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Death Penalty in Indonesian Legal System: Fallibility and the Commitment to International Covenant on Civil and Political Rights

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Abstract. Indonesia as a sovereign state has inherent ability to determine its own positive law. Departing from that, Indonesia upholds death penalty in its legal system in its Criminal Code and various *lex specialis* laws. Death penalty has been long an issue of universal concern as it relates to the non-derogable right to life. Meanwhile Indonesia has death penalty in the national laws to maintain its own interest, it is also bound to international commitment in human rights, one of them being ICCPR which has been ratified by Law number 12 of 2005. In ICCPR, state parties are only allowed to apply death penalty for most serious crimes. This article aims to find out what are the measure for most serious crime and if Indonesian law has aligned to the measure. The research employs normative qualitative method, namely research that analyzes meanings, concepts, and characteristics in related products of law and literature by drawing on diverse strategies of inquiry. This research finds out that Indonesia indeed still has some laws not yet aligned with the most serious crime measures despite as a sovereign country, it wields power to make laws (*ius poenali*) and power to implement its own laws (*ius puniendi*).

Keywords. Death Penalty, Indonesian Law, ICCPR, Indonesian Criminal Code, International Commitment

A. Introduction

Death penalty is the heaviest penalty that exists in the criminal law regime. This type of penalty naturally takes away human most basic rights, namely the right to life. The right to life is further elaborated by the Human Rights Law as non-derogable right – the rights which may not be subjected to any derogation in whatever circumstances and by whomever.¹ The right to life, on top of that, is an inherent right namely a right attained by human since he was born. Acknowledgement of the right which may not be subjected to any derogation in whatever circumstances is a significant sign of a constitutional state which respects human right principles. To a further extent, there is a common understanding that a state who is negligent in

¹ *Non-derogable* right is referred to in the Article 4 of Law No. 39 of 1999 on Human Rights. This article is a duplicated provision from Article 28I of the 1945 Constitution augmented with the right of equality before the law which is a constitutional value derived from Article 28D section (1) of the 1945 Constitution.

protecting the citizen's non-derogable rights can be presumed as conducting gross violation of human rights.²

Having said that, non-derogable rights such as right to life is bypassed through the application and execution of death penalty for the purpose of executing the final and binding court ruling. This is the case in Indonesia where death penalty is acknowledged in the Indonesian Criminal Code ("ICC")³, and numbers of specific laws (*lex specialis*) such as the narcotic law, the human rights court law, the anti-corruption law, and several other laws. These death penalty provisions has engendered Indonesia to become a retentionist state (a state that still upholds death penalty). In fact, Indonesia is a retentionist among 56 other states in the midst of the universal trend that moves toward removal of death penalty (abolitionism); with 108 countries are recorded to have abolished death penalty for all types of crime (*de jure* abolitionist), 8 countries have abolished death penalty restrictively to ordinary crimes and 28 countries have abolished death penalty in practice.⁴

Death penalty itself has gained supports and dissents throughout the decades. Beccaria argues that death penalty is an absolute futility that modernizes human malignancy and legalizes barbarity.⁵ In an execution of death penalty, the offender is faced with the risk of fallible judgement and in such event, the execution to death which has been carried out cannot be annulled. Despite new evidence (*novum*) is found to show the innocence of the offender, the death penalty cannot be revoked.

This aspect of death penalty is concerning when compared to other types of penalty as revision process (*herziening*) is always open whenever new evidence can be found. Article 264(3) Criminal Procedure Code has established that there is no limited time for the application of revision as long as three requirements are fulfilled: (i) *novum* is found, (ii) facts that are used as a judgement reason proven invalid, (iii) judge's mistake or egregious error. The third aspect about judge's mistake or egregious error is reinforced in the Supreme Court Regulation No. 1 of 1969, section 3(a). Frank Hogan, the dean of American district attorneys, once said, "there is virtually no such thing as finality in a judgement of conviction."⁶

Despite Frank Hogan depicted that conviction is susceptible to erroneous judgement, finality in criminal court is well reflected in the maxim *lites finiri oportet*, that is a judicial process must reach the end. The function of such finality is to ensure legal certainty especially for crime offenders. However, such realization of how uncertain finality can seriously affect the outcome, such as the case of death penalty, is significant to be considered.

In fact, death penalty in Indonesia is often accompanied by procedural defects such as the lack of qualified interpreters in the case of Yusman Telaumbanua in the investigation in Gunungsitoli Sectoral Police. Telaumbanua is sentenced to death when he was still 16 years old. He was forced to sign the interrogation notice (*Berita Acara Pemeriksaan*) with threat in a language he doesn't even read. Similarly, in the case of Mary Jane and Raheem Agbaje, a lack

² Rhona K.M. Smith, *et.al*, *Hukum Hak Asasi Manusia*, Yogyakarta: PUSHAM UII, (2008), p. 53.

³ ICC known originally as *Kitab Undang-Undang Hukum Pidana* (KUHP) accommodates death penalty as one of the possible criminal punishments under Article 10(a) on the provisions of basic punishment. Besides basic punishment, there is an additional punishment such as: (i) deprivations of right, (ii) forfeiture of property, and (iii) publication of judicial verdict. These types of punishment originate from the Dutch Law, namely *Wetboek van Strafrecht voor Nederlandsch Indische* (WvS) enacted in Indonesia (at the time was Dutch East Indies) with *Koninklijk Besluit* on 15 October 1915. After Indonesia gained its independence in 1945, WvS is then legalized by Law Number 1 of 1946 on Criminal Provisions. WvS itself is a very old law which came into effect in Indonesia since 1918 when Indonesia was still under the colonization era.

⁴ Amnesty International, *Death Sentences and Executions 2021*, London: Amnesty International, (2022), p. 62.

⁵ Cesare Beccaria, *Of Crime and Punishment*, Translated by Jane Grigson, New York: Marsilio Publisher, (1996), p. 16.

