ACTIVISM AND PRAGMATISM: CHALLENGES FACING THE HUMAN RIGHTS COMMITTEE IN ENSURING INDONESIA'S FULFILLMENT OF ITS ICCPR OBLIGATIONS

Muhammad Raihan Sjahputra
Faculty of Law, Universitas Gadjah Mada
sjahputramuhammadraihan@mail.ugm.ac.id

Abstract

As a state party to the ICCPR, Indonesia is subject to the compliance monitoring procedures enacted by the Covenant, which include, inter alia, the submission of State reports to the Human Rights Committee (HRC) as its treaty body and the obligation to comply with the recommendations made by the Committee as the output of the review process of said State report. Such procedures are enacted in the hopes of ensuring the States parties' compliance with the treaty obligations. However, based on the judgement of the HRC themselves, as reflected in their Concluding Observation on Indonesia's Initial State Report, it can be inferred that there are certain issues which demonstrate Indonesia's failure to fulfill their ICCPR obligations, which to this day still persists. This article intends to delve on discussions regarding the factors that may be the cause of said failures, and finds that there are at least two such factors, which are the unwarranted expansion of treaty obligations towards its States parties by the HRC themselves, and an inhibition of a more pragmatic nature in the form of political reluctance by Indonesia as the State party in question themselves to follow the HRC's recommendations due to the lack of internal will and external pressure.

Keywords*: Challenges, Human Rights Committee, Indonesia, ICCPR.*

Intisari

Sebagai salah satu negara anggota ICCPR, Indonesia memiliki kewajiban untuk mematuhi prosedur-prosedur pengawasan kepatuhan yang diatur dalam ICCPR itu sendiri, yang meliputi, di antaranya, pengumpulan *State report* mereka kepada Human Rights Committee (HRC) sebagai *treaty body* dari ICCPR, dan untuk mematuhi rekomendasi yang dibuat oleh HRC kepada negara yang bersangkutan sebagai produk akhir dari proses eksaminasi *State report* yang bersangkutan. Kewajiban yang demikian diatur dengan harapan agar kepatuhan negara-negara anggota terhadap kewajiban-kewajiban perjanjian bisa dipastikan. Namun demikian, berdasarkan penilaian dari HRC sendiri, sebagaimana terefleksikan dalam *concluding observation* mereka terhadap *State report* pertama Indonesia, terdapat beberapa isu yang menunjukkan kegagalan Indonesia dalam memenuhi kewajiban ICCPR mereka yang, hingga saat penulisan artikel ini, masih bertahan. Artikel ini bertujuan untuk membahas mengenai faktor-faktor yang mungkin merupakan penyebab dari kegagalan-kegagalan tersebut, dan menemukan bahwa terdapat setidaknya dua faktor, yakni perluasan kewajiban perjanjian yang tidak sah oleh HRC itu sendiri, dan halangan yang lebih bersifat pragmatis dalam bentuk keengganan politis dari Indonesia untuk mengikuti rekomendasi oleh HRC karena kurangnya keinginan internal serta tekanan eksternal.

Kata Kunci: *Tantangan, Human Rights Committee, Indonesia, ICCPR*

A. Introduction

In an effort to establish a mechanism Statein ensuring the compliance of States parties to international human rights treaties, every treaties mandate to supervise and monitor the conduct of States in relation to the implementation of the human rights treaties obligations to specific treaty bodies.[1] These treaty bodies are composed of individual experts, which distinguishes them from the General Assembly and other political bodies in the framework of the United Nations (UN).[2] Among these treaty bodies is the Human Rights Committee (HRC), which is the treaty body of the International Covenant on Civil and Political Rights (ICCPR). The human rights treaty bodies monitor the implementation process of States including the process of State reporting. The "State Report" is a document containing measures taken by States to implement human rights in their national legal system.[3] The Reports would then undergo a process of review by the treaty bodies, which involves a so-called constructive dialogue with a representative or a group of representatives of the State being reviewed and ends with the adoption of non-binding resolutions, which are called concluding observations (COs).[4]

As a State party to all of the core human rights conventions and a member State of the UN, Indonesia is obligated to comply with the compliance monitoring procedure. However, has the procedure in fact resulted in a better compliance by Indonesia to the human rights standards? The discussion in this work would be focused on Indonesia's ICCPR obligations, to which Indonesia has been a State party since 23 February 2006[5] making Indonesia oblige to submit a State Report to the HRC as stipulated in article 40 of the Covenant. This choice is made due to the fact that a concluding observation by the HRC

---

1 Helen Keller and Geir Ulfstein, ed., *UN Human Rights Treaty Bodies: Law and Legitimacy,* (Cambridge: Cambridge University Press), 1.
2 Keller, *Law and Legitimacy*, 97.
3 *Ibid*., 16.
4 Jasper Krommendijk, "The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies. The Case of Human Rights Treaty Bodies", *The Review of International Organizations* 10, No.4, (December 2015): 490.
5 As of 23 February 2006, Indonesia has ratified, and subsequently became a state party to, the International Covenant on Civil and Political Rights (ICCPR).

in 2013 as the final output of the review process of Indonesia's initial State report has indicated that in the eyes of the Committee, there are still numerous issues in the field of civil and political rights whose promotion and protection Indonesia still need to improve in order to improve their compliance to the ICCPR itself, which include the practice of the usage of corporal punishment in the autonomous region of Aceh, the failure of the government to address the impasse between the Komnas HAM (Indonesia's National Commission of Human Rights) and the Attorney General of Indonesia on the matter of the threshold of evidence required by the Komnas HAM before the Attorney General could take any course of action regarding the gross human rights violation that allegedly have been committed between 1997 and 1998, the government regulations which allow medical practitioners to practice Female Genital Mutilation (FGM) to female infants, etc. A number of those issues, and many other issues listed in the concluding observation, are phenomenon's that still occur in Indonesia to this day[6], which would seem to indicate that there exists a State of continuing commission of non-compliance by Indonesia to its ICCPR obligations. Thus, a logical question can be formulated as to why these inadequacies might occur, which I would like to touch upon in this article.

Alternatively, however, a question regarding whether such inadequacies might be categorized as a non-compliance at all or not might also be fairly posed, and thus, this article would also delve upon the nature of those non-compliances by connecting them to the context and the reasoning behind the HRC's decision to categorize them as issues that are violations of the ICCPR

6 The Qanun Aceh No.6 of 2014, which is the legal basis upon which the practice of lashing as a form of corporal punishment from criminal actions is utilized in the Special Region of Aceh's criminal justice system, is still in force as of November 2022, which is the time of this article's writing. The Minister of Health Regulation No.1636 of 2010, which is the legal basis of the practice of Female Genital Mutilation, however, has been revoked by the The Minister of Health Regulation No. 6 of 2014, although it is interesting to note that the revoking regulation does not outright ban the practice of female genital circumcision and merely instructed the Majelis Pertimbangan Kesehatan dan Syara'k (The Council for Health Deliberation and Syara'k) to formulate a guideline on how to do female genital circumcision without mutilating the genitalia itself. Regarding the impasse between the Komnas HAM and the Attorney General, see, among others, Nurrahman Aji Utomo, "Dekonstruksi Kewenangan Investigatif dalam Pelanggaran Hak Asasi Manusia yang Berat" (in Bahasa Indonesia), *Jurnal Konstitusi* 16, no.4 (December 2019).

provisions. Of particular interest to this article are the issues mentioned by the HRC regarding the aforementioned practices of lashing as a punishment for a number of penal offences in the Special Region of Aceh[7]; the impasse between the office of the Attorney General and the Komnas HAM which have led to the futility of the Law No.26 of 2000 which establishes the *ad hoc* Court of Human Rights ("Pengadilan Hak Asasi Manusia *ad hoc*") in achieving its goal to deal with gross human rights violations allegedly committed between 1997 and 1998[8]; and the lack of option given by the Indonesian education system for Indonesian students to avoid getting a course on religious education altogether[9]. These issues in particular are selected due to them being issues that in my judgement are still of high degree of relevance among the lives of the Indonesian people, and because these issues, in my view, are perfect representations of different factors which may hamper Indonesia's acceptance of the HRC Recommendations. The surprisingly little amount of research done on this topic, *i.e.* the relationship between Indonesia and the HRC, has compelled myself to write this paper, with the hopes of contributing to the growth of the discourse of human rights in Indonesia.

