

**ASIAN HUMAN RIGHTS COURT SIMULATION  
FIRST CHAMBER**

***MR. CHIOU HO-SHUN***

***v***

***TAIWAN GOVERNMENT***

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***Amicus curiae***  
**filed by**  
**Covenants Watch**

**pursuant to Article 9 § 2 of the Statute of Asian Human Rights Court Simulation**

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**Yibee Huang, Chief Executive Officer**  
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## **A. INTRODUCTION**

1. This submission is respectfully made by Covenants Watch per the *Amicus Curiae* Invitation by the Asian Human Rights Court Simulation (AHRCS) on 5 April 2019, in accordance with Article 9 § 2 of the Statute of AHRCS.
2. Covenants Watch is an NGO based in Taipei, Taiwan. It is committed to promoting the application of international human rights standards and relevant institutional development in Taiwan. Excluded from international society since the 1970s, the Taiwanese government has not been under the supervision of the United Nations system. Under these circumstances, Covenants Watch strives to introduce a unique treaty review process, which can hold the government accountable and ensure its domestic laws, policies, and practices are aligned with international human rights standards. In addition to its domestic activities, Covenants Watch plays an increasing role on the international level by participating in the Special Procedures and the Universal Periodic Review of the UN Human Rights Council.
3. Covenants Watch takes no position on whether Chiou Ho-shun committed the murder or not. Covenants Watch's sole interest is that the trial proceedings correctly follow international law fair trial standards.

## **B. SUMMARY OF FACTS**

4. The court has already provided a summary of the facts of the case in its List of Issues and Undisputed Matters, dated May 18, 2019 ("List"). Covenants Watch will summarize only the important facts relating to this brief's focus on international law and add relevant additional facts not included in the court's List.
5. Taiwan convicted Chiou of murdering Ke-Hong Yu-Lan and Lu Zheng on 29 November 1989 and he has been in prison for nearly thirty years.<sup>1</sup> He has appealed his conviction to the Supreme Court twelve times.<sup>2</sup> The first eleven times, the Supreme Court reversed and remanded the case back to the Taiwan High Court.<sup>3</sup> Each time, the Taiwan High

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<sup>1</sup> List at 2-3.

<sup>2</sup> List at 2-3.

<sup>3</sup> List at 2-3.

Court found him guilty.<sup>4</sup> On the twelfth appeal in 2011, the Supreme Court affirmed the lower court's ruling and death penalty sentence.<sup>5</sup>

6. In the Taiwan High Court's 11<sup>th</sup> trial, the court admitted confessions that the police may have extracted through torture.<sup>6</sup> At trial, six of his co-defendants testified that they had been tortured during the process.<sup>7</sup> The Control Yuan declared that four members of the Taipei City government police department crime investigation unit used "violence, coercion, bribery, and deception" while interrogating Yu Zhi-Xiang, one of the codefendants.<sup>8</sup> In two audio recordings of the interrogation, the police discussed using chili water and hitting Yu.<sup>9</sup> The officers also bragged about beating Chiou to get him to confess.<sup>10</sup>
7. Missing from the List is further detail on Taiwan High Court's handling of Yu's confession, as the court excluded documented confessions proven to be procured through misconduct, but retained those confessions unproven to be coercively obtained.<sup>11</sup> It was unclear to what extent the Taiwan High Court had tried to prove whether these other confessions were made while Yu was under threat or undue influence by his torturers. The court included a confession Yu made to the prosecutor while his torturers stood in the same room.
8. After pre-trial hearings, the Asian Human Rights Court (AHRC) identified several unresolved issues relating to torture, including:
  - Should the AHRC court only admit the international agreements that Taiwan has incorporated into domestic law as the prevailing rules of the case?<sup>12</sup> (hereinafter referred to as "Issue 1").
  - Given that Taiwan is not a state party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and has not unilaterally declared itself bound by the convention's

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<sup>4</sup> List at 2-3.

<sup>5</sup> List at 2-3.

<sup>6</sup> List at 2(7).

<sup>7</sup> List at 2(8).

<sup>8</sup> *Announcement by the Control Yuan*, September 29, 1994.

<sup>9</sup> Annex 1-1: Co-defendant (Yu Zhi-Xiang) tortured by the police on Oct 1, 1988, Annex 1-2: Co-defendant (Yu Zhi-Xiang) tortured by the police on Oct 1, 1988 II.

<sup>10</sup> List at 2 (7, 8).

<sup>11</sup> List of issues, April 01, 2019, at 3.

<sup>12</sup> List at 4(1).

obligations, should UNCAT apply to Chiou's case?<sup>13</sup> (hereinafter referred to as "Issue 3").

- If Chiou proves that the police tortured him and Yu, has Taiwan violated (a) Chiou's right against torture under Article 7 of the ICCPR, (b) Chiou's right against torture under Article 2 Section 1 of the CAT, and (c) Chiou's UNCAT Article 15 right for the state not to invoke evidence obtained through torture at trial?<sup>14</sup> (hereinafter referred to as "Issue 4, part 1").
- If Taiwan's domestic court excludes the part of the written transcript containing the confession extracted through torture, may they still adopt other parts of the written transcript's confession dealing with facts? Would doing so violate Chiou's right not to be compelled to admit guilt under Article 14 of the International Covenant on Civil and Political Rights (ICCPR)?<sup>15</sup> (hereinafter referred to as "Issue 4, part 2")

### C. ARGUMENT SUMMARY

9. All people have the right to a fair trial.<sup>16</sup> The use of torture to extract confessions for use as evidence violates fair trial standards because it compels someone to testify against themselves. Through widespread acceptance and practice, the prohibitions on torture and the use of confessions obtained through torture have become customary international law, which is binding on all states. These obligations apply to Taiwan regardless of whether Taiwan had signed on to the UNCAT and ICCPR at the time of the conviction (November 1989).
10. Under international fair trial standards, when the state seeks to submit a defendant's confession, the prosecution has the burden to prove that the defendant confessed freely and voluntarily. Placing the burden on the defendant would be unfair as he has limited resources with which to investigate the matter, whereas the police and prosecution have greater control over the access to the records of the interrogation.

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<sup>13</sup> List at 5(3), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT), Dec. 10, 1984, 1465 U.N.T.S. 85 at art. 2(1).

<sup>14</sup> List at 5(4), UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, at art. 7.

