

# PALERMO CONVENTION IN OUR LEGAL SYSTEM: PART OF OUR NATIONAL LAW OR MERELY A SOURCE OF LAW

Wisnu Aryo Dewanto\*

## Abstract

*Article 38 of the 2000 Palermo Convention sets out that the Convention will enter into force after a minimum requirement of ratifying or acceding States are fulfilled that is 40 countries. The Indonesian Government had signed the Palermo Convention on December 12, 2000 and had continued to ratify on April 20, 2009. Here the debate begins in regard with the legal status of the Convention that has been ratified by the Indonesia Government, whether the Convention applies for Indonesia or in Indonesia. In the era of Professor Mochtar Kusumaatmadja, treaties that had been ratified or acceded by the Indonesian Government would ipso facto be enforceable in Indonesia, therefore academics and practitioners convinced that Indonesia was a monist State even though in practice it never showed it. That Indonesia has been running the monism concept, I have repeatedly argued through my writings. It is because the constitutional law experts have defined and described some terms in a wrong way, such as the meaning of ratification of the Vienna Convention 1969, of approval of Parliament under Article 11 of the 1945 Indonesian Constitution, of ratification act set out by Law Nr. 24 of 2000 in regard with International Treaties as well as the meaning of self-executing and non-self-executing treaties. This paper would like to propose a different point of view on the practice of the Indonesian legal system in regard with treaties, especially the legal status of the 2000 Palermo Convention in our legal system. In addition to it, this paper also would like to identify the difference between the international obligations burdened by Indonesia as a State party, with the direct application of the Convention in our national courts, which unfortunately those two concepts are often associated with each other.*

**Keywords:** *The Palermo Convention, monism-dualism, Indonesian practice*

## I. INTRODUCTION

In December 2000 the Government of Indonesia has signed the Palermo Convention 2000 on Trans-Organized Crimes known as the United Nations Convention on Transnational Organized Crime. The Indonesian Government takes approximately 9 years to ratify the Convention on April 20, 2009 through Act No. 5 of 2009. From some teachings in the course of international law and international treaty, it seems that

---

\*Author is a Lecturer at the Faculty of Law, Universitas Surabaya. He obtained his Bachelor of Law (Sarjana Hukum) from Universitas Atma Jaya (1997), Master of Law from Macquarie University (1999) and University of Washington (2003, and Doctor of Law from Universitas Gadjah Mada (2011).

there is confusion addressing the significance of the ratification of the treaty by the Indonesian Government. It is because there is a very strong doctrine attaching in people's mind that the ratification act is assumed as the implementing legislation of treaty in Indonesia. The ratification law contains only two articles with the treaty enclosed. According to constitutional law experts, by enclosing the treaty in the ratification act it means a ratified treaty can directly be implemented in Indonesia [read: court]. Most of international law lecturers deem that Indonesia adopts the monism concept despite the fact that none of treaty provisions has been applied by judges as legal basis. This misunderstanding is due to their perplexity to conceive between the concept of monism and international obligations burdened to states parties.

In PILC 2013 conducted at Faculty of Law Universitas Padjadjaran, Bandung I strongly criticized the Delri's report to the UN Committee on Human Rights in regard with the use of Article 2 of the ICCPR as an example that international treaty is part of our national law so it can directly be applied in our municipal courts. The Article 2 of the Covenant is actually not an article that can be provided as a legal basis because the existence of the article simply wants to describe the legal status of the Covenant for the states parties, which the states parties are required to enact legislation that can make the rights contained in the Covenant have legal effect in national level.

The Indonesian Government often feels uncertain when it comes to ratify a treaty due to its understanding that the treaty provisions will apply in Indonesia [read: court]. In fact, ratification has no meaning whatsoever, except to make the treaty enter into force in international level. In addition, the Indonesian Government is entitled to declare about the meaning of Indonesia's ratification of a treaty. The Colombian Government when ratifying the Rome Statute expressly declared that "none of the provisions of the Rome Statute alters the domestic law applied by the Colombian judicial authorities in exercise of their domestic jurisdiction within the territory of the Republic of Colombia." On the top of that, Uruguay, in regard to the Rome Statute, boldly declared that "...Uruguay shall ensure its application to the full of extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic."

