

DO INTERNATIONAL HUMAN RIGHTS RATIFICATIONS IMPROVE RESPECT FOR HUMAN RIGHTS IN INDONESIA?

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ABSTRAK

Peningkatan jumlah ratifikasi konvensi tentang hak asasi manusia internasional oleh Indonesia sangat menggembirakan, bahkan di Asia Tenggara, Indonesia leading dalam soal ini. Namun sayang, ternyata tidak ada korelasi antara jumlah ratifikasi hak asasi manusia dan praktek Indonesia dalam melindungi dan mendorong penghormatan hak asasi manusia, dengan kata lain bagi Indonesia, tidak ada jaminan bahwa ratifikasi perjanjian hak asasi manusia internasional akan meningkatkan penghormatan dan perlindungan hak asasi manusia dalam praktek kehidupan sehari-hari, bahkan semakin buruk.

1. INTRODUCTION.

The emergence of international human rights law is one of the most significant developments that has taken place since the end of the Second World War¹ and the totalitarian excesses preceding it². The post-World War II era has seen the establishment and subsequent growth of international human rights law. This is a turn away from authoritarianism, which has also led to a global spread of democratic governance. Today, there are a growing number of international human rights instruments, including major international and regional treaties, institutions, and organizations³.

The swift rise of human rights as a normative benchmark for any government claiming legitimacy must surely rank as one of the most inspiring humanitarian stories of all times⁴, with the result that "human rights" today have become a universal issue⁵. *Robertson and Merrils* have observed that this development reflects a wider phenomenon, namely an increased concern of people all over the world about the treatment accorded to their fellow human beings in other countries, particularly if such treatment fails to meet the minimum standards of civilized behaviour. Pertinent legal rules thus are a reflection of social standards and the current interest in the international

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¹ J. Rehman, *International Human Rights Law - A Practical Approach* (2003), p. 1.

² R. B. Lillich & H. H. Hannum, *International Human Rights - Problems of Law, Policy and Practice* (1995) 3rd ed., p. 36.

³ T. Landman, *Protecting of Human Rights A Comparative Study* (2005), p. 1.

⁴ J. R. Bauer and D. A. Bell, 'Human Rights and Asian Values - The Limit of Universalism', 2000 *China Review International*, vol. 7, no. 2, p. 295.

⁵ See F. Dallmayr, 'Asian Values and Global Human Rights', 2002 *Philosophy East & West*, vol. 52, no. 2, p. 173.

protection of human rights. This is the result of a profound change in societal and governmental attitudes⁶.

The growth and expansion of human rights law have also brought about a radical change in the idea of human rights⁷. Human rights as a legal concept are an essential part of contemporary international law.⁸ Today it is universally acknowledged that gross violations of individual and collective rights cannot be justified on grounds of sovereignty or domestic jurisdiction⁹. Human Rights fall "under the collective juridical guarantee by all civilized States" so that their violation allows a collective response.¹⁰ Moreover, Rawls argues that such violations may not only be condemned but in grave cases may lead to intervention and even military sanctions¹¹. Rehman asserts that human rights are the concern of the international community with a growing recognition that the protection of fundamental human rights constitutes an obligation *erga omnes*¹².

This increasing global

awareness of human rights, however, has not only met the approval of states but there is also disagreement on matters of interpretation and enforcement¹³. This mixed reaction is caused, in part, by the fact that human rights standards are increasingly global rather than regional¹⁴.

Harris notes that the evolution of the international law of human rights has been one of the most remarkable features of the development of international law since 1945¹⁵. Whereas progress so far has been mainly through treaties, customary international human rights law is in the process of evolution as well.

2. HUMAN RIGHTS IN THE NEW ORDER.

Just as the relevance of human rights issues is increasing on the international agenda, political changes have taken place in many countries that have been notorious violators of human rights.¹⁶ In these

⁶ See J. Rehman, *supra* note 1, p. 2.

⁷ See S. E. Waltz, 'Universalizing Human Rights - The Role of Small States in the Construction of the Universal Declaration of Human Rights', 2001 *Human Rights Quarterly*, 23.1, p. 44.

⁸ J. Rehman, *supra* note 1, p. 2.

⁹ See M. Koskenniemi, *The Gentle Civilizer of Nations - The Rise and Fall of International Law 1870-1960* (2005), p. 55.

¹⁰ See J. Rawls, *The Law of People with the "Idea of Public Reason Revisited"* (1999), p. 81.

¹¹ See J. Rawls, *The Law of People with the "Idea of Public Reason Revisited"* (1999), p. 81.

¹² J. Rehman, *supra* note 1, p. 2.

