CHAPTER II
LITERATURE REVIEW

A. Conceptual Framework

1. Historical of International Human Rights Law

Just as the French Revolution ended the divine rights of kings, the human rights revolution that began at the 1945 San Francisco conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law. States have had to concede to ordinary human beings the status of subjects of international law, to concede that individuals are no longer mere objects, mere pawns in the hand of states.[11]

In general, every human being has inherent right to life. The right shall be protected by law and no one shall be arbitrarily deprived of his life.[12] The emergence of human rights law in the international sphere is one of the most significant developments to have taken place since the end of the Second World War.[13]International Human Rights Law has challenged and jettisoned the traditional rules relating to State sovereignty. These traditional rules perceived international law as a law primarily related to sovereign States in which non-State actors, in particular individuals, had very little role to play. A key aspect of the

[11] Sohn, 'The New International Law : Protection of the Rights of Individuals Rather than States' (America : 32 American ULR, 1982), P.1.

[12] International Covenant on Civil and Political Rights, article 6.

[13] Javaid Rehman, *International Human Rights Law,* (England : Pearson Education Limited, 2010), P.3.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

traditional legal order was the reliance of States upon the principle of non-interference in their domestic affairs, which meant that violations of human rights were not a matter of international concern.[14]

In historical terms, the rights of individuals (with the limited exceptions of treatment of aliens and arguably that of humanitarian intervention) was a subject that was not addressed by international law.[15] Even in relation to the aforementioned exceptions, the international legal order represented the dominance of States without according individuals any specific rights. Thus, in the absent of independence legal personality for individuals, if their rights were violated by a foreign State, it was the State of the victim that was authorized to bring a claim for violation of their rights. In the case of humanitarian intervention, while force was sometimes used to intervene military to protect (primarily religious) minorities, such actions were often accompanied (if not dictated) by selfish motives, e.g. territorial gains.[16] Individuals themselves were unable to claim the right of humanitarian intervention nor was there a wholesale recognition of any such right at the global level.[17]

---

[14]Bilder, 'An Overview of International Human Rights Law' *Guide to International Human Rights Practice,* (England : Transnational Publishers, 2004), P.4.

[15]McGoldrick, *The Human Rights Committee : Its Role in the Development of the International Covenant on Civil and Political Rights* (United Kingdom : Clarendon Press, 1991), P.3.

[16]Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention' 19 *Michigan Journal of International Law* (1998), P.1005.

[17]Since the ending of the cold war, the Security Council under Chapter VII of the United Nations has on occasion authorised collective armed intervention in response to gross violations of human rights. See Chesterman, *Just War or Just Peace* "The Security Council and Human Rights: Lesson

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

The growth and expansion of human rights law has brought about a radical change to the ideological bases of international law. Such a change is evident through a variety of ways. Firstly, it is now well established that investigations into human rights abuses can not be prevented by arguments base upon the Principle of State sovereignty and domestic jurisdiction.[18] These are concern for the International Community as a whole, with the going recognition that the protection of fundamental human rights is an obligation *ergaomnes.*[19] Secondly, since the last quarter of the twentieth century, there have been monumental changes in the bodies dealing with human rights issues, as well as mushrooming of international human rights instruments. Specific treaties focusing *inter alia* upon the prohibition of racial discrimination, torture, enforced disappearances and those defining and promoting children's and women's rights have been adopted.

Further significant modifications have taken place in field of human rights during the opening years of the new millennium. The United Nations Human Rights Council was established in 2006, abolishing the Human Rights Commission.[20] New procedures of review

---

to be learned from the Iraq – Kuwait Crisis and its Aftermath" (United Kingdom : Clarendon Press, 2001); P. 107.

[18]Javaid Rehman, *Op.Cit,* P.4..

[19]*Barcelona Traction, Light and Power Company, Limited Case (Belgium v. Spain),* Judgement 5 February 1970, (1970) ICJ Reports 3, 32; Jenning and Watts, *Oppenheim's International Law* (NewYork : Oxford University Press, 1996) vol. 9, P.5.

[20]Human Rights Council, *Human Rights and Death penalty in International Law*, www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf, downloaded on 04 May 2013

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

of State practices have been brought into operation, and human rights is now fortunately beginning to engage with highly significant (although previously ignored) area such as the human rights of disabled persons.[21] Thirdly, the setting up of various mechanisms to published, promote and protect human rights has heightened human rights awareness which has had a significant impact on other areas of international law such as international criminal law, international refugee law and international humanitarian law. Fourthly, the procedural advancement of international human rights law has meant that individuals, groups and other non-State actors are more directly involved in challenging violations of their rights and have no more recognized role within international courts, committees and tribunals.

Notwithstanding these advances, in practice human rights law continues to be constrained and limited. Subsequent chapters establish that not only are there substantive weakness in existing rights, the application of these rights is impaired by the absences, weakness and limitations of implementation mechanisms and procedures. Our analysis will elaborate upon many of these weakness and limitations. The lack of enforcement machinery upon all areas of international law, although its impact is felt most vividly and fully in human rights law.

The inception of international human rights law is generally related to the developments that took place at the end of Second World

[21] International Convention of the Rights of Persons with Disabilities and its Optional Protocol, UN GAOR, 61st Sess, Item 67(b), UN Doc. A/61/611 (6 Dec 2006).

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

War. After that war, the United Nations was established to 'save succeeding generations from the scourge of war . . . and to reaffirm faith in fundamental rights'.[22] The United Nations Charter,[23] which represents the constitutions of the organization, is also an international treaty, the provisions of which bind all States that are parties to the treaty.[24] The Charter assigns a range of functions to the United Nations, and although there are references to human rights, there has been considerable debate over the priorities which dictate the role and performance of this organization. As noted above, the UN Charter contains a number of references to human rights. According to the preamble of the Charter : We the peoples of the United Nations, determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . have resolved to combine our efforts to accomplish these aims.

After the adoption of the Universal Declaration of Human Rights (UDHR),[25] the next stage was to establish legally binding principles on international human rights. In its Resolution 217B and E (III) of 10 December 1948 the General Assembly, through the ECOSOC, requested the Human Right Commission to continue accord priority to

[22]Preamble of the United Nations Charter (1945).

[23]26 June 1945, 59 Statue of United Nations Charter .

[24]The substantive provisions of the Charter also binds non-State parties in general international law.

[25]10 December 1948, UN GA Res. 217 A (III), UN Doc.A/810 at 71 (1948).

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

the drafting of the International Covenant and measures of implementation.[26] Originally it had been intended to draft a single covenant covering all the fundamental rights. However, with the emergence of Cold War and the rise of new nation States (with their own priorities) it became impossible to incorporate all the rights within one document.[27] The Western States put the emphasis on civil and political rights whereas the focus of the socialist and newly Independent States was upon economic, social, and cultural rights and the right to self-determination. There were divisions as regards having civil and political rights, alongside the economic, social and cultural rights within the text of a single treaty. Those in favour of a single Covenant argued that human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. All rights should be promoted and protected at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured.[28]

It was ultimately decided to have two different treaties, one

[26]Ghandhi, *The Human Rights Committee and the Right of Individual Communication : Law and Practice* (England : Ashtage Publishing Co, 1998), P.3.

[27]Steiner, Alston and Goodman, *International Human Rights in context : Law, Politics, Morals : Text and Materials* (NewYork : Oxford University Press, 2008), P.136.

