

# INTERNATIONAL LAW AS A POLITICAL INSTRUMENT (A CASE STUDY OF INDONESIA)

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**Abstract:** *International law can be seen as a political instrument in the sense to Change Concepts and Norms, to Intervene in Domestic Affairs and to Justify and Exert Pressure. In this context, developed countries can use these Laws to intervene in developing countries to transform concepts or norms are thus in line with the wishes of the developed world. The use of the concept of human rights, for example has a broad meaning. With these words, large and developed countries can use to intervene in domestic issues in the country. In the case of Indonesia, countries such as America, Europe and so urged Indonesia to participate in the international contract will open up access to the Indonesian market and protections for Intellectual Property Rights (IPR). The use of the word eg Human Rights has forced Indonesia to ratify the treaty on the International Labor Organization (ILO) and the Convention on the Elimination of All Forms of Racial Discrimination. Therefore, international law as a political instrument has been exploited for the specific purposes which may provide advantages especially to developed countries.*

**Keywords:** *international law, political instrument, Indonesian experience.*

**Abstrak:** Hukum internasional dapat dilihat sebagai alat politik dalam arti Mengubah Konsep dan Norma, untuk intervensi dalam Negeri dan Justify dan Mengerahkan Tekanan. Dalam konteks ini, negara-negara maju dapat menggunakan UU ini untuk campur tangan di negara-negara berkembang untuk mengubah konsep atau norma-norma yang demikian sejalan dengan keinginan negara maju. Penggunaan konsep hak asasi manusia, misalnya memiliki arti yang luas. Dengan kata-kata ini, negara-negara besar dan maju dapat digunakan untuk ikut campur dalam urusan dalam negeri di negara tersebut. Dalam kasus Indonesia, negara-negara seperti Amerika, Eropa dan mendesak Indonesia untuk berpartisipasi dalam kontrak internasional akan membuka akses ke pasar Indonesia dan perlindungan Hak Kekayaan Intelektual (HKI). Penggunaan kata misalnya Hak Asasi Manusia telah memaksa Indonesia untuk meratifikasi perjanjian tentang Organisasi Buruh Internasional (ILO) dan Konvensi tentang Penghapusan Segala Bentuk Diskriminasi Rasial. Oleh karena itu, hukum internasional sebagai alat politik telah dimanfaatkan untuk tujuan tertentu yang dapat memberikan keuntungan terutama untuk negara-negara maju.

**Kata Kunci:** hukum internasional, instrumen politik, pengalaman Indonesia.

## Introduction

The function of international law, as noted in numerous text books, is to law down a set of rules or norms for its subject. This function, however, is only one of the many functions of international law. Another function which many may

not be immediately aware of is that international law is an instrument used by states to achieve their national objectives. This paper will dissect primarily the political utility of international law or more precisely international law as a political instrument.

Having a dual personality is inevitable for international law due to the reality of inter-state relations dense with geo-political relations. Increasingly popular concept of globalization has caused intertwined interests between state's internal affairs and international events. It is impossible to conceive that a state is immune and unaffected by international phenomena. It is precisely this convergence that creates an increasing sentiment that international law is encroaching on states' sovereignty. This sense is particularly more obvious in several legal regimes, take as examples: international trade law, environmental law, human rights and war against terrorism. These issues are certainly meaningless when states do not act in a collective sense.

Although states seem to encounter common enemies on these issues; they, however, give rise to conflicting political interests. It is inevitable that within a large group of states, each state or a small group of states will tend to build a coalition of similar political interests (more similar than the political interests of other states). Such political coalition, whether individual or collective within a large group of states, will consequently create conflicting/competing political interests even in the face of common enemies. This assumes that those common enemies are not merely facades that are vulgarized in order to apply political pressure to certain states.

Another crucial reality is the increasing economic dependence or interdependence among states. Simply put, economic dependence or interdependence is often used as a leverage to apply political pressure to another state. Sometimes, it is used to the extent of avoiding or even justifying an act violating sovereignty. One can immediately relate this phenomenon to the notion of rational self-interest states.

This paper intends to paint a picture of how international law is used as a political instrument. In an effort to provide concrete examples, Indonesian

experiences will be subject of this paper. In this paper, I will demonstrate how international law is employed by states or international organizations against Indonesia in order to secure vested interests, primarily of political nature.

### **International Law as a Political Instrument**

The reality of international law is it is used as a political weapon irrespective of the status of certain states, be it developed, developing or underdeveloped countries. Of course, the developed countries will have more say in international law than under developed countries.

I argue that the structure of colonialization remains under the contemporary international law structure. The face may change, but the structure remains the same. In the colonial eras where there existed no category of developed and developing countries; it is the category of colonizers and colonies. The particular feature of this structure is that policies (or one would rather say they will) of colonizers towards its colonies are forced. Such coercive means will not be contradictory to international law. In today's world, superimposed, and typically by use of force, for instance arms. Although, it is considered an outright violation of international law, nonetheless, the structure remains similar. What changes is the means, i.e. in the old days, force is associated with hard power such as weapons; today, force is associated with soft power and political pressures. International law is constituted on the basis of this type of soft power. An instance can be drawn from the cradle of modern international law in post World War II, after the constitution of the United Nations. The most powerful political entity to date is United Nations Security Council.

