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CIL RESEARCH PROJECT ON INTERNATIONAL MARITIME CRIMES

INDONESIA'S COUNTRY REPORT

By

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I. OVERVIEW: INDONESIAN LAW OF TREATIES

The Indonesian law of treaties is governed by article 11 of the Constitution, Law No. 37 of 1999 on Foreign Relations (Law 37/1999), and Law No. 24 of 2000 on International Treaties (Law 24/2000). Law 24/2000 replaces Presidential Letter No. 2826 of 1960 on the Conclusion of Treaties with Foreign States.

Article 11 of the Indonesian Constitution authorizes the president to conclude treaties with other states.[1] After the Third Amendment, the Constitution requires the president to obtain the approval of House of Representatives (*Dewan Perwakilan Rakyat*/DPR) when concluding treaties with other states,[2] particularly, when such treaty would fundamentally impact the lives of the people and burden state budget.[3] Parliament approval shall also be obtained in cases where a treaty requires the enactment or amendment of laws.[4]

Law No. 37/1999 sets out the basic rules on how to conclude and ratify international treaty. These rules include the obligation of the initiating government institution to consult the Minister of Foreign Affairs on its intention to conclude an international treaty;[5] and the requirement of the Government Official concerned to seek for Full Powers from the Minister of Foreign Affairs prior to the signing of an international treaty.[6] Law 37/1999 also required the enactment of another Law to further regulate the conclusion and ratification process of international treaties.[7] Based on this, in 2000, the Government enacted Law 24/2000 that sets out in more detail the conclusion and ratification procedures of international treaties under Indonesian law. There are no laws or doctrine on the implementation of treaties in the domestic system. As such, this assessment of the implementation of international agreements in Indonesia is based on practice.

Under Indonesian law, a treaty is defined as "an agreement, in a certain form and under a certain title, governed by international law, made in writing and creates certain rights and obligations within the scope of public law."[8] The term "international" and "within the scope of public law" seem to correspond to the fact that the law applies to treaties between states and to distinguish between agreements regulated by public international law and

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[1] Constitution of the Republic of Indonesia of 1945 (Constitution), art 11(1)
[2] In this regard, the Constitution is silent on how such approval should be given. Unlike in Article 11(2) of the Constitution where the Parliament's approval is indicated by enactment of a legislation
[3] Constitution, art 11(2)
[4] *Ibid.*
[5] Law No. 37 of 1999 concerning Foreign Relations (Law 37/1999), Art. 13
[6] *Ibid*., Art. 14
[7] *Ibid*., Art. 15
[8] Law 24 of 2000 concerning International Treaty (24/2000), Art. 1 (1); and Law 37/1999, Art. 1(3)

agreements regulated by national law.[9] Therefore, the law on treaties does not apply to agreements failing within a state's domestic sphere or under domestic law, i.e. agreements between individuals and other private entities among themselves or with the state.[10]

The Indonesian law on treaties also applies to agreements concluded between the state and international organizations or other international legal subjects.[11] Defined as "legal entities recognized by international law and having the capacity to enter into treaties with states,"[12] "international legal subjects" exclude international or multinational companies. [13] In concluding treaties, the government shall be guided by "national interest based on the principles of equality, mutual benefit, and taking into account the prevailing national and international law."[14]

During the drafting of Law 24/2000, there were debates on whether or not agreements concerning foreign loans and aid fall into the category of "agreements governed by public international law." A decision was made to include such agreements as agreements subject to ratification[15] which procedure and approval process are to be regulated under a separate law.[16]

II. RATIFICATION AND IMPLEMENTATION OF INTERNATIONAL TREATIES

A. Treaty Conclusion and Ratification

1. Capacity to conclude treaties, full powers and credentials

Under Indonesian law, state agents invested with the authority to conclude a treaty are:
1. The president;[17]
2. The minister of foreign affairs;[18]
3. The minister of finance for treaties regarding foreign loans. In this case, the minister of foreign affairs shall delegate its authority to the minister of finance; and[19]

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[9] Mark E. Villinger, *Commentary on the 1969 Vienna Convention on the law of Treaties*, (Leiden; Boston: Martinus Nijhoff Publishers, 2009) at 81
[10] *Ibid*., at 77
[11] Law 24/2000, Art. 4(1)
[12] *Ibid.*, Elucidation, Art. 4(1)
[13] Anthony Aust, *Modern Treaty law and Practice*, 2nd Ed. (Cambridge: Cambridge University Press, 2007) at 18; Anglo Iranian Oil company (UK v. Iran) (Preliminary Objections)
[14] Law 24/2000, Art. 4(2)
[15] *Ibid.*, Art. 10
[16] *Ibid.*, Elucidation, Art. 10. Up until now there is no law, as required under Law 24/2000, which regulates the procedure and approval process of international treaties that relate to foreign loans/grants. However, there are laws and regulations that relate to the procedure and approval process of foreign loans/grants that fall within the ambit of state finance regime. The relevant Laws and Regulations are: Law No. 17 of 2003 on State Finance; Law No. 1 of 2004 on State Treasury; and Government Regulation No. 2 of 2006 on Procedure on Loan Procurement and/or Grant Acceptance and Transmission of Foreign Loan and/or Grant. Under these laws and regulations, there is no affirmation on whether agreements on foreign loans/grants should be treated as international treaty in accordance to Law 24/2000.
[17] Law 24/2000, Art. 7(2)
[18] *Ibid.*, Art. 7(2), 1(9)
[19] *Ibid.*, Elucidation, Art. 7(2). *See also* Art. 8 of Law No. 17/2003 on State Finance. In contrary to Art. 7(2) of Law 24/2000, Art. 8 of Law 17/2003 states that the Finance Minister has full authority to sign finance-related international treaties without any prior delegation of powers by or to report to the Ministry of Foreign Affairs.

4. Other state dignitaries possessing Full Powers.[20]

Full Power is granted by a letter issued by the president or the minister, which authorizes state officials representing the government to conclude a treaty, including signing, accepting, or expressing the state's consent to be bound to such treaty.[21] Full Powers are issued in accordance with international practices affirmed by the 1969 Vienna Convention on the Law of Treaties (VCLT).[22] Not all treaties need to be concluded by persons possessing full powers. The signature of a treaty concerning technical cooperation to implement previous treaties in force can be concluded without necessitating Full Powers as long as the material of such treaty falls within the authority of the state or government institution.[23]

While not requiring full powers, state officials who attend, take part, or adopt the final result of an international meeting must have Credentials,[24] which are letters issued by the president or the minister which authorize state officials representing the government for the purpose of attending, negotiating, and accepting the outcome of an international meeting. [25] Full Powers and Credentials are often combined, particularly in the conclusion and ratification procedures of a multilateral treaty adopted by a large number of states.[26]

2. Conclusion of Treaties

In practice, the conclusion of treaties includes several phases, namely: (1) exploration, (2) negotiation, (3) drafting, (4) acceptance, and (5) signing. [27] Throughout the whole process, the minister of foreign affairs shall give his/her opinion and political considerations based on national interest, and shall consult with the House of Representatives in matters relating to public interest.[28]

(a) Exploration

In the exploration stage, the "initiating institution" consults and coordinates with the minister of foreign affairs[29] its intention to conclude a treaty. Initiating institutions consist of state institutions, government institutions, non-departmental government institutions, as well as local governments.[30] State institutions are those whose functions and authorities are regulated in the Constitution, namely, the House of Representatives (DPR), the Board of Financial

[20] *Ibid.*, Art. 7(1)
[21] *Ibid.*, Art. 1(3)
[22] Law 24/2000, Elucidation, Art. 7(1). Indonesia is not yet a party to the 1969 Vienna Convention on the Law of Treaties.
[23] *Ibid.*, Art. 7(5)
[24] *Ibid.*, Art. 7(3)
[25] *Ibid.*, Art. 1(4)
[26] *Ibid.*, Elucidation, Art. 7(4)
[27] *Ibid.*, Art.6(1)
[28] *Ibid.*, Art. 2. Under Art. 10 of Law 24/2000, matters of public interest include: (a) matters pertaining to politics, peace, defense, and state security; (b) alterations to or delimitation of the territory of the Republic of Indonesia; (c) sovereignty or sovereign rights of a state; (d) human rights and the environment; (e) the formation of a new legal norm (law making treaty); (f) foreign loans and/or grants-aid.
[29] Represented by the Directorate-General of Legal Affairs and Treaties and/or the Regional of Multilateral Units of the Department of Foreign Affairs
[30] Law 24/2000, Art. 5(1); Directorate-General of Legal Affairs and Treaties of the Department of Foreign Affairs of the Republic of Indonesia, *Guidelines to Treaty Making under Law number 24 of the Year 2000 on Treaties*.

Auditor (BPK), the Supreme Court, and the Supreme Advisory Council.[31] Government Institutions are executive institutions including the president, departments or agencies of other government institutions, such as the Indonesian Science Institute (LIPI) and the National Atomic Energy Agency.[32] Other independent agencies established by the government for the purpose of performing certain duties do not fall into the category of government institutions.[33] During this exploration period, the ministry of foreign affairs, through correspondence and interdepartmental meetings, gives political and legal consideration in accordance with national interest, foreign policy, and existing treaty implementation procedures.[34]

(b) Drafting and Negotiation

As a result of the consultation mechanism, the initiating institution and the ministry of foreign affairs produce a draft treaty and a "Guideline for the Delegation of the Republic of Indonesia." The Guideline which requires the approval of the minister of foreign affairs contains[35]:

a. background of the matter
b. analysis of the political, legal, and other aspects of the matter which may affect national interest
c. Indonesia's position on the matter, including recommendations and possible adjustments

The second phase of the process involves the negotiation of the substance and technical aspects of the draft treaty by the state's delegation led by the minister or other state dignitaries from relevant institutions.