This declaration reaped many objections from other state parties of the Rome Statute because the Uruguay Government was considered not to have a sincere commitment as a party to the Rome Statute. The question arises when the Indonesian Government ratifies the Palermo Convention, whether the Convention applies in Indonesia or for Indonesia. This paper will discuss a few things with regard to the meaning of ratification in our constitutional system, ratification law of a treaty and the distinction between international obligations and the monism concept.

## **II. THE DEVELOPMENT OF TREATY IN OUR LEGAL SYSTEM: FROM THE ERA OF PROFESSOR MOCHTAR KUSUMAAT- MADJA UNTIL TODAY**

The politics of law of the law of treaty in Indonesia is very interesting to be discussed because there is a very different view amongst constitutional law and international law experts in dealing with the application of treaties in our legal system. Our Constitution does not explicitly regulate the intercourse between international law and municipal law. Article 11 of the Constitution only regulates the relation between the President and the DPR in terms of making treaties with other states. Therefore, the question arises whether judiciary may use the rules of international law in their courts. Judges seemingly are reluctant to apply the rules of international law to resolve matters because they reckon that they are not obliged to implement the rules. The reluctance may be very reasonable when we refer to the case of NMB v. PT. Nizwar closely in regard with the applicability of the 1927 Geneva Convention to Indonesia after the independence proclamation.<sup>1</sup> There were two major opinions arise regarding this Geneva Convention, first opined that international agreements concluded by the Kingdom of the Netherlands remained in effect for Indonesia since the Indonesian Government did not withdraw from the agreements.<sup>2</sup> Then, second assumed that the Indonesian Government was no longer bound by the international agreements.<sup>3</sup>

In the case of PT. Nizwar, Indonesia seemed to adopt a monism

---

<sup>1</sup> Sudargo Gautama, *Indonesia dan Arbitrase Internasional* (Bandung: Alumni, 1992) hlm, 314

<sup>2</sup> *Ibid*, p 68

<sup>3</sup> *Ibid*.

concept because the National Court of Central Jakarta through its decision Nr. 228 of 1979 dated June 10, 1981 recognised the 1927 Geneva Convention to apply in Indonesia without an implementing legislation. However, the decision was annulled by the Supreme Court on the grounds of the existence of the Presidential Decree Nr. 34 of 1981 did not make the 1927 Geneva Convention applicable in Indonesia prior to the enactment of an implementing legislation. The interpretation of the Supreme Court at the time turned out to be in line with the Constitutional Court decision Nr. 33/PUU-IX/2011 regarding judicial review of the ASEAN Charter, that the ratification law issued by the DPR did not make treaties enforceable in Indonesia since it is merely a formal approval of the DPR to the President that wants to ratify a treaty. Thus, the Geneva Convention only applied to Indonesia as a state.

The term of “implementing legislation” or “legislative action” is interpreted a bit different than what it appears in the Law Nr. 24 of 2000 on Treaties, especially Article 9 paragraph 2 which states “ratification of a treaty as referred to paragraph 1 shall be made by an act or a presidential decree.” The term “presidential decree” was then changed to be “presidential rule” due to the emergence of Law Nr. 12 of 2011 on the Formation of Law. The existence of Article 9 paragraph 1 of the Law Nr. 24 of 2000 is actually contrary to Article 11 of the Indonesian Constitution due to the need of the involvement of the DPR to give approval to the President before ratifying a treaty. Implementing legislation is a product of the DPR to elaborate the norms of international law in order to be applicable in our municipal courts, such as the Berne Convention that was approved through a Presidential Decree Nr. 19 of 1997 was applied in our legal system through Law Nr. 19 of 2002 on Copyright. Unfortunately, in regard with the 1958 New York Convention on Foreign Arbitral Awards, the Supreme Court misunderstood the meaning of an implementing legislation by issuing the Supreme Court Rule Nr. 1 of 1990 as the implementing legislation of the New York Convention. In fact, the implementing legislation of the Convention was actually the Law Nr. 30 of 1999 on Indonesian National Board of Arbitration in which governs the recognition and the enforcement of foreign arbitral awards.

Professor Harjono’s dissertation stated that the Presidential Letter

Nr. 2826/HK/1960 was the result of Article 11 interpretation conducted by the Executive. The word “interpretation” becomes false if we look at the doctrine of separation of powers in regard with who has the authority to interpret laws. It is the authority of the judiciary, not the Executive branch.<sup>4</sup> Moreover, the word of “pengesahan” in Article 9 paragraph 2 of the Law Nr. 24 of 2000 leads to a contradiction understanding associated with the word “ratification” therefore some understandings deem that the authority to ratify a treaty be at the DPR, not the President.