<sup>15</sup> ICCPR at art. 14(g).

<sup>16</sup> UN Declaration of Human Rights art. 10-11, ICCPR at art. 14.

11. In Chiou's case, the court should not have admitted his confession and his co-defendants' statements made under torture and coercion. Issue 4, part 1 suggests that Chiou should have the burden of proof.<sup>17</sup> However, under both international and Taiwanese law, the burden should be placed on the state to prove that he confessed voluntarily. If the prosecution cannot provide such proof, then it cannot use the confession in court. Instead, the prosecution must adduce other evidence proving that Chiou committed the crime. If the prosecution can otherwise prove beyond a reasonable doubt that Chiou committed the crime, then the court should find him guilty; but the judgment may not rely on statements made under torture.
12. Chiou's co-defendant Yu's confession is also inadmissible. Taiwanese courts convicted the police officers of torturing Yu. Before being tortured, Yu denied involvement, as he did at trial. When he confessed to the prosecutor, he had recently experienced torture at the hands of police officers who were present in the same room while he confessed. Yu probably feared additional torture if he did not confess, meaning he most likely did not confess freely and voluntarily.
13. Applying the death penalty to Chiou violates international law because the trial procedures violated several procedural safeguards, including not allowing him to cross-examine witnesses, depriving him of the presumption of innocence, and subjecting him to an unreasonable amount of time waiting for a final verdict and execution. Moreover, because the overwhelming trend of international law points toward abolition, the AHRC should not affirm a death penalty sentence for Chiou.

#### **D. DEFINITIONS**

14. International fair trial standards grant individuals the rights to (among others):
  - a. a fair and public hearing by a competent, independent, and impartial court established by law;
  - b. the presumption of innocence until proven guilty;
  - c. equality before the court;
  - d. examine, or have examined, all witnesses testifying against him;
  - e. be tried without undue delay;

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<sup>17</sup> List at 5(4).

f. not be compelled to testify against oneself or to confess guilt.<sup>18</sup>

15. The UNCAT defines torture as any act committed by a person acting in an official capacity “by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.”<sup>19</sup>

## **E. TAIWAN IS BOUND BY INTERNATIONAL LAW’S PROHIBITION OF THE USE OF TORTURE**

16. Issues 1 and 3 should be resolved in favor of applying the international accords to Chiou’s case because torture is prohibited by all sources of international law, including: 1) international agreements or treaties, 2) customary international law, or rules formed through state behavior, and 3) the derived general principles common to the major legal systems of the world.<sup>20</sup> The first two sources of international law are discussed below, a survey of major legal systems is in Section F.

### *International Agreements and Treaties*

17. States create international law when they make binding international agreements.<sup>21</sup> Both global and regional treaties emphasize the prohibition on using torture to elicit confessions.

18. The ICCPR guarantees the right not to be compelled to testify against oneself or to confess guilt.<sup>22</sup> Article 7 prohibits subjecting an individual to torture or cruel, inhuman or degrading treatment or punishment.<sup>23</sup> Additionally, 166 states are parties to the UNCAT, including all of the world’s major legal systems, suggesting widespread adoption.<sup>24</sup> The UNCAT categorically prohibits the use of torture to obtain confessions.<sup>25</sup>

19. Although the ICCPR became part of Taiwan’s legal system through the “Act to Implement the ICCPR and ICESCR” as late as 2009, the Republic of China (Taiwan)

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<sup>18</sup> ICCPR at art. 14.

<sup>19</sup> UNCAT at art. 1.

<sup>20</sup> Restatement 3d of the Foreign Relations Law of the U.S. (RST), § 102 (3rd 1987); Vienna Convention on the Law of Treaties (VCLT), May 23, 1969 8 I.L.M. 679 (1969) 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) at art. 11, 38.

<sup>21</sup> RST at 2; VCLT at art. 11.

<sup>22</sup> ICCPR at art. 14(3)(g).

<sup>23</sup> *Id.* at art. 7.

<sup>24</sup> United Nations Treaty Collection *Chapter IV Human Rights 9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, status as at: 13-06-2019 07:19:57 EDT.

<sup>25</sup> UNCAT at art. 2(2).

signed the ICCPR in 1967 while it was still a member of the UN. According to the Vienna Convention on the Law of Treaties (VCLT), “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.”<sup>26</sup> Furthermore, in response to a court request, the Taiwanese Ministry of Foreign Affairs re-affirmed in 2000 that the government always had the intention to ratify the covenants at an opportune time.<sup>27</sup>

20. Regional treaties reinforce universality of the principle against torture, the European Convention on Human Rights (ECHR), which serves as the foundational statute for the European Court of Human Rights (ECtHR), prohibits torture in Article 3 and rules out any derogation for times of emergency in Article 15(2).<sup>28</sup> The African Charter on Human and Peoples' Rights prohibits torture as an affront to human dignity.<sup>29</sup> The American Convention on Human Rights guarantees people the right to humane treatment and not to be subject to torture.<sup>30</sup>

#### *Customary International Law*

21. Customary international law prohibits using confessions extracted through torture. A practice becomes customary international law when it exhibits three attributes: a) Widespread state practice, b) *Opinio juris*, or opinions of law that can be derived from legal scholars, court decisions, or when states act under a sense of obligation to follow the practice as a matter of customary international law, and c) A significant number of states do not object to the practice as binding.<sup>31</sup> No precise formula exists for determining how widespread a practice must be to constitute customary international

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<sup>26</sup> VCLT at art. 18(a).

<sup>27</sup> *Taiwan High Court Criminal Judgment Appeal-Yi-Shang No. 1268 of 2000.*

<sup>28</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 at Art. 3, 15(2).

<sup>29</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) at art. 5.

<sup>30</sup> *Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose,"* Costa Rica, November 22, 1969 at art. 5 ¶ 2.

