Declaration, which applies to “mentally retarded persons,” to interpret the much broader phrase “spiritual and physical capability” used in Article 6(1) of the impugned law.⁹⁷

⁹² Decision, *Abdurrahman Wahid Case*, at 6–7.

⁹³ These prohibited grounds include “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR *supra* note 1, art 2.

⁹⁴ Decision, *Abdurrahman Wahid Case*, at 11.

⁹⁵ Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), art. 6, U.N. Doc. A/RES/30/3447 (Dec. 9, 1975).

⁹⁶ Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), art. 7, U.N. Doc. A/RES/2856(XXVI) (Dec. 20, 1971).

⁹⁷ Decision, *Abdurrahman Wahid Case*, at 11. In any event, Abdurrahman Wahid suffered from physical, not mental, health problems.

The Court also referred to Article 21(1) of the Universal Declaration of Human Rights (“UDHR”).⁹⁸ Article 21(1) establishes the right to take part in the government of one’s country, either directly or through freely chosen representatives.⁹⁹ Though the Court noted that the UDHR’s principles were internationally accepted,¹⁰⁰ it emphasised that Indonesian law provided the same protections:

[T]he principles mentioned in Article 21 of the Universal Declaration of Human Rights are general principles accepted by the international community [B]ecause Indonesia is part of the international community, it implicitly recognises these principles in the Preamble, Part IV of the Constitution, and explicitly mentions them in Chapter XA, Articles 27(1) and 28D(3) of the Constitution.¹⁰¹

Similarly, in the *Indonesian Overseas Workers Case*,¹⁰² the applicants argued that the statute under review was discriminatory because it only provided various protections to Indonesian workers abroad who were at least 21 years old. The majority of the Court ultimately rejected this application. However, when determining what constituted discrimination under the Constitution, the majority set out Article 1(3) of the 1999 Human Rights Law which, the Court noted, contained a definition of discrimination similarly to that contained in Article 2 of the ICCPR.¹⁰³ The Court then referred to a European Community Council Directive,¹⁰⁴ which sets out examples of differential treatment on the basis of age that do not constitute discrimination.¹⁰⁵

⁹⁸ *Id.* at 8–9.

⁹⁹ Universal Declaration of Human Rights, *supra* note 84, art 21(1).

¹⁰⁰ Decision, *Abdurrahman Wahid Case*, at 26–27.

¹⁰¹ *Id.* at 27.

¹⁰² Decision, Reviewing Law 39 of 2004 on Placement and Protection of Indonesian Overseas Workers (*Overseas Workers Case No. 2*) (Constitutional Court Decision 028-029/PUU-IV 2006).

¹⁰³ Article 1(3) of Law 39 of 1999 on Human Rights establishes the grounds of discrimination as “religion, ethnicity, race, group, faction, social status, economic status, sex, language, or political belief.” Law No. 39 of 1999 on Human Rights, art. 1(3).

¹⁰⁴ Council Directive 2007/78/EC of 27 of November 2000 establishing a general framework for equal treatment in employment and occupation (adopted 27 November 2000, entered into force 2 December 2000) 303 OJ L 16.

¹⁰⁵ Decision, *Overseas Workers Case No. 2*, at 60; Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 1; International Convention on the Suppression and Punishment of Crime of Apartheid, November 30, 1973, 1015 UNTS 243. In another case, the issue was the constitutionality of provisions which required addictive substances, including tobacco, to meet minimum quality standards for health reasons. Decision, Reviewing Law 36 of 2009 on Health (*Health Law Case*) (Constitutional Court No. 19/PUU-VIII-2010) One argument made by the applicants was that this provision was discriminatory. *Id.* The

2. *Absolute Rights Cases*

The Court has also cited various international agreements, such as the UDHR, ICCPR, and the International Covenant on Economic, Social and Cultural Rights, to support the argument that constitutional rights can be limited in some circumstances—such as to maintain public order, or the dignity or honour of an individual. Most commonly, the Court cites Article 19(3) of the ICCPR,¹⁰⁶ noting its similarity to Article 28J(2) of the Constitution, which permits constitutional rights being limited by legislation directed at:

protecting the rights and freedoms of others and which accords with moral considerations, religious values, security and public order in a democratic society.¹⁰⁷