¹³ See M. Monshipouri and C. E. Welch, 'The Search for International Human Rights and Justice - Coming to Terms with the New Global Realities', 2001 *Human Rights Quarterly*, 23. 2, p. 372.

¹⁴ Consider, for example, the Pinochet case. The Council of Europe has successfully pressed for regional standards of democracy and human rights in the past. What was unusual in the Pinochet case was the extension of global standards based to a large degree on Europe, to another region (Latin America), where there had traditionally been a substantial deference to state power and a political deference paid to leaders drawn from the armed forces. The Pinochet case has clearly set new precedents against the impunity of dictators and war criminals, which nongovernmental human rights organizations (NGOs) are seeking to extend. Likewise, the willingness of the international community to deploy troops to halt ethnic slaughter and ethnic cleansing has been unprecedented in modern times. These trends mark a new era of defending human rights, but the limits of the larger question of trans-sovereign law enforcement still remain undefined, see *ibid*.

¹⁵ D.J. Harris, *Cases and Materials on International Law* (1991), 4th ed., p. 602.

¹⁶ See J. Zalaquet, 'Menangani Pelanggaran Hak Asasi Manusia di masa lalu, Prinsip-prinsip Penyelesaian Kendala Politik', 2003 *Dignitas*, vol. 1, p. 81

countries, where authoritarian regimes were in power, government-sponsored systemic human rights violations have frequently taken place. This was also the case in Indonesia during the Suharto era (New Order Government, March 11, 1966 to May 21, 1998).

Throughout the New Order Government, power played a dominant role, often replacing the rule of law. Violations as well as the abuse of law were common practice during the New Order Government. During this period, protection of and respect for human rights hit rock bottom in Indonesia. Systemic violations of human rights often are associated with certain repressive features of the government.¹⁶ Patterns of authoritarian rule, if widespread, strongly limit prospects for the implementation of human rights.¹⁷ Respect for human rights has further exposed the fact that Indonesia had only ratified very few human rights instruments. The reluctance of the Indonesian government during the New Order Era to ratify human rights instruments as well as adopting and including their substance into the national legal system severely limited respect for and protection of human rights.¹⁸

The widespread and systematic violations of human rights were one of the elements that finally caused the collapse of the Suharto (political) system.¹⁹ The breakdown of the highly repressive New Order regime after 32 consecutive years in power has resulted in an increasing awareness of the significance of respect for human rights.²⁰ *Piechowiak* points out that the modern concept of human rights is partly rooted in the experience of 'legal lawlessness' (i.e. a reaction to experiencing dictatorial regimes) when crimes were committed and not sanctioned by law, and when human beings were denied their status as such. One response to these experiences was the emergence of the international law of human rights.²¹ The concept of human rights that has been adopted gives rise to a new paradigm for understanding that human rights are not only embedded in international law, but also in other areas of culture. This embraces an attempt to explain the reasons for gross violations of fundamental rights, and an attempt to avoid such violations in the future.²²

¹⁶ See R. Falk, *Human Rights and State Sovereignty* (1981), p. 63.

¹⁷ Ibid.

¹⁸ See I. W. Parthiana, 'Indonesia dan Hak-hak Asasi Manusia, Bagaimana Indonesia Menyikapi Instrumen-instrumen Internasional tentang Hak Asasi Manusia', in Wila Chandrawila Supriadi (ed.), *Percikan Gagasan Tentang Hukum ke III, Kumpulan Karangan Ilmiah Alumni FH Unpar* (1989), p. 55.

¹⁹ See A. Yudhawiranata, 'Menyelesaikan Pelanggaran Hak-hak Asasi Manusia di masa lalu: Masalah Indonesia Pasca Trasisi Politik', 2003 *Dignitas*, vol. I, p. 25.

²⁰ See B. Manan et al, *Perkembangan Pemikiran dan Pengaturan Hak Asasi Manusia di Indonesia* (2001), p. 1.

²¹ M. Piechowiak, 'What are Human Rights? The Concept of Human Rights and Their Extra-Legal Justification', in R. Hanski and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Text Book* (2000), p. 3.

²² Ibid.

