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ARTICLE

International Law in the Indonesian Constitutional Court: A Typology of Use

Simon BUTT[1], BISARIYADI[2] and Fritz SIREGAR[3]

[1]Indonesian Law, University of Sydney Law School, Camperdown, NSW, Australia; [2]Constitutional Court, Indonesia and [3]Pancasila University, Indonesia
Corresponding author: Simon Butt; Email: simon.butt@sydney.edu.au

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Abstract

This article examines the Indonesian Constitutional Court's use of international law in its decisions between 2003 and 2023, when it referred to international legal instruments in approximately 10% of its constitutional review cases. However, it has not clearly explained why or how it uses international law. The article develops a typology of the Court's use of international law, categorising it into four areas: bolstering domestic law, interpreting domestic law, rejecting international law, and misconstruing international law. The Court primarily uses international law to support or confirm domestic constitutional and statutory provisions, especially when they are similar (or universal, as the Court sometimes observes). However, the Court sometimes uses international law to interpret domestic law, and occasionally, it even appears to misconstrue international law to reach a desired outcome. We conclude that, if anything, the Court practices pragmatic dualism, rather than pragmatic monism, as Palguna and Wardana argued in this Journal in 2024.

Keywords: Indonesian law; international law; Constitutional Court; monism; dualism

Since its establishment in 2003, the Indonesian Constitutional Court (*Mahkamah Konstitusi*) has referred to international law in many of its judgments. Indeed, in some of its early jurisprudence – such as in cases involving the constitutionality of retrospective criminal laws – the Court considered international law in some detail when interpreting new Indonesian constitutional provisions for the first time. By our count, the Court has referred to an international instrument in around 10% (167 of the 1729 or so) of the constitutional review cases it decided in the 20 years between 2003 and December 2023. However, the Court has not clearly explained why it mentions international law in its decisions, let alone how it should, can or will use the international law provisions and principles that it mentions. These are curious omissions because the Court does not have any obligations to mention international law in the first place. After all, Indonesian law does not prohibit any court from reaching a decision based purely on domestic law. It does not even specify that international law (even treaties Indonesia has ratified) has any domestic legal effect.

This article aims to fill the explanatory gap that the Court itself has left by developing a typology of categories of the Court's use of international law. We have developed this typology by, first, identifying judgments that refer to international law and, second,

examining those judgments for indications about how the Court appears to have used that international law. We begin by providing some necessary context: a brief description of Indonesia's constitutional history, an overview of Indonesia's legal system (including its judicial system and where the Constitutional Court sits within it), and the unresolved debate about whether Indonesia is monist or dualist. We then identify the international treaties the Constitutional Court has mentioned or used before setting out our typology and provide examples of the categories we have identified.

This article can be seen as a companion to a piece published in the *Asian Journal of International Law* in 2024 by I Dewa Gede Palguna and Agung Wardana entitled "Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law".[1] Palguna was a long-serving and well-respected Constitutional Court judge. He is now an academic (at Udayana University, Bali), as Wardana has been for many years (at the prestigious Gadjah Mada University Law Faculty). They argued that the Indonesian Constitutional Court practices "pragmatic monism", using a limited number of instructive case studies, which are notorious for the Court's use of international law. The present article pursues a broader endeavour – seeking more to describe how the Constitutional Court uses international law in its decision-making across a more diverse range of cases than to fit this within a theoretical framework. This leads us to the conclusion, explained below, that, if anything, the Court practices "pragmatic dualism".[2] We hope that our different conclusions will spur much-needed debate about the place of international law in the Indonesian domestic legal system.

I. Constitutional history and legal system

Indonesia is a diverse and sprawling archipelago of more than 17,500 islands spread across over 5,000 kilometres from East to West. Located in Southeast Asia, its population is around 280 million, making it the largest Association of Southeast Asian Nations economy and the world's fourth.[3] The nation is highly diverse – in ethnicity, religious practice and socio-economic development.

Indonesia declared its Independence on 17 August 1945, after around 350 years of Dutch colonialism.[4] Indonesia has since had four constitutions. Indonesia's first President, Soekarno, proclaimed the new Republic's first Constitution – the "1945 Constitution" on 18 August 1945. The second was the Constitution of the Federal Republic of Indonesia, which lasted from 27 December 1949 until 17 August 1950, when Indonesia's third Constitution – the Interim Constitution of 1950 – was brought into force. On 5 July 1959, Soekarno unilaterally reinstated the 1945 Constitution, which remained in force unamended throughout Soeharto's New Order (1966–1998).[5] After Soeharto's fall, the 1945

[1] I Dewa Gede PALGUNA & Agung WARDANA, "Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law" (2024) Asian Journal of International Law 1–21.

[2] We note that, on the international plane, the International Court of Justice has, too, adopted a pragmatic approach to domestic compliance with international obligations, holding that national circumstances and political realities can be relevant when considering whether the state has met those obligations.

[3] "Population Comparison", (2025), online: The World Factbook https://www.cia.gov/the-world-factbook/field/population/country-comparison/.

[4] Note, however, that the duration of Dutch colonialism is contested, with one scholar, Resink, arguing that it was much shorter: G J RESINK, *Indonesia's History Between the Myths. Essays in Legal History and Historical Theory* (The Hague: W. van Hoeve, 1968).

[5] For discussion of these constitutions and the questionable legality of the transitions from one to the next, see Simon BUTT, "Constitutions and Constitutionalism" in Robert HEFNER, ed, *Routledge Handbook of Indonesia* (London: Routledge, 2017) 54.

Constitution was amended yearly from 1999 to 2002.[6] Although still entitled the "1945 Constitution", the document is now very different from its original version. The old structural core of the document remains – including Indonesia's five-pronged national ideology, Pancasila, in the Preamble. But features of liberal democracy replaced provisions that underlay the authoritarian regimes of Soekarno (from 1959) and Soeharto.

Indonesia's legal system is based on the Dutch legal system in place at the time of Independence. During colonisation, the Dutch had enforced a pluralist legal order. Dutch law applied to Europeans in the colony and Indonesians lived largely under customary law.[7] The 1945 Constitution retained Dutch institutions and colonial law and applied them to the entire population, pending the creation of new institutions and national laws.[8] In this way, Indonesia also inherited the civil law tradition. The Dutch Civil Code and civil procedural codes remain largely in force in Indonesia today, as do many other Dutch-made laws.[9] However, Indonesian lawmakers have issued thousands of laws in the intervening decades.

II. Judicial institutions

The Indonesian Constitution establishes two apex courts: the Constitutional Court and the Supreme Court.[10] The Supreme Court oversees four judicial branches, each with a distinct jurisdiction. These are the military courts (*pengadilan militer*), religious courts (*pengadilan agama*), administrative courts (*pengadilan tata usaha negara*), and general courts (*pengadilan umum*). Most civil litigation and criminal prosecutions are heard at first instance in the general courts, which operate at the district (*kabupaten*) and city (*kota*) level. Within select general courts are specialised courts, including an anticorruption court, commercial court, human rights court (including an ad hoc court for historical crimes), industrial relations court, and taxation court. Although judges can sit alone in some circumstances, they generally sit in panels of three or sometimes five, led by a chairperson. Each court has a chief justice (*ketua*) and at least one deputy chief justice (*wakil ketua*).

A. The Constitutional Court

Before the Constitutional Court's establishment, Indonesia had no tradition of constitutionalism, in the sense that the government considered itself bound by the Constitution.[11] While successive governments claimed to rule under the Constitution, there were no mechanisms by which citizens could hold the government to it, such as by challenging the constitutionality of government actions or laws. The 1945 Constitution was vague, allowing the government to interpret it at will. Even the handful of rights mentioned in it

[6] For discussion on these amendments and the debates surrounding them, see Denny INDRAYANA, *Indonesian Constitutional Reform, 1999-2002: An Evaluation of Constitution-Making in Transition* (Jakarta: Kompas, 2008).

[7] MB HOOKER, *A Concise Legal History of South-East Asia* (Oxford; New York: Clarendon Press; Oxford University Press, 1978).

