

# **ADPAN: When Justice Fails: Thousands executed in Asia after unfair trials**

(Index: ASA 01/023/2011)

**ERRATA AND UPDATE**

**LATEST UPDATE!!!**

## **Separate Appeal Case on Leng Guoquan, China**

On 23 November 2011 following a re-trial in the case of Leng Guoquan, the Dandong City Intermediate Court sentenced Leng Guoquan to life imprisonment.

酷刑

亚洲反死刑网络 PENYIKSAAN

불공정한 재판

PARUSANG KAMATAYAN

不公平審判 ASIA 死刑

死刑に反対するアジア・ネットワーク

不公审判

TORTYUR

ความบริสุทธิ์

KEGAGALAN PENEGAKAN KeadILAN

사형

DEATH PENALTY

KARAPATANG MAGKAROON NG ABUGADO

고문

強迫自白

处决 亞洲 強迫自白

مصائب جرم كوفيل لو فتاح سعودي

의무적 사형 부과

ANGGAPAN TIDAK BERSALAH

SEKSAAN 死刑

HUKUMAN MATI

FORCED CONFESSIONS

強制性死刑

誤判

تشدد

무죄 추정

SAPILITANG HATOL NA KAMATAYAN

強迫作出的供述

ได้รับการสันนิษฐานไว้ก่อนว่าเป็นผู้บริสุทธิ์

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不公正な裁判

推定有罪

판결 오류

ITURING NA WALANG SALA HANGGAT HINDI NAPAPATUNAYAN

死刑

PRESUMED GUILTY

PENGAKUAN PAKSAAN

WHEN JUSTICE FAILS

Thousands executed in Asia after unfair trials

ANTI DEATH PENALTY ASIA NETWORK

**ANTI  
DEATH  
PENALTY  
ASIA  
NETWORK**

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# 1. INTRODUCTION

“My son was killed for a crime he did not commit.... our family has lived in shame and neighbours never spoke to us. Whatever apology or compensation the government promises, it is too late.”

Wang Tsai-lien, mother of Chiang Kuo-ching who was coerced into making a confession and subsequently executed in error in 1997 in Taiwan.<sup>1</sup>

“The law is the law but I wish Parliament would abolish the death sentence because if a mistake is made, it would be irreversible. There are other ways of dealing with heinous crimes.”

Former High Court and Court of Appeal Judge Datuk K.C. Vohrah, Malaysia.<sup>2</sup>

More people are executed in the Asia-Pacific region than in the rest of the world combined. Add to this the probability that they were executed following an unfair trial, and the gross injustice of this punishment becomes all too clear.

Failures of justice in trials which result in an execution cannot be rectified. In the Asia-Pacific region, where 95 per cent of the population live in countries that retain and use the death penalty, there is a real danger of the state executing someone in error following an unfair trial.

In January 2011, **Taiwan's** Ministry of Justice admitted that Chiang Kuo-ching, a private in the Air Force, had been executed in error in 1997 for a murder committed 15 years previously. The authorities acknowledged that his statement “confessing” to the crime had been made as a result of torture and that his conviction had been rushed through a military court. The court had ignored his allegations of torture and his pleas of innocence. In September 2011, a military court formally acquitted Chiang Kuo-ching and a month later **Taiwan's** Ministry of Defence announced it will pay US\$3.4m in compensation to Chiang Kuo-ching's relatives.<sup>3</sup>

Chiang Kuo-ching is not an isolated case. Across the region, as elsewhere in the world, people are sentenced to death after proceedings which fail to meet international standards of fair trial.

In many countries in the region, the right to a fair trial is impeded by laws which deny due process. Even in countries where due process safeguards exist in principle, including in specific laws, they often do not apply in practice.

Courts continue to rely on “confessions” extracted through **torture** as evidence in criminal trials – despite the international ban on torture and on the use of such confessions. Laws impose **mandatory death sentences** for crimes such as drug trafficking, and place the burden of proof on the accused, depriving them of the **right to be presumed innocent** until and unless proven guilty according to law. **Access to a lawyer** before, during and after trial is often denied, and in some countries the **independence of the judiciary** is not assured. Some states have established **special courts** which sentence people to death after hasty proceedings.

