



**Human Rights Violation in Indonesia as a result of the imposing
“Most Serious Crimes”**

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***“Reach your ambition as high as the skies! Dream it as high as the skies!
Because if you fall, you’re going to fall among of the stars”***

[Sukarno, 1901-1970] – Founding father of Indonesia

Human Rights Violation in Indonesia
As a result of the imposing
“Most Serious Crimes”

A Socio-Legal Study

THESIS

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Birth in Jakarta, Indonesia

In 1995

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Glossary

CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CIDT	Centre for International Development and Training
HAM	Hak Asasi Manusia
HRC	Human Rights Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICMRW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
MA	Mahkamah Agung
MA-RI	Mahkamah Agung Republik Indonesia
MK	Mahkamah Konstitusi
OHCHR	Office of the United Nations High Commissioner for Human Rights

PKI	Partai Komunis Indonesia (Communist Party of Indonesia)
TV	Television
UN	United Nations
UUD	Undang-Undang Dasar
UPR	Universal Periodic Review
UDHR	Universal Declaration of Human Rights
UN	United Nations
W.v.S.NI	<i>Wet Beok van Straf voor Netherlandindie</i>

1. Introduction

On February 13, 2006, Andrew Chan and Myuran Sukumaran were sentenced to death by firing squad with five other foreigners from four different countries, each from Brazil, Nigeria, Australia, and Indonesia.¹ The group was arrested at Ngurah Rai International Airport of Bali for drug smuggling from Denpasar to Sydney, with the evidence of 8.3 kilograms of heroin in their belongings. On April 29, 2015, Chan and Sukumaran were executed by the firing squad after several appeals, judicial review, and clemency against the death penalty.

This thesis examines several issues linked with human rights related to the example case above. First, Indonesia is relatively new in international human rights. Only two from nine human rights instruments have been ratified by Indonesia before 1998 due to Soeharto regime which spread the systematic human rights abuse, for instance; widespread torture, attack on the minorities and the genocide crimes in East Timor and Aceh along with the employed of military to execute his opponents.² This time is called as Indonesian dark time. Right after the massive riot in Indonesia which leads to the fall of Soeharto regime in 1998. Six treaties have been ratified by Indonesia since the country reaffirms the serious commitment to address human right issues. The ratification of several treaties by Indonesia is discussed to identify Indonesia's obligation and to assess how they are bound to human rights law with the short history of human rights in Indonesia.

¹ Maguire, Amy, and Shelby Houghton. "The Bali Nine, Capital Punishment and Australia's Obligation to Seek Abolition." *SSRN*, 1st ser., 28 (August 08, 2016): 67-91.

² "Indonesia: Suharto's Death a Chance for Victims to Find Justice." Human Rights Watch, January 27, 2008, <https://www.hrw.org/news/2008/01/27/indonesia-suhartos-death-chance-victims-find-justice>. (accessed May 17, 2019)

Second, death penalty is one of several punishment types breaching human rights. In the International Covenant on Civil and Political Rights (ICCPR), every human being has the inherent right to life. In some occasions, however, the use of death penalty is still allowed although it is restricted only for the most serious crimes and not contrary to the ICCPR.⁴

Furthermore, the limitation of death penalty by international law and international human rights Law is also stated in several conventions, for example: *The Safeguards Guaranteeing Protection of Those Facing the Death Penalty*, and *The UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Execution*.⁵ In this provision, death penalty is allowed only for the term of ‘most serious crime’, and it should not go beyond intentional crimes.⁶ Besides, the author will evaluate the type of offence in Narcotics based on the United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substance of 1988, Single Convention on Narcotic Drugs of 1961 along with the 1972 Protocol, and Convention on Psychotropic Substances of 1971.

Regarding the execution that Indonesia implements to drug offences, it is important to examine whether the drug crimes fall under “most serious crimes”. Since Indonesia had executed 18 convicts to justify that narcotic is one of the “most serious crimes”. Based on early justification by Rick Lines, the drug offences do not meet the threshold of severity under international human rights law.⁷

⁴ The UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

⁵ Sadakat, Kadri. "A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty London: International Bar Association." *IBAHRI*, May 2008, 1-16.

⁶ General Assembly Resolution, *Safeguards guaranteeing protection of the rights of those facing the death penalty*, E/AC.57/1984/14 (14 December 1984), available from undocs.org/E/AC.57/1984/14

⁷ Lines, Rick. "The Death Penalty for Drug Offences and International Human Rights Law." *Amicus Journal*, 28th (2010): 21-28.

Third, in Indonesia, the right to life is mentioned in Indonesia's constitution as the right that cannot be limited under any circumstances.⁸ Indonesia is also one of the signatory states to ICCPR and has ratified it through National Law No.12/2005 which means Indonesia is bound to the covenant based on the principle of *pacta sunt servanda* (international treaties should be upheld by all the signatories).⁹ In reality, however, death penalty still exists in Indonesia's National Law and penal code for the "most serious crimes". In article 6(2) of ICCPR, the execution of death penalty is allowed only to the "most serious crimes" for countries that have not abolished the death penalty. Furthermore, the types of the "most serious crimes" in Indonesia are recognized as drug offences, corruption, and terrorism.¹⁰ One of the reasons for the Constitutional Court to argue that this crime, specifically drug offences, falls under the "most serious crimes" is the perception that this type of crime leads to a sense of fear in society.¹¹ Besides, the death penalty can give deterrent effect to the community or at least death penalty becomes an attempt to intimidate the society from committing crime.¹² In modern legal theory, however, the aim for a verdict to the defendant is for rehabilitation and deterrence. Further, the author identifies what Indonesian Law defines as the most serious crime based on the opinion of the Judges and the law.

⁸ Article 28I (1) of Indonesian Constitution – The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance

⁹ Febrian, Nurhidayatulloh, Helena Primadianti, Ahmaturrahman, and Fatimatuz Zuhro, "A Gap Between Right to Live Protection and Death Penalty in Indonesia (Judges Decision on Cases Threatened Death Penalty)." *SHS* 54 (2018): 1-6.

¹⁰ Drug offences, Corruption and Terrorism stated as the "most serious crimes" in Indonesia under article 114 (2) National Narcotics Law 35/2009, article 2 (2) National Anti-Corruption Law 31/1999, and article 6 National Anti-Terrorism Law 15/2003 respectively.

¹¹ Indonesian Constitutional Court Decision (No 15/PUU-X/2012) [2012] P403

¹² *Ibid.*

Fourth, the way Indonesia interprets drug offences as one of the “most serious crimes” to execute 14 people in 2015 and 4 people in 2016 had resulted in a major concern from the world. There are a lot of arguments concerning the execution on the legal standing of domestic legislation and international treaties which lead to the violation of human rights obligation. The aim of this thesis is to show the reader that there are several problems in Indonesia regarding the death penalty and its relation with the four points above are further discussed.

2. Research Questions

The main research question of this thesis is: How have the ratification of human rights treaties affected the use of death penalty in Indonesia? The research question is also followed by the following sub-questions:

- i. To what degree does international law matter for domestic Indonesia law and state policy?
- ii. How do international human rights regulate the death penalty?
- iii. What is the nature of Indonesia’s international human rights obligations?
- iv. How does Indonesian judicial legal system understand the death penalty in light of “most serious crimes” exceptions?
- v. Which human rights have been violated by Indonesia regarding to the imposition of death penalty due to the interpretation of narcotics offences as the “most serious crimes”?

3. Methodology

To answer the research questions and sub-questions in this thesis, it will be based on literary research. The literary research consists of several books, articles from scholars, reports published by the United Nations and Judge's decision that have a correlation to analyse the motivation behind the phrase of "most serious crimes" in Indonesia. Besides, to be able to answer the questions, a number of interviews with human rights related NGO were also held in order to dig deeper analysis on the execution of death penalty in Indonesia.

4. Structure of the thesis

The first part of this thesis provides information of human rights in Indonesia which focuses on Indonesia obligation under international human rights law. The ratification of several treaties are enacted by Indonesia to be legally bound. To be detailed, the second part of this thesis focuses on international human rights instruments. In detail, in ICCPR, the right to life must be respected, and any execution of death penalty that is not categorized as "most serious crimes" can be regarded as deprivation of life in arbitrary way, and the countries have an obligation to perform it in a good faith. Then, chapter three starts with the Indonesian judicial system, penalties, and human rights. In this chapter, there are inconsistencies between judicial institutions such as MK (Constitution Court of Indonesia) and MA (Supreme Court of Indonesia) regarding death penalty punishment, along with the urgency to formulate a clear rule in the classification of "most serious crimes". Afterwards, an analysis of death penalty in Indonesia is elaborated in chapter four which shows that death penalty violates the human rights when viewed from the

point of view of the international human rights law before ending this thesis with conclusion and recommendation in chapter five.

1 | Human Rights in Indonesia

“I have to be calm, even though I am scared. To make others not afraid.”

(Munir 1965-2004)

“Indonesian leading activist who was poisoned on a flight

From Jakarta to Amsterdam in 2004”¹³

1.1 Introduction

This chapter explains the history of the adoption of human rights treaties into national law, the nature of Indonesia’s commitment to human rights, the nature of obligation, commitment and the relation between international human rights law and Indonesian Constitution Law. The aim of this chapter is to give an insight for the readers that Indonesia has an obligation related to the issue of human rights and the country is bound to human rights law.

1.2 History of Indonesia in Human Rights.

The history of Human Rights in Indonesia is divided into five periods¹⁴:

1. Period 1908-1945
2. Period 1945-1950
3. Period 1950-1959
4. Period 1959-1966
5. Period 1966-1998
6. Period 1998-present

¹³ Huggler, Justin, "Indonesian Human Rights Activist Who Died on Flight Was Poisoned with Arsenic." *The Independent*, November 13, 2004, <https://www.independent.co.uk/news/world/asia/indonesian-human-rights-activist-who-died-on-flight-was-poisoned-with-arsenic-533056.html> (accessed June 02, 2019).

¹⁴ Manan, Bagir, *Perkembangan Pemikiran Dan Pengaturan Hak Asasi Manusia Di Indonesia* (Bandung: Yayasan Hak Asasi Manusia, Demokrasi Dan Supremasi Hukum, 2001).

In the first period (1908-1945), the concept of human rights in Indonesia was the rights of self-determination as an independent nation. A number of youth organizations emerged to give pressure to Indonesia to become an independent country from the colonialism of the Dutch.¹⁵ The second period (1945-1950), the realization of political rights, the participation of the civil society and the freedom of association were the important events to highlight several years after Indonesia's independence.¹⁶ The third period (1950-1959) was the setback of human rights in Indonesia due to the change of political system from Parliamentary Democracy to Guided Democracy under President Sukarno's 1955 Decree which contradicted the freedom of expression.¹⁷ The fourth period (1966-1998), in the history of human rights in Indonesia, this period was called as the dark time of the nation. The rebellion of PKI (The Communist Party of Indonesia) and the chaotic situation in Indonesia caused Indonesians to believe that Human Rights is the product of western conspiracy which tries to infiltrate the culture of liberty.¹⁸ This movement ended with a coup d'état against President Soekarno led by President Soeharto and resulted 78,000 people killed.¹⁹ The implementation of Human Rights under President Soeharto had been considered as having a poor record.²⁰ As examples, the right of speech, freedom of press, and civil liberties were restricted, and little dissent was not tolerated. In this period, human rights was limited to the formal respect for and recognition in the National Law, e.g., only two human rights treaties have been ratified by Indonesia—Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC). However, a growing dissatisfaction to President Soeharto and a massive riot happened in Jakarta to request for a fair election in Indonesia, which resulted in the resignation of Soeharto who had held the office for almost 31 years. The fifth period (1998-present), after Soeharto stood down from the presidency and

¹⁵ Manan, *Perkembangan Pemikiran Dan Pengaturan Hak Asasi Manusia Di Indonesia*, 128.