The Court has also upheld statutes that appear to breach apparently non-derogable constitutional rights contained in Article 28I(1) of the Constitution, which states:

The right to life, the right to not be tortured, the right to freedom of thought and conscience, the right to religion, the right to not be enslaved, the right to be recognised as an individual before the law, and the right to not be prosecuted under a law of retrospective application are human rights that *cannot be limited under any circumstances*.¹⁰⁸

In these cases, a majority of the Court has decided that Article 28I(1) rights can be limited or nullified by reference to Article 28J(2). The Court has justified doing this by referring to international law despite the plain words of the Constitution—particularly “cannot be limited under any circumstances.”

Court referred to various international legal sources to show that only legal subjects, and not objects such as tobacco, enjoyed freedom from discrimination. *Id.*

¹⁰⁶ Article 19(3) of the ICCPR states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals.

ICCPR, *supra* note 1, art. 19(3)

¹⁰⁷ Decision, Reviewing Law 36 of 2009 on Health (*Health Law Case*) (Constitutional Court No. 19/PUU-VIII-2010).

¹⁰⁸ *Id.* (emphasis added).

In the *Bali Bombing Case*, for example, the applicant, Abdul Kadir, had been convicted in Indonesia's general courts of involvement in the 2002 Bali Bombings and sentenced to 15 years imprisonment under an anti-terrorism law that was enacted after the bombings took place.¹⁰⁹ He argued that a separate law that purported to permit this anti-terrorism law, to be applied retrospectively to pursue him and other perpetrators, breached his constitutional right to freedom in Article 28(1) from prosecution under a retrospective law.¹¹⁰

By a majority of five judges to four, the Court decided that the statute was unconstitutional.¹¹¹ In coming to this conclusion, the majority attributed significant weight to the words "cannot be limited under any circumstances" in Article 28I(1).¹¹² The majority also referred to provisions of international human rights conventions that supported the prohibition on retrospectivity.¹¹³

Both the majority and the minority, who would have allowed retrospective prosecution because of the seriousness of the case, also cited provisions of international conventions and examples of the retrospective laws being applied by international tribunals. From these conventions and examples, the majority reasoned:

[T]he essence of the principle of non-retroactivity is to protect against the criminalisation of an act that was not considered a crime when the act was perpetrated . . . Also prohibited are new laws which stipulate a harsher penalty or punishment than the penalty or punishment applicable at the time the act was committed . . . [Retrospective legislation is justified provided that] it does not violate the two prohibitions mentioned above.¹¹⁴

¹⁰⁹ For background and further references, see Simon Butt & David Hansell, *The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003*, 6 AUST. J. ASIAN L. 1 (2004).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 176.

¹¹² Decision, Reviewing Law 16 of 2003 on the Stipulation of Interim Law 2 of 2002 about the Application of Interim Law 1 of 2002 on the Eradication of the Crime of Terrorism in the Bali Bombings of 12 October 2002 as a Statute (*Bali Bombing case*), 36–37 (Constitutional Court No. 013/PUU-I/2003).

¹¹³ *Id.* (citing Universal Declaration of Human Rights, *supra* note 84, art 11(2); European Convention for the Protection of Human Rights and Fundamental Freedom, art 7, November 4, 1950, 213 UNTS 222 [hereinafter European Convention on Human Rights]; ICCPR, *supra* note 1, arts 4, 15; American Convention on Human Rights, art 9, November, 22 1969, 1144 UNTS 143; Rome Statute of the International Criminal Court arts. 22–24, July 17, 1998, 2187 UNTS 3).

¹¹⁴ *Id.* at 53.