[28]Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc.A/2929 (1955), 7 para 8.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

covering primarily civil and political rights (i.e. ICCPR)[29] and the other economic, social and cultural rights (i.e. ICESCR).[30] As we shall analyze in detail, although some rights contain within this treaties overlap, there are, nevertheless, substantial differences in the content, nature of obligations and implementation mechanisms. The ICCPR and the ICESCR were approved by the third Committee of the General Assembly in December, 1966. Each Covenant required 35 ratifications and both came into force in1976. The Optional Protocol was approved in 1966 and required 10 ratifications. As of 8 April 2009, there are 163 States parties to the ICCPR. In addition, 112 States have made declarations pursuant to the First Optional Protocol to the ICCPR.[31] The Second Optional Protocol aimed at the Abolition of Death Penalty was adopted and opened for signature, accession or ratification on 15 December 1989.[32] It came into operation on 11 July 1991. There are currently 71 States parties to this Protocol. The ICCPR consists of a preamble and 53 articles, which are divided into eight parts. The ICCPR consists of the following rights :

Article 1 The right to self-determination

Article 6 The right to life

[29]Adopted at New York, 16 December 1966.Entered into force 23 March 1976.GA Res. 2200A (XXI) UN Doc.A/6316 (1966) U.N.T.S. 171; 6 I.L.M. (1967) 368.

[30]Adopted at New York, 16 December 1966.Entered into force 3 January 1976.GA Res. 2200A (XXI) UN Doc.A/6316 (1966) U.N.T.S.3; 6 I.L.M (1967) 360.

[31]New York, 16 December 1966 United Nations, 999 U.N.T.S. 302.

[32]Annex to GA Res. 44/128. Reprinted in 29 I.L.M (1990) 1464. See generally Schabas, *The Abolition of Death Penalty in International Law* (Cambridge : Cambridge University Press, 1997).

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Article 7 Freedom from torture or cruel, inhuman or degrading treatment or punishment

Article 8 Freedom from slavery and slave trade

Article 9 The right to liberty and security

Article 10 The right of detained persons to be treated with humanity

Article 11 Freedom from imprisonment for debt

Article 12 Freedom of movement and choice of residence

Article 13 Freedom of aliens from arbitrary expulsion

Article 14 Right to a fair trial

Article 15 Prohibition against retroactivity of criminal law

Article 16 Right to recognition everywhere as a person before the law

Article 17 Right to privacy for every individual

Article 18 Right of freedom of thought, conscience and religion

Article 19 Right of opinion and expression

Article 20 Prohibition of propaganda for war and of incitement to national, racial or religious hatred

Article 21 Right of peaceful assembly

Article 22 Freedom of association

Article 23 Right to marry and found a family

Article 24 Rights of the child

Article 25 Political Rights

Article 26 Equality before the law

Article 27 Rights of persons belonging to minorities

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

The ICCPR has many rights are covered by UDHR or other international and regional human rights treaties. However, unlike the UDHR, the ICCPR does not accord protection to the right to property (covered by Article 17 UDHR and ECHR first protocol).[33] For the most part the ICCPR grants rights to all individuals who are within States parties' territories and are subject to their jurisdiction, regardless of their constitutional or political status. Thus, the protection covers nationals, aliens, refugees and illegal immigrants. The reference in the ICCPR to 'everyone' or 'all persons' in relation to a majority of rights confirms this view.[34] In order to ensure the rights within the Covenant, States parties undertake to provide for an effective remedy, by competent and judicial authorities, and to ensure the enforcement of these remedies by competent authorities.[35]

The supremacy of international law prioritizes law over national law. Gerald Fitzmaurice wrote that the principle of supremacy is 'one of the great principles of international law, informing the whole system and applying to every branch of it'. In general terms, the principle of supremacy on international law seeks to subordinate the sovereignty of states to international law. One of its manifestations is that international law is supreme over, and takes precedence in the international legal

[33]ECHR, First Protocol (adopted 20 march 1952) entered into force 18 May 1954.

[34]McGoldrick, *Op.Cit*, P.20-21.

[35]International Covenant on Civil and Political Righrs, article 2 (3).

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

order, national law.[36] In the event of a conflict between international law and domestic law, international law will have to prevail in the international legal order, domestic law being considered a fact from the standpoint of international law. This aspect is at the heart of the law of treaties[37] and the law of international responsibility.[38]

2. Indonesia

2.1. Indonesia Legal System

Indonesia is a former of Dutch Colonial which was embracing the principle of concordance. Since Colonial was embraced the Europe Continental System, and we adhered the principle of concordance from Colonial, thus the legal system in Indonesia was organized and written legal system which is called Civil Law.[39]

This legal system was developing in mainland Europe countries. Actually, originally came from the codification of Roman Empire's law under *Justinianus* Empire century of VI B.C. In its development, the legal principles contained in the *Corpus*

[36]Javaid Rehman, *Op.Cit.,* P.68.

[37]Vienna Convention on the Law of Treaties, article 27 and 46.

[38]Art. 3 and 32 of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter Articles on State Responsibility). The Article7ys are contained in the Annex of UN Doc A/Res/56/83 (28 January 2002) and reproduced in *James Crawford*, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002). A comparable principle is contained in Art. 35 of the Draft Articles of the ILC on the Responsibility of International Organizations, UN Doc A/CN.4/L.270 (2007). The Draft Articles of the ILC on the Responsibility of International Organizations do not contain an article comparable to Art. 3 of the State Responsibility Articles, *see* discussion in Report of the ILC on the work of its 55th Session (2003), UN Doc A/58/10, Suppl. 10, par. 9–10 of the Commentary to draft Article 3.

[39]R. Abdoel Djamali, S.H., *Pengantar Hukum Indonesia,* Revised Edition, (Jakarta : Rajawali Press, 2006). P.69.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Juris Civilis, became a basic formulation from the codification of law in mainland European countries, such as Germany, Netherlands, France, Italy, and as well as Latin America and Asia, including Indonesia during the Colonial Government.[40]

The main purpose from this Civil Law is obtained the legal binding force, as embodied in the form of regulations and laws systematically, which is arranged in a particular codification and compilation. Law Assurance become a major purpose from this Civil Law system. Assurance only can be attained if the law is codified and written. With the aimed of law and Law Assurance purpose, a Judge cannot be freely create the law that have binding legal force. The Judge's function "only to set and interpreting the regulations within the jurisdiction. The last decision of a Judge in a case just band the both parties only (*doctrins Res Ajudicata*).[41]

For example, Civil law systems do not use juries. Instead, decisions as to guilt or innocence are made by a panel of three judges. One of these judges is the Chairman and is usually more senior than other two judges. Typically, the judges produce a single, joint judgement (*Putusan*). It is virtually unknown for a judge to discent from the decision of the other two members of the panel and dissenting judgements are rarely produced and never released (except, recently, in the Commercial Court).

[40] *Ibid*

[41] *Ibid*

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Typically, Civil Law judgments are much shorter than Common Law judgments.[42] In Indonesia, for example, the judgment may be only a few pages. In major cases, judgments tend to be long, of a length to be expected in a Common Law Appeal Court, but this is usually because the Courts often summarize all the evidence in the judgment. Legal reasoning to distinguish previous cases and do forth is relatively rare, because Civil Law systems do not have a system of precedent.

Precedent, in Common Law systems, is the principle that previous cases with similar facts on an identical point of law will bind courts of equal or lower status. In Civil Law systems, courts are not bound by decisions of courts at the same level or higher. This means that there is little need for law reporting in Indonesia and certainly not for published authoritative sets of judgments. Some, limited collections of judgments are published (for example, *Yurisprudensi*) but they are ad hoc in nature. In fact, statements as to preferred interpretation or policy issued by the Supreme Court in the form of Circular Letters (*Surat Edaran*), rather like practice notes in the Common Law System, tend to be more influential than previous decisions, even of the Supreme Court.

