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FOREWORD

TO THE INAUGURAL ISSUE OF THE INDONESIAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW

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The spread of liberal constitutionalism in the post Cold War era has encouraged national courts to engage with international and foreign law, in parallel with the entrenchment of supranational courts. These trends encourage nation-states to reexamine exclusionary policies in light of emerging international standards and comparative best practices. An exemplary contribution is the International Court of Human Rights 2013 advisory opinion, OC-18, a ruling that is boldly in line with the interests of humanity. In this decision, the Court ruled that the State cannot justify negative discriminatory treatment of undocumented migrant workers solely based on "criteria [that is arbitrarily determined by national lawmakers] and is not proportional under international law."[1] What makes this decision notable is that the Court reached its decision by ruling that all countries are bound by a mandatory "*jus cogens*" norm of equality before the law:

1. Beth Lyon, Sarah Cleveland, & Rebecca Smith. *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. SOC. JUST. 795 (2003).

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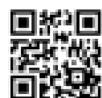

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> [T]he principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*[2] . . . both the international instruments and the respective international case law establish clearly that States have the general obligation to respect and ensure the fundamental rights. To this end, they should take affirmative action, avoid taking measures that restrict or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.[3]

Thus the ongoing "humanization of international law"[4] is bringing with it a re-examination of the relationship between national and international law. An all-encompassing treaty that provides guidance for States on how to treat the interface between the domestic and international legal systems remains elusive,[5] but there is a substantial body of theoretical work going beyond the unrealistic debate between the dualist and monist camps.[6] For example, in response to the "migration of constitutional

2. *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Sept. 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), para. 101, *available at* http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html (last visited Sept. 08, 2013).
3. *See Id.* para. 81.
4. *See e.g.* Theodor Meron, The Humanization of International Law (2006).
5. In the absence of such transnational guidance, there have been interesting responses at the national level. Chief among them is what one might call a "domestic instrumentality," an opening-up by the individual State to voluntarily incorporate international legal obligations into its domestic legal system. The best known process is "constitutional convergence," in which international treaties effected the writing process of national constitutions, bringing the process full circle, as the original treaties were actually influenced by national constitutions of the day.
6. *See e.g.,* New Perspectives on the Divide Between National and International Law (Janne E. Nijman & André Nollkaemper eds., 2007).

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ideas [that] occurs from the international to the national level," Mattias Kumm has tried to develop "the appropriate doctrines" that "can help prevent the migration of unconstitutional ideas from the international to the national level, while securing engagement with international law."[7]

In her recent worldwide survey, Professor Dinah Shelton noted that "international law appears to have some impact in domestic legal systems, in particular in interpreting constitutional and statutory provisions."[8] Moreover, she claimed that, "[t]hose countries that have experienced dictatorships or foreign occupation reveal greater receptivity to international law, often incorporating or referring to specific international texts in their post-repression constitutions."[9] Simply put, "[t]he failures of the domestic legal order seemingly have inspired in these countries a turn towards an international 'safety net.'"[10] And this contention is backed by a burgeoning empirical studies that consistently support the idea that international law may help to "lock in" democracy.[11] This voluntary reception among new democracies is based on the assumption that since a constitution acts as a "precommitment device," it makes sense for domestic actors to view international law more favorably. Constitutions and international law share defining features, i.e., binding and limiting the options of policy makers in a way that can be invoked by individual claimants or utilized in governance decisions.

Indonesia's trajectory has been different. On the global scale, Indo-

7. *See* Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement, in* The Migration of Constitutional Ideas 256-93 (Sujit Choudhry ed., 2006).

8. Dinah Shelton, *International Law in Domestic System, in* General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé 509 (K.B. Brown & D.V. Snyder eds., 2012).

9. *Id.* at 509-510.

10. *Id.* at. 510.

11. *See e.g.* Tom Ginsburg, *Locking In Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. Int'l L. & Pol. 707 (2006) ("[s]uggest[ing] that new democracies tend to be more open to customary international law, and to provide for treaty-making structures that build on the logic of precommitment. This finding demonstrates that international legal commitments have both domestic and international audiences.").

nesia pursued "an unusual strategy of democratic reform."[12] One of the characteristics of Indonesia's "distinctive path" toward democracy is "an inside job" in which "[t]hose leaders and the former opposition leaders who joined them . . . pursued radical constitutional change intramurally, without resort to a constitutional commission or a convention and with relatively little consultation with civil society bodies or the public at large."[13] Although this more closed off model was successful in bringing about a modest form of democracy, Indonesia's progress towards a more fully inclusive political system has stalled.[14] Meanwhile, although the human rights provisions in Indonesia's 1945 constitution are largely drawn from the UN Declaration of Human Rights,[15] Indonesian civil society has been slow to utilize international law,[16] as have the Courts and legislature.[17] Indeed, the majority of scholarly publications on human rights in Indonesia, including those written by prominent legal scholars, view rights as purely national matters.[18] Moreover, there has been little to