Many developing countries utilize international law to change some long standing principles that give advantage to developed countries. In addition, international law is also used by developed countries and developing countries.

The form of international law that is frequently used as political instrument is international agreements. When State subscribes to international agreement it would mean that State voluntarily bind itself to observe the obligations and transform whatever international law provisions to national law. Thus, to

intervene on domestic affairs of certain State, a State will accommodate their interests in international agreement.

Intervention by using international agreement begins when there is a policy with extra territorial nature of certain State. For example, investors from developed countries often complain about the closure of or restricted access to developing countries' markets or piracy that is pervasive. For this reason, the developed countries would want to intervene in the legal system of the developing countries in order to open or liberalize their market or give more protection to intellectual property rights.

The desire to intervene is usually accommodated by international agreement. The agreement will generally be formulated or drafted to suit the interests of the developed countries. The agreement will then be discussed in international conferences without any significant opposition from developing countries.

An international agreement that protects and suits the interests of developed countries will be encouraged to be signed or ratified by the developing countries. Once the developing countries have subscribed to the agreement, the developed countries will voice compliance. The developing countries will be requested to amend their national legislation so as to comply with the provisions of the international agreement.

There are several objectives being pursued of developed countries using international agreements. First, to ensure the developing countries will not promulgate laws which are incompatible with those laws of the developed countries or which may have adverse effects to the interests of developed countries. Second, the interests of the developed countries can be accommodated in the developing countries without being deemed as intervention in the domestic affairs of the target State.

### **The Use of International Law as Political Instrument**

There are at least three uses of international law as a political instrument. First, is to change prevailing concepts or norms. Second, it is used as means to

intervene in domestic affairs of other States. Last, but not least, to be used as justification of State's actions or pressure to other State. The following is the discussion of respective use of international law as political instrument.

## **1. As Means to Change Concepts and Norms**

International law as a political instrument can be used to change or introduce provisions, foundations, norms, or concepts (hereinafter referred to as "concepts"). This stems from the fact that international law, in particular international agreement, is formulated by States. Consequently, States may change or introduce new concepts. And where these concepts gain international recognition within the community of nations then these concepts will also garner binding force.

One of the most effective ways is with the accommodation of a new concept into an international agreement. This certainly does not mean that a State over a short period will perform it, as the formulation and amendment of international agreements require both the completion of relevant processes and time.

As an example, Australia, Japan, Germany, and several other States have demanded that there be change to the membership of the Security Council of the United Nations. This demand constitutes a new concept from the previous accepted concept. To realize this kind of change there is a need to amend the United Nations Charter.

Furthermore, Japan and Germany are extremely interested in the amendment of two Articles in the United Nations Charter that states that they are "enemy state". One must remember that the United Nations Charter was produced at the conclusion of the Second World War of which Japan and Germany were two of the defeated States.<sup>1</sup>

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<sup>1</sup> Japan and Germany fought for the repeal of Article 53 and Article 107 of the UN Charter. Article 53 states, "(1) The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against

Other examples are the national interests of the United States (US) that would require the US to have legitimacy with respect to the use of force in anticipatory attack. These efforts were undertaken by the US with the commencement of the debate on the need to amend Article 51 of the United Nations Charter.<sup>2</sup> The efforts of the United States, in the eyes of many States, were no different from a ruler amending the constitution so that the ruler in effect has even greater powers.

Developing countries, on the other hand, often use international agreements to change the face of international law which is considered to be euro-centric. Cassese in his book titled *International Law in a Divided World* states that international law for developing States "... is instrumental in bringing about social change, ...".<sup>3</sup>

When the formulation or amendment of an international agreement is not successful, it is often that the States with an interest will endeavor to reinterpret the provisions. Thus, the provision is still intact, but the interpretation has significantly changed. If this new interpretation is accepted by the international community, it will then become an implied amendment. An example of this reinterpretation is the legal basis for humanitarian intervention by the United Nations or States.

## 2. As a Means to Intervene in Domestic Affairs

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renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state. (2) The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter." Meanwhile Article 107 states, "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action." See UN Charter, Articles 53 and 107.

<sup>2</sup> Article 51 states the following, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>3</sup> Antonio Cassese, *International Law in a Divided World*, (Oxford: Oxford University Press, 1986), p. 119.

Second, international law becomes a political instrument for State to intervene in other State's affairs. This kind of intervention may not be considered as violation of international law.

Again, the most effective way to intervene with international law is by using international agreements. International agreements forced States to adjust its national legislation to be in accordance with the agreements.

International agreements in this context can be considered the equivalent of regulations made by the central government in their relationships with regional governments. These regulations become signposts for regional governments with respect to what can and cannot be done. It is clear that the regional regulations must not be in conflict with the regulations of the central government.