¹⁶ *Ibid.*, 129.

¹⁷ *Ibid.*, 130.

¹⁸ *Ibid.*, 131.

¹⁹ *Ibid.*, 132.

²⁰ *Ibid.*, 133.

the new President B.J Habibie elected, “human rights have been “re-recognised” in an Amendment to the Constitution of Indonesia”.²¹ Along with that, the commitment and seriousness of Indonesia were shown in the four additional treaties that have been ratified after 1998, i.e., Convention on the Elimination of all forms of Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), and lastly International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.²² The ratification of several human rights treaties can be seen as a remark for Indonesia to implement the conception of human rights standards where the state has to protect the rights of their inhabitant.

1.3 The Nature of Indonesia’s Human Rights Obligation

Indonesia has two obligations on human rights; first, the national obligation and second, the international obligation. Indonesia’s domestic obligation on human rights is declared in Article 71-72 National Law 39, 1999. In chapter V, the article mentions that it is the government’s duties and obligation to respect, protect, uphold, and promote human rights towards effective implementation in law, politics, economics, social and cultural aspects, state security, and other areas.²³ In the same provision, the right to life and sustain life are guaranteed by the country, which responsibility of protecting lives belongs to the government is in line with the Article 71-72 National Law 39, 1999.

Furthermore, in Article 28I Indonesian Constitution:

The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, to adhere to a religion to be treated as an individual before the law, and the right not to be prosecuted on the basis of

²¹ Azhar, Haris, "The Human Rights Struggle in Indonesia." *SUR* 20 (2014): 216-549.

²² UN High Commissioner for Refugees (UNHCR), *UNHCR Submission on Indonesia : UPR 27th Session* , September 2016, <https://www.refworld.org/docid/5a12b5432.html> (accessed June 19, 2019).

²³ Indonesia Legislation 39/1999, art. 71.

retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance.²⁴

Second is Indonesia's human rights towards international obligation. Based on General Principle of International law *Pacta Sunt Servanda*, Article 26 of the Vienna Convention on the Law of Treaties states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."²⁵ This term applies to all parties that ratify international human rights instruments. Before the states accept a treaty through ratification, states have to know that there are legal obligations for them to conform to.²⁶ "One of Indonesia's obligations to the Human Rights Committee is to submit periodic reports every five years to the relevant treaty body on how the rights are being implemented."²⁷ The nature of this obligation is to determine the concrete action of what has been done by Indonesia to improve, develop, and promote conformity of human rights with international standards, along with the goal for the next four year under the resolution 60/251.

1.4 Commitment of Indonesia to Human Rights.

The commitment of Indonesia to promote and improve human rights has been shown in their National Action Plan 1998 – 2013. It was a national policy document which consisted of their further action to promote and protect the human rights which need to be handed to the high commissioner for human rights.²⁸ In Indonesia national action plan, it consists of four main pillars: "First, ratification of international human rights instruments; second, dissemination of information and education on human rights, implementation of priority issues on human rights;

²⁴ Indonesia Constitution, art. 28, sec. I.

²⁵ United Nations, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS 1155 (UNVCLT).

²⁶ OHCHR, *Training Manual on Human Rights Monitoring Professional Training Series No.7* (New York and Geneva: UN, 2001), available from undocs.org/HR/P/PT/7.

²⁷ Ibid.

²⁸ OHCHR, *Handbook on National Human Rights Plans of Action Professional Training No. 10* (New York and Geneva 2002), available from undocs.org/HR/P/PT/10.

lastly, implementation of the international human rights instruments that have been ratified by Indonesia.”²⁹

Indonesia’s first action was to promote and uphold the importance of the international human rights instruments. Indonesia has ratified several treaties to the national law, for example, the adaption of ICCPR and the IESCR into National Law Number 11/2005, which scheduled to take place in 2003, but was later brought forward to 2000.³⁰ The commitment of Indonesia to human rights was based on indivisibility, equality, and recognition principles to the current national circumstances.³¹ “The indivisibility principle implies civil, political, economic, social, and cultural rights regarded as integral parts of a whole that cannot be broken up without diminishing each one of the components.”³² Also in the official philosophical foundation of Indonesia (Pancasila), it is noted that the five principles recognize “A just and civilized humanity” as well as relevant articles in the 1945 Constitution which came into being prior to the adoption of the UDHR in 1948, the promotion and protection of human rights in all values, customs, culture, and traditions of the Indonesia people.”³³

Indonesia’s second action is the dissemination of information and education on human rights. Indonesia has promoted “the human rights as a standard of social life essential to building values, attitudes, and habits of people when they are interacting with others. Indonesia also promotes why it is valuable to protect human rights in universities or higher education using different types of media (radio, TV) and seminar.”³⁴

²⁹ OHCHR, *Indonesia National Plans of Action for the Promotion and Protection of Human Rights (1998-2013)* <https://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

Third, the implementation of human rights in Indonesia has become a concern for human rights committee and activists due to some policies which leads to the violation of human rights itself.³⁵ For example, Indonesia recognises the right to life as a non-derogable rights and should be the predominant priority due to the priority of life. However, in reality, the death penalty still exists in the country penal code along with the confusing, uncertain and unfair system of trial.³⁶

1.5 Relation of Indonesia Constitution and International Human Rights Law

The 1945 Constitution of the Republic of Indonesia is a social contract to the community and contain the main instrument for the protection of human rights in Indonesia. To be detailed, Chapter XA of The 1945 Constitution contains 10 Articles of Human Rights, and specifically in Article 28I (1) :

The nature of right to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are the fundamental human rights that shall not be curtailed under any circumstance.³⁷

Furthermore, the aim of international human rights law to protect human rights brought up the similarity to the Indonesia Constitution, for instance; Article 3, 4, 5 UDHR:

Everyone has the right to life, liberty and security of person.³⁸ No one shall be held in slavery or servitude and the slave trade shall be prohibited in all

³⁵ Karain, Frederika, "Human Rights and the Environment in West Papua, Indonesia," *Justice and Peace*, May 14, 2018, <https://www.justiceandpeace.nl/wp-content/uploads/2018/05/Report-Human-rights-and-the-environment-in-West-Papua-Indonesia.pdf>. (accessed May 17, 2019).

³⁶ The unfair trial will be explained more in chapter 3

³⁷ Indonesia Constitution, art. 28, sec. I.

³⁸ UN General Assembly, *Universal Declaration of Human Rights* (UDHR), 10 December 1948, 217 (III), art. 3.

their forms.³⁹ No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment.⁴⁰

The above articles serve the same objective between Indonesia Constitution and international human rights law which enforce the obligation to respect, to protect and to fulfil human rights.

1.6 Conclusion

After examining human rights in Indonesia from the country's history, constitution, and several treaties that have been ratified into domestic legislation, the results showed that there is commitment from Indonesia to uphold its fundamental human rights. Besides, Indonesia's government facilitates the realization of the rights that is legally bound by international human rights law. Furthermore, by ratifying several human rights instruments, Indonesia has an obligation to ensure the enforcement and basis of human rights in accordance with the international human rights standards. The next chapter focuses on the details of the death penalty and its regulation based on international human rights Law.

³⁹ UN General Assembly, *UDHR*, art. 4.

⁴⁰ *Ibid.*, art. 5.

2 | International Human Rights Instruments

2.1 Introduction

Right to life is one of the fundamental right in human rights instruments and it is inherent to every human being.⁴¹ In article 4(2) of the ICCPR, it is clearly stated that there is no derogation permitted to the right to life.⁴² Although there is exception in Article 6(2) of the ICCPR to some countries that still have a capital punishment, the imposition of death sentence is only be applied to genocide and “most serious crimes”. The limitation to use the capital punishment cannot be imposed if it does not meet the criteria because the rights to life are paramount and cannot be arbitrarily deprived.⁴³

In recent years, the use of capital punishment on the basis of responsibility for criminal acts against drug kingpin is the current reason for many countries to legalize the use of capital punishment on narcotics including the classification of narcotics to the “most serious crimes”. In this chapter, the issue of narcotics is also discussed whether or not it satisfies the threshold of “most serious crimes” under the International Law.

Furthermore, the aim of this chapter is to give insight to the reader that death penalty is limited to the “most serious crimes” only. Countries that ratify the international human rights instruments have the obligation to restrict the execution of capital punishment.

⁴¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 6.

⁴² *Ibid.*, art. 4, sec. 2.

⁴³ *Ibid.*, art. 6.

2.2 Death Penalty and Arbitrary Deprivation of Life

Death penalty is a legal process whereby a person is put to death by state as a punishment for a crime. In article 2, 4, 5 and 6 of the ICCPR, capital punishment is not prohibited⁴⁴ for countries who have not abolished the imposition of the death penalty in their penal codes. Although the right to life inheres for every human being,⁴⁵ it is not totally absolute.⁴⁶ Article 6 of the covenant mentions about the exception to take the right to life, but it is limited in strict conditions with regards to the most serious crimes.

The authority to take an individual's life may be authorized in a domestic law, but it is still arbitrary if it is not done with the applicable provisions.⁴⁷ Besides, the meaning of "arbitrariness" cannot be interpreted as "against the law", it must be understood more broadly and include the elements of inappropriateness, injustice, lack of predictability.⁴⁸ The application of death penalty to the convict who does not pose a serious and imminent threat to the lives or bodily integrity of others, can be regarded as an "arbitrariness" because it does not fulfil the elements of reasonableness, necessity, and proportionality.⁴⁹

Furthermore, there are several regulations that need to be addressed by the countries that still have not abolished the imposition of death penalty:

- Limitation of the death penalty to only the most serious crimes;⁵⁰

⁴⁴ Article 6 ICCPR "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes ... This penalty can only be carried out pursuant to a final judgement rendered by a competent court"

⁴⁵ UN General Assembly, *UDHR*, preamble.

⁴⁶ OHCHR 'General Comment 36' on 'Article 6 of the International Covenant on Civil and Political Rights, on the right to life' (2018) UN Doc CCPR/C/GC/36, para 16.

⁴⁷ *Ibid.*

⁴⁸ OHCHR 'Communication on Fongum Gorji Dinka v Cameroon' (2005) UN Doc CCPR/OP/83.

⁴⁹ OHCHR, *General Comment 36*, 16.

⁵⁰ UN General Assembly, *ICCPR*, art. 6, sec. 2.