In addition to it, there was a shifting understanding in regard with self-executing and non-self-executing in Indonesia so as to cause quarrels amongst academics and practitioners. So far, the self-executing treaty is understood as the entry into force of an international treaty only requires a signature, while the non-self-executing treaty is defined as the entry into force of an international treaty requires ratification. The emergence of these two definitions in academic is very astonishing because these definitions are rather far from the initial definition of these emerging concepts. The self-executing and non-self-executing treaties originally appeared for the first time in the US. Article 6 of the US Constitution states that “...all Treaties are the supreme law of the Land.” Then a question arised within judges was whether all the international treaties ratified by the US Government shall be applied directly in municipal courts. In Foster case, the definition of self-executing treaty came up when Justice Marshall said that “a self-executing treaty if the application of a treaty without the aid of legislation.”<sup>5</sup> Thus, it was described further by Vazquez in relation to the US legal system that “a self-executing treaty is defined as a treaty that may be enforced in municipal courts without the prior legislation by the Congress.”<sup>6</sup> In a case a treaty is considered as a non-self- executing when it cannot be directly implemented in national courts due to the requirement of an implementing legislation. The court will refuse to apply treaty provisions if the provisions are regarded as non-self-executing. In *Whitney v. Robert-*

<sup>4</sup> Harjono, 1994, *Aspek-Aspek Yuridis Pembuatan Perjanjian Internasional dalam Sistem UUD 1945*, (Disertasi, Universitas Airlangga, pp. 256-259.

<sup>5</sup> Malvina Haberstam, 2000, *International Human Rights and Domestic Law Focusing on U.S. Law with Some Reference to Israeli Law*, 8 *Cardozo J. Int'l & Comp. L.* 225, *Cardozo Journal of International and Comparative Law*, p. 234.

<sup>6</sup> Carlos Manuel Vazquez, 1995, *The Four Doctrines of Self-Executing Treaties*, *American Journal of International Law*, Volume 89, Issue 4, p. 695.

son, the US Supreme Court decided that “when the treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect...”<sup>7</sup>

The different comprehension on self-executing and non-self-executing treaty in Indonesia finally creates an error to interpret whether a ratified treaty shall apply in Indonesia or to Indonesia. Basically, It did not err when people thought Indonesia adopted the monism concept because I at first thought it so when we looked back to the checks and balances system in our constitutional system. Looking at the checks and balances system operated in the US constitutional system in regard with treaties, the US President needs to have approval from the US Senate in order to ratify a treaty. The approval of the US Senate has two meanings, first to let the President ratify the treaty and to make the treaty enforceable in US courts unless otherwise determined by the Senate.<sup>8</sup> For instance, the President with the approval of the Senate ratified the ICCPR. In the process of approval, the Senate put some conditions, which were to make a reservation for Article 6 para 5 and to declare that the ICCPR would not create a private cause of action in US courts.<sup>9</sup> In Domingues case, ICCPR was used to challenge the decision of Nevada Court due to give a death sentence to Domingues who was aged not yet 18 years old. The death sentence was inappropriate with the ICCPR that had been ratified by the US Government. However, the appeal was rejected by the Nevada Supreme Court on the grounds that the US Government has reserved the Article 6 para 5 of the Covenant and the ICCPR was regarded as a non-self-executing treaty. Therefore, the court handed down the death sentence was considered lawful.<sup>10</sup> In Indonesia the implementation of the checks and balances system in term of process of ratifying treaty is similar, but it becomes very different in regard with the legal consequences of the DPR approval to the

---

<sup>7</sup> David Sloss, 1999, *The Domestication of International Human Rights: Non-Self-Executing Declaration and Human Rights Treaties*, 24 *Yale J. Int'l. L.* 129, *Yale Journal of International Law*, p. 146.

<sup>8</sup> Jordan J. Paust et.al., 2000, *International Law and Litigation in the U.S.*, West Group, USA, pp. 219-220.

<sup>9</sup> Chrissy Fox, 2003, *Implication of the U.S.' Reservations and NSE Declaration to the ICCPR for Capital Offenders and Foreign Relations*, *Comments*, 11 *Tul. J. Int'l. & Comp. L.* 303, *Tulane Journal of International and Comparative Law*, pp. 304-308.

