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**Indonesia's Approach to International Treaties:
Balancing National Interests and International Obligations**

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Abstract

The relation and interaction between international and domestic law are one of the classic issues in international, and its' controversy remains in the realm of theory and practice. This is an issue many generations of international and constitutional lawyers have wrestled, are wrestling, and will continue to wrestle. For the Indonesian context, this issue is also still far from clear. The Indonesian Constitution of 1945 stipulates that the President of the Republic of Indonesia has the authority to conclude treaties with other countries. However, it does not clearly and specifically govern the status and position of international treaties under the Constitution. As a result, the Indonesian approach to the international treaty is rather pragmatic and susceptible to some inconsistencies. It can be seen in several decisions of the Indonesian Constitutional Court that clearly demonstrate the ambiguity of an international treaty. The Indonesian Parliament (DPR) argues that Indonesia should emphasize its national interests when Indonesia concludes international treaties. To a certain extent, this approach is vulnerable to disregarding international obligations in the name of national interests. Some legislations, for instance, in the field of trade, which contain a national interest clause that potentially will put Indonesia as the party that disregards its international obligations. This paper argues that national interests and international obligations are mutually inclusive, and not mutually exclusive elements. To this end, international treaties should have a clear status and position under the Indonesian constitution to ensure that national interests and international obligations are in harmony.

Keywords: *International law, international treaty, domestic law, Indonesia, national interests, international obligations.*

A. Introduction

International and domestic law has several differences in both theory and practice; however, they did have several point of similarities, one of which is that the state is the main subject of these two peculiar legal systems. The theoretical question is whether the two legal systems are one unified legal

system (monism) or a separate legal system (dualism) and how the interaction between the systems. This is subject to much academic debate among international lawyers. At the practical level, many countries, including Indonesia, applied different forms and systems on the relations and interactions between

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international and domestic law, and international treaties.

The judicial review of Law No. 38/2008 on the Ratification of the ASEAN Charter that was submitted to the Constitutional Court by several NGOs (Non-Governmental Organizations) was the first case that opened the veil of unclarity of the interaction between international and domestic law in the Indonesian legal system. The applicant argued that the ASEAN Charter contains materials contrary to the constitution. For example, the Charter supports the liberalization of trade and services. Although the Court decided that the challenged provisions of the Charter did not violate the Constitution, the judgment clearly illustrated the unclear position of international law in the Indonesian legal system. The Court seems to put international and domestic law on the same footing so that the Court has jurisdiction to hear the case, despite the fact that the ASEAN Charter is an international treaty to which Indonesia is legally bound. This is truly a political question over which the Court has no jurisdiction on it.

The ASEAN Charter case revealed that national interests and international obligations could be conflicting elements in the interaction between international and domestic law. It can be seen, for instance, in Act No. 7/2014 on Trade which provides that the Indonesian government, with the approval of the House of Representatives, may withdraw its membership in an international treaty for the sake of national interests. This provision is very susceptible to putting Indonesia as the party disregarding its international obligations. Indonesia should provide a legal framework to ensure national interests and international obligations are mutually inclusive and not mutually exclusive elements. To this end, international law should have a clear status and position under the Indonesian constitution to ensure that national interests and international obligations are working in harmony.

This paper will begin by reviewing the interaction between international and domestic law from a theoretical perspective. The next stage is a discussion on the interaction between Indonesia and international law in both the Indonesian Constitution and in

practice since the colonial era to political reforms in 1998. This section will also discuss how the Constitutional Court applies international law to the cases submitted to the Court. Finally, this paper will discuss the most appropriate regulatory model to create a balance between national interests and international obligations.

B. Interaction Between International and Domestic Law: From Theoretical to Practical Approach.

The interaction between international and domestic law has been one of the most controversial issues in the doctrine and practice of international law in both international and domestic lawyers. O'Connell neatly stated, 'Almost every case in a municipal court in which a rule of international law is asserted to govern the decision raises the problem of the relationship of international law and municipal law.'³ The controversy lies, among others, on the fact that domestic law represents an expression of state sovereignty, while on the other hand, international law operates beyond the limits of state sovereignty. For most developing countries, this is also exacerbated by the fact that historically, modern international law is very Euro-centric that put non-European nations not completely equal. The Treaty of Westphalia (1648)⁴ was a milestone in the formation of the European community that encouraged to the formation of law governing relations among European countries (*Corpus iuris gentium Europaeum*), which was then referred to *ius publicum Europaeum* and that eventually formed *ius gentium Europeum*. Rafael Domingo has observed, '... it is a territorial law - a balance of interstate sovereign forces, power, and wars between European states'.⁵ European countries were constructed as a war zone (*theatrum belli*) and non-European nations were considered as *res nullius* that was open to European countries to occupy. *Ius gentium Europeum* was mostly based on the unwritten law (*ius non scriptum*) that bound to European countries. This significantly contributed to the formation of modern international law, which is not only Euro-centric but also smacks of colonial

³ Daniel Patrick O'Connell, *International Law*, Stevens, London, 1970, p 38.

⁴ This agreement was held in Westphalia-Northwestern Germany in 1648 to end 30 years war in Europe.

⁵ Rafael Domingo, *The New Global Law*, Cambridge University Press, Cambridge, 2010, p.25.

nuances due to the formation of modern international law is also an integral part of European colonialism.⁶

The important question is whether the two legal systems are different, separate, or one unified legal system, and how the interaction between the two legal systems. Dualism and monism are the classic theories that use to justify the interaction between international and domestic law. The two legal systems, national and international, are separate and apart. Underlying dualism is a concept of sovereignty. Granted that law is an expression of sovereign wills, municipal law is addressed to the subjects of that will, whereas international law is the collective product of a number of sovereigns. The dualist holds that a further national legislative action is required to incorporate or transform that international instrument into domestic law. Its status as international law does not automatically give it validity and legitimacy as municipal law.⁷ On the other hand, the philosophical underpinning of monism is the idea of the unity of law. International law and domestic law form part of a single uniform legal structure. No further specific legislative act is necessary to give that international instrument legal force.⁸ However, dualism and monism only explain why international and domestic law is a separate or one unified legal system but fails to resolve problems and difficulties at the practical level.