Once the accused has been sentenced to death, he or she has the right under international law to **appeal** to a higher court, and to seek **clemency** or commutation of the sentence. But in some countries, neither of these avenues is available.

Government officials in many Asia-Pacific states argue that the enforcement of criminal justice falls exclusively within the sovereign authority of each state, but the conduct of trials is subject to international human rights law and standards. These are never more important than in circumstances where the state uses its power to take the irreversible step of depriving someone of his or her life.

Concerns that safeguards for fair trial are inadequately enforced, and that they fail to protect the right to life and the right to freedom from cruel, inhuman and degrading punishment, are compelling law-makers across the region to rethink their position on the death penalty. These concerns, and the fact that the death penalty is irrevocable, have led an increasing number of national legislatures and constitutional courts to conclude that the death penalty should not be applied.

The view that the death penalty in and of itself is a violation of human rights has progressively been gaining ground within the international community. The Anti-Death Penalty Asia Pacific Network (ADPAN) opposes the death penalty in all circumstances and campaigns across the region for abolition, believing that the death penalty violates the right to life and is the ultimate form of cruel, inhuman and degrading punishment.

While understanding the devastating impact of violent crime and sympathizing with victims and their families, ADPAN also argues that there is no evidence to demonstrate that the death penalty deters crime more effectively than other punishments. Victims of crime are doubly victimised by unfair trial procedures which can result in the innocent being executed and the real perpetrators never being brought to justice.

As long as the death penalty has not been abolished it is crucial to ensure that the right to a fair trial is fully respected for each and every person facing this punishment.

This report is part of ADPAN's campaign against unfair trials and the death penalty in the Asia-Pacific region. It is linked to a campaign report, "*Lethal Injustice in Asia: End Unfair Trials, Stop Executions*", (Index: ASA 01/022/2011) which summarises this report and includes the eight individual appeal cases in a separate folder.

## TOWARDS WORLDWIDE ABOLITION

More than two thirds of all countries in the world have abolished the death penalty in law or are not using it in practice. While 58 countries retain and use the death penalty, in recent years less than half of those countries were known to have regularly carried out executions.<sup>4</sup> Since 2007, the UN General Assembly has adopted three resolutions supported by an increasing majority, calling for a worldwide moratorium on executions with a view to abolishing the death penalty.

As of June 2011, 73 countries were party to the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), undertaking not to carry out executions and to abolish the death penalty (however four of these countries have made reservations allowing them to apply this punishment for crimes "of a military nature committed during wartime"). These developments towards abolition reflect a growing awareness of the unfairness of the death penalty among activists, lawyers, judges, parliamentarians and people generally, in the Asia-Pacific region and beyond.

Out of 41 countries in the Asia-Pacific, 17 have abolished the death penalty for all crimes, nine have not carried out executions for at least 10 years and are considered by Amnesty International to be "abolitionist in practice" and one – Fiji – uses the death penalty only for exceptional military crimes (see Table on page 7).<sup>5</sup> Australia, Nepal, New Zealand, Philippines, and Timor-Leste are parties to the Second Optional Protocol to the ICCPR, and in 2010 the Mongolian government submitted a bill to parliament to ratify the Second Optional Protocol.

14 countries in the region still retain the death penalty and have carried out executions in the past 10 years. Thailand resumed executions in 2009, although it had declared its commitment to abolishing the death penalty in its Human Rights Action Plan 2009-13. Taiwan resumed executions in 2010, despite having declared a policy of "gradual" abolition in 2000.