B. Indonesia, The Human Rights Committee, and Concluding Observation CCPR/C/IDN/CO/R.1

1. The Unwarranted Expansion of Convention Rights and Obligations of Its State Parties by the Treaty Bodies: Case Study of Paragraphs 15 and 26 of the Indonesia IRCO

a. The Controversy Regarding the Position of General Comments and the Treaty Body Recommendations as Forms of Soft Laws: Traces of "Human Rights Activism"

Unlike in developed national legal systems where a clear identification of laws can be made, primarily by making a reference to its constitution, legislation (statutes), and judicial case laws, in the decentralized legal system of international law, which lacks a clear hierarchical structure and also lacks a centralized body with the authority to enact universally binding legislations

7 Indonesia's Initial Report Concluding Observation (hereinafter "IRCO"), para.15
8 Indonesia IRCO, para.8.
9 *Ibid*., para.26.

as in national legal systems, identifying the sources of law is not that easy of an undertaking,[10] but in the midst of all those disputes, the constitutive instrument of the International Court of Justice, the Statute of International Court of Justice ("the Statute of ICJ"), has generally been agreed upon to be the most authoritative list of those sources.[11] However, it is important to note that the list as provided in article 38 (1) of the ICJ Statute is not an exhaustive one, and that there are other possible sources of law which are not listed on said article, as evidenced by the fact that several publication on the topic has often explored the possibility of other instruments as legitimate sources of international law, which are those international legal instruments classified as soft laws. Although attempts to define it has attracted considerable theoretical controversy, it can be said that the definition of soft laws is "a convenient description for a variety of non-binding normatively worded instruments used in contemporary international relations by States and international organizations"[12] In other words, such instruments that are categorized as "soft laws" have no binding force upon States, usually in the form of non-binding resolutions made by international organizations, recommendations, codes of conduct, and standards.[13] As it so happens, general recommendations and conclusions made by treaty bodies fall into this category of source of international law.

The general comments of the treaty bodies and recommendations made by treaty bodies, which are instruments containing the interpretation by the treaty bodies regarding the specific contexts in which to apply the provisions contained in the human rights treaties and are published by the treaty bodies themselves, are merely auxiliary to the treaties, and thus, they are of no binding status to the States which ratified its parent treaties.[14] The same goes for the

10 Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (New York: Routledge, 1987), 35.
11 Malanczuk, *Akehurst's*, 36.
12 Giulia Bosi, "Overcoming the "Soft vs Hard Law" Debate in the Development of New Global Health Instruments", *Opinio Juris*, November 30, 2021, https://opiniojuris.org/2021/11/30/overcoming-the-soft-vs-hard-law-debate-in-the-development-of-new-global-health-instruments/.
13 *Ibid.*
14 Mátyás Bódig, "Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights", in *Tracing the Roles of Soft Law in Human Rights*, ed. Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (Oxford:

treaty bodies' concluding observations, which are mere recommendations to the States parties and not a form of outright condemnation in the same breath as rulings or judgements made by international tribunals. As noted by Walter Kälin, the COs as the end product of the monitoring process of State reports are non-binding in nature, with the COs usually ending up as mere expressions of concern rather than a condemnatory one, and the recommendations contained therein being a rather broad and vague sets of recommendations.[15] But as with the general comments, they are also often considered as authoritative interpretations of human rights treaty provisions.[16]

Its non-binding nature to States, however, cannot be taken to mean that the general comments have played no role whatsoever in the development of the field of international human rights law. On the contrary, it has, in fact, played a role that is significant to some degree in enhancing the quality of the communication and cooperation between the States parties and the treaty bodies, and it has also been useful as a guidance for the States parties in interpreting the substances of the rights as stipulated in the human rights treaties themselves, due to the design flaw of the language of the conventions themselves, so it is to fulfill the legal void that was caused by said design flaws. In this sense, the general comments are said to have a "norm-filling" function. This also due to the fact that many soft laws have been considered by States and other interlocutors of international law to be authoritative interpretations of treaties .[17] However, it is important to note that their status as a soft law has raised some issues in the approach of States to the general comments, and even has been noted by Bódig to cause some tensions of political and doctrinal nature in its implementation.[18] The controversy is sparked by those parties who adopt an unsympathetic stance towards those soft laws, the majority of them being. States which are reluctant in complying to the interpretation of

Oxford University Press, 2016), 69.

15 Keller, *Law and Legitimacy*, 17.

16 Zhang Xuelian, "On the 'Concluding Observations' of the United Nations Human Rights Treaty Bodies", *China Human Rights* 18, no.3 (June 2019). http://www.chinahumanrights.org/html/2019/MAGAZINES_1023/14005.html

17 A.E. Boyle and C. Chinkin, *The Making of International Law*, (Oxford: Oxford University Press, 2007), 213.

18 Bódig, *Social Rights*, 69.

the treaty bodies on the provisions of their respective parent treaties. They typically contend that the general comments have been utilized by the treaty bodies as a form of human rights activism, which sought to, instead of merely interpreting, reformulate or reconstitute the contents of the treaties, in an effort to push current interpretation and develop new rights.[19]

Chief example of such an instance is the controversy surrounding the CESCR's General Comment No.15 regarding the right to water, which confirms the longstanding controversy regarding whether or not the right to have an access to water source is a human right.[20] The discourse on the matter has been a rather slow and contentious one for a substantial amount of time, with many parties, chief of them States, debating it through a long line of international conferences.[21] In this context, the CESCR General Comment No.15 in 2002 is deemed to be controversial due to the fact that after decades of contention, it is the first international law instrument to expressly recognize the rights to water as, indeed, a human right, regardless of the fact that the rights to water is not a right which have explicitly been articulated in any international human rights conventions. Owing also to the potential obligations that it may impose upon States parties to the ICESCR, in particular extraterritorial obligations relating to the transfer of water to water-short countries, it is no wonder that this particular general comment has attracted a considerable amount of controversy.[22]

I would like to use the discussion regarding the controversy of "human rights activism" by the treaty bodies as a launching point to discuss the HRC's own stance in this case to unwarrantedly expand treaty obligations towards Indonesia by analysing the instrument which serves as the basis of the discussions contained in this article, the HRC Indonesia IRCO, which, by way of its comparison with the ICESCR case, would end in the conclusion

19 *Ibid.*, 81.
20 *Ibid.*
21 Takele Soboka Bulto, "The Emergence of Human Right to Water in International Human Rights Law: Invention or Discovery?", *Melbourne Journal of International Law* 12, no.1 (September 2011): 19.
22 Jimena Murillo Chávarro, "The Human Right to Water: A Legal Comparative Perspective at the International, Regional, and Domestic Level ʻʼ (Doctor of Law diss., Universiteit Gent, 2014), 342.

