

# The Reception and Effectiveness of International Fundamental Rights in Some Selected ASEAN States

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## *Abstract*

The author examines the reality and some of the challenges posed by the reception and effectiveness of international fundamental rights in ASEAN States. Specific examples taken from Vietnam, Indonesia, Cambodia, and Malaysia are also studied. Some of those examples show that the legal core principles of international law pertaining to the reception and effectiveness of such rights in these countries do not always match up with their practical (national) circumstances and legal framework.

**Keywords:** International Law; Fundamental Rights; Reception; Effectiveness; Vietnam; Indonesia; Cambodia; Malaysia.

## **1. Introduction**

The question of the relationship between municipal law and international law is of great importance theoretically and practically. The study of the states' practice pertaining to that relationship is essential<sup>1</sup> to understand the issues and challenges that this relationship may trigger. Its importance is shown by the attention this question receives from politicians,

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<sup>1</sup> G.-A. Walz, *Les rapports du droit international et du droit interne* [The Relationship Between International Law and Domestic Law], volume 61 (Collected Courses of the Hague Academy of International Law 1937) 399.

public servants, judges and especially diplomats.<sup>2</sup> The national courts deal from time to time with cases in which questions of domestic law are linked to those of international law. They must sometimes apply laws whose content depends on the validity of an international treaty, or laws that refer to rules or concepts of international law, like human rights and fundamental freedoms. Conversely, international law also relies on municipal law from time to time.<sup>3</sup> Therefore, the discussion about the role of international legal norms may be reduced to the question of the *technical* adaptation of municipal law to international law<sup>4</sup> and vice versa. Even though this is a discussion that may be, to a great extent, of a technical nature, we submit that it still remains of great interest, for example because of the consequences this and that position about it may have on the application of international legal norms at the domestic level.

The author of this article aims to examine and discuss the various ways some selected ASEAN countries introduce international legal norms in their domestic law, ways that are applied, mostly to treaties<sup>5</sup> - because they are considered the most important source of international law<sup>6</sup>, in Vietnam, Cambodia, Indonesia, and Malaysia. Because “the question of how norms of public international law are received into domestic legal systems is largely

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<sup>2</sup> Heinrich Triepel, *Les rapports entre le droit interne et le droit international* [The Relationship Between Domestic Law and International Law], volume 1 (Collected Courses of the Hague Academy of International Law 1923) 77.

<sup>3</sup> *ibid* 95; see also Article 38(1)(d) of the Statute of the International Court of Justice. However, it must be noted that caution is appropriate regarding the use of domestic courts decisions at the level of international law: “it has been observed that some judicial decisions of national courts present a narrow outlook or rest on a very inadequate use of the international law sources” (Aldo Zammit Borda, ‘A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective’ (2013) EJIL 24, 658). For an in-depth analysis and an example from Canada of such appropriate required caution, see Geneviève Dufour and Alexandre Morin, ‘Le renvoi relatif à la sécession du Québec: critique du traitement que fait la Cour Suprême du droit international’ [The Quebec Secession Reference: Criticism of the Supreme Court’s Treatment of International Law] (1999) 12-2 *Revue québécoise de droit international* 175 (only available in French).

<sup>4</sup> Hermann Mosler, *L’application du droit international public par les tribunaux nationaux* [The Application of Public International Law by National Courts], volume 91 (Collected Courses of the Hague Academy of International Law 1967) 633.

<sup>5</sup> Treaties themselves bear different names in international law. For example, they are called ‘conventions’ under Article 38(1)(a) of the Statute of the International Court of Justice. The term ‘treaty’ is defined under Article 2.1(a) of the United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331 (hereinafter ‘VCLT’).

<sup>6</sup> Farid Sufian Shuaib, ‘The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse?’ (2008) *IIUM Law Journal* 16(2), 185.

a matter of constitutional law”<sup>7</sup>, we will also refer to the constitutional arrangements that exist, or do not exist, to incorporate the obligations provided by the treaties that these countries ratified. In addition, far from being far-fetched or only theoretical, some of the practical legal issues that these ways of introducing international law in domestic law trigger in the context of each of these countries are studied. Further, this article hopes to shed some light on some of the issues related to the reception and effectiveness of international fundamental rights in these countries.

## 2. The Incorporation and the Transformation of International Law

The incorporation of international law, as a general legal concept<sup>8</sup>, is the process by which international agreements become part of the municipal law of a sovereign state. Mendez explained, “[b]y incorporation what is meant ... is that the treaty is considered to become a *binding* part of domestic law.”<sup>9</sup> The incorporation of a norm of international law in municipal law also supposes that its content must be exactly the same in both systems of law.<sup>10</sup> As for the parent concept of transformation in international law, it emphasizes the separation between international law and municipal law<sup>11</sup>, which is the opposite of the idea to bring directly an international legal norm into the national legal order with a minimum of formal requirements.<sup>12</sup> The approach that focuses on the transformation of international legal norms stresses the importance of a concept that separates international law and municipal law, State’s sovereignty. State’s sovereignty “demands that nations decide how international legal obligations and rights are received into their own domestic legal systems [...] Different states have adopted different methods depending on the source of international law in question.”<sup>13</sup>

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<sup>7</sup> Gib van Ert, ‘Dubious Dualism: The Reception of International Law in Canada’ (2010) 44 Val. U. L. Rev. 3, 927.