⁶ John N. Mitchell, "Restoring the Finality of Justice", *Alabama Lawyer* 32, No. 4 (1971), p. 367.

of interpreter has become a major issue in the due process of law. Death penalty without a proper due process of law is a flagrant disrespect to the fundamental right to life.

However, supports of death penalty are numerous. Van Veen, for an instance, argues that death penalty is needed as a community defense mechanism to deter other community members to commit similar offense. Kant's theory (*Kategorischen Imperativ*) recognizes proportional principle known as *talio beginsel* arguing that the punishment must be proportionate to the offense, e.g., murderer must be sentenced with death penalty.⁷ Death penalty finds justification as well in the absolute theory of punishment which concerns solely the fact that crime has been committed without concern for the offender's future. This theory is also known as *quia peccatum* which in essence focuses both on the subjective revenge of the offender (*subjectieve vergilding*) and the objective revenge of the offense (*objectieve vergilding*).⁸ In this theory, revenge is the legitimacy of punishment.

In Indonesia, the death penalty cases have a growing trend. Amidst the pandemic in 2020, the death penalty cases amounted to at least 87 death penalty cases (March to October) with a total of 106 defendants. When compared to the previous year during the same period (27 March 2019 up to 9 October 2019), there were 48 death penalty cases with a total of 51 defendants. By 2020, there were 355 people on a death row.⁹ Out of the 355 people, about 94 people were foreigners. Looking at this data, the number only grew concerning.

Death penalty in Indonesia, despite court ruling and positive laws, must also be reviewed from Indonesia's international commitment. Indonesia is bounded by the international commitment established through International Covenant on Civil and Political Rights ("ICCPR") ratification. The ratification was undertaken by Law Number 12 of 2005 (Law 12/2005) on the Ratification of ICCPR. In the second paragraph of 'General Elucidation' (*Penjelasan Umum*) of the Law 12/2005, the second paragraph give a detailed account on the reasons Indonesia become party in this covenant. The elucidation states that Indonesia is a rule of law country and since its inception in 1945 Indonesia has respected universally acknowledged human rights. Indonesian posture toward human rights can be learned through the fact that it had included the significant provisions on human rights in its 1945 Constitution even before Universal Declaration on Human Rights (UDHR) was established.¹⁰

ICCPR, in Article 6(1), claims right to life as an inherent right, and therefore in Article 6(2) only allows death penalty for states who still adopt it (retentionist) under two limited circumstances, which are: (i) imposed only for the most serious crimes, (ii) pursuant to a final judgement. Final judgement refers to a court ruling that is final and binding to both prosecutor and defendant. In Indonesia, the hierarchy of court plays a great factor in understanding what "final judgement" means. In a lot of cases, Indonesian court system goes from the lowest level or district court (*Pengadilan Negeri*) to high court (*Pengadilan Tinggi*) to Supreme Court (*Mahkamah Agung*) and lastly Revision (*Herziening*).

Indonesia as a state who still adopts death penalty (retentionist) must adhere to these two qualifications for death penalty, one of it being the categorization of most serious crimes. Indonesia which punishes death penalty for crimes such as blackmails, treason, state betrayal, murder, corruption, narcotics production and distribution, etc., gives this paper an urgency to

⁷ P.A.F Lamintang and Theo Lamintang, *Hukum Penitensier Indonesia*, Second Edition, Jakarta: Sinar Grafika, (2019), p. 13.

⁸ Eddy Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana*, Yogyakarta: Penerbit Erlangga, (2009), p. 12.

⁹ Adhigama Andre Budiman, *et.al*, 2020 Indonesian Death Penalty Report: Taking Lives During Pandemic, Jakarta: Institute for Criminal Justice Reform, (2020), p. 21.

¹⁰ See *Penjelasan Umum*, Paragraph 2 of Law 12/2005.

revisit whether those crimes are well categorized within the 'most serious crimes' as defined by the ICCPR. The novelty this paper offers is the analysis of Indonesian commitment to ICCPR and what it means in relations to the death penalty that is still adopted in Indonesia. Based on the introduction above, several issues are raised:

1. How can a crime be categorized as 'most serious crime' to give eligibility for death penalty?
2. Does Indonesia, through its positive death penalty laws, adhere to Article 6 of ICCPR, specifically to the limits of 'most serious crime' that is allowed for a retentionist?
3. What is the implication rendered to ICCPR commitment (Law 12/2005) with the current situation of death penalty in Indonesia?

B. Discussion

1. Most Serious Crime in ICCPR

a. The *travaux préparatoires* and Conflicting Views of Article 6 (2) ICCPR

The 'most serious crime' stipulation in Article 6(2) ICCPR needs a further analysis as without a clear standard, 'most serious crime' is open to a wide definition and subject to varying standards dependent on the various approaches of national culture, religion, tradition, and political context. In international human rights law, such open interpretation is known as relativist approach. Such relativist approach to 'most serious crime' is criticized by the International Commission Against Death Penalty (ICDP) as highly problematic and undermines the universality of norms which is essential in international law.¹¹ Article 6 sets the direction towards abolition of the death penalty by establishing state obligations to progressively restrict its use. Unfortunately, the 'most serious crime' in ICCPR has not been defined in any instruments.¹²

There are two conflicting views on what 'most serious crimes' entail. The first view (FV) argues that 'most serious crime' qualification acts as a limit to death penalty and should be understood as a restrictive measure. The second view (SV) relates to the acceptability of ICCPR by the states which tend to preserve a more permissive and wider interpretation of 'most serious crime' in order to accommodate their national interests such as guarding the national security and functioning social retribution¹³. In this rationale, the broad wording of 'most serious crimes' were meant to allow the usage of margin of appreciation to decide which crimes constitute as 'most serious crimes' taking into consideration the circumstances that exists in the jurisdiction of a state.¹⁴

The formulation of article 6(2) ICCPR gained escalated debates in the session held by the Third Committee of the UN from 13 to 26 November 1975. The debate was mainly between Uruguay and Colombia – wishing the formulation to forbid death penalty totally – and France who disagrees arguing that such strict formulation would hinder retentionist states to take up the Covenant. France was supported by Bulgaria and opposed the strict obligation to abolish death penalty as agreement to such provision will obstruct the accession process of the

¹¹ International Commission Against Death Penalty (ICDP), *The Death Penalty and the Most Serious Crimes: A Country-by-Country Overview of the Death Penalty in Law and Practices in Retentionist States*, Geneva: ICDP, (2013), p. 6.