The debate over monism and dualism takes place mostly in countries with a civil law tradition, such as Germany, Italy, France, and the Netherlands, while countries with a common law tradition are more focused on seeking practical solutions. In the UK for instance, this is not an academic debate but in the context of the separation of powers between the executive and the legislature in the tackling of international treaties. It is the

executive that is empowered to conclude treaties at the international level and the legislature that transforms it into domestic law.⁹ Some have observed that the adherence to monism or dualism represents a country's ideology or political system. Monism is considered to be more accommodating to individual freedom and democracy while dualism is compatible with those states in favour of absolutist and authoritarian tendencies. The third world that adheres strong doctrine of state sovereignty for consolidating their statehood do not necessarily dualist countries, they mostly follow the tradition of their former colonial countries.¹⁰

The theoretical debate between monism and dualism faded away in the late 20th century because the theories proved unsatisfactory. The approach has shifted, from theoretical to practical approach. This is an evitable effect of the shifting characteristic of international law towards global law because international law only recognizes the equality of states, but fails to give the right place to individuals who are important components of a state. International law is regarded as an artificial law that gives more priority to institutions than personals or individuals.¹¹ Global law is personal connectedness between people of the world (permeability), which Bederman neatly stated as follows: *to increase permeability... ..designing institutional mechanisms by which domestic and international legal authorities can efficiently interact.*¹² Since the freedom of movement of people and commodities intensified, state sovereignty eroded and national borders blurred. As a result, both domestic and international law are not fully able to provide an adequate solution, and the answer is global law. Ludwikowski described this as the evaporation of national and international frontiers and the national legal

⁶ Atip Latipulhayat, 'Internationalization of International Law: From Hegemony to Harmony of Norms', Paper Presented at the 5th AsianSIL Biennial Conference, Bangkok, 26-27 November, 2015, p. 2. See also Martti Koskeniemi, "International Law in Europe", *European Journal of International Law*, Vol. 16, Issue.1, 2014, p. 113. H.Steiger, "From the International Law of Christianity to the International Law of the World Citizen: Reflections on the Formation of the Epochs of the History of International Law", *Journal of the History of International Law*, Vol. 3, Issue 3, 2001, p.183

⁷ David Haljan, *Separating Powers: International Law Before National Courts*, Springer, The Hague, 2013, pp. 92-3. See also Piere-Marie Dupuy, "Relations between

the International Law of Responsibility and Responsibility in Municipal Law" in James Crawford et al. (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, p. 174. Hishasi Owada, "Problems of Interaction Between the International and Domestic Legal Orders", 5 *Asian Journal of International Law*, Vol.5, Issue 2, 2015, pp.249-50

⁸ Haljan, *supra* note 7 at 93.

⁹ Damos Dumoli Agusman, *Treaties Under Indonesian Law: A Comparative Study*, Rosda, Bandung, 2014, p. 29.

¹⁰ *Ibid.* p.30.

¹¹ Domingo, *supra* note 5 at 98.

¹² David J. Bederman, *Globalization and International Law*, Palgrave Macmillan, New York, 2008, pp. 164-5.

system's de-nationalization, domestic law's internationalization, and international law's de-territorialization.¹³

The impact of globalization on the relation and interaction between international and domestic law is obvious. The change and development of international law have to some extent, been viewed by states with caution and indifference. States make domestic law as a pretext to protect their national interests from the intrusion of international law because international law is regarded as less democratic or even non-democratic since its creation beyond popular (people) control.¹⁴ A territorial-based theory of monism and dualism that separates and distinguishes between international and domestic law has lost its legitimacy. A practical approach is more acceptable than a territorial-based theory such as monism or dualism due to the fact that globalization, among others, is characterized by the de-territorialization of international law. As a result, the relation and interaction between international and domestic law will produce common not conflicting, interests.

Some practical approaches that might be considered are, among others; (1) interdependence; (2) constitutionalism and legal pluralism; and (3) intermestic approach. Interdependence approach is based on the idea that the existence and implementation of international law cannot be detached from domestic law - domestic legal institutions (state organs) in particular. Jurisdiction in international law is actually abstract in nature; the real and factual jurisdiction belongs to domestic law. Nowadays, several norms of international law have been directly reached out to individuals. On the other hand, countries need a legal vehicle in dealing with other countries. Thus, the interaction between international and domestic law should be carried out in the framework of an interdependence relation.

Another approach is constitutionalism and legal pluralism. This approach assumes that shifting characteristics of international community into a global society is

characterized by several trends, among others, the erosion of state consent as a requirement in international law-making, acceptance of universal norms, the intertwinement and functional complementary of international and domestic law, and the questions of statehood and recognition. These phenomena appear to be the ground for the idea of the constitutionalization of international law. Meanwhile, legal pluralism is basically an anti-thesis of constitutionalization of international law, but departs from the same premise - international law suffers from fragmentations. At the same time international law also faces various limitations that come from domestic law when operating in the territory of a sovereign state. Various limitations and advantages possessed by both the legal system, in turn, encouraged the creation of practical models that allow the two systems to interact harmoniously.¹⁵

The last approach is intermestic. This terminology was coined by the then Indonesian Foreign Minister Dr. Hassan Wirajuda, which gradually gained public support through his various initiatives and activities conducted by the Ministry of Foreign Affairs. This is the linkage or the entanglement of domestic and international affairs, which is referred to as "intermestic affairs." It is an idea of how to develop a closer linkage issue between international and domestic factors in responding to the global challenges while simultaneously making use of global opportunities for national benefit. The intermestic approach is a part of total diplomacy, which was, in fact, already envisioned since 1945 by the late Dr. Moh Hatta, Indonesian first Vice President, when he clearly stated that foreign policy should be in line with Indonesian domestic politics. Under this approach, the interaction between international and domestic law would be a closer linkage to responding to global challenges and simultaneously using global opportunities for national benefit.