<sup>8</sup> The monist approach may be understood in international law as the doctrine of incorporation, but here incorporation is used as a general legal expression.

<sup>9</sup> Mario Mendez, ‘The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts’ in *The Legal Effects of EU Agreements* (Oxford University Press, 2013) 17 (italics added).

<sup>10</sup> Triepel (n 2) 97.

<sup>11</sup> Mosler (n 4) 649; Walz (n 1) 431.

<sup>12</sup> Mosler, *ibid* 636-637.

<sup>13</sup> Simon Butt, ‘The Position of International Law Within the Indonesian Legal System’ (2014) 28(1) Emory International Law Review 2, 3.

In principle, nothing prevents a State from deciding that a treaty can be applied immediately within its borders.<sup>14</sup> Some authors argue that the international legal order and the legal order of a State are not separate. They state that these orders must rather be considered as spheres of one general legal order.<sup>15</sup> Nonetheless, it must be kept in mind that the main subject of these two spheres is different: international law regulates interactions between States, that are all deemed equal in principle<sup>16</sup>, while municipal law regulates the relations between individuals.<sup>17</sup>

### 3. Different Ways to Introduce Human Rights at the Domestic Level

The importance of human rights and freedoms in the context of the relationship between international law and municipal law has been described in the following terms: “[t]he value of international human rights law is demonstrated when nations incorporate the provisions of the major internationally-created human rights covenants into their own domestic legal systems”.<sup>18</sup> It is worth recalling that “[t]he international community is in no way composed of States having the same moral, political, legal objectives”<sup>19</sup> and, more specifically, “[t]he application of [human] rights always implies taking into account the context”<sup>20</sup>. Therefore, even though Vietnam, Cambodia, Indonesia, and Malaysia may have, more or less, the same understanding of what international fundamental rights are, as a matter of principle, they may still use different ways to introduce them in their domestic law, sometimes not without its contradictions and legal issues. For instance, these countries are “willing to

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<sup>14</sup> Mosler (n 4) 631. See also *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, 26: “Jurisdiction implies the right to decide what substantive law is applicable in a given case to which the jurisdiction extends.”

<sup>15</sup> See e.g. Mosler, *ibid* 626.

<sup>16</sup> Triepel (n 2) 81, 83; see also *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 2(1).

<sup>17</sup> Walz (n 1) 383, 385.

<sup>18</sup> Wayne Douglas Burns, *Thailand and International Law* (Master in Law thesis, University of British Columbia 1992) 108 (italics in the original).

<sup>19</sup> B. Mirkine-Gutzévitch, *Quelques problèmes de la mise en oeuvre de la Déclaration universelle des droits de l’Homme* [Some Problems in the Implementation of the Universal Declaration of Human Rights], volume 83 (Collected Courses of the Hague Academy of International Law 1953-III) 265 [translation from French by the author].

<sup>20</sup> Olivier De Schutter, ‘Universalité des droits de l’homme et mondialisation : la question des valeurs asiatiques’ [Universality of Human Rights and Globalization: The Question of “Asian Values”] in Thierry Marrès and Paul Servais (eds), *Droits humains et valeurs asiatiques – Un dialogue possible?* [Human Rights and Asian Values – A Possible Dialogue?] (Bruylant, 2002) 24 [translation from French by the author].

recognise that a number of challenges remain in *implementing* economic, social and cultural rights ... in Southeast Asia.”<sup>21</sup>

The importance that international fundamental rights have on municipal law can also be seen through the lens of judicial decisions in cases where, for example, judges may not be in position to fill a gap in the interpretation of municipal law without resorting to international law.<sup>22</sup> In those cases, “international norms *can* be considered when interpreting domestic norms, [but] they have typically played [for example in Canadian law] a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation”.<sup>23</sup> Thus, the weight that can be given to international legal norms in municipal law may be reduced when these norms are not incorporated in the national legal order. These norms may still be considered, but more narrowly as being solely *persuasive* in order to help courts, for example, interpret national legal norms, without having these norms being *binding* on them.

Yet, judicial decisions whose effect is contrary to international law do not free the States from their obligations and commitments towards the international community.<sup>24</sup> In the same spirit, Article 35 *in fine* of the ASEAN Human Rights Declaration provides for a safeguard against the use by ASEAN member countries of its lack of development to justify breaches of fundamental rights: “While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights.”<sup>25</sup> In addition, the Bangkok Declaration of 1993 also provides under Article 5: “the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure”.<sup>26</sup> In that

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<sup>21</sup> Alison Duxbury and Hsien-Li Tan, *Assessing Human Rights Implementation in Southeast Asia* in *Can ASEAN Take Human Rights Seriously?* (Cambridge University Press 2019) 44 (italics added).