## TRYING DEATH PENALTY CASES - State responsibilities and practice across the Asia-Pacific

Laws and practice		UN International Covenant on Civil and Political Rights (ICCPR) 1976	Second Optional Protocol to the ICCPR 1991	UN Convention against Torture (CAT) 1987	Laws that provide for the death penalty which do not meet fair trial standards	Legal clauses which restrict the right of appeal and review by a higher court	Laws that provide for mandatory death sentences, including drug offences and other non-violent crimes	Practice on the death penalty that falls short of international standards for fair trial	Torture and other ill-treatment used to extract confessions
States that retain the death penalty	Afghanistan	A - 1983		R - 1987	✓		✓	✓	✓
	Bangladesh	A - 2000		A - 1998	✓	✓			✓
	China	S - 1998		R - 1988	✓		✓	✓	✓
	North Korea	A - 1981			✓	✓	✓	✓	✓
	India	A - 1979		S - 1997			✓	✓	✓
	Indonesia	A - 2006		R - 1998	✓			✓	✓
	Japan	R - 1979		A - 1999		✓		✓	✓
	Malaysia				✓		✓	✓	✓
	Mongolia	R - 1974		A - 2002				✓	✓
	Pakistan	R - 2010		R - 2010	✓	✓	✓	✓	✓
	Singapore				✓		✓	✓	
	Taiwan **	R - 2009			✓			✓	✓
	Thailand	A - 1996		A - 2007	✓			✓	✓
Viet Nam	A - 1982						✓	✓	
Abolitionist in practice	Brunei				✓		✓	✓	
	Laos	R - 2009		S - 2010			✓	✓	✓
	Maldives	A - 2006		A - 2004	✓			✓	✓
	Myanmar				✓	✓	✓	✓	✓
	Nauru	S - 2001		S - 2001					✓
	Papua New Guinea	A - 2008							✓
	South Korea	A - 1990		A - 1995			✓ ***		
	Sri Lanka	A - 1980		A - 1994	✓			✓	✓
Tonga								✓	
* Fiji								✓	
Abolitionist for all crimes	Australia	R - 1980	A -1990	R - 1989					
	Bhutan								
	Cambodia	A - 1992		A - 1992					
	Nepal	A - 1991	A - 1998	A - 1991					
	New Zealand	R - 1978	R - 1990	R -1989					
	Philippines	R - 1986	R - 2007	A - 1986					
	Samoa	A - 2008							
	Solomon Islands								
	Timor-Leste	A - 2003	A - 2003	A - 2003					
	Tuvalu								
	Vanuatu	R - 2008		A - 2011					

**S = Signed.** The state shows its intention to examine a treaty with a view to ratifying it. Signature requires a state to refrain from acts that undermine the treaty's objective.

**R = Ratified.** The state formally joins the treaty and is legally bound by it.

**A = Acceded.** The state formally joins the treaty and is legally bound by it.

\*States which apply the death penalty only for exceptional crimes; \*\* Taiwan is not a UN member state, \*\*\* Only in Military trials

## 2. WHAT IS A FAIR TRIAL?

In 1948 the Universal Declaration of Human Rights (UDHR), the cornerstone of human rights law, proclaimed that, “Everyone has the right to life, liberty and security of person.” The basic principle at the heart of the right to a fair trial was also articulated in that Declaration: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Since 1948, the right to fair trial has become a rule of customary international law (that is, a rule derived from consistent state practice and consistent consideration by countries of it as binding on them (*opinio juris*). Such rules are binding on all countries irrespective of whether or not they have ratified relevant treaties).

The principles of fair trial were reaffirmed and elaborated in 1966 in the United Nations International Covenant on Civil and Political Rights (ICCPR) in particular in Article 14 and more specific standards, for instance on the role of judges, prosecutors and lawyers, as well as in the jurisprudence of UN and regional human rights mechanisms.

Of those countries that retain the death penalty in the Asia-Pacific region, six countries are still not party to the ICCPR: **Brunei, Fiji, Malaysia, Myanmar, Singapore, and Tonga** (see Table on page 7).

### EXTRACTS FROM ARTICLE 14 OF THE ICCPR

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance

assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt...

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

## 2.1 THE RIGHT TO FAIR TRIAL IN DEATH PENALTY CASES

**“It is a commonplace that due process serves to protect defendants. However, due process is also the mechanism through which society ensures that the punishments inflicted in its name are just and fair”**

UN Special Rapporteur on extrajudicial, summary or arbitrary executions.<sup>6</sup>

In cases where the life of the accused is at stake it is all the more important that principles of fair trial are rigorously applied. Sentencing someone to death and executing them following a trial that does not meet basic fair trial standards violates the right to life of that person.