As an example, at the conclusion of World War II the Allied Forces made a peace treaty with the defeated States that implied that these defeated States were not to have any war capabilities. In the peace treaty between the Allied Forces and Japan that was signed in San Francisco in 1951 it was explicit in a number of Articles that Japan was not to use force in the settlement of disputes and to trust the security mechanisms of the United Nations.<sup>4</sup> This provision was to prevent Japan from becoming the source of any future disastrous world war. The provisions in the peace treaty had a significant impact on Japanese domestic policy as it related to not possessing any war capabilities and implied a

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<sup>4</sup> This matter is written into the Peace Treaty between the Allied Powers and Japan in Article 5 which states, "(a) Japan accepts the obligations set forth in Article 2 of the Charter of the United Nations, and in particular the obligations (i) to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; (ii) to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations; (iii) to give the United Nations every assistance in any action it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations may take preventive or enforcement action. (b) The Allied Powers confirm that they will be guided by the principles of Article 2 of the Charter of the United Nations in their relations with Japan. (c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements." See the Treaty of Peace with Japan, available at [http:// www.taiwandocuments.org/sanfrancisco01.htm](http://www.taiwandocuments.org/sanfrancisco01.htm) (last accessed on 5 October 2003).

dependence on foreign States in matters of defense.<sup>5</sup> The Allied Forces also limited the war capabilities of Italy in the peace treaty that they signed.<sup>6</sup>

In reality the above is the second means of utilizing International Law as a political instrument: the intervention in domestic affairs of another State without it having to be considered a violation.

The use of international agreements becomes an entry point to intervene, States intending to undertake an intervention must have in their possession other instruments in order that the State suffering the intervention wants to sign any international agreement proposed. These instruments will usually be in the form of economic dependence or dependence in defense matters. In the event these other instruments do not exist then it is difficult for the State suffering the intervention to be bound by any international agreement.

### **3. As a Tool to Justify and Exert Pressure**

Finally, International Law functions as a political instrument based on the fact that in the international interactions of States, there are always mutual influences. States use International Law to pressure other States in order to achieve compliance with their policies. Meanwhile, states also exploit under international law to reject such pressure. Developed States, as argued by Cassese, frequently use International Law in the framework of, “... *protects them from undue interference by powerful States...*”<sup>7</sup>

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<sup>5</sup> In Article 9 of the Japanese Constitution of 1947 it is stipulated that Japan will not possess war capabilities and as a consequence will not have an Army, Navy, or Air Force. Yet, this interpretation from time to time changed in the direction of an interpretation that allowed Japan to possess the three armed services noted provided their objective was for defensive purposes. Japan even to this day is very dependent in defense problems to the US based on the security agreement, Treaty of Mutual Cooperation and Security between Japan and the United States.

<sup>6</sup> In Article 51 of the Peace Treaty between Allied and Associated Powers with Italy, as an example, it is stated that, “Italy shall not possess, construct, or experiment with (i) any atomic weapon, (ii) any self propelled or guided missiles or apparatus connected with their discharge (other than torpedo and torpedo-launching gear comprising the normal armament of naval vessels permitted by the present Treaty), (iii) any guns with a range of over 30 kilometers, (iv) sea mines or torpedo of non-contact types actuated by influence mechanisms, (v) any torpedo capable of being manned.”

<sup>7</sup> Antonio Cassese, *Op. Cit.*, p. 119.



The actions of the United States and the United Kingdom towards Iraq prior to the invasion of Iraq are the examples of International Law being used as an instrument of pressure. The United States and the United Kingdom utilized International Law to pressure Iraq into providing access to *international inspectors* on the suspicion of possession of *weapons of mass destruction*. The International Law which formed the basis of these demands was Iraq's membership of the *Non Proliferation Treaty* (NPT)<sup>8</sup> and a number of other UNSC resolutions.<sup>9</sup> At some points, the United States and the United Kingdom determined that this pressure was not providing the results expected and consequently used this as a premise for the attack and invasion of Iraq.<sup>10</sup> In order to provide legitimacy to the attack, the United States and the United Kingdom used International Law that was especially weak.<sup>11</sup>

An example that is indicative of States using International Law to reject the pressures of other States is the moment Russia and France were encouraged by the United States to agree to the SC resolution legitimizing the attack on Iraq.<sup>12</sup> Factually, Russia, France, and Germany deemed that the attack on Iraq is a violation of International Law.<sup>13</sup>

From the above description, the third use of International Law as a political instrument is in the application of pressure by States and the rejection of those pressures by other States.

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<sup>8</sup> Treaty on the Non-Proliferation of Nuclear Weapons (1968), and available at <http://www.iaea.or.at/worldatom/Documents/Legal/npttext.shtml> (last accessed on 5 October 2003). Iraq is one of the signatories to this treaty.

<sup>9</sup> UNSC Resolution No. 661 (1990) dated 6 August 1990, 678 (1990) dated 29 November 1990, 686 (1991) dated 2 March 1991, 687 (1991) dated 3 April 1991, 688 (1991) dated 5 April 1991, 707 (1991) dated 15 August 1991, 715 (1991) dated 11 October 1991, 986 (1995) dated 14 April 1995, 1284 (1999) dated 17 December 1999, and 1382 (2001) dated 29 November 2001.

<sup>10</sup> The attack commenced on 20 March 2003.