3. REFORMATION ERA AND DEMAND FOR THE TRIAL OF PAST HUMAN RIGHTS VIOLATIONS.

In Indonesia, the demands for bringing to justice past human rights violators have mounted in the meantime, but violations of human rights continue in various forms, patterns and by different perpetrators. There are still numerous violations of human rights, many of which appear to go unchallenged at the international level. While the issue of human rights is often exploited by a number of social groups for their own political and economic purposes, government officials are unwilling to take action because they are worried about being accused of human rights violations themselves. Not only are human rights violations committed by government officials against the people, but also in horizontal perspective between members of society. *Smith* has a rather similar perception, namely that the international system for protection human rights is not sufficiently equipped to address this dimension of human rights.²³

Following the collapse of the authoritarian New Order govern

ment, a large number of gross human rights violations were never brought to court. *Juwana* argues that a fundamental shift from an authoritarian to a democratic government coupled with personal commitment from individuals in high-level government positions does not automatically bring about improvements in human rights practice.²⁴

It may be argued that coming to terms with past human rights violations on the basis of Law No. 26/2000 only served as a political commodity since there were no serious government efforts to try officials as perpetrators. Indonesian society is faced with a situation where human rights are neither sufficiently respected nor protected, let alone enacted. The settlement of human rights cases is still limited, often slow, sometimes discriminative and incomplete. Human rights violations are often aggravated by a misapplication of human rights enforcement efforts.²⁵ Sentences by the ad hoc human rights courts for Tanjung Priok and East Timor²⁶ are still considered to have been far from being just and tend to give impunity to former military members and politicians.²⁷

In general, the Indonesian government has made no serious

²³ See R. K.M Smith, *Textbook on International Human Rights* (2003), p. 83.

²⁴ H. Juwana, 'Special Report - Assessing Indonesia's Human Rights Practice in the Post-Soeharto Era: 1998-2003', 2003 *Journal of International & Comparative Law*, vol. 7, p. 644.

²⁵ See Majelis Permusyawaratan Rakyat Republik Indonesia, *Putusan Majelis Permusyawaratan Rakyat Republik Indonesia: Sidang Tahunan Majelis Permusyawaratan Rakyat Republik Indonesia 7-8 Agustus 2000* (2000), p. 100.

²⁶ In February 2002, the Panel of ad hoc Human Rights judges presided over its first case - the post-referendum crimes against humanity committed in East Timor in 1999. Following this, the panel will hear the human rights abuses committed in Tanjungpriok, North Jakarta in 1984. Unfortunately, no investigations have previously been conducted into either the Tanjungpriok case or the East Timor case.

²⁷ See Suara Merdeka, *FKS - Penegakan Hak Asasi Manusia Belum Memuaskan*, 9 December 2004.

efforts to address past or current abuses, new human rights legislation not with standing.²⁸ There are many cases of human rights violations that have yet to be resolved and brought to justice.²⁹ The human rights violations indicates that there is a significant gap between rights in principle (i.e., those formally protected by international law) and rights in practice (i.e., those rights actually protected by states and enjoyed by individuals and groups).³⁰ For international lawyers, such a gap comprises the difference between *de jure* protection and *de facto* realization of human rights, or the gap between the "theory and reality of human rights".³¹

4. National implementation methods of international agreements

There are various approaches to national implementation of international agreements.³² The doctrinal issue is normally presented as a clash between dualism (or pluralism) and monism.³³ These two schools of thought concerning the relationship between international and municipal law matured in the 19th century but have remained controversial until today.³⁴ This controversy focuses on whether international and municipal law are two separate legal orders, existing independently of one another; and if

so, on what basis it can be said that one is superior to the other; or whether they are both part of the same legal order.³⁵

Brownlie emphasizes that the dualist doctrine reflects the essential difference between international and municipal law, namely the fact that the two systems regulate different subject-matters and different relationship; international law deals with relationship between sovereign states, municipal law applies within a state and regulates the relations of its citizens with each other and with the state.³⁶ According to this view, neither legal order has the power to create or alter the rules of the other. If municipal law states that international law applies in whole or in part within the jurisdiction, this is merely an exercise of authority of municipal law, an adoption or transformation of the rules of international law. In the case of a conflict between international law and municipal law, courts will normally apply municipal law. Monism is academically understood as arguing that international and municipal law are part of the same system of norms. They derive their validity and contents, by an intellectual operation, from a basic norm (*Grundnorm*). This basic norm may be defined as follows: "States ought to behave as they have customarily behaved".³⁷

²⁸ See Human Rights Watch, *World Report 2002: Indonesia*, available at <http://www.hrw.org/wr2k2/asia7.html>, retrieved on 15 April 2005

²⁹ Komisi Hak Asasi Manusia, *Transitional Justice*, (2002), p. 1.

³⁰ T. Landman, *supra* note 3, p. 4-5.

³¹ *Ibid.*

³² See M. Scheinin, 'International Human Rights in National Law', in R. Hanski et al, *An Introduction to the International Protection of Human Rights, A Textbook*, (2000), p. 418.