In another case about freedom from retrospectivity, Abilio Jose Osorio Soares, the former Governor of East Timor, sought constitutional review of Article 43(1) of Law 26 of 2000 on the Human Rights Court.¹¹⁵ Under this provision, proceedings in the Human Rights Court had been initiated against him for human rights abuses in East Timor in 1999. Article 43(1) states: “[G]ross violations of human rights which occurred before this Law is enacted [can] be heard and adjudicated by the *Ad Hoc* Human Rights Court.”¹¹⁶

In this case, a majority of the Court found that Article 28I(1) rights were not absolute in all circumstances. Those rights must be read alongside Article 28J(2), which allows exceptions to “satisfy just demands in accordance with moral considerations, religious norms, security and public order.”¹¹⁷ The majority decided that Article 43(1) could be applied to pursue “gross violations of human rights,” defined under Article 7 of the Human Rights Court Law as genocide and crimes against humanity.¹¹⁸

The majority appeared concerned to justify this decision by reference to international law. As it had in *Bali Bombing*, the majority set out Articles 11(2) and 15 of the ICCPR which, they decided, prohibit laws of retrospective operation only if the act in question was not a crime under national or international law—or the general principles of law recognised by the community of nations—at the time the act was committed.¹¹⁹ The Court also mentioned the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Both Tribunals were established to prosecute alleged crimes after the alleged crime had taken place. This was justifiable under international law because the alleged crimes were illegal at the time they were allegedly committed.¹²⁰

Another case involving an Article 28I(1) right was brought by five applicants sentenced to death for drug offences.¹²¹ They argued that the provisions of Indonesia’s Narcotics Law, under which they had been

¹¹⁵ See generally Decision, *Soares Case*.

¹¹⁶ Law No. 26 of 2000, art. 43(1).

¹¹⁷ Decision, *Soares Case*, at 56.

¹¹⁸ *Id.*

¹¹⁹ The Court also referred to Article 4 of the ICCPR, which allows the state to derogate from its obligations under the Convention during public emergencies, provided that it does not contravene international law, involve discrimination, or contravene the European Convention on Human Rights. See ICCPR, *supra* note 1, art. 4; Decision, *Bali Bombing case*, at 53, 66; Decision, *Soares case*, *supra* note 75 at 57.

¹²⁰ Decision, *Soares Case*, at 58.

¹²¹ Decision, Reviewing Law 22 of 1997 (*Death Penalty Case*) (Constitutional Court No. 2-3/PU-V/2007).

sentenced, violated the right to life provided in Articles 28A and 28I(1) of the Constitution, and breached Indonesia's ICCPR obligations.¹²²

A majority of the Court rejected the challenge, making various arguments based on international law. The majority pointed to Article 46 of the Vienna Convention on the Law of Treaties which, the Court held, prohibits states from failing to comply with a treaty because the treaty breaches national law, unless the breach "concerned a rule of . . . internal law of fundamental importance."¹²³ The Court opined that Indonesia could, therefore, contravene the ICCPR by imposing the death penalty for drug offences if this was of "fundamental importance" to Indonesia.¹²⁴

In any event, the Court reasoned that Indonesia had not breached the ICCPR, which allows the death penalty for the "most serious crimes."¹²⁵ The Court decided that these crimes included drug offences, particularly those described in the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which Indonesia had ratified by enacting the 1997 Narcotics Law.¹²⁶ According to the Court, both "particularly serious" crimes referred to in the Narcotics Convention and "most serious crimes" under the ICCPR affected the "economic, cultural and political foundations of society" and carried "danger[s] of incalculable gravity."¹²⁷ Imposing the death penalty for such crimes was, therefore, not only permissible under the ICCPR—in the Court's view, it was in fact implicitly sanctioned by the Narcotics Convention, which encouraged member states to take strong action against drug traffickers.¹²⁸

The Court's interpretation of "most serious crimes" to include drug offences appears to contradict the view of the UN Human Rights Committee:

¹²² Law No. 22 of 1997.

¹²³ Article 46 of the Vienna Convention on the Law of Treaties states in full:

- (1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
- (2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Vienna Convention on the Law of Treaties, art. 46, May 23, 1969, 1155 U.N.T.S. 331

¹²⁴ Decision, *Death Penalty case*, at 420.