<sup>11</sup> The US and the UK based this on two matters. First it was based on UNSC Resolution No. 1441 which according to these two countries granted authority to use force if Iraq was not cooperative. Secondly, is the use of Article 51 of the UN Charter.

<sup>12</sup> "British FM Tables Iraq Draft Resolution," News Max Wires, 8 March 2003, available at <http://www.newsmax.com/archives/articles/2003/3/7/205053.shtml> (last accessed on 8 October 2003).

<sup>13</sup> "France, Germany and Russia condemn war threat" Guardian Unlimited, 19 March 2003, available at <http://www.guardian.co.uk/france/story/0,11882917636,00.html> (last accessed on 8 October 2003).

## **The Use of International Law by Developed Nations Against Developing Nations**

International Law is exploited by Developed States against Developing States for at least two reasons. First, as a means of becoming involved in the domestic affairs and policies of the Developing State. Second, in order to put pressure on the Developing State to take actions that comply with the policy frameworks of the Developed State.

International agreements are often used by developed States to undertake interventions in the domestic affairs of developing States. The interventions undertaken cannot be separated from the interests of the States making them. The majority of developing States, usually the 'west', package their interests in the form of International Law. As Cassese notes,

“... law was molded by Western countries in such a way as to suit their interests; it was therefore only natural for them to preach law abidance and to attempt to live up to legal imperatives which had been forged precisely to reflect and protect their interests”.<sup>14</sup>

The interests of developed States are varied, starting from economic motives and ranging to human values and the preservation of the world's environment.

In the problems of international trade, developed States are most worried about the actions of developing States after they gain independence and possess the sovereignty to create national laws that are inclined to policy initiatives that close off national markets to foreign goods and services. This policy certainly has negative effects for the business actors of developed States with interests in the developing State. Actually, the market of a developing State constitutes a very large market even though it is only in the early tariff stage. Therefore, developed States feel the need to prevent developing States from taking policy initiatives that are characterized as being protective of their industries or policies that close-off access to their markets. This action occurs when one remembers that a one of the factors that a developed State must consider in respect to the growth and

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<sup>14</sup> Antonio Cassese, *Op. Cit.*, p. 108.

stagnation of their economies is the dependence of their economies on the ability of business actors to exploit foreign markets.

With respect to human rights, the involvement of developed States in the domestic affairs of a developing State arises from the lack of attention paid to human rights by the political elite of the developing State in the running of government, and in fact there is an inclination towards meanness.<sup>15</sup> In fact it is fair to say that post World War II the problems of humanity have come to international attention. Violations of human rights in one State will come under the scrutiny of other States, as in this age of global maturity international crimes are known and considered to be extraordinary crimes against humanity.<sup>16</sup> For the purposes of preventing the repetition and the spread of these types of human rights violations by the governments of developing States, developed States feel the need to provide guidance.

With respect to environmental problems, developed States interfere in the domestic affairs of developing States. This is done remembering that developed States usually condemn developing States in terms of the their economy development and insufficient attention being paid to environmental problems, this even leans towards the explosion of excesses that lead to environmental destruction. It is clear that environmental destruction in one place will have consequences for the world as a whole. Because of this, one of the destruction prevention efforts is to influence developing States into taking policy initiatives that have implications for the environment.

One of these intervention efforts that can be undertaken by developed States in the three issues noted previously is the exploitation of international agreements. International agreements will be drafted by developed States which in

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<sup>15</sup> Human Rights violations by the majority of developing nations in fact do occur and do not get denied. Only what often happens are the objections of developing nations to the arrogance of developed nations as the evaluator of human values while forgetting their past history. Moreover the intervention undertaken is deemed to be motivated by economic interests.

<sup>16</sup> In Article 5(1) of the Rome Statute of the International Criminal Court, international crimes are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The perpetrators of these international crimes can be tried by whoever and whenever based on universal jurisdiction.

essence will influence policies and national laws of developing States.<sup>17</sup> To prevent policies that will close developing States' markets, international agreements will be constructed in such a way that have the effects of a liberalization national market. To prevent actions that violate human rights by the governments of developing States, international agreements will be constructed to prohibit certain actions. Hence, to prevent policies that will destroy the environment, international agreements will be drafted that pay particular attention to the problems of the environment.

Furthermore, developing States are driven by developed States to be bound by several international agreements that they have drafted.<sup>18</sup> If a developing State finally becomes a participant, this brings with it consequences for the developing State with respect to transforming the provisions of the international agreement into their national laws. As such the national laws of the developing State will reflect the values that are valued by the developed State.

In the event that the international agreement is already signed by the developing State, and the policy initiatives taken are in conflict with the agreement, then the developed State will without hesitation use international agreements as a means to put pressure on the developing State. And where necessary the developed State will not be hesitant in using the provisions of the international agreement to 'punish' the developing State.<sup>19</sup>

Hence, the international agreement that has been signed by the developing State will be used as a medium for intervention into the domestic affairs as well as an implementation of pressure by the developed State.