<sup>31</sup> RST at § 102, ICJ Statute, Article 38(1)(b), VCLT at art. 38.

law, but it should reflect widespread practice and the failure of several important states to adopt the practice can prevent it from becoming customary international law.<sup>32</sup>

22. The prohibition on torture is widespread practice. In 1975 the UN General Assembly voted unanimously to prohibit torture globally.<sup>33</sup> The International Court of Justice (ICJ) stated unequivocally in *Belgium v. Senegal* that the “prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).”<sup>34</sup> Because all UN members are parties to the ICJ statute, rulings of the court carry strong, widespread influence on international law.<sup>35</sup> The ICJ reasoned that the prohibition on torture appears in numerous international instruments of universal application, including the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions, the International Covenant on Civil and Political Rights of 1966, and General Assembly Resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>36</sup> The ICJ also noted that almost all states have introduced the prohibition into their domestic law and the international community regularly denounces torture in national and international fora.<sup>37</sup> Furthermore, both parties to the case, Belgium and Senegal, agreed with the court that torture is against customary international law, even without the ICCPR.<sup>38</sup>
23. The ECtHR declared in *Chahal v. United Kingdom* that states may not derogate from their international legal obligations not to torture, even for public emergencies.<sup>39</sup>

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<sup>32</sup> RST at § 102, comment b: *Practice as customary law*.

<sup>33</sup> UN General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, A/RES/3452(XXX), UN General Assembly, *Unilateral declarations by Member States against torture and other cruel, inhuman or degrading treatment or punishment*, 8 December 1977, A/RES/32/64.

<sup>34</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 at p. 422 ¶ 99.

<sup>35</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI at ch. 14, art. 93.

<sup>36</sup> *Id.* at ¶ 100.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 97, 99.

<sup>39</sup> *Chahal v. United Kingdom*, ECHR RJD 1996-V, 1831 at ¶ 23-26, 79) at art. 3 (where a Sikh separatist sought to block deportation to India where he had experienced torture and expected to experience further torture, the court wrote that the European Convention on Human Rights (ECHR) prohibits torture in absolute terms and that the article provides for no derogations or exceptions.).

24. The UN Human Rights Committee recently offered its opinion of the law that torture creates a risk of death, violating the ICCPR's guarantee of the right to life.<sup>40</sup> The Committee continues that criminal convictions resulting in the death penalty based on information obtained through torture or cruel, inhuman, or degrading treatment of interrogated persons, violate Article 7's prohibition on torture and Article 14(3)(g)'s requirement that no person be forced to testify against himself or confess guilt, as well as Article 6.<sup>41</sup>
25. The United States agrees that the practice of prohibiting torture has become so widespread that it is customary international law.<sup>42</sup> When the US passed implementing legislation of UNCAT, it believed it was already bound by the principles in Article 3 of the convention.<sup>43</sup>
26. States need not express that they believe they are bound by the custom; rather, omissions can be just as telling.<sup>44</sup> Non-parties to the UNCAT, despite not having formally taken on the convention's obligations, act under the belief that the prohibition on torture is binding international custom. Non-signatories generally deny allegations of torture, demonstrating that they believe there is international custom against torture. For example, in response to allegations of torture, Iran does not make the defense that it has not joined the UNCAT.<sup>45</sup> Rather, the relevant Iranian governmental bodies deny the accusations.<sup>46</sup> Iran's omission of claiming that it is not bound by the rule suggests that it believes it is obligated. Moreover, Iran has signed the ICCPR, which prohibits torture in Article 7.<sup>47</sup>
27. Similarly, North Korea also denies claims of torture when accused.<sup>48</sup> North Korea insists that although it is not yet a party to the UNCAT, it has enshrined the treaty's laws into

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<sup>40</sup> CCPR/C/GC/36 at ¶ 54.

<sup>41</sup> *Id.*

<sup>42</sup> RST at § 102 (3rd 1987).

<sup>43</sup> 8 U.S.C.S. § 1231 (LexisNexis, Lexis Advance through PL 116-17, approved 5/10/19) (United States policy concerning the involuntary return of persons in danger of subjection to torture).

<sup>44</sup> RST at § 102, comment c: *Opinio juris*.

<sup>45</sup> *Iran MPs to investigate protester torture claims*, Associated French Press, (January 6, 2019) <https://www.france24.com/en/20190106-iran-mps-investigate-protester-torture-claims>.

<sup>46</sup> *Id.*

<sup>47</sup> United Nations Treaty Collection *Chapter IV Human Rights 4. International Covenant on Civil and Political Rights*, status as at: 13-06-2019 07:19:57 EDT, ICCPR at art. 7.

<sup>48</sup> Justin McCurry *North Korea denies US student Otto Warmbier was tortured*, June 23, 2017, <https://www.theguardian.com/world/2017/jun/23/north-korea-denies-us-claims-otto-warmbier-torture>.

its national constitution.<sup>49</sup> Thus, even rogue states who have not acceded to the UNCAT still consider themselves bound by its rules. Finally, North Korea has also signed the ICCPR, which contains similar prohibitions on torture.<sup>50</sup>

28. Although Malaysia has not signed the UNCAT, Malaysia is actively working toward signing and ratifying it.<sup>51</sup> Furthermore, Malaysia's criminal code prohibits the use of torture to extort confessions.<sup>52</sup>
29. Singapore has also not signed the UNCAT, but its criminal code contains an almost identical provision prohibiting the use of torture to extract confessions.<sup>53</sup>
30. A significant number of states do not object to the prohibition on torture. States wishing not to be bound by widespread international custom must persistently object to it and claim not to be bound by it whenever possible and appropriate.<sup>54</sup> No country persistently objects nor claims to have the right to torture its citizens.<sup>55</sup> Even though some states may violate the prohibition on torture, that does not diminish the law's validity, just as people violating municipal law does not mean the law does not exist.<sup>56</sup>
31. Furthermore, the persistent objector doctrine does not apply to *jus cogens* or peremptory norms in international law.<sup>57</sup> Peremptory norms are rules accepted and recognized by the international community as a whole and from which no derogation is allowed.<sup>58</sup> Peremptory norms can be altered only by a subsequently emerging peremptory norm of international law.<sup>59</sup> As noted above, the ICJ has ruled that the prohibition on torture is a peremptory norm.<sup>60</sup>

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<sup>49</sup> A/HRC/13/13 at ¶ 50.

<sup>50</sup> ICCPR.

<sup>51</sup> The Sun Daily *Abdelwahab Hani to address obstacles delaying M[alaya]sia's accession to UNCAT*, July 2, 2018, <https://www.thesundaily.my/archive/abdelwahab-hani-address-obstacles-delaying-msias-accession-uncat-CUARCH560772>.