<sup>10</sup> *Ibid.*, p. 319.

treaty. The DPR approval does not make the treaty enforceable in our legal system, but it is merely a formal form from the DPR to permit the President to ratify treaty.

Although Indonesia was colonized by the Dutch that adopts the monism concept, but the fact prevailing in Indonesia is the dualism concept. The evidence of Indonesia as a dualist state can be viewed from the absence of our Constitution to regulate the legal status of treaties in our national legal system. Unlike monist states they clearly set out the status of treaties in their constitutions, such as Article 6<sup>11</sup> of the US Constitution, Article 55<sup>12</sup> of the 1958 French Constitution, Article 94<sup>13</sup> of Grundwet and Article 15 paragraph 4<sup>14</sup> of the Russian Constitution. Furthermore, there are countries that do not regulate the legal status of treaties due to the primacy of their national law, such as Australia, Canada and Germany. For Germany, this state put the international customary law higher than international treaties. The customary law can directly be implemented in its national courts, however the treaties must go through a transformation process in order to enforce.<sup>15</sup> According to these countries, the act of ratification is merely binding upon the states in the international level, not in the national level. If Hj. Suparti Hadhyono stated that our judges were not bound by treaty provisions it is false because the judges in reality are not bound by treaty provisions made by the Executive. Our judges are only bound by laws enacted by the DPR. Therefore, the international law is only as a source of law for the judges.<sup>16</sup>

---

<sup>11</sup> "All...treaties are the supreme law of the land."

<sup>12</sup> "Treaties and agreements duly ratified or approved shall upon publication prevail over Acts of Parliament..."

<sup>13</sup> "Statutory legislations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of the treaties that are binding on all persons or resolutions by international organization."

<sup>14</sup> "The general recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal system. If an international treaty of the Russian Federation established other rules than those stipulated by the law, the rules of international treaty shall apply."

<sup>15</sup> Hasil penelitian Penulis ketika menulis disertasi hukum yang berjudul "Perjanjian Internasional Self-Executing dan Non-Self Executing di Pengadilan Nasional", pada Sekolah Pascasarjana Fakultas Hukum Universitas Gadjah Mada, Yogyakarta.

<sup>16</sup> Hj. Suparti Hadhyono, "Praktek Penerapan Perjanjian Internasional dalam Putusan Hakim", at <http://www.scribd.com>

In the ratification Act it contains only two articles which the second article states that “the Act applies on the date of enactment.” Some legal scholars gives different comments on the word “apply” that indicates that the Act makes the ratified treaty have the force of law in Indonesia. Other comments express their opinion that the word “apply” means that the Act is a legal basis for the President to ratify the treaty. By understanding the constitutional system and the separation of powers doctrine in Indonesia, we are deemed as a dualist state where ratified treaties will not be directly applicable in our municipal courts or in other words all treaties are regarded as non-self-executing in Indonesia. Article 7 of the Law Nr 12 of 2011 shows the process of transformation must be carried out in order to make ratified treaties enforce. Moreover, the ratification Act is actually addressed to the President and the DPR when they are enacting laws they shall recall the ratified treaty norms to be applied in the national level, such as the UN Convention on Climate Change that was ratified by Ratification Act Nr. 6 of 1994, its treaty norms were embodied on the Law Nr. 32 of 2009 on the Environmental Protection and Management.

### **III. RATIFICATION OF TREATY AS THE CONSENT TO BE BOUND OF STATES IN INTERNATIONAL LEVEL**

Steps in the making of international agreements are negotiation, signing and ratification or accession. In the case of consent to be bound of treaty,<sup>17</sup> the consent to be bound of states to treaties can be conducted in many ways, such as signature, signature ad referendum and ratification or accession.<sup>18</sup> According to Starke, the legal consequences of signing a treaty are very dependent on whether the treaty requires ratification or not. If so, the signing states approve the substance of the treaty and the states are bound by Article 18 of the 1969 Vienna Convention.<sup>19</sup> The applicability of signing a treaty will be divergent when the treaty does not require ratification. According to Oppenheim, “although ratification

<sup>17</sup> Boer Mauna, 2001, *Hukum Internasional: Pengertian, Peranan, dan Fungsi dalam Era Dinamika Global*, Alumnus, Bandung, pp. 83-84.

