INDONESIA'S DEATH PENALTY EXECUTION FROM THE REALIST VIEW OF INTERNATIONAL LAW

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Abstract

During the first half of 2015, Indonesia executed fourteen prisoners who had been convicted of smuggling drugs to and from Indonesia. Twelve of them were foreigners. This execution led to withdrawal of the ambassador of Brazil, Netherlands, and Australia, whose citizens are among those executed. Criticism came from around the world, and small number of Indonesians. Most critics cited human rights abuse; and death penalty is against international law. However, the lack of further explanation can make the statement misunderstood. The distinctive nature of international law is one factor that makes death penalty issue is still debatable. Another factor is the inconsistent world's reaction on human rights issues, showing realistic behavior in international relations. Therefore it is important to understand the nature of international law from the realist perspective of international relations in explaining death penalty in Indonesia. The purpose of this paper is to elaborate Indonesia's death penalty from the realist perspective of international law.

Keywords: *realism, international law, international relations, death penalty*

Abstrak

Selama semester pertama tahun 2015, Indonesia telah mengeksekusi 14 terdakwa penyelundup narkoba dari dan ke luar Indonesia. 12 dari mereka adalah warga negara asing. Eksekusi ini menyebabkan ditariknya duta besar Brazil, Belanda, dan Australia, karena warga negaranya termasuk dalam terdakwa yang dieksekusi tersebut. Berbagai negara di dunia, termasuk sebagian kecil rakyat Indonesia, mengkritisi keputusan tersebut, karena hukuman mati dianggap sebagai pelanggaran HAM dan dengan demikian berlawanan dengan hukum internasional. Namun demikian, pernyataan tersebut tidak menjelaskan secara tepat permasalahan dalam hukum internasional. Karakteristik khusus hukum internasional menjadi salah satu faktor yang menyebabkan hukuman mati terus diperdebatkan. Faktor lain yaitu reaksi dunia terhadap isu HAM tidak konsisten, yang menunjukkan realisme dalam hubungan internasional. Oleh sebab itu, pemahaman tentang karakteristik hukum internasional dari perspektif realisme hubungan internasional sangat penting dalam menjelaskan hukuman mati di Indonesia. Artikel ini bertujuan untuk mengelaborasi hukuman mati di Indonesia dari perspektif realisme terhadap hukum internasional.

Kata kunci: *realisme, hukum internasional, hubungan internasional, hukuman mati*

Introduction

Indonesia's President Joko Widodo, who began his term in October 2014, made ground-breaking policies shortly after he began his term. In law implementation, he lifted a moratorium on death penalty in December 2014, which resulted in the first phase of execution of five convicted drug smugglers from Maldives, Nigeria, Vietnam, Brazil, and Netherlands on January 2015. Brazil and Netherlands withdrew their ambassador for Indonesia in protest. The second phase was on

April 2015, where four Nigerians, two Australians, a Brazilian and an Indonesian were executed. This had led to heated exchanges of Indonesia and Australia who also withdrew its ambassador for Indonesia. The policy also resulted in abrupt statistics: the first semester of 2015 saw almost the same number of death penalty as in 2007 to 2014; 14 in 2015 and 16 in the seven years span (http://www.economist.com/blogs/graphicdetail/2015/04/daily-chart-15).

The execution also raised condemnation in foreign media, particularly Australian. They wrote how the two Australians, the "Bali Nine" convicts had refused to be blindfolded (http://www.smh.com.au/world/bali-executions-eight-prisoners-refused-to-wear-blindfolds-as-they-were-shot-20150428-1mvm99.html).

There were also pictures of vigils held by Australians in their home country to ask for plea from President Joko Widodo to stop the execution. The coverage showed that Australian government and public believed that Andrew Chan and Myuran Sukumaran did not deserve the punishment. On the other hand, Indonesian government and its people seem to unite in the opposite end of the spectrum; 86 percent of people surveyed support death penalty execution for drug smugglers (http://www.republika.co.id/berita/nasional/umum/15/04/27/nng5js-survei-sebut-publik-dukung-hukuman-mati-narkoba). Some Indonesian media even published a survey in Australia that said more than half Australians polled agree with the execution and that their government should not bother negotiating with the Indonesian government to stop the execution (http://nasional.tempo.co/read/news/2015/03/05/078647252/duo-bali-nine-survei-australia-setuju-hukuman-mati).