<sup>52</sup> Malaysia: Penal Code, Act No. 574 of 1997, 7 August 1997 at ch. 16, art. 330.

<sup>53</sup> Singapore: Penal Code, November 30, 2008, available at <https://sso.agc.gov.sg/Act/PC1871> at ch.16, art. 330.

<sup>54</sup> RST at comment d: *Dissenting views and new states*.

<sup>55</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-84 (2d Cir. 1980).

<sup>56</sup> J. Brierly, *The Outlook for International Law*, 4-5 (Oxford 1944).

<sup>57</sup> *Id.*, VCLT at art. 53

<sup>58</sup> VCLT at art. 53.

<sup>59</sup> *Id.*

<sup>60</sup> *Belgium v. Senegal* at ¶ 99.

### *Application to Taiwan and Chiou's Case*

32. Taiwan is bound by the international custom prohibiting the use of torture to extract confessions. The obligation applies to Taiwan regardless of whether it is a party to the UNCAT because the prohibition has become customary international law and Taiwan signed the ICCPR in 1967, which also prohibits torture.<sup>61</sup> Moreover, not only does Taiwan not object to the UNCAT, but its domestic law reflects the same prohibition on the use of torture.<sup>62</sup> Taiwanese law also prohibits the use of confessions obtained through torture as evidence at trial.<sup>63</sup> The confession may not serve as the sole basis of conviction, rather, the state must investigate to see if the confession is consistent with the facts.<sup>64</sup> If the accused claims that his confession was obtained through torture or other improper means, then the confession must be investigated prior to investigating all other evidence.<sup>65</sup> Taiwanese courts must order the public prosecutor to prove that the accused confessed freely and voluntarily.<sup>66</sup>
33. Although the murder happened before the emergence of the ICCPR implementation act of 2009 and the proposed UNCAT implementation bill,<sup>67</sup> and although ex post facto laws are prohibited, Taiwan's argument misstates the timeline of the country's legal obligations in three important ways:
34. First, the international custom against torture emerged before Chiou's initial conviction. The UN General Assembly Resolution against torture was unanimously adopted in 1975. The 3<sup>rd</sup> Restatement on Foreign Relations Law declared the prohibition to be international custom in 1987, which is also the same year that the UNCAT came into

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<sup>61</sup> U.S. Library of Congress *Taiwan: Two International Human Rights Covenants Ratified* (April 15, 2009), available at <https://www.loc.gov/law/foreign-news/article/taiwan-two-international-human-rights-covenants-ratified/>.

<sup>62</sup> Xingshi susong fa [Code of Criminal Procedure], art. 98 (as amended November 16, 2016, the relevant passages were last amended in 2003) available at <https://law.judicial.gov.tw/LAWENG/FLAW/dat02.aspx?lsid=FL001445> (stating that examinations of the accused must proceed in an honest manner without using "violence, threat, inducement, fraud, exhausting examination or other improper means").

<sup>63</sup> *Id.* at art. 156(1) (stating that the confession of an accused not extracted by violence, threat, inducement, fraud, exhausting interrogation, unlawful detention or other improper means and consistent with facts may be admitted as evidence).

<sup>64</sup> *Id.* at art. 156(2).

<sup>65</sup> *Id.* at art. 156(3).

<sup>66</sup> *Id.*

<sup>67</sup> *Bill to Implement the Convention Against Torture and the Optional Protocol to the Convention Against Torture* (Executive Yuan, December 2018).

force.<sup>68</sup> The 2012 ICJ decision declaring the prohibition of torture to be *jus cogens* cited declarations and treaties that came into existence well before 1987.<sup>69</sup> Taiwan also signed the ICCPR in 1967.<sup>70</sup> Even though Taiwan had not yet ratified the ICCPR, under international law, Taiwan was obligated not to defeat the object and purpose of the agreement.<sup>71</sup> Convicting someone based on evidence obtained through torture violates the ICCPR's object and purpose of protecting inalienable rights and the inherent dignity of human beings.<sup>72</sup>

35. Second, Taiwan's Supreme Court did not uphold Chiou's conviction until 2011, and by then, the ICCPR and UNCAT were all in force and widely accepted. Moreover, Taiwan passed ICCPR implementation legislation in 2009,<sup>73</sup> meaning it was bound by its anti-torture provisions at the time of the decision. Furthermore, almost every decision cited as evidence of international custom prohibiting torture in this *amicus curiae* happened before 2011. Finally, the 2009 ICCPR implementation legislation states that any application of the covenant should refer to the UN Human Rights Committee's interpretations, which, as mentioned above, prohibit torture and convicting someone based on a confession extracted through torture.<sup>74</sup>
36. Third, Taiwan's violations continue to mount every day that Chiou is imprisoned based on a confession extracted by torture. His continued incarceration violates the prohibition against torture.
37. Therefore, issues 1 and 3 should be resolved in favor of applying at least the torture-related provisions of the ICCPR and UNCAT to Chiou's case. Additionally, if Chiou can prove that the police tortured him, then on issue 4 part 1, the court should rule that Taiwan violated his ICCPR and UNCAT rights.

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<sup>68</sup> RST at § 102, UNCAT.

<sup>69</sup> *Belgium v. Senegal*.

<sup>70</sup> U.S. Library of Congress *Taiwan: Two International Human Rights Covenants Ratified* (April 15, 2009), available at <https://www.loc.gov/law/foreign-news/article/taiwan-two-international-human-rights-covenants-ratified/>.

<sup>71</sup> VCLT at art. 18.

<sup>72</sup> ICCPR at Preamble.

<sup>73</sup> Ministry of Justice *Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*, April 22, 2009 at art. 3 ("ICCPR Implementation Act"), Reply Brief for the Republic of China at 2.

<sup>74</sup> ICCPR Implementation Act at art. 3.