<sup>18</sup> Rebecca Wallace, 1992, *International Law*, 2nd Edition, Sweet & Maxwell, London, p. 222.

<sup>19</sup> J.G. Starke, 1984, *Introduction to International Law*, Butterworth, London, p. 429.



is necessary in principle but not always essential.”<sup>20</sup> Then Schwarzenberger also argues that “if the treaty is not subject to ratification, the signature necessarily also serves the additional purpose of expressing the consent of the parties to be bound by the treaty.”<sup>21</sup>

In Canada ratification of international treaties does not have any legal consequences in municipal courts before implementing legislation enacted by the Federal or Provincial Parliament of Canada.<sup>22</sup> In terms of making and implementing international agreements, the Canadian constitutional system divides two major powers, which are the Executive and the Legislature. The Federal Executive Government may abide to any international treaties. However they cannot make sure whether or not the ratified treaties become part of national law of Canada. The reason is due to the differentiation of the state obligations in international and national level, where the international obligations are imposed on the Executive Government and the authorization to make laws lay on the Parliament either federal or province.<sup>23</sup> In case of Labor Convention, the Canadian Government entered into agreement of three Conventions at an International Labor Conference, in which the legal impacts of the ILO Conventions were to the provincial governments therefore the provincial governments are entitled to enact implementing legislations to make the Convention norms enforceable in Canada. As said by Lord Atkins that “Where the subject matter of a treaty comes within provincial legislative competence, only province may enact implementing legislation.”<sup>24</sup>

On this issue, the Indonesian Government has ratified the Palermo

---

<sup>20</sup> H. Lauterpacht, 1948, *Oppenheim’s International Law: A Treatise*, Vol. I – Peace, Longmans, Green and Co., London-NY-Toronto, p. 815.

<sup>21</sup> Georg Schwarzenberger, 1951, *Power Politics: A Study of International Society*, Frederick A. Praeger, New York, p. 144.

<sup>22</sup> Christopher Harland, *Domestic Reception of International Humanitarian Law: U.K. and Canadian Implementing Legislations*, in Christopher P.M. Walters (Ed.), 2006, *British and Canadian Perspectives on International Law*, Martinus Nijhoff Publishers, Leiden/Boston, p. 29.

<sup>23</sup> Melanie Mallet, *A Primer on Treaty Making and Treaty Implementation in Canada*, Original Contribution, Thanks to Prof. Magnet, p. 2.

<sup>24</sup> George Slyz, 1997, *International Law in National Courts*, 28 *NYU J. Int’l. & Pol.* 65, *New York University Journal of International Law and Politics*, p. 82.

Convention through the Law Nr. 5 of 2009. As having been explained before the ratification Act was not the form of transformation of ratified treaties in Indonesia, but the Act was the form of formal approval from the DPR to the President to ratify international treaties. The Palermo Convention is merely applied to Indonesia as a State where the Indonesian Government has an obligation to carry out international obligation mandated by the Convention. Article 1 of the Palermo Convention explains that the purpose of this Convention is to promote cooperation amongst countries in order to combat trans-organized crimes. The Convention also requires the state parties to take legislative measure in order to penalize types of crimes set forth in the Convention, such as money laundering, corruption, and other crimes. The Indonesian Government has enacted legislations in relation with the Convention such as money laundering, corruption, extradition, protection on witnesses and victims.

#### **IV. CONDUCTING INTERNATIONAL OBLIGATIONS OF TREATIES IS NOT THE SAME AS THE MONISM CONCEPT**

In some discussions with legal scholars, it appears that there is an overlapping understanding in regard with performing international obligations with the monism concept. At the time a State respects the immunity rights of diplomatic staff set in the 1961 Vienna Convention on Diplomatic Relations, there is an assumption that Indonesia is a monist state. However, I have a different point of view that Indonesia is not showing the monism practices but merely performing the international obligations on the basis of reciprocity with other countries. Similarly, when an state officer will be assigned to a diplomatic post and had to transit in a third state, the transit state shall perform the obligation set forth in Article 40 of the 1961 Vienna Convention to respect the immunity right and privileges of the diplomatic agent. In criminal or civil cases involving foreign diplomatic officials, our judges are not bound by the 1961 Vienna Convention, but are bound by Article 9 of Indonesian Criminal Code which states that “The application of Articles 2, 5, 7 and 8 are limited by exceptions that are recognised in international law.”