<sup>22</sup> Triepel (n 2) 77-78.

<sup>23</sup> *Quebec (Attorney General) v. 9147-0732 Québec inc.* [2020] SCC 32, para 22 (italics in the original).

<sup>24</sup> Mosler (n 4) 628; see also *France, Great Britain, Italy, and Japan v. Germany* (1923) P.C.I.J., Ser. A, No. 1; from a legislative point of view, see also VCLT (n 5) Article 27: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

<sup>25</sup> See online: <https://asean.org/asean-human-rights-declaration/>.

<sup>26</sup> See online: <https://www.questia.com/magazine/1G1-15630307/the-bangkok-declaration>.

context, Chen argues that “The words ‘sovereignty’ and ‘interference’ have been notorious over the past fifty years, used by some Asian states as an excuse for no improvement in human rights.”<sup>27</sup>

#### 4. The Gap and Unclarity between the Theory and the Practice

As two authors suggested, “whether binding or non-binding, action rather than aspiration is the true determinant of successful implementation” of international legal norms.<sup>28</sup> This statement allows us to emphasize the fact that there is often a gap or, at least, unclarity between the theory and practice in the implementation of international legal norms at the domestic level, more precisely, for the purpose of our study, in some selected South-East Asian countries. For example, “[e]ven where economic, social and cultural rights are important to ASEAN members, there exists a gap between proclamation and practice.”<sup>29</sup> There are also “disparities in implementation. ... the preference [being] for prioritizing economic, social and cultural rights over civil and political rights by ASEAN states is clear”.<sup>30</sup> Importantly, even if Vietnam<sup>31</sup>, Cambodia<sup>32</sup>, and Indonesia<sup>33</sup> (with the exception of Malaysia that has not) ratified the two major United Nations human rights treaties, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR)<sup>34</sup>, and even if the Charter of the ASEAN provides that its members are to promote and protect human rights<sup>35</sup>, “Southeast Asian states [still] remain hesitant in participating in the international human rights system more comprehensively”.<sup>36</sup> Nevertheless, being ‘hesitant’ about it does not allow these countries to bypass their compliance with the basic principle of *pacta sunt*

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<sup>27</sup> Jau-hwa Chen, ‘Asia Values? Why Not, But How?’ in L. Avonius et al. (eds), *Human Rights in Asia* (Palgrave MacMillian, New York, 2008) 50.

<sup>28</sup> Duxbury and Tan (n 21) 14.

<sup>29</sup> *ibid* 14, 34.

<sup>30</sup> *ibid* 62.

<sup>31</sup> In 1982.

<sup>32</sup> In 1992.

<sup>33</sup> In 2006.

<sup>34</sup> Hurst Hannum, ‘Human Rights’ in Simon Chesterman, Hisashi Owada, and Ben Saul (eds.), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, 2019) 125.

<sup>35</sup> *Charter of the Association of Southeast Asian Nations*, 20 November 2007, Article 2(i).

<sup>36</sup> Hsien-Li Tan, ‘Enough of ‘Asian values’: roots of the ASEAN states’ reticence towards human rights’ in *The ASEAN Intergovernmental Commission on Human Rights – Institutionalising Human Rights in Southeast Asia* (Cambridge University Press, 2011) 24-25.

*servanda* (treaties must be executed).<sup>37</sup> This applies, for example, to the treaties ratified by Vietnam since it became a party to the Vienna Convention on the Law of Treaties (1969) in 2001.<sup>38</sup> Its Article 26 provides, “Every treaty in force is *binding* upon the parties to it and *must be performed* by them in good faith”.<sup>39</sup> Therefore, even though “States are free to determine how they meet their international obligations” and even though “international law leaves it to the domestic legal order to determine how it gives effect to its treaty obligations in the domestic legal arena”<sup>40</sup>, States must still abide by their treaty obligations not only at the international level by way of ratification, for instance, but they must also ensure their application at the domestic law. Sometimes, there might be some inconsistency in the implementation of treaty obligations in municipal law, even if a country has ratified a treaty at the international level, and then has accepted to be bound by it. This possible inconsistency, illustrated by the said ‘hesitation’ previously mentioned, is an example of the tension that may exist in the relationship between municipal law and international law.

## 5. Defining Monism and Dualism

Although the opposition between monism and dualist has lost somehow of its vigor<sup>41</sup>, and even if international law does not include any rule according to which the obligations of international law would form an integral part of the internal legal order<sup>42</sup>, it remains valid to submit, but this should not be considered as something new, that the approach adopted by States to receive international legal norms matters, and that the States may be distinguished on the ground of being either monist or dualist.<sup>43</sup> Dualism stresses the

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<sup>37</sup> See, e.g., A. A. Краевский, ‘Исследования права с позиций социальных и гуманитарных (неюридических) наук’ [*Legal Research from the standpoint of social and humanitarian (non-legal) sciences*] (2021) 12 *Вестник Санкт-Петербургского университета – Право* [*Bulletin of the University of Saint-Petersburg - Law*] 1, 193. Retrieved from: <https://lawjournal.spbu.ru/> [translated from Russian by the author].