¹² Devi Kartika Putri, "Interpreting 'Most Serious Crimes' Under Article 6(2) Of ICCPR", *Jurnal Mimbar Hukum* 31, No. 3 (2019): 421. <https://doi.org/10.22146/jmh.48979>

¹³ Social retribution is a retribution on criminals by means of fines, incarceration, or death. These punishments are a social expression of the victims' vengeance to be exacted to the offender for the interest of the whole society. Read more <https://www.upcounsel.com/lectl-retribution-and-punishment-criminal-law-basics>

¹⁴ Eckart Klein, "The Importance and Challenges of Values Based Legal Orders", *Intercultural Human Rights Law Review*, Vol. 10, No. 1, (2015): 5-6.

Convention.¹⁵ Meanwhile, Uruguay and Colombia were sponsored by Finland, Panama and Peru who proposed article 6(2) to forbid explicitly death penalty without any reservation whatsoever.

During the debate, Panama proposed a clause: “The State Parties to this Covenant recognize the necessity of promoting the abolition of the death penalty”, which was concurred with by Peru. Peru refused the initial proposal by Uruguay and Colombia and proposed an amendment which adds the opening clause “In countries where capital punishment exist,..”. The amendment gained support from Costa Rica, Brazil, Ireland, Panama, and the Philippines.¹⁶ With the clause, progressive efforts can be made by the state through its legislation to minimize and ultimately abolish the death penalty in its national law.

Subsequently, delegation from France proposed a possible compromise between the wish for abolition and the sovereignty of retentionist states, namely, to allow the states to undertake the development of their penal legislation in such a way as to move progressively towards abolition of death penalty. France’s proposal gained numerous supports from many countries and was eventually agreed upon with the finalized Article 6(2) made to accommodate two interests, namely: the abolition of death penalty considering right to life and the leniency in article 6 therefore becomes a common goal.

b. ‘Most Serious Crime’ Qualification as a Restrictive Measure

While ‘most serious crime’ meaning has not been expressly spelled out in treaty form, the debates over its drafting combined with the extensive practice of international human rights mechanisms and the principles of interpretation adopted subsequently can clarify the meaning and significance of the phrase.¹⁷ The *travaux*, as previously discussed, provides us with the understanding that it shall be unlawful to deprive any person of his life with the one exception being upon conviction of a crime which death penalty is provided by law.¹⁸ The understanding, which implies that the legality of an execution would be determined solely within the domestic legal order (national law), is ‘dangerous’ as it would permit what amounts to arbitrary killing to be masked by the trappings of law. The referral to national law as the determiner of ‘most serious crime’ has led many countries to practice excessive death penalty and not conform to the international law standards.

ICCPR gives two measures on ‘most serious crime’ determination: (i) it must be based on ‘law in force’ and (ii) it must be not contrary to any ICCPR provisions. Article 6(2) ICCPR is, indeed, not expressive on the meaning of ‘law in force’; whether it means national law or international law. However, comprehending law in force as national law and thus apply it as guideline for ‘most serious crime’ negates the purpose of providing limitation of ‘most serious crime’. For instance, the practice in Gambia through the Criminal Code, Armed Forces Act, and Anti-Terrorism Act.¹⁹ Not only in Gambia, in other states such as China, Iran, Indonesia, North Korea, Singapore, Malaysia have emitted a sense of defeat on the ICCPR’s ‘most serious

¹⁵ William A. Schabas, *The Abolition of the Death Penalty in International Law*, Cambridge: Cambridge University Press, (2002), p. 65.

¹⁶ *Ibid.*, p. 66.

¹⁷ United Nations Human Rights Council, “Civil and Political Rights, Including the Questions of Disappearances And Summary Executions”, United Nations Document, UN Doc. A/HRC/4/20, 29 January 2007, para. 39.

¹⁸ See Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, (1987), pp. 113-145.

¹⁹ See Human Rights Council, *Report of The Special Rapporteur on Extrajudicial, Summary, Or Arbitrary Executions, Christof Heyns*, A/HRC/29/37/Add.2, para. 20.

crime' truest definition. Despite, some are not bound directly due to unexecuted ratification process, as a signatory to such covenant the state must act in good faith and not defeat the purpose of the Covenant. The purpose of the Covenant of which is to provide a restrictive scope in determining 'most serious crime' in article 6.

In 1982, Human Rights Committee (HRC) has established ICCPR General Comment No. 6 (General Comment) on the right to life stated that 'most serious crimes' must be read restrictively to mean that death penalty is an exceptional measure.²⁰ Author opines that exceptional measure as established by HRC in General Comment is not strictly defined and potentially open to interpretation. Although HRC has not precisely defined the elements that exceptional measure must entail, the Safeguards Guaranteeing Protection on the Rights of Those Facing Death Penalty (Safeguards), which was approved by the Economic and Social Council in 1984, can be referred to as a recourse. The Safeguards scope 'most serious crime' as intentional crimes with lethal or other extremely grave consequences.²¹ Intentional is further defined as a premeditation and deliberate intent to kill.²² Deliberate intent to kill must be shown evidentially via direct intent, preparation to kill, and *mens rea* existence.

Under this definition then, death penalty is justified for murder on a retribution purpose or as Hor had addressed it as classic capital crime²³. Such is the retributive appeal of the exaction of life for life and in line with the absolute theory of punishment that is endorsed by Kant, Hegel, Herbart and Stahl. Kant's *talio beginsel* emphasizes on the proportionality of the penalty. Stahl's 'holy' concept of punishment is entrusted to God's representative on this earth to distribute justice (the trustee is no other than state via state's laws and law enforcer). Herbart believes that there is a common interest for the offender to be punished with equal punishment. All these subsequently taper down to confer the HRC 'intentional' element such as in the crime of murder, despite it has only been described shortly.