³³ I. Brownlie, *Principles of Public International Law* (2002), 5th ed. p. 34.

³⁴ See C. C. Joyner, *International Law in the 21st Century* (2005), p. 38.

³⁵ See D.J. Harris, *supra* note 15, p. 68.

³⁶ See I. Brownlie, *supra* note 34, pp. 34-35.

³⁷ *Ibid.*

In essence, the opposing schools of dualism and monism do not adequately reflect actual state practice and have thus been modified in many respects, bringing them closer together, without, however, producing a conclusive answer on the relationship between international and municipal law.³⁸

Scheinin argues that nowadays the classifications of dualism and monism are largely regarded as outdated. The widespread use of 'compromise' implementation methods such as incorporation, the processes towards constitutional regulation of the legal effect of international norms, the possibility of the judiciary to apply doctrines that allow a wide use of international norms even without their formal status as norms of domestic law, and the growing heterogeneity of what is an 'international norm', all of these contribute to an erosion of the traditional distinction between 'dualism' and 'monism'.³⁹

There is no generally accepted classification for the broad variety of existing methods for the national implementation of international treaties.⁴⁰

One of the classifications applied in existing textbooks is the following distinction of different implementation methods:

Adoption: International treaties become part of domestic law following international ratification (or

a corresponding expression by the State of its will to become bound by treaty), and publication only; no separate legislative measure is adopted.⁴¹

Incorporation: In order to implement an international treaty, a separate legislative act is adopted at the municipal level to provide domestic legal effect to all or part of the treaty provisions, without necessarily repeating the material contents of the provisions in the text of the enactment. Incorporation as a technical term relates to 'dualism' because it is based on the idea that international ratification in itself is not sufficient to establish domestic validity, but must be accompanied by a legislative act. Often the term 'incorporation' is used in a broader sense, referring to all implementation methods by which treaty provisions become part of domestic law.⁴²

Transformation: The treaty provisions themselves do not receive formal status within domestic law (through adoption or incorporation), but relevant domestic laws are amended for the purpose of bringing their substance into conformity with pertinent treaty provisions. If transformation is applied as the main method of treaty implementation, a State is usually considered to be 'dualist'. Passive transformation may be considered to be a special case of transformation. This relates to a situation where no amendments to existing domestic laws are necessary in order to comply with the treaty provisions. It was partly

³⁸ P. Malanczuk, *Akehurst's Modern Introduction to international Law* (1997), 7th ed., p. 63.

³⁹ M. Scheinin, *supra* note 33, pp. 418-419.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

due to passive transformation as the implementation method for the European Convention on Human Rights by the Scandinavian countries in the 1950s that, some 40 years later, there arose a need to incorporate the Convention into domestic law in order to adjust to the expanding potential of the ECHR.⁴³

Reference: This refers to a domestic enactment which includes a clause on the applicability or even on the priority of international treaties in matters covered by the law in question. This method is also called 'sector-monism'.⁴⁴

Most States apply more than one of these methods. Transformation, incorporation, and reference, for example, can be applied side by side, and the degree of 'dualism' or 'monism' is simply determined by the frequency of the methods used. Even the 'ultimate' dividing line between 'pure' monism (adoption) and various types of dualism is flexible, since what actually becomes decisive is the decision by which Parliament gives its consent to the international ratification of a treaty.⁴⁵

5. DO INTERNATIONAL HUMAN RIGHTS TREATIES IMPROVE RESPECT FOR HUMAN RIGHTS IN INDONESIA?

Now a days and most likely in

⁴³ Ibid.

⁴⁴ Ibid

⁴⁵ Ibid.

⁴⁶ D. J. Bederman, *International Law Frameworks: Concepts and Insights Series*, (2001), p. 30.

⁴⁷ R. M. M. Wallace, *International Law*, (2005), 5th ed., p. 21.

⁴⁸ L. Henkin, *International Law: Politics and Values* (1995), p. 28.

⁴⁹ Ibid.

⁵⁰ M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', 2000 *European Journal of International Law*, vol. 11, no. 3, p. 501.

⁵¹ Ibid.