[8] Articles I and II of the Transitional Provisions of the 1945 Constitution.

[9] We note that the Dutch-derived Criminal Code was replaced in 2023 and will come into operation in 2026.

[10] See Articles 24, 24A, and 24C of the Constitution.

[11] Although Indonesia is said to have experienced some form of constitutional democracy for a short period in the 1950s. Herbert Feith suggests this period was 1953–1957; Adnan Buyung Nasution suggests 1957–1959: Herbert FEITH, *The Decline of Constitutional Democracy in Indonesia* (Ithaca N.Y.: Cornell University Press, 1962); Adnan Buyung NASUTION, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante, 1956-1959*, 1st. ed (Jakarta: Pustaka Sinar Harapan, 1992).

were unenforceable.[12] Constitutional review, arguably a prerequisite to constitutionalism, was not available in Indonesia until 2003, when the Constitutional Court heard its first case.

The Constitutional Court has several functions, including constitutional review.[13] This is significant, because the 2000 amendment to the Constitution inserted a catalogue of human rights that largely reproduce the rights granted in key international human rights treaties (including the International Covenant on Economic, Social and Cultural Rights [ICESCR] and the International Covenant on Civil and Political Rights [ICCPR]).[14] However, this power is limited to assessing the consistency of national statutes with the Constitution. This means that the Constitutional Court cannot formally review the constitutionality of other types of laws, such as government, ministerial and local-government regulations, or even government action.[15] The review of regulations for consistency with statutes falls to the Supreme Court, and the review of government action to the administrative courts.[16] On the whole, this jurisdictional separation is strictly maintained. In practice, this is a very significant limitation, given that most Indonesian laws take the form of regulations.[17] The Constitutional Court also has no power to determine whether the decisions of other courts are constitutional.

The Constitutional Court has nine judges. The three arms of government – the president (as head of the executive), the legislature, and the Supreme Court – are each responsible for filling three positions on the bench. If a position becomes vacant, such as through retirement or dismissal, the institution that nominated the outgoing judge fills the vacancy.[18] When the Constitutional Court was first established, its judges could serve up to two 5-year terms.[19] They elected their own chief and deputy chief justices, who held their positions for two years and six months.[20] In 2020, the Constitutional Court Law was amended to remove judicial terms. Now, judges cannot be removed until they reach the mandatory retirement age of 70, unless they meet the conditions for dismissal, such as neglect of duties or misconduct.[21] The minimum age for Constitutional Court judges was also lifted from 47 to 55.[22]

[12] Todung Mulya LUBIS, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: Gramedia Pustaka Utama, 1993).

[13] Its other functions include deciding motions to impeach the president and vice president, resolving electoral disputes, dissolution of political parties and helping settle jurisdictional disputes between institutions established by the Constitution: Articles 24C(1) and 24C(2) of the Constitution; Article 10 of the 2003 Constitutional Court Law.

[14] Stefanus HENDRIANTO, "Against the Currents: The Indonesian Constitutional Court in an Age of Proportionality" in Po Jen YAP, ed, *Proportionality in Asia* (Cambridge: Cambridge University Press, 2020) 169 at 172. However, this view is contested. BISARIYADI argues that the insertion of human rights in the constitutional amendment process was heavily influenced by the human rights charter in *Ketetapan MPR XIII/MPR/1998 on Human Rights* which emphasised Indonesian rather than international values: BISARIYADI, *Hak Konstitusional* (Jakarta: RajaGrafindo Persada, 2023).

[15] Tim LINDSEY & Simon BUTT, *Indonesian Law* (Oxford University Press, 2018); Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden; Boston; Brill Nijhoff, 2015). Nevertheless, the Constitutional Court has reviewed regulations, albeit indirectly and occasionally, with the most notorious example being Constitutional Court Decision 85/PUU-XI/2013.

[16] The judicial review jurisdiction of the Supreme Court is found in Article 24A(1) of the Constitution.

[17] Tim LINDSEY, "Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in a Split Jurisdiction" (2018) 4:1 Constitutional Review 27–44.

[18] Article 26, 2003 Constitutional Court Law. On the nomination system and its variations, see Lydia Brashear TIEDE, "Mixed Judicial Selection and Constitutional Review" (2020) 53(7) Comparative Political Studies 1092–123.

[19] Article 22, 2003 Constitutional Court Law.

[20] Article 4(3), 2003 Constitutional Court Law.

[21] Articles 23(1) and (2), 2011 Constitutional Court Law (first revision).

[22] Article 15(2d), 2020 Constitutional Court Law (third revision).

Further, the amendment doubled the terms of chief and deputy chief justices from two-and-a-half years to five.[23] At the time of writing, the national parliament was considering further changes to these terms and requirements.

Over the two decades since its establishment, the Court developed a public profile and reputation in Indonesia that appeared stronger than any other Indonesian court. This was arguably the product of strong leadership (at least from its first two chief justices, Professors Jimly Asshiddiqie and Mahfud MD)[24] and its prominence as a forum for relatively free debate about important matters of state. Its decisions in those matters, some of which have been controversial, even polarising, generally contain more detailed reasoning than the decisions of other Indonesian courts. Also notable have been the Court's overall independence and integrity, at least during its first decade or so. In recent years, these qualities have been questioned, with two of its judges (including a serving chief justice) being convicted of taking bribes.[25] Another judge was replaced by the national parliament for issuing decisions that the parliament deemed unfavourable to it.[26]

Most recently, the Court came under heavy fire after it reversed a string of its own decisions refusing to reduce the statutory minimum age limit for presidential and vice presidential candidates.[27] It reversed these decisions in October 2023, in the leadup to the deadline for nomination of presidential and vice-presidential candidates for the 2024 presidential elections. This decision enabled then-serving Indonesian President Joko Widodo's 36-year-old son, Gibran Rakabuming Raka, to be nominated as a vice-presidential candidate (a position he ultimately won as President Prabowo Subianto's running mate). The Court's decision appeared to be made at the behest of its then-Chief Justice, Anwar Usman, who is Raka's uncle. The entire Court was hauled before an Ethics Council (*Majelis Kehormatan*). All judges were formally admonished, and Usman was removed from the chief justiceship (although he remains a judge and may yet see his position restored).[28] There are, therefore, real concerns about the Court's impartiality and credibility and, ultimately, its future after the 2024 elections. While we regard the decisions discussed in this paper as genuine and independently-arrived-at, it is too early to say whether the Court's future decisions will be. Political interference and corruption pose significant threats.

[23] Article 4(3), 2020 Constitutional Court Law (third revision).

[24] At the time of writing, six chief justices had served the Court since its establishment: Jimly Asshiddiqie (2003–2008) Mahfud MD (2008-2013); M. Akil Mochtar (April–October 2013); Hamdan Zoelva (2013–2015); Arief Hidayat (2015–2018) and Anwar Usman (2018–present). On leadership of the Court, see Stefanus HENDRIANTO, "The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia" (2018) 25(3) Washington Law Journal 499.

[25] Justice Akil Mochtar was convicted for extorting a total of around Rp 50 million in bribes from parties contesting elections or their representatives over the course of two years to fix the outcome of regional head election disputes. For this, he was sentenced to life imprisonment – the harshest sentence for a corruption conviction in Indonesian history. In 2017, Constitutional Court judge, Patrialis Akbar, was also convicted for receiving bribes relating to a constitutional challenge before the Court. For discussion of these cases, and other cases of judicial corruption, see Simon BUTT, *Judicial Dysfunction in Indonesia* (Melbourne: Melbourne University Press, 2023).

[26] Jimly ASSHIDDIQIE, "The DPR attacks the Constitutional Court – and judicial independence", *Indonesia at Melbourne* (10 October 2022), online: https://indonesiaatmelbourne.unimelb.edu.au/the-dpr-attacks-the-constitutional-court-and-judicial-independence/.

[27] Constitutional Court Decision 90/PUU-XXI/2023 (summary in English available at https://en.mkri.id/download/summary/summary_1941_1702950064_17ad96544a32db0ce87c.pdf).