Furthermore, other extremely grave consequences have been defined as crimes that are life-threatening. Life-threatening can be widely subjective, therefore there must be an additional criterion annexed to the element of life-threatening in the interpretation of 'grave consequences' to scope objectively what crimes can be categorized as life-threatening. Therefore, the United Nations Commission for Human Rights (UNCHR), via Economic and Social Council, confirmed in 2010 that life-threatening are crimes where privation of life is very likely the consequence of the action.²⁴ The term 'very likely', however, stays vulnerable to various comprehension as it can refer to both: (i) crimes directly intending to cause death, or (ii) crimes which intends to merely cause injury but in the course of nature inflicting death.

In the vast borderland between "most serious" and "serious but not most serious", differences of opinion as well as practices are inevitable.²⁵ The US Supreme Court drew the line above rape—the death penalty in the United States cannot be inflicted for the crime of rape, no matter how aggravated—it is a serious, but not "most serious" crime. This ruling is clearly

²⁰ United Nations Human Rights Committee, "CCPR General Comment No. 6: Article 6 (Right to Life)", United Nations Document, 30 April 1982, para. 7.

²¹ United Nations Economic Social Council, "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", United Nations Document, E.S.C. Res. 1984/50, 25 May 1984.

²² Human Rights Committee, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, A/HRC/4/20, 29 January 2007, p. 14.

²³ Michael Hor, "The Death Penalty in Singapore and International Law", *Singapore Yearbook of International Law*, Vol. 8, 2004: 107.

²⁴ UN Economic and Social Council, "Capital Punishment And Implementation Of The Safeguards Guaranteeing Protection Of The Rights Of Those Facing The Death Penalty", United Nations Document, UN Doc E/2010/10, 18 December 2009, p. 63.

²⁵ Roger Hood, *The Death Penalty—A Worldwide Perspective*, Oxford: Oxford University Press, (2002), p. 75-77.

not uncontroversial. Whether the US Supreme Court standards have gone lower than the HRC standard is another discourse, one thing for sure, it may disserve the boundaries. As for so far, only murder is found to be justified.

Justification for death penalty in the case of murder is also found in Singapore Penal Code, in fact Singapore has made it a mandatory sentence for more than a century.²⁶ Similarly, Indonesia also penalizes murder with death penalty under the provisions of ICC.²⁷ The HRC has asserted the interpretation raised by the Safeguards and had consistently rejected death penalty for crimes that do not result in the loss of life²⁸. In 2019 via General Comment No. 36, HRC stated that the term ‘most serious crimes’ must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing.

However, the HRC definition of ‘intentional killing’ is vague of whether it must be understood as intentionally causing death or intentionally commit offense which results in death. Such vagueness provides challenges in national law, e.g., in Singapore’s unique definition of murder that extends beyond intentional killing. Murder as regulated in the section 300(c) Singapore Penal Code classifies those acts which cause death with the intention of causing merely an injury (established to be sufficient in the ordinary course of nature to cause death) to be also murder. Whether ‘Singaporean’ murder can fall into a type of ‘most serious crime’ under intentional killing is a question that needs further breakdown of related instruments. In 2022, the UN Secretary-General also confirmed that death penalty is only justified for imposition to crimes resulting directly and intentionally in death.²⁹ In the case of ‘Singaporean’ murder, the intention to cause merely an injury – even though direct – may not be intentional. Fortunately, Indonesia is blessed with much simpler interpretation as murder in article 340 ICC is explicitly stated as premeditatedly and intentionally taking away life of another person.

The UNCHR and the HRC have determined that a wide range of specific offences fall outside the scope of the “most serious crimes” including abduction not resulting in death, abetting suicide, adultery, apostasy, corruption, drug-related offences, economic crimes, the expression of conscience, financial crimes, blasphemy, bribery, corruption, and homo-sexual acts.³⁰ Unfortunately, number of countries still punish those types of crime with death penalty such as in Sudan for apostasy, in Somalia for homo-sexual acts, in China for corruption, in Indonesia for drug-trafficking, in Malaysia, Singapore, and the U.S for economic crimes³¹, and many other instances. The crimes can fall outside the ambit of ‘most serious crime’ and still be penalized with death penalty owing to the different beliefs and notions from each of the states as well as disposition towards more regional and domestically rooted understanding of term ‘most serious crime’.

For instance, the U.S and Singapore may consider economic crimes to be most serious one in their national interest. It is possible that economic crimes are seen as a threat to national

²⁶ *Singapore Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.), section 302 (first enacted in 1871).

²⁷ *Indonesian Criminal Code*, Article 340. The offense is known as *moord* and the only homicide offense categorized as capital crime. The other homicide offenses (known as *delik pembunuhan*) such as article 338 and article 339 are penalized with imprisonment of various duration.

²⁸ United Nations General Assembly, “Moratoriums on the Use of the Death Penalty: Report of the Secretary-General”, United Nations Document, A/63/293, 15 August 2008, para. 32.

²⁹ United Nations Human Rights Council, “Question of the Death Penalty: Report of the Secretary-General”, United Nations Document, A/HRC/51/7, 25 July 2022, para. 27.

³⁰ Human Rights Committee, *Civil and Political Rights, Including the Questions of Disappearances And Summary Executions: Report Of The Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions*, United Nations Document, A/HRC/4/20, 29 January 2007, para. 51.

