

INTERPRETING ‘MOST SERIOUS CRIMES’ UNDER ARTICLE 6(2) OF ICCPR

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Abstract

Article 6 of the International Covenant for Civil and Political Rights protects the right to life. Meanwhile, Article 6(2) stipulates an exception where death penalty may only be imposed for the ‘most serious crimes.’ The Human Rights Committee had previously provided that ‘most serious crimes’ exclude other crimes which do not result in loss of life regardless of how severe the crime may be, including—crimes that threaten national security. In this regard, this Article will attempt to explore the scope of ‘most serious crimes’ by means of interpretation and margin of appreciation.

Keywords: *Article 6(2) of ICCPR, most serious crimes, national security, death penalty, margin of appreciation.*

Intisari

Pasal 6 Kovenan Internasional tentang Hak Sipil dan Politik melindungi hak untuk hidup. Sementara itu, Pasal 6 (2) menetapkan pengecualian di mana hukuman mati hanya dapat dikenakan untuk ‘kejahatan paling serius.’ Komite Hak Asasi Manusia sebelumnya menetapkan bahwa ‘kejahatan paling serius’ mengecualikan kejahatan lain yang tidak mengakibatkan hilangnya nyawa terlepas dari seberapa parah kejahatan itu, termasuk — kejahatan yang mengancam keamanan nasional. Dalam hal ini, Pasal ini akan mencoba untuk mengeksplorasi ruang lingkup ‘kejahatan paling serius’ dengan cara interpretasi dan *margin of appreciation*.

Kata Kunci: Pasal 6 (2) ICCPR, kejahatan paling serius, keamanan nasional, hukuman mati, *margin of appreciation*.

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A. Introduction

Article 6 of the International Covenant for Civil and Political Rights [‘ICCPR’] regulates the right to life. The exception to the right to life under Article 6(2) of the ICCPR provided that “[...] *sentence of death may be imposed only for the most serious crimes*[...]” In light of this Article, the Human Rights Committee had previously ruled that ‘most serious crimes’ only include those that results in the loss of life. On the other hand, many retentionist states still apply death penalty including Indonesia. Many of these states firmly argues that their death penalty is in accordance with the requirement under Article 6(2). In making their case, these states claim that crimes which threatens national security are considered as the most serious.

Take an example from Indonesia. Indonesia apply death penalty for narcotic crimes,¹ on the basis that the crime is of most serious as it affects national security. This claim emanates from the Preamble of Act No. 35 of 2009 regarding Narcotics [‘Indonesian Narcotics Act’] which reads: “*the import, export, production, distribution of narcotics [...] are very detrimental and imposes a grave danger to human life, society, nation, and state as well as the national security of Indonesia.*” The level of danger that narcotic crimes pose against Indonesia was also highlighted by President Joko Widodo when he declared that Indonesia was in a ‘state of emergency’ due to its crime rate of narcotics.² Affirming its stance that narcotic crimes do not qualify as amongst the ‘most serious crimes,’ the HRC had previously urged Indonesia to follow the moratorium on death penalty and to review their

legislation to ensure that death penalty is limited only for the ‘most serious crimes.’

The ICCPR had never explicitly discussed the idea that crimes which threatens national security may constitute as ‘most serious crimes’. Rather, to briefly state, it had always interpreted most serious crimes as intentional crimes with lethal or extremely grave consequence.³ While the term ‘intentional’ is equated to premeditation or deliberate intent to kill⁴ that results in the loss of life,⁵ the phrase “other extremely grave consequence” has been described as those endangering life in a way that privation of life is very likely to happen.⁶ To put it simply, the term ‘most serious crimes’ is limited to only qualify crimes that results in loss of life. An implication that arise from such limited interpretation is that the threshold seems to disregard other categories of crime that may have more severe gravity. As such, the Author intends to explore the scope of ‘most serious crimes’ and seek to find whether crimes which threatens national security can constitute as ‘most serious crimes.’

B. Discussion

1. Interpretations to ‘Most Serious Crimes’

Article 6(2) of ICCPR reads:

“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 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

¹ Office of the United Nations High Commissioner for Human Rights, “UN Human Rights Committee deplores Indonesia’s response to its call to stop executions for drug-related crimes”, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15792&>, accessed in 7 December 2016.

² Severianus Endi, “Jokowi Reminds RI of State of Emergency on Drugs”, <http://www.thejakartapost.com/news/2015/01/20/jokowi-reminds-ri-state-emergency-regarding-drugs.html>, accessed in 7 December 2016.

³ United Nations Economic Social Council, “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty”, *United Nations Document*, E.S.C. Res. 1984/50, 25 May 1984.

⁴ United Nations Human Rights Council, “Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions”, *United Nations Document*, UN Doc. CCPR/C/79/Add.85, 28 October 1997, para. 13.

⁵ United Nations Human Rights Council, “Civil and Political Rights, including the Questions of Disappearances and Summary Executions”, *United Nations Document*, A/HRC/4/20, 29 January 2007, para. 53.

⁶ United Nations Economic Social Council, “Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty”, *United Nations Document*, UN Doc E/2010/10, 18 December 2009, para. 63.

a final judgment rendered by a competent court." [emphasis added]

The term 'most serious crimes' under Article 6(2) of ICCPR is not defined by any instrument.⁷ Subsequently, when discussing the scope of 'most serious crimes' in the context of Article 6(2) of ICCPR, there are two conflicting perspective. The **first** perspective, which will be elaborated in **a** and **b** argues that 'most serious crimes' under Article 6(2) of ICCPR functions as a limit to death penalty and should be read restrictively to only mean intentional killings or other extremely grave consequences. This is based on the idea that human rights regime works on the basis of "progressive restriction" approach which aims for the list of crimes punishable by death to get smaller overtime, as opposed to expanding it.⁸

The **second** perspective, which is discussed in **e** reflects a tendency from states to preserve a more permissive interpretation of 'most serious crimes' in order to accommodate national interest in imposing death penalty, for example the consideration of national security or social retribution. From this standpoint, the broad wordings of 'most serious crimes' were meant to allow the usage of margin of appreciation to decide which crimes constitute as 'most serious crimes' taking into consideration the circumstances that exists in the jurisdiction of a state.⁹ Hence, allowing states to impose death penalty for other crimes aside from intentional killings.