Scholars also opine how this will shift Indonesia's foreign policy from friendly nation during Susilo Bambang Yudhoyono's offices to firmer nation. Camroux (http://www.sciencespo.fr/ceri/en/content/jokowi-s-indonesia-executions-diplomacy-and-sukarnoist-turn-0#footnote1_nhpj2cx) sees it as a move by President Joko Widodo to cease domestic public assumption that he would not have a strong voice in foreign policy due to his non military background.

It is also important to note that some human rights campaigners—let alone the UN Secretary General himself, Ban Ki Moon—condemned the execution, pointing that death penalty is against international law. Indonesian government stands firm, saying that the execution is the national determination to enforce the law, particularly as one of the ways to overcome its drug use problem. This confrontation between Indonesia's national law and the international law is possible due among others to the problem of the implementation of international law for centuries. Realist scholars of international relations mostly argue about the relevance of international law due to its lack of superior command. This article will elaborate the international law from the perspective of realist international relations in explaining Indonesia's death penalty executions.

Realist View of International Law

As the dominant perspective of international relations, realist scholars debate on the relevance of the international law, although none fully reject its existence. From early realist until now, states continue to be the primary actor of international relations. The national interest is the main motivation of the states in initiating relations with other states, thus they make the international relations going. On the other hand, this is also the reason states do not submit to higher authority in the international system, because there is none. This also causes the lack of higher authority that can enforce states to obey the international law.

Realist international relations had not existed until the twentieth century, when international relations become one separate discipline. However, both political and legal philosophers have undermined international law since the beginning of modern international law when the Treaty of Westphalia signed in 1648. It is ironic that the Treaty was the ground for state sovereignty, which also challenges the international law, as Hobbes said that 'law neither makes the sovereign, nor limits his authority; it is might that makes the sovereign and law is merely what he commands'. (Brierly, in Barker, 2000). Legal philosophers John Austin questions international law for its lack of superior command and sanctions. He reasoned that states "cannot be subjected to the law, they can only agree to limit their own rights through consent'. For Austin, with such nature, international law cannot be defined as law, only positive morality (in Barker, 2000).

Most modern IR realists accept the existence and the binding nature of international law. E.H. Carr (1939) said that international law is binding because of the politics embedded in every society that implement law. It is also based on this statement that Carr criticizes international lawyers who failed to recognize that politics is inseparable from international law (in Barker, 2000). Hans Morgenthau saw that consent is the main reason states make treaties since it somehow fulfills their national interests. There is no specific obligation in international law, and when state's interest is confronted with the perceived rules of international law, states will oblige to its national interest (in Barker 2010). Based on the view of Kenneth Waltz, power matters more than rules in international law, because law will change depending on the distribution of power. This can be seen when a state violates international law, its punishment (or none at all) will be depend on what the powerful states want to do; therefore the enforcement is not neutral (in Krasner, 2002). Newer realists, as they see a more globalized world, view that international law can contribute to solve coordination problems, reduce transaction costs, generate information and provide opportunities for linking issues, despite privilege upon the powerful (Krasner, 2002). From these realist views, it can be concluded that states might accept international law and cooperate in the interest of increasing their power, and would not be bound agreements when their position and power are threatened (Barker, 2000). It is understandable that realist thinkers and international law scholars agree that realist is not the dominant view in the international law debates; it is dominant in the field of foreign policy, defense, and international trade (Steinberg, 2002). On the other hand, several scholars argue that as more nations become more interdependent and law is proliferated, globalized, and fragmented in world politics realists should engage in re-integrating international law and international relations to overcome global problems such as nuclear weapons, overpopulation, poverty, and ecology as they also matter for states interest as well as for the continued relevance of realism (Sylvest, 2010).

Therefore, realist view of international law presents the following thesis: (a) international law does exist but the relevance is debatable; (b) states may subject to international law as long as it does not confront their national interests; (c) the enforcement of international law depends more on the will of the powerful states than volunteer obligation to rules; (d) states still need international law to cooperate in solving cross border problems because it is in the interest of states to do so.

Death Penalty under International Law

International law does not specifically prohibit the death penalty, although several treaties have proposed the complete abolition of death penalty (http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/death_penalty_resolution.aspx). The UN General Assemby adopted in 2007 a resolution establishing a moratorium on executions with the goal of abolishing the death penalty. The resolution recalled the relevant provisions found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child. As of 2014, 140 coutries have abolished the death penalty; 98 abolitionists for all crimes, 7 abolitionists for ordinary crimes (such as crimes under military law or crimes committed under exceptional circumstances), 35 abolitionists in practice (retain death penalty for ordinary crimes such as murder but have not executed anyone during the last 10 years and are believed to have a policy or established practice for not carrying out executions), and 58 retentionists (retain the death penalty for ordinary crimes) (Amnesty International Report, 2014).