¹²⁵ ICCPR, *supra* note 1, art. 6(2).

¹²⁶ Decision, *Death Penalty case*, at 420.

¹²⁷ *Id.*

¹²⁸ *Id.*

that the death penalty is “a quite exceptional measure” and that “most serious crimes” encompass only the most exceptional circumstances.¹²⁹ While intentional killing, infliction of grievous bodily harm, or acts that create grave danger which may result in death or irreparable harm might fall within this category,¹³⁰ the Committee seems to prefer the view that drug-related offences will generally not.¹³¹

3. *ASEAN Charter Case*

Finally, I turn to discuss the *ASEAN Charter Case*, decided on February 4, 2013.¹³² This was a much-anticipated case, with some scholars hoping that the Constitutional Court would seek, in its decision, to clarify the position of international law within the Indonesian legal system.¹³³ The applicants—a coalition of NGOs—sought a review of Law No. 38 of 2008 on the Ratification of the ASEAN Charter (“Law 38”).¹³⁴ The Law comprises two provisions. Article 1 declares that the national parliament ratifies the ASEAN Charter, the original English-language version of which is appended to the statute along with an Indonesian translation.¹³⁵ Article 1 also states that the Charter is “an inseparable part of this statute.”¹³⁶ Article 2 simply states that the statute comes into force on the date of its enactment and orders that it be published in the State Gazette.¹³⁷

¹²⁹ U.N. Human Rights Comm., General Comment No. 06: Article 6 (The Right to Life), (Apr. 30, 1982) reprinted in U.N., International Human Rights Instruments, at 176, 177, U.N. Doc HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008), [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2fGEN%2f1%2fRev.9%20\(Vol.%20I\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2fGEN%2f1%2fRev.9%20(Vol.%20I)&Lang=en).

¹³⁰ SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY 120 (2004); *Lubuto v Zambia*, U.N. Human Rights Comm., 55th Sess., para 7.2, Commc’n No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990 Annex.

¹³¹ In *T v Australia*, for example, the dissent by committee members Eckart Klein and David Kretzmer found that deporting the accused to Malaysia (where he could face the mandatory death penalty for possessing more than 15 grams of heroin) was in breach of the Article 6 obligations. *T v Australia*, U.N. Human Rights Comm., 61st Sess., para 6, Commc’n No. 706/1996, U.N. Doc. CCPR/C/61/D/706/1996 Annex. The majority disagreed on the facts, finding insufficient evidence that Malaysia intended to prosecute the accused, thus the death penalty was not a foreseeable consequence of deportation. *Id.* para 8.6.

¹³² Decision, Reviewing Law 38 of 2008 on the Ratification of the ASEAN Charter (*Asian Charter case*). (Constitutional Court 33/PUU-IX/2011).

¹³³ Damos Dumoli Agusman, *Apakah MK Bisa Menguji Piagam ASEAN?*, ANTARA, July 25, 2011.

¹³⁴ Decision, Reviewing Law 38 of 2008 on the Ratification of the ASEAN Charter (*Asian Charter case*). (Constitutional Court 33/PUU-IX/2011).

¹³⁵ Law No. 38 of 2008, art. 1.

¹³⁶ *Id.*

¹³⁷ *Id.* art. 2.

The applicants did not ask the Court to invalidate either of these two provisions. Rather, they challenged Articles 1(5) and 2(2)(n) of the ASEAN Charter itself. Article 1(5) states that one purpose of ASEAN is to establish a “single market and production base” with “free flow of goods, services and investment” and “freer flow of capital.”¹³⁸ Article 2(2)(n) binds ASEAN members to multilateral trade rules and to move towards eliminating market barriers to regional economic integration in a “market-driven economy.”¹³⁹