a. Human Rights Committee's Interpretation of 'Most Serious Crimes'

Elaborating the first perspective, ICCPR General Comment No. 6 on the right to life, which was established by the HRC in 1982, only stated that 'most serious crimes must be read restrictively to mean that the death penalty is an exceptional measure.'¹⁰ The Author opines that this description is still broad and open to interpretation. Even though the HRC did not precisely define 'most serious crimes', it seems to fill in such gap by following the interpretation set by the Safeguards Guaranteeing Protection, which was approved by the Economic and Social Council in 1984. According to this document, 'most serious crimes' refers to intentional crimes with lethal or other extremely grave consequences.¹¹ In this context, the Safeguard Guaranteeing Protection defines the word 'intentional' as equated to premeditation and is understood as deliberate intent to kill¹² which results in the loss of life as affirmed by the UN Human Rights Council.¹³ The fact that intentional killing is considered to be the classic capital crime is due to the retribution purpose of life for a life.¹⁴ Whereas "other extremely grave consequences" has been described as those endangering life in a way that privation of life is very likely to happen.¹⁵ In 2013, the UN Secretary-General

⁷ William A. Schabas, 2002, *The Abolition of the Death Penalty in International Law*, Cambridge University Press, United Kingdom, p. 373.

⁸ Ivan Simonovic, 2016, *Death Penalty and the Victims*, United Nations Office of the High Commissioner of Human Rights, New York, p. 165; Roger Hood, et al, 2015, *The Death Penalty: A Worldwide Perspective*, Oxford University Press, United Kingdom, p. 26.

⁹ *Ibid*, pp. 167 -168; see also Eckart Klein, "The Importance and Challenges of ValuesBased Legal Orders", *Intercultural Human Rights Law Review*, Vol. 10, No. 1, August, 2015, pp. 5-6.

¹⁰ United Nations Human Rights Committee, "CCPR General Comment No. 6: Article 6 (Right to Life)", *United Nations Document*, 30 April 1982, para. 7.

¹¹ United Nations Economic Social Council, "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", *United Nations Document*, E.S.C. Res. 1984/50, 25 May 1984.

¹² United Nations Human Rights Council, "Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions", *United Nations Document*, UN Doc. CCPR/C/79/Add.85, 28 October 1997, para. 13.

¹³ United Nations Human Rights Council, "Civil and Political Rights, including the Questions of Disappearances and Summary Executions", *United Nations Document*, A/HRC/4/20, 29 January 2007, para. 53.

¹⁴ Michael Hor, "The Death Penalty in Singapore and International Law", *Singapore Yearbook of International Law*, Vol. 8, 2004, p. 107.

¹⁵ United Nations Economic Social Council, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", *United Nations Document*, UN Doc E/2010/10, 18 December 2009, para. 63.

also confirmed that death penalty should only be used for the ‘most serious crimes’ of murder and or intentional killing.¹⁶ The HRC follows the above interpretations and had consistently rejected death penalty for crimes that do not result in the loss of life¹⁷ suggesting that ‘most serious crimes’ must involve intentional acts of violence resulting in death of victim.¹⁸ The HRC then specified that drug-related offenses, terrorism, and offenses against the state¹⁹ are amongst those crimes that does not amount to ‘most serious crimes’.

However, it is important to note, that the primary task of treaty bodies including the HRC is to *convince* and *persuade* state parties as opposed to judge.²⁰ The HRC, in this regard, issue these documents as part of their role to *assist* state parties in realizing their human rights obligations pursuant to Article 40 of the ICCPR which regulates that reports from state parties are submitted to the HRC for considerations, and as feedback, the HRC publishes their comments and observations. However, neither of these documents are binding. As stated by the US in their comments on the Concluding Observations of the Human Rights Committee: ‘Article 40

did not give the HRC authority to issue legally binding or authoritative interpretations of the Covenant.’²¹ At this end, the comments and concluding observations issued by HRC may have persuasive value,²² seeing that HRC is the treaty body of ICCPR and therefore has the appropriate capacity to make interpretations of the convention. However, their interpretations are not legally binding.²³

For example, in the *Comments on Egypt*, the HRC expressed concerns over Egypt’s measures to combat terrorism. The Egyptian Law No. 97 of 1992 imposes death penalty for acts of terrorism.²⁴ The HRC conveyed that the definition of terrorism under such law was open to a wide range of differing gravity. It was on this basis the HRC suggested the Egyptian government to review the definition “more precisely” that it becomes compatible to ‘most serious crimes’ under Article 6(2) of ICCPR.²⁵ In the *Comments on Cameroon*, the HRC expressed concerns that some of the crimes that are punishable by death penalty, such as secession, espionage or incitement to war are “loosely defined”.²⁶ Furthermore, during the periodic review by the HRC in 2011, Iran’s use of death penalty for drug crimes were

¹⁶ United Nations Human Rights Council, “Question of the Death Penalty: Report of the Secretary-General”, *United Nations Document*, A/HRC/24/18, 1 July 2013, para. 24.

¹⁷ United Nations General Assembly, “Moratoriums on the Use of the Death Penalty: Report of the Secretary-General”, *United Nations Document*, A/63/293, 15 August 2008, para. 32.

¹⁸ United Nations Human Rights Committee, “Communication of *Thompson v. Saint Vincent and the Grenadines*”, *United Nations Document*, CCPR/C/WG/69/DR/806/1998, 10-28 July 2000, para. 8.2.

¹⁹ United Nations Human Rights Council, “Civil and Political Rights, including the Questions of Disappearances and Summary Executions”, *United Nations Documents*, A/HRC/4/20, 29 January 2007, para. 51.

²⁰ Kerstin Mechlem, “Treaty Bodies and the Interpretation of Human Rights”, *Vanderbilt Journal of Transnational Law*, Vol. 42, November 2009, p. 923.