Opponents of death penalty reason that it is against human rights, as stated in most of the basis of international law. The first is Article 3 (1) of the Universal Declaration of Human Rights, which says 'everyone has the right to life, liberty and security of person'. The problem with the Declaration is its unofficially binding nature, despite it is recognized as customary international law which is the primary source of international law and its purpose to define the meaning of "fundamental freedoms" and "human rights" of the United Nations Charter (http://deathpenalty.org/article.php?id=81). The Article 6 of ICCPR more specifically mentions death penalty:

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.

2. *In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.*
3. *When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

(http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx)

The covenant does not textually prohibit the death penalty. Its main purpose is to abolish the practice of death penalty by limiting the execution to most serious crimes and cannot be imposed if:

- a fair trial has not been granted;
- other ICCPR rights have been violated;
- the crime was not punishable by the death penalty at the time it was committed;
- the offender is not entitled to seek pardon or a lesser sentence;
- the offender is under the age of 18;
- the offender is pregnant.

(http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/death_penalty_resolution.aspx)

Another problem is that the meaning of 'the most serious crimes' is still much debated by countries. The United Nations Economic and Social Council creates Re-solution 1996/15 on Safeguards guaranteeing protection of the rights of those facing the death penalty, stipulates that 'the most serious crimes' only applies to international crimes with lethal or other extremely grave consequences. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has similarly stated that the death penalty should be eliminated for economic crimes, drug-related offences, victimless offences and actions relating to moral values including adultery, prostitution and sexual orientation (idem).

Amnesty International, who "opposes the death penalty in all cases without exception" and have been campaigning for total abolition of capital punishment, argues that death penalty does not contribute to the decline of crimes, as it stated:

> "*There is no evidence that the death penalty has a greater deterrent effect on crime than terms of imprisonment. Where governments present the death penalty as a solution to crime or insecurity they are not only misleading the public but in many cases failing to take steps to realize the goal of abolition recognized in international law*." (Amnesty International Report, 2014).

It can be inferred that international law provides only loose basis for prohibiting death penalty. It is common to say that death penalty is against the UN Declaration of Human Rights; however it has been interpreted otherwise; to justify the implementation of death penalty, particularly when the crime committed involves premeditated murder. Other interpretation includes the belief that drugs use have led to the death of many; therefore the committer of drug-related crime should be punished severely, particularly by death.

Another problem is the legal binding of those resolutions, as happens to most content of international law. None of the resolution urged that nations abolish fully the practice of death penalty. The ICCPR comprises of measures of the abolition of death penalty, but does not elaborate the enforcement and sanctions if nations disobey. Some countries ratified the ICCPR, but interpretations stay varied. The United States, one of the retentionist countries, ratified the covenant in 1992, but included in the ratification the declaration that "the provisions of Article 1 through 27 of the

Covenant are not self executing" and a Senate Executive Report stated that the declaration was meant to "clarify that the Covenant will not create a private cause of action in U.S. Courts" (http://deathpenalty.org/article.php?id=81).

Indonesia ratified ICCPR in 2005. However, the Constitutional Court upheld the constitutionality of the punishment in two challenges in 2007 and 2008. In 2007, when challenged by lawyers of Chan and Sukumaran, the Court decided in majority that serious narcotics crimes could rightly be classified as among "the most serious crimes." In 2008 when the method of execution was challenged by Bali bombers, the Court unanimously rejected. Therefore the lack of official binding and varied interpretation hinder the enforcement of international law in abolition of death penalty.

Indonesia's Death Penalty and External Affairs

The issue of death penalty and external affairs is distinctive compared with other issues in foreign affairs because of the complexity involved. The death sentence and execution policy might not be a foreign policy because foreign policy is "the strategy or approach chosen by the national government to achieve its goals in its relations with external entities" (Hudson, 2008), while the capital punishment is mostly domestic legal matter. Executing countries usually reason that they are enforcing national law. However, this can be considered foreign policy behavior, which includes un-intended behavior by the government (Hudson, 2008) that affects foreign relations. When foreign nationals are sentenced, bilateral relation might be at stake and diplomacy is launched to avoid execution and to maintain good relations between countries. Therefore, although executing foreign nationals is a part of domestic policy, the follow up of the decision is mostly external affairs.