## **F. INTERNATIONAL COURT DECISIONS REFLECT A CONSENSUS ON THE PROHIBITION OF USING CONFESSIONS OBTAINED THROUGH TORTURE AS EVIDENCE AT TRIAL.**

38. Major international, national, and Asian legal systems all prohibit the use of confessions obtained through torture or the threat of torture to convict a defendant. The prohibition has become universal because it violates the right to a fair trial, the statements are inherently unreliable, and international accords prohibit it. However, a court determination that a confession was not given freely and therefore inadmissible neither exonerates the defendant nor invalidates subsequent confessions.<sup>75</sup>
39. On Issue 4 part 2, Taiwan's domestic courts may not use any of Chiou's statement made under torture, because customary international law and Taiwan's law both prohibit it. However, if his statements helped the police discover additional information, that evidence is admissible. The same principles apply to Yu's confession. The confession may not be used at trial, but any substantial evidence the police used the confession to uncover, rather than mere confessions, are admissible. However, it remains the burden of the prosecutor to prove that any subsequent confession was not extracted through threat or other improper means, and the court shall examine the method of proof.<sup>76</sup>

### *International Courts and Treaty Bodies*

40. The UN Human Rights Committee has ruled that using confessions obtained through torture violates the ICCPR.<sup>77</sup> In a decision concerning a complaint submitted by Roy Manojkumar Samathanam against Sri Lanka, the committee held that Sri Lanka's Terrorism Investigation Department had pressured him to confess with both torture and threats of torture, thus violating ICCPR 14(3)(g).<sup>78</sup>
41. The ECtHR stated in *Shishkin v. Russia* that using a torture-induced confession to convict a defendant always violates Article 3 of the ECHR, even if the court relies on other evidence to convict him.<sup>79</sup> The violation always raises serious issues as to the

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<sup>75</sup> 49 I.L.M. 1597 (2014).

<sup>76</sup> Code of Criminal Procedure at art. 156(3).

<sup>77</sup> CCPR/C/118/D/2412/2014 at 6.2-6.3.

<sup>78</sup> *Id.* (stating that the officers beat him, forced him to watch acts of torture against inmates, and threatened to arrest and rape his wife and kill his child if he refused to confess).

<sup>79</sup> *Shishkin v. Russia*, Application no. 18280/04, Council of Europe: European Court of Human Rights, 7 July 2011 at 149-150.

fairness of the proceeding.<sup>80</sup> The police tortured Shishkin with beatings, forcing him to wear smoke-filled gas masks, and electric shocks.<sup>81</sup> Although the police officers were convicted of ill-treatment, in criminal proceedings against Shishkin, the Russian court still used his coerced confession to convict him of assault and theft.<sup>82</sup> The ECtHR ruled that, even though neither side produced interview records that would show whether he confessed during the same time period that the officers tortured him, the fact that the officers did torture him raised a strong possibility that his statements to the police were coerced.<sup>83</sup> Shishkin did not need to prove that he was tortured for the ECtHR to conclude the trial was unfair.<sup>84</sup>

42. However, if a suspect's torture-induced confession provides facts that the police then use to discover additional information on the case, that evidence is admissible. In *Gafgen v. Germany*, the ECtHR excluded a confession the defendant made under police threats of physical and sexual violence.<sup>85</sup> After confessing, the defendant took the police officers to the location of the child's corpse, whom the defendant had strangled.<sup>86</sup> Although the court excluded the confession as a violation of ECHR Article 6 § 1's fair trial requirement, the court allowed evidence from the revelation of other information stemming from his confession.<sup>87</sup> The court also allowed a subsequent confession the defendant made at trial and ruled that he had received a fair trial.<sup>88</sup>
43. The African Commission on Human and Peoples' Rights has also condemned the use of torture to extract confessions used to convict defendants.<sup>89</sup> The defendants in *Malawi African Association et al. v. Mauritania* had sought to retract their confessions, but the tribunals refused, and they were convicted mainly on their confessions.<sup>90</sup> The

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at ¶ 11.

<sup>82</sup> *Id.* at ¶ 31, 53-55.

<sup>83</sup> *Id.* at 150-51.

<sup>84</sup> *Id.*, see also *Harutyunyan v. Armenia*, 2007-III Eur. Ct. H.R. 1 at ¶ 8-11 (where the military police beat a serviceman unconscious and squeezed his fingertips with pliers to elicit a confession to murdering another serviceman, the ECtHR held that using evidence derived from torture violates ECHR Article 6 § 1, which grants defendants a right to a fair trial).

<sup>85</sup> *Gafgen v. Germany*, 2010-IV Eur. Ct. H.R. 247 at ¶ 8-11.

<sup>86</sup> *Id.* at 249.

<sup>87</sup> *Id.* at 251.

<sup>88</sup> *Id.*

<sup>89</sup> ACommHPR, *Malawi African Association et al. v. Mauritania*, Communication Nos. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98 at ¶ 115, Merits Decision, 27th Ordinary Session (2000).

<sup>90</sup> *Id.* at ¶ 8, 11.

commission wrote that in addition to violating Article 5, the resulting imprisonments violated Article 6's prohibition of arbitrary arrest and detention because the trials did not adhere to international principles of a fair trial.<sup>91</sup>

#### *Major National Legal Systems' Courts*

44. All major national legal systems' courts have condemned torture. By as early as 1783, England had clearly established precedent prohibiting the use of coerced confessions.<sup>92</sup> Because threats of torture also create the same fear, such that a suspect may say anything to avoid the pain, the UK similarly prohibited using confessions obtained through threats of torture.<sup>93</sup> The UK has also rejected attempts to admit evidence obtained from third parties who may have used torture. In *A v. Home Secretary*, the UK Department of State argued that Parliament had conferred upon the Special Immigration Appeals Commission the power to admit evidence provided by the United States, who may have used torture to obtain it.<sup>94</sup> The House of Lords held: "The English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention."<sup>95</sup>
45. The United States incorporated much of British common law into its legal system and similarly prohibits the use of confessions extracted through torture. In *Brown v. Mississippi*, where the police officer proudly declared on the stand that he had whipped the defendants into confessing where there was otherwise insufficient evidence, the U.S. Supreme Court overturned the convictions stating: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the

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<sup>91</sup> *Id.* at 113.

<sup>92</sup> *see Rex v. Warickshall*, 1 Leach 263 168 E.R. 234 (1783) ("A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."), *see also* 73 Ernest G. Black, *Torture Under English Law*, 75 U. PA. L. REV 344, 344 (1927), available at [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8145&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8145&context=penn_law_review) (discussing a 1628 English case where a convicted murderer persuaded the English Privy Council against torturing him to extract a confession about his codefendants by saying he might make up information to end the torture, including blaming the Bishop of London for the crime).

<sup>93</sup> *Warickshall, A v Home Secretary* (No 2) [2005] UKHL 71 at ¶ 85.