²¹ United Nations Human Rights Committee, “United States Comments on the Concluding Observations of the Human Rights Committee”, *United Nations Document*, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 12 February 2008, p. 9.

²² Kerstin Mechlem, “Treaty Bodies and the Interpretation of Human Rights”, *Vanderbilt Journal of Transnational Law*, Vol. 42, November 2009, p. 923.

²³ *Ibid*, p. 924.

²⁴ Egyptian Law No. 97 of 1992 on Terrorism, Article 86.

²⁵ United Nations Human Rights Committee, “Comments on Egypt”, *United Nations Document*, UN Doc. CCPR/C/79/Add.23, 9 August 1993, para 8.

²⁶ United Nations Human Rights Committee, “Concluding Observations: Cameroon”, *United Nations Document*, UN Doc. CCPR/C/Add.116, 4 November 1999, para 14.

²⁷ United Nations Human Rights Committee, “Concluding Observations: Iran”, *United Nations Document*, UN Doc. CCPR/C/IRN/CO/3, 2 November 2011, para 12.

discussed. The HRC only expressed concerns about the “extremely high and increasing number of death sentences [...] the wide range and often vague definition of offenses for which the death penalty is applied.”²⁷ The HRC went on to recommend the Iranian government to “revise the Penal Code to restrict the imposition of the death penalty to only the ‘most serious crimes’, within the meaning of Article 6(2) of the Covenant and the Committee’s general comment No. 6.”²⁸

The Author makes three remarks from these cases: *first*, the HRC does not explicitly exclude terrorism or drug crimes from ‘most serious crimes.’ Rather, the HRC emphasize that any offense punishable by death must not be vague, loosely defined, and open to differing gravity; *Second*, as consequence to the first point, the scope of ‘most serious crimes’ must be defined strictly. *Third*, in its recommendation for Iran, the HRC did not require the death penalty to be limited to ‘intentional killings’ or ‘other extremely grave consequences’ (despite the fact that HRC follows the interpretation in Safeguard Guaranteeing Protection). Instead, the HRC only advised Iran to restrict death penalty for only ‘most serious crimes’ in accordance with Article 6(2) and the HRC’s general comment No. 6. In which, as previously stated, the general comment only expressed that ‘most serious crimes must be read restrictively to mean that the death penalty should be a quite exceptional measure.’

b. Interpretation of ‘Most Serious Crimes’ by Other Human Rights Treaty Bodies

The above interpretation of ‘most serious crimes’ by the HRC and other UN

bodies is also echoed by the Inter-American Commission on Human Rights [IACmHR]²⁹ as well as the African Commission on Human and Peoples’ Rights [ACmHPR].³⁰ In particular, the American Convention on Human Rights [‘ACHR’] adopts a similar stance to the ICCPR. The ACHR regulates death penalty in Article 4(2) which reads:

*“In countries that have not abolished the death penalty, it may be imposed only for the **most serious crimes** and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.”* [emphasis added].

The requirement of ‘most serious crimes’ under the ACHR is parallel to the one provided under the ICCPR, but in practice, the Inter-American Court of Human Rights [‘IACtHR’] gives a slightly different interpretation. In *Raxcaco-Reyes v. Guatemala*, the IACtHR held that crimes which results in the loss of life does not automatically be punishable by death. Rather, there must be a distinction or categorization of the different degrees of seriousness that distinguishes serious crimes from the “most serious crimes”. The Court went on to describe ‘most serious crimes’ as those that **affect most severely the most important individual and social rights** therefore merit the most vigorous censure and the most severe punishment.³¹

This interpretation is different from the one introduced by HRC that ‘most serious

²⁸ *Ibid.*

²⁹ Inter-American Commission on Human Rights, “Report on Terrorism and Human Rights”, *Report*, OEA/Ser.L/V/II/116, 22 October 2002.

³⁰ African Commission on Human and Peoples’ Rights, “General Comment No 3 on the African Charter on Human and Peoples’ Rights: the right to life (article 4)”, *Report*, 57th Ordinary Session of the African Commission on Human and Peoples’ Rights, Gambia, 4-18 November 2015, para. 24.

³¹ Inter-American Court of Human Rights Judgment in regard to Judgment of *Raxcaco-Reyes v. Guatemala*, 15 September 2005, para. 69-70.

crimes must be read restrictively to mean that the death penalty is an exceptional measure' and that it includes 'intentional crimes with lethal or other extremely grave consequences'. The difference is that the IACtHR added more substantive description by stating that 'most serious crimes' are crimes that affect most severely the most important **individual and social rights**. In this sense, 'most serious crimes' does not only cover intentional killings, but it can also cover other cases that severely affect other important individual and social rights.

To summarize, the term 'most serious crimes' is not defined by ICCPR. In its general comment, the HRC only went far as to say that the reading of such term must be strict to mean that death penalty is an exceptional measure. The HRC agrees with the interpretation of 'most serious crimes' provided within the Safeguard Guaranteeing Protection which limits 'most serious crimes' to intentional killings and other extremely grave consequences resulting in deaths. However, none of the UN bodies explicitly consider national security when interpreting 'most serious crimes.'

c. Interpretation of 'Most Serious Crimes' Based on Article 31 of VCLT

To interpret 'most serious crimes' under Article 6(2) of ICCPR, the Author refers to the general rules of interpretation under Article 31 of the VCLT. In terms of application, Article 4 of the VCLT regulates that the Convention applies only to treaties which are concluded by states after it enters into force. While the VCLT itself was adopted in 1969 and entered into force in 1980, the ICCPR

was adopted 3 years earlier and came into effect in 1976. Therefore, based on Article 4, the general rules of interpretation under the VCLT cannot apply. However, Article 31 of the VCLT is applicable as it possesses customary international law status.³² This was demonstrated in *Kasikili/Sedudu Island*³³ when the International Court of Justice applied the general rules of interpretation under VCLT to interpret the Anglo-German Treaty created in 1890—long before the VCLT existed.

Article 31 of the VCLT stipulates that an international treaty shall be interpreted in good faith and based on the ordinary meaning of the terms in the treaty, on the context and on the object and purpose of the treaty, and on the subsequent practice of the state parties. This provision indicates four methods of interpretation: interpretation based on the ordinary meaning of the terms; the contextual interpretation; interpretation based on the object and purpose of the treaty; and interpretation based on state practice.