that the HRC in this case is also “guilty” of such “human rights activism”.

b. The Utilisation of Flimsy Doctrinal Basis and the Display of Occidental Bias in Interpreting Human Rights by the HRC

Within the Indonesia IRCO, as already mentioned above, there are several issues which the HRC consider as violations, or to put it euphemistically, non-compliances, by Indonesia of the ICCPR. Through a closer examination of these issues, the reasoning (or the lack thereof) by the HRC as to why they are considered non-compliances, and the method upon which they are listed by the HRC as issues, we can observe several problems that may hamper the acceptance of States, particularly Indonesia in this case, of those recommendations. Firstly, I would like to discuss the issue listed in paragraph 15 of the IRCO, which is the point regarding the usage of lashing as a corporal punishment in Aceh, which is a practice that as of 2014 finds its legal basis in the form of a special piece of legislation entitled Qanun Aceh No.6 of 2014. The issuance of the IRCO was in 2013, however, so clearly this was not the piece of legislation that the Committee refers to. The Qawanun governing the usage of corporal punishments in Aceh at this time would be the Qanun No.of 2003 on *Maysir* (Gambling), the Qanun No.14 of 2003 on *Khalwat* (Togetherness), the Qanun No.12 of 2003 on *Khamar* (Alcohol), and the Nanggroe Aceh Darussalam (NAD) Governor Directive No.10 of 2005, which sets out the technical details of the carrying out of lashing sentences. Based on a document separate from the IRCO, in particular the following passage, “Please provide information on measures taken to prohibit the widespread use of corporal punishment in the State party. What measures are being taken to repeal local legislation such as the Aceh Criminal Code of 2005, which introduced corporal punishment for certain offences, and whose enforcement is entrusted to the “morality police” (Wilayatul Hisbah) who execute these punishments in public, using methods such as flogging?”, it appears that the Committee was referring to the NAD Governor Directive No.10 of 2005 due to the year 2005 being listed, but it is difficult to be sure, because the directive’s nature is merely that of a procedural law, and as such, it does not “introduce corporal punishment for certain offences...” as the Committee

Stated in the paragraph. For the purposes of this article, due to the fact that the contents which the Committee described is more in line with the three substantive laws, we shall consider those piece of legislation in question to be the ones referred to by the Committee. Also for the purposes of this article, I would like to note that the provisions of all three has been codified in the Qanun Aceh No.6 of 2014 (in terms of the types of crimes and the utilisation of lashing as the punishment for their commissions), and has been noted by some commentators to render the punishments attached to said crimes to be slightly more severe.[23]

All of the Qanun enumerated above were and are the byproduct of the special autonomy granted by the Central Government of the Republic of Indonesia to the Government of Aceh to enact Islamic Shari'ah Laws, which include the field of Islamic criminal law (*jinayat*), which entails the punishment of lashing for offences such as adultery (*zina*), the consumption of alcohol (*shurb al-khamr*), and gambling (*maisir*).[24] The practice of lashing as a form of punishment for crimes has often been criticized by many for its alleged cruel and arbitrary nature, which lead to it being claimed to be a violation of human rights.[25]

As such, it is fairly logical for the HRC to make a criticism of the practice. As is the practice espoused by the HRC, in their concluding observations, they mention explicitly which article of the covenant the practice breaches. For the practice of lashing in Aceh in particular, the HRC deems it a breach of Articles 2, 3, 7, and 26. Note, however, that in this particular point, the committee's reasoning is not expounded upon in a manner which is more elaborative. Instead, the Committee chose to interpret the provisions freely

23 For a simple comparison, for the punishment attached to the crime of *Khalwat,* the 2014 Qanun increases the maximum amount of lashing permissible for the judge to sentence the convicted to ten, as opposed to the Qanun No.14 of 2003. For a detailed comparison, see Ali Geno Berutu, "Pengaturan Tindak Pidana dalam Qanun Aceh: Komparasi antara No.12, 13, dan 14 Tahun 2003 dengan Qanun No.6 Tahun 2014," (in bahasa Indonesia) *Mazahib: Jurnal Pemikiran Hukum Islam* XVI, no.2 (Desember 2017).

24 Chairul Fahmi, "Revitalisasi Penerapan Hukum Syariat di Aceh (Kajian terhadap UU No.11 Tahun 2006)" (in Bahasa Indonesia), *Tsaqafah: Jurnal Peradaban Islam* 8, no.2 (October 2012): 297.

25 Russel Goldman, "Two Cases Shed Light on Floggings in Muslim World", *ABC News*, February 19, 2009, https://abcnews.go.com/International/story?id=3927504&page=1..

by not invoking the general intention of the text and the lawmakers, or any other international legal instrument, for that matter. This can be seen in the formulation of the paragraph, which reads as follows: “15. The Committee regrets the use of corporal punishment in the penal system, particularly in Aceh province, where the Acehnese Criminal Law (Qanun Jinayah), *inter alia*, provides for penalties that violate article 7 of the Covenant, such as flogging, for offences against the qanun (by-law) governing attire, the qanun khalwat (prohibiting a man and a woman from being alone in a quiet place) and the qanun khamar (prohibiting the consumption of alcohol). The Committee also regrets that the execution of these sentences by sharia police (Wilayatul Hisbah) disproportionately affects women (arts. 2, 3, 7 and 26). The State party should take practical steps to put an end to corporal punishment in the penal system and in all settings. In this regard, the State party should repeal the Acehnese Criminal Law (Qanun Jinayah), which permits the use of corporal punishment in the penal system. The State party should act vigorously to prevent any use of corporal punishment under this law as a form of punishment for criminal offences until it is repealed.”[26]

In this author’s humble opinion, the committee is free to use such somewhat lacklustre method to determine that the practice is a breach of Articles 2, 3, and 26, since the vague wording of those articles and the relative lack of established judicial precedence to inform the interpretation of them mean that there is ample room for a more fluid interpretation of said provisions. In the case of Article 7, however, the existence of Convention Against Torture (CAT) and its invocation by several other international legal authorities in determining the definition of “torture” would serve to complicates matters.

It can be argued that in interpreting the meaning of “torture or...cruel inhuman, or degrading treatment or punishment”, the Committee is not bound by general rules of interpretation, especially as stipulated in Article 31 (3) (a) of the VCLT, to use the definition of torture as enumerated in Article 1 (1) of the Convention Against Torture (CAT).[27] This is due to the fact that

26 Indonesia IRCO, para.15.

27 “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as

for an international agreement to constitute a "subsequent agreement" as stipulated in article 31 (3)(a), ICJ jurisprudence showed that there must be a fact of agreement between the States parties to the treaties,[28] and in regards to the CAT, there is no such agreement between the ICCPR States parties which would suggest their agreement that CAT shall be an authoritative interpretative instrument of the ICCPR. This is also compounded by the fact that Article 1 (2) of the CAT, which reads "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application," may lend credence to the argument that "soft law" instruments such as the HRC General Comments and HRC case laws, which they use extensively as legal basis in coming to conclusions condemning certain practices in several countries as being in violation of Article 7[29], constitute "international agreements" as stipulated in said article.