- against imposing the death penalty when other ICCPR rights have been violated;⁵¹
- Right to a fair trial before the imposition of the death penalty;⁵²

Without the fulfilment of the above categories, it is impossible to impose the death penalty according to international human rights instruments. Furthermore, the implementation of death penalty should be in accordance with other existing provisions, for example: Safeguards Protection of the Rights of Those Facing the Death Penalty of 1984 and The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions. The “Safeguards” is set out in the annex to Economic and Social Council resolution 1984/50, which give both member and non-member states obligations to enforce although these are often impossible to fully enforce.⁵³

2.2.1 The Notion of Most Serious Crimes

In ICCPR definition, the most serious crime is the crimes that result directly and intentionally in death.⁵⁴ Besides, ICCPR also stated several types of crimes that do not meet the “most serious crimes” threshold; drug offences, attempted murder, corruption, armed robbery, piracy, abduction, sexual offences.⁵⁵ The scope of the crimes above is serious in nature but it can never be justified within the article 6 of ICCPR for the imposition of the death penalty.⁵⁶ Furthermore, to restrict the application of death penalty regarding the notion of “most serious crimes” under General Comment No.36 on Article 6 of the ICCPR, states parties are required to constantly review their laws to ensure that the scope of death penalty does not exceed the terms of ICCPR.⁵⁷ Besides, in order to restrict the application of death

⁵¹ OHCHR, *General Comment 36*, 8.

⁵² UN General Assembly, *ICCPR*, art. 14, sec. 1.

⁵³ Finamore, Emma, "Are UN Resolutions Legally Enforceable," *All about Law*, October 31, 2018, <https://www.allaboutlaw.co.uk/commercial-awareness/commercial-insights/are-un-resolutions-legally-enforceable> (accessed May 19, 2019).

⁵⁴ OHCHR, *General Comment 36*, 7.

⁵⁵ *Ibid.*, para. 35.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

penalty regarding this notion, the interpretation to most serious crimes must be set within the overall context of “international standard that is applicable to all States, States cannot claim compliance with article 6 (2) of ICCPR merely because the crime is seen as serious in their specific context.”⁵⁸ Moreover, ICCPR is a legally binding treaties which means that every state that has ratified the treaty are legally bound and have a responsibility to implement the treaty obligations.

2.2.2 Limitation of the Death Penalty

The permission of international human rights law for countries to execute people is limited by three words, “most serious crimes”. In order to determine what kind of crimes categorized as the “most serious crimes”, the UN Human Rights Bodies created guidance to limit the interpretation that can lead to pronounce the death sentence which do not qualify as the “Most Serious Crimes.”⁵⁹

The first to discuss is the ICCPR. In Article 6 (2) ICCPR states “In countries which have not abolished the death penalty, sentence of death may be imposed strictly for the most serious crimes.”⁶⁰ The term of “most serious crimes” cannot be applied to the type of crimes that related to corruption, political crimes, armed robbery, piracy, abduction, drug, and sexual offence which are not related to the basis of Article 6 for the imposition of death penalty.⁶¹ Failure to fulfil Article 6 of the Covenant will violate Article 7 based on prohibition of torture or cruel, inhuman or degrading treatment or punishment for the accused, and also his or her relatives which causes mental suffering and could amount to a violation of their own rights under Article 7.⁶²

⁵⁸ UN Commission on Human Rights, *Extrajudicial, summary or arbitrary executions : Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2002/36*, available from undocs.org/E/CN.4/2003/3/Add.3.

⁵⁹ Lines, "The Death Penalty for Drug Offences and International Human Rights Law," 27.

⁶⁰ UN General Assembly, *ICCPR*, art.6, sec. 2.

⁶¹ OHCHR, *General Comment 36*, para 35.

⁶² *Ibid.*

The second is the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty. These safeguards define that the most serious crimes terms should not go beyond intentional crimes with lethal or other extremely grave consequences. The provision in these safeguards constitutes an enumeration of minimum standards to be applied in countries that still impose capital punishment.⁶³

States that have not ratified or acceded to these treaties are nevertheless bound by international standards, notably those set out in the Safeguards. That the Safeguards may be considered the general law applicable on the subject of capital punishment, even for those States that have not assumed any treaty obligations whatsoever with respect to the imposition of the death penalty, is borne out in the Universal Periodic Review mechanism of the Human Rights Council. Member States report on their compliance with international human rights norms, including those in the Safeguards, regardless of whether they are subject to any relevant treaty norms. Even States that are not subject to conventional obligations with respect to capital punishment have participated in the Universal Periodic Review process as if they were subject to international norms concerning the death penalty.⁶⁴

Third is the reports of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions. This provision emphasizes that the scope of most serious crime must be regarded as an extreme exception to the fundamental right to life.⁶⁵ The reports made by Human Rights Committee reveals that the imposition of death penalty for crimes cannot be applied if it does not result in loss of life.⁶⁶

2.3 The right to a fair trial

The nature of Article 6 of the covenant is to protect people from being “arbitrarily deprived” of their life and to ensure the legal proceedings do not breach one of the

⁶³ OHCHR ‘Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty’ (16 July 2015) UN Doc A/HRC/30/18.

⁶⁴ *Ibid.*, 26.

⁶⁵ Lines, “*The Death Penalty for Drug Offences and International Human Rights Law*,” 48.

⁶⁶ Report of the Secretary-General, ‘Extrajudicial, Summary or Arbitrary Executions,’ CCPR/C/79/Add.25 (2012) available from undoc.org/CCPR/C/79/Add.25.

rules in ICCPR.⁶⁷ The implementation to this provision is stated in Article 14 to 16 of the ICCPR to assure on how a person is treated in the judicial process along with the protection of race, colour, sex, religion, political, nationality, property, birth, or other status of discrimination.⁶⁸ In Articles 28 to 45 of the ICCPR, the covenant establishes the creation of Human Rights Commission responsibility to monitor the implementation of provisions by the parties. “In all death penalty punishment, a fair trial that observes all the provisions of the ICCPR must be held, without which the death penalty may not be imposed.”⁶⁹ The violation on the standards of right to a fair trial will result in a violation of the covenant article.⁷⁰

2.4 The Right not to be subjected to cruel or inhuman torture

There are several methods of capital punishment in the world, for instance; shooting, lethal injection, electrocution, gas inhalation, beheading, and stoning.⁷¹ All types of the capital punishment above are cruel or inhuman tortures to human being. Everyone has the right not to be subjected to that kind of punishment (inhuman punishment).

“Failure to provide treatment that respects the inherent dignity of those condemned to death violates international standards prohibiting torture or other forms of cruel, inhuman, or degrading treatment or punishment (“CIDT”).”⁷² This prohibition of torture is a set of fundamental principles in international law where no derogation

⁶⁷ Kadri, "A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty," 4.

⁶⁸ OHCHR, “*Fact Sheet No. 15 (Rev.1), Civil and Political Rights: The Human Rights Committee*,” May 2005, No. 15 (Rev.1) 15.

⁶⁹ Arbour L, “In the Matter of Sentencing of Taha Yassin Ramadan, Application for Leave to Intervene as Amicus Curiae and Application in Intervention of Amicus Curiae of United Nations High Commissioner for Human Rights” *WSJ*, 2007, <http://online.wsj.com/public/resources/documents/tribunal20070207.pdf> (accessed May 25, 2019).

⁷⁰ OHCHR, *General Comment 36*, 41.

⁷¹ “Description of Execution Methods,” *Death Penalty Info*, May 16, 2014, <https://deathpenaltyinfo.org/descriptions-execution-methods> (accessed May 15, 2019).

⁷² Woodford, Jeanne, “Discrimination, Torture, and Execution: A Human Rights Analysis of the Death Penalty in California and Louisiana.” *Centre for Constitutional Rights*, March 14, 2013, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18612_E.pdf (accessed May 29, 2019).

is permitted.⁷³ It is set forth, without reservation or exception in the foundational human rights instrument, the Universal Declaration of Human Rights,⁷⁴ as well as the CAT,⁷⁵ two provisions of the ICCPR, and various regional human rights instrument.⁷⁶

Furthermore, there are several conventions that prohibit people from suffering a cruel punishment, for example; first, Article 1 Paragraph 1 of the Convention against Torture provides definition of torture that reflects the components of torture under customary international law:

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 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.⁷⁷

Under CAT, death penalty can be considered as torture due to the pain or suffering arising from the imposition of death penalty, and “do not include sanctions that defeat the object and purpose of the Convention against Torture is to prohibit torture.”⁷⁸ Second, the International Criminal Tribunal for the former Yugoslavia (ICTY) judges in the case no IT-96-21-T defines inhuman treatment as “an intentional act or omission. That is an act which, judged objectively, is deliberate and not accidental. It causes serious mental or physical suffering or injury or

⁷³ Ibid.

⁷⁴ UN General Assembly, *UDHR*.

⁷⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), art. 2.

⁷⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 Nov. 1950, E.T.S. 5, article. 3; American Declaration, article. 25, 26; American Convention, article. 5; African Chanticleer on Human and Peoples’ Rights, 27 June 1981, 21 I.L.M. 58, art. 5.

⁷⁷ UN General Assembly, *CAT*, art. 1 sec. 1.

⁷⁸ ‘Implementation of the Convention Against Torture, 8 C F R 208.18 (a) (3)’

constitutes a serious attack on human dignity.”⁷⁹ The failure to fulfil this right is a serious violation of the dignity and purpose of human life and constitutes cruel, inhuman, and degrading treatment.⁸⁰

2.5 Drug-related offences

Nowadays, the number of countries that apply the death penalty over drug offences is around 35 countries included the Philippines, Malaysia, and Indonesia.⁸¹ Many states argue that drug offences are included as the “most serious crimes” and, therefore, the death penalty to drug crimes can be justified.⁸² In Indonesia, the judgment of Indonesian Constitutional Court upholds the legality of execution for drug offences as a “most serious crimes” under its interpretation of both domestic and international law.⁸³

There are two international instruments that can be a guidance of “most serious crimes” in the drug context:

The first is United Nations Conventions against illicit Traffic in Narcotic Drugs and Psychotropic Substance 1988 and the Single Convention on Narcotic Drugs 1961 along with The Protocol 1972. In the provisions, there is no phrase that mentions narcotics as one of the extraordinary crimes. The provisions merely classify narcotics into two stages: first is “grave” and “serious” in nature and secondly is particularly serious.⁸⁴ In the provisions, the elevation of grave or serious term

⁷⁹ Editor, "Implementation of the Convention against Torture," *Legal Information Institute*, January 05, 2012, <https://www.law.cornell.edu/cfr/text/8/208.18#> (accessed June 02, 2019).

⁸⁰ See, inter alia, Case of Neira Alegria et al. v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 20, 60 (19 Jan. 1995) “[E]very person deprived of her or his liberty has the right to life in detention conditions compatible with her or his personal dignity . . . Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.”; Case of The “Street Children” (Villagrán Morales et al.) v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, 165 (19 Nov. 1999); Prosecutor v. Delalić (Zejnil), Case No. IT-96-21-T, 543; Case of Labita v. Italy, 2000 Eur. Ct. H.R. 161, 120).

⁸¹ Gallahue, Patrick, "The Death Penalty for Drug Offences: Global Overview 2011." *HRI Global*, no.28 (2011): 5-47.

⁸² Lines, "The Death Penalty for Drug Offences and International Human Rights Law," 47.

⁸³ Ibid.