The **first** step of interpretation requires linguistic and grammatical analysis of the text itself, searching for its ordinary meaning³⁴ which often relies on dictionaries.³⁵ As previously mentioned, there is no treaty defining 'most serious crimes'. But according to Oxford Dictionary, the ordinary meaning of 'most' refers to the greatest in amount or degree. However, from this interpretation alone, it is still unclear to extract what types of crimes that classify as having the greatest amount or degree of seriousness. Which brings us to the discussion of the second method of interpretation.

³² International Court of Justice Judgment in regard to Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) about Jurisdiction and Admissibility, 15 February 1995, para. 33; International Court of Justice Judgment in regard to Oil Platforms (Islamic Republic of Iran v. United States of America) about Preliminary Objections, 12 December 1996, para. 23.

³³ International Court of Justice Judgment in regard to Case of Kasikili/Sedudu Island (Botswana/Namibia), 13 December 1999, paras. 18-20.

³⁴ Oliver Dorr, *et al*, 2012, *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Berlin, p. 542.

³⁵ International Court of Justice Judgment in regard to Case of Kasikili/Sedudu Island (Botswana/Namibia), 13 December 1999, para. 30.

The **second** method is contextual interpretation. This method is equally important to the first one because in order to truly understand the meaning of a term, the context in which they are used in must be considered.³⁶ In other words, the extract of the ordinary meaning of a term cannot be detached from the place in which such term sits. The word “context” includes preambles, annexes, as well as any instrument made by the parties in connection with the treaty.

The term ‘most serious crimes’ is read with *‘in accordance with the law in force at the time of the commission of the crime’* under Article 6(2) of ICCPR. This means that ‘most serious crimes’ has to be associated with the law in force at the time of the commission of the crime, both on national and international level as upheld by the Indonesian Constitutional Court.³⁷ At international level, this means that death penalty must also be in accordance with other related provisions such as Article 14 with regards to equality before the law and Article 15 regarding legality principle. Other provisions include the Second Optional Protocol on the abolition of death penalty and the Genocide Convention.³⁸

In terms of national level, states have the legislative power to regulate crimes and the appropriate punishments. As mentioned in the *note verbale* signed by 53 states in response to the 2010 UN General Assembly resolution called “Moratorium on the use of the death penalty” in which states held, “the

types of crimes for which death penalty is applied, should be determined by each state, taking fully into account the sentiments of its own people, state of crime, and criminal policy.”³⁹ Furthermore, this argument was similarly reaffirmed in 2015 when the Human Rights Council and states were discussing the Safeguards Guaranteeing Protection, in which states argue that death penalty was only used for ‘most serious crimes’ as determined by each state taking into account **their unique circumstances**.⁴⁰ Based on the above explanation, it is most likely that national security can be taken into account when the reading of ‘most serious crimes’ is associated with domestic law.

The **third** method is based on the object and purpose of the treaty. The ICCPR system is designed to secure minimum fundamental values and not to establish a uniform or harmonized rule.⁴¹ In the *West Indian* death penalty cases, the HRC observed that one of the object and purpose of ICCPR is to *promote reduction* on the use of death penalty⁴² rather than eliminate it completely. Based on this understanding, the Author opines that states may interpret in a manner that allows the consideration of national security as long as it does not defeat the essence of the right to life under Article 6(1) of ICCPR.

Moving on to the **fourth** method, Article 31(3) was designed to consider rules arising subsequently from the implementation of VCLT. Specifically, this article consist of the following methods of interpretation:

³⁶ Oliver Dorr, *et al*, 2012, *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Berlin, p. 543.

³⁷ Constitutional Court Ruling No. 2-3/PUU-V/2007 in regard to Constitutional Review of Act No. 22 of 1997 about Narcotics towards the Constitution of the Republic of Indonesia 1945, 30 October 2007, p. 96.

³⁸ Asian Centre for Human Rights, “Right to Life in the Context of Death Penalty”, *Paper*, Half Day General Discussion on Article 6 of the UN Human Rights Committee, Geneva, 24 July 2015, p. 10.

³⁹ Roger Hood, *et al*, 2015, *The Death Penalty: A Worldwide Perspective*, Oxford University Press, United Kingdom, p. 153.

⁴⁰ United Nations Human Rights Council, “High-level Panel Discussion on the Question of the Death Penalty”, *United Nations Document*, A/HRC/30/21, 2 October 2015, p. 9.

⁴¹ Dominic McGoldrick, “A Defense of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee”, *International and Comparative Law Quarterly*, Vol. 65, No. 1, November 2016, p. 43.

⁴² Alex Conte, *et al*, 2009, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, Ashgate Publishing, United Kingdom, p. 15.

1) “*any subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions”; 2) “*any subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation”; and 3) “*any relevant rules of international law* applicable in the relations between the parties” [emphasis added]. All three methods are deemed to be “authentic elements of interpretation”⁴³ as it reflects state practices. The phrase “authentic elements of interpretation” is not further elaborated by the International Law Commission [‘ILC’]—the body that drafted the VCLT. However, the ILC stated that subsequent practices in the application of a treaty constitute as evidence of how states understand the meaning of the treaty.⁴⁴

According to Report of the Special Rapporteur in 2013, the authentic elements of interpretation such as the subsequent practice of states, may guide the evolutive interpretation of a treaty.⁴⁵ Evolutive interpretation emphasize the need to construe the elements of a convention in accordance with developments of law and social attitudes⁴⁶ and it has been recognized as an acceptable method of treaty interpretation within Article 31 VCLT as held in *Costa Rica v. Nicaragua*.⁴⁷ Referring back to the focus of this thesis, subsequent state practices in the context of the death penalty under Article 6(2) of ICCPR may reflect a rule as the result of

the developments of law and social attitudes.

The focus of the fourth method of interpretation that this thesis will discuss is Article 31(3)(b) which is “*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*”. Two parts will be elaborated: **first** the phrase “in the application” of a treaty and **second** the term ‘practice’.