The increasing number of nations abolishing death penalty also put pressure on the governments whose countries still implement the law. Capital punishment is one of the core debates of human rights, and although most related policies are national matters, human rights issues have become inevitably the object of pressure from the international organizations from UN to NGOs like Amnesty International. However, most human rights violations do not affect government-to-government relations as much as executing foreign national does. Several human rights violations resulted in condemnation and even hostile reaction from other countries, such as economic sanction for China's Tian'anmen tragedy, but other violating countries stay untouched due to double standard and political interests. Nevertheless, it is not unlikely that domestic policy affects foreign policy, as Rosemary Foot stated that "it can be artificial to divide the domestic and external spheres of policy making," as she analyses the foreign policy consequences of the Chinese government's decision to stop demonstration by deploying the army, which led to the death of thousands of Chinese citizens (Foot, 2008).

Indonesia's death penalty executions have influenced bilateral relations with several other countries. The execution of a Brazilian in January prompted Brazil to withdraw its ambassador from Jakarta. In February, Indonesian Ambassador for Brazil Toto Riyanto was stopped when he was about to present his Letters of Credential to the President of Brazil and was later informed that his presentation should be delayed. Indonesia then recalled its ambassador, saying the Brazilian move "disrespectful". Australia recalled its ambassador for Indonesia after the execution of Andrew Chen and Myuran Sukumaran, the ring leader of drug smuggler "Bali Nine" in late April. France condemned the execution of its citizen although its ambassador stays. Condemnations were also made by other countries such as United Kingdom. The UN Secretary General even lamented that death penalty is against international law. However, Indonesia did nothing to stop the execution, saying the death penalty will not be abolished and would continue the phase three of execution although the date was unstated. Indonesia's behavior is predictable regarding the nature of international system where states are sovereign, as recognized by international law, and that states are authorized to manage and enforce its own municipal law.

President Jokowi and Vice Chairman of the House of Representatives Hidayat Nur Wahid said that the execution is an implementation of Indonesia's law enforcement and state sovereignty. Jokowi added that external political pressure will not cause postponement of the execution (Republika, BBC Indonesia). This is proved in the statistics of the execution

during President Jokowi's term which started in October 2014. Since 1998 Indonesia has carried out 41 executions, 17 of them are foreigners, who were executed for drug crimes. The biggest number of execution was carried out in 2015; 14, which exceeds 10 in 2008 when the convicts were mostly sentenced for pre-meditated murder and terrorism (Lowy Institute, Economist).

Most people surveyed by the Indo Barometer from 15-25 March 2015, who propose the death penalty, said that drugs spoil the younger generation (60,8), while 23,7 others said that death penalty can prevent future commit. Those who oppose said that there are other humanistic sanction (36,2), and 28,4 percent said that death penalty is against human rights. This number hasn't changed much for about a decade. Tempo magazine survey on 2010 found that 68,3 percent disagree that death penalty should be abolished. Seputar Indonesia poll of six cities in the same year concluded that 59 percent support death penalty for narcotics crime. Media Indonesia reported in 2006 that 31 percent of 476 respondent surveyed said that corruptors most deserve the death penalty, the second is terrorists (27), and the third drug dealers (20). Indonesia's majority religion of Islam is believed to be the main factor of proposing the death sentence as Qur'an explicitly stated about capital punishment (Lowy Report).

Indonesia's Death Penalty from the Realist View of International Relations

In the state level, Indonesia's retention of death penalty reflected the realistic explanation in international relations. The policy's goal is to enforce the law within its national borders, where drug smugglers usually receive severe punishment, some of which such as ring leaders of narcotics gang like Chan and Sukumaran are regarded as the most serious offenders. When defending his policy, President Jokowi and other elites always cite the grave danger of Indonesia's drug use that has been causing 50 deaths a day. Therefore, the president said that drug dealers pose threats to the nations. Threat, as most realists view it, is one reason states act in accordance with their interests. In protecting its citizens, Indonesia's government implements severe punishment for drug crimes by foreign as well as its nationals.

Based on realist view, it could be said that Indonesia's sovereignty makes the execution possible without sanction from international law despite criticism from the UN, NGOs, media, and public overseas. This proves Waltz statement that law enforcement and sanctions in international law depends on the will of powerful states.