⁸⁴ UN Economic and Social Council (ECOSOC), *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance*, (adopted 20 December 1988, entered into force 11 November 1990) 1582 U.N.T.S 27627, art. 3.

offences to the level of particularly serious can be met if there are (1) participation of domestic or international organized crime, (2) the use of violence or firearms, and (3) the involvement of minors and/or the collaboration of public officials are satisfied.⁸⁵ “Absent these aggravating factors, none of the ‘serious’ offences in Article 3 of the 1998 drug convention satisfy the ‘most serious crimes’ threshold within international human rights law, for the simple reason that they do not even meet the highest threshold of criminality within the drug control regime itself.”⁸⁶

Second, international human rights Law by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1996) recommend that death penalty should be eliminated for crimes such as economic crimes and drug-related offences.⁸⁷

Related to drug offences, human rights committee on the general comment 36 on Article 6 of ICCPR clearly stated that drug offences do not qualify as the “most serious crimes” since the crimes do not result directly and intentionally in death.⁸⁸

Related to the three instruments above, drug offences do not fulfil the threshold of the “most serious crimes”. Further, in relation to the ICCPR, if the death penalty is still performed, it will violate the international law, especially a violation of Article 6(1) of the ICCPR.

⁸⁵ ECOSOC, *UN Drug Convention*, art. 3, sec. 5.

⁸⁶ Murray, Daragh, "The Death Penalty for Drug Offences: What Do the International Drug Control Treaties Say about 'Most Serious Crimes?'" *Human Rights Centre Blog*, March 03, 2016, <https://hrcessex.wordpress.com/2016/03/03/the-death-penalty-for-drug-offences-what-do-the-international-drug-control-treaties-say-about-most-serious-crimes/>.<<https://hrcessex.wordpress.com/2016/03/03/the-death-penalty-for-drug-offences-what-do-the-international-drug-control-treaties-say-about-most-serious-crimes/>> (accessed 08 June 2019).

⁸⁷ OHCHR, ‘*Report by Special Rapporteur Desirability of the abolition of the death penalty*’ A/51/457 (1996) available from undocs.org/A/51/457.

⁸⁸ OHCHR, *General Comment 36*, para 35.

2.6 Conclusion

The right to life is a right that must be respected. However, the right to life is not an absolute right and can be restricted. Deprivation of life is still allowed, but it must be in a non-arbitrary way and satisfy the requirement in ICCPR. Three terms need to be satisfied before execution, unless the execution violates the law and it is a cruel or inhuman act. In addition, the fulfilment of the three prerequisites before an execution of death penalty are as follow:

1. The interpretation of “most serious crimes” has to be strict and restrictive.
2. The death penalty should only be considered if the crime affects in lethal or extremely grave consequences with an intention to commit the crime.
3. The execution does not violate another article of the covenant.

Besides, based on several international conventions and recommendations published by the United Nations, drug offences cannot be categorized as “most serious crimes” since it does not satisfy the requirement in International Covenant on Civil and Political Rights, United Nations Conventions against illicit Traffic in Narcotic Drugs and Psychotropic Substance 1988, the Single Convention on Narcotic Drugs 1961 along with The Protocol 1972, and the international human rights law by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1996) and the ICCPR itself. The countries that ratify any of the treaties above have to perform their obligations in good faith.

3 | The Indonesian Judicial System, Penalties, and Human Rights

3.1 Introduction

In Indonesia, there are several regulations that regulate and grant the rights to life and not to be subjected to cruel or inhuman torture. All the regulations are stated in Article 28A⁸⁹, 28I Indonesia Constitution⁹⁰, National Law No.39/1999⁹¹, and National Law No.12/2005 (Ratification of ICCPR).

However, there are also provisions that allow for punishable crimes by death penalty in the Indonesia territory, for example; the National Narcotics and Psychotropic Law No.22/1997, Indonesia's anti-terror law No. 5/2018, and Indonesia's Anti-corruption Law No.31/1999. The implementation of death penalty for this type of crime is based on the belief of the Indonesian government that the three types of crimes are qualified as the "most serious crimes". Meanwhile, the International parties believe it is not included as the most serious crimes. The interpretation of the Government of Indonesia to the term of "most serious crimes" for the imposition of death penalty attracts criticism from scholars since the types of crimes are not included in the type of the "most serious crimes" based on international conventions. Therefore, when the death penalty is executed, it is considered as a violation of human rights.⁹²

The Government of Indonesia argues that the right to life can be limited in the most exceptional circumstances which can give a deterrent effect in relation to criminal offence. The interpretation of the notion of the "most serious crimes" is fully within

⁸⁹ Article 28A: "Every person shall have the right to life and to defend his/her and existence.

⁹⁰ Article 28I: "The right to life, freedom of thought and conscience, freedom of religion ... are all human rights that cannot be limited under any circumstances."

⁹¹ Article 9: "Everyone has the right to life, sustain life, and to improve his or her standards of living.

⁹² Rothwell, Don, "Law Experts Say Indonesian Death Penalty Is Illegal," *Australian National University*, April 27, 2015, <https://www.anu.edu.au/news/all-news/law-experts-say-indonesian-death-penalty-is-illegal> (accessed June 06, 2019).

the state corridor to interpret it. The aim of this chapter is to explain what Indonesia law mentions regarding the death penalties, “most serious crimes” based on the National Law, judicial decisions, and scholarly opinion.

1. The Relevance of Death Penalty in Extraordinary Crime from the Purpose of Penalty in Indonesia

Indonesia’s penal codes came from the Dutch Colonial Administration around 100 years ago (January 1918), called as the *Wet Beok van Straf voor Netherlandindie* (W.v.S.NI) in which the beginning of the death penalty in Indonesia originated from the rule.⁹³ The nature of Indonesia’s criminal law plays the role to safeguard, to maintain the good behaviour and attitude of Indonesian citizens, and to prevent them from committing offense against the law and immorality.⁹⁴ Judging from the aspects of usability or benefits, the judges believe that the death penalty will provide a deterrent effect for the future potential criminals who have committed or intended to commit crimes.⁹⁵ In relation to human rights, Indonesia judges believes that a person’s rights are limited by the obligations to respect and respect the rights of others. In this perspective, if an individual intentionally removes the life/rights of another person, then the life or the rights to life of the accused is not something that needs to be questioned and defended anymore.⁹⁶ Based on the reason above, Indonesia judges believes that death penalty is still an effective way to give deterrent effect and to intimidate the accused.⁹⁷

Elaborated from the information above, there are three theoretical positions stated by the former Constitutional Judges regarding the death penalty in Indonesia. Those

⁹³ Sahetapy, Jacob Elvinus. *Pidana Mati Dalam Negara Pancasila* (Citra Aditya Bakti, 2007).

⁹⁴ Najih, Mokhammad, "Indonesian Penal Policy: Toward Indonesian Criminal Law Reform Based on Pancasila." *JILS* 3, no. 2 (2018): 149-74.

⁹⁵ Indonesia Constitution Court Decision (2009) 2-3/PUU-V [377]

⁹⁶ Galang, Ngurah, *Relevansi Pidana Mati Dalam Tindak Pidana Kejahatan Luar Biasa (Extraordinary Crime) Dalam Perspektif Pembaharuan Hukum Pidana Di Indonesia* (Ganesha Press, 2017).

⁹⁷ Lynch, Colman, "Indonesia’s Use of Capital Punishment For Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and The Bali Nine Case." *Colombia Human Rights Law Review* 4 (2017): 523-93.

points are among the debates on the concept of death penalty, it is important to discuss their relevance with Indonesia.

First is the attitude from the abolitionist movement to the concept of rehabilitation. This notion completely rejects the execution of the death penalty for any reason. If justice is considered as the reason for executing death penalty, i.e. punishing an individual according to the equal weight of the committed crime, then it is conflicting with the actual purpose of justice. Regarding this view, the purpose of punishment is not to punish but to rehabilitate former criminals. Therefore, the death penalty is seen as an act that is unfair to criminals because they are not given the opportunity to change, repent, and improve themselves.⁹⁸

Second is the attitude of those who adhere to the notion of reconstruction. They argue that the death penalty is appropriate for those who commit major crimes. According to them, the provision of legal sanctions aims to avenge the mistakes made by an individual. This understanding is based on the classic principle of the law of revenge (*lex talionis*) which is found in almost all cultures and religions.⁹⁹ In other terms, this law is expressed by the law of "tooth for a tooth, eye for an eye" which means if someone doing wrong, there should be a compensating measure of justice. In general, adherents of reconstruction understand that the community must be reconstructed on the basis of religious law. This understanding, therefore, is also commonly referred to as the notion of the economists, because they refer to God's law.¹⁰⁰

Third is the attitude of the adherents of the retentionists on the notion of retribution.¹⁰¹ These adherents argue that the main purpose of the death penalty is to punish criminals, so the individual no longer commits crimes and other people become afraid of committing the same crime. These adherents believe that God gives the

⁹⁸ Ridha, Abdurasyid. *Kontroversi Hukuman Mati Di Indonesia* (Sunan Gunung Djati, 2011).

⁹⁹ Walen, Alec, "Retributive Justice." *Stanford Encyclopedia of Philosophy*, June 18, 2014, <https://plato.stanford.edu/entries/justice-retributive/> (accessed June 02, 2019).

¹⁰⁰ Ridha, *Kontroversi Hukuman Mati Di Indonesia*, 105.

¹⁰¹ Brata, Roby Arya, "Pro Kontra Hukuman Mati," *Sekretariat Kabinet Republik Indonesia*, March 09, 2015, <https://setkab.go.id/pro-kontra-hukuman-mati-bagi-pelaku-kejahatan-narkoba/> (accessed May 30, 2019).

government the right to perform justice by imposing the death penalty. Because everyone has no right to determine their own justice, the implementation of justice is performed by the government. Therefore, the government has the right and obligation to uphold justice, one of which is by executing the death sentence for the “most serious crimes”.¹⁰²

The first position can be seen as the insistence from the Indonesian people to announce an overhaul of the Indonesian legal system in order to fulfill Indonesia’s obligation under the UN Convention that has been ratified, specifically the ICCPR.¹⁰³ The second and third positions are the position of Indonesian communities who believe if the legal system is being revised therefore the death penalty should exist to discourage would-be criminals from unlawful action. As a result, potential perpetrator will think twice before committing the crimes for fear of losing their own life.¹⁰⁴

The dominant standards in the judicial practice in Indonesia can be seen to rely on the second position. The reason is that the judges and the President of Indonesia often said that “almost 50 people died every day and it is important to take necessary act to address this problem by imposing capital punishment to give deterrent effect”. The statement does not necessarily mean that it is “an eye for eye”, but it can be interpreted that drug smugglers can be sentenced to death if their crimes also lead to the death of any victim.

¹⁰² Brata, “Pro Kontra Hukuman Mati.”

¹⁰³ Tileman, Hal, "Indonesia’s Long Wait for Its Own Criminal Code." *Indonesia at Melbourne*, November 10, 2016, <https://indonesiaatmelbourne.unimelb.edu.au/indonesias-long-wait-for-its-own-criminal-code/> (accessed May 29, 2019).

¹⁰⁴ Haag, Ernest, "The Death Penalty Prevents Future Murders." *Death Penalty Curriculum*, January 22, 2000, <https://deathpenaltycurriculum.org/node/6> (accessed June 12, 2019).