The applicants pointed out that, partly on the basis of these provisions, various ASEAN free trade agreements had been entered into, such as the ASEAN-China, the ASEAN-Australia and the ASEAN-Korean Free Trade Agreements. However, the applicants argued that free trade was unfair to Indonesians whose ability to compete was weak, such as small scale businesses, and would damage domestic industries. This, they argued, breached constitutional protections in Article 27(2)¹⁴⁰ and Article 33.¹⁴¹

A seven-to-two judge majority of the Court decided that Articles 1(5) and 2(2)(n) of the Charter did not breach the Constitution. According to the majority, neither Article 1(5) nor Article 2(2)(n) bound the state to do anything more than enact national laws to give effect to the agreement and left the state with latitude to choose how to comply with it. In any event, the Charter had not come into force when Law 38 was enacted because other ASEAN countries had not yet ratified it, as required by the Charter.¹⁴²

According to the government, the applicant’s challenge to Articles 1(5) and 2(2)(n) of the Charter presupposed that Law 38 brought the Charter into force within the Indonesian domestic legal system. However, the government emphasised during case hearings, no rule of Indonesian law states that ratification statutes also transform rules of international treaties into national law. In Indonesia, the government continued, the norms of an international agreement can be effectively implemented at the national level only after they are transformed by a national law.

¹³⁸ Charter of the Association of Southeast Asian Nations art. 1(5), Nov. 11, 2007, 2624 U.N.T.S. 223 [hereinafter ASEAN Charter].

¹³⁹ *Id.* art. 2(2).

¹⁴⁰ *Id.* art. 27(2) (“Every citizen has the right to employment and a livelihood befitting a human being”).

¹⁴¹ *Id.* art. 33 (“The economy is a ‘collective endeavour based on the family principle’ and the state must control important branches of industry and natural resources for the ‘greatest prosperity of the people’”).

¹⁴² *ASEAN Charter case, supra* note 132, at 196.

The majority did not directly address the government's argument. Rather, it merely stated that the Charter "took the form of a statute, that is Law 38/2008, as its vessel" and that the statute 'applies as a legal norm' because it binds its subjects—in this case, the state.¹⁴³ However, because the state had not yet implemented its obligations under the Charter, no constitutional rights had been breached.

It might be argued that simply by considering the merits of the case—that is, whether Articles 1(5) and 2(2)(n) were constitutional—the majority implicitly accepted that ratification by statute constitutes transformation into that statute. If this were not so, then the majority could not, legally, have reviewed provisions of the Charter directly. This is because, as mentioned, the Court lacks jurisdiction to review anything but statutes as against the Constitution. If the majority did not consider that the Charter had, by virtue of Law 38, the status of a statute, then it should have refused to hear the case.¹⁴⁴

Instead, as mentioned, the majority held that the ratifying statute bound the state to the Charter. It appears, then, that the majority in the *ASEAN Charter Case* added nothing to the wider debate about how international law enters the domestic legal system. An Indonesian ratification instrument arguably already binds the state internationally—hence the need for presidential and parliamentary endorsement. Even though ratification binds the state to the Charter, it does not necessarily follow that the ratification statute brings the

¹⁴³ It was on jurisdictional grounds that the two dissenting judges declared that they would have rejected the application. In separate judgements, Justices Hamdan Zoleva and Maria Farida distinguished between general statutes and states that ratified international agreements. *Id.* at 199, 202. For them, the Constitutional Court's jurisdiction did not extend to reviewing ratifying statutes because even though 'formally' they were statutes, in substance they were not. *Id.* They both pointed out that a general statute undergoes a process of deliberation and revision, but a ratification statute only adopts the norms agreed to in the treaty. *Id.* The national parliament and government cannot amend the treaty unless the treaty itself allows for this. *Id.* They also observed that a general statute is directly applicable to every person in Indonesia, whereas an international agreement only binds the state and other countries that sign it. *Id.*