(c) Acceptance and Signature

Signing of a treaty shall be done upon agreement and acceptance of a final draft of the text of the treaty. For bilateral treaties, the act of affixing initials to the text of the treaty by each chief of delegation may be deemed as an acceptance.[36] Signature of a treaty serves as the final phase of the conclusion of a bilateral treaty rendering each party's consent to be bound by such agreement. For multilateral treaties, signature does not necessarily constitute a state's consent to be bound by the treaty. The acceptance or approval process usually entails the ratification of a state party to the treaty.[37]

3. Reservations and Declarations

Unless prohibited under the treaty, a state may make reservations and issue declarations with respect to particular provisions of a treaty as long as such reservation and declaration do not prejudice the object and purpose of the treaty. [38] A reservation is a unilateral statement of a state to exclude the application of certain provision of a treaty.[39] A declaration is a unilateral

[31] *Ibid.*, Elucidation, 5(1). The Supreme Advisory Council was abolished in 2003 based on the Fourth Amendment of the Constitution and later on affirmed by Presidential Decree No. 135/M/2003.
[32] *Ibid.*, Elucidation, Art.5(1)
[33] *Ibid.*
[34] Law 24/2000, Elucidation, Art.5(1)
[35] *Ibid.*, Art.5(3)
[36] *Ibid.*, Elucidation, Art.6(1) and 6(2)
[37] *Ibid.*, Elucidation, Art.6(1)
[38] *Ibid.*, Elucidation, Art. 8 (1)
[39] *Ibid.*, Art.1(5)

statement of a state with respect to the understanding or interpretation of a provision of a treaty for the purpose of clarifying the meaning of such a provision and is not intended to affect the rights and obligations of the state under the treaty.[40] Unless the treaty otherwise provides, reservation and declarations can be made during the signature, adoption, approval or ratification a multilateral treaty[41] and may be withdrawn at any time by way of a written statement or any other manner determined in the treaty.[42]

4. Consent to be Bound and Ratification

Indonesian law recognizes the following means of expression of consent to be bound:[43]
a. signature
b. ratification
c. exchange of documents constituting a treaty/diplomatic notes
d. any other means agreed by the parties, including the "simplified procedure" where the state automatically binds itself to a treaty if, after a certain given period, a written notification is not given with respect to the state's refusal to be bound.[44]

Ratification of a treaty is done when it is required by the treaty,[45] by way of a law or a presidential decree.[46]

(a) Ratification by Way of Legislation

Under article 10 of Law 24/2000, ratification by way of legislation shall be done for treaties which subject matter involves[47]:
a. matters pertaining to politics, peace, defense, and state security;
b. alterations to or delimitation of the territory;
c. sovereignty or sovereign rights of the state;
d. human rights and the environment;
e. the creation of a new legal norm (law making treaties); and
f. foreign loans and aid

(b) Ratification by Way of Presidential Decree

Ratification of a treaty which material is not stipulated in Article 10 shall be done by a presidential decree.[48] Ratification of a treaty by presidential decree is conducted for treaties which subject matter is procedural in nature and necessitates prompt implementation without affecting national laws. Types of agreements which fall into this category are, among others, umbrella agreements relating to cooperation in the field of science, technology, economy, trade, culture, commercial maritime, avoidance of double taxation, and the protection of investment. [49]

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[40] *Ibid.*, Art.1(6)
[41] *Ibid.*, Art.1(5), Art. 1 (6)
[42] *Ibid.*, Art. 8 (3)
[43] Law 24/2000, Art. 3
[44] *Ibid.*, Elucidation, art 5. 3
[45] *Ibid.*, Art. 9(1)
[46] *Ibid.*, Art. 9(2)
[47] *Ibid.*, Art. 10
[48] *Ibid.*, Art. 11(1)
[49] *Ibid.*, Elucidation, Art. 11(1)

(c) Ratification Procedures[50]

The ratification process for treaties concluded by Indonesia is done in accordance with the procedures set out under Law No. 10 of 2004 concerning the Formulation of Laws and Regulations (Law 10/2004)[51] and Presidential Decree No. 188 of 1998 concerning Procedures in the Preparation of a Bill.

For the ratification process, the initiating institution provides[52]:

a. Copies of the text of the treaty
b. Copies of the Indonesian translation of the treaties
c. A draft law or a draft of the presidential decree ratifying the treaty
d. An academic explanatory text (for treaties ratified by way of legislation) or an elucidation text (for treaties ratified through presidential decree)

The initiating institution shall coordinate deliberations and meetings with concerned institutions for the completion of the draft (law or presidential decree) and related documents. The initiating institution submits ratification documents and a request of ratification to the president through the minister of foreign affairs to be ratified by the House of Representatives. For treaties ratified by a presidential decree, which do not require approval from the House of Representatives, the government submits a copy of the presidential decree ratifying the treaty to the House of Representatives for evaluation.[53] The House of Representatives may ask for the responsibility or clarification from the government regarding a treaty which they had entered into.[54] If it is deemed as prejudicial to its national interest, such treaty may be rendered null and void upon request of the House of Representatives.[55]

5. Post-Ratification

(a) Publication in State Gazette

Every law or presidential decree concerning the ratification of a treaty shall be published in the State Gazette.[56] This publication is aimed to notify the public on the fact that the State has bound itself and all of its citizens to such treaty.[57]

(b) Notification and Registration

Upon completion of ratification process, the ministry of foreign affairs shall notify counterparts or state parties to the treaty that the Indonesian government has completed its internal procedures for the entry into force of the treaty, or exchange instruments of ratification/accession (for bilateral treaties), or submit the instrument of ratification/accession to the depositary (for multilateral treaties).[58] The minister will inform and submit a certified

[50] Directorate-General of Legal Affairs and Treaties of the Department of Foreign Affairs of the Republic of Indonesia, *Guidelines to Treaty Making under Law number 24 of the Year 2000 on Treaties*.
[51] Law No. 10 of 2004 on the Formulation of Laws and Regulations, Presidential Decree 61/2005, Presidential Decree 68/2005
[52] Directorate-General of Legal Affairs and Treaties of the Department of Foreign Affairs of the Republic of Indonesia, *Guidelines to Treaty Making under Law number 24 of the Year 2000 on Treaties*.
[53] Law 24/2000, Art. 11(2)
[54] *Ibid.*, Art. 11(2)
[55] *Ibid.*, Elucidation, Art. 11(2)
[56] *Ibid.*, Art. 13
[57] *Ibid.*, Elucidation, Art. 13
[58] *Ibid.*, Art. 14

true copy of a treaty concluded by Indonesia to the secretariat of the international organization in which Indonesia is a member. [59] The certified true copy of a treaty shall be registered at the Secretary General of the United Nations in accordance with Article 102 of the United Nations Charter. The Minister will inform and submit copies of the instrument of ratification of a treaty to the relevant governmental institutions. [60]

(c) Depository

The depositary is a state or an international organization appointed or expressly stated in a treaty as depositary of instrument of ratification of the treaty. The depositary shall subsequently inform all parties to the treaty upon receipt of the instrument of ratification from any of the parties.[61] In the event that Indonesia is appointed as a depositary, the minister concerned shall accept and act as the depositary of the instrument of ratification of the treaty submitted by the state parties.[62] The minister of foreign affairs is responsible for the deposit and maintenance of the original document of the treaty concluded by the government, the compilation of a list of official documents, and the publication in the treaties series.[63] Treaties which have been signed by Indonesia shall be deposited in the "Treaty Room" of the Directorate of Treaties for Economic and Socio-Cultural Affairs of the Ministry of Foreign Affairs. A certified true copy of the original document of every treaty shall be submitted to the relevant initiating institution.[64]

(d) Amendment

Upon mutual agreements of the parties and in accordance with the procedures set by the treaty, the government may make amendments to a ratified treaty by a legislation of the same level,[65] except for amendments which are technical-administrative in nature which can be done through a simple procedure.[66] Technical-administrative amendment means that the amendment does not involve the substantive material of the treaty, for example, amendment with respect to the addition in the membership of a council/committee or an addition to the official language of a treaty.[67] Simple procedure means the ratification is done through written notification among the parties or deposited to the depositary state.[68]

(e) Termination

A treaty shall terminate, or may be terminated, based on the following reasons:

a. The parties agree to terminate the treaty in accordance with the procedures set in the treaty
b. The objective of the treaty has been achieved
c. There is a fundamental change of circumstances which affects the implementation of the treaty
d. A party to the treaty fails to comply with or breaches the provisions of the treaty

[59] *Ibid.*, Art. 17(3)
[60] *Ibid.*, Art. 17(4)
[61] Law 24/2000, Art. 14
[62] *Ibid.*, Art. 17(5)
[63] *Ibid.*, Art. 17(1)
[64] *Ibid.*, Art. 17(2)
[65] *Ibid.*, Art. 16(3)
[66] *Ibid.*, Art. 16(4)
[67] *Ibid.*, Elucidation, Art. 16(4)
[68] *Ibid.*, Elucidation, Art. 16(4)

e. Conclusion of a new treaty replacing the previous treaty
f. The emergence of a new peremptory norm of international law
g. The object of the treaty ceases to exist
h. The treaty contains matters which are prejudicial to national interest. [69] National interest refers to sovereignty, public interest, and the protection of Indonesian legal subjects. [70]

A treaty shall not be terminated by reason of a state succession[71], and shall continue to be in force as long as the succeeding state declared that it would be bound by the treaty.[72] Upon termination of a treaty, the rights and obligations of the parties will cease to apply.[73] A treaty which terminates before the end of its designated term shall not, subject to the agreement of the parties, affect the completion of any existing arrangements which have not been fully performed fully at the time of termination.[74]

B. Treaty Implementation

1. Treaties and Domestic Law

The relationship between international law and domestic law are often explained by two approaches: "dualism" and "monism." Under the monist approach, international law and domestic law are viewed as one single unity. States which practices pure monism treat international law as part of domestic law, as such, treaties concluded in accordance with the constitution and has entered into force for the state may directly become part of domestic law without needing further legislation.[75] Under this approach, a judge can directly apply international law and overrule domestic law which contradicts with international law. Furthermore, citizens may invoke international law before national courts.[76]

Under the dualist approach, international law and domestic law are viewed as two separate entities. International law cannot be directly applied in the domestic system without being translated into national law. A state's acceptance of a treaty binds that state externally in the sense that it creates rights and obligations between that state and other state parties to the treaty. Furthermore, it is a generally accepted principle of law that a state cannot invoke the provisions of its internal law to avoid responsibility for the observance of its treaty obligations and in particular to justify its failure to perform a treaty.[77] Nevertheless, without implementing legislation, a judge may not be able to apply that treaty obligation and a citizen may not be able to invoke such treaty obligation before

[69] *Ibid.*, Art. 18
[70] *Ibid.*, Elucidation, Art. 18
[71] Art. 1(8) of Law 24/2000 defines state succession as: a transfer of rights and obligations of one state to another as a result of the replacement of State for the purpose of continuing of the responsibility for the implementation of international relations and for the implementation of the obligation as a party to a treaty, in accordance with international law and the principles embodied in the United Nations Charter.
[72] Law 24/2000, Elucidation, Art. 20
[73] *Ibid.*, Elucidation, Art. 18
[74] *Ibid.*, Elucidation, Art. 19
[75] Anthony Aust, Modern Treaty Law and Practice, *Supra* No 13,at 178
[76] *Ibid.*
[77] 1969 Vienna Convention on the law of treaties, Art 21; Mark E. Villinger, *Commentary on the 1969 Vienna Convention on the law of Treaties*, *Supra* No 9, at 370

national courts.[78] Most states adopt variations of the dualist and monist approach.[79] This seems to be case with Indonesia's practice on treaty implementation.