C. Indonesia and International Law

The Indonesian constitution does not explicitly

¹³ Rett R. Ludwikowski, "Supreme Law or Basic Law?: The Decline of the Concept of Constitutional Supremacy", *Cardozo Journal of International and Comparative Law*, Vol. 9, Issue 2, 2001, p. 253. See also Catherine Brolmann, "Deterritorialization in International Law: Moving Away from the Divide Between National and

International Law" in Janne Nijman and Andre Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford University Press, Oxford, 2007, pp. 84-109.

¹⁴ Agusman, *supra* note 9 at 121.

¹⁵ *Ibid.* pp.125-32.

govern the status and position of international law. The Constitution only governs the power of the President of the Republic of Indonesia with the approval of the House of Representatives to conclude treaties with other countries. This provision gives rise to various interpretations, among others; (1) international law is narrowly perceived as similar and identical to an international treaty; (2) it does not clearly govern the status and position of international law in the Indonesian legal system. As a result, the form of interaction between international and domestic law in the sense of how Indonesia's approach to international law is often determined by the political orientation of the ruling regimes.

1. The Constitution and the Debates Concerning International Law

On the 17th of August 1945, Soekarno and Hatta ¹⁶ proclaimed Indonesia as an independent and unitary state on behalf of the Indonesian people. On the following day, the 1945 Constitution officially come into force. Regarded as 'a lightning constitution', ¹⁷ this original version had only 37 articles providing some basic subject matters, including the form of state and sovereignty; main state organs; local government; human rights; fundamental principles on economics; education; social welfare; national language; as well as the method of the constitutional amendment. Matter on international relations was briefly governed in Art. 11 as follows:

The President with the approval of the House of Representatives may declare war, peace and conclude treaties with other countries.

There are a number of possible reasons that might explain why the framers of the constitution appeared to make such a simple and general norm. The first reason relates to the use of Japan Constitution as a basic reference. This is correctly argued by Damos Dumoli Agusman, who clearly states that the framers of the constitution 'apparently

sought references from the Constitution of Japan...its textual structure and simplicity...greatly resembled the provision of the Meiji Constitution of 1889, which was in force in Japan'.¹⁸ The next reason might deal with the situation when the constitution was drafted. The Constitution's draft was prepared amid the ongoing World War II and the beginning of the liberation war. The framers did not consider international law or treaties as a fundamental constitutional matter. They were occupied with a 'highly political agenda,' namely the question concerning the ideological basis for Indonesia.¹⁹

Given the fact that the original 1945 Constitution contained some significant weaknesses, ²⁰ there was a strong call to conduct constitutional reform. This resulted in 2002 when Indonesia completed a series of a constitutional amendments that marked Indonesia's transformation to become a democratic constitutional state under the rule of law. Several new constitutional provisions were adopted, and new institutions were established, including the formation of a constitutional court and the adoption of a bill of rights. These two new 'instruments' have been believed to be fundamental for applying a democratic constitutional state under the rule of law. Furthermore, the principle of the rule of law was inserted into the paragraph of the Amended Constitution, which is available in Art. 1 para (3).²¹

More importantly, the amendment also touched upon the matter on international relations. The new article now says that:

*(1) The President with the approval of the House of Representatives may declare war; make peace and agreements with other countries.
(2) The President in making other treaties 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, shall*

¹⁶ Soekarno and Moh. Hatta were the first President and Vice President, respectively.

¹⁷ It was Soekarno who gave this label given the fact that it was only debated for less than a month.

¹⁸ Agusman, *supra* note 9 at 213.

¹⁹ *Ibid*, p.215.

²⁰ This included the nature of the executive heavy which enabled the President to play dominant role with the

absence of checks and balances mechanism; the open-ended interpretation without clear guidance which paved the way of the implementation of arbitrary powers; and the presence of the Elucidation of the Constitution that to some extent was inconsistent with the constitutional norms.

²¹ Previously, this principle was available in the Elucidation of the Constitution.

obtain the approval from the House of Representatives.

(3) Further provisions regarding treaties shall be regulated by law.

While para (1) of the amended version is similar to that of the original version, paras (2) and (3) were inserted by the Third Amendment in 2001. Some reasons might explain why the amendment took place. First, unlike the situation in 1945 when international law was not regarded as fundamental for the newly independent country, the current situation has shown that international law has developed greatly and can influence the national government system to some extent. The new subjects of international law have been introduced to include international organizations, which have the power to make treaties or agreements. In practice, those organizations can make agreements with countries that may create financial impact to national governments. This happened in Indonesia when President Soeharto signed an agreement between Indonesia and the IMF in 1998 without the involvement and approval from the House of Representatives. Second, the amendment aims to strengthen the role of the House of Representatives regarding the Presidential power on international relation or policy.²² Thus, these new constitutional norms provide a check and balances mechanism in order to prevent the arbitrary powers conducted by the President.