The phrase “in the application” of a treaty, found in Article 31(3)(b), indicates that there needs to be a subjective link between the practice and the treaty in question.⁴⁸ It means the practice must indicate that the state assumes a position regarding the interpretation of a treaty. In providing an explanation, the ILC referred to the practice of the European Court of Human Rights [‘ECtHR’] and described that, in the context of interpretation based on subsequent practices of states, the Court presumes that member states are aware of their obligations under the ECHR, thus, state legislations and actions under domestic level reflects their understanding of those obligations.⁴⁹ Following the above explanation, it means that when states legislate on death penalty, they are assumed to have done so based on their understanding of their obligations under Article 6(2) of ICCPR.

Furthermore, the term ‘practice’ under Article 31(3)(b) does not only include external conducts for example official acts

⁴³ International Law Commission, “Commentaries to the Draft Articles on the Law of Treaties”, *Yearbook of the International Law Commission*, Vol. II, 1996, paras. 14-16.

⁴⁴ *Ibid*, para. 15.

⁴⁵ United Nations Special Rapporteur, “First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation”, *United Nations Document*, A/CN.4/660, 9 March 2013, para. 64.

⁴⁶ Arai-Takahashi Yutaka, 2002, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Oxford, p. 15.

⁴⁷ International Court of Justice Judgment in regard to Dispute regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*), 13 July 2009, paras. 63-66.

⁴⁸ Oliver Dorr, *et al*, 2012, *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Berlin, pp. 556 – 557.

⁴⁹ United Nations Special Rapporteur, “Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties”, *United Nations Document*, A/CN.4/671, 26 March 2014, p. 8.

or statements made at international level, but it also includes internal conducts such as legislative, executive, and judicial acts.⁵⁰ This means that domestic laws regulating death penalty can be regarded as 'practice' under Article 31(3)(b) which will be elaborated in the next part of the discussion.

d. Margin of Appreciation to Interpret 'Most Serious Crimes'

The previous part discussed subsequent state practice as one method of evolutive interpretation. Before elaborating how states have interpreted 'most serious crimes,' it is necessary to discuss the method upon which states are able to balance between national condition and human rights obligation. In this context, *margin of appreciation* ['MoA'] accommodates national interest to be taken into consideration when complying to human rights obligation. The concept of MoA originates from ECtHR practice in cases of human rights derogation and limitation. It has been referred as the line which international supervision should give way to a State Party's discretion in enacting or enforcing its laws.⁵¹ Yourow defines MoA as the latitude of defense allowed for national legislative, executive, administrative, and judicial bodies in declaring a derogation or restriction or limitation of a certain right guaranteed by the ECHR.⁵² In other words, MoA provides states the opportunity to give an opinion on the exact content of rights as well as on the necessity of a restriction or penalty.⁵³

Specifically, and according to Yutaka, MoA is a measure of discretion which allowed states in implementing ECHR standards to

consider of their national conditions.⁵⁴ An example of its application is *Handyside v. UK*. This case is about a publishing firm who published handbooks for schools that had sexual content. After a number of complaints, the firm was searched and the copies of the books were seized. The applicant was later fined and ordered to pay costs. After he lost the appeal at domestic level, the applicant decided to bring the case to the ECtHR. The ECtHR held that the conviction interfered with the freedom of expression.

The issue at this point was whether such interference was necessary in democratic society. The Court considered that there was no uniform conception between the domestic laws of the state parties in 'protecting morals.' Therefore, states should be given a margin of appreciation in interpreting whether a particular measure to protect moral is 'necessary' in their territory.⁵⁵ The rationale behind this is explained in *Handyside v. UK*. Here, the Court recognized that states, having direct and sustained relation with its society, are in a better position to make any initial assessment of social necessity. The Court gave a further explanation in the following passage:

*"[...] it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of moral varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution [...]"*⁵⁶

⁵⁰ *Ibid* p. 20.

⁵¹ Howard Yourow, 1996, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer Academic Publishers, The Netherlands, p. 13.

⁵² *Ibid*.

⁵³ European Court of Human Rights Judgment in regard to *Handyside v. United Kingdom*, 7 December 1976, para. 48.

⁵⁴ Arai-Takahashi Yutaka, 2002, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Oxford, p. 2.

⁵⁵ European Court of Human Rights Judgment in regard to *Handyside v. United Kingdom*, 7 December 1976, para. 48.

⁵⁶ *Ibid*.

However, it is also important to address that MoA has not been explicitly acknowledged in the application of ICCPR. There exists a view which perceives that MoA has never been explicitly utilized in the context of ICCPR on the risk that it may threaten the ‘universality’ of human rights.⁵⁷ This is related to the concept of universalism and cultural relativism. The former considers that national culture is irrelevant to the question of human rights. The consequence of this concept is that universalists do not allow ‘universal’ standard of human rights be compromised by the local dynamics of different regions. On the other hand, cultural relativism has been defined by Teson⁵⁸ as “*the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.*” Given this feature, explicitly acknowledging MoA would create a risk of states relying upon cultural relativism to validate derogating the content of a particular right.⁵⁹

Despite the lack of formal acknowledgement, the HRC had implied the application of what seems to be MoA in their communications. *Hertzberg v. Finland* is a case about restricting freedom of expression on account of public morals. The HRC stated that, ‘public moral differs

widely. There is no universally applicable moral standard. Consequently, **a certain margin of discretion must be accorded to the responsible national authorities**⁶⁰ [emphasis added].

Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius is another case that implies the use of MoA. It concerns immigration law where the authors, which consisted of 20 women, claimed that the respondent state imposed discriminatory measures based on sex against women, violating the right to found a family and home. The HRC in this case stated the following:

“[...] *The Committee is of the opinion that the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political, and cultural conditions and traditions.*”⁶¹

Such statement shows that HRC implicitly recognized MoA by viewing that legal protection may vary from one state to another depending on their domestic conditions. However, the HRC went on to view that any measures restricting access of foreign nationals into the territory of a state cannot be intrusive to other rights. In this case, subjecting only Mauritian women to those restrictions is discriminatory in nature.⁶²

Affording states with MoA would create an acceptable and overall balance of human-rights compliant.⁶³ Learning from

⁵⁷ Dominic McGoldrick, “A Defense of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee”, *International and Comparative Law Quarterly*, Vol. 65, No. 1, November 2016, p. 53.