2. Indonesia Treaty Implementation: Practice and Problems

The Indonesian constitution is silent on the relationship between international and domestic law and there exist no laws or doctrine on the implementation of treaties in the Indonesian domestic legal system. Furthermore, Indonesian jurisprudence has not developed to a stage that it contributes to explain the relationship between international law and national law. Therefore, any assessment of the implementation of international agreements shall be based on practice. This section will highlight Indonesia's practice on treaty implementation as well as the problems arising thereof.

It is not clear whether Indonesia practices monism or dualism since Indonesia's practice on implementation of treaties has not been consistent. In practice, there are certain conventions that have been ratified and followed by the issuance of implementing legislations/regulations, while others, are not. For example the 1982 United Nations Convention on the Law of the Sea ('UNCLOS'), was ratified by Law No. 17 of 1985 and was implemented by Law No. 6 of 1996. It was law No. 6/1996 (the implementing legislation of UNCLOS), and not Law No. 17 of 1985 (instrument of ratification of UNCLOS) which replaced Law No. 4 of 1960 on Indonesian Waters. On the other hand, the 1961 and 1963 Vienna Convention on Diplomatic and Consular Relations was ratified through the enactment of Law No. 1 of 1982 but without any implementing legislation/regulation.

Furthermore, in the case concerning the enforcement of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), the Indonesian court refused to enforce the supposedly 'self-executing'[80] convention until the Supreme Court Regulation No. 1/1990 on procedures concerning foreign arbitral awards was passed. [81] There were debates among academics, such as between Sudargo Gautama and Supreme Court Judge Asikin Kusumaatmadja on how the courts should have implemented the Convention. Sudargo Gautama[82] was of the opinion that the New York Convention was a self-executing treaty which did not require further implementing regulations. According to Gautama, the New York Convention stated that procedure of enforcement of foreign arbitral awards shall be done in accordance with the procedures of enforcement of domestic arbitral awards which in Indonesia's case had been regulated under decisions of the Indonesian National Arbitration Centre (*Badan Arbitrase Nasional Indonesia* / 'BANI'). On the other hand, Asikin Kusumaatmadja was of the opinion that an implementing regulation was still needed because of the involvement of foreign laws and, as such, greater caution is needed. According to Kusumaatmadja, not all courts are equipped with the capacity to encounter the technical and practical difficulty of the enforcement of

[78] Anthony Aust, Modern Treaty Law and Practice, *Supra* No 13, at 178
[79] *Ibid.*
[80] The convention was ratified by Presidential Decision 34/181 instead of legislation
[81] Supreme Court Regulation No. 1 of 1990 concerning the Procedures of Foreign Arbitration Award (*Peraturan Mahkamah Agung no. 1 tahun 1990 tentang Tata Cara Putusan Arbitrase Asing*.)
[82] Hikmahanto Juwana, *Kewajiban Negara Mentransformasikan Ketentuan Perjanjian Internasional Pasca Keikutsertaan ke dalam Peraturan Perundang-undangan: Studi Kasus Kewajiban Indonesia Pasca Keikutsertaan Dalam Capetown Convention;* Sudargo Gautama, *Hukum Dagang & Arbitrase Internasional,* (Bandung: Citra Aditya Bakti, 1991), at 1-2

foreign arbitral awards in the Indonesian territory, [83]thus, an implementing regulation is needed.

However, there are a handful of treaties that have no implementing regulations but which norms and obligations are observed by the Government and Indonesian courts, such as the direct implementation of the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations, which has no implementing legislation / regulations but was applied by the Supreme Court in its advice concerning the land dispute of the Saudi Arabia embassy. [84]

According to Mochtar Kusumaatmadja[85], like most European continental countries, Indonesia practices monism and shall be directly bound by treaties to which it ratifies without the need to transform such treaty obligation into national laws through implementing legislation.[86] Nevertheless, implementing legislation might be needed for treaty obligations which directly concern the rights of citizens as individuals. **Ko Swan Sik** sought guidance from colonial provisions such as, article 22 (a) of the *Algemene bepalingen van wetgeving*, Staatsblad 1847:23, which states that the authority of a judge and its power to enforce decisions are limited by exceptions under international law.[87] **Damos Dumoli Agusman** identifies some of the monistic characters of Indonesia's application of international law as can be seen from the following examples[88]:

- Law 24/2000 requires instruments of ratification to a treaty to be published in the state gazette in order to inform the public of Indonesia's commitment to the treaty and that the treaty binds all citizens,[89] implying that the ratification of a treaty binds the state both externally and internally even without the existence of implementing legislations/regulations.
- The direct implementation 1961 and 1963 Vienna Convention of the Diplomatic and Consular Relations which has no implementing legislation/regulation as applied by the Supreme Court in the case concerning the land dispute of the Saudi Arabia embassy.
- The Constitutional Court in its judicial review of Law No. 27 of 2004 on the Truth and Reconciliation Commission referred to "universal practice and international custom."
- Law 39/1999 on Human Rights states that international law provisions international law concerning human rights ratified by Indonesia, are recognized as legally binding in Indonesia.[90] The law further states that everyone within the territory of Indonesia is required to comply with Indonesian legislation and law, including unwritten law and international law concerning human rights ratified by Indonesia.[91]

On the other hand, other practices display the dualistic character of Indonesia's application of international law. Law No. 4 of 1960 on Indonesian Waters preceded the 1982

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[83] Hikmahanto Juwana, *Ibid*
[84] Damos Dumoli Agusman, *Perjanjian Internasional dalam Teori dan Praktek di Indonesia: Kompilasi Permasalahan (International Treaty in Theory and Practice in Indonesia: Compilation of Problems)*, (Jakarta: Directorate of Treaties for Economic and Socio-Cultural Affairs, Ministry of Foreign Affairs of Republic of Indonesia, 2008) at 6.
[85] Mochtar Kusumaatmaja and Etty R. Agoes, *Pengantar Hukum Internasional (Introduction to International Law)*, 2nd Ed., (Bandung: PT. Alumni, 2003) at 57
[86] *Ibid.*, at 92.
[87] Damos Dumoli Agusman, Perjanjian Internasional dalam Teori dan Praktek, *Supra* No. 84, at 4
[88] *Ibid.*, at 6
[89] Law 24/2000, Art. 13
[90] Law No. 39 of 1999 concerning Human Rights (Law 39/1999), Art. 7
[91] *Ibid,* Art. 67

UNCLOS, which was ratified by Law No. 17 of 1985 and was implemented by Law No. 6 of 1996. It was law No. 6 of 1996 (implementing legislation), and not Law No. 17 of 1985 (instrument of ratification) which replaced Law No. 4 of 1960. Furthermore, in the case concerning the enforcement of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the Indonesian court refused to enforce the supposedly "self-executing"[92] convention until Supreme Court regulation 1/1990 was passed on procedures concerning foreign arbitral awards. [93]

According to **Hikmahanto Juwana**, assessment on whether or not a treaty should be transformed into domestic law should be based on the substance of the treaty, which can be classified into: "treaty-contract" and "law-making treaties."Treaty-contract" is a treaty between two or only a few states, dealing with a special matter concerning these states exclusively, for example, loan agreements or treaties regarding territorial boundaries.[94] Law-making treaties are those which make norms and are intended to affect the behavior of states.[95]

For law making treaties, states have the obligation to transform treaty obligation into national law because the treaty was intended to affect change of laws/regulations in that state. For example, article 16(4) of the WTO Agreement which states that "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements";[96]Article 4 (1) of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that,[97] "Each State Party shall ensure that all acts of torture are offences under its criminal law"; and Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states that,[98] "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".

Under these treaties, state parties have the obligation to translate treaty obligation into national laws and regulations.[99] According to Juwana, instruments of ratification only serve as an approval of the state to be bound by the treaty as mandated by the treaty or national law. However, instruments of ratification are not enough to enforce treaty obligations which need to be regulated under separate implementing laws/regulations.[100] Juwana continues to argue the importance of transformation particularly for law enforcers since the police, judges,

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[92] The convention was ratified by Presidential Decision 34/181 instead of legislation

[93] Supreme Court Regulation No. 1 of 1990 concerning Procedures for Foreign Arbitral Award (*Peraturan Mahkamah Agung no. 1 tahun 1990 tentang Tata Cara Putusan Arbitrase Asing*)

[94] Hikmahanto Juwana, *Kewajiban Negara Mentransformasikan Ketentuan Perjanjian Internasional Pasca Keikutsertaan ke dalam Peraturan Perundang-undangan: Studi Kasus Kewajiban Indonesia Pasca Keikutsertaan Dalam Capetown Convention*

[95] *Ibid.*

[96] Agreement Establishing the World Trade Organization of 1994, Marrakesh, 15 April 1994, 1867 UNTS 154/[1995] ATS 8/33 ILM 1144 (1994), (entered into force on 1 January 1995), online: http://www.wto.org/english/docs_e/legal_e/04-wto.pdf

[97] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, UNTS 1465 I 24841, at 85, online: http://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf

[98] CEDAW was ratified by the enactment of Law No. 7 of 1984

[99] Hikmahanto Juwana, *Kewajiban Negara Mentransformasikan Ketentuan Perjanjian Internasional Pasca Keikutsertaan ke dalam Peraturan Perundang-undangan: Studi Kasus Kewajiban Indonesia Pasca Keikutsertaan Dalam Capetown Convention*

[100] Hikmahanto Juwana, Konsekuensi Keikutsertaan Indonesia dalam Perjanjian Internasional: Kewajiban Mentransformasi ke dalam Peraturan Perundang Undangan

and prosecutors will only rely on national law and not on treaties or international obligations which have not been translated into national law because they are not considered as a source of law.[101]

In reality, practice on transformation of treaty obligation into national law has been inconsistent. Some of the problems arising from Indonesia's practice in treaty implementation include.