³¹ Human Rights Committee, *Op.Cit.*, para. 24.

security and common interest, therefore, can be utilized to be the consideration of ‘most serious crime’. In Sudan, apostasy is seen as ‘most serious crime’ despite the difficulty to scrutinize it from the lens of the Safeguards with the intentional and lethal consequences element. Somalia, through state practices, has shown that religion can play a great role in determining ‘most serious crime’. It is understandable as almost all residents of Somalia are Muslim. Indonesia itself has concerned itself with drug-related offenses which grew from year to year and the President has signaled in numerous occasions of its imminent threat. In fact, Indonesian international commitment toward fighting drug offenses has been demonstrated in its ratification of United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Law Number 7 of 1997. A decade later, Indonesia establishes drug-related offenses – otherwise known as ‘*delik narkotika*’ – by enacting its own laws on Narcotics, Law Number 35 of 2009. In the narcotics law, there are five acts directly sanction with death penalty. Death penalty is one of the main contributors of death row inmates in Indonesia. Drug-related offense executions are on the rise in Indonesia, Iran, and China with approximately 1000 people are executed each year for drug offences.³²

Clearly the limitation is there and has been set by the HRC and UNCHR (now has turned to Human Rights Council). But, to what extent the state translates that limitation into practice is another challenge of national law interest vis-à-vis international human rights faith. The threat of such crime considered unworthy to become ‘most serious crime’ by the treaty body has raised issues for the state in committing to the internationally accredited meaning of ‘most serious crime’. For instance, apostasy in a country where religion is greatly respected is an issue that is deeper than committing or not committing to the Covenant. Although the issue looks ground, it is an issue at surface and when it becomes more complex such as the issue of abetting and aiding (complicity), it can escalate to a greater challenge. How about aiding a ‘most serious crime’ such as aiding a murder? Can it be deemed as ‘most serious crime’?

The Human Rights Committee opines that a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty.³³ The problem shows up in the implementation as it will be difficult practically to separate the aiding process of murder and the success of murder itself. A successful murder (and all types of crime) has to be seen as an aggregate of all successful elements (abetting, aiding, and executing). A failure in one of those elements would hinder the crimes from happening. A well-executed ‘most serious crime’ has greater chance of failing without a successful complicity. Therefore, jurists should revisit ‘most serious crime’ as not only the actual execution, but whether the aiding and abetting can be considered so too.

Despite all the thresholds laid by the HRC, it is important to note that the primary task of HRC is to convince and persuade state parties as opposed to judge.³⁴ During their regular sessions, the committees examine the state reports together with government representatives in a "constructive dialogue." This characterization provides an indication of the nature of the process: it is meant to be one of dialogue, not of adjudication in the sense of court proceedings. HRC issue documents as part of their role to assist state parties in realizing their human rights

³² Felicity Gerry and Narelle Sherwill, “Human Trafficking, Drug Trafficking, and the Death Penalty”, *Indonesia Law Review* 6, (2016): 269. <http://dx.doi.org/10.15742/ilrev.v6n3.263>

³³ UN Human Rights Committee, “General Comment No. 36”, United Nations Document, CCPR/C/GC/36, 3 September 2019, para. 35.

³⁴ Kerstin Mechlem, “Treaty Bodies and the Interpretation of Human Rights”, *Vanderbilt Journal of Transnational Law*, Vol. 42, (2009): 923, <https://scholarship.law.vanderbilt.edu/vjtl/vol42/iss3/4>.

obligations pursuant to Article 40 of the ICCPR which regulates that reports from state parties are submitted to the HRC for considerations, and as feedback, the HRC publishes their comments and observations. However, neither of the documents issued are binding to the state parties. Article 40 of ICCPR does not give HRC authority to issue legally binding or authoritative interpretations of the Covenant.³⁵ Article 40(4) gives the HRC rights to transmit comments regarding state parties report to the Economic and Social Council (ECOSOC) along with the copies of the reports it has received, however no explicit authoritative measure is conferred to the HRC or ECOSOC.

HRC in its operation “produces” comments and criticisms. For instance, toward Cameron in which the HRC expressed concerns that some of the crimes that are punishable by death penalty, such as secession, espionage or incitement to war are “loosely defined”.³⁶ Furthermore, during the periodic review by the HRC in 2011, Iran’s use of death penalty for drug crimes were discussed. The HRC only expressed concerns about the “extremely high and increasing number of death sentences [...] the wide range and often vague definition of offenses for which the death penalty is applied.”³⁷ Consequently, the HRC recommended the Iranian government to revise the penal code to only the restrictive meaning of ‘most serious crimes’ according to Article 6(2) of the Covenant and the General Comment. In some more instances, HRC seems to be able to only give comments and criticisms, and as a result, recommendation only to make the author learn the non-binding nature of HRC documents.

In several measures of the so-called “restrictive”, there is grey area which will be discussed in the next sub-chapter and how state responds to that vagueness via practices. The non-binding nature of HRC remarks – via its routine comments (not the General Comment), report of the Secretary-General, Report of the Special Rapporteur, and so on – nevertheless, provides guidelines for ‘most serious crimes’ measure. The guidelines of measure can potentially crystalize into customary international law despite it would find many challenges as customary international law must involve widespread, uniform, and consistent practice (objective element) and *opinio juris*.

C. Grey Area of Interpretation and Practices of the State Parties

While it is clear that ‘most serious crimes’ must fulfill the elements that are set by the Safeguards, there is some vagueness or grey area in the Human Rights Committee’s interpretation of ‘most serious crimes’, one of it being a terrorism crime which is determined as falling outside the scope of ‘most serious crimes’.³⁸ The Human Rights Committee has criticized Egypt on its anti-terrorism law strictly because it imposes death penalty. This can cause vagueness in states perspective as terrorism certainly fulfills the two elements of intentional and causing lethal or other extremely grave consequences. Indonesian anti-terrorism Law (Law No. 5 of 2018) which punishes four types of acts with death penalty in the Article 6 and Article 10A – terrorism with force, causing mass victim, destruction of strategic vital object and facility, supply of illegal weapons and radioactive components – is an object of such grey

³⁵ United Nations Human Rights Committee, “United States Comments on the Concluding Observations of the Human Rights Committee”, United Nations Document, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, p. 9.

³⁶ United Nations Human Rights Committee, “Concluding Observations: Cameroon”, United Nations Document, UN Doc. CCPR/C/Add.116, 4 November 1999, para 14.

³⁷ Devi Kartika Putri, *Op.Cit.*: 422-423.