<sup>38</sup> Dr. Nguyen Thi Hoang Anh, Deputy Director, Department of International Law and Treaties, Ministry of Foreign Affairs of Vietnam, ‘Law of treaties’ (2005) Vietnam Law & Legal Forum. Retrieved from: <https://vietnamlawmagazine.vn/law-of-treaties-3631.html>.

<sup>39</sup> VCLT (n 5) 331 (italics added).

<sup>40</sup> Mendez (n 9) 2.

<sup>41</sup> Mosler (n 4) 632.

<sup>42</sup> *ibid* 631.

<sup>43</sup> *ibid* 636.

autonomy of the national and international legal systems.<sup>44</sup> The two systems are distinct.<sup>45</sup> This supposes that municipal law cannot change international law into municipal law without *transforming* it<sup>46</sup> by way, for example, of a law enacted by the Parliament. As beautifully stated by Sperduti, “Dualism ... lives and dies with the premise of the ... sovereignty of the state.”<sup>47</sup> Monism rather states that there is only one legal system that is comprised of both international and municipal law, then excluding the requirement for transforming international legal norms to make them effective in the municipal legal order, mostly because they would be considered as already being part of it by their sole existence.<sup>48</sup> Monism provides that as soon as a treaty is ratified, it entails its *direct* observance as part of the laws of the State.<sup>49</sup> Two authors summarized, “[i]n the monistic doctrine, international law and national law always come together to form a single legal system. In monist models, a ratified international treaty forms part of the domestic legal order and is directly incorporated and often directly applied at the national level.”<sup>50</sup> That being said, “[t]he two approaches are by no means mutually exclusive, as many States *combine* elements of monism and dualism within their legal orders.”<sup>51</sup>

## 6. Vietnam

Since 1998, Vietnam has concluded or acceded to more than one thousand international treaties.<sup>52</sup> Therefore, the legal issues related to the incorporation of those treaties in

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<sup>44</sup> *ibid* 633, 636.

<sup>45</sup> H. L. Dickstein, ‘The Internal Application of International Law in Malaysia: A Model of the Relationship between International and Municipal Law’ (1974) 1 *JMCL* 204, 205

<sup>46</sup> Triepel (n 2) 91.

<sup>47</sup> Giuseppe Sperduti, *Le principe de souveraineté et le problème des rapports entre le droit international et le droit interne* [The Principle of Sovereignty and the Problem of the Relationship between International Law and Domestic Law], volume 153 (Collected Course of the Hague Academy of International Law 1976) 335 [translated from French by the author].

<sup>48</sup> Walz (n 1) 430.

<sup>49</sup> Wilfred Mutubwa, ‘Monism or Dualism: The Dilemma in The Application of Agreements under the South African Constitution’ (2019) *Journal of CSMD* 3(1), 27 (*italics added*).

<sup>50</sup> Fisnik Korenica and Dren Doli, ‘The Relationship between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice’ (2013) 24 *Pace Int’l L. Rev.* 92, 94; see also Hikmahanto Juwana, ‘Indonesia’ in Simon Chesterman, Hisashi Owada, and Ben Saul (eds.), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, 2019), 398-399.

<sup>51</sup> European Commission for Democracy through Law (Venice Commission), *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts* (Study No. 690/2012, CLD-AD(2014)036, 2014) 7 (*italics added*).

<sup>52</sup> Nguyen (n 38).



Vietnam matter. Beyond the theoretical issues related to the dualist and monist models<sup>53</sup>, there are practical issues regarding the reception of international law in Vietnam. For example, “there remains a very low uptake of international law by the Vietnamese judicial bodies in practice. ... There [was] no guidance on the explicit criteria to determine whether a treaty or which parts or provisions therein are ‘explicit and specific’ enough for direct implementation. Nor [was] there established procedure on how courts and *state agencies* would directly apply treaties.”<sup>54</sup> This issue is not new, and is also shared, in different ways, by other ASEAN states, like Cambodia<sup>55</sup> for example. Before the most recent Constitution of Vietnam was adopted in 2013, “the revised 1992 Constitution, as well as the Law on promulgation of legal documents enacted in 1996 and revised in 2001 and the 1998 Ordinance on conclusion and implementation of treaties, contain[ed] no provision relating to the application of treaties and the incorporation of treaties into Vietnam’s legislation in general.”<sup>56</sup> In short, there was no guidance provided to Vietnamese courts and litigants regarding the application of treaties ratified or acceded to by Vietnam.