However, it is noteworthy that in doing so, the Human Rights Committee is becoming increasingly isolated from their peers in terms of merely using their own general comments and case laws (*i.e.* of individual complaints lodged to them) as the appraisal basis for the act of torture, in particular in regards to Article 7 of the ICCPR. Several researches have shown that multiple international institutions, many of them courts and tribunals, have increasingly referred to the CAT in determining cases which involve allegations of torture and/or cruel, inhuman, and degrading treatment (CIDT). Several examples would be the European Court of Human Rights Cases of *Tomasi vs. France* (1992); *Ribitsch vs. Austria* (1995); *Tekin vs. Turkey* (1998)*;* and

---

obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

28 *Kasikili/Sedudu Island (Botswana/ Namibia)*(1999) ICJ Reports 1045, at 1076. For further explanation, see also Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2015): 245-246.

29 As a matter of fact, it is a rarity that the Committee ever invoke any international legal instruments in its condemnation of certain practices as constituting "torture and cruel, inhuman, and degrading treatment " under Article 7. See, for example, paragraph 17 of the Human Rights Committee Concluding Observations on the Initial Report of Pakistan (CCPR/C/PAK/CO/1). This issue will be discussed further in this sub-section.

Selmouni vs. France (1999). These cases have developed a precedent which would relatively consistently be adhered to by the ECHR in determining cases which involve torture and CIDT cases, that of the distinction between the two legal concepts.[30] Contrast that to the HRC practice, in which they have been noted to lack legal certainty, with no articulations as to the reasons for its preferences, if any, in using or not using specific terminologies.[31] This legal uncertainty is especially concerning, considering that the Committee is of a weaker legal foundation than the EHRC, due to the fact that the EHRC's status is as a judicial organ which issues legally binding decisions, as contrasted to the Committee's quasi-judicial status. The implication of such State of affairs is that they require more persuasive arguments through invocation of accepted and existing views, rather than their own reading of the treaty provisions.[32]

As such, this point represents a challenge for the Committee in ensuring that ICCPR States parties which incorporate corporal punishment in their domestic law as a punishment for certain crimes cease such practice: the lack of perceived legitimacy in the eye of the States. This can be seen by examples such as the COs of Pakistan[33] and Yemen,[34] in which the Committee "regrets" and calls for the stoppage of corporal punishments in their national systems without laying out the methodology that they utilized in reaching the conclusion that the practice enumerated therein constitutes "torture" according

---

30 Nigel S. Rodley, "The Definition(s) of Torture in International Law," *Current Legal Problems* 55, no.1 (December 2002): 477-478.

31 Nigel S. Rodley, "The Definition(s) of Torture in International Law.", 478-479; Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Right: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020), 174.

32 Antoine Buyse, "Echoes of Strasbourg in Geneva: The Influence of ECHR Anti-Torture Jurisprudence on the United Nations Human Rights Committee," *Japanese Yearbook of International Law* 59 (2016): 85.

33 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee:* Pakistan, 23 August 2017, CCPR/C/PAK/CO/1, in which its Paragraph 17 states, " ....and that executions are allegedly carried out in a manner that constitutes torture or cruel, inhuman or degrading punishment. It also notes with concern the large number of Pakistani workers..."

34 UN Human Rights Committee, *Concluding Observations of the Human Rights* Committee: Yemen, 21 July 2005, CCPR/CO/84/YEM, in which its Paragraph 16 states, " The Committee reiterates its deep concern that corporal punishments such as flogging, and in a few cases even amputation of limbs, are still prescribed by law and practised in the State party, in violation of article 7 of the Covenant.
The State party should immediately put an end to such practices and modify its legislation accordingly , in order to ensure its full compatibility with the Covenant."

to Article 7 and what legal basis there is to justify such claims. Both countries still retain corporal punishment in their domestic criminal laws to this day.[35] This series of omission of hard laws invocation by the Committee, in the case of Indonesia at least, may serve a purpose.

The choice of the Committee to not make any reference whatsoever to the Convention Against Torture, in particular Article 1, which lays down the elements of torture, may open unwanted limitations for the wide interpretation of the definition of torture which they have consistently used throughout their existence, and would open the chance for interpretations that are not in line with their expansionist views. An example of this would be an empirical study which appraises the suitability of the practice to the Convention Against Torture. Said research have categorically concluded that the practice constitutes a form of lawful sanction due to it having a legal basis in the form of the Qanun Aceh No.6, which is a piece of legislation officially issued by the Government of the Special Region of Aceh; that the practice does not inflict a severe amount of pain due to limitations imposed upon the executioner in regards to the distance that should exist between them and the convict and the regulation that obligation for a doctor to be present in order to, firstly, examine the convict's health before the lashing is done in order to determine whether he or she is strong enough to withstand the process, and to put a halt to the lashings in case they determine that the convict is under the risk of severe injury; that the practice does not, or is not likely to, inflict psychological pain due to several reports of people at the shari'ah courts preferring to suffer the punishment of lashing rather than imprisonment, while prison itself has been noted to cause psychological stress. As such, due to three of the elements not being fulfilled, the practice of lashing as a form of penal sanction in Aceh does not constitute torture as defined by the CAT.[36] It is interesting to note

35 The Yemeni Law no,12 of 1994 concerning Criminal Procedures, which in its Article 282 provides for the lashing of certain type of crimes, is still in force as of February 2023. Republic of Yemen, *Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penaltie* . In the case of Pakistan, the positioning of Islamic Shari'a laws as the supreme law of Pakistan has rendered it legal, although with strict standards, to impose whipping punishment for *hudud* crimes, For more elaboration on the subject, see Aarij S. Wasti, "The Hudood Laws of Pakistan: A Social and Legal Misfit in Today's Society," *Dalhousie Journal of Legal Studies* 12, (2003).

36 Fajri Matahati Muhammadin, et.al., "Lashing in Qanun Aceh and the Convention Against

that the study argues that the interpretation of "torture" as used by the UN Special Rapporteur on Torture at the time, Manfred Nowak, and the CAT to include the practices of lashing in Muslim countries, such as Saudi Arabia, is rather dubious.[37]

Had the HRC done a more thorough and careful examination on the practice and utilized hard laws to which Indonesia is a party to, such as the CAT, as a basis for their appraisal, there is a high chance that they might come to the same conclusion, and as such, this omission of the CAT as a basis for their appraisal, and in turn, its lack of thorough examination of the practice, along with the many COs they issued which do not attempt to invoke "harder" forms of law than their own general comments and case laws, have shown the Committee's proclivity to expand the treaty's contents and obligations towards the States.

The disregard by the HRC of extant hard laws and precedents by other international legal institutions with higher degree of legitimacy then them here is rather disappointing, since it make it seem that the Committee only takes at face value the action of lashing as a torture, and it can lead to a conclusion that this point of the concluding observation has very little legality to it, due to it not having any invocation to international legal instruments which the State party in question, Indonesia, is legally bound to (*e.g.* the Convention Against Torture). This presents a dilemma, for such interpretation would certainly not aid the case of domestic actors, such as NGOs and other civil societies, in bringing an end to the practice[38]. This is especially important, since, in light of Krommendijk's findings, such domestic actors play a very significant role in effectuating the recommendations which the treaty bodies bring upon a country,[39] and it is not unreasonable to suggest that the path that

Torture: A Critical Appraisal," *Malaysian Journal of Syariah and Law* 7, no.1 (June 2019).

37 *Ibid*., 18-20.

38 Among the most prominent of such parties would be the KontraS (Commission for the Disappeared and Victims of Violence), an Indonesian NGO which had voiced their opposition to the practice on multiple occations. For an example of such occasions, see Dwi Riyanto Agustiar, "KontraS Aceh: Hukuman Cambuk Tidak Manusiawi (Aceh's Lashing Punishment is inhumane)," *Tempo.co*, October 4, 2014, https://nasional.tempo.co/read/611929/kontras-aceh-hukum-cambuk-tidak-manusiawi.