1. Lack of legal certainty
   As explained above, there are no laws mandating the issuance of implementing legislation/regulation following treaty ratification. There are still debates amongst academics on whether or not treaties can be directly enforced without having implementing legislation/regulation and whether or not a judge is bound by a treaty which have not been translated into national law.

2. Treaty conclusion and implementation based on political interest
   In many cases, implementing legislations/regulations are only issued based on the political interest of the government in power. According to Hikmahanto Juwana, there have been negligible efforts, possibly even resistance, to amend or introduce legislation that would codify into national legislation Indonesia's obligations as a party to a treaty.[102] Ratification of treaties are seldom followed by codification of treaty obligation into national laws[103] because in many cases treaties are signed or ratified for the sole purpose of acquiring legitimacy and without the intention of implementing such obligations. Juwana gave the example of Indonesia's ratification of ILO conventions due to pressure from international and national NGOs which have not been codified into national laws, as such, could not be enforced.[104]

3. Lack of capacity to implement treaty obligations in the central and provincial level
   In many cases, agencies involved in the process of treaty ratification are not aware or have not thoroughly investigated (i) existing laws and regulations (at the central and provincial level) that might contradict or overlap with treaty obligations; and (ii) the extent to which relevant agencies involved in implementing the treaties (relevant ministries, police, prosecutor's office, regional government) posses the capacity, resources, and infrastructure in implementing treaty obligations, both at the central and provincial levels. According to Juwana, many treaties to which Indonesia became a party to are drafted by or within context of developed countries with a more stable legal system. When such treaties are ratified by developing countries such as Indonesia, problems are prone to be encountered, since in many of these countries written law is not necessarily reflected in the society.[105]

III. IMPLEMENTATION OF SPECIFIC CONVENTIONS RELATING TO MARITIME CRIMES

Indonesia has ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1999 International Convention for the Suppression of Terrorism Financing

[101] *Ibid.*
[102] Hikmahanto Juwana, Treaty Making – Indonesian Practice (2005)
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*

(1999 Terrorist Financing Convention), and the 2000 United Nations Convention on Transnational Organized Crime (UNTOC). Indonesia has NOT ratified the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (SUA 1988), The International Convention against the Taking of Hostages 1979 (The Hostages Convention), The ASEAN Convention on Counter-Terrorism 2007 (ACCT), and The ASEAN Treaty on Mutual Legal Assistance in Criminal Matters 2004 (MLAT). The following sections will examine Indonesia's implementation of UNCLOS, UNTOC, and 1999 Terrorist Financing Convention.

A. The United Nations Convention on the Law of the Sea 1982 (UNCLOS)

1. Indonesia's ratification of UNCLOS and implementing legislations

Indonesia ratified the UNCLOS on 3 February 1986 and have issued laws and regulations to implement the Convention, namely: Law No. 5/1983 concerning Indonesian EEZ, Law No. 1/1973 concerning Continental Shelf, Law No. 6/1996 concerning Indonesian Waters, Law No. 17/2008 concerning Shipping, and Law No. 31/2004 concerning Fisheries as amended by Law No. 45/2009.

Arts 2-32 on Territorial Sea	- Law No. 6/1996 concerning Indonesian Waters - Government Regulations 37 and 38/2002
Arts 34-45 on Straits used for International Passage	- Law No. 6/1996 concerning Indonesian Waters - Law No. Law No. 17/2008 concerning Shipping
Arts. 46-53 on Archipelagic States	- Law No. 6/1996 concerning Indonesian Waters - Government regulations 36/37/38 of 2002
Arts. 55-75 on Exclusive Economic Zone	- Law No. 6/1996 concerning Indonesian Waters - Government regulations 36/37/38 of 2002 - Law No. 5/1983 concerning Indonesian EEZ
Arts. 76-85 on Continental Shelf	Law No. 1/1973 concerning Continental Shelf
Arts. 86-120 on High Seas	- Law No. 31/2004 concerning Fisheries - Law No. 6/1996 concerning Indonesian

	Waters - Government Regulations 36/37/38 of 2002 - Law No. 5/1983 concerning Indonesian EEZ

Table 1. List of implementing legislation on specific articles of UNCLOS

Based on the legislations listed in the table, there are several government agencies that are responsible for the implementation of UNCLOS namely:
1) the Ministry of Transportation;
2) the Ministry of Marine Affairs and Fisheries;
3) the Ministry of Defense;
4) the Indonesian National Army;
5) the Indonesian National Police; and
6) the Ministry of Foreign Affairs.

2. Indonesia's Law on Piracy

So far Indonesia has not enacted any legislation specifically implementing UNCLOS provisions on piracy (Articles 100 – 110). However, prior to the ratification of UNCLOS, Indonesia had already enacted its own provisions on maritime crimes under Law No. 1 of 1946 concerning Indonesian Penal Code.

Under the Chapter of "Maritime Crimes" (*Kejahatan Pelayaran*),[106]the Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana/* KUHP) criminalizes "any person on board an Indonesian ship who unlawfully seizes the ship."[107] The acts of piracy (*pembajakan)* are regulated by articles 438 – 441of the KUHP as follows:

1. The act of entering into service or serving as a shipper on a vessel, knowing that it is aimed to be used or is used to commit acts of violence in the high sea against other vessels or against persons or property on board of such vessels, without being authorized by a belligerent state or without being a part of the navy of a recognized state.[108]
2. The act of entering into service as a member of the crew on board of such vessel, with the knowledge of the above aim or use or the act of voluntarily remaining in service after obtaining this knowledge.[109]
3. Committing acts of violence against another vessel or against persons or property on board said vessel:
   a. within Indonesian sea territory (Coastal Piracy)[110]
   b. on shore, on or near the beach or the mouth of rivers, after wholly or partially crossing the sea for such aim (Beach piracy)[111]
   c. on a river using another vessel, after having arrived from somewhere on board a vessel used for that purpose (River Piracy)[112]

[106] *Kejahatan Pelayaran* has also been translated as crimes relating to navigation
[107] Law No. 1 of 1946 concerning Indonesian Penal Code as affirm by Law No. 73 of 1958 and as amended by Law No. 1 of 1960, Law No. 4 of 1976, and Law No. 27 of 1999 respectively (KUHP), Art. 448
[108] *Ibid.*, Art. 438(1)
[109] *Ibid.*, Art. 438(2)
[110] *Ibid.*, Art. 439(1)
[111] *Ibid.*, Art. 440
[112] *Ibid.*, Art. 441

A person shall be liable for the above offences if s/he:

1. Commits such acts
2. Enters into service or serves as commander or captain on board a vessel, knowing that it is aimed to be used or that it is used for the commission of such acts.[113]
3. Enters into service or serves as a member of the crew on board a vessel, knowing that it is aimed to be used or that it is used for the commission of one of the acts, or who remains voluntarily in service on board such vessel after having such knowledge.[114]
4. Equips a vessel aimed to be used or is used to commit acts of violence in the open sea against other vessels or against persons or property on board of such vessels, either on his/her own or another person's expenses, to commit one of the offences described in articles 439-441[115]
5. Directly or indirectly participates in the rental, freighting or insuring of vessel, either on his/her own or another person's expense, knowing that the vessel is aimed to be used to commit acts of violence in the open sea against other vessels or against persons or property on board of such vessels[116]
6. Deliberately surrenders an Indonesian vessel to sea-pirates, coast-pirates, beach-pirates or river-pirates[117]

   If the acts of violence described in articles 438 - 441 result in the death of one of the persons on board the attacked vessel or of one of the assaulted persons, the skipper, commander or captain and those who have participated in the acts of violence shall be punished by capital punishment, life imprisonment or a maximum temporary imprisonment of twenty years.[118]

Under article 101 of UNCLOS, piracy consists of any of the following acts:

a. Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
b. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
c. Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

It remains unclear whether or not the term "piracy" (*pembajakan*) under the criminal code captures the definition of piracy under the UNCLOS, and not just "sea robbery."The term "sea piracy" *(pembajakan di laut)* are sometimes used interchangeably with "sea robbery" *(perompakan di laut).* During the ASEANAPOL XII Conference held in August

[113] *Ibid.*, Art. 442
[114] *Ibid.*, Art. 443
[115] *Ibid.*, Art. 445
[116] *Ibid.*, Art. 446
[117] KUHP, Art. 447
[118] *Ibid.*, Art. 444

1992 in Brunei Darussalam, the Chiefs of Police agreed to use the term sea robbery instead of sea piracy. Some have argued that the Criminal Code only applies to only to "sea robbery", while other argues that it applies to both sea robbery and sea piracy.

3. Universal Jurisdiction of Piracy

The Indonesian Penal Code allows the exercise of extraterritorial jurisdiction for the crime of piracy including acts of piracy that took place on the high seas. Under Article 4(4), the Indonesian Penal Code applies to any person guilty of the act of piracy[119] and the surrender of a vessel to pirates[120]. Unlike Articles 2 – 3 that emphasize on the territory where the crime occurs (*locus delicti*), Article 4 elaborates certain type of crimes that, if committed outside Indonesia, can trigger the application of the Code. Article 4 even goes as far as to indicate that this provision shall also apply to foreigners.