[28] This account is based on Simon BUTT & Tim LINDSEY, "A Twist in Indonesia's Presidential Election Does Not Bode Well For The Country's Fragile Democracy", *The Conversation* (24 October 2023) <http://theconversation.com/a-twist-in-indonesias-presidential-election-does-not-bode-well-for-the-countrys-fragile-democracy-216007>. See Ethics Council decisions No. 2/MKMK/L/11/2023; 3/MKMK/L/11/2023; 4/MKMK/L/11/2023; and 5/MKMK/L/11/2023.

Despite these controversies, the Court has, through its decisions, created a body of constitutional jurisprudence that Indonesia had previously lacked.[29] These decisions have, in turn, generated a vast academic literature on the Court, both in Indonesia and elsewhere. Much of this literature has focused on the Court's interpretation and application of Indonesia's constitutional Bill of Rights, added to the Constitution in 2000. These cases have involved, for example, the right to life,[30] freedom of religion,[31] and indigenous rights.[32] While some of this literature has considered the Court's treatment of international law in those cases, very little of it has focused on the role of international law in the Court's decision-making.[33]

B. Relationship between international law and domestic law

The literature on the status of international law within domestic legal systems commonly refers to countries following "monism" or "dualism" or something in between. For Kelsen, an influential proponent of monism, international and domestic law should be seen as components of a single system, with international law being "above" domestic law (even national constitutions).[34] By contrast, dualism holds that international and domestic law are different systems, with different fields of operation: international law primarily governs international relationships, while domestic law governs intranational relationships (such as between subjects or the state and its subjects).[35] On this view, for international law to be applied in a domestic legal system, it must first be transformed into rules of national law. These are mere theories.[36] While some states might be influenced by them more than others, in practice, they are of limited utility because they do not explain how states actually behave.[37] Most states have developed their own ways of giving effect to international law (if they give effect to it at all).[38]

The position of international law in Indonesia's domestic legal system is unclear. It has not been specified in any legal instrument or judicial decision. The Constitution itself mentions international agreements, but does not specify their status. Instead, it specifies merely that the president can enter into treaties, but must first seek parliamentary approval if the agreement has "broad and fundamental consequences for the lives of the Indonesian people, creates burdens on the state's finances, and/ or requires amendments to laws or the enactment of new ones" (Article 11(2)).

[29] Simon BUTT & Tim LINDSEY, *The Indonesian Constitution: A Contextual Analysis* (Oxford: Hart, 2012) at 103.

[30] Simon BUTT, "Judicial Responses to the Death Penalty in Indonesia" (2014) 39(2) Alternative Law Journal 134–35; *A Key Domino? Indonesia's Death Penalty Politics*, by Dave Mcrae (Sydney: Lowy Institute, 2012).

[31] Melissa CROUCH, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law" (2012) 7(1) Asian Journal of Comparative Law 1–46; Stewart FENWICK, *Blasphemy, Islam and the State: Pluralism and Liberalism in Indonesia* (Abingdon; New York: Routledge, 2017); Simon BUTT, "Between Control and Appeasement: Religion in five Constitutional Court decisions" in Tim LINDSEY & Helen PAUSACKER, eds, *Religion, Law and Intolerance in Indonesia* (London: Routledge, 2016) 42.

[32] Simon BUTT, "Traditional Land Rights before the Indonesian Constitutional Court" (2014) 10(1) Law Environment and Development Journal 57.

[33] A notable exception is the excellent thesis of Diana ZHANG: "The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003-2008" (University of Melbourne 2010). For a more recent exception, see Palguna & Wardana, *supra* note 4.

[34] Hans KELSEN, "The Pure Theory of Law and Analytical Jurisprudence" (1941) 55(1) Harvard Law Review 44, 66–8.

[35] L OPPENHEIM (ed), *Oppenheim's International Law* (Longmans, 8th edition, 1955) 37.

[36] Hans KELSEN, *General Theory of Law and State* (Routledge, Republished from 1949 original, 2017) 388.

[37] André NOLLKAEMPER and André NOLLKAEMPER, "Introduction" in Janne E NIJMAN and Janne E NIJMAN (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press, 2007) 2.

[38] Eileen DENZA, "The Relationship between International and National Law" in Malcolm EVANS (ed), *International Law* (Oxford University Press, 5th ed, 2018) 388.

This legal gap has led to much academic discussion and speculation 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).[39] This discussion has primarily focused on the position of treaties, ignoring other important sources, such as customary international law.

Most Indonesian scholars conclude that Indonesia is dualist, at least regarding treaties, observing that many ratified international treaties lie dormant and unenforceable by Indonesian courts until they are transformed into domestic law by statute or regulation.[40] However, others reach the opposite conclusion: that Indonesia is monist.[41] Whatever the true position of international law within Indonesian domestic law, the result in Indonesia is significant uncertainty and confusion about whether rules in international treaties ratified by Indonesia automatically form part of Indonesian law.

This confusion is fueled by judicial inconsistency, with many Indonesian general courts ignoring arguments based on human rights arguments, and others, including the Supreme Court, directly applying it.[42] Generally speaking, however, these general Indonesian courts tend to treat international law as a source of ideas, rather than a source of legal obligations with domestic effect.[43]

On our reading, the Constitutional Court addresses international law more regularly than these other Indonesian courts. We now turn to consider how it has used international law in its decisions.

III. International treaties cited by the Constitutional Court

As stated above, the Constitutional Court has mentioned an international legal instrument in around 167 of the 1729 or so constitutional review cases it decided between its establishment in 2003 and December 2023.[44] While the Court has mentioned customary international law, it has not specifically identified or applied principles of customary international law in any case we know.

The Constitutional Court has mentioned in its judgments all of the major international human rights treaties Indonesia has signed and ratified, except for the Convention on Rights of Persons with Disabilities. Table 1, based on our own searches, identifies the number of judgments in which each of these treaties appears.

[39] For an excellent discussion of these two theories and the mediation of them using pragmatism in the context of Indonesia, see Palguna & Wardana, *supra* note 4 at 406–11.

[40] Damos Dumoli AGUSMAN, *Hukum Perjanjian Internasional: Kajian Teori dan Praktik Indonesia* (Jakarta: Refika Aditama, 2010).

[41] Mochtar KUSUMAATMADJA & Etty R AGOES, *Pengantar Hukum Internasional* (Bandung: Penerbit Alumni, 2003).

[42] Shidarta, Stijn Cornelis VAN HUIS & Eko RIYADI, "How Do Indonesian Judges Approach Human Rights in Private Law Cases? A Comparative Exploration" (2022) 15(2) Journal of East Asia and International Law 293–314; Aksel TOMTE et al, *Metodologi Hukum Hak Asasi Manusia: Nalar, Praktik, dan Tantangannya dalam Sistem Peradilan Indonesia* (Jakarta: RajaGrafindo Persada, 2023).

[43] On this distinction, see Brent MICHAEL, "International Law in Constitutional Interpretation: A Theoretical Perspective" (2012) 23 Public Law Review 197. Like most civil law countries, Indonesia lacks a formal system of precedent. Accordingly, judges are not strictly bound by prior decisions, even of superior courts. However, most jurists accept that judicial consistency is highly desirable.

[44] We distinguish here mentions of international legal instruments in the Court's reasoning (the chapter in the Court's decisions entitled *pertimbangan hukum*) as opposed to mentions in the legal submission of any of the parties, including applicants or related parties (*pihak terkait*, similar to amicus curiae). In our observation, these types of submissions tend to be very long, and the Court does not always mention, let alone address, all of them, in its reasoning.

Table 1. Citations of major international human rights treaties.

Treaty	Judgments
International Covenant on Civil and Political Rights	50
Universal Declaration of Human Rights	30
International Covenant on Economic, Social and Cultural Rights	14
Convention on the Elimination of All Forms of Discrimination Against Women	7
Convention on the Rights of the Child	4
Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment	2
International Convention on the Elimination of All Forms of Racial Discrimination	1
Convention on the Rights of Persons with Disabilities	0

Table 2. Cited agreements that Indonesia has ratified.