39 Jasper Krommendijk, "The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies. The Case of Human Rights Treaty Bodies," *The Review of*

the Committee took to carefully elide "harder" laws in their condemnation is to defend their narrative. Still, the fact remains that the Committee is unable to present a strong argument that their interpretation is based upon legal precepts which are binding and authoritative towards Indonesia, and this may warrant a criticism in turn that the Committee is guilty of "human rights activism", as was the criticism that was directed to the CESCR for its General Comment No.15. To further nail that point down, we will next discuss the occidental bias of human rights interpretation displayed by the HRC in the Indonesia IRCO.

As previously mentioned, in paragraph 26, the committee deems to be breaches of the ICCPR the lack of option for Indonesia students to forego religious education at all from their curricula in school. First of all, the recommendation by the HRC for Indonesia to ensure the right of Indonesia schoolchildren to not attend any religious studies courses, as a means to ensure that the right to not hold any religious belief at all, presents a conundrum, that of a paradigmatic difference in viewing and interpreting human rights.

Unlike the human rights understanding which incorporate a secular understanding of human rights, which would seem to be the one adopted by the HRC according to the aforementioned paragraph of the IRCO, Indonesia as a State adopts the view which puts the belief in god at the paramount level of importance in its society, as reflected by its foundational philosophical theory, the Pancasila, which puts "*Ketuhanan yang Maha Esa"* or the belief in god as the first among four other tenets of Indonesian philosophy of life.[40] Therefore, it is the way of life for the Indonesian people to adopt a certain religious belief, or indeed any belief at all, as it plays a central role in the political philosophy of Indonesia that the life of its citizens be built upon a faith in an almighty god.[41]

International Organizations 10, No.4, (December 2015):495-496.

40 Fajri Matahati Muhammadin, "Universalitas Hak Asasi Manusia dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial" (in Bahasa Indonesia), in *Hak Asasi Manusia: Dialektika Universalisme vs Relativisme di Indonesia*, eds. Al-Khanif; Herlambang P. Wiratraman'; and Manunggal Kusuma Wardaya (Yogyakarta: Penerbit LKiS, 2017), 13.

41 Hwian Christianto, "Arti Penting UU No.1/PNPS/1965 Bagi Kebebasan Beragama: Kajian Putusan Mahkamah Konstitusi Nomor 140/PUU-VII/2009" (in Bahasa Indonesia), *Jurnal Yudisial* 6, no.1 (April 2013) :13.

Commenting upon the relation between God and the Indonesian people, Yudi Latif, in his treatise on Pancasila, stated that in the creation process of the nation of Indonesia from the synthetization of multiple nations amidst the spirit of nationalism, it is unthinkable in the collective minds of the founding father the possibility of a public space that is "godless" ("*ruang publik hampa Tuhan"*), as is the case of the European style of nationalism.[42] Thus, it is at the very core of Indonesian identity, as a distinguisher between it and the nations from whose hold it has fought to free itself, to incorporate the belief in god in its understanding of the right to have the freedom of religion. In the Indonesian view, such right is understood to mean that the Indonesian people have a right to choose and practice whichever religion that they believe in, not, however, that they are free to not have a belief in any religion, since the belief in God is the source of human rights itself.[43] This understanding is reflected in the Law No.39/1999 on Human Rights (Undang-Undang No.39 Tahun 1999 tentang Hak Asasi Manusia), which defines human rights as "a set of rights that are inherent in mankind's essence and existence as creatures of God and is His (God's) blessing that is incumbent to be respected and upheld by the State, the law, the government, and everyone else in order to honor and protect the dignity of mankind"[44].

The paragraph 26 of the CO, as opposed to the previously discussed paragraph 15, explicitly made its basis of appraisal explicitly clear, the HRC General Comment no.22. The general comment passage which informs the Committee's view that the right to hold atheistic views is guaranteed under Article 18 of the ICCPR, however, is not the sixth paragraph invoked by the committee, but the fifth paragraph,[45] and so, said paragraph shall be at the forefront of this subsection's discussion. The fifth paragraph represents an

42 Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila* (in Bahasa Indonesia) (Jakarta: Penerbit PT Gramedia Pustaka Utama, 2011), 70.

43 Christianto, "Arti Penting": 13.

44 Article 1(1) of Law No.39/1999 on Human Rights.

45 "The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief...." UNHRC, *General Comment No.22: Article 18 (Freedom of Thought, Conscience, and Religion)*, 48th Sess., U.N. Doc. HRI/GEN/1/Rev.1., adopted 30 July 1993, available at: https://www.refworld.org/docid/453883fb22.html [accessed 23 February 2023].

effort by the HRC to inject itself into the debate regarding whether or not the Freedom of thought conscience, and religion as guaranteed in Article 18 of the ICCPR entails the right of an individual to be an atheist. This can be inferred from the drafting history of the article. The debate on the article is mainly predicated upon whether the right to apostasy and to embrace atheism is guaranteed by the article, where European and North American countries stood resolutely in the positive camp, while Islamic States stood at the opposite camp.[46] The debate resulted in the compromise, proposed by the delegates of Brazil and the Philippines, to omit the phrase ""freedom to maintain or to change his religion or belief' by the words "freedom to have a religion or belief of his choice".[47] The final wording of the article omitted the explicit reference to the right to change one's belief and to have non-religious views, but several authors such as Manfred Nowak is of the opinion that the word *conviction* contained in the French version of the article, which reads "*'la liberte d'avoir ou d'adopter une religion ou une conviction de son choix*,"unambiguously includes non-religious views and beliefs.

However, as Katarzyna Wazynska-Finck and Francois Finck noted, the fact that this article's drafting history is wrought with the debate between the two sides, and the fact that the Islamic States' reservations which primarily made references to the Islamic shari'a law[48] or their constitution, which is are built upon the Shari'a[49] are modified by those States due to overwhelming pressure from the European States, such as the objections of Denmark, Estonia, Germany, Italy and Sweden to the reservation of Pakistan, of Hungary to the reservation of the Maldives, and of Sweden to the reservation of Mauritania, [50] suggests that there is not a State of uniformity in the drafter's intentions, and that the issue is decided mainly due to the European Union's clear stance on this matter.[51] The objections, expressly put forward with the reasoning that

46 Katarzyna Ważyńska-Finck and Francois Finck, "The Right to Change One's Religion According to Article 18 of the ICCPR and the Universality of Human Rights," *Journal of Islamic State Practice in International Law* 9, no.1 (2013): 37.
47 Article 18 (1) of the ICCPR.
48 Example of such states are Pakistan and Maldives.
49 Example of such states are Bahrain and Mauritania.
50 Katarzyna Wazynska-Finck and Francois Finck, "The Right to Change One's Religion", 50.
51 *Ibid*., 51-52.

the such reservations are against the object and purpose of the article, reveals an attempt to achieve the so-called universality of human rights.[52]

The "universalist" position is best exemplified by Manfred Nowak's following assertion, "the system of international human rights law is based on neutrality and norms cannot have religious foundation (even if they are inspired by a particular religion or belief)."[53] Such is the view of human rights which puts itself above religions; which views itself as a system of norm which regulates other "lower" moral value systems such as religions. Such a view stems from the naturalist position of universality of the human rights; that human rights are, inherently, due to its very nature as a secular morality that endows rights which are inherent to every human ever since their birth, endowed with an authority that transcends the temporal, which makes them have primacy over religions.[54] This is a view which has been pointed out as being ironic due to the fact that, as can be seen from the language used in the Universal Declaration of Human Rights (UDHR), the first international document which outlines the recognition for human rights, human rights themselves are based upon a "faith" of the inherent rights of man, and not from a scientifically proven fact that such rights are, indeed, recognized universally as rights, thus proving that human rights are in a position of epistemological stalemate with religions as another form of value system.[55] Ergo, it is of little merit to argue that the secular interpretation of human rights is of a higher value than the religious one, and thus should be given primacy over the latter.