³⁸ Human Rights Committee, Civil and Political Rights, Including the Questions Of Disappearances And Summary Executions: Report Of The Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions, United Nations Document, A/HRC/4/20, 29 January 2007, para. 51.

area. The crime that looks as though it may fulfill the elements of “seriousness” is sometimes classified as outside the scope of most serious crimes. As an inevitable result, the practices in the state parties oftentimes vary. There are states that abolish death penalty for all crimes, while some might still uphold for several specified crimes, and the rest stays retentionist.

For instance, by the mid-19th century, the abolitionist movement had achieved enormous influence in the Northeast states. Many states have reduced executions of serious crimes. In 1846, Michigan became the first state in the United States to abolish death penalty for all crimes except treason and Michigan’s 1962 Constitutional Convention codified that the death penalty was fully abolished. After that, Rhode Island and Wisconsin abolished the death penalty for all crimes. State of Vermont has also abolished death penalty for all crimes, except treason. At the end of the 19th century, we can see that many countries besides the US have also abolished death penalty, such as: Venezuela, Portugal, Brazil, and Ecuador.

Some countries have gone further by forbidding death penalty in their constitution such as France which bans death penalty in the Article 66-1 of the Constitution of the French Republic: “No one can be sentenced to the death penalty” (*Nul ne peut être condamné à la peine de mort*). Similarly, in the Netherlands, the death penalty (*doodstraf*) has been abolished since 1870 for ordinary offenses and 1983 for all offenses.³⁹ Article 114 of the Netherlands Constitution (*grondwet*) lays out the prohibition for death penalty. Article 114 says “*De doodstraf kan niet worden opgelegd*” that means death penalty cannot be imposed.

Oftentimes the practices are divided for certain crimes, e.g., corruption. In some countries, act of corruption by government officials is punished with death penalty. Thailand, for instance, punishes the act of bribery by the Government officials with maximum punishment of death penalty. The Anti-Corruption Act of 1999 has been amended to state that serious acts of corruption can now see the convicted at risk of death by lethal injection.⁴⁰ In Indonesia, corruption committed under special circumstances is penalized with death penalty as regulated in the Article 2 (2) of the Corruption Law.⁴¹ Iran also punishes corruption (*Moharebeh*⁴²) with death penalty. In Vietnam, the same situation exists.

On the contrary, several states set out imprisonment as the maximum punishment for corruption. In Australia, criminal act of corruption is not sanctioned with death penalty. It is regulated under the Australian Criminal Code Act of 1995. For instance, for the act of bribery – regulated in the Division 141 and 142 – is punished with the maximum of 10 (ten) years imprisonment.⁴³ In Malaysia, who applies common law legal system, serious bribery is imprisoned up to 20 years and a fine of not less than five times the sum/value of the gratification or MYR 10,000, whichever is higher. This is regulated under the Malaysian Anti-Corruption

³⁹ Annemarieke Beijer, “The Debate on Capital Punishment in the Netherlands and Germany”, *International Criminal Justice Review* Volume 10, (2000): 98, <https://doi.org/10.1177/105756770001000106>.

⁴⁰ ThaiLaw Forum, “Death Penalty For Corruption in Thailand”, <http://www.thailawforum.com/death-penalty-for-corruption-in-thailand/>, accessed 6 February 2023.

⁴¹ The Article 2 section (2) of Law No. 31 of 1999 on the Eradication of Corruption threatens the corruption act done under ‘special circumstances’ with death penalty. In the explanation chapter of the article further explains that there are four circumstances which can be deemed as ‘special circumstances’ namely: (i) the state is in an emergency as regulated in law, (ii) amidst the national natural disaster, (iii) a repetition of crime act (recidivism), and (iv) the state is in economic and monetary crisis.

⁴² *Moharebeh* in Iran can be roughly translated to waging war against God, or enmity against God. The philosophy behind this is the belief that corruption on earth causes a spread of disorder in the land.

⁴³ The punishment varies and is divided into the act of bribing a Commonwealth public official, offering or providing corrupting benefits to a Commonwealth public official, or whether it is because the false accounting offenses. The heaviest is the act of bribing to the official which can be imprisoned for maximum 10 years.

Commission Act 2009 (MACCA). In the United States, any corruption types of act (bribery, foreign bribery, corporate bribery, private-affiliated bribery) is not sanctioned with death penalty. The primary statute that expressly criminalizes criminal act of corruption in the federal level is 18 USC Section 201. The statute has two principal subparts: Section 201(b), which criminalizes bribery, and Section 201(c), which prohibits the payment or receipt of gratuities.

Not only corruption, various and differing practices are found in other types of crime such as narcotic offenses. In Malaysia, under section 39B of the Dangerous Drugs Act, those in possession of 15 g or more heroin and morphine; 1,000 g or more opium (raw or prepared); 200 g or more cannabis; and 40 g or more cocaine will receive mandatory death penalty. In the United States, drug offenses involving large quantities or mixtures of heroin, cocaine, ecgonine, phencyclidine (PCP), lysergic acid diethylamide (LSD), marijuana, or methamphetamine can be punished with death penalty. However, in practice, no one has been executed for uses of the substances. It involves constitutional matters and the Federal Death Penalty Act of 1994, 18 USC § 3591 on Sentence of Death, the Criminal Procedure Code, and so on. As an additional note, there are numerous voices of disagreement toward death penalty in the U.S as it is seen as a violation to basic human rights. South Korea penalizes some drug offenses with death penalty, yet it has not executed any offender since 1997. Therefore, South Korea has *de facto* moratorium. Having said that, the number of drug offender executions is high in several countries including Iran, North Korea, Saudi Arabia, China, Indonesia, Malaysia, Singapore, and Vietnam.