In international law states make treaties, have full rights and responsibilities in international law that are not enjoyed by other subjects of international law. Therefore countries like Indonesia have the power to implement national law within its territory without being interfered by other states, although in the globalization era, some national policies regarding human rights cannot avoid protests by foreign citizens abroad. Even some international law scholars provide a quite realistic explanation to this. Malanczuk (1997: 64-65) stated that international law leaves some questions to be decided by the national law of a country, but the general rule is that a state cannot invoke their internal law as a reason not to comply with the international law. However the international law does not explicitly explain the method of incorporating it to the national law, so there is no uniformed practice in fulfilling states obligation to international law. It is also understood among international law scholars that most states do not give primacy to international law over their own national law because they have to maintain their sovereignty. Indonesia's execution of death penalty portrays the interest to enforce the national law and maintain their sovereignty and cannot be interfered by external power, as the nature of international law presents challenge to do so.

One cannot ignore the possibility that the execution is political. President Joko Widodo might decide to lift the death penalty moratorium in order to gain domestic support. Polls have proven that more than half Indonesians support death sentence, mostly for corruptors, terrorism, and drug dealers. This might show individual interest of the president, not states. Yet it proves that international law is still incapable of protecting individuals within state boundaries, because individuals do not have full rights in international law; they are the subject in national law. President Jokowi here represents the state as the primary actor in international relations.

Opponents of realism can argue that Indonesia's interest may be threatened because

Indonesia and Australia have long benefited from mutual cooperation. The two countries two-way trade amount to almost US$11.9 billion in 2013 (http://thediplomat.com/2015/05/australia-indonesia-relations-after-the-executions/). It is unclear what harm the ambassador withdrawal had done to both countries' interests, but most scholars pointed that the long-term rupture will hurt both countries. Indonesia's government was even confident that the exchange will be short-lived. Australian scholars also pointed that Australia cannot possibly let the relation freeze for long.[1] Indonesia's confidence and scholars' opinion are based on realist thinking that state's interest weakens moral obligation to international law in determining the action of states.

From the international perspective, inconsistencies on the pressure of human rights violations, particularly death sentence, also reflects realistic approach. Exceptionalism and double standard shows that political interests are embedded in criticism of death penalty. In the case of Bali Nine, the negative coverage of foreign media somehow united Indonesians to support their government. Some educated Indonesians who oppose death penalty even argued that Australia's exceptionalist and double-standard do not help much in achieving the goal of death penalty abolition in Indonesia. Australian government is only concerned when its citizens are executed, while staying silent on the US and China's continuing practice of death penalty which is more than Indonesia's. Other opinion criticizes the Australian media's "overreaction", saying that at almost the same time an Australian citizen was sentenced to death in China, but no media coverage. An IR scholar even pointed on "Australia's hypocrisy" due to its inhumane treatment of asylum seekers trying to reach Australia (http://www.thejakartapost.com/news/2015/01/24/take-aim-fire-will-australian-hypocrisy-a-high-pedestal.html). The more realist view is that states have been granted the power to use violence (http://edition.cnn.com/2015/04/29/opinions/indonesia-australia-death-penalty/). It can be said that as countries attempt to fulfill its obligation to international law, subjective judgement on the breach of international law shows realistic move of states that constrains the implementation of international law.

Conclusion

Based on the realist view of international relations, in international system states continue to be the principal actor, despite rising challenge from non-state actors. This is even more manifested in international law where states make, have full rights and responsibilities in international law that are not enjoyed by other subjects of international law. Therefore countries like Indonesia have the power to implement national law within its territory without being interfered by other states, although in the globalization era certain government policies can draw protests by foreign citizens abroad particularly in human rights issue.

The decision to execute foreign citizen(s) may not be part of foreign policy, however, most government and elite groups certainly realize its impact on bilateral relations with the home country of the convicts. This is also to say that, as cruel as it sounds, the execution may be exploited as a political instrument. It gets many Indonesians' bewildered that the execution was becoming headlines around the world, while China's execution of foreign citizens caught little attention. Not to mention the Indonesian migrant workers that are executed in their employer countries, mostly in a state of defending themselves from the torture of their employers.

This article, rather than criticizing or proposing death penalty, focus more on re-minding the challenge of international law, which is widely believed to have legal binding, but is incapable of limiting state power particularly when fulfilling their national interests. The Amnesty International's move to push the elimination of death penalty is remarkable; now only 58 countries implement death penalty for ordinary crime. This shows that non state actors can have influence in the international law, although rarely surpass the sovereign states. For realists and non realist scholars, it is important to bridge the gap in understanding between the political interests of

[1] Ambassador Paul Grigson is sent back to Jakarta five weeks after recall. Australian government believes that relation with Indonesia is still fragile, although the issue of the executions has almost disappeared from the Australian media (https://theconversation.com/ambassadors-return-to-indonesia-shows-his-recall-was-futile-43119).

states and the need to cooperate and oblige universal moral values in order to implement international law.

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