Treaty	Judgments
United Nations Convention Against Corruption	7
United Nations Convention Against Illicit Traffic in Narcotic and Psychotropic Substances	4
Rome Statute of the International Criminal Court	2
Convention on Mutual Administrative Assistance in Tax Matters	1
The ASEAN Charter	1

The Court has also referred to the United Nations Declaration on the Rights of Indigenous Peoples, even though Indonesia has signed but not ratified it.[45]

The Court has cited other types of international and regional agreements that Indonesia has signed and ratified, as follows in Table 2.

The Court has also mentioned instruments produced by organisations of which Indonesia is a member (even where the instrument itself might not be strictly binding). These include various conventions of the International Labour Organization (ILO) (seven judgments); United Nations comments, resolutions and congresses (seven judgments); World Trade Organisation agreements (five judgments); and an Organisation for Economic Co-operation and Development declaration one1 judgment).

Interestingly, the Court has referred to the Vienna Convention on the Law of Treaties (7 judgments), even though Indonesia has not signed, let alone ratified, it. Of course, the Court's references to the Vienna Convention are not controversial. Even though the Convention is not in force, given that an insufficient number of its signatories have ratified, it is considered to represent the general international law of treaties.[46] The Court has also mentioned European conventions (four judgments) and council directives (two judgments). Of course, these are not binding on Indonesia, which is not a European country. It

[45] For an explanation of Indonesia's failure to ratify, see Irene I HADIPRAYITNO, "The Limit of Narratives: Ethnicity and Indigenous Rights in Papua, Indonesia" (2017) 24:1 International Journal on Minority and Group Rights 1–23.

[46] Daniel REICHERT-FACILIDES, "Down the Danube: The Vienna Convention on the Law of Treaties and the Case Concerning the GabcïKovo-Nagymaros Project" (1998) 47:4 International & Comparative Law Quarterly 837–54.

has also extensively considered various instruments emphasising the importance of judicial independence (five judgments), particularly the Bangalore Principles 2002.

IV. The Constitutional Court's use of international law

As mentioned at the outset, the Constitutional Court has not clearly explained why it mentions international law or how it should, can or will use international law principles. Nevertheless, in our observation, in practice, the Court uses international law in specific ways. In this section, we describe these uses and provide case examples, offering hypotheses to explain those uses.

A. General impressions

As a preliminary matter, we note that, in some cases, the Court has declared that because Indonesia has ratified a specific treaty, Indonesia is bound by that treaty under the *pacta sunt servanda* principle.[47] In this context, the Court sometimes refers to the Vienna Convention, Article 38(1) of the Statute of the International Court of Justice, or even simply that as a member of the international community, Indonesia is bound to the treaties it signs.[48] To underline the point, the Court sometimes adds that, under Article 27 of the Vienna Convention, a state cannot use its national law as an excuse for failing to implement an international agreement to which it is otherwise bound.[49]

Nevertheless, the Court's affirmations that Indonesia is bound by the treaties it has ratified are occasionally accompanied by a statement asserting Indonesia's "sovereignty".[50] So, for example, in decision 86/PUU-XIV/2016, the Court declared that Indonesia was bound by Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) because it had ratified it, but emphasised that the Constitution allowed the state to limit, under Article 28J(2) of the Constitution, rights CEDAW might otherwise impose.[51] The Court has also pointed out that Indonesia can choose whether to be bound by international agreements and withdraw from participation if desired.[52]

Given its emphasis on ratification obligations but also Indonesia's ultimate sovereignty, it is perhaps unsurprising that the Court appears to have avoided expressing a view on whether Indonesia follows monism or dualism (which, as mentioned, is unresolved under Indonesian law). The only reference we could find to the monism/dualism debate is equivocal and is as follows:

> As a result of Indonesia's participation in an international agreement, particularly if it is a convention, and particularly *if the view that Indonesia follows dualism is followed*...then the participation requires national implementing legislation, that is, making international law (in this case, the Convention) a part of national law through enactment into national law so that it binds all citizens....If international law is

[47] See, for example, Constitutional Court Decisions 33/PUU-XIII/2015 at [3.16.2]; 007/PUU-XII/2014 at [3.15]; 102/PUU-VII/2009 at [3.15].

[48] Including because the Vienna Convention is a codification of international custom that has been accepted as law by the international community: Constitutional Court Decision 102/PUU-XV/2017.

[49] Constitutional Court Decision 102/PUU-XV/2017.

[50] Constitutional Court Decision 13/PUU-XXII/2024, 95. On the case of cannabis for medical use, Indonesia's government filling reservation on Article 48 of Single Convention on Narcotic Drugs 1961, under the argument of to impose the state sovereignty principle, as it was defended by the Court.

[51] Constitutional Court Decision 86/PUU-XIV/2016.

[52] Constitutional Court Decision 33/PUU-IX/2011 at [3.18].

> adopted into national law through implementing legislation...then that international law has been adopted into national law...[53] [our emphasis]

A notable case that presented an opportunity for the Court to clarify whether Indonesia was monist or dualist was Constitutional Court decision 102/PUU-XV/2017, which concerned the constitutionality of Law 9 of 2017.[54] In response to Indonesia's signing of the Convention on Mutual Administrative Assistance in Tax Matters (the "Tax Convention"), the Indonesian government produced two legal instruments: Presidential Regulation 159 of 2014 and Law 9 of 2017. The applicants argued that only one of these instruments was necessary and that having both caused legal uncertainty (which violates Article 28D(1) of the Constitution). The Court pointed out that the applicant had mistaken the purpose of the Presidential Regulation which, according to the Court, merely conveyed Indonesia's consent to be bound to the Tax Convention (under Article 11 of the Vienna Convention). By contrast, Law 9 of 2017 was passed to "implement" (*melaksanakan*) provisions of the Tax Convention.[55]

What the Court meant by "implement" is unclear. The Court pointed out that Law 24 of 2000 on International Agreements requires conventions such as the Tax Convention to be endorsed by the Indonesian national parliament. The Court said that Law 9 of 2017 provided this endorsement for the Tax Convention. However, the Court did not go so far as to say that Law 9 of 2017 was intended to *transform* the content of the Convention into domestic law. It is quite possible that the Court merely intended that under Indonesian Law, binding Indonesia to the Tax Convention required a statute, not a mere presidential regulation. That statute did not need to carry the treaty's substance into Indonesian law; it could merely convey Indonesia's ratification and leave the transformation of the Convention to subsequent legislation or regulation.

In a handful of cases, the Court has described how international law has influenced the content of domestic law, or even prompted its enactment. For example, the Court has stated that changes to Indonesia's anticorruption laws have accorded with efforts to "synchronise and harmonise national and international legal instruments", such as the United Nations Convention against Corruption (UNCAC) (which, the Court noted, Indonesia has ratified).[56] In one employment-related case, the Court referred to a new Workplace Law being enacted to replace an old one, not just because the old law no longer accorded with the "demands and current developments", but also to realise guarantees for the basic rights of workers that were in line with various ILO conventions.[57] However, in our view, the Court cannot be taken, in these cases, to have suggested that international law has supplanted domestic law. Rather, it has confirmed that only domestic law directly applies in Indonesia; international law may influence Indonesian law-makers but will only apply if domestically enacted.

B. Bolsters domestic principles

The Court commonly refers to international law when one of the rights or principles of international law is the same as or similar to domestic constitutional rights or principles.[58] Here, the court sometimes also observes that those rights or principles are "universal". In

[53] Constitutional Court Decision 102/PUU-XV/2017 at [3.15].

[54] The primary purpose of Law 9 of 2017 was in fact to endorse Emergency Law 1 of 2017, issued by the President. The president has power under Article 22(1) of the Constitution to issue such laws, which have statutory authority, but which lapse if not endorsed by the DPR at its next sitting (Article 22(2) and (3)).

[55] Constitutional Court Decision 102/PUU-XV/2017 at [3.10].

[56] Constitutional Court Decision 25/PUU-XIV/2016 at [3.10.6].

[57] Constitutional Court Decisions 77/PUU-XVI/2018 and 75/PUU-XX/2022.