⁵² M. W. Janis, *An Introduction to International Law* (1993), 2nd ed., p. 26.

the future, international treaties are playing an important role in regulating international issues. Along with general principles and customs, treaties are an essential source of international law.⁴⁶ Treaties represent the most tangible and most reliable method of identifying what has been agreed between States,⁴⁷ they epitomize the principle of consent.⁴⁸ Inevitably, the normative character of a treaty depends on an antecedent, underlying "constitutional" principle, rooted perhaps in natural law, the principle *pacta sunt servanda*, agreements are to be observed.⁴⁹ In this context, the principle *pacta sunt servanda* does not only mean that 'promises shall be kept', as is so often assumed, but more specifically and literally that 'agreements shall be followed'.⁵⁰ It is, in other words, the multi-party, or relational, dimension of a *pactum* that is central to the assumption of obligations in treaty law.⁵¹

The basic principle regarding the observance of treaties *pacta sunt servanda* finds its place in Article 26 the Vienna Convention: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". The notion of good faith in the observance of international agreements is, of course, a fundamental principle of international law.⁵²

The attractiveness of treaties as the primary regulatory instruments in international relations for states as well as international organizations stems from their mostly written form, also their making, application, implementation and termination that are relatively certain, uniform, and stable.⁵³ Treaties can generally contribute to legal certainty for the international community, and particularly for the interested parties. Thus, it is no surprise that the number and types of international treaties has been growing. This is also true for treaties concerning human rights that play an important role in the manifestation of the goals laid down in Universal Declarations of Human Rights.

The international community has established an ideal standard for human rights protection formally laid down in international human rights treaties. There are many countries that have become signatories to the main legal instruments comprising the international human rights regime, where both the breadth and depth of formal participation has expanded since the 1948 Declaration.⁵⁴

However, despite the growth and proliferation of legal instruments for the protection of human rights, there has been a growing disparity between official proclamation and actual implementation of human rights standards.⁵⁵ The success or failure of the international human

rights system should be accessed in light of its impact on human rights practices at the domestic level.⁵⁶ At the beginning of the new millennium, it is clear that the concept of human rights is widely accepted as the "idea of our time". The conceptual battle seems to be over, and the focus has shifted to the actual implementation of human rights. Universal ratification of the main United Nations human rights treaties might appear on the horizon, but ratification in itself is largely a formal, and in some cases an empty, gesture. The challenge now is to ensure that the promises included in the treaties and affirmed through ratification are realized as part of the life of ordinary people around the world.

Turning to Indonesia, this country has ratified the following six United Nations human rights treaties that are of central importance: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965; the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966; the International Covenant on Civil and Political Rights (ICCPR) of 1966; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984 and the Convention on the Rights of the Child (CRC) of 1989.

⁵³ See C. C. Joyner, *supra* note 35, p. 11.

⁵⁴ See A. F. Bayefsky, *The UN Human Rights Treaties System: Universality at The Crossroads* (2001), available at <http://www.yorku.ca/hrights>, retrieved on August 24, 2005.

⁵⁵ See T. Landman, 'Measuring Human Rights: Principle, Practice and Policy', 2004 *Human Rights Quarterly*, vol. 26.4, p. 906.

⁵⁶ See C. Heyns and F. Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 2001 *Human Rights Quarterly*, vol. 23.3, p. 483.

According to Article 11 of the Indonesian Constitution and according to Law No. 20/2000 concerning International Treaties, Indonesia follows what has traditionally been called a monist approach, where treaties become part of municipal law through adoption. The monist approach could potentially lead to a greater impact of treaties on the domestic legal system, because they automatically become part of the law of the land through ratification or accession.⁵⁷

How ever, in Indonesia with its relatively weak civil society, ratification can often be expected to have no effect when addressing the difficulties that the implementation of international human rights treaties face or will face in practice, as will be shown hereafter. Indeed, the ratification of international human rights treaties as well as the Indonesian Constitution often has little practical effect. Moreover, bylaws based on the Sharia (Islamic law) have recently been introduced in several provinces, with serious restrictions for women in the name of

religion, including a public curfew and the requirement for them to wear the headscarf in public.⁵⁸ Regional autonomy and devolution seem to run counter to the implementation of international human rights treaties and the Indonesian Constitution itself. For instance, the province of Aceh enjoys the privilege to apply Islamic law.⁵⁹ The most notorious *Qanun* is based on Law No. 11/2002 concerning the Implementation of Islamic law.⁶⁰ It must be noted that some forms of punishment according to Islamic law (such as whipping and stoning to death) are contrary to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984.⁶¹ Such a situation was exacerbated by the absence of effective judicial review and with a judiciary that depends upon the executive, both in legal and in administrative terms.⁶²

In 2002 Hathaway published an article 'Do Human Rights Treaties Make a Difference?'⁶³ In this article she intended to quantify the effect of human rights treaty ratification on human rights practices.⁶⁴ She has

⁵⁷ Ibid, p. 490.