The debate on the need to amend Art.11 began in 1999 with the *Golongan Karya* Party as an initiator, which asked the possibility of including the House of Representatives to participate in the treaty-making in the form of granting approval.²³ Yet, it further raised the question of whether or not such approval was necessary for all type of international agreements. In response, the Indonesian Democratic Party Struggle proposed that the approval was only necessary for agreements that would create State's financial burden and/or result in the change of Indonesian territory as well as give serious influence on the implementation of national sovereignty.²⁴

Despite raising awareness about the international agreement, the debates were interrupted, as most members of the People

Consultative Assembly did not regard such matter as a priority.²⁵ The discussion was re-opened in the preparatory process for the Third Amendment in 2001. Having considered the impact of the IMF agreement, the two new paragraphs: paras (2) and (3) were inserted to accommodate international agreements on economic or other fields which will have a serious impact on the lives of the Indonesian people and the country. Sri Mulyani – now the Minister of Finance of the Republic of Indonesia and Sri Adiningsih – the then Head of Advisory Council to the President – strongly endorsed the inclusion of such a paragraph.²⁶

From the above explanation, it can be seen that most debates at the time concentrated on the issue of the serious impact that may be resulted from the international agreement. Consequently, both the original and the amended version of the Indonesian Constitution have been silent regarding the matter on international law, in particular international treaties. This constitutional norm does not make any legal instruments on how international law enters into domestic law, but it merely regulates the President's treaty-making power or foreign policy. Thus, it fails to determine the clear status of international law or international treaty within the Indonesian constitutional or legal system.

2. International Law and Indonesia's Political Regimes

The form of interaction between international and domestic law in the sense of how Indonesia's approach to international law can be traced to the three phases of Indonesia's political regimes: pre-colonial, colonial, and post-independence. In the pre-colonial era, several kingdoms in the Indonesian Archipelago had made diplomatic contact with many nations in the world. For example, the Islamic Sultanate of Atjeh made some agreements with the Turkish Ottoman Empire. This relation was subject to the principles of international law based on customary and religious law. For example, the Ottoman Empire adhered to the principles of Islamic international law (*Siyar*). In this period, international relations were entirely conducted by the Dutch government with

²² Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Buku IV Kekuasaan Pemerintahan Negara Jilid 1, Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008, p.481.

²³*Ibid.* p.482.

²⁴*Ibid.*

²⁵*Ibid.* p.486.

²⁶*Ibid.* p.487.

reference to international law that was very Euro-centric. International law had been designed as a framework for the enterprise of territorial expansion and colonialism through the penetration of the European value system and the political support from the European colonialism. International law provided a very exclusive and full privilege of norms to European countries, eventually forming an international club and the imperial system.²⁷ Therefore, the views of the founding fathers of Indonesia, as well as public perception towards international law, especially treaties, were influenced by the sentiment of nationalism, a culture of resistance or indifference to so-called 'colonial' international law.²⁸ International law was considered unfriendly to Indonesia. Ko Swan Sik observed that the question of giving legal effect to international law in the municipal sphere is connected with the historical experiences of those countries on the international level, in light of their non-Western origins and their political and legal cultures.²⁹

Indonesia gained its independence in 1945. Since then, Indonesia has experienced three consecutive regimes with different approaches toward international law, which, to a certain extent, represented the political ideology of the regimes. Under Soekarno's administration (the first President of the Republic of Indonesia), which was often dubbed the "Old Order" regime, Indonesia's approach to international law was actually representing the politics of anti-colonialism. Sukarno and other founding fathers viewed international law as a colonial legacy that justified the colonialization of Asians and Africans. Yamin, the prominent legal scholar and also one of the framers of the Indonesian Constitution, observed that international law belonged to and was made by Christian-dominated Western Europe, and Asia did not participate in its creation.³⁰ This claim had been confirmed as most European countries argued that unilateral proclamation of independence as an act of that was a flagrant violation of international law.³¹

Nevertheless, in the interest of maintaining

the existence of a new independent state, Indonesia took a moderate approach to international law, among others, by taking part in a series of negotiations with the Dutch government, such as the Linggarjati Agreement of 1947 and the Dutch-Indonesian Round Table Agreement of 1949, which eventually strengthened the legal status of Indonesia as a subject of international law. The political system changed in the 1950s when President Soekarno implemented a new political system, what he called "guided democracy," which was actually Soekarno's political vehicle toward authoritarianism. In the context of international relations, this was increasingly marked by anti-liberalism among the Indonesian elite, and to a certain extent, it had significantly affected the form of interaction between Indonesia and international law by taking a more hostile attitude toward international law. In 1957 Indonesia unilaterally issued the so-called Djuanda Declaration, by which Indonesia drew straight baselines connecting the outmost points on the legal watermark of the outmost islands. Indonesia claimed a 12-mile territorial sea limit. This declaration obtained a strong reaction from Western countries, especially the United States, as it was considered a serious violation of international law that recognized a 3-mile territorial sea limit. Instead of responding to the protests, Indonesia confirmed the claim by issuing Act No.4 / 1960 on Indonesian waters and maintained a 'persistent non-compliance to international law'.³²

Indonesia's distrust of international law reached its culmination when Indonesia decided to withdraw its membership from the United Nations and its agencies in 1965. United Nations, according to Indonesia, had completely been hijacked by the colonial powers that were so blatantly against Indonesia's anti-colonial struggle. Some have observed that this act was considered a violation of the principle of *pacta sunt servanda*. Indonesia argued that this act was based on the principle of *rebus sic stantibus* and therefore was not contrary to international

²⁷ Christopher Weeramantry, *Universalising International Law*, Martinus Nijhoff Publishers, the Netherlands, 2004, p. 4.

²⁸ Agusman, *ibid.*, p. 5.

²⁹ Ko Swan Sik, "International Law in Municipal Legal Orders of Asian States: Virgin Land" in Ronald St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya*, Martinus Nijhoff, the Netherlands, 1994, p. 738.

³⁰ Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* (Preparatory Documents to the Constitution of 1945), Vol. III, 1960, p. 48.

³¹ Sunaryati Hartono, "The interaction between National Law and International Law in Indonesia" in Paul Waart, et al. (eds.), *International Law and Development*, Martinus Nijhoff, Dordrecht, 1988, p.35.