B. The United Nations Convention on Transnational Organized Crime (UNTOC 2000)

1. Indonesia's ratification of UNCTOC and implementing legislations

Indonesia ratified the UNTOC on 20 April 2009 with Law No. 5 of 2009. Indonesia also ratified the protocols supplementing the convention, i.e. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children through the enactment of Law No. 14 of 2009 and The Protocol against the Smuggling of Migrants by Land, Sea and Air (through the enactment of Law No. 15 of 2009. After the ratification of UNTOC, Indonesia has enacted Law No. 35 of 2009 concerning Narcotics (Law 29/2009) and Law No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering (Law 8/2010),[121] in which the two laws cover important offences under UNTOC. At present, the Ministry of Law and Human Rights is still conducting an assessment to identify existing gaps in the law in order to further harmonize Indonesia's regulations with the provisions of UNTOC.[122]

2. Existing laws covering UNTOC offences

Prior to the ratification of UNTOC, Indonesia has also enacted various legislations related to transnational organized crimes. Some of the existing laws which cover the same/similar offences as covered by the UNCTOC include[123]:

1. Law No. 1 of 1946 concerning Indonesian Penal Code;
2. Law No. 1 of 1979 concerning Extradition;
3. Law No. 9 of 1992 concerning Immigration as amended by Law No. 37 of 2009;
4. Law No. 31 of 1999 concerning the Eradication of the Crime of Corruption as amended by Law No. 20/2001, Law No. 30/2002, and Law No. 20 of 2010 respectively;

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[119] *Ibid.*, Arts. 438, 444 - 446
[120] *Ibid.*, Arts. 447
[121] Law No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering (Law 8/2010) was enacted to replace Law No. 15 of 2002 (Law 15/2002) concerning Money Laundering as amended by law No. 25 of 2003 (25/2003)
[122] National Legal Reform Programme (NLRP), UNTOC Gap Analysis: Addressing Indonesia's Legislation, Jakarta, 19 May 2010, online: http://int.nlrp.org/pages/g/nlrp4bf38c30df168
[123] Law No. 5 of 2009 concerning the Enactment of the United Nations Convention against Transnational Organized Crimes (Law 5/2009), Elucidation

5. Law No. 41 of 1999 concerning Forestry as amended by Law No. 19 of 2004;
6. Law No. 15 of 2002 concerning Money Laundering as amended by Law No. 25/2003 (replaced by Law No. 8 of 2010);
7. Law No. 15 of 2003 concerning enactment of Government Regulation in lieu of Law No. 1/2002 on the Eradication of the Crime of Terrorism as Law;
8. Law No. 1 of 2006 concerning Mutual Legal Assistance in Criminal Matters
9. Law No. 13 of 2006 concerning Protection of Victims and Witnesses
10. Law No. 21 of 2007 concerning the Elimination of Trafficking in Persons
11. Law No. 35 of 2009 concerning Narcotics
12. Presidential Instruction No. 5 of 2004 concerning the Acceleration of Corruption Eradication in Indonesia. The Presidential Instruction serves as an umbrella for the formulation of Indonesian Action Plan and National Strategy on Corruption Eradication

Under these existing laws and regulations there are several government institutions responsible in implementing UNTOC that consist of:

1) The Ministry of Law and Human Rights;
2) The Corruption Eradication Commission (KPK);
3) The Indonesian Financial Transaction Reports and Analysis Centre (PPATK);
4) The Supreme Court;
5) The Indonesian Attorney General;
6) The Indonesian National Police;
7) The Ministry of National Development Planning/National Development Planning Agency (Bappenas);
8) The Ministry of Social Affairs;
9) The Witness and Victim Protection Agency (LPSK);
10) The National Narcotics Board (BNN);
11) The National Human Rights Commission (Komnas HAM); and
12) The Ministry of Administrative and Bureaucratic Reforms (MenPAN)

3. Implementation of Article 5 UNTOC concerning Criminalization of Participation in an Organized Criminal Group and Article 6 UNTOC concerning Criminalization of the Laundering of Proceeds of Crime

(a) Article 5 UNTOC: Criminalization of Participation in an Organized Criminal Group

Article 5(1) UNTOC states that:

> *i. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*
>
> *1. Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:*
>
> *(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;*
>
> *(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:*
>
> *a. Criminal activities of the organized criminal group;*

> *b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim*
>
> *2. Organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group.*

Article 5(1) requires all States Parties to adopt legislations to criminalize any participation in a criminal group. The Article also entails States Parties to create offences for attempts and abetment in the commission of serious crimes involving criminal organization.

a1 Criminalization of Participation in an Organized Criminal Group

Indonesia has not had a special provision criminalizing participation in an organized criminal group as prescribed under Article 5 UNTOC. However, in relation to certain serious crimes, the involvement of an organized criminal group in the commission of those serious crimes will constitute aggravating circumstances that will entail harsher punishment and/or fine. The related serious crimes in question are:

1. Trafficking in persons (Law No. 21 of 2007 concerning the Elimination of Trafficking in Persons or Law 21/2007);
2. Drug-related crimes (Law No. 35 of 2009 concerning Narcotics or law 35/2009); and
3. Money laundering (Law No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering or Law 8/2010).

Each of the law has adopted the definition of organized criminal group as stipulate in Article 1(1) of UNTOC. Each Law uses almost identical definition of organized criminal group:[124]

> *… a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more offences set out in accordance with this Law, in order to obtain, directly or indirectly, a financial or other material benefit.*

Both Law 21/2007 and Law 35/2009 stipulate that the commission of trafficking in persons/drug-related crimes by an organized criminal group shall consequently aggravate the punishment of each person involved in the organized criminal group to 1/3 (one-third) of the maximum sentence and fine.[125] However, Law 8/2010 applies a different approach; Article 6 of this Law states that:

> *(1) In the event where the crime of money laundering … is committed by a corporation,[126] the corporation and/or the managing personnel of the corporation shall be subject to punishment.*
>
> *(2) Such punishment shall be imposed against a corporation if the crime of money laundering is:*
>
> *a. Committed or instructed by the managing personnel of the corporation;*
> *b. Committed in order to achieve the aim and purpose of the corporation;*
> *c. Committed in accordance with the instigator's/perpetrator's duties and functions in the corporation*

[124] Law No. 21 of 2007 concerning the Elimination of Trafficking in Persons (Law 21/2007), Elucidation, Art. 16; Law No. 35 of 2009 concerning Narcotics (35/2009), Art. 1(20); and Law 8/2010, Elucidation, Art. 6(1).
[125] Law 21/2007, Art. 16 and Law 35/2009, Art. 132(2). In relation with Law 35/2009, Article 132(3) further elaborate that in case where the maximum penalty of a drug-related crime amount to maximum imprisonment of 20 years or death-penalty then the aggravation of the penalty shall not apply.
[126] According to the elucidation of Article 6(1) of Law 8/2010, the term *corporation* in this Article also includes the definition of organized criminal group identical to that of Article 1(1) of UNTOC.

Under Indonesian legislations, the penalties imposed on the commission of serious crimes, including participation in an organized criminal group, comprise of imprisonment up to 20 years, fine, a combination of imprisonment and fine, and death-penalty.[127] The criminalization of a person's participation in an organized criminal group under Indonesian Law emphasizes on a person's 'conduct' in the criminal activity of an organized criminal groups as prescribed by Article 5(1)(a)(ii) of UNTOC. However, there are some significant differences between UNTOC provision and the provisions under Indonesian Law regarding the criminalization of participation in an organized criminal group:

a. The criminalization of participation in an organized criminal group in Indonesian Law is limited to the commission of trafficking in persons, drug-related crimes, and money laundering. There are no provision in the Penal Code that criminalize a person's participation in an organized criminal group in general;

b. Under Law 21/2007, Law 35/2009, as well as Law 8/2010, it is not clear on whether or not such participation in an organized criminal group should be an active one;[128] and

c. The wordings in these laws suggest that a person need not have the knowledge of *either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes*[129] in order to be accounted for his/her involvement in an organized criminal group. The absence of the element of knowledge or criminal intent can also be seen in the criminal acts defined in Law 21/2007, Law 35/2009 and Law 8/2010.[130]

a2 Attempts and Abetment

Under the Indonesian Criminal Code, an attempt to commit a crime is punishable under the law if the intention of the perpetrator has been revealed with the commencement of the act of crime and that the act was not completed not solely due to the perpetrator's volition.[131] The penalty for an attempt to commit a crime is the same as the maximum penalty for the crime that is attempted to commit, mitigated by one-third.[132] If the maximum penalty for a crime amount to death-penalty or life imprisonment then a maximum imprisonment of fifteen years shall be imposed for attempt.[133] However, under several Indonesian legislations related to transnational organized crimes such as trafficking in persons, drug-related crimes, and money laundering, attempt to commit these crimes is punishable under the same penalty as that of a completed crime.[134]

With regards to abetment, under the penal, Law 21/2007, law 35/2009, and Law 8/2010, an abettor of a crime is subject to the same treatment and penalty as the perpetrator.[135] The mode of penalization relating to attempt and abetment is consisted of

[127] Law 21/2007, Arts. 2 – 9; Law 35/2009, Arts. 111 – 126 and 129; and Law 8/2010, Arts. 3 – 5 and 7 – 8.
[128] Article 5(1)(a)(ii) of UNTOC clearly stipulates that a person's participation in an organized criminal group shall be an active one.
[129] UNTOC, Art. 5(1)(a)(ii).
[130] The crimes of trafficking in persons, drug-related crimes, and money laundering do not necessitate the presence of criminal intent of the perpetrator. *See* Law 21/2007, Arts. 2 – 6; Law 35/2009, Arts. 111 – 126 and 129; and Law 8/2010, Arts. 3 – 5.
[131] KUHP, Art. 53(1).
[132] *Ibid.*, Art. 53(2).
[133] *Ibid.*, Art. 53(3).
[134] Law 21/2007, Art. 10; Law 35/2009, Art. 132(1); and Law 8/2010, Art. 10.
[135] KUHP, Art. 55; Law 21/2007, Art. 10; Law 35/2009, Art. 133; and Law 8/2010, Art. 10.

imprisonment up to 20 years, fine, a combination of imprisonment and fine, and death-penalty.[136]

(b) Article 6 UNTOC: Criminalization of the Laundering of Proceeds of Crime

Article 6 UNTOC requires all States Parties to adopt national legislations and other measures to criminalize the laundering of proceeds of crime. Article 6(2) UNTOC necessitates States Parties to adopt implementing legislations that cover the widest possible range of predicate offences. Furthermore, Article 6(2) requires States Parties to widen their respective jurisdiction to prosecute and try such offences that take place within and outside their jurisdiction.