2. The “most serious crimes” standard in Indonesia

a. The Indonesian Court Arguments in the Use of the “most serious crimes” for Death Penalty

Drug offences, terrorism, and corruption are the three crimes that are considered as the “most serious crimes” in Indonesia. Although there is no record in domestic criminal formulation that they can be classified as the “most serious crimes”, the opinion of the Constitutional Court of the Republic of Indonesia is a matter for legal argument. According to the Indonesia Constitutional Court (MK) by the decision No.15/PUU-X/2012, the reason to justify narcotics to be included as one of the “most serious crimes” is due to the fear it caused to the society. Narcotics result the death of nearly 50 people every day.¹⁰⁵ Moreover, the Constitutional Court argues that the impact of drug crimes are similar to “crimes against humanity . . . aimed at killing and destroying human being(s) slowly but sure(ly).”¹⁰⁶ Another argument that Indonesia made was, “many countries . . . still maintain capital punishment, including those that (have) reinstate (d) capital punishment after previously having abolished it.”¹⁰⁷ Besides the Indonesian Constitutional Court (MK), the decision by the Supreme Court of Indonesia (MA) can be seen as the argument from the Indonesian Authority on the “most serious crimes”:

MK Decision No.2-3/PUU-V/2007 regarding the Judicial Review on Narcotics classified as the “most serious crimes”¹⁰⁸

The Court believes the classification of the “most serious crimes” is in line with the phrase of Article 6(2) of the ICCPR and must be read along with the phrase “according to the prevailing laws when the crime is committed”¹⁰⁹ Furthermore,

¹⁰⁵ Humas, "Inilah Rencana Aksi Nasional Pencegahan Dan Pemberantasan Narkotika." *Sekretariat Kabinet Republik Indonesia*, August 31, 2018, <https://setkab.go.id/inilah-rencana-aksi-nasional-pencegahan-dan-pemberantasan-narkotika-2018-2019/> (accessed May 27, 2019).

¹⁰⁶ Indonesia Constitution Court Decision 2007, 23-41

¹⁰⁷ Ibid.

¹⁰⁸ Kasim, Ifdhal, "Legal Framework on Death Penalty in Indonesia," *ICLaD*, no.32 (2016): 2-32.

¹⁰⁹ Ibid., 3.

the MK gives a suggestion that in the future the National criminal law must reform and consider this aspect:

(i) death penalty is no longer a primary punishment, but only as an alternative punishment; (ii) death penalty may be imposed with a 10-year probation period, which can be converted into a life sentence or 20-year of imprisonment, under the condition that the convict shows a good faith; (iii) death penalty cannot be imposed for minors; (iv) death penalty execution towards pregnant women and mentally-ill must be postponed until the said women gives birth to her child and the mentally-ill is healed.¹¹⁰

MK Decision No. 21/PUU-VI/2008 regarding the Judicial Review on Article 14 (3), Article 14 (4) of Law No.2/PNPS/1964 on the Procedures of Death Penalty Execution.

In this MK Decision, the court argues that the pain inflicted from the execution is not violating the notion of cruel or inhuman torture due to the impact of consequence attached to the process of dying. Moreover, it is not considered as a torture towards the death convict. Besides, the court argues that there is no method for death penalty without painless process.¹¹¹

On the other hand, the Supreme Court of Indonesia (MA) gives a decision which contradicts with the imposition of death penalty elaborated above.¹¹²

MA Decision No. 45 PK/Pid.Sus/2009.¹¹³

In this decision, MA states that the death penalty punishment contradicts with Article 28A of the Constitution, Article 1(2) and 4 of National Human Rights Law No.39 of 1999, and Article 3 of the Universal Declaration of Human Rights (“UDHR”)

¹¹⁰ Kasim, "Legal Framework on Death Penalty in Indonesia," 3-4.

¹¹¹ Ibid., 4

¹¹² Ibid.

¹¹³ Supreme Court of Indonesia Decision (2009) 45 PK/Pid.Sus.

MA Decision No. 39 PK/Pid.Sus/2011.¹¹⁴

In this decision, MA argues that the purpose of penalization is education, correction, and prevention to the people who commit crimes, and therefore imposing death penalty is not in line with Article 28I (1) of the 1945 Constitution and Article 4 of the Human Rights Law. Furthermore, in MA decision, it quoted the phrase “cannot be limited under any circumstances” in the 1945 constitution which means the right to life cannot be limited or waived by any person/institution including authorized officials and court decisions.¹¹⁵

From the justification above between MK and MA decision, there are inconsistencies between the judicial institutions to interpret the human rights on death penalty punishment. One thing to note concerning the MK decision is their suggestion to reform the legal system of Indonesia and consideration of the death penalty which is no longer a primary punishment. The court suggest the death penalty should be converted into life sentence or 20-year of imprisonment if the convict shows a good faith.¹¹⁶

For the Indonesian people, the disagreement between courts (MK and MA) will increase the ambiguity in the Indonesian legal system. As mentioned earlier, the dominant judicial practice in Indonesia is based on the principle of revenge, of which the Indonesian people have already believed that narcotics is one of the main problems in Indonesia, for instance: criminality and sexual assault. Second, the Indonesian people will consider that the Supreme Court does not care with Indonesia’s future generation because the court prohibited the death penalty.

Furthermore, the significance of this disagreement in law/human rights law perspective will instead weaken the enforcement of human rights. In its duties, the Supreme Court has the task of deciding specific or concrete matters based on article 24 (1) and 24c of the Indonesian Constitution, while on the other hand, the Constitutional Court has the duty to decide on normative and abstracts matters.

¹¹⁴ Supreme Court of Indonesia Decision (2011) 39 PK/Pid.Sus.

¹¹⁵ Lubis, Todung Mulya, Jimly Asshiddiqie, and Alexander Lay, *Kontroversi Hukuman Mati, Perbedaan Pendapat Hakim Konstitusi* (Kompas Press, 2009).

¹¹⁶ Kasim, "Legal Framework on Death Penalty in Indonesia," 3.

Both institutions continue to perform their responsibilities without violating the rules of the state, because the Supreme Court in its decision must be in line with Article 36 of the 1945 Constitution, in which the "right to life cannot be limited under any circumstances" and the Constitutional Court only decides that the interpretation of the right to life can be limited. If the interpretation of the Constitutional Court performed by amending the 1945 Constitution that the right to life can be limited, this will become a different issue since basically the Supreme Court only adheres to the highest legal source in Indonesia—the 1945 Constitution.

b. Arguments of Indonesian Scholars regarding the “most serious crimes”

There are a number of scholars who argue for the constitutionality of death penalty and for the ICCPR’s limitations on most serious crimes. Abdul Hakim Garuda Nusantara, the Chairman of Indonesia’s National Commission on Human Rights mentions that “arguing the death penalty in Indonesia is unconstitutional and a cruel criminal act does deserve capital punishment.”¹¹⁷ Dr. Mudzakir, as a member of the Indonesian Criminal Code Revision team, testified regarding its conclusion. He stated that the intention of death penalty on Indonesia penal code is purely “as the last resort to protect . . . society, rather than the principle of punishment.” Another member of the Indonesian Criminal Code Revision Team, Dr. Nyoman Serikat Putrajaya argues that “there was a concern that society will take the law into their own hands to take revenge if there is no channel through the laws allowing for death penalty.”¹¹⁸ Based on the scholars’ argumentation, the death penalty punishment should be abolished with the following reasons; (i) death penalty is considered as an inhuman punishment, (ii) under Article 28I of Indonesian Constitution, this type of punishment is unconstitutional due to the right to life guaranteed by the Constitution, and (iii) the aim of the punishment should rehabilitate the convict and purge their guilt.¹¹⁹

¹¹⁷ Indonesia Constitution Court Decision 2007, 41.

¹¹⁸ Lines, "The Death Penalty for Drug Offences and International Human Rights Law," 545

¹¹⁹ Gardiner, Gerald, "The Purposes of Criminal Punishment: I The Nature of Punishment," *The Modern Law Review* 21, no. 2 (1958): 117-160.

c. Deterrent Effect of the Death Penalty in Indonesia's Perspective. One of the benefits of the death penalty that Joko Widodo (President of Indonesia) believes is its deterrent effect.¹²⁰ He states that;

Every day 50 young Indonesians die; in one year that is 18.000 dead, furthermore the number of drug users had reached 4.5 million, with 1.2 million of them beyond the point of rehabilitation because of the extreme natures of their cases.¹²¹

Joko Widodo believes that death penalty can give a deterrent effect to drug smugglers, drug dealers, and potential dealers and users.¹²² On the other hand, it will also break the chain of drug dealers with the defendants who have been executed. Furthermore, Joko Widodo's claim that the deterrent effect will reduce the number of drug offence violations has to be proven by a research procedure or a survey which can be accessed by scholars, NGOs, and the general public. It is vital because until this current study was written, the research and survey conducted by the government were never published or covered in the National Law academic texts.

3. Indonesia Universal Periodic Review (UPR) to UN

Indonesia, along with the other nations, has an obligation to submit the Universal Periodic Review to United Nations (UN) and Human Rights Council (HRC) every four years. The last period that Indonesia attended was in 2017 after the execution of 18 people by the Government of Indonesia in 2015 and 2016. Many countries in this session were questioning the responsibilities of Indonesian enforcement of rights related to Civil and Political Rights (Right to life, liberty, and security of the person) which are indirectly related to the execution of 18 drug smugglers in 2015

¹²⁰ Carolyn Hoyle, 'There's No Evidence that the Death Penalty Acts as a Deterrent,' *University of Oxford*, April 27, 2015, <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2015/04/theres-no-evidence-death-penalty-acts-deterrent> (accessed on May 09, 2019).

¹²¹ Jabour, Bridie, "Joko Widodo Defends Death Penalty as 'positive' for Indonesia," *The Guardian*, May 10, 2015, <https://www.theguardian.com/world/2015/may/10/joko-widodo-defends-death-penalty-as-positive-for-indonesia> (accessed May 29, 2019).

¹²² *Ibid.*

and 2016. However, the enforcement of these rights are not included by the representative of Indonesia into a periodic review report called the “National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21”. Further, the following are the 7 points considered by Indonesia as their own success:¹²³

- Cooperation with civil society
- Promoting the rights of women and the vulnerable groups
- Combating trafficking and slavery
- Freedom of thought, conscience, and religion
- Rule of law and good governance
- Freedom of opinion and expression
- Poverty and economic, and social rights

When the Indonesian representative was questioned by the Human Rights Committee about the execution of the 18 people, the Indonesian representative only promised to uphold better human rights and make effort that there will be a penal code revision which will “continuously strives to incorporate the principles of CAT within the Bill in particular definition of torture and cruel, inhuman or degrading treatment.”¹²⁴ General comments are also made by the Indonesian human rights committee to ensure that Indonesia will “prioritize the settlement of gross human rights violations, guarantee the freedom of religion and belief, and freedom of expression as well as to abolish death penalty.”¹²⁵ From the UPR session in 2017, the committee and several countries believe that Indonesia shall take any intermediate step to abolish the death penalty or to re-establishing an official moratorium.¹²⁶

¹²³ OHCHR, ‘*Report of the Human Rights Council on its thirty-sixth session*’ UN Doc A/HRC/36/L.1 (2017), available from undocs.org/A/HRC/36/L.1.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Views expressed by the State under review on the recommendations and/or conclusions as well as on its voluntary commitments and on the outcome – Report of the Human Rights Council on its thirty-sixth session, A/HRC/36/2.