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<sup>17</sup> Only this often becomes a problem and rejection for developing States towards what is done by developed States is the economic motive or other specified interests. Liberalization of international trade, human rights, and environmental problems also possess an economic motive for developed States. In fact several issues are regularly used by politicians of developed States to gain support from constituents when elections near. This is indicative of the type of consistency used by politicians in the struggle for matters that are believed in by the community regarding developing States.

<sup>18</sup> The force used can be characterized from persuasive through to forced, and is an exploitation of the dependence of developing States on developed States.

<sup>19</sup> In the national car (mobnas) project, Indonesia encountered a situation where domestic policy did not comply with Indonesia's obligations as a result of its participation in the WTO and GATT agreements.

## **The Failure to Use International Law as a Political Instrument: Human Rights in Developing States**

Human Rights are believed to possess universal values. Universal values means that there no known limitations with regard to space and time. These universal values have been translated into a number of national legal products. As a matter of fact these universal values are solidified in a number of international instruments, including international human rights agreements, such as: “*The International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination and others*”.

However, the reality is indicative of the universal value of human rights in their practical application enjoy no such equality or uniformity. In Indonesia, several international human rights agreements have not caused any significant changes with respect to the development of human rights within the community.

If analyzed in more depth, there are several causes as to why in developing States, including Indonesia, international human rights agreements are ineffective and this is not solely based on an *unwillingness* of the government to perform its obligations.

The first cause is the occurrence of bias in the production and drafting of international human rights agreements. This occurs because the proposal for the international agreement originates from the developed State. The experts and drafters of the developed State normally operate from a *thinking framework* based on the legal system and culture of the developed State. They usually fail to understand the cultural sense of the legal system in Developing Countries, like Indonesia.

In fact, there seems to be an effort (and act) of European nations to superimpose their values to be accepted, even though this civilization has long been accepted, both through force or voluntary acceptance, by other States. European civilization has already been positioned for a long time as modern civilization.

One form of evidence of this and that can be seen as one of the sources of international law is contained in Article 38(1) of the Statute of the International Court of Justice. It is stated that *General Principles of Law Recognized by Civilized Nations*. The question that begs to be asked is what is meant by the words “civilized nations”? Is this not an indication that at the time of the drafting of the United Nations Charter there was an acknowledgment of a dichotomy between civilized and uncivilized nations? The drafter of the United Nations Charter most certainly claimed to be from the “civilized nations”.

Dichotomy of civilized or uncivilized nation at that moment maybe was the difference between the nations of Europe or nations that practiced European traditions and nations that had only recently been freed from colonization, the majority of which were located in Asia and Africa.

This, really, constitutes an ‘insult’ in the context of a mature international community. -The United Nations Charter has not been amended and still contains the phrase “civilized nations”, in effect, taking a position that there are uncivilized nations in the current world.

It is this kind of paradigm that often colors the drafting of international instruments in the human rights field. It is not surprising then that the formulation of Articles are more reflective of provisions that are *implementable* in Developed States but are *unimplementable* in Developing States.

Furthermore, at the time the international agreement is drafted it is difficult to lose the impression that is soldered onto the minds of the drafters as an assumption that it is Developing States that commit the majority of human rights violations. Because of this, international agreements are directed more to Developing States than the Developed States.

Whereas, the perpetrators of human rights violations really do not just originate from Developing States, but also from Developed States.

Other problems that are faced in the production and drafting of international agreements in the human rights field are that these agreements are made through the adoption of *benchmarks* based on the legal infrastructure of the

Developed State. But, there is a very wide gap between the legal infrastructure available in Developed and Developing States.

The ineffectiveness is also caused by the formulation of Articles that are too idealistic and compromising. This occurs because although the Developing State has the opportunity to debate and changes Articles that have been submitted to reduce bias that might have otherwise arisen in the draft of the Developed State; nevertheless the opportunity to do so is never properly catered to. The experts and the members of the delegation from the Developing State in essence are seeking the ideal without consideration of the legal infrastructure within their State that will be required to implement it. Actually, the members of the delegation are those that voice the views of the Developed State.

Furthermore, if there is any conflict between the view of the Developed and Developing States then the Developing State will find a way out by formulating an Article that is characterized as being compromising. Yet, the provisions that are characterized as compromising invite multiple interpretations making them difficult to implement.

The source of other problems is the realization that the international agreement, whether consciously or not, has already been used by Developed States as a tool of intervention into the Developing State. The formulation of international agreements in the human rights field are not regularly used for honorable purposes, that is for the purpose of respecting human rights themselves.

International agreements in the human rights field actually become a tool in the interests of the Developed State, arraying from the economy through to the political and social components of the Developing State. The law is a political product. Hence international agreements are political products.

Developed States use a number of methods to encourage and pressure the governments of Developing States in order that they decide to be included in international human rights agreements. The participation in turn becomes an *entry point* for Developed States to encourage Developing States to fulfill their obligations. This encouragement is not deemed to be a violation of international law remembering that the Developing State has already been bound by

international agreements. Even like this occurs because Developed States are suspicious of Developing States' willingness to implement their obligations under international agreements.

Besides the ineffectiveness that arises at the drafting and objective stage of the international agreement, the ineffectiveness also arises because of factors that appear in the Developing States. This is caused by the realization that participation more often occurs by force, and not because of any awareness of a need to bind oneself.