However, this problematic situation might have changed with the adoption of the *Law on Conclusion, Accession and Implementation of Treaties* of 2005 that “contains very detailed provisions on the conclusion and *implementation* of treaties in Vietnam, which evolution, is also confirmed with the adoption of the *Vietnam’s Law on International Treaties* in 2016.<sup>57</sup> Dung observed, “[o]ne of the most significant revisions [of that latter law] is the specification of the relationship between international treaties, the Constitution of Vietnam

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<sup>53</sup> A.F.M. Maniruzzaman, ‘State Contracts in Contemporary International Law: Monist versus Dualist Controversies’ (2001) 12 *European Journal of International Law* 2; see also Sébastien Lafrance, ‘India, International Energy Law and Transboundary Environmental Harms’ (IJPIEL, 5 April 2021). Retrieved from: <https://ijpiel.com/index.php/2021/04/05/india-international-energy-law-and-transboundary-environmental-harms/>.

<sup>54</sup> Lan Ah Nguyen, Hao Duy Phan and Jessye Freeman, ‘International and ASEAN Law in the ASEAN 10 National Jurisdictions: The Reception of International Law in the Legal System of Vietnam’ in *ASEAN Integration through Law: The ASEAN Way in a Comparative Context* (Plenary on Rule of Law in the ASEAN Community). Retrieved from: [https://cil.nus.edu.sg/wp-content/uploads/2016/08/SD\\_ES-ASEAN-10-Vietnam-study.pdf](https://cil.nus.edu.sg/wp-content/uploads/2016/08/SD_ES-ASEAN-10-Vietnam-study.pdf) (italics added).

<sup>55</sup> Surya Subedi, ‘Life as a UN Special Rapporteur: The Role of UN Special Rapporteurs in Developing International Law, the Impact of Their Work, and Some Reflections of the UN Special Rapporteur for Human Rights in Cambodia’ (2014) *Asian Yearbook of International Law*, volume 20, 2014, 24.

<sup>56</sup> Nguyen (n 38).

<sup>57</sup> Law 108/2016/QH13.

and other legal instruments.”<sup>58</sup> For example, its Article 76 provides, “[t]he Prime Minister shall be responsible for conducting *implementation* of treaties to which the Socialist Republic of Vietnam is a party”.<sup>59</sup> This means that States agencies would *now* benefit from legislative guidance on, at least, who is responsible for the incorporation of treaties in municipal law. In addition, “the National Assembly of the Socialist Republic of Vietnam has been constantly enhancing its role ... in the formulation and *enactment of laws related to the implementation of obligations* of the International Human Rights Conventions to which Vietnam has signed or acceded.”<sup>60</sup>

To discuss again briefly the now-repealed Law on Conclusion, Accession and Implementation of Treaties of 2005, let us emphasize that it provides, “treaties might be *directly applied* provided that they are clear and specific enough for *direction implementation*”.<sup>61</sup> This led some authors to conclude that Vietnam follows a monist approach to the reception of international law.<sup>62</sup> However, because “Viet Nam decides on the incorporation of treaties into Vietnamese law *on a case-by-case basis* [, i]t does not strictly follow the monist theory”, contrary to what these authors contend, “[n]or does [Vietnam] agree to the dualistic doctrine that international law must be transformed into national law to become domestically binding on a state”.<sup>63</sup> Indeed, “[a]lthough the Constitution of the Socialist Republic of Vietnam 2013 (‘the Constitution’) does not address the relationship between national law and international law, an examination of various legal documents suggests that it adopts a *modified monist approach*”<sup>64</sup>

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<sup>58</sup> Tran Viet Dung, ‘State Practice of Asian Countries in International Law: Vietnam’ (2016) 22 Asian Y.B. Int’l L. 388, 388.

<sup>59</sup> Italics added.

<sup>60</sup> H.V. Nghia, N.M. Hang and L.T.T. Mai, ‘Vietnam and the implementation of international commitments and obligations on human rights’ (2021) 24 Journal of Legal, Ethical and Regulatory Issues, 1-12 (italics added).

<sup>61</sup> Nguyen, Phan and Freeman (n 54).

<sup>62</sup> *ibid.*

<sup>63</sup> Trinh Hai Yen, ‘Part III International Law in Asian and Pacific States, Southeast Asia, Vietnam’ in Simon Chesterman, Hisashi Owada, Ben Saul (eds.), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, 2019) 479-480 (italics added).

<sup>64</sup> *ibid* 478-479 (italics added).

Because of Đổi Mới's impacts on Vietnam's society, the country became "more frequently engages in human rights discourse."<sup>65</sup> For example, Vietnam signed the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>66</sup> in 2013. Its National Assembly ratified it in 2014. The State party's ratification occurred in 2015.<sup>67</sup> Immediately after ratifying this convention, the Decision No. 364/QĐ-TTg approving its implementation in Vietnam was issued.<sup>68</sup> Even though the official message conveyed by Vietnam in 2017 was that "[i]nternational treaties to which Viet Nam is a party, including the [Convention against Torture], have been incorporated into domestic laws"<sup>69</sup>, Nguyen wrote in late 2020 that "Vietnam *does not directly apply* the provisions of the Convention against Torture, but the implementation of the Convention will comply with provisions of the Constitution and the laws of Vietnam."<sup>70</sup> In addition, there was a "resolution, ratifying the Convention against Torture ... [that] *implicitly reject[ed] the direct applicability* of the entire Convention, stating that Viet Nam will develop and make laws in conformity with it."<sup>71</sup> This triggers an important question that must be raised in the context of this article: why Vietnam would not *directly* apply this convention in its domestic law when Vietnam may be a 'monist' or 'modified monist' State, meaning that it should apply international law *directly* within its national legal order according to the

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<sup>65</sup> John Gillespie, 'Evolving concepts of human rights in Vietnam' in Randall Peerenboom et al. (eds.), *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA*, (Taylor & Francis Group, 2006) 454.