4. Conclusion

The application of death penalty to the “most serious crimes” in Indonesia’s judicial system needs to be reformed. The urgency to reform this system can be seen from the absence of clear rules in the classification of the terms of the “most serious crimes”. The inconsistencies between judicial institutions (the Constitutional Court and Supreme Court of Indonesia) in their statements against the death penalty can be found in MA Decision No. 39 PK/Pid.Sus/2011 and MK Decision No. 21/PUU-VI/2008. The disagreement between judicial system and the absence of clear rule in the classification of “most serious crimes” will have an impact in the enforcement of human rights in Indonesia. This happens because there are regulations that allow the implementation of death penalty but conversely there are also regulations that do not allow the death penalty to be executed. Furthermore, the urgency of the absence of the rule will have an impact in the form of mistrust against the MA Institution due to its issuance of unpopular decision (refusing the death penalty). In addition, the MK decision explicitly mentions that the death penalty cannot be a primary decision any longer to give deterrent effect. Instead, it should be imposed with several years in imprisonment or life sentence. The suggestion that MK made in their decision is to avoid the ambiguity regarding the death penalty and the right to life which can result in the absence of legal certainty. Moreover, the views of the Constitutional Court open up a new possibility that the right to life is non-derogable, since it is stated in the Indonesian Constitution.

4 | Argument concerning the problem of death penalty in Indonesia

Each person has the right to life and the right to defend his life and existence.
(Article 28A, Indonesia's Constitution, 1945)

4.1 Introduction

The way Indonesian Court understands about the notion of the “most serious crimes” has an impact on their decision to cancel the unofficial four-year moratorium on death penalty to resume the executions in 2013.¹²⁷ It also raises a big concern from the world, especially the Human Rights Committee. Indonesia has two reasons to end the unofficial moratorium of death penalty. Those reasons are (i) drug offences argued by Indonesia posed a threat equivalent to the “most serious crimes”, and (ii) a sovereign right.

The U.N., in their ICCPR treaties, mentioned

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes (...) not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide ... final judgement rendered by a competent court.¹²⁸

However, the way judges considers drug crimes as the “most serious crimes” has become a major concern. The U.N. have several guidelines that the writer had mentioned above on chapter two on the interpretation of the “most serious crimes” to overcome the misinterpretation by states who use this exception to execute and legalize the use of capital punishment, specifically for the drug offences.

¹²⁷ Syamsuddin, Aziz, "Indonesia and the Death Penalty," *Parliamentarians for Global Action*, May 07, 2019, <https://www.pgaction.org/ilhr/adp/idn.html> (accessed June 09, 2019).

¹²⁸ UN General Assembly, *ICCPR*, art. 6, sec. 2.

The issue regarding the intervention was also mentioned in the MK in their decision due to the many complaints from other countries that mentioned the death penalty. The judges argue on the sovereign right, where “Indonesia has a freedom to make and apply laws within its territory and on its citizens wherever they are without any interference from other states, and Indonesia has the authority to enforce these law.”¹²⁹ Any intervention attempt on Indonesian law from other foreign countries could be considered as a violation of customary international law. Based on the principle of non-intervention, Indonesia has the right to retaliate any of these interventions.¹³⁰

The aim of this chapter is to show the reader that the way Indonesia understands the “most serious crimes”, especially in narcotics, is a problem in accordance with International Law, Indonesian Constitution 1945, and their own National Law.

4.2 Human Rights Violation as a result of breaching the U.N. Conventions

4.2.1 Human Rights Violation by Indonesia as a Result of the misinterpretation of the U.N. Convention

In MK Decision No.2-3/PUU-V/2007, the Indonesian Court interprets several treaties for EU member states for justification of the right to life is not absolute as it is stated. However, the permission to execute people in the treaties that mentioned by the court should be understood in the wider context, for instance from their explanatory report and from the content of the article which cannot be directly judged. There are four articles from several treaties quoted by the court that the writer finds to lead to the human rights violation.

1. Article 2 – Protocol Number 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of Death Penalty.

¹²⁹ Afriansyah, Arief, "Indonesia Does Need the Death Penalty to Deter Drug Traffickers," *The Conversation*, April 27, 2015, <https://theconversation.com/indonesia-does-need-the-death-penalty-to-deter-drug-traffickers-37853> (accessed June 02, 2019).

¹³⁰ *Ibid.*

“A State may make provision in its law for death penalty in respect of acts committed in time of war or imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions”

Although the Protocol 6 only applicable for European Countries, the Judges of Indonesian Constitution use it in their decision No.2-3/PUU-V-2007 as a reference. The Court mentioned the Article 2 of the Protocol above as an explanation that the imposition of death penalty is still allowed even in EU Countries.¹³¹ However, the Courts have to see the background behind this Protocol in order to understand the aim of the participating countries. According to Explanatory Report—ETS for Protocol No.6, the aim of the Protocol is to limit the death penalty in respects of “acts committed in time of war or imminent threat of war.”¹³² The purpose of the Indonesian Constitution Court used Protocol 6 as an exception or legitimation of the execution for drug offences is nonsensical. The drug offences that Indonesia purpose to be executed is exempted from the “most serious crimes” term, not liable to be executed, and it does not have any exemptions under any articles.

2. Article 2(2) - Convention for the Protection of Human Rights and Fundamental Freedoms “Deprivation of life shall not be regarded as inflicted in contravention when it results from the use of force which is no more than absolutely necessary”

The explanation of Article 2(2) that Constitutional Court mentioned about the permission to end one’s life must be understood if the situation is permitted and no more than “absolutely necessary”.¹³³ This “absolutely necessary” may result

¹³¹ Indonesia Constitution Court Decision 2007, 416.

¹³² Protocol No 114 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty: Explanatory Report, 1983.

¹³³ Council of Europe, "The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights." *HRH*, 2006. <https://www.refworld.org/docid/49f184722.html>.

as an unintended outcome in the deprivation of life.¹³⁴ “It means the European Convention on Human Rights established the law enforcement agents may shoot with the intent to kill where necessary to defend their lives or that of others.”¹³⁵ “In self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape.”¹³⁶ One of the examples is in the fight against terrorism. Furthermore, the article 2(2) must be read in conjunction with article 15 (1)-(2) in which the derogation in time of emergency is allowed in time of war, occasions that threaten the life of the nation or any High Contracting Party and not contrary to the obligations under international law.

Frankly, the purpose of the constitutional judges in their decision (No.2-3/PUU-V-2007) to use Article 2(2) of Convention for the Protection of Human Rights and Fundamental Freedoms lacked legal standing. First, it is clear the permission to kill not more than in time of war and public emergency which threatens the life of Nations, the same provision also can be found in ICCPR which Indonesia has ratified.¹³⁷ Second, the drug offence does not fall under the scope of death penalty, which means the death penalty must not be imposed for this type of crime if seen in European perspective.¹³⁸

¹³⁴ Council of Europe, "The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights."

¹³⁵ Hess bruegge, Jan Arno. *Human Rights and Personal Self-defense in International Law*. OSO, 2017.

¹³⁶ *Ibid.*, 177.

¹³⁷ ICCPR article 4 (1) reads “ In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties may take measures derogating from their obligations under the present Covenant to extent strictly required by the exigencies of the situations, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

¹³⁸ Council of the EU, “ EU *Common Guidelines on Death Penalty*, ” 8372/13 COHOM 63 PESC 93 (Brussels April 12, 2013).

3. Article 6(2) - ICCPR “(...) Sentence of death may be imposed only for the most serious crimes (...) and not contrary to the provisions of the present Covenant (...) and Punishment of Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court”

Explanations that are established by the Indonesian Court to use Article 6(2) of the ICCPR for the reason “life is not absolute” is inappropriate. ICCPR clearly stated that the right to life cannot be derogate under the Article 4(2) with exception to “most serious crimes”. Besides, there is no derogation permitted under Articles 6. Furthermore, the Human Rights Committee has stated that “the imposition (...) of the death penalty for offences which do not result in loss of life cannot be applied.”¹³⁹ Further, “the characteristics of the most serious crimes, such as drug offences, apostasy, committing a third homosexual act, illicit sex, embezzlement by officials, and theft by force, is incompatible with article 6 of the covenant”¹⁴⁰ To conclude, the treaties that the Indonesian Court quoted for justification for the right to life is not absolute and does not have correlation with the execution for drug offences. It is not relevant to interpret the crimes categorized as the “most serious crimes” with the violation that do not meet the threshold of “most serious crimes” in international human rights law (e.g., comparing the imminent threat of war or armed conflict with drug offences).

4.2.2 Arguments concerning the Death Penalty and Drug Trafficking (U.N. Drug Conventions)

In MK Decision No.2-3/PUU-V/2007, the implementation of National Narcotics Law is in accordance with U.N. Drug Conventions against Illicit Traffic in Narcotics Drugs and Psychotropic Substances 1988.¹⁴¹ The Court believes that the

¹³⁹ OHCHR ‘Extrajudicial, Summary or Arbitrary Executions’ A/HRC/20/22 (9 August 2012), available from undocs.org/A/HRC/20/22.

¹⁴⁰ OHCHR ‘International Covenant on Civil and Political Rights Sixty-first session’ CCPR/C/79/Add.85 (19 November 1997) undocs.org/CCPR/C/79/Add.85.

¹⁴¹ Indonesia Constitution Court Decision 2011, 426.

imposition of death penalty is in line with the article 3(5) of Drugs Convention which mentions “the parties shall ensure that their domestic courts and other competent authorities having jurisdiction can take into factual circumstances which make the commission of the offences established in accordance with paragraph I of this article particularly serious.”¹⁴² This is followed by the article 3(1) of drugs Convention mentioning that “each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law.” Furthermore, the court, in their decision, highlighted article 24 of the drugs convention which stated “A party may adopt stricter or severe measures than those provided by this convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic”¹⁴³

First, the competent authorities, in this case is Indonesia, has the jurisdiction to ensure that the prosecution is executed to maximize the effectiveness of law enforcement. However, the article 3(1) and article 3(5) of the drugs and Psychotropic Substance must be seen in conjunction with the article 3(4) (a)-(d), 1988. In that provision, there are main mandatory parameters set by the Drugs Convention in the type of penalties that can be imposed. Article 3(4) (a)-(d) 1988 Convention proposed “(...) be liable to adequate punishment particularly by imprisonment, deprivation of liberty or sanctions.”¹⁴⁴ Besides, subparagraphs (c) and (d) provide the basis for States Parties to provide alternatives to conviction or punishment other than the death penalty, for instance: education, rehabilitation, and social reintegration of the offender.¹⁴⁵ In addition, the countries that still maintain death penalty are recommended to adhere to United Nations Safeguards guaranteeing the protection of rights of persons facing the death penalty.¹⁴⁶

¹⁴² UN Economic and Social Council (ECOSOC), *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance*, art. 3, sec. 6.

¹⁴³ *Ibid.*, art. 24.

¹⁴⁴ *Ibid.*, art. 3, sec. 4.

¹⁴⁵ *Ibid.*, art. 1, sec. 4.

¹⁴⁶ *Ibid.*, art. 21.