⁵⁸ Fernando Teson, “International Human Rights and Cultural Relativism” in Patrick Hayden, 2001, *The Philosophy of Human Rights*, Paragon House, Minnesota, pp 409-423.

⁵⁹ Dominic McGoldrick, “A Defense of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee”, *International and Comparative Law Quarterly*, Vol. 65, No. 1, November 2016, p. 53.

⁶⁰ United Nations Human Rights Committee, “Communication of Leo Hertzberg v. Finland”, *United Nations Document*, UN Doc. CCPR/C/OP/1, 1985, para. 10.3.

⁶¹ United Nations Human Rights Committee, “Communication of Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius”, UN Doc. CCPR/C/OP/1, 1984, para. 9.2 (b) 2 (ii) 2.

⁶² United Nations Human Rights Committee, “Communication of Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius”, UN Doc. CCPR/C/OP/1, 1984, para. 9.2 (b) 2 (ii) 3.

⁶³ Dominic McGoldrick, “A Defense of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee”, *International and Comparative Law Quarterly*, Vol. 65, No. 1, November 2016, p. 58.

the Council of Europe, MoA has played a crucial role in ensuring the compliance of member states in executing their human rights obligations while accepting that states are in a better position to determine the legal necessities within their jurisdiction. Given the greater diversity of ICCPR state parties compared to the geographically homogeneous members of the Council of Europe, an MoA would assist the HRC to balance between the idea of universal human rights and leaving space for reasonable disagreement, legitimate differences, and national cultural diversity.⁶⁴ Especially considering the fact that the HRC has to accommodate the plurality of legal orders of the state parties.

e. States' Interpretation of 'Most Serious Crimes'

As mentioned in the previous part, Article 31(3)(b) emphasize on *any subsequent practice* of states in the application of a treaty which include domestic laws and government actions at international level. Generally, from 195 states in the world, 140 states have abolished death penalty, with 56 still imposes death penalty.⁶⁵ From 56 states, there are at least 33 states who imposes death penalty for drug crimes⁶⁶ and 38 states for terrorism.⁶⁷ In the context of human rights treaty obligations, it has been argued that states' responses to the treaty bodies' works including comments and observations, constitute as subsequent practices in the sense of Article 31(3)(b).⁶⁸ Below, we will see how states have a different interpretation than HRC in the sense that they

reserve death penalty for crimes other than cases of intentional killings.

1) United States of America

The term 'intentional killing' as the threshold of 'most serious crimes' had previously been challenged by the US Supreme Court in a murder case on the basis that there are crimes lacking intent to kill, but still causes grave consequences to life. The US, as signatory of the ICCPR, is bound by Article 6(2) and must apply death penalty for the 'most serious crimes', but the US Supreme Court took a different view than the HRC in applying the threshold. In *Tison v. Arizona*,⁶⁹ Justice O'Connor stated that the threshold of "intent to kill" is not a satisfying way to qualify for death penalty. This is due to the fact that many defendants who did have the intent to kill may lack culpability if they claim that their doing was for self-defense. On the other hand, there are also defendants who lacked the specific intent to kill but they may, in fact, be the most culpable. Her comment on this was "*some non-intentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies [...]*" For this reason, the majority in such case refused to apply the narrow threshold of "intent to kill" but

⁶⁴ *Ibid*; Andrew Legg, 2012, *The Margin of Appreciation in International Human Rights Law Deference and Proportionality*, Oxford University Press, United Kingdom, p. 225.

⁶⁵ Amnesty International, "Death Penalty 2015: Facts and Figures", <https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/>, accessed in 20 May 2017

⁶⁶ Patrick Gallahue, "Drugs and the Death Penalty", *Paper*, Open Society Foundations, 2016, p. 5.

⁶⁷ World Coalition against the Death Penalty, "The Death Penalty for Terrorism: Detailed Fact Sheet", *Paper*, 34th Session of the United Nations Human Rights Council, 2016, p. 7.

⁶⁸ Kerstin Mechlem, "Treaty Bodies and the Interpretation of Human Rights", *Vanderbilt Journal of Transnational Law*, Vol. 42, November 2009, p. 920.

⁶⁹ United States Supreme Court Judgment in regard to *Tison v. Arizona*, 21 April 1987.

rather rely on the question of whether there were any “**reckless disregard for human life.**”⁷⁰

Furthermore, death penalty for crimes that does not result in the death of individual is possible if it concerns **national interest**. First example is espionage. The Federal Death Penalty Act 1994 specifies death penalty for homicide and non-homicide crimes. In the latter category, the Act allowed death penalty for espionage that led to the disclosure of major elements of defense strategy and war plans.

The second example is treason. In *Stephan v. United States*, treason is considered as the most serious crimes against the **security of a state**. The crime of treason is punishable by death penalty upon conviction, a finding of one or more of the statutory **aggravating factors**, and a determination that the aggravating factors outweigh any mitigating factors.⁷¹ Those aggravating factors are: prior treason conviction, **grave risk to national security**, grave risk of death, **grave risk of harm to others**, and any other aggravating factor.

In the context of drug trafficking, the US can impose death penalty for first offense if the case is causes death or severe injury.⁷² It should be noted that under the Anti-Drug Abuse Act, death penalty cannot be imposed to offenders who only manufacture, distribute, or deliver substances. The Act limits death penalty to those who

engage in a continuing criminal enterprise.