Another key distinction between Common Law and Civil Law systems is that Civil law systems are 'inquisitorial' in nature

[42]Lindsey, T, *Indonesia : Bankruptcy, Law Reform & the Commercial Court*, (Sydney : Desert Pea Press, 2000).

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

while Common Law systems are ‘adversarial’. This means that in Common Law systems, the judge acts as an impartial referee while the parties present their witnesses in an attempt to convince a jury or, in most cases, the judge. The judge generally does not ask questions of witnesses and is usually active only in enforcing the rules of evidence and procedure.

In an inquisitorial system, however, the judges conduct an enquiry into the truth of what occured, that is the facts behind the legal issues in dispute. For this reason, judges control the proceedings and may directly question witnesses. In some Civil Law systems, the judges may even dominate the hearing to such an extent that lawyers are left with few questions to ask at all.

The layout of an Indonesian court reflects the inquisitorial nature of Civil Law proceedings. The judges face the witness who sits alone in a chair in the centre of the court. Lawyers are placed off to the sides, reflecting their relatively reduced significance in proceedings. Judges may sometimes even call witnesses that the parties have not called, demand that additional witnesses attend or even refuse to hear from witnesses called by the parties. There is also less emphasis on the rules of evidence in inquisitorial systems as judges tend to allow most material in and then decide on its merits at a later point.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

In Indonesia, prosecution is always conducted by state officials known as prosecutors. These are always government employees and private lawyers are never hired to represent the prosecution. Normally, police conduct initial investigations and then hand a brief to the prosecution. Issues such as arrest and detention can only be decided on the application of an accused person at a pre-trial hearing (*praperadilan*) and can never be raised at the main trial.

2.2. The definition of Human Rights

Base on Law No. 39 of 1999 Article 1 Paragraph 1, Human Rights is sets of rights attached to nature and human existence as a creature of God and is a gift from God that must be respected, upheld and protected by the State, Law and Government, and everyone for respect and protection of human dignity.[43]

This Act sets forth in detail provisions concerning the right to life and the right not to be abducted and/or killed, the right to found a family and bear children, the right to self-development, the right to justice, the right to freedom of the individual, the right to security, the right to welfare, the right to participate in government, women's rights, children's rights, and the right to religious freedom. As well as governing human rights, this Act also governs

[43]Law No 39 of 1999 regarding Human Rights Article 1 Para.1

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

basic obligations, and the duties and responsibilities of the government with regard to upholding human rights.

The 1945 Constitution of the Republic of Indonesia, which is based upon *Pancasila*, also contains humanitarian precepts and basic principles of human rights. These principles have been incorporated into a number of national laws and regulations that serve to protect and promote the well-being of the Indonesian people. Moreover, it is also important to note that the 1945 Constitution has many principles that are similar to those contained in the 1948 Universal Declaration of Human Rights.

The Preamble of the 1945 Constitution sets forth the humanitarian principles as contained in *Pancasila*, and forms the basis of the State and the philosophical outlook on the lives of the Indonesian people. The Preamble states:

"*Whereas independence is the natural right of every nation, colonialism must be abolished in this world because it is not in conformity with Humanity and Justice...Following this, in order to set up a government of the State of Indonesia which shall protect the whole of the Indonesian People and their entire native land of Indonesia, and in order to advance the general welfare, to develop the intellectual life of the nation and to contribute in implementing an order in the world which is based upon independence, abiding peace and social justice..."*

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

2.3. The definition of Death Penalty

Capital punishment or the death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime. The judicial decree that someone be punished in this manner is a death sentence, while the actual process of killing the person is an execution. Crimes that can result in a death penalty are known as *capital crimes* or *capital offences*. The term *capital* originates from the Latin *capitalis*, literally "regarding the head" (referring to execution by beheading).[44]

Capital punishment has, in the past, been practiced by most societies;[45] currently 58 nations actively practice it, and 97 countries have abolished it (the remainder have not used it for 10 years or allow it only in exceptional circumstances such as wartime).[46] It is a matter of active controversy in various countries and states, and positions can vary within a single political ideology or cultural region. In the European Union member states, Article 2

[44]Michael Kronenwetter, *Capital Punishment: A Reference Handbook* (2 ed), (United States : Contemporary World Issues, 2001), P.202.

[45]"The most notable aspect of the criminal provisions was that punishments took the form of seizure of property, banishment, or, more often, payment of a fine. Even murder and other severe crimes (arson, organised horse thieving, robbery) were settled by monetary fines. Although the death penalty had been introduced by Vladimir the Great, it too was soon replaced by fines." Magocsi, Paul Robert, *A History of Ukraine*, P. 90, (Toronto: University of Toronto Press, 1996). P. 90.

[46]Amnesty International, *Abolitionist and Retenionist Countries,* http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries, downloaded on 15 May 2013

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

of the Charter of Fundamental Rights of the European Union prohibits the use of capital punishment.[47]

Currently, Amnesty International considers most countries abolitionist. The United Nations General Assembly has adopted, in 2007, 2008 and 2010, non-binding resolutions calling for a global moratorium on executions, with a view to eventual abolition.[48]Although many nations have abolished capital punishment, over 60% of the world's population live in countries where executions take place, such as the People's Republic of China, India, the United States of America and Indonesia, the four most-populous countries in the world, which continue to apply the death penalty (although in India, Indonesia and in many US states it is rarely employed). Each of these four nations voted against the General Assembly resolutions.

2.4. Ratification of ICCPR and the development in Indonesia

Considering the strong commitment of Indonesia's Government to the protection of human rights, ratified the ICCPR was the right step to do since there is such factors that make Indonesia must do the ratified, such as below :

a) Ideo Syncretic (Leadership Factor)

[47]European Communities, *Charter Of Fundamental Rights of The European Union,* http://www.europarl.europa.eu/charter/pdf/text_en.pdf, downloaded on 15 May 2013

[48] United Nations http://www.un.org/apps/news/story.asp?NewsID=24679&Cr=general &Cr1=assembly, and European Communities, *Op.Cit.,* downloaded on 15 May 2013.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Attention to the human rights began to shift as the changes in the international scene in the late 1980s and continues to roll on toward democratic form, the issue of human rights is an important issue in the political agenda and foreign policy of the developed countries. Global conditions has provided an impetus growing Indonesian community awareness of the importance for promotion and protection of human rights. It is also becoming an important consideration in the State Department put the issue of human rights in the context of national interests in foreign policy.[49]

The improvement monumental of Human Rights in Indonesia was seen from the national legislation and institutional aspects of ratified various of international human rights law's regulation, including the ICCPR which is characterized by the issuance of Act No. 39 of 1999 regarding the Human Rights Law and Act No. 26 of 2000 regarding the Human Rights' Court that reinforce efforts to uphold human rights in Indonesia.

b) National Interest

The National Interest is one of the factor that can't be ignored in any foreign policy's country, the national interest

[49]Universitas Veteran, *Kebijakan Ratifikasi ICCCPR di Indonesia,* http://www.library.upnvj.ac.id/pdf/s1hi09/204613010/bab3.pdf, downloaded on 20 May 2013.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

here is a device of a national goal to be achieved, which is an important factor in Indonesia's foreign policy.[50]

Thus, National Interest and the power considered as means and ends of Indonesia to survive in the International Political, and the most important one is to achieve 5 equal goals which are political equality, equality in front of the law, equality of opportunity, economic equality, and social equality or equal rights regardless of the type of leadership.

c) Public Opinion

The formulation of a country's policy is unable to ignore the public opinion. This was illustrated from the House Representative (DPR and MPR) which expressed support for ratified the ICCPR. This is reasonable because the House of Representatives is an institution that represents the voice of the people as it should.