The universalist school of thought has also drawn criticism from the relativist school of thought, which views a society's culture as the accumulation of its wisdom and thus becomes its identity, and that universalism is but an extension of European practices and the effort to depict them as a universal truth.[56] In this respect, Michael Freeman also makes an interesting assertion,

52 *Ibid*., 53.

53 Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary* (Arlington: N.P Engel, 1993), 411-412.

54 Henri Féron, "Human Rights and Faith: a 'world-wide secular religion'?", *Ethics and Global Politics* 7, no.4 (December 2014) :3.

55 *Ibid*.

56 Makau W.Mutua, "Savages, Victims, and Saviors, the Metaphor of Human Rights," *Harvard International Law Journal* 42, no.1 (Winter 2001): 220.

which is that those conceptions of human rights formulated in non-western cultures are not human rights at all, but rather a differing conception of human dignity. [57] The universalistic school of human rights, then, can be viewed as part of the project in international law to "proselytise" the non-western cultures, who are deemed to be "uncivilized" in the European osyche, into the "civilized" culture of the Europeans.[58] This assertion would be substantiated in this case in the light of the fact that the right to forego religious education is not referred to in the text of the Covenant, neither was it a subject of discussion by the drafters, and that the HRC General Comment was the first United Nations document to feature it as the States parties' obligation, with the intention of supporting the European States' position on the matter.[59]

The paragraph 26 of the Indonesian IRCO, then, can be argued to be an instance of an occidental bias in human rights interpretations, which speaks to the lack of regard that the Committee give to the understanding that the human rights implementation is a socio-legal enterprise which must give way to the cultural predispositions of the people which it purports or aspires to regulate, since law, in most cases, is but the codification of existing norms rather than the swayer of the behavior of the people that it governs.[60] Therefore, for the Committee to deem the Indonesian practice of providing compulsory religious studies for Indonesian schoolchildren a violation of its obligations is an instance of an occidental bias of human interpretation; a bias which is so heavily swayed in the direction of human rights ideas as they are formulated in western countries and too predilected at the notion of human rights as a universal value, paying no regard to the reality that there is ample room for particularistic considerations in its implementation all across different corners of the world, owing to the shifting conditions in the cultures

57 Michael Freeman, "The Problem of Secularism in Human Rights Theory," *Human Rights Quarterly* 26, (2004): 382.

58 Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005): 4; Syed Muhammad Naquib Al-Attas, *Islam and Secularism* (Kuala Lumpur: Art Printing Works Sdn. Bhd., 1993): 25.

59 Katarzyna Wazynska-Finck and Francois Finck, "The Right to Change One's Religion", 44.

60 Håkan Hyden, "Implementation as A Socio-Legal Enterprise," in *Human Rights Law: From Dissemination to Application: Essays in Honour of Göran Melander*", edited by Jonas Grimheden and Rolf Ring (Leiden: Koninklijke Brill NV, 2006), 385.

and traditions of specific countries. As Håkan Hyden noted, when it comes to norms contained in an international convention, norms of a country function as a mirror to its peoples' own beliefs. If one does not recognize themselves in the mirror, then the contents of the convention does not correspond to the norms of that person's society.[61]

Should the committee consider such practices as the ones listed in paragraph 15 and 26 as breaches of the Covenant, then this author is of the opinion that the fault lies with the Committee themselves, who have unwarrantedly, that is to say, both legally and sociologically, characterize them as such. Ergo, it can be concluded that amongst the challenges that hamper the effectiveness of the Committee, through its review of State reports, in ensuring Indonesia's compliance, disregard for more established laws and precedents and the occidental bias that they have in interpreting the human rights conventions can be counted as two of them.

2. Pragmatic Inhibition: The Political Reluctance of States to Fulfill Their Treaty Obligations and the Lack of External Pressure from the International Community

However, it is not the intention of this work to merely lambast the Committee as the sole factor which hampers their own effectiveness with respect to Indonesia. It would also like to point out that the country in question, Indonesia, itself has also presented certain challenges to the treaty-based procedure. In order to demonstrate this point, paragraph 8 of the Indonesia IRCO would be the focus of this subchapter's discussion. The paragraph in question reads as follows:

"The Committee regrets the failure by the State party to implement article 43 of Law 26 of 2000 in order to establish a court to investigate cases of enforced disappearance committed between 1997 and 1998 as also recommended by Komnas HAM and the Indonesian Parliament. The Committee particularly regrets the impasse between the Attorney General and Komnas HAM with regard to the threshold of evidence that should be satisfied by Komnas HAM before the Attorney General can take action. The Committee further regrets

61 *Ibid.*

the prevailing climate of impunity and lack of redress for victims of past human rights violations, particularly those involving the military (art. 2).

The State party should, as a matter of urgency, address the impasse between Komnas HAM and the Attorney General. It should expedite the establishment of a court to investigate cases of enforced disappearance committed between 1997 and 1998 as recommended by Komnas HAM and the Indonesian Parliament. Furthermore, the State party should effectively prosecute cases involving past human rights violations, such as the murder of prominent human rights defender Munir Said Thalib on 7 September 2004, and provide adequate redress to victims or members of their families."

Said paragraph is chosen due to the fact that the issue in question in it being an issue that, in contrast to the issues discussed in the previous subchapter, does not involve the discourse of the epistemological nature of human rights. The criticism which the committee made in this regard, in its essence, is about the climate of impunity that the Government of Indonesia has effectively caused, and such appraisal is based upon Indonesia's own national laws, and thus, recalling the discussion regarding a country's national laws as a reflection of its own values, should not merit a controversy regarding whether or not the Committee has unwarrantedly injected its own views of human rights. The legislation at issue in the paragraph, the Law No.26 of 2000 on the Human Rights Court ("Undang-Undang No.26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia), is a law that was enacted in the year of 2000 in an effort to bring to justice those who are responsible for the commission of gross human rights violations in Indonesia[62], and its Article 43 provides for the establishment of *ad hoc* human rights court in order to try those who are responsible for gross violation of human rights that have occurred in Indonesia before the coming into force of the Law, which include those that transpired in the former Indonesian region of East Timor in the years leading to and during their independence process from the Republic of Indonesia, as noted by the

62 Ken Setiawan, "The Human Rights Court Embedding Impunity," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, ed.Melissa Crouch (Cambridge: Cambridge University Press,2019): 287.