Lastly, the application of article 24 to “adopt more strict ... in its opinion ... for the prevention or suppression of illicit traffic”¹⁴⁸ means that it implies for “permissible substitute controls, e.g., the prohibition of trade activities in psychotropic substances instead of requiring licenses for them.”¹⁴⁹ UN publication stated that “the reference to the death penalty should not imply any position as to the admissibility of that penalty on legal or moral grounds”¹⁵⁰ Regarding the article 3(4) of UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance where Indonesia is also one of the ratifying countries, Indonesia should abolish death penalty punishment. In addition, Indonesia must pay attention to article 3(4) in the Narcotics Convention 1988 where the types of penalties are written to be in the form of deprivation of liberty, pecuniary sanctions and confiscation, but not deprivation of life.¹⁵¹ MK decision considers that the death penalty regarding the narcotics offences is in accordance with article 24 of the narcotics convention which allows for a country to adopt more strict rules to the accused. In fact, the interpretation of the article does not mean to be aggravating the sentence to become a death penalty. On the other hand, in article 3(4) a-b, there are parameters that establish a convention for adequate punishment, such as imprisonment, deprivation of liberty or sanctions, but not death penalty or deprivation of life.

4.3 Human Rights Violation as a result of breaching Domestic Legislation

4.3.1 Argument concerning the Indonesian Constitution Court

In article 28J of the Indonesian 1945 Constitution, there is an article that limits human rights and said by the Indonesian Constitutional Court Judge that the article

¹⁴⁸ UN Economic and Social Council (ECOSOC), *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance*, art. 24.

¹⁴⁹ United Nations Publication, “*Commentary on the Convention ON Psychotropic Substances*,” E/CN.7/589 (21 February 1971) available from undoc.org/E/CN.7/589.

¹⁵⁰ *Ibid.*

¹⁵¹ UN Economic and Social Council (ECOSOC), *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance*, art. 3, sec. 4.

is in line with the systematic regulation in Article 29(2) Universal Declaration of Human Rights (UDHR). The Judges, by Lukman Hakim Saefuddin, believe that human rights is not absolute in Indonesian 1945 Constitution, included the right to life.¹⁵³

Article 28I (1) Constitution of the Republic of Indonesia of 1945:

“The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstances”¹⁵⁴

Article 28J – Constitution of the Republic of Indonesia of 1945:

“In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.”¹⁵⁵

Article 29 (2) – UDHR:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”¹⁵⁶

Similar with the personal opinions of both Judges, the Constitutional Court of Indonesia concurs with all human rights listed in Chapter XA-1945 Constitution

¹⁵³ Indonesia Constitution Court Decision 2007, 412.

¹⁵⁴ The Constitution of Indonesia, art. 28I, sec. 1.

¹⁵⁵ Ibid., art. 28, sec. J.

¹⁵⁶ UN General Assembly, *UDHR*, art. 29, sec. 2.

can limit their validity. The original intent of the 1945 Constitution which states that human rights can be limited by placing Article 28J as the closing article of all provisions governing human rights is in line with the systematic regulation in the UDHR which places articles on limiting human rights as a closing article.

However, the Former 1st Chief Justice of the Constitutional Court of Indonesia—Jimly Asshidiqie—strongly opposes that the limitation of article 28J (2) is not related to article 28I (1). He argues that the provisions of Article 28J is not related to Article 28I paragraph (1) 1945 because Article 28I is the "ultimate article" in the 1945 Constitution regarding the Human Rights. Moreover, any exception of article 28J (2) must not reduce the seven types of human rights that article 28I (1) mention under any circumstances.¹⁵⁷

Further, it is true that some rights are limited or derogable,¹⁵⁸ but the deprivation of rights can only be restricted in specific situations specified in the Human Rights Act or exceptional circumstances of a 'state of emergency'.¹⁵⁹ However, some rights is non-derogable. It is absolute to the right not be tortured or treated in an inhuman or degrading way and several no derogation rights that stated in articles 28I (1) of the 1945 Constitution and Article 6,7,8 (paragraphs I and II), 11, 15, 18 ICCPR.

4.3.2 Argument concerning the differences in the decisions of the Constitutional Court (MK) of the Republic of Indonesia and the Supreme Court (MA) of the Republic of Indonesia

There are different opinions between the Indonesian Constitutional Court and the Supreme Court (MK Decision No.2-3/PUU-V/2007 and MA Decision No.39 PK/Pid.Sus/2011).

¹⁵⁷ Matompo, Osgar, *Pembatasan Terhadap Hak Asasi Manusia Dalam Prespektif Keadaan Darurat* (Erlangga, 2014).

¹⁵⁸ Derogable rights, is the rights outside the scope of Article 28I, for example; the right to freedom of opinion and expression, right to gather, and freedom of movement, which can be exercise based on morality, religious values, security and public order or exceptional circumstances of a 'state of emergency'.

¹⁵⁹ UN General Assembly, *ICCPR*, art. 4.

This Supreme Court decision was originated from an appeal made by the death row inmates in the Narcotics case in 2006. The defendant in this case was sentenced to death at the district court level, then the defendant appeal and verdict was replaced by 15-year-imprisonment under the consideration of human rights. The Supreme Court argues on the right to life “cannot be limited under any circumstances.”¹⁶⁰ Furthermore, the Judges provided an example from the MA Decision No.45 PK/Pid.Sus/2009 confirming that a death penalty contradicts with article 28A of the Constitution and UDHR. The right to life cannot be limited by anyone.¹⁶¹

The argument of the Supreme Court to overturn the previous court ruling based on “death penalty is contrary to the purpose punishment which educative, corrective, and preventive.”¹⁶² The death penalty is contrary to the article 3 of the universal declaration of Human Rights, contrary to article 28 paragraph 1 of the 1945 Constitution and Article 4 of Law No. 39 of 1989. The clauses above cannot be reduced in any form and ignored by anyone, including the decision of the judge/court.

This is again reinforced by the view of the opinion of an expert and former Constitution Judges of Indonesia, Dr. Maria Farida Indrati, S.H., M.H. She argues the provisions in Article 28J paragraph (2) of the 1945 Constitution which contains that human rights restrictions cannot be applied to Article 28I paragraph (1) because of the existence of the phrase "under any circumstances."¹⁶³ This is crucial to note from the argumentation above of several former Constitution Judges about various rights that can be limited, except the rights that stated in Article 28I (1) of the 1945 Constitution.

¹⁶⁰ Supreme Court of Indonesia Decision 2011, 52.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Lubis et al., *Kontroversi Hukuman Mati, Perbedaan Pendapat Hakim Konstitusi*, 120.

4.4 Argument concerning the fair trial in Indonesia

Article 14 and 15 in ICCPR provides fair trial right, which is one of the most fundamental human rights that needs to be fulfilled and absolutely enforced.¹⁶⁴ However, fair trial is another problem that Indonesia has in their legal proceeding system. Article 14 of the ICCPR guarantees that everyone is entitled to the right of fair trial before the court with the trial conducted by competent, independent, and impartial judicial administration determined by law. There are several cases in Indonesia which noted by an international report regarding the unfair trial issues.

¹⁶⁵ The type of unfair trial that can be examined are as follow:

1. Mary Jane Veloso Case (Philippines):¹⁶⁸

The unfair trial on this case can be observed from: (i) the law enforcement agency that never informed her family when she was arrested, (ii) unavailability of the translator for the accused, and (iii) Mary Jane's legal counsel appointed by Indonesia police never assisted her in the investigation process, trial, and the pleadings did not have the substance to air her defence.

2. Rodrigo Gularte case (Brazil):¹⁶⁹

The unfair trial on this case can be observed from: (i) Rodrigo's mental disabilities that cannot be neglected (even it never been discussed in the trial), (ii) the 10-year-duration of Rodrigo's detention time to the time of execution before execution, and (iii) the unavailability translator.

From two examples above, there are disproportionate impact of the use of the death penalty on foreigners, for instance the unfair trial experiences that still plague the judiciary system in Indonesia. The types of unfair trials that can be summarized

¹⁶⁴ Maulana, Arif, "INDONESIA: Indonesia Death Row and Problems of Unfair Trial," *Asian Human Rights Commission*, April 09, 2018, <http://www.humanrights.asia/news/ahrc-news/AHRC-PAP-002-2018/> (accessed May 20, 2019).

¹⁶⁵ Ibid.

¹⁶⁸ Wibowo, Suryo, "Flawed Justice Unfair Trial and the Death Penalty in Indonesia," Amnesty. 2015. <https://www.amnesty.org/download/Documents/ASA2124342015ENGLISH.PDF> (accessed May 13, 2019).

¹⁶⁹ Ibid., 47.

from the example above are as follows: lawyer was not provided immediately, the lawyer did not protect his client during the trial process, there were no translators to the accused native language, the right not to be tortured, the right to be connected with representatives of the state, and the right as a person with mental disabilities. The office of the High Commissioner for Human Rights urged all states that have a death penalty not to “impose the death penalty on a person suffering from any form of mental disorder or to execute any such person,”¹⁷⁰ notably under several instruments that Indonesia has ratified; CRPD,¹⁷¹ CEDAW,¹⁷² ICPRMW,¹⁷³ CRC.¹⁷⁴

4.5 Arguments on the Logic of Non-Compliance Indonesia

To understand the logic of Indonesia in understanding the concept of compliance and enforcement in international human rights law, specifically on ICCPR, the writer uses the indicator used by Jana von Stein. In her book, she proposed the concept of compliance based on the behaviour of states to comply with and without the prohibition in the agreement.¹⁷⁵ In the execution of death penalty in Indonesia, there are two logical thoughts to be used by the Indonesian government:

1. Logic of appropriateness¹⁷⁶

This logic emphasizes on how the state values itself in international relations, how the state sees a norm in international relations, and whether the state has acted appropriately in accordance with what is expected by the international community.¹⁷⁷ In this logic, Indonesia judges views that the interpretation of the death penalty and the scopes of its imposition are in accordance with the

¹⁷⁰ OHCHR, ‘Commission on Human Rights Resolution 2003/67: The Question of the Death Penalty’ E/CN.4/RES/2003/67 (24 April 2003) available from undoc.org/E/CN.4/RES/2003/67, art. 4, sec. G.

¹⁷¹ *Ibid.*, art. 5.

¹⁷² *Ibid.*, art. 1.

¹⁷³ *Ibid.*, art. 7.

¹⁷⁴ *Ibid.*, art. 2, sec. 1.

¹⁷⁵ Stein, Jana Von, *International Law: Understanding Compliance and Enforcement* (Blackwell Publishing, 2010).

¹⁷⁶ *Ibid.*, 42.

¹⁷⁷ Alfarauqi, Aulia, *Ratifikasi ICCPR Dan Praktek Hukuman Mati Di Indonesia* (University Gadjah Mada, 2015).

regulations applied to the rule which regulated the death penalty in the national narcotics law and penal code. However, Indonesia's policy is inversely proportional with the mandate to protect the right to life by The Office of The High Commissioner for Human Rights and it is in accordance with UN General Assembly resolutions in 2007, 2008, 2010, 2012 and 2013 in abolishing the death penalty along with the ICCPR. In order to fulfil and perform a good faith of their obligation in ICCPR, Indonesia must reform and harmonize its national law with the ICCPR framework, especially in relation to the elimination of death penalty in the criminal law in Indonesia.