In 2002, prior to the ratification of UNTOC, Indonesia has enacted Law No. 15 of 2002 concerning the Crime of Money Laundering (Law 15/2002) that was later on amended by Law 25/2003. After the ratification of UNTOC by Indonesia, Indonesia promptly enacted Law No. 8/2010 concerning the Prevention and Eradication of Money (Law 8/2010) to replace Law 15/2002 as amended by Law 25/2003 and incorporates relevant provisions of UNTOC. Law 8/2010 prescribes imprisonment up to 20 years, fine, and a combination of imprisonment and fine as its mode of penalties.[137]

According to Article 2(1) of Law 8/2010, the proceeds of crime shall be Assets derived from the following criminal acts:

1. Corruption;
2. Bribery;
3. Narcotics-related crime;
4. Psychotropic substances-related crime;
5. Smuggling of workers;
6. Smuggling of immigrants;
7. Banking offences;
8. Capital market offences;
9. Insurance crime;
10. Customs/tariffs-related crime;
11. Crimes related to tax of goods;
12. Trafficking in persons;
13. Illegal trade of arms;
14. Terrorism;
15. Kidnapping;
16. Theft;
17. Embezzlement;
18. Fraud;
19. Counterfeiting of currencies;
20. Gambling;
21. Prostitution;
22. Taxation offences;
23. Forestry offences;
24. Environmental crimes;
25. Maritime and fisheries offences; or
26. Other offences for which the prescribed penalty is 4 years imprisonment or more

Article 2(1) of Law 8/2010 also establishes that Indonesia has a jurisdiction over the abovementioned predicate offences when they are perpetrated both within and outside of Indonesian territory and where the offence are considered as crimes under Indonesian Law. This specific provision adopted the provision set out in Article 6(2)(c) UNTOC. Based on this requirement, in order to determine the result of an offence, Law 8/2010 applies double criminality principle.[138]

Furthermore, the phrase ‘considered a crime under Indonesian Law’ in Article 2(1) indicates that Law No. 8/2010 does not allow criminalization of any of the above offences

[136] *Ibid.*, Art. 10; Law 21/2007, Arts. 2 – 9; Law 35/2009, Arts. 111 – 126 and 129; and Law 8/2010, Arts. 3 – 5, 7 – 8, 11(2), 12(5), and 13 – 16.
[137] Law 8/2010, Arts. 3 – 5, 7 – 8, 11(2), 12(5), and 13 – 16.
[138] *Ibid.*, Elucidation, Article 2(1).

before the enactment of the Law concerning the Crime of Money Laundering in 2002.[139] However, predicate offences that took place prior to April 2002 (the date of the enactment of the first anti money laundering Law) which then leads to money laundering after April 2002 can be charge with the money laundering offence.[140]

There is nothing in Indonesian Law that stipulates that the offence of laundering the proceeds of crime does not apply to the persons who also committed the predicate offences. The Indonesian Penal Code and Law 8/2010 allow the prosecution and punishment of a person that commits both the predicate offence and the laundering of proceeds of such crime. The prosecution of a person charged with both the offence of laundering of proceeds of crime and predicate offence are possible based on the practice of Indonesian prosecutors to apply a combined-cumulative approach for prosecution.[141] An example of this practice can be seen from the judgment of the Medan District Court (North Sumatera) on 31 August 2005 in the case of Jasmarwan where the Court found the defendant guilty as indicted for forgery of State's documents, fraud and money laundering.[142] The court established that the three acts constituted a causal link of predicate offences and the laundering of the proceeds of crime; nevertheless the crimes should be treated as separate acts since the intention of the defendant in committing each crime differed from one another.[143]

4. Jurisdiction over Offences under UNTOC

Under Chapter I of the Indonesian Penal Code, the Code applies to any person guilty of a punishable act within the territory of Indonesia including acts committed on board of an Indonesian vessel or aircraft.[144] This means that Indonesian Courts have jurisdiction over crimes committed by both Indonesian citizens and foreigners in Indonesian territory. Furthermore, the Indonesian Penal Code, subject to the restrictions of international law[145], also applies extraterritorially to:

1. Any person (either Indonesian or foreigner) who outside Indonesia is guilty of[146]:
   a. One of the crimes against state security[147] and crimes against the president and vice president[148] ;
   b. Crimes concerning currency or paper money issued by the state or bank, or with respect to duty stamps issued and marks used by the Indonesian government
   c. Forgery of bond or debt certificates at the expense of Indonesia

[139] The crime of money laundering and some of its predicate offences is first introduced in the Indonesian Legal System in 2002 through the enactment of Law No. 15 of 2002 that was later on amended by Law No. 25 of 2003 and finally replaced by Law 8/2010. This is in accordance with the principle of legality under Article1(1) of KUHP that stipulates "no act shall be punished unless by virtue of a prior statutory penal code."
[140] Asia Pacific Group on Money Laundering, APG 2nd Mutual Evaluation Report on Indonesia, 9 July 2008, at 36.
[141] Based on the practice of the Indonesian Attorney General Office, there are 5 types of indictments commonly used in the Indonesian legal system, which are: 1) single indictment; 2) alternative indictment; 3) subsidiary indictment; 4) cumulative indictment; and 5) combination indictment. So far there is no legal basis that set out the type of indictment in Indonesia.
[142] District Court of Medan, Judgment, Case No. 873/Pid.B/2005/PN.Mdn, 31 August 2005 *cited in* Yunus Husein, *Perkembangan Terkini Rezim Anti Pencucian Uang Indonesia*, Jakarta, February 2007, at 5
[143] *Ibid.*
[144] KUHP, Art. 2 – 3.
[145] *Ibid.*, Art. 9
[146] *Ibid.*, Art. 4
[147] *Ibid.*, Arts. 104, 106, 107, 108, 110, 111 bis, 4(1), 127
[148] *Ibid.*, Art. 131

d. Crimes concerning piracy[149], surrender of a vessel to pirates[150], unlawful exercise of control of aircraft[151], and crimes against the safety of civil aviation[152].

2. An Indonesian national who outside Indonesia commits[153]:
   a. One of the crimes against public order under articles 160 and 161, crimes against public authority under article 240, forgery of documents under article 270, crimes relating to piracy under articles 450 and 451
   b. Acts deemed by the Indonesian penal provisions to be a crime and on which punishment is imposed by the law of the country where it has been committed.[154]
3. An Indonesian official who commits one of the crimes under articles 410-437.

In relation with the offence of laundering the proceeds of crime, Indonesian Court has a jurisdiction over attempt to commit, aiding and abetting, or association with or conspiracy to commit the crime of money laundering over person/cooperation that reside in or outside of Indonesian territory.[155] However, Law 8/2010 does not explain further whether such participation should aim at the commission of the laundering of proceeds of crime within Indonesian territory.

5. Extradition

Under Article 16 of the UNCTOC, state parties that do not make extradition conditional on the existence of a treaty shall recognize offences under such article as extraditable offences between themselves.

Under Indonesian Law No. 1 of 1979 concerning extradition (Law 1/1979), extradition is granted by treaty[156] or based on reasons of comity and national interest.[157] According to this law, "treaty" refers to an agreement made between Indonesia and other countries ratified by law and do not specify whether or not such treaty must be in the form of an extradition treaty. In any case, Indonesia should be able to recognize the Convention as the legal basis for extradition, since:

(a) extradition policy is not conditional upon an extradition treaty
(b) Indonesia did not make any reservations to article 16 of UNCTOC
(c) Indonesia's law on extradition does not prevent application of article 16 of UNCTOC

[149] *Ibid.,* Arts. 438, 444 - 446
[150] *Ibid,* .Arts. 447
[151] *Ibid.,* Arts. 479 (j)
[152] *Ibid.,* Arts. 479(l), (m), (n) and (o)
[153] *Ibid.*, Arts. 5(1), 6: The applicability of article 5 (1) is limited such that the capital punishment -cannot be imposed upon an act which the capital punishment is not provided for by the law of the country where the act has been committed.
[154] *Ibid.*, Art 5(2): The prosecution of the crime referred to under secondly may also be instituted if the accused becomes a subject after the commission of the act
[155] Law 8/2010, Art. 10.
[156] Law No. 1 of 1979 concerning Extradition (Law 1/1979), Art. 2(1)
[157] *Ibid.*, Art. 2(1)

Country	Name of Treaty	Signature	Ratification Status
Republic of Korea	Treaty on Extradition between the Republic of Indonesia and the Republic of Korea	28 November 2000	Ratified by Law No. 42/2007 on 23 October 2007
Hong Kong	Agreement Between the Government of the Republic of Indonesia and the Government of Hong Kong for the Surrender of Fugitive Offenders	5 May 1997	Ratified by Law No.1/2001 on 8 May 2001
Australia	Extradition Treaty between the Republic of Indonesia and Australia	22 April 1992	Ratified by Law No. 8/ 1994 on 2 November 1994
Thailand	Treaty Between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand Relating to Extradition	29 June 1976	Ratified by Law No.2/1978 on18 March 1978
The Philippines	Extradition Treaty Between the Republic of Indonesia and the Republic of the Philippines and the Protocol.	10 February 1976	Ratified by Law No.10/1976 on 26 July 1976
Malaysia	Treaty between the Government of the Republic of Indonesia and the Government of Malaysia Relating to Extradition	7 June 1974	Ratified by Law No.9/1974 on 26 December 1974

Table 2. Countries to which Indonesia has extradition treaties

Indonesia has also signed, but not ratified, extradition treaties with Singapore (27 April 2007) and the People's Republic China (1 July 2009). Furthermore, the Annex of Law 1/1979 lists the following acts as Extraditable Offences:[158]