2. Adherence of Indonesian Death Penalty to ‘Most Serious Crimes’ Notion

Indonesian death penalty is scattered in the ICC and special laws, also known as *lex specialis*. Some types of crime are easy to be qualified based on the two elements discussed previously, while others are not. Crime such as murder which is regulated under the Article 340 perfectly fulfills the elements in the Safeguards. Murder is not identical all over the world, as it can be tricky as in the case of Singapore. However, the murder as outlined in the ICC has the intentional elements clearly expressed in article 340 (“dengan sengaja”). In Indonesian criminal law theory, such expression of delicts requirement is known as *delicts bestandellen*. Besides the intentional element, the grave consequence is also explicitly mentioned as taking away the life of another person.

Hijacks resulting in death is punished with death penalty via article 444 of ICC. The Author opines that this fulfills the two elements as there is an intent and consequently a loss of life. Article 124(3) of ICC is a little trickier to deal with. This article punishes with death penalty several acts such as: divulging to enemy, destroying an occupied posts or logistics of national armed forces, desertion, uprising, causing a confused riot. Determining whether these acts fall inside or outside the scope of ‘most serious crimes’ is rather difficult as the elements may not be as easily predicted as the predecessor. Divulging to enemy may be deemed as most serious only if it can be proven to have caused lethal or other extremely grave consequences. The same goes for the other three. Without clear indication that it will cause consequences in such a way that is potential to cause loss of life, then it is hard to see how such crime can be most serious. Indirectness in causing consequences may raise more questions.

Theft with force causing death or serious injury by two or more offenders are punished with death penalty. Such stipulation exists under article 365(4) of ICC. Similarly, blackmail with force leading to serious injury or death is also a capital crime under article 368(2) of ICC. Have two of these crimes not included serious injury as a possible cause, it will be in the scope of ‘most serious crime’. Serious injury is of questionable nature of whether it is the

consequences referred to in the Safeguards. Consequences must be life-threatening and “life-threatening” as understood by UNCHR is a situation in which loss of life is very likely. In this case, serious injury has to be further analyzed whether it serves the “life-threatening” aspect of the consequence.

Outside ICC, Indonesia upholds death penalty in specific laws such as terrorism law, narcotics law, anti-corruption law, and the human rights court law. Each has different characteristic and therefore needing different approach in regard to death penalty. There are six provisions in narcotics law (Law Number 35 of 2009) which contain death penalty. Drug-related offences have been a subject of debate for decades of whether it can be assumed as ‘most serious crime’. United Nations Office on Drugs and Crime argues that although drugs and crime kill, the government should not kill because of them.⁴⁴ The HRC, in a lot of occasions, have clarified in a tone that does not permit death penalty for drug offenses which does not involve homicides. In its Concluding Observation to Thailand, the HRC urged the state to review its imposition of death penalty for offenses related to drug-trafficking. It is plausible to argue that drug offenses do not have the capacity to intentionally cause lethal consequences, in this case, loss of life. The main motive is financial gain, and death is oftentimes a trickle of aftereffects. This can be safely argued yet the emergency felt by the government to respond to the drug and narcotic problems is in surge. The numbers only grew in Indonesia when it has been too high (almost 100 cases of drug offenses per three months in average) with myriad of international networks operating locally. The issue of state interest in protecting the citizens vis-à-vis international commitment will be further analyzed in the next sub-chapter.

The Human Rights Court Law in Indonesia (Law Number 26 of 2000) has two articles which contain death penalty, namely: article 36 and article 37. In Article 36, it stipulates that every person who carries out genocide in five *modus operandi*, such as: massive killing, causing massive physical or mental suffering, creating living conditions which will result in destroy, forcing actions with intent to prevent birth in large scale, and forcibly transferring children out of the group. Furthermore, article 37 punishes crimes against humanity (massive and systematic one) in the form of murder, extermination, forced eviction, arbitrary deprivation of liberty, and apartheid, with death penalty.

The Human Rights Courts Law is one of the reformed era products of law to answer many accidents of human rights violation which had happened in the past. Genocide is an intentional killing of group of people, and needless to say, a most serious crime. Crimes against humanity in the five forms specified above fall within ‘most serious crime’ as it successfully demonstrates the intent through being systematic and massive and generate in an adverse consequence.

Anti-terrorism Law (Law No. 5 of 2018) punishes four types of acts with death penalty in the Article 6 and Article 10A, namely: terrorism with force, causing mass victim, destruction of strategic vital object and facility, supply of illegal weapons and radioactive components. Despite being called by HRC as unworthy of ‘most serious crime’ status, the Author thinks that setting terrorism in such an ecosystem where it terrifies the potential offender is very crucial. Think about the countries who have long abolished death penalty in the West Europe such as the case of Pym Fortuyn who was shot by Volkert V. Graaf days before general election, the killing of Theodore Van Gogh by Mohammad Bouyerihe, Charlie Hebdo shooting in Paris which has killed 12 innocent lives and injured 11 others. Such inhumane acts of terrorism must

⁴⁴ UN Office on Drugs and Crime, “Organized Crime and its Threat to Security: Tackling a Disturbing Consequences of Drug Control”, E/CN.7/2009/CRP.4, 2009, p. 15.

certainly intrigue the deepest recesses of our conscience and wonder whether death penalty is well-deserved in such scenarios. In Author's opinion, terrorism offense especially as regulated in Indonesian anti-terrorist law has fallen as a most serious crime.

Corruption committed under special circumstances⁴⁵ is subjected to death penalty. Corruption (bribery, and in other forms) as well as economic crimes is on the "hot list" of the HRC criticisms of widening implementation of 'most serious crime'. Not only Indonesia, but many countries which treats corruption as a capital crime gets the "spotlight" in HRC periodic reports. Despite the effects that corruption may cause to living conditions – specifically under special circumstances which are presumably more challenging than normal time – the corruption is deemed by the HRC and the UNCHR as well outside the scope of 'most serious crime'. The elements are felt to not exist namely: intent on causing lethal or extremely grave consequences.

3. State International Commitment vs. State Jurisdictional Sovereignty

Jean Bodin in *De Republica* argues that state sovereignty is the most supreme, absolute and eternal power which is undivided and unlimited. Bodin argues that sovereignty is a characteristic and attribute of a state, without which, there is no state. Furthermore, in *Six Books of the Commonwealth* argues that sovereignty is not limited either in power, charge, or strength.⁴⁶ Sovereignty, as the most supreme power, becomes a source of law which cannot be bound or restricted by other laws.