The implementation of ratified ICCPR have such standards as below :[51]

- Principle of Non-Discrimination
- Harmonization of international instruments that are bound by national laws

[50]K.J. Holsti, "*Politik Internasional : Kerangka Analisa."* (Jakarta : Pedoman Ilmu Jaya, 1987), P.135-173.

[51]Universitas Veteran, *Op.Cit.,* downloaded on 20 May 2013

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

- Enforced and carry out what is stated in the preamble, contents, and the articles of the covenant
- Ratification of the Covenant requires Indonesia to create and submit initial reports and periodic reports on the implementation of the ICCPR in Indonesia
- Indonesia's legal system will be required to make the decisions of the pro-human rights that truly embodies the promotion and protection of Human Rights
- Form a committee for the implementation and monitoring Human Rights.

In 2005, Indonesia has ratified the ICCPR which has been constitution in Law Number 12 of 2005 regarding the approval of ICCPR. There is also explained the reason for Indonesia to consider to ratify this Convention which is Indonesia is a Law Country and since His birth in 1945, Indonesia has been upheld the Human Rights.

2.5. Human Rights Law in the Moslem's Perspective

Indonesia is a country that has a majority of the population which is Moslem. The purpose of Islam itself assessed from the point of view of human rights is to recognize the value of humanity and nature. From the Islamic perspective, power or authority can be revoked at any time of the ruling, because the power is

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

manifested in the people's mandate. For the problem of core values, Islam is not contrary to the International Human Rights Law.

Historical evidence shows that in the year of 622 A.C., along with Arabs, Jews, Christians, and others, Mohammad founded the city which is called Madinah. And the approval of other nations, Mohammad gave the city the first written constitution in the world. The Constitution recognizes the freedom of religion, the principles of defense and foreign policy and organize a system of social insurance. He also made alliances and treaties with tribes living around Madinah.[52] Some scientists then gave the model name of this country with the name of the government Madinah State Model.[53]In principles, Islam is a major rule that guides human to keep the peace between individuals, groups, communities and countries. At least, there is 56 verses in Al-Qur'an requires Muslims to uphold the justice for all human beings, regardless of religion and politics. Point of view of Mohammad as a human and social leaders held political attitudes and behavior in daily life. He communicates with a close friend, the leader of another country, and its people. Human Rights is the basis for a civilized society founded by the Prophet Muhammad in 600s using the Madinah's Charter. Indonesian Muslim Scholar and

[52]Zainuddin Zardar and Zafar Abbas Malik, *Human Rights in Moslem'sPerspective,* (United Kingdom : Icon Book Ltd, 1999), P.20.

[53]Artidjo Alkostar, "*Pengadilan HAM, Indonesia, dan Peradaban*." (Jakarta : PUSHAM-UII, 2004), P.24.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

former minister Mohammad Natsir said that religion and religious duty in Islam has a close relationship with the humanitarian values of human religious duties based on what he was doing and how he does it to fulfill its responsibilities towards humanity.[54]

2.6. Human Rights Law in Constitution and UUD 45's Perspective

The threat of death penalty in Indonesia originates from the *Wetboek van Strafecht* that was passed as Criminal Code Book (Kitab Undang-Undang Hukum Pidana (KUHP)) by the Dutch Colonial Government on January 1st, 1918. Enforcement of the Criminal Code is based on the provisions of Article 1 of the rules of transitional Constitution 1945 (UUD 1945) that declared all laws which shall remain valid as long as there hasn't held a new rules[55] and strengthened with the Law No.1 of 1946 regarding the *Wetboek van Strafrecht* become Criminal Code Book (KUHP).[56]

In 1964, the government has issued the Law No. 2/PNPS/1964 regarding the Procedure of implement the Death Penalty. The Law also mentioned that the execution of the Death Row inmates is done by being shot to death. Since previously, there was never had any regulation how the execution must be carried out.

---

[54]*Ibid,* P.27.

[55]Indonesia, *Undang-Undang Dasar Negara Republik Indonesia 1945.*

[56]Indonesia, *Constitution No. 1 of 1946 regarding the Criminal Rules Law, Additional Paper of Indonesia Year of 1958 Number 127.*

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

In the post-1998 reform, the Indonesian Courts still impose criminal death penalty. The Death Penalty was threatened on 6 (six) felony. This is due to some of various legislations that still carry in the death penalty which actually the death penalty is part of pra-reform policies but still apply in the post-reform, such as :

1. Criminal acts of terrorism was regulated by Law No. 15 of 2003 concerning the Stipulation Government Regulation 1 of 2002 on the Eradication of Terrorism Jo Perpu No 1 of 2002 on Combating Criminal Acts ofTerrorismJoLaw16 of 2003 concerning Stipulation of Government Regulation2 of 2002 on the Application of Government Regulation1 of 2002 on the Eradication of Terrorism in the event Blasting Bali bomb in October 12, 2002DateJoInterim Law2/2002on Enactment of Government Regulation1/2002on the Eradication the events of terrorism on Bali Bombing in October 12 2002.
2. Narcotics criminal acts which was regulated by Law No. 35 of 2009 regarding the Narcotics Jo Law No. 22 of 1997 regarding Narcotics.
3. Psychotropic which was regulated by Law No. 5 of 1997 regarding the Psychotropic .
4. Crime Planned/Bere Murder which was regulated in Criminal Code.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

5. Criminal to National Secutiry which was regulated by Criminal Code.
6. The spread of hating crimes and led to the war which was regulated by Criminal Code.
7. Crime of Treason which was regulated by Criminal Code.
8. Crime of Theft offences that caused the death of others which was regulated by Criminal Code.

As the result for still enactment of the Death Penalty in Indonesian Legal Instrument of Law, then the execution of the death penalty is still continue and occur until now. Practice of capital punishment in Indonesia is still considered as discrimination since they were not reaching the elite group actors from committing criminal activities which could be categorized as a serious crime/ outstanding, for example : corruption.

The second amendment of UUD 1945 stated explicitly that 'Every person have the rights to life and defend their life'. And the next paragraph stated that Every person also have the right to life, the right to not being tortured, the rights to have freedom of thought, conscience, the rights to have their own religion and the right not to be protected base on retroactive law. All of these is the basic human rights that inviolable.[57]

3. Malaysia

[57]The second amandment of UUD 1945.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

3.1. Malaysia Legal System

Malaysia is a federation of thirteen states and three federal territories, namely, Kuala Lumpur, Putrajaya and Labuan. The federation has a central government. The legislative and executive powers of the federation are divided between the central and state governments. Important matters such as defense, external affairs and others are under the Federal Government and matters of local concern, for example, land, mining, and agriculture are under the state law.

Early laws of the Malay states are recorded from the time of the Malaccan Sultanate which was largely influenced by Hindu, Buddhist, and Islamic philosophy. The traditional laws were generally unwritten and only customary in nature. A Malay Sultan during the Malacca era held absolute power and commanded absolute loyalty from his subjects. The Sultan could declare war, decide on the life and death of his subjects, administer justice and maintain law and order.

In 1511, Portuguese captured Malacca which was governed by a governor or captain. However, The Dutch defeated the Portuguese and took over Malacca in 1641. A Dutch administration was immediately established and was headed by a governor and assisted by a council comprising of the mayor, the merchants, a secretary and many others. In Malaysia, we have a written

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

constitution known as the Federal Constitution which was formally adopted on 31st August 1957. The Constitution guaranteed their basic rights such as the right to life and liberty, right to equality, right to education, right to property as well as freedom to practice one's religion.