1. Murder
2. Premeditated murder
3. Physical torture (*penganiayaan*) resulting in severe body injuries or the death of a person, premeditated torture and severe torture
4. Rape, sexual abuse
5. Intercourse with a woman outside marriage or engaging in sexual acts with a person with the knowledge that the person is unconscious, helpless, under-aged (under 15), or not mature enough to marry
6. Sexual acts commited by an adult and an under-aged person of the same sex

[158] Law no. 1/1979, Annex

7. Giving or using drugs or tools with intention of aborting a woman's pregnancy
8. Abducting a woman with force, threats of violence or deception, or under-aged
9. Trafficking of women and children
10. Kidnapping and illegal detention
11. Slavery
12. Extortion and threats
13. Copying or forgery of currency or bank paper or distributing forged money or bank paper
14. Storing or importing forged money to Indonesia
15. Forgery or crimes relating to forgery
16. False oaths
17. Fraud
18. Criminal acts relating to bankruptcy
19. Embezzlement
20. Theft, robbery
21. Arson
22. Intentional destruction of property or buildings
23. Smuggling
24. Intentional acts to endanger the safe travel of trains, ships, aircrafts and its passengers
25. Sinking or destroying vessels at sea
26. Torture or physical abuse on board vessels at sea with the intention to cause death or severe injury
27. Mutiny or agreement to mutiny by two persons or more on board of ships at sea against the captain, incitement to mutiny
28. Sea piracy
29. Air piracy, crimes against aviation, crimes against aircraft facilities and infrastructure.
30. Corruption
31. Narcotics and other dangerous drugs
32. Acts violating Laws on weaponry, arms, explosives and inflammable materials.

The above list is not exhaustive and may be added by government regulations.[159] Apart from crimes listed above, extradition may also be granted for other crimes upon the discretion of the requested state.[160] Under Indonesia's extradition law, the requirements and principles are as follows:

[159] Law no. 1/1979, Art. 4(3)
[160] *Ibid.*, Art. 4(2)

1. Based on the principle of Double Criminality, the act committed should be considered as a crime by the requesting state as well as by the requested state. [161]
2. Indonesia may refuse the request of extradition on the following grounds:
   a. The act is a political crime. [162] Generally extradition will not be granted for political crimes, unless regulated otherwise in the treaty between the Indonesia and the requesting state.[163]The law does not provide the definition of political crimes, however, has made reference as to crimes which should not be considered as a political crime, that is:
      - A crime that is principally more of an ordinary crime than a political crime
      - The taking or attempted taking of the life of a Head of State or a member of his family
   b. The act is a crime under military criminal law which are not crimes under ordinary criminal law, unless decided otherwise in the treaty between the Indonesia and the requesting state (Article 6)
   c. Request over the surrender of its nationals[164]
   d. The crime has been committed in whole or in part in Indonesian territory[165] (Article 8)
   e. The person requested for extradition is undergoing investigation/proceedings in respect of the same crime for which extradition has been requested[166] (Article 9)
   f. There is a final and binding judgment passed by an Indonesian Court with respect to the crime for which extradition is requested[167]
   g. The person claimed for extradition has been sentenced and exonerated or has served his sentence in another state in respect of the crime for which extraditions is requested.[168]
   h. If, under Indonesian law, the right to prosecute or the right to enforce judicial decision has expired by reason of lapse of time (Article12);
   i. The crime for which extradition is requested is a capital offence under the law of the requesting state, while under Indonesian law such crime is not a capital offence or capital punishment are rarely enforced. An exception can be made if the requesting state provides sufficient guarantee that death-penalty will not be carried out. (Article 13)
   j. If according to the relevant authorities there are substantial grounds to believe that the person claimed for extradition will be prosecuted, sentenced, or subjected to other measures, on account of his religion, political opinion or nationality, or because of his belonging to a certain race or group of the population.(Article 14)

[161] *Ibid.*, Elucidation
[162] *Ibid.*, Art. 5(1)
[163] *Ibid.*, Art. 5(3)
[164] *Ibid.*, Art. 7
[165] *Ibid.*, Art. 8
[166] *Ibid.*, Art. 9
[167] *Ibid.*, Art. 10
[168] Law no. 1/1979, Art. 10

k. If the person claimed for extradition will be prosecuted, sentenced or detained on account of the commission of another crime than that for which extradition has been requested. An exception can be made if there is approval from the President. (Article 15)

l. If the person claimed for extradition will be surrendered to a third state in respect of other crimes, committed before the request for extradition. (Article 16)

6. Mutual Legal Assistance

Under Article 18 of the UNTOC, a state party should provide mutual legal assistance to other state parties to UNTOC with which it does not have another mutual legal assistance treaty in force. However, in any case, Indonesia should be able to apply this provision, considering: recognize the Convention as the legal basis for extradition, since:
(a) Mutual legal assistance policy is not conditional upon a treaty;
(b) Indonesia did not make any reservation on article 18 of UNCTOC; and
(c) Indonesia's law on mutual legal assistance does not prevent application of article 18 on UNTOC

Mutual Legal assistance is governed by Law No. 1 of 2006 on Mutual Legal Assistance (Law 1/2006) in Criminal Matters. Under this law, mutual legal assistance may be provided based on a treaty, [169] or on the basis of good relationship under the reciprocity principle.[170] Under this law, refusal of request of assistance may be based on the following grounds:

a. The request for Assistance relates to the investigation, prosecution or examination before the court or punishment of a person for the crime that is alleged:
   i. To have committed a crime of political nature, except a crime or attempted crime against the life or person of a Head of State/a Head of Central Government, terrorism; or
   ii. To have committed a crime under military law;

b. The request for Assistance relates to the investigation, prosecution and examination before the court on a person for a crime the perpetrator of which has been acquitted, awarded with clemency, or has completed serving the criminal sanction;

c. The request for Assistance relates to the investigation, prosecution and examination before the court on a person for a crime which if it is committed in Indonesia, it cannot be prosecuted;

d. The request for Assistance is conveyed for prosecuting or bringing a person into justice based on a person's race, gender, religion, nationality, or political belief;

e. An approval for providing the Assistance upon its request will be harmful to the sovereignty, security, interests, and national law;

f. The foreign state may not assure that the items requested for will not be used for a matter other than the criminal matter in respect to which the request was made; or

g. The foreign state may not assure to return, upon its request, any item obtained pursuant to the request.

[169] Law No. 1 of 2006 on Mutual Legal Assistance (Law 1/2006), Art. 5(1)
[170] *Ibid.*, Art. 5(2)

h. The request for Assistance relates to the investigation, prosecution, and examination before the court or punishment of a person for a crime that if said crime committed within the territory of the Republic of Indonesia is not a crime;

i. The request for Assistance relates to the investigation, prosecution, and examination before the court or punishment of a person for a crime that if said crime committed outside the territory of the Republic of Indonesia is not a crime;

j. The request for Assistance relates to the investigation, prosecution and examination before the court or punishment of a person for a crime that is subject to capital punishment; or

k. An approval for providing Assistance upon said request will be harmful for the investigation, Prosecution and examination before the court in Indonesia, endanger the safety of person, or burden the assets of the state.

Indonesia has mutual legal assistance treaties with Australia[171] and China.[172] Indonesia has also signed and ratified the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters.[173] On 3 March 2002 Indonesia and the Republic of Korea has signed a treaty on Mutual Legal Assistance in Criminal Matters but so far the treaty has not been ratified.

C. 1999 International Convention for the Suppression of the Financing of Terrorism (1999 Terrorist Financing Convention)

1. Indonesia's ratification of the Terrorist Financing Convention and Existing laws covering the Convention's offences

Indonesia ratified the Terrorist Financing Convention on 29 June 2006 with Law No. 6 of 2006 (Law 6/2006). Indonesia submitted a reservation of Article 24 on the settlement of disputes concerning the interpretation or application of the Convention. It took the position that disputes relating to the interpretation and application on the Convention which cannot be settled through the channels provided for in Art 24 (1) may be referred to the International Court of Justice only with the consent of all the parties to the dispute.

In accordance with Article 2 (2) (a) of the Convention, Indonesia submitted a declaration stating that the following treaties shall not be included in the Annex:

1. Convention of the Prevention and Punishment of Crime Against Internationally Protected Persons
2. International Convention Against the Taking of Hostages
3. Protocol for the Suppression of Unlawful Acts of Violence at Airport Serving International Civil Aviation, Supplementary to the Convention for the Suppresion of Unlawful Acts Against the Safety of Civil Aviation

[171] Treaty between the Republic of Indonesia and Australia on Mutual assistance in Criminal Matters. signed on 27 October 1995, ratified by Law No.1 of 1999 on 27 January 1999.
[172] Treaty Between the Republic of Indonesia and the People`s Republic of China on Mutual Legal Assistance in Criminal Matters, signed on 24 July 2000, Ratified by Law No.8 of 2006 on 18 April 2006
[173] Treaty on Mutual Legal Assistance in Criminal Matters signed on 29 November 2004 and ratified by Law No. 15 of 2008 on 30 April 2008.

4. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
5. Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf

Additionally, Indonesia submitted a declaration of Article 7 of the Convention on the establishment of jurisdiction over the offences in that such provision shall be implemented in strict compliance with the principles of the sovereignty and territorial integrity of States.