For Developing States, changes at the legislation level do not mean unequivocally that there is a need for any change the level of the community. The ratification of any international agreement in the human rights field frequently ends with the ratification instrument. The government is not usually serious about implementing the necessary follow-up actions such as the transformation of the provisions of the international agreement into national laws, undertake the necessary socialization with the law enforcement apparatus at all levels, provide the required supporting infrastructure, and make the necessary efforts to change the legal culture of the community.

It also cannot be ignored that the government pursues the participation of Developing States in international agreements in the field of human rights for political interests. Often the participation is performed to just the extent to gain the desired image of a commitment to the respect of human rights. Hence, participation is not usually studied to the extent necessary to understand the consequences of signing-off on an international human rights agreement.

International agreements that promote and protect human rights, in reality are not sufficient to improve human rights conditions in Developing States, including Indonesia. There is only one issue that must be known, the ineffectiveness is not an apology for not continually undertaking efforts to develop and respect human rights. Whether Indonesia decides to participate in an international agreement in the human rights sector or not, human rights must still be respected, upheld to the highest order, and developed by all.



## **The Indonesian Experience**

Indonesia has some experience related to the utilization of International Law as a political instrument. This experience can be divided into two distinct categories; namely, those experiences where Indonesia must follow the wishes of the international community as a consequence of the international community utilizing International Law (furthermore “the Use of International Law against Indonesia”) and those experiences where Indonesia was able to utilize International Law (furthermore “the Use of International Law by Indonesia”).

### **1. The Use of International Law against Indonesia**

There are many cases that are indicative of where other States or international organizations have used International Law against Indonesia.

International Law, particularly international agreements, is used by developed States to ‘plug’ the independence and sovereignty of Indonesia. A number of international agreements signed by Indonesia have the impact of limiting the government’s space to move with respect to taking policy initiatives. Moreover, any policy initiatives undertaken in relation to the international agreement are expected to be done so at the internationally accepted standard level.<sup>20</sup>

Not all international agreements are signed by Indonesia matter-of-factly as there is considerable awareness by Indonesia with respect to certain problems and issues. There are a large number of international agreements that Indonesia has signed as a consequence of zealous encouragement and pressure from developed States and international organizations.<sup>21</sup> The economic dependence of the Indonesian economy on developed States and international financial institutions has resulted in Indonesia being susceptible to this type of zealous encouragement and pressure.

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<sup>20</sup> ‘International standards’ represents a euphemism for the standards of the west or developed nations.

<sup>21</sup> Aside from the insistence and pressure of developed States and international organizations for Indonesia to participate in international agreements there are also domestic pressures such as from non-government organizations, interest groups, moreover demonstrations from a number of different elements of the community.

In the activities of international trade, developed States, like the United States and the States of the European Union, demand that Indonesia to participate in international agreements that imply an opening up of access to the Indonesian market and protections for Intellectual Property Rights (IPR). In the IPR sector, for instance, the participation of Indonesia in the *Trade-Related aspects of Intellectual Property Rights* (TRIPs) agreement has already resulted in the enactment of a Law on Trade Secrets, a Law on Industrial Design, and a Law on Integrated Circuit Design, as well as amendments to the Law on Patent, the Law on Trademarks, and the Law on Copyright.<sup>22</sup>

In the human rights area, Indonesia has already ratified three conventions including the *International Labor Organization* (ILO)<sup>23</sup> and the Convention on the Elimination of All Forms of Racial Discrimination.<sup>24</sup>

International Law was used by the United Nations in pressuring Indonesia is amenable to the establishment of a court to try the perpetrators of international crimes in East Timor. If Indonesia was not amenable to this, then the UN would establish an international court to be known as the *International Criminal Tribunal for East Timor* (ICTET) which was to resemble the *International Criminal Tribunal for former Yugoslavia* (ICTY) and the *International Criminal Tribunal for Rwanda* (ICTR). This threat to create and establish a court of this nature succeeded in forcing Indonesia to establish a Human Rights Court.<sup>25</sup>

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<sup>22</sup> In Article 1(1) TRIPs it is stated that, "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." For the full text of TRIPs, it is available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm) (last accessed on 22 September 2003).

<sup>23</sup> The ILO Convention that have already been ratified comprise of ILO Convention No. 105 concerning The Abolition of Forced Labor as Law No. 19 of 1999; ILO Convention No. 138 concerning Minimum Age for Admission to Employment as Law No. 20 of 1999; ILO Convention No.111 concerning Discrimination in Respect of Employment and Occupation as Law No. 21 of 1999; and ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor as Law No. 1 of 2000.

<sup>24</sup> Law No. 29 of 1999.

<sup>25</sup> The establishment of the Human Rights Court based on Law No. 26 of 2000 on the Human Rights Court.