Committee.[63]

The main factor behind the decision to establish the *ad hoc* human rights court, aside from the prevailing *zeitgeist* of the *Reformasi* era (1998 onwards) in Indonesia to rid themselves of the climate of impunity that is present during the Soeharto era, is the pressure from the international community to bring to justice those who are responsible for such violations, with the UN Human Rights Commission passing a resolution in a special session that was held in 27 September 1999 to form an international investigation commission to look into the allegations of the commission of gross human rights violation in Timor Leste. There were also several resolutions passed by the UN Security Council (UNSC) in regards to the resolution of the situation in East Timor.[64] There were even talks of establishing an international *ad hoc* court in the same breath as the International Criminal Tribunals for the Former Yugoslavia and Rwanda, though it finally resulted in nothing, due to several factors which would be elaborated upon below.[65] The serious threat of sovereignty encroachment by the international community, along with the moratorium on foreign aids sent by its allies, such as the Netherlands in 1991 as a response to the Santa Cruz incident, led Indonesia to come up with the decision to establish the *ad hoc* Human Rights Court, as a way to ensure the international community, especially the West, that Indonesia would not let those responsible for the gross human rights violations go unpunished.[66]

As the Committee rightly noted, however, the Law no.26 of 2000, and by extension the existence of the *ad hoc* Court itself, ever since its inception up through the year of the IRCO, 2013, and even up to the year of this article's writing, 2022, has been widely criticized by multiple parties due to several problems concerning its bureaucratic and highly politicized establishment procedure. Article 43 of the Law, which provides the conditions for the establishment of the *ad hoc* human rights court, does not provide a clear procedure for the establishment of an *ad hoc* Human Rights Court, but practice

63 *Ibid.*, 230.
64 R.B. Sularto, *Pengadilan HAM (Ad Hoc)*: *Telaah Kelembagaan dan Kebijakan Hukum* (in Bahasa Indonesia), (Surabaya:Sinar Grafika, 2018): 50.
65 *Ibid*.
66 Sularto, *Pengadilan HAM*, 51.

shows that the process is initiated by a fact finding team which is composed of the Komnas HAM, who are tasked to investigate whether or not allegations of gross human rights violation have indeed occurred or not. The fact finding team then reports its findings to the Attorney General's office, and if the report shows that the allegations are find that the report are substantiated with "sufficient amount of evidence"[67], and the Attorney General's office's own investigation indicated as such, then he or she would forward the report to the President, who would then send a letter to the House of Representatives, which contains a proposal to establish an *ad hoc* Human Rights Court, dealing with that specific allegation. The House holds the final say in the matter of whether or not the *ad hoc* Court shall be established.[68]

There are two palpable problems that are inherent to such a scheme, the first being the authority of the Attorney General to single handedly nullify the findings of the Komnas HAM on the grounds that the evidence that they have submitted are deemed to not be sufficient, and the second being the role of the House of Representatives. As the reader could probably infer, those two problems clearly show that the legislation was made with political considerations in mind.[69] The endowment of the authority that is traditionally reserved for the judicial authorities to the legislative branch of the government, represented in this case by the House, is a clear breach of the separation of powers doctrine, and speaking on practical terms, realistically, the House has a proclivity to rely more on political considerations rather than legal argumentations,[70] which opens up the possibility that matters of justice shall be decided on the wills and the whims of the members of the members of the House, not, as ideally should be, by the facts and the law. Aside from that, the lack of clarity in Article 20 (3) regarding the threshold of "sufficient evidence" has *de facto* given an unchecked power to the Attorney General to arbitrarily reject the reports submitted by the Komnas HAM as they wish

67 Article 20 (3) of the Law No.26 of 2000.
68 Zainal Abidin, "Pengadilan Hak Asasi Manusia di Indonesia: Regulasi, Penerapan, dan Perkembangannya" (in Bahasa Indonesia) (Paper that was presented at Human Rights Advocacy Course held by ELSAM in Jakarta on 27 October 2010), 8-9.
69 *Ibid*., 10.
70 *Ibid*.

to interpret the phrase. A study on the matter has shown that the Attorney General has invoked miniscule reasons such as a mistake in the numbering of the reports made by the Komnas HAM as grounds to reject their report.[71] These inherent problems with the system has resulted in the futility of the *ad hoc* Human Rights Court to try the past gross human rights violations which is its very *raison d'etre*, with its trials noted as being riddled with problems of duress encumbered upon the key witnesses by the parties that are being tried, namely the police forces and members of the military, and of the lack of attentiveness and enthusiasm by its judges in exploring the witness statements and other evidences provided in the trial[72]

However, the *status quo* is not likely to change anytime soon. As mentioned above, there were talks amongst the international community to establish an international court to try the human rights violations in East Timor during the early stages of the *reformasi* era, but those talks eventually ended up going nowhere. This happened because of a few factors, firstly, the incidents in East Timor do not present a palpable threat that would lead to a breach of international peace and security unlike those which transpired in the former Yugoslavia and Rwanda, at least in the eyes of the UNSC, and at the time of the talks, in the early 2000s, the UNSC was filled with allies of Indonesia, and so, when the held talks regarding the matter, they deferred to Indonesia's wishes to not create an international court in the country.[73] Secondly, the cost that would be required to establish and run an international court is very exorbitant, and thirdly, the prevailing view amongst the international community that the crimes in question are better to be prosecuted by local courts due to its rulings being potentially more respected than rulings of International courts.[74]

Said factors, the lack of political will, the exorbitant cost of international courts, and the perceived benefits of local prosecution, has led Indonesia

71 Nurrahman Aji Utomo, "Dekonstruksi Kewenangan Investigatif dalam Pelanggaran Hak Asasi Manusia yang Berat" (in Bahasa Indonesia), *Jurnal Konstitusi* 16, no.4 (December 2019), 817.

72 Syamsuddin Rajab, *Politik Hukum Pengadilan HAM di Indonesia* (East Jakarta: Nagamedia, 2018), 10

73 William Burke-White, "A Community of Courts: Toward A System of International Criminal Law Enforcement," *Michigan International Law Journal* 24, no.1 (2002): 44.

74 *Ibid*., 45-46.

to become rather complacent in respect of the campaign of past human rights violation prosecution which they have promised to the international community, and with the lack of more international pressure, the *status quo* is unlikely to change for the better. Such is the final roadblock for the Human Rights Committee that this paper finds, the lack of political will from the State in question to follow through with their commitments to the Convention.

C. Conclusion

Through an examination of the Indonesia Initial Report Concluding Observation and recent developments on the issues brought up in said document, we may conclude that the relationship between Indonesia and the Human Rights Committee has experienced several roadblocks which hamper the realization of a fruitful cooperation between the two. Such roadblocks may be divided into two categories, one being the roadblocks that emanate from the Committee themselves, namely the unwarranted expansion of the treaty obligations towards the State parties stemming from an occidental view by the Committee of human rights stipulated in the provisions of the Convention and the disregard of the Committee towards hard laws and more established precedents, and the other which emanate from the States party's reluctance themselves, which has to do with both the lack of political will internally and the lack of external political pressure. With the Committee-based challenges, we observe that, on matters in which there are epistemological differences between the State and the Committee in understanding the concept of human rights as represented by the issues stipulated in paragraphs 15 and 26, their eagerness to "jump the gun", dubbed "human rights activism", albeit in a rather derogatory manner, has resulted in points of recommendation that has very little legal validity and sociological considerations to it, which naturally would result in the reluctance of Indonesia to follow such recommendations. On the other hand, with the State party-based challenges, we observe that the lack of will from the State itself and the lack of international pressure combined has resulted in complacency by the State in following through with several recommendation points made by the Committee. Such complacency

has nothing to do with epistemological difference in understanding human rights, but merely due to political convenience, which encourages sheer pragmatism on the behalf of the State party, as represented in the IRCO by the issue stipulated in paragraph 8. Hence, it is only fitting that the title of this article is one that succinctly identifies those two main challenges: activism, on the part of the Committee, and pragmatism, on the part of the State party, Indonesia.

BIBLIOGRAPHY

Abidin, Zainal. "Pengadilan Hak Asasi Manusia di Indonesia: Regulasi, Penerapan, dan Perkembangannya." Paper, ELSAM, Jakarta, 2010.