<sup>94</sup> *A v Home Secretary* (No 2) at ¶ 54.

<sup>95</sup> *Id.*

confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.”<sup>96</sup>

46. Confessions obtained through torture are unreliable because tortured suspects are likely to say whatever the torturers ask of them to end the pain. In 1897 the U.S. Supreme Court stated in *Bram v. United States* that due to man’s natural desire for self-preservation, pain can force someone to confess falsehoods, making extorted confessions unreliable.<sup>97</sup>
47. Torture can continue to dominate suspects’ thoughts for a period of time afterward, especially if they fear the prospect of more torture.<sup>98</sup> If the police coerced the defendant’s confession through intimidation or fear, the presumption arises that his subsequent confessions will be the product of the same coercion.<sup>99</sup> The length of time between confessions is a factor in evaluating whether the dominating influence of torture remains and brief time intervals suggest that the impact has not faded.<sup>100</sup>
48. The same presumption against the voluntariness of the confession exists when the police torture a suspect and then bring the suspect before a third person to confess.<sup>101</sup> The suspect will remember the torture and even if the police officer makes no threats and commits no violence in front of the third party, the suspect may seek to please the officers to avoid being tortured again.<sup>102</sup> Such a confession is coerced and not made voluntarily.<sup>103</sup>

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<sup>96</sup> *Brown v. Mississippi*, 297 U.S. 278, 284-85, 56 S. Ct. 461, 464 (1936); see also *Lyons v. Okl.*, 322 U.S. 596, 605, 64 S. Ct. 1208, 1213 (1944) (“A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt.”).

<sup>97</sup> *Bram v. United States*, 168 U.S. 532, 546, 18 S. Ct. 183, 188 (1897), see also *People v. Hall*, 413 Ill. 615, 624, 110 N.E.2d 249, 254 (1953) (“An involuntary confession obtained by brutality or coercion is wholly unreliable and is the most flagrant violation of the principles of freedom and justice.”).

<sup>98</sup> *State v. Ellis*, 294 Mo. 269, 283, 242 S.W. 952, 955 (1922).

<sup>99</sup> *Id.*, see also *Cavazos v. State*, 143 Tex. Crim. 564, 160 S.W.2d 260 (1942) (stating that when the defendant made the second confession he was still suffering from the physical abuse of electric shocks and “water cure” and feared further torture if the second confession did not match the first).

<sup>100</sup> *Lang v. State*, 178 Wis. 114, 126-27, 189 N.W. 558, 563 (1922).

<sup>101</sup> *State v. Lewis*, 175 La. 696, 702, 144 So. 423, 425 (1932).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

## *Asian Legal Systems*

49. China is a party to the UNCAT and announced in 1997 that it would address the problem of coerced confessions in its legal system.<sup>104</sup> The code's provision states: "It shall be strictly forbidden to use unlawful methods to obtain evidence. Any testimony of a witness, victim or defendant obtained by coercion, enticement, deception or other illegal method cannot be the basis for conviction."<sup>105</sup> In at least one recent case, China's Supreme People's Court ruled that confessions obtained through torture are inadmissible.<sup>106</sup> Furthermore, China has also paid out fines to victims of police torture, further demonstrating that China's judicial system considers the use of torture to obtain confessions illegal.<sup>107</sup> Although China may violate the prohibition, it never asserts the right to torture its people. As noted above, violations of the law neither prove that the law does not exist nor that the state does not consider itself bound by the law.<sup>108</sup>
50. Japan is a party to the UNCAT and ICCPR. Japan's constitution prohibits torture and declares that confessions obtained through torture are inadmissible.<sup>109</sup> Japan has had numerous defendants exonerated after revelations that their confessions were coerced.<sup>110</sup>
51. As noted above, Malaysia and Singapore both prohibit the use of torture to extort confessions in their respective criminal codes.<sup>111</sup>
52. Taiwanese law makes the same prohibition. To ensure that the accused is offering a confession voluntarily and without coercion, Taiwan's Criminal Procedure Code requires that the entire proceeding of examining the accused be recorded in audio or video, without interruption, except in cases of emergency.<sup>112</sup> If the defendant says that

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<sup>104</sup> United Nations Treaty Collection *Chapter IV Human Rights 9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Symposium: Reforming China's Criminal Procedure: China's Tortuous Path Toward Ending Torture in Criminal Investigations* (Symposium), 24 Colum. J. Asian L. 273, 278, see also Murray Scot Tanner *Torture in China: Calls for Reform from within China's Law Enforcement System Prepared Statement to Accompany Testimony Before the Congressional-Executive Committee on China*, July 26, 2002.

<sup>105</sup> National People's Congress *Criminal Procedure Law of the People's Republic of China*, as amended March 14, 2012 at art. 50.

<sup>106</sup> Megha Rajagopalan *China Supreme Court rules out confession through torture*, Reuters, November 11, 2013, <https://uk.reuters.com/article/uk-china-torture-idUKBRE9AK07R20131121>.

<sup>107</sup> Symposium at 276.

<sup>108</sup> *Outlook for International Law* at 4-5.

<sup>109</sup> *Constitution of Japan*, 3 November 1946, at art. 36, 38.

<sup>110</sup> *Japan's Prosecution System* David T. Johnson *Crime and Justice* Vol. 41, No. 1, Prosecutors and Politics: A Comparative Perspective (August 2012), pp. 35-74.

<sup>111</sup> Malaysia: Penal Code at ch. 16, art. 330; Singapore Penal Code at ch. 16, art. 330.