While Indonesia has not issued any legislation implementing the Convention, it has existing laws which regulate offenses covered by the Convention, namely: Law No 15 of 2003 concerning Anti Terrorism (Law 15/2003) and Law No. 8 of 2010 on the Prevention and Eradication of Money Laundering that replaced Law No. 15 of 2002 concerning Money Laundering. Under these Laws, the National Policy, Attorney General Office, the Supreme Court, the Indonesian Financial Transaction Reports and Analysis Centre (PPATK), and the Central Bank (Bank Indonesia) are responsible for the prevention and eradication of terrorist financing in Indonesia. These institutions are also required to collaborate with the Ministry of Foreign Affairs and the Ministry of Law and Human Rights in relation with international cooperation and formulation of terrorist-financing-related laws and regulations.[174]

2. Offences and Penalties under the 1999 Terrorist Financing Convention

Article 2 of the Terrorist Financing Convention provides that the Convention criminalize every person that conduct an act of providing or collecting funds with the intention to use the funds or having the knowledge that the funds are to be used to carry out offences as defined in the treaties listed in the Annex of the Convention;[175] or any other act intended to cause death or serious bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[176]

The criminalization of terrorist financing under Indonesian Law is provided under Law 15/2003 and Law 8/2010. Law 15/2003 enacts the contents of the Government Regulation in Lieu of a Law No. 1 of 2002 on Combating the Crime of Terrorism as law effectively on 4 April 2003. Articles 6 – 10 of Law 15/2003 stipulate the crimes that constitute acts of terrorism. The criminalization of funding terrorist acts is provided under Article 11 – 13. Article 11 of Law 15/2003 provides that:

Article 11

> *Shall be punished with 3 (three) years and a maximum of 15 (fifteen) years of imprisonment, any person who intentionally provides or collects funds with the objective that that they be used or there is a reasonable likelihood will be used partly or wholly for criminal acts of terrorism as stipulated in Articles 6, 7, 8, 9, and 10.*

[174] Law No. 37/1999, Art. 6(2); Law No. 24/2000, Art. 2; and Law No. 10/2004, Art. 18
[175] Terrorist Financing Convention, Art. 2(1)(a).
[176] Ibid., Art. 2(1)(b).

Article 12

Shall be punished with 3 (three) years and a maximum of 15 (fifteen) years of imprisonment, any person who intentionally provides or collects assets with the objective that they be used or there is a reasonable likelihood will be used partly or wholly for:

a. committing any unlawful act of receiving, possessing, using, delivering, modifying or discarding nuclear materials, chemical weapons, biological weapons, radiology, micro-organism, radioactivity or its components that causes death or serious injuries or causes damage to assets;

b. stealing or seizing nuclear materials, chemical weapons, biological weapons, radiology, microorganism, radioactivity or its components;

c. embezzling or acquiring illegally nuclear materials, chemical weapons, biological weapons, radiology, micro-organism, radioactivity or its components;

d. requesting nuclear materials, chemical weapons, biological weapons, radiology, micro-organism, radioactivity or its components;

e. threatening to:

d. use such nuclear materials chemical, biological weapons, radiology, micro-organism, radioactivity or its components to cause death or injuries or damage to properties; or

e. commit criminal acts as stipulated in b with the intention to force another person, an international organization, or another country to take or not to take an action;

f. attempting to commit any criminal act as stipulated in a, b or c; and

g. participating in committing any criminal act as stipulated in a to f.

Article 13

Shall be punished with 3 (three) years and a maximum of 15 (fifteen) years of imprisonment, any person who intentionally provides assistance to any perpetrator of criminal acts of terrorism by:

a. providing or lending money or goods or other assets to any perpetrator of criminal acts of terrorism…

The criminalization of terrorist financing is also found in Article 2(2) of Law 8/2010 that states:

Assets that are known or reasonably suspected to be used and/or used directly or indirectly for terrorist acts, terrorist organization, or individual terrorist shall be regarded as the proceeds of crime as intended by paragraph (1)(n).[177]

Articles 11 – 13 of Law 15/2003 and Article 2(2) of Law 8/2010 accommodate the criminalization of providing funds for terrorist acts as set out in Article 2(1) of the Terrorist Financing Convention. However there are some discrepancies between the Laws and the Convention. First, Law 15/2003 does not provide a definition of funds and assets which both are being repeatedly used in defining the scope of the crime of terrorist financing. The term fund, since it is not defined under the law, is interpreted in its general meaning that is limited

[177] Article 2(1)(n) of law 8/2010 listed terrorism as one of the predicate offences from which the proceeds of crime can be derived.

to money and any negotiable instruments.[178] Even though Law 15/2003 and Law 8/2010 provide a definition of asset,[179] the definition does not suffice the requirement of the definition of Funds provided in Article 1(1) of the Financing Terrorism Convention[180] to incorporate coverage of "legal documents or instruments in any forms, including electronic or digital, evidencing title to, or interest in, such assets".

Second, Indonesian Law on Anti Terrorism does not incorporate most of the treaties listed under the Annex of the Financing Terrorism Convention. The scope of the financing of the terrorist offences under Law 15/2003 is so far focused on offences related to aircraft and safety of civil aviation, protection of nuclear material, and terrorist bombing.[181] Therefore, if an individual financed the commission of a crime listed under Article 3 of Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), for example, then the person might be indicted for violations of the Indonesian Penal Code relating to abetting and aiding a crime but not for financing terrorism under Article 11 – 13 of Law 15/2003. Third, Law 15/2003 does not cover the offence of financing terrorism in time of armed conflict as suggested in Article 2(1)(b) of Terrorist Financing Convention.

It is also worth to mention that under Article 2(2) of Law 8/2010 assets directed to finance terrorism are regarded as proceeds of crime deriving from the predicate offence of terrorism. The provision is essentially inconsistent with the Indonesian anti money laundering regime under Law 8/2010 since it shifts the chain of events that leads to the acquirement of proceeds of crime. In this regards, Article 2(2) of Law 8/2010 indicates that the assets/funds used to finance terrorism is seen as proceeds of crime derived from the acts of terrorism that has not even occurred while Article 2(1) of Law 8/2010 stipulates that a predicate offence must first take place in order to acquire the proceeds of crime. The Law is silent on the reasoning of the inclusion of the offence of terrorism funding in the money laundering regime.

3. Conspiracy, Attempt, Abetment, and Aiding

Article 2(5) of the Terrorist Financing Convention provides that any person also commits an offence if that person:

> *(a) Participate as an accomplice in an offence set forth in paragraph 1 or 4 of this Article;*
>
> *(b) Organizes or directs others to commit an offence as set forth in 1 or 4 of this Article;*

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[178] Asia Pacific Group on Money Laundering, APG 2nd Mutual Evaluation Report on Indonesia, 9 July 2008, at 43.

[179] Under Article 1(9) of Law 15/2003 and Article 1(13) of Law 8/2010, Assets are defined as "all movable or immovable both tangible and intangible objects, however required."

[180] Under Article 1(1) of Terrorist Financing Convention, Funds are defined as:

> … assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

[181] Indonesia has ratified the International Convention for the Suppression of Terrorist Bombing through law No. 5 of 2006; and the Convention on the Physical Protection of Nuclear Material through Presidential Regulation No. 46 of 2009. Moreover, Indonesia has enacted Law No. 4 of 1976 on the Amendment and Insertion of Provisions on Aviation Crimes and Crimes against Aviation Facilities and Infrastructure and Law No. 1 of 2009 on Aviation.

(c) Contributes to the commission of one or more offences as set forth in paragraph 1 or 4 of this Article; by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

1) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this Article; or

2) *Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this Article.*

The offences set out in Article 2(5) of Terrorist Financing Convention are available in the Indonesian Penal Code. Article 53 of the Indonesian Penal Code makes attempt to commit a crime as an offence. The penalty for an attempt to commit a crime is the same as the maximum penalty for the crime that is attempted to commit, mitigated by one-third.[182] If the maximum penalty for a crime amount to death-penalty or life imprisonment then a maximum imprisonment of fifteen years shall be imposed for attempt.[183] Articles 55 – 56 of the Penal Code cover all the type of offences defined in Article 2(5) of the Financing Terrorism Convention, such as participating as an accomplice, organizing and/or directing others to participate in a criminal act, and acting in common purpose to further the commission of a criminal act.

Law 15/2003 also includes provisions concerning conspiracy, attempts, aiding and abetting. Article 14 provides that the planning and inciting other person to commit act of terrorism as defined in Articles 6 – 12 (including terrorist financing) is punishable by death or life imprisonment. Article 15 criminalizes conspiracy, attempt, and assistance to commit any criminal act of terrorism, including terrorist financing, as stipulated in Articles 6 – 12 of Law 15/2003. The punishment under Article 15 for conspiracy, attempt and assistance is the same as the perpetrator of the said criminal acts of terrorism under Articles 6 -12. Lastly, Article 16 covers the offence of facilitating terrorism from outside of Indonesia. The offender under Article 16 will receive the same penalty as the perpetrator of terrorist acts set out in Articles 6 – 12. Unlike the Penal Code, Law 15/2003 does not treat the non-completion of a criminal act as a factor that can mitigate the weight of the crime as well as the punishment.

4. Jurisdiction

Article 7 of the Convention provides that each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:
(a) The offence is committed in the territory of that State;
(b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;
(c) The offence is committed by a national of that State.

Law 8/2010 applies to crimes committed within Indonesian territory as well as to crimes committed outside state borders.[184] The Indonesian Criminal Code also provides that the Code may apply extraterritorially, for example, to any person guilty of a punishable act outside Indonesia on board an Indonesian vessel or aircraft[185] and to any person who outside

[182] KUHP, Art. 53(2).
[183] *Ibid.*, Art. 53(3).
[184] Law 8/2010, Art. 2(1).
[185] KUHP, Art. 3

Indonesia is guilty of crimes concerning currency, piracy,[186] unlawful exercise of control of aircraft,[187] and crimes against the safety of civil aviation[188].

5. Extradition

Indonesian Law on extradition is governed by Law No. 1 of 1979 concerning extradition. Under this law, extradition is granted by treaty[189] or based on reasons of comity and national interest.[190] For discussion regarding Indonesian law on extradition, please see section (II.B.3.5) above.

6. Mutual Legal Assistance

Mutual Legal assistance is governed by Law No. 1 of 2006 on Mutual Legal Assistance in Criminal Matters. Under this law, mutual legal assistance may be provided based on a treaty, [191] or on the basis of good relationship under the reciprocity principle.[192] For discussion on Indonesian law on Mutual Legal Assistance, please see section (II.B.3.6) above.

[186] *Ibid.*, Art. 438, 444 - 446
[187] *Ibid.*, 479 (j)
[188] *Ibid.*, 479(l), (m), (n) and (o)
[189] Law 1/1979, Art. 2(1)
[190] *Ibid.*
[191] Law 1/2006, Art. 5(1)
[192] *Ibid.*, Art. 5(2)