³² Agusman, *supra* note 9 at pp.6-11

law. President Soekarno insisted that treaties were always subject to revision if they were against the justice of mankind, such as treaties allowing colonialism.³³

President Soeharto came to power in 1966, replacing President Soekarno and calling his administration the "New Order". Soeharto's new order regime shifted Indonesia's approach to international law from hostile to one that was more open, critical, and accommodating to international law. This approach was intended to create a balance between national interests and international obligations. Mochtar Kusumaatmadja neatly formulated this new orientation as follows: Indonesia's attitude of not accepting existing international regulations was acceptable as long as Indonesia takes into account the legal interests of other states and is willing to contribute to its changing.³⁴

Indonesia applied this approach when proposing the archipelagic concept, which was eventually accepted in the UNCLOS 1982. Many countries, particularly developed countries, initially opposed this concept as they viewed the concept as a blatant violation of international law. Indonesia was not committed in the violation of international law, but in fact, to creating new international law which could accommodate its national interest without undermining the interests of other countries. Kwiatkowska aptly stated: that Indonesia did not break international law but instead had made it.³⁵ Mochtar argued that a unilateral act of a state driven by its basic need might constitute a newly emerging rule of international law by virtue of customary international law.³⁶ Nevertheless, some have observed that Indonesia has a different approach toward international law relating to protecting human rights. Indonesia claimed that human rights represented Western values and were considered incompatible with Indonesian values. This, however, does not exclusively apply to Indonesia; it is the approach of most developing countries, especially those controlled by the military government like Indonesia under the Soeharto regime.³⁷

The political reform that took place in

1998 reached its culmination with the fall of President Suharto, who had been in power for nearly 32 years. One of the important agendas of the reform was a constitutional amendment particularly related to the limitation of the presidential term. Unfortunately, it was not the case to the status and position of international law. The Amended constitution still identifies international law as an international treaty. Although the government subsequently enacted a law that specifically regulates international agreements, it created new problems instead of resolving the interaction between international and domestic law. The ASEAN Charter case seems to open the Pandora's box on the unclear status and position of international law in the Indonesian legal system. It was triggered by the allegations that the ASEAN Charter contained materials that were contrary to the Constitution and the national interests of Indonesia. It was then followed by enacting the law on trade that governs the withdrawal and cancellation of its membership in an international treaty if it is considered contrary to the national interests of Indonesia.³⁸ This approach seems to be more pragmatic and protective. Thus, the crucial issue is the interaction between international and domestic law and how to balance the two.

D. National Interests and International Obligations

The foregoing discussion reveals that international and domestic law interaction may cause tension between international obligations and the need to protect national interests. Below will be discussed some particular cases submitted to the Constitutional Court that reflect the problem of the international legal position in the Indonesian legal system and also its relevance to the interaction between international and domestic law.

1. The Constitutional Court and International Law

The new powerful Constitutional Court (hereafter the Court) was officially established in 2003. Art. 24C para (1) of the Amended Constitution grants it the powers to make the final decision in reviewing statutes in the light

³³*Ibid.*, p.11.

³⁴ Mochtar Kusumaatmadja, *Pengantar Hukum Internasional*, Bina Cipta, Bandung, 1976, p.63.

³⁵ Barbara Kwiatkowska, "The Archipelagic Regime in the Philippines and Indonesia, Making or Breaking

International Law", *International Journal of Estuarine*, Vol. 6, Issue 1, 1991, pp.13-30.

³⁶Kusumaatmadja, *ibid.* pp.56-65.

³⁷ Agusman, *supra note* 9 at pp.13-14.

³⁸ Art.85 of Act No.7/2014 on Trade.

of the Constitution; to determine disputes concerning the authority of the state organs whose power is derived from the Constitution; to dissolve political parties, and to resolve disputes regarding the results of a general election. Moreover, it has the power to make decisions concerning the opinion of the House of Representatives with regard to alleged violations by the President and/or the Vice President of the Constitution. In other words, it has the power to have the final legal say in any impeachment proceedings.³⁹

Since its inception, the Court has been regarded as a new model for judicial reform in Indonesia, specifically in terms of transparency and capability.⁴⁰ It is seen as concerned 'with achieving a broad form of social justice and with advancing the process of democratization'.⁴¹ More significantly, the Court 'appears to be emerging as an effective guardian of the new Constitution'⁴², particularly in relation to the human rights norms through the power of constitutional review.

The discussion on the application of international human rights norms within the Court will undoubtedly relate to the issue of whether or not international treaties have been used as main legal sources, in particular when the Court construes the constitutional provisions. In a broader sense, Simon Butt has identified three approaches to international law in the Court's decisions.⁴³ First, is 'the weak-use approach' by which the Court refuses to use international law as a reference point and ignores or dismisses arguments based on international law from the parties?⁴⁴ Surprisingly, in some cases, the Court has rejected the use of international norms, although the norms may have influenced the Court. This is evident, for example, in its decision on the Children's Court Law Case.⁴⁵ The applicant raised some international law

arguments challenging the validity of several provisions that made the age of criminal culpability eight years old for some offenses. The Court changed that age to twelve, which was in fact in line with the UN Committee on the Rights of the Child. In its decision, however, the Court clearly stated that it was not using "these instruments and recommendations . . . [as] a gauge to assess the constitutionality of the age of responsibility for children."⁴⁶

Second approach is that 'the Court gives more credence to international law, but attributes no real influence to it.'⁴⁷ This means that the Court refers to international law aiming to merely support a decision in a way it has already arrived at, based on an interpretation of the Constitution and Indonesian law that the Court claims as its own.