<sup>66</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, 85.

<sup>67</sup> Human Rights Committee, United Nations, International Covenant on Civil and Political Rights, 'Concluding observations on the third period report of Viet Nam', CCPR/C/VNM/CO/3, 29 August 2019, para 30(g).

<sup>68</sup> Nguyen Tung Lam, 'Công ước của Liên Hiệp quốc về chống tra tấn và các hình thức đối xử hoặc trừng phạt tàn bạo, vô nhân đạo hoặc hạ nhục con người và pháp luật Việt Nam về phòng, chống tra tấn' [United Nations Convention against torture and brutal, inhuman or degrading treatment or punishment and Vietnamese legislation on prevention and combat of torture] (October 29, 2020) Học viện lục quân (The Army Academy). Retrieved online: <http://hvlq.vn/tin-tuc/tin-quoc-te/cong-uoc-cua-lien-hiep-quoc-ve-chong-tra-tan-va-cac-hinh-thu.html>.

<sup>69</sup> United Nations Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure, Initial report of States parties due in 2016, Viet Nam, CAT/C/VNM/1, 13 September 2017, para 8 *in fine*.

<sup>70</sup> Nguyen (n 68) (italics added). In the original: "Việt Nam không áp dụng trực tiếp các quy định của Công ước chống tra tấn, mà việc thực hiện Công ước sẽ theo quy định của Hiến pháp và pháp luật của Việt Nam" (italics added) [translated from Vietnamese by the author].

<sup>71</sup> Trinh (n 63) 3 (italics added); see also *Resolution on the Ratification of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2014*, No. 83/2014/QH13.

monistic model of reception of international law? A possible explanation, and justification, could perhaps be based on the fact, as we pointed out earlier, that Vietnam is, contrary to what was stated by some authors, neither dualist nor monist, but a *hybrid* of the two models, which would give Vietnam some flexibility regarding the implementation of treaties. In addition, “between 2017 and 2018, Vietnam had adopted three new laws in order to better *implement*”<sup>72</sup> that specific convention.

## 7. Indonesia

Indonesia made no explicit choice about how international law is to be introduced in its domestic law.<sup>73</sup> In that respect, Iskandar opined:<sup>74</sup>

Indonesia’s attitude to international law is *ambiguous*. ... this could imply a denial of the existence of international law. This is evidenced by the absence of regulations that clearly state the place of international law [in Indonesia]. In the constitution itself, there is not a single article that mentions the place of international law in [Indonesia’s] domestic legal system.

In hope to solve that issue, one could possibly look at article 11(2) of the 1945 Indonesian Constitution to find out what place international law holds within Indonesia’s legal system.<sup>75</sup> This article reads, “[t]he President in making other international agreements that will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or that will requires an amendment to or the enactment of a law, shall obtain the approval of the House of Representatives.” However, an author remarked, “there is not yet a consensus on how to interpret this provision, or on what the right interpretation of it should be.”<sup>76</sup> More specifically, there is “significant uncertainty and confusion about whether rules contained in international treaties ratified by Indonesia automatically form part of Indonesian law.”<sup>77</sup> Therefore, it is fair to submit, as nicely

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<sup>72</sup> Tran (n 58) 433 (*italics added*).

<sup>73</sup> Butt (n 13), 2-3.

<sup>74</sup> Pranoto Iskandar, *Hukum HAM Internasional - Sebuah Pengantar Kontekstual* [International Human Rights Law - A Contextual Introduction] (IMR Press, 2012) 227 (*italics added*) [translated from Indonesian by the author].

<sup>75</sup> Juwana (n 50) 398.

<sup>76</sup> *ibid.*

<sup>77</sup> Butt (n 13) 5.

pointed out by the latter author, that in Indonesia, “there is an *unresolved* relationship between international law and Indonesian national law: transform or not to transform?”<sup>78</sup>

Butt observed, “the Supreme and Constitutional Courts’ use of international law has been inconsistent.”<sup>79</sup> This uncertainty is not clarified by the various approaches adopted by the Indonesian Constitutional Court towards international law. Butt identified three different approaches about it: either that court gives no weight whatsoever to arguments based on international law or it gives it more credence, but no real influence, or it relies heavily on it.<sup>80</sup> These approaches go from one end of the spectrum to the other end, making it even more difficult to find some common trends in terms of what approach among these three would prevail over the two others. These various *conflicting* approaches adopted by the same court show clear inconsistency in the use of international law in municipal Indonesian courts.