Similarly, when the Indonesian Government allows foreign ships to

navigate in our territorial sea with the right of innocent passage, it does not mean that Indonesia is running the monism concept. However Indonesia as a State is performing its international obligation to open its territorial waters for foreign ships to sail peacefully. If Indonesia does not carry out the international obligations imposed by the 1982 UNCLOS then other countries may submit an objection or claim to the ICJ. The main actor of implementing the obligations is the Executive that has the authority to make external affairs.

In contrast, the monism concept is related to whether or not a treaty can be directly applied in national courts of a state.<sup>25</sup> According to Grotius, the law of nations is the law that is universal and binding on all mankind.<sup>26</sup> The unification of national law and international law in one pyramid of legal system will make the international law automatically becomes part of the national law of states that once the ratification action taken the treaty will be an integral part of the national legal system of the State.<sup>27</sup> Interestingly, the monism concept is divided into two mainstreams, which are the monism concept with primacy on national law and with primacy on international law. According to the first mainstream, treaty norms are elaborated into national law of each state so that even though the main source of law is the national law but it is not contrary to the norms of international law. Thus, the second one thinks that the international law is placed in the highest order in the hierarchy of law.<sup>28</sup>

Basically, the question whether or not treaty can be applied directly in courts is a question that must be answered by the state itself. As noted above, in order to understand whether or not a state adopts the monism concept it can be observed from the state constitutions. Unfortunately, the understanding that in monist states all treaties can be directly applied in their courts is not true because not all treaties in fact can be directly applied. The courts need to analysis whether or not the treaty norms bind individuals, as practiced in the Netherlands and France. Al-

---

<sup>25</sup> Jacob Dolinger, 1993, Brazilian Supreme Court Solutions for Conflict Between Domestic and International Law: An Exercise in Eclecticism, 22 Cap. U. L. Rev. 1041, Capital University Law Review, p. 1045.

<sup>26</sup> George Slyz, op.cit., p. 69.

<sup>27</sup> Alina Kaczorowska, 2002, Public International Law, Old Bailey Press, p. 36.

<sup>28</sup> Ibid

though the courts consider that the treaty norms can be directly implemented the courts need to observe the ratification process whether or not there is reservations or declaration toward the treaty concerned, as practiced in the US.

## **V. THE PALERMO CONVENTION CONCLUDED BY THE EXECUTIVE, BUT JUDGES FOLLOW LAWS ENACTED BY THE LEGISLATURE**

Philosophically we realize that treaty norms only provide the rights and obligations to states parties. From the separation of powers system it is clear and firm that the municipal courts are only bound by the laws enacted by the Legislature. Some states clearly explain that ratification of a treaty does not provide any benefit for the state in the national level until the Legislature approves and enacts the law to transform the treaty norms concerned such as Canada. For countries giving primacy to national law, the enforceability of treaty norms requires a process of transformation. The reason why international law in nature is non-self-executing it is because the view of national law and international law is different in every way as well as the different function of the Executive and the Legislature.

In several countries such as UK and Australia, the separation of powers is properly enforced. In UK the power to make treaty lays on the Executive branch, including negotiation, signature and ratification, without the involvement of the Parliament. However, the ratified treaty has never been part of UK national law without the implementation legislation enacted by the Parliament. UK judges only adhere to laws enacted by the Parliament and the judges do not have authority to review any law or to declare the law is unconstitutional because the power to declare so is the Parliament itself.<sup>29</sup> The judges also do not have any authority to make “second-guess legislation” or interpreting the law without consulting first with the Parliament as the lawmaker. The doctrine of Parliament sovereignty makes ratified treaties to enforce without the Parliament’s consent.<sup>30</sup> Similarly in Australia, the separation of powers

<sup>29</sup> Aalt Willem & Philipp Kiiver, 2007, *Constitutional Compared: An Introduction to Comparative Constitutional Law*, Intersentia, Antwerpen, p. 108.