The final approach shows that 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'.⁴⁸ According to Butt, this approach is evident in the Court's Decision reviewing Law 23 of 2003 on General Election of President and Vice President, also known as *Abdurrahman Wahid Case* (Constitutional Court No. 008/PUU-II/2004).⁴⁹ In addition, it 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.⁵⁰

What follows provides a selected case example of the Court's decision that applies international human rights norms. It is important to note, however, that since the Court does not have the power to hear a constitutional complaint, all constitutional rights enforcement has been done through the power of constitutional review.

³⁹ Art. 24C para (2) of the 1945 Constitution as amended by the Third Amendment.

⁴⁰ Susi Dwi Harijanti & Tim Lindsey, "Indonesia: General Elections test the amended Constitution and the new Constitutional Court", *International Journal of Constitutional Law*, Vol. 4, Issue 1, 2006, p. 151. See also, Susi Dwi Harijanti, "Comparative Law and Constitutional Amendment: The Case of Indonesia", Paper presented at the International Conference on Comparative Law organized by College of Comparative Law, China University of Political Science and Law, Beijing, September 25-26, 2015, p. 4.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Simon Butt, "The Position of International Law Within the Indonesian Legal System", *Emory International Law Review*, Vol.8, Issue 1, 2014, p.15

⁴⁴ *Ibid.*

⁴⁵ The Court Judgement on Reviewing Law No. 3 of 1997 on Children's Courts (*Children's Court Law Case*) (Constitutional Court No.1/PUU-VIII/2010).

⁴⁶ Harijanti & Lindsey, *supra* note 40 at 151.

⁴⁷ Butt, *supra* note 43 at 16.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

1. a. The PKI Case or the Communist Party Case⁵¹

The applicants for this case involved two groups. The first was filed under the Case No. 011/PUU-I/2003, and the second was Case No. 017/PUU-I/2003. In accordance with the Court Rules of Procedure, these two petitions are allowed to be conducted simultaneously. The applicants sought to review the constitutionality aspect of Art. 60 (g) of Law No. 12 of 2003 on General Election, which limited the rights of citizens to stand and participate in the election. This article specifically prohibited former members of the banned Indonesian Communist Party, including its mass organizations and any person 'directly or indirectly involved in the G30S/PKI or any other illegal organization' to be elected members of the House of Representatives at the national and regional and local levels. They argued that Art. 60 g breached their constitutional rights as regulated by Art. 27 para (1), Art. 28D para (1) and Art. 28I para (2) of the Amended Constitution.

The Court's judgment handed down on February 24, 2004, struck down Art. 60 g, although one judge dissented.⁵² In its decision, interestingly, the Court referred to Art. 21 of the UDHR (Universal Declaration of Human Rights) and Art. 25 of the ICCPR (International Covenant on Civil and Political Rights) despite the absent argument on the reason why it used such international legal instruments. The Court recognized that a statute could limit individual rights, but it found that those limitations must be based on 'strong, reasonable, proportional and not extreme ground.' However, in its examination, the Court further found that the ban on communist-linked candidates in Art. 60 g were based solely on political grounds, and these were neither reasonable nor strong legal basis. It, thus, decided that Art. 60 g was against the Constitution. In particular, this article breached the following constitutional provisions:

a. Art. 27: equality before the law and government.

b. Art. 28D para (1): equal rights to recognition, security protection, and certainty of just laws and equal treatment before the law.

c. Art. 28D para (3): the right to equal opportunity in government.

d. Art. 28I para (2): rights to freedom from discriminatory treatment.

Accordingly, Art. 60 g was 'not legally binding,' and former communists and those suspected of being communists or linked to them were entitled to stand for election. The Court further said that this decision was intended as a step toward 'national reconciliation and justice for the future.'

1.b. The Bali Bombing case

The applicant, Masykur 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 (Law No. 16 of 2003). He argued that this anti-terrorism law, which was applied retrospectively to pursue him and other perpetrators, breached his constitutional right regulated in Article 28(1), which prohibits the use of retrospective law.

By a majority of five judges to four, the Court handed down a decision that declared the disputed statute unconstitutional. In making the judgment, the majority referred to some of the international legal instruments, including Art. 11 (2) UDHR, Art. 4 (2) ICCPR, and Rome Statute. Moreover, they cited the US Constitution that prohibits the use of retrospective law and regional legal instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedom and the American Convention on Human Rights.⁵³ According to Butt, from these conventions and examples, the majority reasoned:

[T]he essence of the principle of non-retroactivity is to protect against the criminalization of an act that was not considered a crime when the act was perpetrated . . . Also prohibited are new laws which stipulate a harsher penalty

⁵¹ See also, Harijanti & Lindsey, *supra* note 40 at 149.

⁵² Summary of the Court's Decision No. 011-017/PUU-I/2003.

⁵³ Summary of the Court's Decision No. 013/PUU-I/2003, pp. 4-5.

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.⁵⁴

Despite the significant use of international legal instruments, in particular, which take the form of international covenant or treaty, it is important to note that at the time, Indonesia was not a party to both the ICCPR and the Rome Statute. Like the PKI Case mentioned above, the question is, then, under what circumstances does the Court use such a covenant or treaty? Sadly, however, in its decision, the Court did not again explain further the reason why it used the international instruments. It is suggested that the Court should provide solid reasons that can enrich discussion regarding the position of international law within the Indonesian legal system.

1.c. The Abdurrahman Wahid case

The applicant was the former President who challenged the constitutional validity of Art. 6 para (1) of the 2003 General Election Law, which required candidates to be 'spiritually and physically capable of performing the duties and responsibilities of President or Vice President'. He argued that this article breached his constitutional rights, particularly Art. 27 para (1) of the Amended Constitution. He further argued that Art. 6 para (1) breached Indonesia's international legal obligation stemming from the ICCPR to which Indonesia had been a party.