Besides Bodin's view on state sovereignty, sovereignty in the international law scope must refer to the nation state notion which was conceived by Westphalian system (Westphalia Agreement 1648). The nation state notion argues that a state has both internal and external sovereignty. Internally, a state is sovereign and equipped with an exclusive obligation to its own regions free from any external interventions. A state is a holder of law supremacy to its people, thus, determine its own fate through its own laws.

Grotius, a father of International Law, states that an external sovereignty is a sovereignty of a state in the relation to another state. External sovereignty refers to a condition of independence and equal right between states. As Max Huber, a judge of the Permanent Court of International Justice, once said in the *Island of Palmas* case, independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a State.⁴⁷ As a corollary, state exercises its own national laws as one of the many other functions it has.

The long-standing issue of exercising national laws and state international obligation (commitment) is a complex matter that involves the interaction of national law and international law framework. On one hand, a state has international obligations made by agreeing (acceding) to international law (Covenant). On the other hand, it has strong national interest based on its unique needs and national situation. Not rarely does the national self-interest contradict the international obligation. In that case, a primacy to either international commitment or national interest must be determined.

A state is limited in applying its power of sovereignty arbitrarily and without good reasons. The administration of such sovereignty and territorial jurisdiction must be based on a

⁴⁵ There are four circumstances which can be deemed as 'special circumstances' namely: (i) the state is in an emergency as regulated in law, (ii) amidst the national natural disaster, (iii) a repetition of crime act (recidivism), and (iv) the state is in economic and monetary crisis.

⁴⁶ Sefriani, *Hukum Internasional: Suatu Pengantar*, 2nd Ed (Jakarta: Rajawali Press, 2017), p. 12.

⁴⁷ *Netherlands v USA, Island of Palmas* case (1928), p. 838.

justified purpose with close attention to principles of good governance. The modern constitutional state, i.e., Indonesia, has set a benchmark for this in which constitution is meant as a control mechanism for the government in relation to its people. International instruments as external means for the states in justifying their policy and actions.

The international principle such as *pacta sunt servanda* also obligates whichever states who has contracted into an international agreement to commit with a good intention. In the context of human rights obligation establishment, *pacta sunt servanda* “obligates” the states to adhere and align its international human rights duty with its own national laws, extending to its Constitution, human rights law, criminal law, and other related laws that may impinge its human right commitments.

It is erroneous to see state’s submission to international law as undermining the state sovereignty. Ironically it is with the submission to international law that the state’s sovereignty manifested as only a sovereign state who can enter and be state parties to international agreement or covenant and be willing to commit to all of its obligations stipulated therein. In other words, bounding self to international law is a conspicuous show of sovereignty and only through then, the state manifests its sovereignty.

However, issue arises as with the accession of ICCPR, state parties are expected to abolish death penalty gradually, or in the case of retaining, it must only be reserved for most serious crimes. The obligations arise from such international commitment may conflict outright the national laws which uphold death penalty. Such clashes of the two are inevitable as the phrase ‘most serious crime’ is left very subjective and open to any interpretations before the Safeguards measure is adopted and HRC came with its interpretation. Interpretation by HRC which narrows the scope may conflict with state’s subjective interpretation before the existence of Safeguards, as one must note that the Safeguards were adopted 18 years (in 1984) after the ICCPR was adopted in 1966 via General Assembly resolution 2200A.

In theories of sovereignty, state wields the power to make laws (*ius poenali*) and the power to therefore punish in case violation occurs (*ius puniendi*). By becoming state parties to ICCPR, different understanding of most serious crime (as explained in the previous sub-heading) is well translated in those *ius poenali* and *ius puniendi*. However, the sovereignty notions shall not be an “excuse” for states to outright disrespect the protection of human rights there are in the covenant which it consents to.

c. Conclusion

In the Indonesian Constitution, Article 28A guarantees right to life. However, the constitution unlike France’s, has not said anything explicit regarding death penalty. The Law on Human Rights (Law No. 39 of 1999) further specified right to life in the Section 9. The Human Law on Human Rights existed as a result of the unsatisfactory protection of human rights since its independence.⁴⁸ Yet the law has also not specified a state’s position on death penalty. Death penalty laws in the ICC and other *lex specialis* have, many times, been reviewed in the Constitutional Court. The Court, in Constitutional Court Decision No. 15/PUU-X/2012, claimed that death penalty is only available to most serious crimes. However, the measure of most serious crime is quite different with those of HRC. Constitutional Court assumes a crime as ‘most serious crime’ when it causes extraordinary fear to the society.

As learnt in sub-heading (2), some norms in Indonesian law have digressed from the measure and also scope of most serious crime. Despite so, such digressions have been treated

⁴⁸ Paragraph 3, General Elucidation, Law Number 39 of 1999 on Human Rights.

as necessary for the common and national interest. In responding to such anomaly, Indonesia in its new Criminal Code (Law Number 1 of 2023), which will be effective in 2026 onward, regulates death penalty as a “special” criminal sanction in which if the offender shows a reasonably good behavior within ten years and with due process of evaluation, the government through ministry of law and human rights can commute death penalty to life imprisonment. In this new regime, death penalty is viewed as the very last resort to uphold social safety (article 89). Despite so, such new regulation and approach has not answered the digression from international measure set by HRC.

Indonesia, is indeed, in the dilemma of the two: international commitment and jurisdictional sovereignty. It is not easy to strike a balance as the choice is quite binary (either abolishing or retaining death penalty). International commitment to ICCPR via Law 12/2005 should not be offset with the national interest of holding to death penalty. However, abolishing death penalty may not be a solution as even with death penalty, corruption cases have grown worse, murder cases increased, terrorisms in past few years have increased. The reasonable position must be taken by Indonesia to review its death penalty for crimes that may exceed the scope of ‘most serious crimes’ in order for national interest to be accommodated while not compromising international commitment.

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