<sup>30</sup> Michael Bogdan, 1994, *Comparative Law*, Kluwer Law and Taxation, Norstedts

doctrine is also the reason to not implement treaty norms in municipal courts. All ratified treaties will need implementing legislations to be applicable. In terms of implementing legislation, Australia runs a unique way where the implementing legislation needs to have a clause saying that “have the force of law in Australia” in order to the treaty norms be applicable in national level. Another clause shows that a treaty can be implemented in courts is “This Act was intended in particular to make the provisions to give effect to the Convention.” For instance, the Genocide Convention Act 1949 (Cth) is the implementing legislation of the Genocide Convention, but the presence of this Act was not intended to make the Genocide Convention apply in courts, but it was only approval from the Commonwealth Parliament to the Australian Government that had ratified the Convention.<sup>31</sup> In making treaties, the Government does not receive any intervention from the Parliament as said by Gareth Evans that “The Constitutional power to enter into treaties is one that belongs to the Governor-General in Council. The Commonwealth Parliament, inconsequence, has no formal function to exercise by way of review or oversight of international conventions, treaties and agreements which the Federal Government is considering signing.”<sup>32</sup> Moreover, the legal effect of the ratification of international agreements binds the Australian Government but it did not provide the rights and obligations to the Australian citizens.<sup>33</sup> In case of *Victoria v. Commonwealth* the applicant provided the ratified ILO Convention but then the High Court of Australia answered as follow: “Thus, as matters stand in Australian... the conduct of the external affairs by the Executive may produce agreement which the Executive wishes to translate into the domestic or municipal legal order. To do so, it must procure the passage of legislation implementing those agreements if it wishes to create individual rights and obligations or change existing rights and

---

Juridik & Tano, Sweden, pp. 124-125.

<sup>31</sup> Rosalie Balkin, *International Law and Domestic Law*, in San Blay et.al. (Ed.), 2005, *Public International Law: An Australian Perspective*, 2nd Edition, Oxford University Press, pp. 124-125.

<sup>32</sup> Suri Ratnapala, 2002, *Australian Constitutional Law: Foundation and Theory*, Oxford University Press, Victoria, p. 33.

<sup>33</sup> Gareth Evan, 1995, *International Treaties: Their Impact on Australia*, A Speech on the International Treaties Conference, Canberra, Australia, at <http://www.australian-politics.com/foreign/treaties/85-09-04treaties-evans.shtml>

obligations under that legal order.”<sup>34</sup>

One of the reasons why Indonesian judges does not apply treaty norms in their courts is because the separation of powers doctrine in which the ratified treaty only binds Indonesia as a State in regards with international relations. In addition, the judges are only bound by laws enacted by the Legislature or DPR. In reality, the judges have freedom to do legal interpretation of rules of law if they are deemed incompatible with ratified treaties, however this is rarely done. The Palermo Convention does not have legal effects in national level until its implementing legislation made by the DPR. In fact, the Indonesian Government has anticipated the rise of trans-national crimes by issuing some relevant laws, such as trafficking, money laundering, corruption, extradition, terrorism and other several laws that are relevant to the Convention.

## **VI. CONCLUSION**

The implementation of treaties in Indonesia has always been an interesting debate amongst legal scholars in the field of constitutional law and international law. The debate topic is always whether Indonesia adopts monism or dualism concept. The debate then develops to the legal consequences of ratification treaties, the separation of powers and the divergent between applying international obligations and the monism concept.

From the description above it can be drawn that the dualism concept is more dominant to be implemented in our legal system by looking at the Constitution and Article 7 of the Law Nr 12 of 2011 on the Formation of Law. Furthermore, the ratification of treaty is an international act of Indonesia in conjunction with other countries and aims to create the treaty to apply universally. The act of ratification to the Palermo Convention does not make the Convention applicable in Indonesia [read: court], but for Indonesia. The applicability of the Palermo Convention in national level very much depends on the DPR to enact an implementing legislation. This is caused the doctrine of separation of powers in regard with the authority to make laws. Therefore, judges are not bound by treaties made by the Executive, but by laws enacted by the DPR. In

---

<sup>34</sup> *Ibid.*, p. 124.

term of international obligations, any treaty always assign to states parties to adhere and to apply international obligations under each treaty so that the treaty norms become effective and applicable. One of the international obligations lying under the Palermo Convention is that all states parties shall take any legislative measures to make the provisions in the Palermo Convention have the force of law. The Indonesian Government together with the DPR has an obligation to enact any laws that are relevant to the Convention. Some of Acts of Parliament have been enacted to fulfill its obligations toward the Palermo Convention, such as terrorism, corruption, extradition, money laundering and trafficking. Carrying out the international obligations of treaty is the not the same as the concept of monism due to different legal consequences. Therefore, it errs if there is suspicion that ratification of treaty is to make the treaty enforceable in Indonesia [read: court], however it applies to Indonesia as a state.