In examining the case, the Court observed that the applicant should have referred to Art 2 of the ICCPR which prohibit discrimination based on 'race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The Court argued that Art. 6 para (1) of Law on General Election did not, in fact, apply discrimination based on any of these grounds. Surprisingly, the Court cited the 1975 Declaration on the Rights of Disabled Persons as the international instrument

most relevant to the case.⁵⁵ Art. 4 of the Declaration stated by the Court, says:

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.

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 added).⁵⁶

Simon Butt argues that the reference to these two Declarations was problematic as the character of the Declaration is non-binding resolution of the UN General Assembly.⁵⁷ Furthermore, Butt questions on the use of the Declaration on the Rights of Mentally Retarded Persons for this case in a way that the Court applies broader interpretation to the phrase of 'spiritual and physical capability' in Art. 6 para (1) of the disputed law to include 'mentally retarded persons'. In this context, I share the same view with that of Butt.

1.d. The ASEAN Charter case

Decided on February 4, 2013, this ASEAN Charter case was a much-anticipated case, with some scholars hoping that the Court would seek, in its decision, to clarify the position of international law within the Indonesian legal system.⁵⁸ The applicant was a coalition of NGOs seeking the constitutionality of Law No. 38 of 2008 concerning Ratification of the ASEAN Charter. The Law itself consists of two provisions. Art. 1 simply states that the House of Representatives ratifies the

⁵⁴ Butt, *supra* note 43 at.21.

⁵⁵ Indonesia is now a party to the Convention on Person with Disabilities.

⁵⁶ Butt, *supra* note 43 at 18.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

ASEAN Charter and the original English-language version is placed in the Appendix to the statute along with an Indonesian translation. Article 1 also states that the Charter is “an inseparable part of this statute.” 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.

The applicants did not ask the Court to invalidate either of the two articles, but rather challenge 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.” 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.” The applicants argued that both articles breached constitutional protection as provided by Art. 27 para (2)⁵⁹ and Art. 33.⁶⁰

Most of the judges decided that the challenged provisions did not violate the Constitution. Further, the Court said 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. However, because the state had not yet implemented its obligations under the Charter, no constitutional rights had been breached.⁶¹

Two judges were dissent arguing that the application should be rejected. Judges Hamdan Zoelva and Maria Farida Indrati made a distinction between general statutes and statutes that ratify international agreements.⁶² As a result of this distinction, according to Zoelva and Indrati, the Court has no jurisdiction to hear the case on ratifying statutes. Further, both judges share the opinion that general statutes will directly applicable to all persons in Indonesia whereas an

international agreement only binds the state and other countries that sign it.

2. Withdrawal and Cancellation of International Treaty

Article 85 of Law No.7 / 2014 on Trade, among others stipulate that for the seeks of national interests, government with the approval of the House of Representatives may review and withdraw its membership of an international trade agreement. This provision is controversial because it will put Indonesia as a country that does not have good faith to perform an international treaty. Although this provision has not been applied yet, the international community has begun paying particular attention to this provision, one of which is the European Union (EU). The EU realizes this provision would be a legal barrier to making a trade agreement with Indonesia. Therefore, the EU put this provision in the Market Access Database (MADB) as a trade barrier to protect the interests of member countries that may result.

International agreement is essentially a meeting point of various different national interests. Therefore, it is acceptable if Article 27 of the Vienna Convention of 1969 provides that a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty. National interest may be used as an excuse to withdraw from the treaty if it can be proven that the injured national interests is a result of fundamental changes in circumstances, material breach, or other reasons. National interest is not a legal term; it is a political term that opens to different interpretations that ultimately lead to the absence of legal certainties.

E. Managing National Interests and International Obligations

In Indonesia’s political and legal system, the three branches of government have a role in

⁵⁹ “Every citizen has the right to work and to earn a humane livelihood”

⁶⁰ (1) The economy is organized as a common endeavor based upon the principles of the family system.

(2) Sectors of production, which are important for the country and affect the life of the people are under the powers of the State.

(3) The land, the waters and the natural resources

within are under the powers of the State and must be used to the greatest benefit of the people.

⁶¹ Butt, *supra* note 43 at.28.

⁶² See The Judgement of the Court No. 33/PUU – IX / 2011 on Reviewing UU No. 38/2008 on the Ratification of the Asean Charter, pp.199-205.

managing the impact of international law. The executive undoubtedly is the most important player in this respect. Its responsibility includes conducting Indonesia's international relations, determining policy decisions about international law, and negotiating international treaties. The role of the House of Representatives and the Courts arises from their responsibilities to give approval to particular international treaties and implement Indonesia's international obligations.

The constitutional norms that are available in Art. 11 of the Constitution are not the sole legal instrument regulating the role of the House of Representatives. Such broad norms are then elaborated in some relevant laws, including Law No. 37 of 1999 concerning Foreign Relations and Law No. 24 of 2000 on Treaties. The latter Law, in particular, provides some forms of the House's involvement. Firstly, as regulated by Art 2, Minister who is responsible for international affairs provides political consideration and all necessary measures in making and concluding treaties by conducting consultation with the House of Representatives, in particular dealing with the public interest. Secondly, Art. 9 para (2) determines that ratification of international treaties can be carried out by law or presidential decree (now presidential regulation). Thirdly, Art. 11 para (2) gives power to the House of Representatives to evaluate the ratification of an international agreement by presidential regulation. The elucidation of Art. 11 para (2) states that such evaluation might be carried out, although the House's approval is not necessary. In doing its function and powers, the House may request the government's explanation or responsibility toward the international agreement that has been made and, surprisingly, can request the government to annul such an agreement if it considers it against the national interest.