Common Law is the oldest form of Malaysian Law. English colonialists brought common law principles into their country and these principles formed the foundation of their legal system. Since written law / Civil law cannot address fully every aspect of the principles of law, Malaysian themselves follow closely the Common Law from English and apply judgements and decisions in it while deciding a case.[58]

3.2. Ratification of ICCPR and the development in Malaysia

Not only Malaysia ratified neither the ICCPR nor the Torture Convention, it also fails to comply with international guidelines, and has domestic laws that contradict global human right standards. It divides prisoners between those detained under the Internal Security Act (ISA) and those who are not. ISA prisoners can be detained for two years without trial, and this period may be extended. They are also subject to different rules while in detention, including denial of access to a lawyer in the first

[58]Malaysian Journal, *Introduction to Malaysian legal System,* http://www.eraconsumer.org/eraconsumer/introduction-to-malaysian-legal-system&catid=77:malaysian-law-a-legalsystem&Itemid=103, downloaded on 11 May 2013.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

60 days of detention. To date the Human Rights Commission of Malaysia (Suhakam) has concentrated its efforts on conditions for these prisoners, however evidence suggests that all prisoners in Malaysian jails face serious human rights violations, such as overcrowding, malnutrition and a lack of medical care. Unfortunately, as Suhakam is the only independent body permitted access to prisons in Malaysia – and its activities are tightly restricted, reliable, and detailed reports on conditions are difficult to obtain.

The Human Rights Commission in Malaysia, Suhakam, is the sole mechanism available to prisoners seeking to make a complaint, massive political pressure renders it but useless. Although commissioners are empowered to conduct investigations and make recommendations, the State tightly controls them at every step. Commissioners may be denied access to prisoners.[59] They are not permitted to talk in private, in violation of principle 29 of the Body of Principles. In addition, recommendations made by Suhakam are not taken seriously, and not even discussed by the Parliament, to which they are submitted annually.[60] The government also controls commissioners by limiting appointment

[59]Aliran Executive Committee, 'An Affront to Parliament', *Aliran Monthly,* vol. 21 no. 3, 27 April 2001.

[60]On 19 June 2002. Parliament rejected two motions to debate human rights issues arising from Suhakam's*Annual Report 2001,* submitted to Parliament. Aliran, 'We will be vigilant, NGOs end 100 days of disengagement with Suhakam – 2 August 2002'.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

to two years, and dismissing outspoken commissioners at will. Last year, three were dismissed, although they had simply performed their duties according to law. The new appointees were ex-civil servants with little or no background in human rights. In practical terms then, there exists no avenue for complaints by prisoners in Malaysia, be they detained under the ISA or otherwise.

3.3. Arguments against Death Penalty in Malaysia - Legal Perspective

In Malaysia, the death penalty applies to various offences. The statistics are staggering where between 1979 till 2001, 359 peoples have been executed in Malaysia. As the countries around the globe have done away with the death punishment, Malaysia cling vehemently to capital punishment.

Table 1 below shows the different mandatory penalty convictions in Malaysia with its relevant provision in the statutes. The method is death by hanging once the accused is found guilty.

Table 1 : Mandatory Death Penalty in Malaysia	
Offence	Legal Provision which provides for mandatory death penalty
Trafficking in dangerous drugs	Section 39(B) of the dangerous Drugs Act 1952
Discharging a firearm in the commission of a scheduled	Section 3 of the Firearms Increased Penalties Act 1971

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

offence	
Trafficking in dangerous drugs	Section 39(B) of the Dangerous Drugs Act 1952
Offences in Security Areas for possession of fire-arms, ammunition and explosives	Section 57(1) of the Internal Security Act 1960
Offences in Security Areas for possession of fire-arms, ammunition and explosives Accomplices in case of discharge of firearm	Section 3A of the Firearms (Increased Penalties) Act 1971
Offences against the Yang di-Pertuan Agong Murder	Section 121A of Penal Code Section 302 of Penal Code

Table 2 below states the offences that fall under discretionary death penalty where the decision on death sentencing lies within the dis-creation of the judge, the judiciary exercising total independence according to the Federal Constitution.[61]

Table 2 : Discretionary Death Penalty	
Offence	
Waging or attempting to wage war or abetting the waging of war	Section 121 of Penal Code

[61]Courtesy of Sitham and Associates, Advocates & Solicitors, Penang

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

against the Yang di-Pertuan Agong, a Ruler or Yang di-Pertuan Negeri	
Consorting with a person carrying or having possession of arms or explosives	Section 58(1) of Internal Security Act 1960
Abduction, wrongful restraint, wrongful confinement for ransom (kidnapping)	Section 3 of kidnapping Act 1961

The decision on discretionary death sentence will normally rely on the different circumstances of the case. One of the most important considerations is the seriousness of the offence. However, the Malaysian court would adhere to the "beyond reasonable doubt" rule when it comes to the ruling on death sentencing as the liberty and life of the accused is at stake. The prosecution officer will have to prove that the committal of the said crime was beyond reasonable doubt or else the courts will not bring about a conviction.

There are insufficient statistics provided by government agencies to the public regarding the number of death sentences in this country. The best representation are the statistics provided by the National Human Rights Commission (Suhakam). The statistics appear to show that since 2001, approximately159 peoples are on

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

death row. Another statistics is that provided by the Deputy Home Minister, Zainal Abidin Zin, that 359 death sentences have already been carried out within the period of 31 years from 1970 to October 2001. The findings were that the majority of cases were convictions for drug trafficking offences.

An example regarding the death penalty in Malaysia is the case ss 302 and 376 of the Penal Code, murder and rape. The convict is Kartigeyan a/l Krishman (2013)[62] MLJ 278 regarding appeal dismissed, affirming the conviction and sentence of death for the murder and 20 years imprisonment and fifteen strokes of the rotan for rape by the High Court. In the light of the trial judge's finding that the prosecution had successfully proven a prima facie case and upon the accused electing to remain silent the court was put in a situation where it had no choice but to convict the accused on the charges as he had failed to rebut the evidence adduced by the prosecution. The record absolved any error on the part of the trial judge. Apart from the above, the fact the appellant was aged approximately 18 years and 11 months at the time of commission of the offence was a ground that could be dismissed outright as the age factor did not exculpate or dismiss the accused's culpability for the offences with which he was charged.

[62]Malaysian Journal Law, 2013.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Since time immemorial, the death sentence serves as retribution for the death that was caused. It is common rooted opinion that the victim's family and friends will have extreme hatred towards the convict that they would definitely wish for a death sentence in return for the life taken. Since ancient times there has been the application of the saying, "an eye for an eye, a tooth for a tooth."

The theory of retribution has raised controversy over the years. Robert Macy who is the District Attorney of Oklahoma mentioned this :

> *"In 1991, a young mother was rendered helpless and made to watch as her baby was executed. The mother was then multilated and killed. The killer should not lie in some prison with three meals a day, clean sheets, cable TV, family visits, and endless appeals."*

Professor of Jurisprudence at Fordham University, Prof Ernest Van den Haag, who conducted studies on the correlation of the death penalty to deterrence commented that :

> *"Even though statistical demonstrations are not conclusive, and perhaps cannot be, capital punishment is likely to deter more than other punishments because people fear death more than anything else. They fear most death deliberately inflincted by law and scheduled by the courts. Whatever people fear most is likely to deter most."*

It is upmost importance to make reference to the Malaysian Federal Constitution in the issue of right to life as the author addresses the death penalty law Art 5(1) states clearly that *"No*

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

person shall be deprived of his life or personal liberty, save in accordance with the law".