⁵⁸ A. S. Sawitri, *Women activists urge end to abuse in name of religion*, in The Jakarta Post, 01 September, 2006), available online at <http://www.thejakartapost.com/detailheadlines.asp?fileid=20060901.A06&irec=5>, retrieved on September 01, 2006.

⁵⁹ The Jakarta Post, *Women, The poor singled out by Aceh sharia enforcers: ICG*, 03 August 2006, available online at <http://www.thejakartapost.com/detailheadlines.asp?fileid=20060802.@03&irec=2>, retrieved on 03 August 2006.

⁶⁰ Ibid.

⁶¹ C. Heyns and F. Viljoen, *supra* note 57, p.495.

⁶² See Economic and Social Council, *Civil and Political Rights, including Questions of Torture and Detention, Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January - 12 February 1999*, E/CN.4/2000/4/Add.2, p. 4, available at <http://www.unhcr.ch/Huridocda/Huridocda.nsf/2848af408d01ec0ac125669004e770b>, retrieved on 24 August 2006.

⁶³ O. Hathaway, 'Do Human Rights Treaties make a difference?', 2002 *Yale Law Journal*, vol. 111, pp. 1935-2042.

⁶⁴ R. Goodman and D. Jinks, 'Measuring the Effects of Human Rights Treaties', 2003

provided an interesting new theory on the role of human rights treaties that even suggests an unexpected relationship between treaty ratification and worse performance than before.⁶⁵ Hathaway maintains that her analysis supports several important empirical claims, including:

- (1) countries with worse human rights records appear to ratify treaties at a higher rate than those with better records;
- (2) treaty ratification is associated with worse human rights practices than expected;
- (3) enforcement procedures reduce non-compliance;
- (4) ratification is associated with better practices in full democracies.⁶⁶

Hathaway asserts that these findings contradict empirical predictions of both rational actors and normative models of treaty compliance. She offers a theoretical model that, in her view, more adequately explains the empirical evidence. Hathaway states that treaties 'operate on more than one level simultaneously'.⁶⁷ They create a binding law that is intended to have particular effects, and they express the position of those countries that join them.⁶⁸ For Hathaway, this dual role of treaties helps to explain the 'paradoxical patterns of interaction between

human rights treaty ratification and human rights practices'.⁶⁹ In combination with the poor monitoring and enforcement mechanism of some international human rights treaties, countries with poor performance can not only get away with continued human rights violations but may at times even step up violations in the belief that the nominal gesture of treaty ratification will shield them somewhat from pressure.⁷⁰

Hathaway suggests that some states ratify treaties to signal to other important actors their commitment to human rights.⁷¹ Because of the legal character of international human rights treaties, ratification is virtually costless in that unenforced treaty rules do not require any actual changes in state practice.⁷² More specifically, international actors (including states and non-governmental organization) reward ratifying states by reducing political pressure to promote human rights standards, thereby actually increasing human rights violations,⁷³ with the result that human rights treaty ratification can even lead to worse human rights records.⁷⁴ In this way, the law and politics of international human rights treaties provide a structural incentive for some 'countries (to) take positions to which they do not subsequently conform'.⁷⁵

⁶⁵ See E. Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', 2005 *Journal of Conflict Resolution*, vol. 49, No. 6, p. 927.

⁶⁶ R. Goodman and D. Jinks, *supra* note 65, p. 172.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ E. Neumayer, *supra* note no. 66, p. 927.

⁷¹ R. Goodman and D. Jinks, *supra* note 65, p. 172.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ E. Neumayer, *supra* note no. 66, p. 927.

⁷⁵ R. Goodman and D. Jinks. *supra* note 65. p. 172.

If the many violations of human rights in Indonesia were analyzed with Hathaway's theory, it could be concluded that Indonesia wants to "jump on the bandwagon" or to respond to international pressure to ratify⁷⁶ In other words, treaties are ratified in response to stronger international pressure.⁷⁷ Of course, it is not surprising that Indonesia continues to commit substantial human rights abuses even after ratifying human rights treaties.⁷⁸ Actually, in ratifying the core of United Nation human rights treaties, state parties assume obligations to provide periodic reports on their implementation of those treaties.⁷⁹ According to Amnesty International, Indonesia has fallen behind in its reporting obligations with respect to many human rights treaties.⁸⁰