[58] Constitutional Court Decision 29/PUU-V/2007 at [3.22.2].

particular, the Court has emphasised the universality of Indonesian constitutional principles by reference to international law in cases involving the prohibition of discrimination[59] and the presumption of innocence.[60] However, the Court's reference to universality should not be taken to mean that the Court will use international law to interpret or apply the domestic constitutional right as a matter of course. (It certainly uses international law in this way, but only in a limited number of cases, as discussed below.) Indeed, the Court has stressed that this use of international law does not mean that the Court has used "fulfilment of international obligations…as a basis to review the constitutionality of a statutory norm".[61]

How the Court expresses the identity or similarity between the domestic and international law differs from case to case. For example, it sometimes sets out the domestic source of the right and then says "so too" (*demikian juga*) the international source.[62] In others, the Court says that the constitutional and international rights are "consistent" (*sejalan dengan*)[63] or "conform" (*sesuai*) with each other.[64] However, one trend is clear. The Court *almost always* refers to the relevant domestic legal principle *before* referring to its international counterpart. Exceptions are very rare.[65] In our view, this may be a deliberate textual strategy that emphasises the pre-eminence of the state's obligations under the domestic Constitution while also implicitly justifying the content of that domestic law by reference to international standards.

The Court has taken this domestic-source-first approach in many cases, as demonstrated in Table 3.

1. Discrimination cases

In discrimination cases, the Court has often referred to Indonesian discrimination law – contained in the 1999 Human Rights Law[66] and the Constitution – and noted that it is "consistent with" (*bersesuaian dengan*) or "in line with" (*sejajar dengan*) these international treaties, notably the ICCPR and Universal Declaration of Human Rights (UDHR),[67] or that discrimination was prohibited by both Indonesian law and these treaties.[68] In other words, the Court appears to have used international law to support or confirm its decisions about discrimination based on the Constitution and domestic law.[69]

Some discrimination cases have involved challenges to statutes preventing particular categories of citizens from standing for election.[70] In one famous case, former Indonesian President Abdurrahman Wahid, along with several others, challenged the constitutional

[59] Constitutional Court Decision 033/PUU-XIII/2015 at [3.16.2]; 19/PUU-V/2007.

[60] Constitutional Court Decision 24/PUU-III/2005; 71/PUU-XIV/2016.

[61] Constitutional Court Decision 33/PUU-XIII/2015 at [3.16.2].

[62] For example, Constitutional Court Decision 67/PUU-XVII/2019; 14/PUU-X/2012, per Zoelva J in dissent.

[63] For example, Constitutional Court Decision 67/PUU-XVII/2019.

[64] For example, Constitutional Court Decision 020/PUU-I/2003.

[65] One such exception – where the Court mentioned the international source for the right, freedom or principle before articulating the domestic source – occurred in a case about the minimum voting age. The Court said that right to vote and be elected can be limited provided that doing so is proportional and not excessive, mentioning Article 29(2) of UNDRH and then said "Article 28 J(2) even justifies such a restriction": 75/PUU-VII/2009 at [3.11.2].

[66] Law 39 of 1999 on Human Rights.

[67] The Court has not limited itself to citing the UDHR and ICCPR in discrimination cases. In a case about age discrimination, the court referred to 2007/78/EC of 27 November 2000, which allows member states to provide that differences of treatment on grounds of age is not discrimination, if objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives: Constitut)ional Court Decision 28-29/PUU-IV/2006.

[68] Constitutional Court Decisions 5/PUU-V/2007; 19/PUU-V/2007; 023/PUU-VII/2009.

[69] Constitutional Court Decision 86/PUU-XIV/2016.

[70] Constitutional Court Decisions 011-017/PUU-I/2003, 102; 016/PUU-V/2007; 016/PUU-V/2007, 79 and 82; and 003/PUU-VII-2009, 129-30, which cites the ICCPR.

Table 3. Court cites domestic legal source before the international source.

Right, freedom or principle	Domestic source cited	International source(s) cited	Constitutional Court decision(s)
Right to communicate and obtain personal information	Article 28F of the Constitution	Article 19 of the UDHR	67/PUU-XVII/2019
Freedom of expression	Article 28E(2) of the Constitution	Articles 19(1) and 19(2) of the ICCPR and Johannesburg Principles on National Security, Freedom of Expression and Access to Information	014/PUU-VI/2008; 78/PUU-XXI/ 2023
Freedom of association	Article 28 of the Constitution	Article 20 of the UDHR and Article 21 of the ICCPR	020/PUU-I/2003
Right to honour and reputation	Article 28G of the Constitution	Article 12 of the UNDHR and Article 17 of the ICCPR	014/PUU-VI/2008; 001/PUU-IX/2011
Right to privacy	Article 28G (1) of the Constitution	Article 12 of the UDHR and Articles 17 and 19 of the ICCPR	78/PUU-XVIII/2020 citing 50/PUU-VI/2008
Right to vote and be elected in general elections	Law 39 of 1999 on Human Rights Law	ICCPR	102/PUU-VII/2009
Equality before the law	Article 27(1) and 28D of the Constitution	ICCPR and UDHR	Dissent in 120/PUU-VII/2009
Presumption of innocence	Implicit in Indonesia being a law state (*negara hukum*)	Article 14(2) of ICCPR	024/PUU-XIII/2015; 025/PUU-XIII/2015; 71/PUU-XIV/2016
Right to work, decent working conditions and an adequate standard of living	Article 28D(2) of the Constitution	Article 6(1) ICESCR	061/PUU-VIII/2010; 13/PUU-XV/2017
Preferential payment of employee salaries in the event of bankruptcy	Article 28D (2) of the Constitution	European Council Directive OJC 135/2,9.6.1978	018/PUU-VI/2008
Right of citizens to leave the country	Article 28E(1) of the Constitution	ICCPR	64/PUU-IX/2011
Judicial independence (and its prerequisites)	Indonesian judicial ethics codes	Bangalore Principles of Judicial Conduct 2002 and other international standards	053/PUU-XIV/2016; 043/PUU-XIII/2015; 92/PUU-XVIII/2020; 85/PUU-XVIII/2020
Right to religious freedom	Law 39 of 1999 on Human Rights Law and Law 12 of 2005	Article 18 of the ICCPR and the Universal Declaration	140/PUU-VII/2009

(*Continued*)

Table 3. (*Continued.*)

Right, freedom or principle	Domestic source cited	International source(s) cited	Constitutional Court decision(s)
Rights of children	Article 28B(2) of the Constitution; Child Protection Law	UN Convention on the Rights of the Child	1/PUU-VIII/2010; 22/PUU-XV/2017
The right to basic necessities (of life)	Preamble, and Articles 28C(1) and 28H(1) of the Constitution	Articles 7–15 of ICCPR	39/PUU-XIV/2016
Limitation of copyright holder's exclusive rights in the public interest	Indonesia's Copyright Law	TRIPs, the Berne Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty.	52/PUU-XIII/2015
Legal recognition of customary law communities	Articles 18B(2) and 28I(3) of the Constitution	United Nations Declaration on the Rights of Indigenous Peoples	127/PUU-VII/2009; 35/PUU-X/2012; 96/PUU-XII/2014

validity of Article 6(1) of the 2003 Election Law,[71] which required candidates to be "spiritually and physically capable of performing the duties and responsibilities of President or Vice President".[72] The applicants argued that this was discriminatory and thus breached several constitutional provisions, including Article 27(1) of the Constitution, which grants all citizens the right to equality before the law, a right that the provision says the government must protect "without exception".[73] The applicants also argued that Article 6(1) breached Indonesia's international obligations under the ICCPR, which Indonesia had ratified. Article 25 of the ICCPR states: "Every citizen shall have the right and opportunity ... [t]o take part in the conduct of public affairs ... and to be elected at genuine periodic elections which shall be by universal and equal suffrage", without unreasonable restrictions.