Agustiar, Dwi Riyanto. "KontraS Aceh: Hukuman Cambuk Tidak Manusiawi" *Tempo.co*, October 4, 2014. https://nasional.tempo.co/read/611929/kontras-aceh-hukum-cambuk-tidak-manusiawi.

Al-Attas, Syed Muhammad Naquib. *Islam and Secularism*. Kuala Lumpur: Art Printing Works Sdn. Bhd., 1993.

Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law*. Cambridge: Cambridge University Press.2005.

Berutu, Ali Geno. "Pengaturan Tindak Pidana dalam Qanun Aceh: Komparasi antara No.12, 13, dan 14 Tahun 2003 dengan Qanun No.6 Tahun 2014." *Mazahib: Jurnal Pemikiran Hukum Islam* XVI, no.2: 87-109.

Bódig, Mátyás. "Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights." in *Tracing the Roles of Soft Law in Human Rights*, edited by Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone, 69-88. Oxford: Oxford University Press, 2016.

Bosi, Giula. "Overcoming the "Soft vs Hard Law" Debate in the Development of New Global Health Instruments." *Opinio Juris*, November 30, 2021,Overcoming the "Soft vs Hard Law" Debate in the Development of New Global Health Instruments.

Boyle, A.E. and C. Chinkin. *The Making of International Law*. Oxford: Oxford University Press, 2007.

Bulto, Takele Soboka. "The Emergence of Human Right to Water in International Human Rights Law: Invention or Discovery?."*Melbourne Journal of International Law* 12, no.1 (September 2011): 291-314 .

Burke-White, William. "A Community of Courts: Toward A System of International Criminal Law Enforcement." *Michigan International Law Journal* 24, no.1 (2002): 1-97.

Buyse, Antoine. “Echoes of Strasbourg in Geneva: The Influence of ECHR Anti-Torture Jurisprudence on the United Nations Human Rights Committee.” *Japanese Yearbook of International Law* 59 (2016): 81-98.

Chávarro, Jimena Murillo. “The Human Right to Water: A Legal Comparative Perspective at the International, Regional, and Domestic Level. ‘’ Doctor of Law diss., Universiteit Gent, 2014.

Christianto, Hwian. “Arti Penting UU No.1/PNPS/1965 Bagi Kebebasan Beragama: Kajian Putusan Mahkamah Konstitusi Nomor 140/PUU-VII/2009” , *Jurnal Yudisial* 6, no.1 (April 2013) :1-16.

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984.

Fahmi, Chairul. “Revitalisasi Penerapan Hukum Syariat di Aceh (Kajian terhadap UU No.11 Tahun 2006).” *Tsaqafah: Jurnal Peradaban Islam* 8, no.2 (October 2012): 295-310. http://dx.doi.org/10.21111/tsaqafah.v8i2.27.

Féron, Henri. “Human Rights and Faith: a ‘world-wide secular religion?.” *Ethics and Global Politics* 7, no.4 (December 2014) :181-200. https://doi.org/10.3402/egp.v7.26262.

Freeman, Michael. “The Problem of Secularism in Human Rights Theory,” *Human Rights Quarterly* 26, (2004): 375-400.

Gardiner, Richard. *Treaty Interpretation*. Oxford: Oxford University Press, 2015.

Goldman, Russel. “Two Cases Shed Light on Floggings in Muslim World.” *ABC News*, February 19, 2009. https://abcnews.go.com/International/story?id=3927504&page=1..

Human Rights Committee, *Concluding observations on the initial report of Indonesia: Human Rights Committee*, 2013, CCPR/C/IDN/CO/1, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/IDN/CO/1&Lang=En, [accessed 6 November 2022].

Hyden, Håkan. “Implementation as A Socio-Legal Enterprise.” in *Human Rights Law: From Dissemination to Application: Essays in Honour of Göran Melander*, edited by Jonas Grimheden and Rolf Ring, 375-392. Leiden: Koninklijke Brill NV, 2006.

International Covenant on Civil and Political Rights, 1966.

Kasikili/Sedudu Island (Botswana/ Namibia), Judgement, ICJ Reports 1999, p.1045

Keller, Helen and Geir Ulfstein, ed. *UN Human Rights Treaty Bodies: Law and Legitimacy*. Cambridge: Cambridge University Press, 2012.

Krommendijk,Jasper.“The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies. The Case of Human Rights Treaty Bodies.” *The Review of International Organizations* 10, No.4, (December

2015): 489-512. https://doi.org/10.1007/s11558-015-9213-0.

Latif, Yudi. *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila*. Jakarta: Penerbit PT Gramedia Pustaka Utama, 2011.

Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*. New York: Routledge, 1987.

Muhammadin, Fajri Matahati, et.al., "Lashing in Qanun Aceh and the Convention Against Torture: A Critical Appraisal." *Malaysian Journal of Syariah and Law* 7, no.1 (June 2019): 11-24.

Muhammadin, Fajri Matahati. "Universalitas Hak Asasi Manusia dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial." in *Hak Asasi Manusia: Dialektika Universalisme vs Relativisme di Indonesia*, edited by Al-Khanif; Herlambang P. Wiratraman; and Manunggal Kusuma Wardaya, 1-20. Yogyakarta: Penerbit LKiS, 2017.

Mutua, Makau Wa. "Savages, Victims, and Saviors, the Metaphor of Human Rights," *Harvard International Law Journal* 42, no.1 (Winter 2001): 201-245.

Nowak, Manfred. *UN Convention on Civil and Political Rights: CCPR Commentary*. Arlington: N.P. Engel, 1993.

Republic of Yemen Republican Decree for Law No.12 for the Year 1994 Concerning Crimes and Penalties.

Rodley, Nigel S..”The Definition(s) of Torture in International Law." *Current Legal Problems* 55 no.1 (December 2002): 467-493.

Setiawan, Ken. "The Human Rights Court: Embedding Impunity." In *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, edited by Melissa Crouch, 287-310. Cambridge: Cambridge University Press, 2019.

Sularto, R.B.. *Pengadilan HAM (Ad Hoc)*: *Telaah Kelembagaan dan Kebijakan Hukum*. Surabaya: Sinar Grafika, 2018.

Taylor, Paul M. *A Commentary on the International Covenant on Civil and Political Right: The UN Human Rights Committee's Monitoring of ICCPR Rights*. Cambridge: Cambridge University Press, 2020.

UN Human Rights Committee, *Concluding Observations of the Human Rights Committee:* Pakistan, 23 August 2017, CCPR/C/PAK/CO/1

UN Human Rights Committee, *Concluding Observations of the Human Rights* Committee: Yemen, 21 July 2005, CCPR/CO/84/YEM

UN Human Rights Committee, *General Comment No.22: Article 18 (Freedom of Thought, Conscience, and Religion)*, 48th Sess., U.N. Doc. HRI/GEN/1/Rev.1., adopted 30 July 1993.

Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia

Undang-Undang Nomor 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia

Wasti, Aarij S.. "The Hudood Laws of Pakistan: A Social and Legal Misfit in

Today's Society." *Dalhousie Journal of Legal Studies* 12 (2003): 63-95.

Ważyńska-Finck, Katarzyna and Francois Finck. "The Right to Change One's Religion According to Article 18 of the ICCPR and the Universality of Human Rights." *Journal of Islamic State Practice in International Law* 9, no.1 (2013):36-59..

Xuelian, Zhang. "On the 'Concluding Observations' of the United Nations Human Rights Treaty Bodies." *China Human Rights* 18, no.3 (June 2019)