In the environmental area, Indonesia has already signed a number of international agreements. These international agreements, among others, include the United Nations Framework Convention on Climate Change,<sup>26</sup> Vienna Convention on the Protection of Ozone Layer,<sup>27</sup> Montreal Protocol on Substances that Deplete the Ozone Layer,<sup>28</sup> Convention on Biodiversity,<sup>29</sup> Convention on Wetland of International Importance especially Water flow Habitat,<sup>30</sup> Convention on International Trade in Endangered Species of Wild Flora and Fauna,<sup>31</sup> Agreement on the Conservation of Nature and Natural Resources,<sup>32</sup> International Plant Protection Convention,<sup>33</sup> Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal,<sup>34</sup> United Nations Convention to Combat Desertification,<sup>35</sup> and International Tropical Timber Agreement.<sup>36</sup>

The success in getting Indonesia to sign these international agreements in international trade, human rights, and the environment is at best very *superficial*. The primary reason underlying this statement is that there is no certainty that these international agreements will be reflected in any sustainable reality.

There are two primary impediments. First, of the several international agreements already signed by Indonesia there has been a failure in getting any of these transformed into any type of domestic national law.

This can be critically questioned with respect to the objective of the amendments. Whether or not the proposed amendments to the regulatory framework are in response to the needs of the Indonesian public or whether the amendments are required to satisfy obligations mandated in the international agreement? If the answer is the first of these, then the question that must be asked

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<sup>26</sup>Law No. 6 of 1994

<sup>27</sup> Presidential Decree No. 23 of 1992

<sup>28</sup> Presidential Decree No. 23 of 1992

<sup>29</sup> Law No. 5 of 1994

<sup>30</sup> Presidential Decree No. 48 of 1991

<sup>31</sup> Presidential Decree No. 43 of 1978

<sup>32</sup> Presidential Decree No. 26 of 1986

<sup>33</sup> Presidential Decree No. 2 of 1977

<sup>34</sup> Presidential Decree No. 61 of 1993

<sup>35</sup> Presidential Decree No. 135 of 1998

<sup>36</sup> Presidential Decree No. 4 of 1995

is whether the awareness of the Indonesian community about such problems as IPR, for example, is sufficiently high enough to warrant the amendments being made?

Thus, the same questions could be asked with respect to human rights. It is reasonable to question whether the international agreement in the field of human rights is really with a view to the respecting and upholding of human rights or whether it is merely a political instrument being exploited for the benefit of the Developed States? This question arises because on the one hand the participation of Indonesia in the international human rights agreement is expected to bring positive change to Indonesia. Yet, on the other hand if the international human rights agreement is applied in the manner expected of Indonesia then the enjoyment of the benefits will be of the Developed States. The application of provisions in international agreements in the labor sector, for example, has the consequence of increasing the cost of goods and services produced in Indonesia.<sup>37</sup> For Developed States this is good because the costs of the goods produced in their States remain competitive. Other benefits include the guarantee that work opportunities will continue to remain guaranteed in Developed States.

The same issue applies in international agreements in the environmental area which have been critically questioned as to whether they are really drafted to protect and preserve the environment or whether these agreements are drafted in order that products made from wood cannot be more easily made available than the steel, plastic, or other goods produced by the industries of Developed States?

The Convention on the Elimination of Racial Discrimination, for example, did not result in any amendments to the legislation frameworks that are connotatively racially discriminative, such as the requirement to possess a Letter Evidencing Indonesian Citizenship (*Surat Keterangan Berkewarganegaraan Republik Indonesia* or SKBRI).

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<sup>37</sup> Indonesia has already ratified International Labor Organization Conventions. The Conventions already ratified include among others; ILO Convention No. 105 concerning the Abolition of Forced Labor, ILO Convention No. 138 concerning the Minimum Age for Admission to Employment, and ILO Convention No.111 concerning Discrimination in Respect of Employment and Occupation.

Second, despite the existence of an international agreement the transformation of these provisions into the national domestic laws of a State can be said to only be to the level of amendments to the regulatory framework. Moreover, the legislation in the majority of developing States, like Indonesia, is rarely reflected in or as changes to one's daily existence. The weakness of law enforcement represents one of the root causes for this failure.

## 2. The Use of International Law by Indonesia

Indonesia has at a number of different opportunities exploited International Law as a political instrument. A number of these were successful and even more were unsuccessful.

First, Indonesia has already used International Law to introduce a new concept in its national interest. In this context, Indonesia successfully introduced the concept of the *archipelagic state*. Indonesia's struggle commenced with the announcement of the *Deklarasi Djoeanda* (Djuanda Declaration) of 13 December 1957. The concept of the *archipelagic state* gave rise to a number of consequences that have since been accommodated in the 1982 Convention on the Law of the Sea.<sup>38</sup> The successful utilization of International Law in this instance is aided by logical thought, consistency of the struggle for recognition in international forums, and perseverant diplomacy.

Yet the struggle for Indonesia in changing a concept, which has so far been embraced by the international community, in the field of space law has ended in failure. For a long time Indonesia has advocated that the *Geo-Stationery Orbit* (GSO) be acknowledged as a part of Indonesia.<sup>39</sup> This struggle is considered to have failed because in 2002 Indonesia finally ratified the 1967 *Space Treaty*. This Treaty explicitly states that no State has any sovereign claim whatsoever over

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<sup>38</sup> United Nations Convention on the Law of the Sea (UNCLOS), Part IV, Article 46-54. The English language text can be accessed at [http:// www.hri.org/docs/LOS/](http://www.hri.org/docs/LOS/) (last accessed on 5 October 2003).