2. Logic of Consequences¹⁷⁸

In this approach, the state is perceived as a rational, self-interested individual. In this case, Indonesia gives priority to their interests or believe in drug offence as "most serious crimes" from consideration to safe the future generations of Indonesia. After assessing profit-loss calculation based on the framework of international governance, Indonesia judges believes that international law does not have a significant impact and can be said to be nil since the Ad Hoc Peace Commission in deciding disputes between countries that ratify the ICCPR has no binding power. Therefore, Indonesia favour to choose to save their future generation from narcotics with legal standing of sovereignty and non-interference policy in domestic affairs that cannot be treated by international law.

Regarding the two logics above, Indonesia is more inclined towards the "logic of consequences". This is due to Indonesia's priority to safeguard its community, especially its future generations from the dangers of drugs by performing executions of drug lords. Further, Indonesia judges feels that it has performed a good faith regarding the logic of appropriateness based on the arguments in MK Decision No.2-3/PUU-V/2007 stating that the death penalty scope was only

¹⁷⁸ Stein, *International Law: Understanding Compliance and Enforcement*, 43.

allowed for "the most serious crimes" and narcotics was one of the "most serious crimes" in Indonesia.

4.6 Factors of Indonesia's non-compliance with the international human rights law

In executing the death penalty, Indonesia is in a position that is not compliant with the international human rights law viewed from the perspective of the international human rights law (specifically ICCPR). There are four possible factors that can be assumed as the basis of Indonesia's non-compliance with international human rights law.

(i) The ICCPR basically is a legally binding treaty, but the influence of these treaties is difficult to gauge.¹⁷⁹ In particular, the enforcement in ICCPR is lack of a strong mechanism. These views "are not to be understood as strictly binding in law and cannot be enforced."¹⁸⁰

(ii) The issue of abolishing death penalty against crimes, especially narcotics, is an unpopular issue in Indonesian society. According to Gartzke and Gleditsch cited Stein, an international commitment that is unpopular within a country makes it difficult for the government to ignore public sentiment towards a commitment.¹⁸¹

(iii) The reciprocity on human rights issues had forced Indonesia to change its policy on death penalty. The definition of reciprocity, according to Keohane, is "exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the others in such a way that good is returned for good, and bad for bad."¹⁸² This can be seen from the relationship between Indonesia and the Philippines in the case of Mary Jane, whose execution was cancelled at the last second. In reciprocity, the roles between international actors must be the same

¹⁷⁹ Philip, Pettit, *Equity and the Law of Trust* (Oxford University Press, 2009).

¹⁸⁰ Peter, Edge, *Legal Responses to Religious Difference*, (Kluwer Law International, 2002).

¹⁸¹ Dunoff, J, Pollack, M, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012): 485.

¹⁸² Robert, Keohane, "After Hegemony: Cooperation and Discord in the World Political Economy," (Princeton University Press, 1984).

as other countries. Therefore, it leads to compliance/benefits if they are obedient to an agreement (reciprocal). An example of reciprocity in Mary Jane's case can be seen in "Jokowi's support base it would appear to express empathy with, in a sense of 'one of us' (his campaign slogan), and being consistent with his Sukarnoist beliefs, political practice, and domestic priorities"¹⁸³ Furthermore, the narrative of Mary Jane as a foreign worker was being duped to hit very close to Indonesian workers in Saudi Arabia.¹⁸⁴

(iv) The many important institutions that exist in Indonesia have conflicting views on the issue of the death penalty since the author has explained that there is an inconsistency between the views of the Constitutional Court and the Supreme Court on the right to life. The significance of this inconsistency will result a weak enforcement of human rights, especially on the right to life since death penalty is still allowed in the legal system of Indonesia.

4.6 Conclusion

The imposition of death penalty by Indonesia can be said to violate human rights when viewed from the point of view of the international human rights law. Some of the arguments stated above are one example of violations of human rights by Indonesia. Besides, the decisions of the Indonesian Constitutional Court and Indonesian Supreme Court contradict each other on the issue of right to life which make it difficult to achieve for the enforcement of human rights. In addition, the fundamental issues such as no translator, lawyer was not granted immediately, and the right as a person with mental disabilities are some of the basic examples for a fair trial that are not provided by the Indonesian Government to ensure that every convict has equal treatment by the law, and their rights are admitted under the Article 26 of the ICCPR. Moreover, the lack of enforcement alleging the violation

¹⁸³ Camroux, David, "Jokowi's Indonesia: Executions, Diplomacy and the Sukarnoist Turn," *SciencesPo*, May 21, 2015, <http://www.sciencespo.fr/ceci/fr/content/jokowi-s-indonesia-executions-diplomacy-and-sukarnoist-turn> (accessed June 11, 2019).

¹⁸⁴ Lamb, Kate, "Mary Jane Veloso: Why Was She Spared in the Indonesia Executions?" *The Guardian*, April 30, 2015, <https://www.theguardian.com/world/2015/apr/30/indonesian-executions-why-was-mary-jane-veloso-spared> (accessed June 02, 2019)

from the Human Rights Committee is one of the factors that caused Indonesia's practice of reverse logic and failure to comply with the ICCPR.

5 | Conclusion and Recommendation

1. Discussion

In this thesis, the writer hopes to provide the reader an understanding on how the debate in domestic and international regarding the imposition of death penalty to drug offences is categorized as “most serious crimes” in Indonesia. The research question of this thesis is: How have the ratification of human rights treaties affected the use of death penalty in Indonesia?

This question had been answered in the five sub-questions:

a. To what degree does International human rights law matter for domestic Indonesia law and state policy?

Indonesia has ratified several treaties regarding the protection of human rights into domestic law which is legally binding for States. This means that all rights related to the human rights must be protected under Indonesian legal system and integrate it in all decision making, for instance, ensuring the type of punishment in the formulation of National Law not breaching the human rights role.

b. How do international human rights regulate the death penalty?

The regulation of death penalty under international human rights law is stated in ICCPR. Under the Article 6 (2) of the ICCPR, death penalty is only imposed to “most serious crimes” and cannot be placed for drug offences.¹⁸⁵ Besides, the interpretation of “most serious crimes” must be determined within the international standard which is applicable to every state; it cannot be applied to individual because the crime is seen as a serious matter in their specific context.¹⁸⁶

¹⁸⁵ OHCHR, *General Comment* 36, 35.

¹⁸⁶ OHCHR, *Report by Special Rapporteur Desirability of the abolition of the death penalty*, 17.

c. *What is the nature of Indonesia's international human rights obligations?*

By ratification of several human right treaties, Indonesia has obligation to protect, respect, uphold and promote human rights towards effective implementation in across sectors (law, politics, and economics, social and cultural aspect).¹⁸⁷ Besides, Indonesia has an obligation to report all the implementation to Human Rights Committee by submitting their periodic reports every five years.

d. *How does Indonesian judicial legal system understand the death penalty in light of "most serious crimes" exceptions?*

There was no official explanation on National Law or penal codes regarding the death penalty. However, the constitutional judges argue that the impact of drug crimes are similar to crimes against humanity which resulted in the death of 50 people every day and caused fear to the society.¹⁸⁸ After a careful consideration on the actual effect of drugs and the importance of protecting Indonesia's society, according to the national law of Indonesia, narcotic is one of the "most serious crimes" and can be imposed with death penalty under article 6(2).

e. *Which human rights have been violated by Indonesia regarding the imposition of death penalty due to the interpretation of narcotics offences as "most serious crimes"?*

With the execution imposed by Indonesia against death row inmates with narcotics cases, Indonesia has violated the right to life, right to freedom from arbitrariness, the right to fair trial, the right to freedom from torture and breached the human rights instruments.

¹⁸⁷ Indonesia National Law 39, 1999, art. 71.

¹⁸⁸ Indonesia Constitution Court Decision 2007, 161.

2. Final Conclusion

This thesis has described that the execution of death penalty in Indonesia to reduce drug offences has raised a huge debate from participants from various circles ranging from the Indonesian people, international concern, Secretary General of the United Nations, and various Heads of State.

Indonesia used to have a dark time on human rights before the Reformation era. However, right after the reformation, Indonesia shows its obligation to protect the human rights by ratifying 5 treaties into its National Law, such as the ICCPR, CEDAW, ICRMW, CRC, and CRPD. To conclude, after the period, there are six treaties that Indonesia ratified and one treaty that has been signed to show Indonesia's determination in upholding human rights. However, the implementation of the treaties did not go well since Indonesia was still executing convicted inmates. In this case, Indonesia did not only violate international norms that were binding, but also did not respect the norm. Furthermore, the non-compliance act by Indonesia is the reason for the many protests organized by countries whose citizens were executed by Indonesia because Indonesia has demonstrated its commitment through ratification and made it legal in its national law.

The imposition of death penalty is one of the punishments breaching the right to life, which is recognized as a fundamental principle under the international human rights law. Although the permissions of death penalty are still admitted in several human rights treaties, but the prerequisite is “no one shall be arbitrarily deprived of his life.”¹⁸⁹ The meaning construction on this ICCPR article must be interpreted internationally and not by each country. It is because only by using a "universal" standard, the ICCPR will be able to obtain holistic and objective meaning.¹⁹⁰

¹⁸⁹ UN General Assembly, *ICCPR*, art. 4.

¹⁹⁰ Opinion from Professor Philip Alston, John Norton Pomeroy Professor of Law, New York University School of Law, and director of the Centre of Human Rights.

Furthermore, the construction of meaning on the phrase the “most serious crimes” must also be interpreted as it is with the ICCPR where the interpretation is done internationally and not in each country. The example is inside the Safeguards Guaranteeing the protection of the Rights of Those Facing the Death Penalty. The terms for “most serious crimes” should not go beyond intentional crimes with lethal or other extremely grave consequences. The reports of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions emphasize that the scope of imposition of death penalty must be regarded as an extreme exception to the fundamental right to life.¹⁹¹ If the states fail to comply with the ICCPR, they will violate the fundamental of human rights and it opens possibility to breach the rights in other articles (for example, the imposition of death penalty can be considered breaching the article 7 of the ICCPR, which contains the prohibition of torture or cruel, inhuman or degrading treatment, or punishment for the accused.)

Related to the drug offences, based on international law, the justification of narcotics offences that are categorized as the “most serious crimes” has no legal standing. There are two international instruments that can be used as a guidance for not categorizing narcotics offences as the “most serious crimes”, those are: (i) United Nations Conventions against illicit Traffic in Narcotic Drugs and Psychotropic Substance 1988, and the Single Convention on Narcotic Drugs 1961 along with The Protocol 1972, and (ii) international human rights law by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1996). Based on the International instruments above, drug offences do not fulfil the threshold of the “most serious crimes”, and if the punishment is still performed, the executor country is breaching the International Law, specifically Article 6(1) of the ICCPR.

¹⁹¹ Lines, "The Death Penalty for Drug Offences and International Human Rights Law," 23.

Lastly, the imposition of death penalty in Indonesia for drug offences violates human rights seen from many regulations that are not adhered to and there is also an unfair trial which is an absolute requirement. The imposition of the death penalty is still permissible but only for the “most serious crimes”. The stipulation of these rules cannot be determined by the State unilaterally, but based on joint provisions as outlined in the international agreement. In addition, the imposition of the death penalty must be in accordance with the flow, applicable conditions, and rules applicable by international human rights law (ICCPR, and consider other core international human rights instruments).

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