12. Donald Horowitz, Constitutional Change and Democracy in Indonesia 1 (2013).
13. *Id.*
14. *Id.* at 207 (stating that "within a few years of the democractic transition, it had become customary to refer to Indonesia as a low-quality democracy.")
15. Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change?*, 6 Sing. J. Int'l & Comp. L. 17 (2002).
16. *See* Pranoto Iskandar, *Pemanfaatan Hukum Internasional dalam Tata-Kelola Migrasi Ketenagakerjaan di Indonesia: Sebuah Tinjauan Umum, in* Standar Internasional Migrasi Berbasis Ketenagakerjaan 29-34 (Pranoto Iskandar ed., 2011). *See also* Knut D. Asplund, *Resistance to Human Rights in Indonesia: Asian Values and Beyond,* 1 Asia Pac. J. Hum. Rts & L. 41-43 (2009) (stating that human rights is widely viewed by civil society, *inter alia*, as a competitor to religious doctrine).
17. *See* Irene Istiningsih Hadiprayitno, *Defensive Enforcement: Human Rights in Indonesia*, 11 Hum. Rts Rev. 397 (2010) (arguing that "[t]he enforcement of human rights in Indonesia is centered on a dialog-based approach, rather than a violation-based approach. The adoption of human rights discourse in the legal system serves as revealing violations and opening a dialog between human rights agents and victims, rather than actually guarantee law enforcement through punishment.").
18. *See* Bagir Manan et. al., Perkembangan Pemikiran dan Pengaturan Hak Asasi Manusia di Indonesia (2006); *see also* Majda El-Muhtaj, Hak Asasi Manusia dalam Konstitusi Indonesia 95 (2005) (quoting Machfud MD, former chairman of the Constitutional Court and a prominent professor of constitutional law, who acknowledges the self-limiting conception of human rights in the 1945

no discussion on the relationship between international and municipal law in Indonesia. As aptly stated by Indonesia's foreign affairs ministry's then-director of treaty of economic, social and cultural, "Indonesian law, practice, doctrine regarding the status of treaties in national legal system is in its immature stage and often frequently producing problems at the practical level in terms of the implementation of the former in Indonesian legal system."[19] As a result, the Indonesian legal discourse on human rights has exhibited a piecemeal approach. The most conspicuous example is in the field of freedom of religion.[20]

In hindsight, the above situation is not only at odds with the existing global effort, but also potentially undermines the legitimacy of Indonesia-led projects in promoting democracy abroad. The most important of these efforts is the Bali Democracy Forum, in which democracy has a new impetus as something universal.[21] No less important, the current model would hurt the very objective of the Indonesian struggle in advocating and protecting the basic rights of the Indonesian diaspora in their host countries. Domestically, the exciting development at the global and comparative level might be beneficial for Indonesia's current efforts in developing a new national legal system based on universal values such as democracy and human rights. As rightly pointed out, international and national laws work in tandem to reinforce those ideals.[22] All in all, by taking this dynamic seriously, Indonesian legal reform would benefit significantly in both international and domestic audiences as the foremost non-Western democractic State.

The Institute for Migrant Rights, as an academy-based initiative, seeks to foster further discussion at this critical juncture for a new di-

Constitution that exclude the protection of the human rights of non-citizens.).

19. Damos Dumoli Agusman, *Status Hukum Perjanjian International dalam Hukum Nasional Republik Indonesia*, 5 Indon. J. Int'l L. 490(2008).

20. *See infra* the contribution of Dian Shah to this issue at 260-299; *see also* Syamsul Arifin, Attitudes to Human Rights and Freedom of Religion or Belief in Indonesia: Voices of Islamic Religious Leaders in East Java 59 (Nelly van Doorn-Harder, Tore Lindholm & Nicola Colbran eds., 2010).

21. *See* http://www.ipd.or.id/ (last accessed Dec. 06, 2013).

22. *See* Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 Harv. J. Int'l L. 61-95 (2013); *see also* Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (2009).

rection in legal discourse, with particular emphasis on human rights. In particular, this undertaking is aimed to bring to light the best practices that are rapidly coming to the fore as a result of the ongoing "humanization of international law" at the domestic level, particularly in the area of the administration of justice. It is our hope that the *Indonesian Journal of International & Comparative Law* will contribute to the region's and the Global South's engagement with international law.