The clause covers two areas of concern which is the freedom to live and also the freedom to live without detention. However, this freedom, can be curtailed by the intervention of the judiciary, whereby such freedom hinges on the creativity of the judiciary.

This is supported by the 3rd principal of A.V. Dicey's rule of law : 'The rule of law includes the results of judicial decisions determining the rights of private persons.' Judges should exercise their discretionary power whilst construing any clauses in the law that will curtail the basic rights of the alleged party, but in practice, this is seldom ever done.

Hence, the phrase 'in accordance to law' should be also scrutinized as it gives very wide arbitrary powers to the court to decide when it is appropriate to have removed the rights of people even in the most drastic situations that involve the taking of another's life. When judges are asked why they act so arbitrarily, their response is usually always that they are not in the position to answer to the reasonability and morality of the law as they are required to abide by the laws that have been passed by Parliament.

The authors are totally against the death penalty and in sync with the notion of protecting human life which has been echoed by

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

respected members in the legal fraternity. Lord Diplock in the Privy Council's case of *Ong Ah Chuan*(1981) held that the mandatory death sentence should be used very sparingly and only in exceptional circumstances. Lord Diplock further commented in the same case that capital punishment is unconstitutional as he recognized Art 5(1) that one will be deprived of life when capital punishment is applied. Another case of mandatory death sentence, PP v. Lau Kee Hoo is being challenged under constitutional grounds.

The further argument came about whether the international instruments such as the Universal Declaration of Human Rights or ECHR could influence or be binding to the commonwealth countries constitution. Lord Diplock contended that :

> "..... in order to dispose of these appeals ... their Lordships do not find it necessary to decide whether ... it should be recognized as a fundamental rule of natural justice under the common law system of criminal procedure...."

He further stated that :

> "..... capital punishment finds no place in the Universal Declaration of Human Rights (UDHR) proclaimed by the United Nations in 1948 nor in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, notwithstanding the fact that the Public Prosecutor in *Ong Ah Chuan's* case, heard earlier had submitted that UDHR and the European Convention on Human Rights did not influence the constitution....."

Such stance was also taken in the case of *Reyes v. The Queen* in 2002. Lord Bingham of Cornhill also stated in his Privy

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Council judgment in *Reye's* case that the mandatory death penalty has infringed both the provision to protect the right to life and protection against inhuman punishment.

The next provision that is totally against the death penalty is the United Nations, Universal Declaration of Human Rights where it states that : 'Everyone has the right to life, liberty and security of a person' and added that : 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

A contrasting somewhat modified view in relation to capital punishment is a provision in The International Covenant on Civil and Political Rights (1966) where it adopts the idea of right to life inherent where it pleads that society should not abolish the death penalty totally but apply a higher limitation to the application of the death sentence. The Second Optional Protocol of the above covenant called upon the international society to abolish the death penalty and to only limit it to war time crimes for national security purposes.

Not only that above reasons, considering that it is a universal truth that Judges and Juries are human and that humans more often than not make mistakes. Although most of the death penalty offences require the prosecutor to prove beyond reasonable doubt before a death penalty conviction can be made, it does not guarantee a zero error result to the evidence brought forward.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

According to the study of Columbia University Law School, it was conclusively found that 2/3 of death penalty trials have substantial errors.

Hence, by acknowledging that judges are humans and there are many factors beyond the control of humans that could cause wrongful execution, the public should protect their rights to life by supporting the abolition of the death penalty so as to reduce the risk to nothing.

B. LEGAL FRAMEWORK

1. International Legal Instruments Relevant to Death Penalty

a. Universal Declaration of Humans Rights (UDHR)

The Universal Declaration was adopted by General Assembly Resolution 217 (III) and was not intended to be legally binding. The intention of those who drafted the Declaration was to provide guidelines which States would aim to achieve. Thus according to Mrs Eleanor Roosevelt, the Chairperson of the Human Rights Commission, 'It is not and does not purport to be a statement of law or legal obligation';[63] it is instead a common standard of achievement for all peoples of all nations'.[64]Nowadays, UDHR has become as an authoritative interpretation of the Charter, as part of customary international law, and also binding States with its *jus cogens* character.

[63]Javaid Rehman, *Op.Cit.*, P.79.

[64]*Ibid.*

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

The UDHR has retained its place of honor in the human-rights movement. No other document has so caught the historical movement, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole. Parent to the two major covenants that followed it and grandparent to the many specialized treaties in the field, the Declaration expressed in lean, eloquent language the hopes and idealism of a world released from the grip of World War II. However, self-evident it may appear today, the Declaration bore a more radical message than many of its framers perhaps recognized. It proceeded to work its subversive path through many rooted doctrines of international law, forever changing the discourse of international relations on issues vital to human decency and peace. It underscored the need for international human-rights institutions that could exercise novel jurisdiction over states. It animated peoples in many countries to rethink their plight and to demand of their leaders an unprecedented recognition of their human rights. This remarkable Declaration has become the constitution of the universal human-rights movement.[65]

The UDHR is remarkable in two fundamental aspects, such are the rights and the freedom of individuals were set forth. In

[65]Steiner, 'Securing Human Rights : The First Half-Century of the Universal Declaration and Beyond' *Harvard Magazine* (September – October 1998) http://harvardmagazine.com/1998/09/world3.html, downloaded 1 May 2013.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

1948, the then 58 Member States of the United Nations represented a range of ideologies, political systems and religious and cultural backgrounds, as well as different stages of economic development. The authors of the UDHR, themselves from different regions of the world, sought to ensure that the draft text would reflect these different cultural traditions and incorporate common values inherent in the world's principal legal systems and religious and philosophical traditions. Most important, the UDHR was to be a common statement of mutual aspirations -- a shared vision of a more equitable and just world.[66]

The UDHR covers the range of human rights in 30 clear and concise articles. The first two articles lay the universal foundation of human rights: human beings are equal because of their shared essence of human dignity; human rights are universal, not because of any State or international organization, but because they belong to all of humanity. The two articles assure that human rights are the birthright of everyone, not privileges of a select few, nor privileges to be granted or denied. Article 1 of the UDHR declares that "all human beings are born equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Article 2 of the UDHR recognizes the universal dignity of a life free from

[66] Universal Declaration of Human Rights, available on www.un.org/rights/HRToday/declar.htm downloaded on 11 May 2013.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

discrimination. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The first cluster of articles, 3 to 21, sets forth civil and political rights to which everyone is entitled. The right to life, liberty and personal security, recognized in Article 3, sets the base for all following political rights and civil liberties, including freedom from slavery, torture and arbitrary arrest, as well as the rights to a fair trial, free speech and free movement and privacy.

The second cluster of articles, 22 to 27, sets forth the economic, social and cultural rights to which all human beings are entitled. The cornerstone of these rights is Article 22, acknowledging that, as a member of society, everyone has the right to social security and is therefore entitled to the realization of the economic, social and cultural rights "indispensable" for his or her dignity and free and full personal development. Five articles elaborate the rights necessary for the enjoyment of the fundamental right to social security, including economic rights related to work, fair remuneration and leisure, social rights concerning an adequate standard of living for health, well-being and education, and the right to participate in the cultural life of the community.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

The third and final cluster of articles, 28 to 30, provides a larger protective framework in which all human rights are to be universally enjoyed. Article 28 recognizes the right to a social and international order that enables the realization of human rights and fundamental freedoms. Article 29 acknowledges that, along with rights, human beings also have obligations to the community which also enable them to develop their individual potential freely and fully. Article 30, finally, protects the interpretation of the articles of the Declaration from any outside interference contrary to the purposes and principles of the United Nations. It explicitly states that no State, group or person can claim, on the basis of the Declaration, to have the right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth in the UDHR.