The Court observed that the applicants should have referred to Article 2 of the ICCPR, which contains various prohibited grounds for discrimination.[74] Nevertheless, the Court found that Article 6(1) of the 2003 Election Law did not, in fact, discriminate on any of these grounds.[75] In its reasoning, the Court referred to Article 21(1) of the UDHR. Article 21(1) establishes the right to take part in the government of one's country, either directly or through freely chosen representatives. Though the Court noted that the UDHR's principles were internationally accepted,[76] 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

[71] Law 23 of 2003 on Presidential and Vice-Presidential Elections.

[72] Constitutional Court Decision 008/PUU-II/2004.

[73] *Ibid.*, at 6.

[74] These prohibited grounds include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status": ICCPR, Article 2.

[75] Constitutional Court Decision 008/PUU-II/2004, 26.

[76] Constitutional Court Decision 008/PUU-II/2004, 26–7.

> 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.[77]

Another example of the Court's treatment of discrimination is Decision 028-029/PUU-IV/2006.[78] Here, 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. A majority ultimately rejected this challenge. However, when determining what constituted discrimination under the Constitution, the majority set out Article 1(3) of Indonesia's 1999 Human Rights Law, which, the Court noted, contained a definition of discrimination similar to that of Article 2 of the ICCPR.[79] The Court then referred to a European Community Council Directive, which sets out examples of differential treatment based on age that do not constitute discrimination.[80]

Also notable is the Court's use of international treaties to bolster findings that an impugned statute is *not* discriminatory. It has done this in cases involving statutes that differentiate between legal subjects, but not on race, religion, gender, or social status (specified as grounds for discrimination not only in domestic law, but also in the UDHR and the ICCPR).[81] The Court has, for example, taken this approach to reject the argument that prerequisites for nomination for public office are discriminatory (observing that this applies to all candidates and their nominating parties).[82] It has also pointed to various international legal sources to show that only legal subjects, and not objects such as tobacco,[83] or modes of transportation,[84] were entitled to freedom from discrimination. Here, the Court pointed out that the ICESCR includes 10 bases for discrimination against people: race, colour, sex, language, religion, political, or other opinion; national or social origin; property, birth, or other status.[85]

2. *Limitation of rights*

The Court has also cited various international agreements, such as the UDHR, ICCPR ICESCR, to support the argument, based on Article 28J(2) of the Indonesian Constitution, that constitutional rights can be limited in some circumstances – such as to maintain public order, or the dignity or honour of an individual.

So, for example, in some cases, the Court has set out or mentioned Article 28J(2) of the Constitution and pointed out that Article 29(2) of the UDHR and Article 19(3) of the ICCPR impose similar limitations or at least are "consistent" with Article 28J(2) of the Constitution.[86] While this might be read as using international law to justify the limitation of constitutional rights, there is little to commend this view. This is because, like in

[77] Constitutional Court Decision 008/PUU-II/2004, 27.

[78] Constitutional Court Decision 028-029/PUU-IV/2006 reviewing Law 39 of 2004 on Placement and Protection of Indonesian Overseas Workers; 2/PUU-XVII/2019 (citing 028-029/PUU-IV/2006).

[79] 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".

[80] Council Directive 2007/78/EC of 27 of November 2000 establishing a general framework for equal treatment in employment and occupation.

[81] Constitutional Court Decisions 91/PUU-XIV/2016 at [3.6.3]; 105/PUU-XIII/2015 at [3.11].

[82] Constitutional Court Decisions 006/PUU-III/2005; 16/PUU-V/2007; 3/PUU-VII/2009.

[83] Constitutional Court Decision 19/PUU-VIII/2010. In this case, the applicants argued that imposing statutory quality standards for addictive substances was discriminatory.

[84] Constitutional Court Decision 29/PUU-XIII/2015 at [3.13].

[85] *Ibid*., at [3.15.6].

[86] Constitutional Court Decisions 132/PUU-VII/2009 at [3.11]; 015/PUU-X/2012 at [3.11.4]; 67/PUU-XVII/2019 at [3.11]. 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

many of the discrimination cases just described, where the Court limits rights, it mentions the domestic constitutional source for the limitation *before* the international source. In the words of the Court, limiting rights "does not just not violate the Constitution, but also does not violate general legal principles recognised by the international community, such as … Article 29(2) of the UDHR".[87]

A classic example of rights limitation occurred in one of the Court's first cases – the *Bali Bombing case* of 2003. In this case, the applicant (Abdul Kadir) had been convicted 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.[88] Kadir pointed to a separate law that expressly purported to permit this anti-terrorism law being applied retrospectively to pursue him and other perpetrators. Kadir argued that this breached his constitutional right to freedom from prosecution under a retrospective law, provided in Article 28I(1). This provision 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* (emphasis added).

By a majority of five judges to four, the Court decided that the statute was unconstitutional. In reaching this conclusion, the majority attributed significant weight to the fact that the freedom was retrospective prosecution was included as a right that "cannot be limited under any circumstances" in Article 28I(1).[89] To support this conclusion based on a textual analysis, the majority referred to provisions of international human rights conventions that supported the prohibition on retrospectivity,[90] observing, for example, that Article 28I(1) had been "adapted" from Article 15 of the ICCPR.[91]

However, the majority opinion in *Bali Bombing* remains an outlier in the Court's right limitations jurisprudence. The minority in that case, and the Court (whether unanimous or by majority) in subsequent cases, has adopted a more expansive interpretation of Article 28J(2) of the Constitution that permits the limitation of rights expressed as non-derogable in Article 28I(1).[92]

The Court has attempted to justify this limitation by referring to international law. In these cases, the Court argues that, because the provision limiting rights appears at the end of a section on rights in both the Indonesian Constitution and the ICCPR, they can be read to apply to all of the rights that precede them in the documents.[93]

For example, the majority in a subsequent case about freedom from retrospective criminal laws took a similar view to the minority in *Bali Bombing*. Here, Abilio Jose Osorio Soares

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".

[87] Constitutional Court Decision 020/PUU-I/2003 at 36.

[88] Constitutional Court Decision No 013/PUU-I/2003.

[89] Constitutional Court Decision 013/PUU-I/2003 at 36–7.

[90] These were: Universal Declaration of Human Rights, Article 11(2); European Convention for the Protection of Human Rights and Fundamental Freedom and its Eight Protocols, Article 7; ICCPR, Arts 4, 15; American Convention on Human Rights, Article 9; Rome Statute of the International Criminal Court, Arts 22-4. 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.

[91] Constitutional Court Decision 013/PUU-I/2003 at 60.

[92] Butt & Lindsey, *supra* note 31.

[93] Constitutional Court Decisions 015/PUU-X/2012; 045/PUU-VIII/2010 at [3.14].

(former Governor of East Timor) challenged Article 43(1) of Law 26 of 2000 on the Human Rights Court.[94] Under this provision, proceedings in the Human Rights Court had been initiated against him for alleged 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".

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". 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.

The majority in *Soares* attempted to justify this decision using Articles 11(2) and 15 of the ICCPR. The judges decided that these provisions 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. 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 derogation does not contravene international law or involve discrimination.[95]

Another example involves the Court's 2009 decision relating to dishonouring religion, usually referred to as "blasphemy".[96] Here, the Court refused to disturb the prohibition on dishonouring religion because the prohibition was needed to protect various constitutional religious rights.[97] In reaching this decision, the Court *distinguished* Article 28J(2) from Article 18 of the ICCPR. Article 28J(2) allows religious considerations to be taken into account in the limitation of the rights of others, but the ICCPR does not. While this comparison did not result in the Court rejecting or criticising the ICCPR, it provided a point of distinction from Indonesian law, which helped the Court justify its decision.[98]

Finally, we provide an example from Constitutional Court decision 78/PUU-XXI/2023. This challenge was brought by two activists, Haris Azhar and Fatiah Maulidiyanty, who were being prosecuted for allegedly spreading a hoax relating to powerful politician Luhut Binsar Pandjaitan (Coordinator Minister for Maritime and Investment in the Widodo administration). The Court upheld their challenge, but when considering whether free speech rights could be limited under Article 28J discussed the UDHR and the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.[99]

C. *Reliance for interpretation or justification*

The Court has also used international legal principles and interpretations from international bodies to help it construe the Indonesian Constitution, the statute being reviewed in the case, or both.[100] This approach is well-expressed by one judge in a case involving

[94] Constitutional Court Decision 65/PUU-II/2004.