Contrary to Malaysia, as we will see in the next chapter, Indonesian law seems to be more *welcoming* of some international human rights instruments, such as ICCPR and ICESCR<sup>81</sup>, but this may be the consequence of both the ambiguity and the different conflicting approaches towards international law that were previously mentioned. Uncertainty would give way to some chaos in terms of consistency in the approach to be retained towards the reception of international law.

That being said, “it is common to hear that judges in the Supreme Court are *reluctant* to refer to international legal instruments simply because such instruments are international in nature and not national laws *per se*.”<sup>82</sup> Conversely, “the direct reference to international human rights instruments [in some Indonesian laws] shows that international agreements may not need to be *transformed* formally into Indonesian law to be relevant at the domestic level.”<sup>83</sup> They would be considered *directly* as part of the law of the land. When comparing

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<sup>78</sup> Juwana (n 50) 405-406 (italics added).

<sup>79</sup> Butt (n 13) 5.

<sup>80</sup> *ibid* 15.

<sup>81</sup> Juwana (n 50) 397.

<sup>82</sup> *ibid* 400-401 (italics added).

<sup>83</sup> *ibid* 401-402.

these two latter approaches towards international law in Indonesian domestic law, one being welcoming and the other being reluctant to rely upon it, there could be a middle ground position that might also exist in Indonesia about it, which would stem from the fact that the Indonesian Constitutional Court “has in some cases, treated international law as a *highly persuasive guide when interpreting provisions of Indonesia’s Constitution*.”<sup>84</sup> This latter approach seems to be somewhat equivalent, to a certain extent, to what the Supreme Court of Canada stated in its 2020 decision, *Quebec (Attorney General) v. 9147-0732 Quebec inc.*<sup>85</sup>

Thus, “the weight the [Indonesian] Constitutional Court has given to international law appears to be inconsistent”<sup>86</sup>, which may be caused by “the absence of domestic Indonesian legal rules specifying the way that international law, once ratified, enters into force in the Indonesian legal system.”<sup>87</sup> Therefore, it seems difficult to adopt a firm position about whether Indonesia is a monist or a dualist country. However, Butt states that Indonesia “appears to be *primarily* dualist in practice”.<sup>88</sup> Theory and practice may then come into collision with one another.

## 8. Cambodia

Two articles of the Cambodian Constitution address in broad terms the relationship between international and domestic law. Its article 26 states that “the King signs and ratifies *international treaties and conventions* after their approval by the National Assembly and the Senate”. Its article 31 also reads:

The Kingdom of Cambodia *recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women’s rights and children’s rights.*

Khmer citizens shall be equal before the law, enjoying the same rights and freedom and obligations regardless of race, color, sex, language, religious belief, political tendency, national origin, social status, wealth or other status. *The exercise of*

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<sup>84</sup> Butt (n 13) 5, 13, 15 and 27 (italics and emphasis added).

<sup>85</sup> (n 23).

<sup>86</sup> Butt (n 13) 5, 15

<sup>87</sup> *ibid* 2.

<sup>88</sup> *ibid* 27 (italics added).

*personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law.*

In spite of these two articles, “the [relevant] wording of the Constitution is ambiguous”<sup>89</sup> and “unclear”<sup>90</sup> – as it is also the case in Indonesia, as we have seen previously. Its Article 31 “blurs the line between monism and dualism”<sup>91</sup>, leaving the question of which approach should prevail unresolved. The Cambodian Constitution does not have any “clear provision for the status of international treaties in Cambodian law.”<sup>92</sup> This ambiguity and unclarity opened the door to a *conflicting* understanding of the relationship between international and domestic law in Cambodia. For example, in 1997, the Cambodian government took the position that Cambodia is a dualist State when it stated, “covenants and conventions *may not be directly* invoked before the courts or administrative authorities”.<sup>93</sup> However, when it comes to human rights more specifically, they have been “expressly named in the Constitution, no express act of the legislature [then] appears to be required”.<sup>94</sup> This made some authors suggest that “it is undeniable that some treaties are *directly* applicable”<sup>95</sup>, without the need for incorporating it in domestic law. Nevertheless, “Cambodian courts refuse[d] to entertain claims ‘in the absence of enabling legislation, directly based on international laws’.”<sup>96</sup>

## 9. Malaysia

Contrasting with other States, like Indonesia and Cambodia for instance, Malaysia’s constitution is silent on the application of international law. However, its subparagraph

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<sup>89</sup> Daniel Heilmann, *Implementation of International Human Rights and Human Rights Decisions in Cambodia* in Stefan Kadelbach, Thilo Rensmann, Eva Rieter (eds.), *Judging International Human Rights*, (Springer, 2019) 425-426.