The general assembly proclaims that the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measure, national and international, to secure their universal and effective recognition and observance, both among the peoples of

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Member States themselves and among the peoples of territories under their jurisdiction.[67]

In addition, the legal status of this declaration have no binding legal effect, but have an undeniable moral force and provide practical guidance to States in their conduct; covenant, statutes, protocol and conventions are legally-binding for those States that ratify or accede to those instrument.[68]

b. International Covenant on Civil and Political Rights (ICCPR)

The Universal Declaration of Human Rights of 1948 was codified into two Covenants, which the General Assembly adopted on 16 December 1966. Together with the Optional Protocols, they constitute the "International Bill of Human Rights". The ICCPR is a landmark in the efforts of the international community to promote human rights. It defends the right to life and stipulates that no individual can be subjected to torture, enslavement, forced labour and arbitrary detention or be restricted from such freedoms as movement, expression and association.[69]

The ICCPR is divided into six parts and 53 articles. Part I reaffirms the right of self-determination. Part II formulates general obligations by States parties, notably to implement the Covenant

[67] United Nation Declaration on Human Rights, available on http://www.un.org/en/documents/udhr/index.html, downloaded 24 June 2013.

[68] Universal Human Rights Instrument, available on http://www2.ohchr.org/english/law/ downloaded on 24 June 2013.

[69] International Covenant on Civil and Political Rights, available on http://www.un.org/millenium/law/iv-4.html, downloaded on 24 June 2013.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

through legislative and other measures, to provide effective remedies to victims and to ensure gender equality, and it restricts the possibility of derogation. Part III spells out the classical civil and political rights, including the right to life, the prohibition of torture, the right to liberty and security of person, the right to freedom of movement, the right to a fair hearing, the right to privacy, the right to freedom of religion, freedom of expression, freedom of peaceful assembly, the right to family life, the rights of children to special protection, the right to participate in the conduct of public affairs, the over-arching right to equal treatment, and the special rights of persons belonging to ethnic, religious and linguistic minorities. Part IV regulates the election of members of the Human Rights Committee, the State reporting procedure and the inter-State complaints mechanism. Part V stipulates that nothing in the Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and to utilize fully their natural resources. Part VI provides that the Covenant shall extend to all parts of federal States and sets out the amendment procedure. The Covenant is not subject to denunciation.[70]

The Human Rights Committee monitors implementation by States parties in a variety of ways. Initial and periodic reports are examined by the plenary, which formulates concluding

[70] *Ibid.*

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

observations with concrete recommendations. In order to assist States parties in preparing reports, the Committee has formulated 28 general comments, which constitute a commentary on the provisions of the Covenant. Well in advance of the examination of a report, the Committee forwards a list of issues to the State party concerned. The list is prepared by the members and takes into consideration information received from other United Nations organs and specialized agencies as well as from non-governmental organizations.[71]

The right to life, contained in Article 6, represents the most fundamental of all human rights.[72] It has been protected by all international and regional human rights instruments. According to Article 6(1) : 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' The committee has pronounced it as the supreme right and the provisions of the treaty establish firmly that no derogations are permissible from this right, even in times of public emergency.[73] The term 'inherent' as used in Article 6(1) connotes a positive and broad obligation including, for example prevention of wars and reduction in infant mortality.[74] War, armed

[71] *Ibid.*

[72] Javaid Rehman, *Op.Cit.*, P.92-100.

[73] Article 4(2) ICCPR; General Comment No. 6 The right to life (Article 6) 30/04/82.

[74] *Ibid*, para 2.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

conflict and internal disturbances result in an uncountable number of deaths.[75] In its commentary, HRC has expressed concern over the proliferation of weapons of mass destruction. Special concern is reserved for nuclear weapons, which the Committee regards as amongst the greatest threats to the right to life. It, therefore, asserts that the production, testing, possession as well as the use of nuclear weapons should be prohibited with activities being recognized as a crime against humanity.[76]

Article 6 does not provide an absolute prohibition of taking life but only 'arbitrary' deprivation of life which raises questions about the nature and scope of the right to life. According to Professor Shestack : 'Surely the right to life guaranteed by Article 6(1) of ICCPR would seem to be so basic as to be considered absolute. Yet Article 6(1) only offers protection against 'arbitrary' deprivation of life.[77]

c. International Covenant on Economic, Social and Cultural Rights (ICESCR)

Economic, social and cultural rights are designed to ensure the protection of peoples as full persons, based on a perspective in which people can enjoy rights, freedoms and social justice simultaneously. The Covenant contains some of the most

[75] *Ibid*, para 4.

[76] *Ibid,* above 64.

[77] Shestack, 'The Jurisprudence of Human Rights' in Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press, 1984) pp.69-113 at P.71.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

significant international legal provisions establishing economic, social and cultural rights, including rights relating to work in just and favorable conditions, to social protection, to an adequate standard living, to the highest attainable standards of physical and mental health, to education and to enjoyment of benefits of cultural freedom and scientific progress. It also provides for the right of self-determination; equal rights for men and women; the right to just and favorable conditions of work; the right to form and join trade unions; the right to social security and social insurance; protection and assistance to the family; the right to adequate standard of living; the right to the highest attainable standard of physical and mental health; the right to education; the right to take part in cultural life; and the right to enjoy benefits of scientific progress and its applications.[78]

Compliance by States parties with their obligations under the Covenant and the level of implementation of the rights and duties in question is monitored by the Committee on Economic, Social and Cultural Rights which submits annual reports on its activities to the Economic and Social Council. The Committee works on the basis of many sources of information, including reports submitted by States parties and information from United Nations specialized agencies including the International Labor

[78] International Covenant on Economic, Social and Cultural Rights, available on http://www.un.org/millenium/law/iv-3.html, downloaded on 25 June 2013.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Organization, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the Food and Agriculture Organization of the United Nations, the World Bank and the International Monetary Fund. In addition, information is submitted from the United Nations Development Program, the Office of the United Nations High Commissioner for Refugees, the United Nations Centre for Human Settlements (Habitat) and others. It also makes use of information from other United Nations treaty bodies, from national non-governmental and community-based organizations working in States which have ratified the Covenant, from international human rights and other non-governmental organizations, and from generally available literature.[79]

2. Jus Cogens and Human Rights Law

The notion of *jus cogens* in international law encompasses the notion of peremptory norms in international law.[80]In this regard, a view has been formed that certain overriding principles of international law exist which form "a body of *jus cogens*."[81] These principles are those from which it is accepted that no State may derogate by way of treaty. As a result they are generally interpreted as restricting the

[79]*Ibid.*

[80] "Peremptory" is defined as : "Imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown." Black's Law Dictionary (Sixth Edition, 1990), P. 1136.

[81] I. Brownlie, *Priciple of Public International Law (*British : EJIL, 1998), P.515.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

freedom of States to contract while 'voiding' treaties whose object conflicts with norms which has been identified as peremptory.[82]However, both the scope and in fact very existence of this concept has been debated within the international legal community for many years. Consensus was finally reached as to a definition during the Vienna Conference held in 1969 ("the Vienna Conference") and this was codified in Article 53 of the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention").