## **REFERENCES**

- Aalt Willem & Philipp Kiever, 2007, *Constitutional Compared: An Introduction to Comparative Constitutional Law*, Intersentia, Antwerpen.
- Alf Ross, 1947, *A Textbook of International Law: General Part*, Longmans, Green and Co, London-NY-Toronto.
- Alina Kaczorowska, 2002, *Public International Law*, Old Bailey Press.
- Boer Mauna, 2001, *Hukum Internasional: Pengertian, Peranan, dan Fungsi dalam Era Dinamika Global*, Alumni, Bandung.
- Carlos Manuel Vazquez, 1995, *The Four Doctrines of Self-Executing Treaties*, *American Journal of International Law*, Volume 89, Issue 4.
- Chrissy Fox, 2003, *Implication of the U.S.’’ Reservations and NSE Declaration to the ICCPR for Capital Offenders and Foreign Relations*, *Comments*, 11 *Tul. J. Int’l. & Comp. L.* 303, *Tulane Journal of International and Comparative Law*.
- Christopher Harland, *Domestic Reception of International Humanitarian Law: U.K. and Canadian Implementing Legislations*, in Christopher P.M. Walters (Ed.), 2006, *British and Canadian Perspectives on International Law*, Martinus Nijhoff Publishers, Leiden/Boston.
- David Sloss, 1999, *The Domestication of International Human Rights: Non-Self-Executing Declaration and Human Rights Treaties*, 24 *Yale J. Int’l. L.* 129, *Yale Journal of International Law*.
- Gareth Evan, 1995, *International Treaties: Their Impact on Australia*, A Speech on the International Treaties Conference, Canberra, Australia, at <http://www.australian-politics.com/foreign/treaties/85-09-04treaties-evans.shtml>

- Georg Schwarzenberger, 1951, *Power Politics: A Study of International Society*, Frederick A. Praeger, New York.
- George Slyz, 1997, *International Law in National Courts*, 28 *NYU J. Int'l. & Pol.* 65, *New York University Journal of International Law and Politics*.
- H. Lauterpacht, 1948, *Oppenheim's International Law: A Treatise*, Vol. I – Peace, Longmans, Green and Co., London-NY-Toronto.
- Harjono, 1994, *Aspek-Aspek Yuridis Pembuatan Perjanjian Internasional dalam Sistem UUD 1945*, Disertasi, Universitas Airlangga.
- J.G. Starke, 1984, *Introduction to International Law*, Butterworth, London.
- Jacob Dolinger, 1993, *Brazilian Supreme Court Solutions for Conflict Between Domestic and International Law: An Exercise in Eclecticism*, 22 *Cap. U. L. Rev.* 1041, *Capital University Law Review*.
- Jordan J. Paust et.al., 2000, *International Law and Litigation in the U.S.*, West Group, USA. Malvina Haberstam, 2000, *International Human Rights and Domestic Law Focusing on U.S. Law with Some Reference to Israeli Law*, 8 *Cardozo J. Int'l & Comp. L.* 225, *Cardozo Journal of International and Comparative Law*.
- Melanie Mallet, *A Primer on Treaty Making and Treaty Implementation in Canada*, Original Contribution, Thanks to Prof. Magnet.
- Michael Bogdan, 1994, *Comparative Law*, Kluwer Law and Taxation, Norstedts Juridik & Tano, Sweden.
- Rebecca Wallace, 1992, *International Law*, 2nd Edition, Sweet & Maxwell, London.
- Rosalie Balkin, *International Law and Domestic Law*, in San Blay et.al. (Ed.), 2005, *Public International Law: An Australian Perspective*, 2nd Edition, Oxford University Press.
- Sudargo Gautama, 1992, *Indonesia dan Arbitrase Internasional*, Alumni, Bandung.
- Suri Ratnapala, 2002, *Australian Constitutional Law: Foundation and Theory*, Oxford University Press, Victoria.
- Thomas Buergenthal, 1992, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, Extract from *Recueil der cours*, Volume 235, Martinus Nijhoff Publisher, the Netherlands.