[95] *Ibid*., at 57.

[96] Constitutional Court Decision 140/PUU-VII/2009.

[97] Simon BUTT & Tim LINDSEY, "State Power to Restrict Religious Freedom: An Overview of the Legal Framework" in Tim LINDSEY & Helen PAUSACKER, eds, *Religion, Law and Intolerance in Indonesia* (London: Routledge, 2016).

[98] Indonesia is formally a "state based on law" (*negara hukum*): Article 1(3) of the Constitution. However, the Constitutional Court has emphasised that this concept is not equivalent to the rule of law, including because it embodies a religious component. For a discussion of this, and the implication of Indonesia's national ideology, Pancasila, see Simon BUTT, *Constitutional Recognition of Beliefs in Indonesia* (2020).

[99] UN Doc. E/CN.4/1996/39 (1996). 78/PUU-XXI/2023 at [3.16.3].

[100] For examples of cases in which the Court extensively refers to international treaties, see Constitutional Court Decisions 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 486; 008/PUU-II/2004.

employment rights: "[I]n order to understand the right to work" in the Constitution, "it is best to carefully study" various rights in international treaties.[101]

So, for example, in a case concerning copyright and rebroadcasting, the applicants argued that whether "relaying" could be considered "rebroadcasting" within the meaning of one of the impugned provisions was unclear and, hence, the provision was unconstitutional (as mentioned, the Indonesian Constitution includes a legal certainty guarantee in Article 28D(1)). In response to this argument, the Court appeared to rely on international definitions, under which "rebroadcasting" encompassed "relaying", pointing to the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, which is an appendix to the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement.[102]

In another case, the Court was asked to rule on the constitutionality of a Truth and Reconciliation Commission, established in 2004 to hear allegations of past human rights abuses.[103] Among the applicants' objections was that the statute that established the Commission had permitted the president to award amnesties to perpetrators who confessed in some circumstances and upon payment of compensation. The Court decided that this provision was unconstitutional. In fact, the Court invalidated the entire statute, given that amnesties were integral to it.

In reaching this decision, the Court said that international law prohibited amnesties for gross human rights violations. The Court said:

> An amnesty sets aside legal protection and justice guaranteed by the Constitution. [Rejecting amnesties] is universal practice and custom as contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which stipulates that there must be adequate, effect and prompt reparation for harm suffered....This is the interpretation used to view Articles 28A, Article 28D(1) and Article 28I(1), (4) and (5)... [104]

In yet another case, the Court used Article 11(1) of the ICCPR (as ratified by Law 11 of 2005) to define "basic human needs" to include clothes, food and shelter. The impugned law only regulated food, but this did not result in unconstitutionality, given that other statutes regulated the provision of clothing and housing.[105]

In some cases, the Court refers to international law in an apparent effort to justify not its decision but rather the content of national law. For example, in one case concerning the death penalty, the Court seemed to justify the apparent harshness of Indonesian narcotics laws – particularly the availability of the death penalty under them – by reference to international law. In this case, the Court referred to the United Nations Convention Against Illicit Traffic in Narcotic and Psychotropic Substances (1988) as evidence of the seriousness with which the international community viewed narcotics offences, and noted that Indonesia is a party to that convention. "Therefore, it is an international legal obligation for Indonesia to implement the rules of the Convention in good faith", including the obligation to "maximise the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences" (Article 3(6) of the Convention). The Court said that the imposition of harsh (*keras*) penalties was

[101] Namely ICCPR, Article 2 and Universal Declaration of Human Rights, Article 23: Constitutional Court Decision 019-020/PUU-III/2005, per Natabaya J.

[102] Constitutional Court Decision 78/PUU-XVII/2019 at 183–4.

[103] See Lindsey & Butt, *supra* note 17 at 263–4.

[104] Constitutional Court Decision 006/PUU-IV/2006 at 122.

[105] Constitutional Court Decision 98/PUU-XI/2013.

'part of the fulfilment of Indonesia's international obligations and "can be justified as is implicitly encouraged by" the Convention. Indeed, as the Court pointed out, the Convention even permitted the imposition of even more severe measures than those provided by the Convention.[106]

1. Dissents

Dissenting judges have also used international law to interpret the Constitution and relevant statutory provisions. These cases are significant because, on our reading, these judges have used international law to justify their departure from the majority reasoning. We present three examples here.

In the first case, three dissenting judges appeared to use the ICESCR requirement that states give effect to the right to health "to the maximum of their available resources" to interpret various constitutional provisions concerning the right to health, health care, and adequate health facilities.[107] Article 28H(1) guarantees provision of health care (amongst other entitlements). Article 34(3) requires the state to provide adequate health and public facilities. In light of the ICESCR, the dissenting judges held that the impugned provision (which permitted, but did not require, the state to give special recognition to those involved in overcoming a pandemic) failed to reflect the ICESCR and these constitutional provisions (interpreted in light of the ICESCR).[108]

The dissents in our second example come from a 2006 case concerning the constitutionality of the minimum age requirement of 21 years for Indonesian migrant workers.[109] Here, the majority upheld the minimum age, deciding that this was a matter for the legislature to determine. However, all four dissenting judges argued that the age limit violated the right to work, using as a reference point the ILO Minimum Age Convention 1973 (No 138) (which prohibits child labour, but does not set a 21-year age limit).[110]

Finally, in an important dissent, Justice I Dewa Gede Palguna refused to add "naming as a suspect" as a ground upon which a pretrial hearing (*praperadilan*) could be brought. These are proceedings, regulated in a handful of provisions of the Code of Criminal Procedure, at which defendants can challenge the legality of their arrest or detention, and of them being formally named as a suspect (roughly equivalent to being "charged" in other legal systems). One of the reasons Justice Palguna gave for refusing was the ICCPR, which requires only that any person be able to challenge the lawfulness of their arrest or detention. The ICCPR does not mention being named a suspect as a ground for challenge. Because not including this ground did not violate Article 9 of the ICCPR, Justice Palguna saw no reason to question its constitutionality.[111]

D. Underplays or rejects international law

In some cases, the Court has openly declared that the Constitution and national statutes – and not international law – are its reference points in constitutional review cases.[112] For example, in a case about the constitutionality of affirmative action, the Court declared that the policy

[106] Constitutional Court Decision 44/PUU-XVII/2019.
[107] Constitutional Court Decision 36/PUU-XXIII/2020.
[108] Justices Aswanto, Suhartoyo, and Isra.
[109] Constitutional Court Decision 28-29/PUU-IV/2006.
[110] Justices Marzuki, Fadjar, Siahaan, Harjono.
[111] Constitutional Court Decision 21/PUU-XII/2014 at 120–1.
[112] See, for example, Constitutional Court Decisions 37-39/PUU-VIII/2010 25-6; 10-17-23/PUU-VII/2009 136–7.