<sup>90</sup> Emma Palmer, *Adapting International Criminal Justice in Southeast Asia – Beyond the International Criminal Court* (Cambridge University Press, 2020) 55.

<sup>91</sup> Heilmann (n 89).

<sup>92</sup> Jörg Menzel, ‘Cambodian Law: Some Comparative and International Perspectives’ in Hor Peng, Kong Phallack, Jörg Menzel, (eds.), *Introduction to Cambodian Law* (Konrad Adenauer Stiftung, 2012) 489.

<sup>93</sup> Committee on the Elimination of Racial Discrimination, *Seventh periodic reports of States parties due in 1996: Cambodia. 05/05/97, CERD/C/292/Add.2*. (State Party Report), para 19 (italics added).

<sup>94</sup> Mahdev Mohan, ‘Cambodia’ in Simon Chesterman *et al.* (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, 2019) 503.

<sup>95</sup> Meas Bora, *Extradition: International and Cambodian Law* in Hor Peng, Kong Phallack, Jörg Menzel (eds.), *Introduction to Cambodian Law* (Konrad Adenauer Stiftung, 2012) 420 (italics added).

<sup>96</sup> Mohan (n 94) 503

76(1)(a) enables the Malaysian Parliament to make law “for the purpose of *implementing* any treaty, agreement or convention between the [Malaysian] Federation and any other country or any decision of an international organisation of which the Federation is a member.” In addition, article 74(1) of the Malaysian constitution provides, “Parliament may make laws with respect to any other matters enumerated in the ‘Federal List’”, which, under its Ninth Schedule, includes the “*Implementation* of treaties, agreements and conventions with other countries.” Therefore, in Malaysia, “[a] treaty will have legal effect ... only when it has been transformed into domestic law by means of a parliamentary enactment ... [This is] a pure dualist approach.”<sup>97</sup>

With respect to international human rights instruments, Malaysia is a party to only two of them<sup>98</sup>, even if the protection of basic human rights is enshrined in the Constitution of Malaysia.<sup>99</sup> More precisely, Malaysia is not a party to the two international covenants on human rights, namely the International Covenant on Civil and Political Rights<sup>100</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>101</sup>. Therefore, being a member state of the United Nations and because it affirmed acceptance of this international legal instrument, the only general human rights instrument that can be relied upon in Malaysian courts, besides the two instruments already mentioned, is the Universal Declaration of Human Rights (hereinafter ‘UDHR’).<sup>102</sup> However, the decision *Merdeka University Bhd v Government of Malaysia* rejected the binding character of the UDHR, saying it “is merely a statement of principles devoid of any obligatory character.”<sup>103</sup> This approach to the application of international human rights in Malaysian domestic law

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<sup>97</sup> Abdul Ghafur Hamid and Khin Maung Sein, ‘Malaysia’ in Simon Chesterman *et al.* (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, 2019) 468.

<sup>98</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 and UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>99</sup> See, e.g., liberty of the person (Article 5) and prohibition of slavery and forced labour (Article 6).

<sup>100</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>101</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>102</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>103</sup> [1981] 2 MLJ 356, 366.



remains uncontested<sup>104</sup>, including by the judiciary<sup>105</sup>, since this decision was rendered. Malaysia ratified the UDHR but one author recalled that “[r]atification alone does not make the terms of the treaty applicable for municipal law.”<sup>106</sup> Again, Malaysia has a pure dualist approach, and then “any reference to *unincorporated* international human rights instruments or norms”<sup>107</sup> would not have much, if any, weight in Malaysian courts.

## Conclusion

What transpires from the brief study of the implementation of international treaty norms in Vietnam, Indonesia, Cambodia, and to a lesser extent in Malaysia, is that they have some degree of uncertainty and ambiguity about the weight to be given to these norms in their municipal law, and the way they implement these norms is sometimes inconsistent. This may also be seen with respect to the weight given to international human rights at the domestic level in these countries. Could this uncertainty and ambiguity be eventually explained by the above-mentioned reluctance of some institutions, sometimes governmental sometimes judicial, to make international human rights norms effective within their borders? Maybe. However, this would be, if this was the only suggested explanation provided, only one piece of the puzzle, which would only be a convenient oversimplification. Another piece of the puzzle that could help answering the issues pertaining to that uncertainty and ambiguity may be related to the manner the legal system of these countries implement international law norms. However, each of these countries, even if they have, for some of them, similarities between themselves, does it differently, and they also experience different issues in that respect. Therefore, this other piece of the puzzle would also be an oversimplification, if it was the only suggested explanation. The truth is that, in spite of several similarities shared by these countries as we have seen so far, each and one of them differ in so many ways when it comes to the implementation of international treaty norms that trying to identify common grounds between them is interesting, but it would not be sufficient to provide a satisfactory and complete answer regarding all the complex issues that it raises.

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<sup>104</sup> Hamid and Sein (n 97) 473.

<sup>105</sup> *ibid* 476.

<sup>106</sup> Shuaib (n 6) 194.

<sup>107</sup> *ibid* (*italics characters added*).

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