<sup>39</sup> GSO in the beginning was claimed as a part of the sovereignty of Indonesia then this hanged to become an exclusive right and finally it has been claimed as a preferential right that is possessed by Indonesia.

outer space.<sup>40</sup> In retrospect the failure of Indonesia to advance this claim is in the lack of logic in the concept being advocated and the ability of the majority of States to logically and successfully oppose the Indonesian view.<sup>41</sup>

In 1997 Indonesia utilized International Law to resolve a territorial dispute with Malaysia over the Sipadan and Ligitan Islands. The resolution of this territorial dispute if not resolved in the manner that it was conceivably could have been resolved through the use of force. By bringing this dispute within the corridor provided by International Law for the resolution of these types of matters, specifically the International Court of Justice (ICJ), Indonesia has successfully avoided a war. War is not the best option remembering that both Indonesia and Malaysia are members of ASEAN. Furthermore, it should not be forgotten that Indonesia was once involved in a “confrontation” with Malaysia in the past. Although war was successfully avoided, Indonesia still failed to convince the Judges of the ICJ that the two islands at the heart of the dispute were part of the sovereign territory of Indonesia.

Aside from the utilization of International Law as noted previously, Indonesia has already exploited International Law as an enforcement tool against other States.

This occurred when the Government of Indonesia put pressure on the Government of Sweden to take action against the leaders of the *Gerakan Aceh Merdeka* (GAM or the *Free Aceh Movement*) after it was found out that they held Swedish citizenship. Although the benefits of International Law are limited to discourse and carried out in Indonesia, yet it could still be used to put pressure on the Government of Sweden.<sup>42</sup> The discourse is focused on three points. First, the discourse relating to the obligations of Sweden at International Law to not permit their territory to be used by their citizens to undertake actions to interfere with the

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<sup>40</sup> Law No. 16 of 2002 on the Ratification of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967).

<sup>41</sup> States that claim GSO as a part of their territory number only a few, namely States that passed by the Khatulistiwa line. These States made what is known as the Bogota Declaration.

<sup>42</sup> The success of applying any pressure to the Government of Sweden at the time of writing this paper is still at the preliminary research stage by the Public Prosecutors in Stockholm particularly with respect to whether there is sufficient evidence to bring the suspect to trial.

sovereignty of Indonesia. Second, was discourse relating to options of suspending or severing diplomatic ties with Sweden. Third, discourse relating to the testing of the difference between the views of Indonesia and Sweden in the ICJ in so far as they relate to matters of international law.

One of the failures of Indonesia in using International Law as a tool of enforcement occurred when Indonesia sort to undertake an examination of Hambali. Hambali is suspected of being the driving force behind a number of terrorist acts in Indonesia. Hambali was successfully captured by Thai forces in cooperation with forces from the United States. Not long after being captured Hambali was whisked away and taken to the United States.

The desire for Indonesia to prosecute Hambali was based on the need to know the perpetrators and the probabilities of future terror attacks. Yet in Indonesia there was already a developing discourse regarding an extradition request to the United States to extradite and punish Hambali in Indonesia. The desire to gain access to Hambali was in fact the pragmatic option held by the Indonesian Government rather than extradition. Although the possibility of extradition existed at International Law, yet at the political level it was a case of Indonesia facing-off with the United States. This is even before any consideration has been paid to the fact that at that time the United States were already legally processing Hambali.

The failure of Indonesia to pressure the United States is because of an inability to get the United States to merely acknowledge the obligation of the United States to grant access. In this case, Indonesia should have used other International Law arguments as *bargaining chips*. Several of these arguments, among others, includes the requirement for States to work cooperatively in the war against terror based on UNSC resolution and the obligation upon Indonesia to accompany Hambali for so long as Hambali remains an Indonesian citizen pursuant to Indonesian law.<sup>43</sup> This closely resembles the arrest and prosecution of

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<sup>43</sup> Unfortunately the Minister of Foreign Affairs stated that the problem is that because the act perpetrated by Hambali is categorized as a non-traditional crime it thereby makes it difficult for the Indonesian Government to execute its obligations to assist an Indonesian citizen in legal trouble in a foreign jurisdiction. See "Hassan seeks U.S. permission to question Hambali," The

William Nessen where Indonesia granted access to representatives of the United States to meet with Nessen. Nevertheless, it must be conceded that the pressure applied by Sweden and the United States, the failure of Indonesia at specific levels occurred as a direct result of Indonesia's lack of other instruments to apply any pressure, aside from International Law. The other instruments that can be used include economic dependence, which can become a combined problem for States, military strength, and others.

### **Involucres**

Consciously or unconsciously, International Law has already been exploited as a political instrument for the purposes of satisfy particular interests. This paper outlines how International Law becomes a political instrument.

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Jakarta Post 27 August 2003 available at <http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030827.B02> (last accessed on 8 October 2003); Although an obligation such as this is not dependent on whether the criminal action is traditional or not as this is an obligation of the State towards its citizens.



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