<sup>112</sup> Taiwan Code of Criminal Procedure at art.100.

his confession was extracted by improper means, his confession shall be investigated before investigating any other evidence.<sup>113</sup> If the public prosecutor presented the evidence, then the court shall order the prosecutor to prove that the defendant confessed freely and explain the method of proof.<sup>114</sup>

53. Taiwanese judicial precedents reinforce the prohibition on using confessions obtained through torture as evidence. As early as 1934, the Republic of China Supreme Court held that confessions may only be used as evidence when not extracted through “violence, threat, inducement, fraud, exhausting interrogation, unlawful detention or other improper means.”<sup>115</sup> The Supreme Court reiterated the rule excluding evidence obtained through torture again in 2002.<sup>116</sup> Finally, as previously discussed, Taiwan’s domestic law makes UN Human Rights Committee interpretations on the ICCPR binding precedent and the Committee has prohibited using confessions obtained through torture.<sup>117</sup>

#### *Application to Chiou’s Case*

54. The rule from *Gafgen* regarding confessions and the discovery of additional facts helps resolve Issue 4 part 2’s question about the use of the written transcript of Chiou’s confession. If the confession led the police to search and discover additional facts, those findings are admissible.<sup>118</sup> However, the prosecution must independently confirm the evidence’s validity; Chiou’s statement cannot be used to validate the subsequently discovered facts.
55. Under Taiwanese law, the state must produce the video or audio recording of the entire proceeding of Chiou’s examination to use his statement at trial. If the prosecution cannot produce the video or audio recording, then his confession cannot be admitted as evidence. Similarly, if the video or audio recording does not prove that he confessed voluntarily, then the entirety of the written transcript of his confession is inadmissible.

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<sup>113</sup> *Id.* at art. 156.

<sup>114</sup> *Id.*

<sup>115</sup> Supreme Court, Criminal Division, Precedent 23 Shang Zi No. 868 (1934).

<sup>116</sup> Supreme Court, Criminal Division, Precedent 91 Tai Shang Zi No. 2908 (2002) (holding that when a defendant claims that he did not confess voluntarily, the court must undertake an in-depth investigation and cannot reject his claims of torture merely because the police officer denies them).

<sup>117</sup> ICCPR Implementation Act at art.3, CCPR/C/118/D/2412/2014 at 6.2-6.3.

<sup>118</sup> *Gafgen* at ¶ 8-11.

56. The court should also rule Yu's statements inadmissible. The court acknowledged that Yu was tortured, but because he had made the same statement several times, only the times he confessed in response to torture were excluded. According to defendant's attorney statement in the eleventh High Court retrial, the court allowed his other statements, including one where the police stood next to him while he spoke to the prosecutor. The presence of the police in the room still carried coercive power, making the statement unreliable. The fact that he has since recanted his statement further suggests that he did not believe himself free to tell the truth.
57. Finally, admitting evidence obtained through torture would create a terrible precedent for the Asian Human Rights Court. The decisions cited above criticize the use of confessions extracted through torture in the harshest terms. One should expect opprobrium from all corners of the globe if the court permitted such a flagrant violation of human dignity and international law. It is also likely that countries in the region will refuse to participate in a court that is against the grain of international law. More concerning is that the very individuals who have been tortured by their state will believe they have no hope for relief from the court. Not only may this deter individuals from seeking redress with the court, but the perverse incentive will be created for Asian states to continue to use torture. Instead, the court should use Chiou's case to make a strong statement against the use of confessions obtained through torture.

**G. INTERNATIONAL FAIR TRIAL STANDARDS REQUIRE ASSIGNING THE PROSECUTION THE BURDEN OF PROVING CHIOU CONFESSED VOLUNTARILY, FREE OF TORTURE.**

58. Customary international law and major international treaties require that when a defendant claims that a confession was extracted through torture or other coercion, the burden of proof falls to the state to prove the defendant confessed freely.<sup>119</sup> It is unfair to place the burden of proof on defendants because they have limited means of investigation.<sup>120</sup> Rather, because the prosecution is the party offering the confession as

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<sup>119</sup> Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *General Recommendations of the Special Rapporteur on torture*, Office of the United Nations High Commissioner for Human Rights <https://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>, (last visited on June 4, 2019) at ¶ K.

<sup>120</sup> *Id.*

evidence, it has the burden of proving the defendant made the statement voluntarily.<sup>121</sup> The United States Supreme Court agreed in *Miranda v. Arizona* and wrote: “Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.”<sup>122</sup>

58. The UK has long held that when the prosecution offers a confession as evidence, it has the burden to prove that the statement was made freely and willingly.<sup>123</sup> The House of Lords maintained the principle in *A v Home Secretary (No 2)*, 2005, reasoning that it would be an unfair burden to expect the detained person to prove that a statement had been obtained through torture.<sup>124</sup> The court assigned the prosecution the burden to undertake its own investigations into any suspicions of torture and ensure that the suspicions have been reasonably rebutted before entering the statement into evidence.<sup>125</sup>
59. Taiwanese law also stipulates that the burden of proof falls to the prosecution. The criminal procedure code requires that if the defendant claims that his confession was obtained through improper means, the court shall order the public prosecutor to prove the defendant confessed voluntarily.<sup>126</sup> The Judicial Yuan explains the shift in the burden of proof: “If the defendant’s confession was provided by the public prosecutor, the public prosecutor shall bear the burden of proof to identify the methods of proof and prove that the defendant’s confession was out of free will.”<sup>127</sup>

#### *Application to Chiou’s Case*

60. At trial, per both international and Taiwanese law, the Asian Human Rights Court should assign the prosecution the burden of proving that Chiou’s confession was made

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<sup>121</sup> *Id.*

<sup>122</sup> *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628 (1966).

<sup>123</sup> *Ibrahim v. The King* [1914] AC 599, [1914] UKPC 16, [1914-15] All ER Rep 874, (1914) 24 Cox CC 174 at 9 (“It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn[sic] by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.”).

<sup>124</sup> *A v Home Secretary (No 2)* at ¶ 98.

<sup>125</sup> *Id.*

<sup>126</sup> Taiwan Code of Criminal Procedure at art. 156, ¶ 3.

<sup>127</sup> Judicial Yuan *If the defendant alleges that his/her confession he/she was not voluntary, what is the legal effect? How shall such defendant make his/her claims to protect his/her rights?*, Q&A, (January 7, 2006), available at [https://www.judicial.gov.tw/OnA/en\\_content.asp?seq=254](https://www.judicial.gov.tw/OnA/en_content.asp?seq=254).

voluntarily. The prosecution must produce the video or audio recording of his interrogation, which must prove beyond a reasonable doubt that Chiou offered the confession voluntarily. If the prosecution cannot provide the entirety of the video or audio recording of the interrogation, or the recording does not conclusively prove the voluntariness of the confession, then the court should not admit the confession as evidence. Then, the prosecution must prove that Chiou committed the crime through other evidence.