¹⁴⁴ This "transformation argument," if correct, raises significant questions. One is that if Law 38 transformed the ASEAN Charter into a national statute, then it would have come into force *before* the ASEAN Charter itself. Law 38 came into force on the date of its enactment November 6, 2008, whereas the Charter came into force thirty days after ten ASEAN states ratified it, which eventually occurred on December 15, 2008. Another issue is that, as mentioned above, many types of treaties can also be ratified by presidential decree. If the ratification of a treaty transforms that treaty into Indonesian law, then does that treaty have the same legal authority or weight as the ratifying law? In other words, does a treaty ratified by presidential decree have the same weight as a presidential decree in the Indonesian legal system, and does a treaty ratified by statute have the same weight as a statute? Because presidential decrees formally have a lower status than statutes in the Indonesian legal hierarchy, does this mean that the national parliament could, therefore, override a treaty ratified by presidential decree, regardless of that treaty's importance? The Constitutional Court's decision provides no answers to these questions.

Charter “into” Indonesian domestic law so that it becomes an instrument enforceable in Indonesian courts.

CONCLUSION

While there remains much uncertainty, reasons exist to suggest that Indonesia might be formally monist, at least in part. Some treaties appear to be automatically applied, particularly bilateral treaties that concern specific matters on which Indonesia pledges to co-operate. Also, some Indonesian courts appear amenable to international law, though its use has been primarily as an aid to interpretation in constitutional cases. In the available cases, the Supreme Court has used international law only as an aid to fill in gaps in Indonesian law, not to override it.

Despite this, the system appears to be primarily dualist in practice: many government officials will not act on international norms until they are transformed into Indonesian law. The result is that Indonesia does not in fact comply with many treaties until domestic laws are issued to bring those treaties into effect. The “lag” between ratification and transformation can be many months or even years, given Indonesia’s notoriously slow law-making processes. Some treaty obligations have simply not been complied with at all.¹⁴⁵ Even though in some ways Indonesia’s system might appear to follow “self-executing treaty” distinction that is commonly associated with the United States,¹⁴⁶ the government and the courts have provided no guidance on how the system should or does work. The result of all this appears to be significant uncertainty about the effect of ratification of any given treaty.

This uncertainty is, in fact, to the great advantage of the Indonesian government. To the international community, it can claim that ratification will automatically bring treaties into domestic Indonesian law. If challenged, Indonesian officials—some no doubt with genuinely-held belief—can point to Kusumaatmadja and Indonesia’s Dutch legal heritage. This makes deflecting international criticism for non-compliance much easier than if Indonesia was openly dualist.

Indonesia’s UN Universal Periodic Review in 2012 was a case in point. In its assessment of Indonesia’s progress on human rights, the Human Rights Council complemented Indonesia on its *ratification* of the Convention on the

¹⁴⁵ Juwana, *supra* note 5.

¹⁴⁶ TRIGGS, *supra* note 10, at 123.

Rights of Persons with Disabilities and the International Convention on the Rights of All Migrant Workers and Members of Their Families. It also praised Indonesia for submitting bills to its National Parliament on the *ratification* of two Optional Protocols to the Convention on the Rights of the Child; for being in the process of *ratifying* the International Convention for the Protection of All Persons from Enforced Disappearance; and for considering the *ratification* of the Rome Statute of the International Criminal Court. Of course, as I have argued, ratification of most of these agreements will have little or no effect in Indonesia because they require significant amendments to Indonesian law and will, therefore, most likely lie dormant until transformed. Only a handful of States involved in the Periodic Review urged Indonesia to enact domestic laws to implement these and other international agreements.

Domestically, the uncertainty about the effect of ratified treaties allows the government to avoid obligations under international treaties it has ratified—by simply declaring that a further step of transformation is required before those obligations can be enforced against it in Indonesia. The government might not take that step for many years, if at all, for a variety of reasons, including politics or economics.¹⁴⁷ This leaves citizens and others in Indonesia vulnerable to the deprivation of rights that international treaties seek to provide.

In the face of this doctrinal and practical uncertainty, one thing does seem clear: Given the convenience this uncertainty brings to the Indonesian government, there is little incentive for legislative or constitutional change to clarify the status of international law within the Indonesian legal system any time soon.

¹⁴⁷ Juwana, *supra* note 5.