In practice, the House of Representatives has not always given approval to the ratification of treaties. An example of this can be seen in its refusal to ratify the bilateral treaty between Indonesia and Singapore regarding Defence Cooperating Agreement, which was signed by the two governments on May 27, 2007. In the following month, the House of Representatives refused to ratify it as the treaty was made in a single

package with the Extradition Treaty. The Singaporean government insisted that it would hand over the person who committed corruption in Indonesia unless Indonesia would allow Singapore to conduct military training with Indonesia's army as well as with other countries in the Indonesian territory. The Indonesian Democratic Party-Struggle strongly rejected the proposed ratification with five arguments. These include: First, the making process was strictly closed both in Defence Cooperation Agreement as well as the Implementation Agreement. Second, the proposed treaty allowed the use of access and the use of Indonesian territory for military training conducted solely by the Singaporean Army. Third, the Singaporean Army would be allowed to conduct military training in Indonesian territory with other countries. Fourth, the proposed treaty gave little benefit to Indonesia, and finally, there was a misconception in regard to the policy of extradition. The Indonesian executive government argued that the connection between the two treaties, i.e., Defence Cooperating Agreement and Treaty on Extradition, was merely based on the spatial (*Ruang*) concept, which was replaced by the money concept.⁶³ All reasons, to a certain extent, demonstrate the minimal scope for legislative involvement in and public consultation about international law in Indonesia. This has prompted a concern that there is a 'democratic deficit' in Indonesia's engagement with the international or bilateral legal order. More importantly, the case of this refusal might help to explain the content of 'national interests.'

Another example was the ratification of the ASEAN Charter. Members of the House were greatly divided. For those who did not approve, the ASEAN Charter was considered having both substantive and procedural defects. Hajriyanto Y Thohari – a member of Commission I of the House – argued that from the point of procedural view, the making of the ASEAN Charter was contrary to Art. 2 of Law No. 24 of 2000 on International Treaty.⁶⁴ The Law clearly states the need to make a consultation with the House in respect of public interest. In fact, Head of State of the ASEAN members made the consultation after the signing of the ASEAN Charter in November

⁶³ Susi Dwi Harijanti & Ali Abdurahman, 'Keterlibatan Dewan Perwakilan Rakyat dalam Pelaksanaan Kekuasaan Presiden Di Bidang Hubungan Luar Negeri',

Research funded by Padjadjaran University, 2013, p.22.

⁶⁴ *Ibid*, pp. 22-3.

2007. In addition, Thohari also raised his concern in the context of substantive aspect. He argued that the ASEAN Charter fails to demonstrate significant progress for the ASEAN future. This was evident in the case of the uncertain establishment of ASEAN Human Rights Bodies.⁶⁵ Although the process of ratification of ASEAN Charter was quite complicated, but the House finally agreed to ratify through Law No. 38 of 2008. In 2011, there was an application to seek review on the constitutionality of this Law and in 2013 the Constitutional Court handed down its decision.

To balance its national interests and international obligations, Indonesia may consider Australia's practice in this regard. The Commonwealth Parliament of Australia also faced problem of lack of a role in treaty-making process. To respond, the Parliament introduced a reform in 1996, which briefly covered five aspects, as follows:

- a. The tabling in parliament of all treaty actions proposed by the government in parliament for at least 15 sitting days prior to binding action being taken, with an exemption for treaties considered by the Minister for Foreign Affairs to be particularly urgent or sensitive. Since 2002, treaties of major political, economic or social significance have been tabled for 20 sitting days prior to binding action being taken.
- b. The preparation, by the relevant Commonwealth Government department, of a National Interest Analysis (NIA) for each treaty, outlining information including the obligations contained in the treaty and the benefits for Australia of entering into the treaty.
- c. The establishment of the parliamentary Joint Standing Committee on Treaties (JSCOT).
- d. The establishment of the Treaties Council, comprising the Prime Minister, premiers and chief ministers.
- e. The establishment of the Australian Treaties Library on the Internet.⁶⁶

Apart from the works of the House of Representatives, the executive branch of government has the primary role in Indonesia's interaction with regional and international legal order. Under the Constitution, the executive government has an exclusive power to assume international obligation on behalf of Indonesia. Although the House of Representatives has the power to propose a bill in law making process, however, its power does not include a proposed bill on ratification of a particular treaty.

To describe the dominant role played by the executive, Australia is again an interesting example to compare. The Department of Foreign Affairs and Trade (DFAT) notes that the government 'retains the right to remove itself from treaty obligations if it judges that the treaty no longer serves Australia's national and international interests.'⁶⁷ One example is Australia's withdrawal from membership of the United Nations Industrial Development Organization (UNIDO) in 1996. The grounds for the withdrawal were that:

UNIDO's activities were not considered to make a substantial contribution to Australia's priority development objectives; [and] ... Funding obligations did not represent value-for-money or an appropriate contribution to Australia's aid objectives.⁶⁸

F. Concluding remarks

Unlike in most European countries, modern international law is not an integral part of the history of Indonesia. For European countries, international law is part of their value system. In other words, international law, in a certain extent, is part of their national interests. Therefore, the interaction between national interests and international obligations are relatively working in harmony, and it has a significant historical justification. Thus, it is reasonable if most of the European countries treat international law as the law of the land.

Indonesia views norms of international law critically because it is considered as an integral part of European

⁶⁵*Ibid*, p. 23.

⁶⁶ Hillary Charlesworth, *et.al*, *No Country is an Island: Australia and International Law*, UNSW Press, Sydney, 2006, pp 41-2.

⁶⁷ *Ibid*, p 37.

⁶⁸ *Ibid*, p 38.

colonialism. This appears to be a persistent view as the international order today still contains elements of imperialism, such as in the area of trade. The hegemony of Western countries in almost aspects of international order has encouraged developing countries to be more sensitive to their national interests. International obligations are often seen as a new form of imperialism. For Indonesia, it is important to formulate the interaction between international and domestic law in the form of interdependent relation. Within this framework Indonesia is encouraged to participate actively in the creation new norms of international law to protect its national interests.

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