> has been accepted by Indonesia and derives from CEDAW, but because in the present application the Court is faced with a choice between the 1945 Constitution [which refers, in Article 28H(2), to the right to special treatment in some circumstances] and these policy imperatives based on CEDAW, what must be prioritised is the 1945 Constitution.[113]

The Court has also emphasised in several cases that the UDHR only represents a "statement of ideals", with "no direct binding legal force",[114] and that its principles must be adjusted to the "ideology, religion, social and culture of the people in each country".[115] Nevertheless, the Court has also accepted that many of its principles have been picked up in Indonesian legal instruments.[116]

Former Justice Roestandi appeared to warn against over-reliance on international law along a similar line 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 Indonesian statutes. As such, the Constitution trumps international law.[117] As Roestandi 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."[118]

More rarely, the Court has explicitly rejected international norms, even though the Court appears to have been influenced by them. It is unclear to us why the Court has done this, because in these cases the Court has not used this rejection of international law to reach a conclusion inconsistent with international law. In Decision 1/PUU-VIII/2010, for example, the applicants raised several international law arguments to challenge the validity of the age of criminal culpability being eight years old for some offences.[119] In its decision, the Court lifted that age to 12, which was in line with the UN Committee on the Rights of the Child. However, the Court emphasised that in adopting this as the age of criminal responsibility, it was "not using these instruments and recommendations ... [as] a gauge to assess the constitutionality of the age of responsibility for children".[120]

Another case involved a challenge to Indonesia's marriage age (then 16 for women, 18 for men, under Indonesia's 1974 Marriage Law). The Court observed that Indonesia had ratified CEDAW, Article 16(1) of which requires parties to eradicate discrimination against women in all areas of marriage and family relations. To this end, CEDAW recommended that the marriage age be the same for men and women. However, instead of relying on CEDAW, the Court focused on the difference between the 1974 Marriage Law (which, as mentioned, stipulated different ages for men and women) and Indonesia's Child Protection Law, which defined a child as any person under 18 years old. The Court appeared to prefer the minimum marriage age to be 18 for both men and women, pointing out that "The lack of synchronisation

[113] Constitutional Court Decision 022-24/PUU-VI/2008. See also Constitutional Court Decision 114/PUU-XX/2022.

[114] Constitutional Court Decision 008/PUU-IV/2006. This is also cited in Decision 24/PUU-XX/2022 (page 626). The court made a distinction in the construction of the "right to marry" in UDHR and of the "right to institute a family" as a constitutional right in accordance to article 28B(1) of the 1945 Constitution.

[115] Constitutional Court Decision 24/PUU-XX/2022, Constitutional Court Decision citing 008/PUU-IV/2006 at 57.

[116] Constitutional Court Decision 008//PUU-IV/2006.

[117] Constitutional Court Decision 065/PUU-II/2004 at 63–4; Constitutional Court Decision 011-017/2003 at 40–1.

[118] Achmad ROESTANDI, 'Mengapa Saya Mengajukan Dissenting Opinion, in Refly HARUN, ZAM HUSEIN, & BISARIYADI (eds), *Menjaga Denyut Konstitusi: Refleksi Satu Tahun Mahkamah Konstitusi* (Jakarta: Constituaional Court, 2004), 51.

[119] Constitutional Court Decision 1/PUU-VIII/2010 at 9–10, 26–7.

[120] *Ibid*., at 151.

will cause the violation of the rights of women and children that are clearly guaranteed by the Constitution."[121]

E. Misconstruction

In some important cases, the Court appears to have misunderstood or perhaps misconstrued the international law it used to interpret the Constitution, leading to outcomes that might perplex some international lawyers. An example of this comes from another case involving the interpretation of Article 28I(1) on rights that appear to be non-derogable, but that the Court has permitted to be limited. This case was brought by five applicants sentenced to death for drug offences.[122] They argued that the provisions of Indonesia's Narcotics Law,[123] under which they had been convicted, violated the right to life provided in Articles 28A and 28I(1) of the Constitution, and breached Indonesia's ICCPR obligations.

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".[124] 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.[125]

In any event, the Court reasoned that Indonesia had not breached the ICCPR, which allows the death penalty for the "most serious crimes" (Article 6(2)).[126] 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. 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". 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.

[121] Constitutional Court Decision 22/PUU-XV/2017 at [3.16]. For an excellent discussion of this and related cases, see Dina AFRIANTY, "Child marriage: Constitutional Court finally ditches religious arguments", *Indonesia at Melbourne* (24 January 2019) https://indonesiaatmelbourne.unimelb.edu.au/child-marriage-constitutional-court-finally-ditches-religious-arguments/.

[122] Constitutional Court Decision 2-3/PU-V/2007.

[123] Law 22 of 1997.

[124] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 46 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".

[125] Constitutional Court Decision 2-3/PU-V/2007 at 420.

[126] A point also made in Constitutional Court Decision 015/PUU-X/2012. The Court also pointed to other international instruments that allow the death penalty, including Protocol Additional I to the 1949 Conventions and Relating to the Protection of Victims of International Armed Conflict, Protocol Additional II to the 1949 Conventions and Relating to the Protection of Victims of Non-International Armed Conflict, Rome Statute of International Criminal Court, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), American Convention on Human Rights, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.

The Court's interpretation of "most serious crimes" to include drug offences appears to contradict the view of the UN Human Rights Committee ("Committee"): that the death penalty is "a quite exceptional measure" and that "most serious crimes" encompass only the most exceptional circumstances.[127] While intentional killing, infliction of grievous bodily harm or acts that create grave danger that may result in death or irreparable harm might fall within this category, the Committee seems to prefer the view that drug-related offences will generally not.[128]

The Court also made a misleading reference to international law in the *Abdurrahman Wahid case*, discussed above in the context of discrimination. After referring to the ICCPR, 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.

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).

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. In any event, Abdurrahman Wahid suffered from well-known physical, not mental, health problems.

V. Concluding remarks

Our reading of the cases in which the Constitutional Court mentioned international law in its judgments reveals a typology involving four categories of use: bolstering or interpreting domestic law; and misconstruing or rejecting international law. Of these four categories, two (bolstering and rejecting) appear to have no effect on the Court's decisions, and two (interpreting and misconstruing) appear capable of bearing on the Court's decision-making.

Most commonly, the Court uses international law to bolster Indonesian domestic law (whether the Constitution or a national statute), when the international and domestic principles are the same or similar. It may well be that this simply indicates that Indonesia's Constitutional Court judges consider the fundamental rights they interpret and apply as universal.[129] As mentioned, the Court has no reason to do this, given that international

[127] UN Human Rights Committee, "General Comment No. 06: The Right to Life (Article 6)" at [7].

[128] Sarah JOSEPH, Jenny SCHULTZ & Melissa CASTAN, *International Covenant on Civil and Political Rights : Cases, Materials and Commentary* (Oxford: Oxford University Press, 2004) at 120.

[129] BISARIYADI, "Referencing International Human Rights Law In Indonesian Constitutional Adjudication" (2018) 4:2 Constitutional Review 249–70 at 266.

law has no independent legal force in Indonesia, and the Court's main functions in constitutional review cases are interpreting and applying the Constitution to national statutes. Less commonly, but also with limited potential to alter decision-making, are cases where the Court openly rejects international law in favour of domestic legal principles. In these cases, there seems no utility in the Court mentioning international law, to then expressly reject it. We suspect that one reason for this may be that parties continue to base submissions on international law and that the Court may feel the need to respond to those submissions.

The other two categories of use, while very rarely encountered in the cases, appear more like to have affected Constitutional Court decisions. These are, first, use of international law to interpret a constitutional obligation or a statute and, second, deliberate misapplication or misconstruction of international law, apparently to reach a decision that the Court thinks meets domestic expectations but defies Indonesia's international obligations. These two categories of use have emerged most commonly in split decisions, often in dissenting judgments. This suggests to us that some judges are uncomfortable about using international law either as an interpretative tool or to reach conclusions that might be difficult to justify.

The cases we have considered to develop this typology lead us to a different conclusion to Palguna and Wardana's. As mentioned, they argued that, based on selected case studies, the Court tends to treat international law as part of domestic law unless it contradicts the Constitution (pragmatic *monism*).[130] Our data suggest that the Court is inconsistent in its approach to international law, but that, if anything, it has probably adopted something resembling pragmatic *dualism*. In other words, it rarely gives independent authority to international law (as one might expect in a monist system) and usually cites it alongside an equivalent domestic principle (usually *after* it has cited that domestic principle). Nevertheless, the Court is not always consistent and occasionally, but clearly, relies on international law to help it interpret Indonesian constitutional and statutory provisions (sometimes resulting in questionable outcomes). For pragmatic reasons, then, it sometimes diverges from its general approach of dualism.

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Simon BUTT is Professor of Indonesian Law, University of Sydney Law School.

BISARIYADI is a researcher at the Constitutional Court of the Republic of Indonesia.

Fritz SIREGAR is Lecturer, Pancasila University.

[130] Palguna & Wardana, *supra* note 4 at 420.

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