6. CONCLUSION

In recent years there has been a growing appreciation that the development of human rights norms and associated processes must necessarily be reflected in the forms and structures of general international law.⁸¹ The concepts of *erga omnes* obligations and *jus cogens* are prime examples of developments in the structure of international law whose recognition

has been informed by an overriding concern for human rights.⁸²

Likewise in Indonesia, there had been a number of positive developments in the area of human and civil rights, for instance, the holding of the most democratic elections in Indonesian history, the flourishing of free expression and association, the adoption of legislation establishing human rights courts and the ratification of international human rights law. In short, Indonesia had made great progress; however, it still has a long way to go in the process of transformation it had embarked upon. Indonesia had never been so forcefully struck by the discrepancy between the law in theory and the law in practice. In effect, it seemed that the new protection afforded by legislation had not really become operational yet. According to the International Crisis Group, *the Jakarta* newspapers regularly carried stories of mob justice, when the locals with no confidence in the police or civil institutions took the law into their own hands and punished – even by burning to death – people caught committing petty crimes.⁸³ The several decades of authoritarian regimes in Indonesia have often contributed to some form of desensitization in relation to human

⁷⁶ See C. Heyns and F. Viljoen, *supra* note 57, p. 450.

⁷⁷ *Ibid.*

⁷⁸ See R. Goodman and D. Jinks, *supra* note 65, p. 171.

⁷⁹ Amnesty International, *Indonesia: Recommendations to the Government of Indonesia on the Occasion of the election of Ambassador Makarim Wibisono as Chair of the United Nations Commission on Human Rights*, (AI Index: ASA21/001/2005, 2004), p. 3.

⁸⁰ *Ibid.*

⁸¹ M. Craven, *supra* note 51, p. 490.

⁸² *Ibid.*

⁸³ United Nations; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, *Summary record of the 492nd meeting: Indonesia. 26/11/2001.CAT/C/SR.492. (Summary Record)*, available online <http://www.unhcr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/891006224a>, last retrieved on October 25, 2005.

rights. This can take the form of loss of confidence in institutions, of acceptance of the absence of the Rule of Law and of a certain fatalism vis-à-vis the phenomena of impunity and corruption.⁸⁴

Given these circumstances the Constitution and the ratification of the international human rights treaty have had little or no effect upon the constraint of executive power. They have not served as the foundation of a state based on the Rule of Law as this term is commonly understood and indeed cannot do so. The very limited guarantees of human rights, the judiciary's dependence upon executives in both legal and administrative terms and the low level of legal social consciousness, have all contributed to a situation in which the Constitution and the ratification of international human rights treaty are accorded symbolic respect but no practical effect.⁸⁵

According to Hathaway, there are 'the paradoxical patterns of interaction between human rights treaty ratification and human rights practices'.⁸⁶ In combination with the poor monitoring and enforcement mechanism of international human rights treaties, countries (such as Indonesia) with poor performance do

not only manage to get away with continued human rights violations but may at times even increase violations in the belief that the nominal gesture of treaty ratification will shield them somewhat from pressure.⁸⁷ This perspective helps explain why treaty ratification might sometimes be associated with worse human rights practices than otherwise expected.⁸⁸

Indonesia has done poorly in building good governance and in the enforcement of the Rule of Law. The good policies were not sustainable without implementing laws to promote human rights development. Many of the reforms necessitate initiatives and reforms at the legislative and institutional levels, the abrogation of certain rules that the authorities admit are incompatible with international human rights standards, and directives and instructions to the authorities with a view to ending impunity.⁸⁹

In the era of political transition to a more democratic Indonesia, the lack or even the inexistence of respect for human rights was not due to unwillingness but rather inability. This inability indicates that there is a gap between what is regulated and what is done, both at the level of governmental bureaucracy and at

⁸⁴ International Commission of Jurists, *Indonesia – Attacks of Justice 2000 – Indonesia*, available online at http://www.icj.org/news.php3?id_article=2571&lang=en, last retrieved on September 29, 2005. Corruption is institutionalized in the Indonesian judiciary, especially in the Supreme Court, which has been notorious for its corruption.

⁸⁵ *Ibid.*

⁸⁶ Hathaway, *supra* note 64, p. 1941.

⁸⁷ *Ibid.*

⁸⁸ Economic and Social Council, *Civil and Political Rights, Including Questions of Torture and Detention*, available online at <http://www.unhcr.ch/Huridoca.nsf/2848af408d01ec0ac1256609004e770b>, last retrieved on September 29, 2005.

⁸⁹ Economic and Social Council, *Civil and Political Rights, Including Questions of Torture and Detention*, available online at <http://www.unhcr.ch/Huridoca.nsf/2848af408d01ec0ac1256609004e770b>, last retrieved on September 29, 2005.

the level of society at large. Inability happens because of the lack of supporting infrastructures so that the provisions in the covenants or in the laws and regulations can be reflected in practices within the society. Accordingly, some challenges must be met. The main human rights challenge in the current century is to translate global consciousness, law and institutions into reality.⁹⁰

The first challenge that must be taken into account by the government after the ratification of human rights instruments is to speed up the transformation and translate the current norms of the human rights instruments into the Indonesian national law. This transformation can be accomplished in the forms of amending or proposing and making new laws in line with what is mandated in the human rights instruments. The government has to abolish various national laws and regulations contrary to the human rights norms mentioned earlier.