61. The prosecution also has the burden of proving that Yu made his statements voluntarily. Video recordings exist proving that the prosecution tortured Yu. The courts removed one of Yu's confessions due to torture but kept in others where torture was not proved. However, the prosecution must prove that the other statements were made voluntarily, that sufficient time had elapsed between the statements for the coercive influence of past torture to fade, and that the confession was not made in fear of possible torture afterward or in other locations without monitoring devices.

## **H. APPLYING THE DEATH PENALTY TO CHIOU VIOLATES INTERNATIONAL LAW**

62. Applying the death penalty to Chiou violates international law in two ways: 1) The Taiwanese courts violated numerous procedural safeguards in Chiou's trial, and 2) *Opinio juris* increasingly points to considering the death penalty as cruel and unusual punishment.
63. The death penalty may only be administered for the most serious crimes and when all of the other ICCPR procedural safeguards have been followed.<sup>128</sup> International law prohibits applying the death penalty when numerous procedural flaws transpired throughout the trial.<sup>129</sup> If the flaws include the use of forced confessions, the inability to examine relevant witnesses, or the failure to respect the presumption of innocence, then the death sentence is arbitrary in nature and violates ICCPR Article 6's guarantee of the right to life.<sup>130</sup>

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<sup>128</sup> ICCPR at art. 6 ¶ 2.

<sup>129</sup> CCPR/C/GC/36 at 41.

<sup>130</sup> *Id.*

64. Because Chiou’s trial contained numerous procedural flaws, applying the death penalty to him would constitute an arbitrary deprivation of life. The use of Yu’s statements extracted through torture and Chiou’s confession, which was not proven to be voluntary, violates procedural safeguards.<sup>131</sup> Furthermore, forcing him to stay in jail for 23 years while going through 11 retrials violates the presumption of innocence. Every time the Supreme Court remanded the case back for a new trial, it vacated the lower decision, meaning that he should have benefitted from the presumption of innocence.<sup>132</sup> Keeping him in prison during the retrial vitiated this presumption. The court should have allowed him to leave prison while undergoing a new trial. Additionally, Chiou could not examine witness Yu, who died before Chiou could examine him.<sup>133</sup> Chiou was also unable to hire another expert to examine an audio recording attributed to Yu because the tape was lost.<sup>134</sup> Therefore, Chiou did not receive a fair trial because he did not enjoy the presumption of innocence or ability to cross-examine witnesses.
65. The length of time that the Taiwanese judicial system has subjected him to uncertainty, nearly 30 years now, also constitutes cruel and unusual punishment. In *Soering v. United Kingdom*, the ECtHR held that extraditing a German national accused of murder in the United States would subject him to the “death row phenomenon” of waiting through agonizing years of uncertainty through the lengthy appeals process under the shadow of death.<sup>135</sup> Such treatment, the court held, would constitute cruel and unusual punishment, and the court refused to allow his extradition. In Chiou’s case, the continual uncertainty of 23 years of 11 trials and an additional seven years of waiting for execution violates the *Soering* principle. Therefore, the Taiwanese courts should preclude the application of the death penalty to Chiou.
66. Chiou’s case highlights the inherent difficulty in administering the death penalty: the fact that after 11 trials, the courts have been unable to convincingly remove the uncertainty and unfairness associated with the case, demonstrates the arbitrariness of applying death penalty. Recognizing this challenge, *opinio juris* on the death penalty

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<sup>131</sup> *Id.*

<sup>132</sup> List at 2(1).

<sup>133</sup> List at 3(4).

<sup>134</sup> List at 3(4).

<sup>135</sup> *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989 at ¶ 105-11.

points to a developing norm against the application of the death penalty. The 2017 independent review by outside experts of Taiwan's compliance with the ICCPR strongly emphasized that Taiwan should abolish the death penalty because international law is increasingly accepting that the death penalty violates human dignity.<sup>136</sup> In 2012, the UN Secretary-General reported that 150 states have outlawed the death penalty and that in many of the remaining states, there is a visible trend toward restricting its application or declaring a moratorium.<sup>137</sup> The ECtHR has ruled that the death penalty constitutes cruel and unusual punishment and the African Court on Human and Peoples' Rights (ACHPR) has called for states to abolish the practice.<sup>138</sup> If the Asian Human Rights Court Simulation upholds the death penalty, it will be moving against the strong, continuous march toward abolition.

## I. CONCLUSION AND RECOMMENDATIONS

67. International law obligates Taiwan not to torture or use confessions obtained through torture at trial. These obligations, arising out of treaties, custom, and *jus cogens* apply to Taiwan regardless of whether it has signed on to the relevant international accords or not. International law also requires that when the prosecution seeks to enter a defendant's confession into evidence, the prosecution must prove that the defendant made the statement willingly.
68. In Chiou's case, the prosecution has not yet proven that Chiou confessed willingly, something it must do before the AHRC. The court should also not consider the confession of codefendant Yu, who has proven the police tortured him into confessing.
69. In light of these findings, Covenants Watch makes the following recommendations:
- Ask Taiwan's courts to reaffirm their obligations under ICCPR, UNCAT, and Taiwan's Code of Criminal Procedure.
  - Vacate the 2011 decision of the Taiwanese Supreme Court and the High Court's conviction of Chiou, unless the prosecution can prove beyond a reasonable doubt

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<sup>136</sup> International Review Committee *Review of the Second Reports of the Government of Taiwan on the Implementation of the International Human Rights Covenants: Concluding Observations and Recommendations adopted by the International Review Committee*, January 20, 2017 at ¶ 58-59.

<sup>137</sup> *Report of the Secretary-General, Questions of the Death Penalty, Human Rights Council Twenty First Session*, A/HRC/21/29 July 2, 2012 at ¶ 4-16.

<sup>138</sup> *Al-Saadoon v. UK*, application No. 61498/08, ¶ 115 (2010), A.C.H.P.R. Res. 42(XXVI)99, A.C.H.P.R. Res.136(XXXVIII)08.

that Chiou committed the murder. The prosecution must do so without resorting to confessions that it cannot prove were made willingly.

- Remand the case for further proceedings consistent with international law.
- While the case proceeds, Taiwan must immediately release Chiou and he may continue to live outside of prison until found guilty.
- Award Chiou monetary damages and court costs to be paid by Taiwan as well as a public apology, per Article 11 of the AHRC statute.
- Remove the death penalty as a possible sentence for Chiou.
- Declare that the death penalty violates the human right to life.