This article considers first the development of the current overwhelming view that norms of *jus cogens* exist in international law. Within this analysis : briefly consider that the debate as to the validity of international law itself, summarizing what are generally accepted as the sources of international law from which concepts of *jus cogens* are drawn, continue with consideration of the development of the concept of *jus cogens* both theoretically and legally up to and including an analysis of the debates during the Vienna Conference and the subsequent promulgation of the Vienna Convention. Second, to identify what are accepted as being the constituent elements of concept *jus cogens* in international law while also providing some brief examples. Third, consider the existence and impact of emerging norms of *jus cogens* in international law. Fourth, consider the invalidity of a treaty whose object is considered to be in violation of a principle of *jus*

[82]T. Meron, *On a Hierarchy of International Human Rights,* 80 American Journal of International Law (British : AJIL, 1986), P.1-14.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

cogens (either because of a conflict with existing *jus cogens* or emerging *jus cogens*). And fifth, consider the existence of principles of *jus cogens* in international humanitarian law (if any).

Recognition of International Law itself as a valid corpus of rules has been a gradual process.[83] At a national level, the existence and therefore validity of the law is quite clear. Law is created and enforced by virtue of the power of the State exerted over its citizens (individuals). As has been stated, "in systems of municipal law the concept of formal source of law refers to the constitutional machinery of law-making and the status of the rule is established by constitutional law."[84] For this reason it is considered to be 'valid'. However, such a formal structure is absent in the international arena. International law has been described as "one of the possible sets of laws for ordering the world" being based "on the wills of all or many nations."[85]

It is however clear that States have become more and more dependent on each other, a phenomenon perhaps largely attributable to the growing 'institutionalization' of the international community.[86] This so-called interdependence requires regulation. Although this is sometimes achieved by way of agreements reached between Individual

[83]L. Oppenheim, *Oppenheim's International Law,* (Ninth Edition, edited by Sir R. Jennings and Sir A. Watts) (NewYork : Oxford University Press, 1996), P.3.

[84]I. Brownlie, *Op.Cit.*, P.1.

[85]H. Kelsen, *The Basis of Obligation in International Law,* in : Libro Homenaje al Profesor Barcia Trelles (1958) P.196.

[86]J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties,* (NewYork : Oxford University Press, 1974), P. 35-165. This interdependence of States also means that so-called freedom of action of States (which in any has never been absolute) is even more curtailed today.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

States the lacuna is also filled through the recognition by individual States of a so-called international 'conscience' which imposes legal regulation on the actions of States and in doing so ensures international respect for basic social values.[87] Similarly this is reflected in the so-called international moral infrastructure which itself is subject to normative disciplines.[88]

As a result of the regulation of States by International Law, the concept of 'national sovereignty' has undergone an evolution and today States are regulated by both their own national rules together with the continually developing laws of the international community.[89]

Having recognized the general validity of international law, before one can identify those norms which may be designated norms of overriding importance within this law, it is necessary to identify the sources from which they may drawn. The sources of international law are generally regarded as having been exhaustively enumerated in Article 38(1) of the Statute of International Court of Justice ("ICJ"):

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :

[87]Based on this 'moral code' international recognition and respect for certain basic social values can mean that particular agreements reached between a limited number of States become'valid' for all.

[88]Rafael Nieto – Navia, Judge of ICTY and ICTR, *International Peremptory Norms (Jus Cogens)* And International Humanitarian Law, http://www.iccnow.org/documents/Writing ColombiaEng.pdf , downloaded on 25 June 2013.

[89]*Ibid.*

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. International custom, as evidence of a general practice accepted as law;
c. The general principles of law recognized by civilized nations;
d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

It is immediately noteworthy that norms of *jus cogens*are not included specifically as being a 'formal' source of international law. Before these norms can be properly placed among the 'formal' sources one must identify both its evolution as a legal concept and the extent of international recognition of its existence.

Schwarzenberger considered the possibility of the existence of *jus cogens inter partes*, that is, norms of *jus cogens* having a limited effect only between identified or signatory parties.[90] Such a notion envisaged the creation of norms of *jus cogens* by way of treaty, and thereafter observance of by the requirement that every treaty in force is binding upon the parties to it and must be performed by them in good faith *(pacta sunt servanda)*.[91] However, such a treaty is limited by the

[90] *Ibid.*

[91] This means that not all general international law treaties even those ratified by a very large number of States can be classed as *jus cogens.*

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

fact that there is no overriding rule prohibiting derogation and the norm is only binding

States through treaties or customary law establish or develop international law. At the same time, the discretion to formulate new laws is not unlimited and there remain certain rules of international law from which no derogation or reservation is permissible. In strict legal terms these rules have attained the status of norms of *jus cogens*. The elaboration of the doctrine of *jus cogens*, or peremptory norms as they are also known, is provided by the 1969 Vienna Convention on the Law of Treaties.[92]

According to the Article 53 of the Convention :

> *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*

Furthermore by virtue of the Article 64 newly emergent peremptory norms of general international law, terminate or render void any existing conflicting. Treaty provisions.[93] Two important features of Article 53 and 64 need to be noted. Firstly, the provisions of Article 53 and 64 are now subsumed into customary law, thereby binding all States, parties and non-parties to the Vienna Convention.

[92]For consideration of the meaning of *jus cogens* see Article 53 and 64 Vienna Convention on the Law of Treaties;

[93]Article 64 of the Vienna Convention on the Law of treaties (1969).

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

Secondly, the restrictions contained within Article 53 and 64 apply as much to other sources such as customary law or general principles of international law as they do to treaties. Although there is no specifications as to what constitutes such as norm, fundamental rights such as the right of all peoples to self-determination, and the prohibition to slavery, genocide, torture and racial discrimination represent settled examples of *jus cogens*. This point is well established by various commentaries on the subject. According to the commentary of the International Law Commission's analysis of 'best and settled rules' of *jus cogens* prohibition include :

a. A treaty contemplating the performance of any other act criminal under international law and
b. A treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide . . ."[94]

In Professor Brownlie's categorization, the 'least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting trades in slaves and piracy'.[95] To this, we can add the prohibition on torture,[96] the right to life[97]and liberty and security of the person.[98]

[94]I. Brownlie, *Op.Cit.,*, P.510-512.

[95]*Ibid.*

[96]Prosecutor v. AntoFurundzija, Case No. IT-95-17/1-T. 10 December 1998. Judgement Judicial Supplement 1.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

C. OPERATIONAL FRAMEWORK

1. Definitions of Human Rights

Literally, the term of "human rights" consists of two word : human and rights.[99]

1) Human means "of people, showing the better qualities of people, citizens, individuals, persons".
2) Rights means "morally good or acceptable, true or correct, moral or legal claim to get".

Based on the above-mentioned meanings, it can be concluded that Human Rights may be defined as "basic rights of freedom, equality, justice, etc for an individual."

2. Definitions of Death Penalty

Literally, the term of "death penalty" consists of two words: death and penalty.[100]

1) Death means "dying, end of life, permanent end destruction".
2) Penalty means "punishment for breaking a law, rule of contract".

Based on the above-mentioned meanings, it can be concluded that Death Penalty may be defined as "punishment of being killed for a crime". The Death Penalty simply means as the punishment for the

---

[97]Gormley, 'The Right to Life and the Rule of Non-Derogability : Peremptory Norms of Jus Cogens' in Ramcharan (ed.), *The Right to Life in International Law* (British : Brill, 1985), P.120.

[98]Javaid Rehman, *Op.Cit.*, P.26.

[99]Oxford Learner's Pocket Dictionary (Fourth Edition, 2008), P.216 and 380

[100]The Oxford Paperback Thesaurus (Third Edition, 2006), P.430 and 609

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012

defendant whom were found guilty of committed the most serious crimes in within a regional or international.

Erlina, The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights vs Death Penalty, 2013
UIB Repository©2012