2) Cuba

Under Cuban law, drug trafficking not resulting in death can still be subject to death penalty if the trafficking, producing, or transporting of drugs were conducted by state agents or the activities of such utilized state resources; or the drug offense were part of an international drug trafficking ring.⁷³ Furthermore, death penalty may be imposed upon crimes that sabotage or impair social, economic, or military resources, on the condition that it uses dangerous methods or involves state agents, causing serious injury to health or **threatening public security**.⁷⁴ Treason is also another crime punishable by death if such crime aims to harm the independence of Cuba, including threatening the life, liberty, or integrity of the state or government.⁷⁵

3) Saudi Arabia

Saudi Arabia—another signatory of the Arab Charter—imposes death penalty for perpetrators of terrorist acts. In their view, such act is one of the most serious crimes. In its report to the Security Council clarifying anti-terrorism legislation, the state claimed:

“It is a basic principle of the Islamic Sharia that whatever leads to the forbidden is itself forbidden. Terrorist acts are forbidden and are among the most serious crimes in the

⁷⁰ *Ibid.*

⁷¹ United States Supreme Court Judgment in regard to *Stephan v. United States*, 1 June 1943.

⁷² United States Code Title 21 of 1998 on Prohibited Acts § 841(b).

⁷³ Cuban Penal Code of 1870, as amended by Law No. 87 of 1999, Article 190.

⁷⁴ *Ibid.*, Articles 104, 105, 106, 108.

⁷⁵ *Ibid.*, Articles 91-94; 98(1); 107(1).

Sharia texts. Therefore, in accordance with the norms of the Islamic Sharia, anything that is conducive to or that facilitates the commission of such acts is also forbidden, and this includes the provision or collection of funds to be used for terrorist acts."⁷⁶ [emphasis added].

In their report to the Security Council Committee pursuant to Resolution 1373 on counter-terrorism, Saudi Arabia asserted that the act of terrorism is not just related to the injured individuals, but to the community as a whole, because they violate the sanctity of the innocent and the **security and stability** of the state.⁷⁷

4) Singapore

Singapore is not a party to the ICCPR. However, it has, on numerous occasions, addressed the issue of death penalty and its relation to the 'most serious crimes. In responding a report by Amnesty International, the government argued that the application of death penalty is only reserved for "the most heinous crimes".⁷⁸ Furthermore, in a letter addressed to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions in 2007, Singapore argued that "[...]the right to life is not the only right, and. [...] it is the duty of societies and governments

to decide how to balance competing rights against each other."⁷⁹ The government also stated that their tough drug laws helped decrease crime rate and create a relatively safe and crime free environment in Singapore which attracts both tourists and investors.⁸⁰

In determining whether an offender should be sentenced to death, it depends on the number of drugs that were involved⁸¹ as it bears a reasonable relationship with the purpose of its legislation to secure public safety. The number of drugs being trafficked increases, the **harms caused to the community** will also increase,⁸² and so will the level of culpability of the perpetrator.

Similar to the reasoning of Singapore, Malaysia is firm on the notion that drug crimes pose as a major threat to the state's safety and security.⁸³ The state considers it as most serious crimes since Malaysia is usually used as a transit country for drug traffickers from the Golden Triangle (Thailand, Laos, Burma).

2. Crimes that Threaten National Security may amount to 'Most Serious Crimes'

From the state practices above, it can be seen that those states do not share the same interpretation of Article 6(2) of ICCPR as the HRC, as they impose death penalty for crimes that does not necessarily

⁷⁶ Counter-Terrorism Committee, "Report of the Kingdom of Saudi Arabia Submitted Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001) concerning Counter-terrorism", *Report*, UN Doc. S/2001/1294, 2001, p. 4.

⁷⁷ *Ibid.*

⁷⁸ Ministry of Home Affairs of Singapore, "The Singapore Government's Response to Amnesty International's Report "Singapore – The Death Penalty: A Hidden Toll of Executions", https://web.archive.org/web/20100125195351/http://www.mha.gov.sg:80/basic_content.aspx?pageid=74, accessed in 10 June 2017.

⁷⁹ Amnesty International, "Singapore – The Death Penalty: A Hidden Toll of Executions", *Report*, January 2014, p. 4.

⁸⁰ *Ibid.*, p. 2.

⁸¹ Singapore Act No. 5 of 1973 on Misuse of Drugs, Sections 15-33(A).

⁸² Michael Hor, "The Death Penalty in Singapore and International Law", *Singapore Yearbook of International Law*, Vol. 8, 2004, p 110.

⁸³ Yinyos Leechaianan, *et al.*, "The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia, and Thailand: A Comparative Legal Analysis", *MDPI Journal*, Vol. 2, No. 2, June 2013, p. 132.

always result in loss of life such as terrorism, treason, and narcotic crimes. The common threshold between these practices is that death penalty can be imposed upon crimes that threatens national security.

Crimes that ‘threatens national security’ may amount to ‘most serious crimes’ because of the following reasons: **first**, the Author opines that limiting the ‘most serious crimes’ to only cover intentional killings underrates other crimes that does not only have severe effect on one individual, but towards the society and public safety as well. **Second**, compared with the time when the ICCPR was drafted in 1954, crimes are now easily committed cross-border resulting in widespread effect to society; in this sense, it constantly deals with national security. Considering this factor, it is important that the threshold of ‘most serious crimes’ reflect the current circumstances. This is also in line with evolutive interpretation.

Third, consider these two facts: first, during the drafting of Article 6(2) of ICCPR, states expressed concerns over the broad wordings of ‘most serious crimes’, and suggested that a definition is given to the term but no further effort was made. Second, the HRC which serves as a treaty body of ICCPR, only described ‘most serious crimes’ as a term that should be read restrictively to make death penalty an exceptional measure. Neither the *travaux préparatoires* or HRC gives a precise meaning of ‘most serious crimes.’ This support the Author’s opinion that states do have the authority to further interpret ‘most serious crimes’ and it does not have to only include intentional killings. Crimes which threatens national security can amount to ‘most

serious crimes’ so long as such crime is defined strictly by ascribing to it, a set of aggravating conditions that would distinguish the ‘most serious crimes’ from the less serious ones.