The transformation into the national law is considered a challenge due to the fact that many opportunities, the Indonesian government cannot do much, following the ratification of the international treaties. Following this ratification, there is no support or even guarantee that the international ratified legal norms can be implemented in the national legal

system. This means that ratifying these internationally norms for Indonesia does not mean that the international law is carried out in the practice of daily life. For example, the efforts of the Indonesian government to protect its citizens from torture are far from sufficient. Although Indonesia has signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, no improvement can be seen. There have not even been any significant efforts to implement the recommendations from the UN Commission against Torture that followed the Indonesian country report to the commission.⁹¹

The second challenge is how the legal enforcement official understands various laws of amended human rights law or the laws created as a consequence of ratifying human rights instruments. Without proper understanding on the part of the law enforcement officials, it is difficult to imagine that human rights laws are genuinely meaningful in social life.

This challenge is generally a legal problem in Indonesia. Many laws and regulations only have symbolic meaning because they are not well understood and as a consequence they are not enforced by the state officials or, even state officials that must be the agent to protect the people in fact become the perpetrators of violence by

⁹⁰ D. Cassel, *The Globalization of Human Rights: Consciousness, Law and Reality*, available online at <http://du.edu/gsis/hrhw/volumes/2004/magnarella-2004.pdf>, last retrieved on October 26, 2006.

⁹¹ See Kontras, *A Portrait of "Brutality" of Police, the People's Defender* (2004), no. 03/V-VI, p. 18.

committing human rights violations.⁹²

The next challenge is that the government has the obligation to ensure that all human rights provisions transformed into the laws can be uniformly applied throughout Indonesia and non fulfillment of obligations accepted by the State to prosecute and punish genocide, grave breaches of international humanitarian law and other crimes against the most fundamental human rights, the government has created a safe environment for the architects of such inhumane policies.⁹³

The other challenge that must be faced is how the government can provide supporting infrastructures for the application of the laws transformed from the human rights instruments. In Indonesia, law enforcement officials frequently have to work with the most minimal supporting infrastructure for law enforcement. The prisons are in a deplorable state, they are inhumane, the regulations are inadequate or do not even respond to the

contemporary development, which also troubles the police, the public prosecutors and the judges. In short, the lack of public confidence in the impartiality and probity of the principal justice institutions, the prosecution service and the court⁹⁴ has been exacerbating the human rights condition in Indonesia.

Another less important challenge is that the government of Indonesia has to change the culture of Indonesian people and that of the government officials themselves who are less aware of human rights. This has happened due to the minimal legal awareness of civil and political rights in the Republic of Indonesia. Frequently the laws fail to apply due to low level of legal support by the culture of society.

If the various challenges described above are not immediately solved with the right solutions by the Indonesian government and all the national components, Indonesia will remain in the category of countries which cannot respect human rights.

⁹² The result of research conducted by a research institute named Impartial regarding the Indonesian Police Force in the Transitional Era stated that official force separation from the military institution, one Police Forces of the Republic of Indonesia was regarded as one of the institutions promoting violence against the people. The statement was presented by the Monitoring Institute for Human Rights Impartial via its research under the theme. The critiques covered the Police Brutalities in the Transitional Era. According to Impartial these conditions were exacerbated by a member of factions as the doctrinal wrongdoings and the military culture during the New Order era, weak sanctions against the human rights violations and brutal actions, and corruption triggered by minimum welfare. The problem of weak sanctions for the policemen guilty of gross violations considered as ordinary violations, even only as essential violations of police codes, strongly confirms the police's impunity. This will encourage the violation of human rights and more brutalities committed by the police in the future. See, Kompas, 4 June 2005, p. 6.

⁹³ See M. Griffin, *Ending Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in 21st Century*, available online at http://www.icrc.ch/Web/eng/siteeng0.nsf/htmlall/57JQHJ?OpenDocument&View=defaultBody&style=custo_print, last retrieved on October 22, 2006.

⁹⁴ See F. Kerrigan & P. Dalton, *The Human Rights Courts and Other Mechanisms to Combat Impunity in Indonesia*, Danish Institute for Human Rights, available online at <http://article2.org/mainfile.php/0502/225>, last retrieved on December 20, 2006

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