There are two approaches in defining national security. **First**, the traditional definition, which only emphasize securing state territory exclusively from foreign interference.⁸⁴ For example, this definition can be found in Siracusa Principles,⁸⁵ which was prepared by the UN Commission on Human Rights in 1984. According to the Siracusa Principles, national security is a term used to justify measures taken to protect the existence of nation, its territorial integrity or political independence against force or threat of force.⁸⁶ Any measure must be necessary to avert a real, and not only hypothetical, danger to the national security or democratic order of the state.⁸⁷ Based on such definition, national security cannot be invoked as justification for imposing measures to prevent a local or isolated threats to law and order.⁸⁸

Nevertheless, the concept of national security changed since the end of the cold war in 1991 and due to globalization. This does not mean that the traditional view is abandoned, rather through the course of progress, the concept of national security is introduced to new elements. Which brings the discussion to the **second** approach namely, the non-traditional definition of national security that is becoming more popular. According to Mely Cabailero-Anthony, the non-traditional definition refers to ‘the challenges to survival and well-being of society and states that arises from threats such climate change, cross-border environmental conditions, transferable diseases, uneven migration, food shortages, people smuggling, drug trafficking,

⁸⁴ Ekpenyong Nkereuwem Stephen, “Drug Trafficking and the Threat to Nigeria’s National Security”, *Canada Social Science*, Vol. 12, No. 12, 2016, p. 3.

⁸⁵ United Nations Commission on Human Rights, “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights”, *United Nations Document*, E/CN.4/1985/4, 28 September 1984.

⁸⁶ *Ibid.*

⁸⁷ United Nations Human Rights Committee, “Communication of Lee v. Republic of Korea”, *United Nations Document*, UN Doc. CCPR/C/84/D/1119/2002, 20 July 2005, para. 7.2; See also United Nations Human Rights Committee, “Communication of Belyatsky et. Al. v. Belarus”, *United Nations Document*, UN Doc. CCPR/C/90/D/1296/2004, 24 July 2007, para. 7.3.

⁸⁸ United Nations Commission on Human Rights, “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights”, *United Nations Document*, E/CN.4/1985/4, 28 September 1984.

and other forms of transnational crime.⁸⁹ Threats to Non-traditional national security has the following characteristics: transnational in nature; transmitted rapidly due to globalization; difficult to be prevented completely, in the sense that it can only be responded through coping mechanism; national solutions are often insufficient, consequently, regional cooperation is needed; the object of security is no longer solely state sovereignty or territorial integrity, but also includes the survival of individuals and society as a whole.⁹⁰

In determining the threshold of crimes that threatens national security, the Author refers to the practice of IACtHR who recognized a similar MoA. In *Raxcaco Reyes*, the IACtHR held that a kidnapping does not amount to 'most serious crimes.' In a hypothetical case where the kidnapping was followed by death, other circumstances must be considered before passing the most severe punishment. In this context, the Court was of the opinion that domestic law must grant courts 'a margin of subjective appraisal'.⁹¹ As such, the Court also take into view of the gravity of each offense. Specifically, the IACtHR stated:

"The intentional and illicit deprivation of another's life (intentional or premeditated murder, in the broad sense) can and must be recognized and addressed in criminal law under various categories (criminal classes) that correspond with the wide range of gravity of the surrounding facts, taking into account the different facets that can come into play: a special relationship between the offender and the victim, motives for the behavior, the circumstances under which the crime is committed, the means employed by the offender, etc. This approach allows for a graduated assessment of the gravity of the offense, so that it will bear an appropriate relation to the graduated levels of gravity

of the applicable punishment."⁹² [emphasis added]

Following this understanding, the Author opines that for crimes which threatens national security to be punishable by death, it must be proven that the crime is accompanied by aggravating factors in which the courts have margin of subjective appraisal to decide whether those factors merit enough to justify death penalty.

In order for death penalty to be justified, a crime that threatens national security must meet the following conditions: **first**, recalling the previous discussion about the traditional and non-traditional approach to national security, in which, the former focuses more on the well-being of a state and the latter on the well-being of society. Following this understanding, a crime must have caused grave harm to society or the state. **Second**, referring back to the previous discussion on state practices, states tend to impose death penalty for certain crimes because of their harmful nature against national security. But the Author opines that there must be a link between the perpetrator's action and the harm. Meaning that the common gravity of a crime such as terrorism or drug crimes cannot be generalized into individual cases. Rather, each case needs to demonstrate the severe impact of the crime and how it harms the national security in order to establish that the crime in question is indeed the most serious. **Third**, the Author opines that in terms of crimes which involves organized criminal groups, death penalty should only be reserved for the perpetrator that is most responsible. This would also contribute to limiting the list of perpetrators that can be subject to death penalty.

Fourth, other aggravating circumstances which depends case-by-case following the *Raxcaco*

⁸⁹ Mely Cabailero-Anthony, "Non-Traditional Security Challenges, Regional Governance, and the ASEAN Political- Security Community", *Paper*, Asia Security Initiative Policy Series Working Paper No. 7, 13 September 2010, p. 1.

⁹⁰ *Ibid.*

⁹¹ Inter-American Court of Human Rights Judgment in regard to Judgment of *Raxcaco-Reyes v. Guatemala*, 15 September 2005, para. 71.

⁹² Inter-American Court of Human Rights Judgement in regard to *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago about Merits, Reparations and Costs*, 21 June 2002, para. 102.

Reyes case. For example, in drug cases, domestic courts may consider aggravating circumstances. Examples are: the perpetrator must have a high-level position within an organized criminal group. These set of conditions can serve as a qualification criterion to ensure that the imposition of death penalty remain in line with the need to restrict the scope of ‘most serious crimes’ and match the gravity of the threshold, while accepting the margin that states rely on to impose death penalty for other crimes that are not limited to intentional killings.

C. Conclusion

To conclude this Article, the Author makes a

few remarks. **First**, the Human Rights Committee narrowly interpret ‘most serious crimes’ as to only include those that results in loss of life. **Second**, applying the rules of interpretation under Article 31 of the VCLT, ‘most serious crimes’ are not limited to those that results in loss of life. As seen from state practice and through margin of appreciation, ‘most serious crimes’ can be interpreted in a broader manner as to include crimes against national security. **Third**, crimes against national security would not immediately render death penalty. Rather, there must be aggravating factors that would give more weight to the severity of the crime.

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