A series of resolutions by the UN Economic and Social Council (ECOSOC) and the jurisprudence of human rights treaty bodies,<sup>7</sup> mainly the Human Rights Committee, have strengthened safeguards to protect the right to fair trial for those facing the death penalty.<sup>8</sup> In a 2010 report, the UN Secretary-General stated that the 1984 ECOSOC safeguards (see below), which were endorsed by the General Assembly, “should be considered the general law applicable on the subject of capital punishment, even for those States that have not assumed any treaty obligations whatsoever with respect to the imposition of the death penalty.”<sup>9</sup>

The safeguards are based on the premise that there should be special protection of the rights of those facing charges carrying the death penalty, “above and beyond” the protections normally afforded to people facing criminal charges.<sup>10</sup> This is because death penalty cases involve the right to life, and the arbitrary deprivation of life is prohibited under Article 6 of the ICCPR.

**EXTRACTS FROM ARTICLE 6 OF THE ICCPR**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life[...]
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court[...]
3. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

**UN 1984 ECOSOC SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY<sup>11</sup>**

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.
4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.
5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.
6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.
7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.
8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.
9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

There is an explicit provision in international law that the death penalty can be imposed only for the “most serious crimes”. The UN Human Rights Committee has interpreted “most serious crimes” to mean that the death penalty should be a quite exceptional measure,<sup>12</sup> and the 1984 ECOSOC Safeguards state that the scope of application of the death penalty should not go beyond intentional crimes with lethal or other extremely grave consequences. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has concluded that the death penalty should be used only where it can be shown that there was an intention to kill which resulted in the loss of life.<sup>13</sup> Despite these provisions, people in the Asia-pacific region are executed for non-violent crimes ranging from drug trafficking to theft.

There are at least 55 capital offences in **China**, 28 in **Pakistan**, 57 in **Taiwan** and 21 in **Viet Nam**. In **North Korea**, a number of political offences are punishable with death, including “conspiracy to overturn the state” and “treason against the fatherland.” In some countries, the death penalty is imposed for actions which, under international law, should not be treated as a criminal offence at all. In **Pakistan**, individuals have been sentenced to death for blasphemy, although no one is known to have been executed on these grounds. In **Afghanistan**, people have been sentenced to death for converting from Islam to another religion, even though “apostasy” is not included as an offence in Afghanistan’s Penal Code (state prosecutors rely on Article 130 of Afghanistan’s Constitution, which enables them to prosecute alleged crimes “in accordance with the Hanafi jurisprudence” even when there is no codified law).

## 3. LAW AND PRACTICE UNDERMINING THE RIGHT TO FAIR TRIAL

“The death penalty cannot be analysed in isolation from the context within which its imposition occurs... the widely acknowledged possibility of error in the process leading to conviction and its disproportionate application on those from lower socioeconomic groups are powerful arguments against the retention of the death penalty.”

The Advisory Council of Jurists of the Asia Pacific Forum of National Human Rights Institutions, 2000.

### 3.1 TORTURE AND OTHER ILL-TREATMENT

“Nearly every wrongful verdict in recent years relates to illegal interrogation.”

Deputy Procurator-General of the Supreme People’s Procuratorate, China, 2006.<sup>14</sup>

The prohibition of torture and other cruel, inhuman or degrading treatment is absolute in international law, with no exceptions permitted, including in times of war or other public emergency.

International fair trial standards are explicit that no one should be forced to testify against themselves or to confess guilt. Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) requires state parties to “ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

Yet most countries in the region that retain the death penalty tolerate torture or other ill-treatment as a means of inducing confessions (see Table on page 7), even though in many cases their own laws forbid its use. Courts often ignore evidence of torture and other ill-treatment when sentencing people to death.

**China** ratified the Convention against Torture in 1988 and Chinese law prohibits the use of torture to extort confessions. The authorities have also passed a number of

regulations in recent years aimed at strengthening this prohibition and reinforced procedures to tackle the use as evidence of other illegally obtained statements, especially in death penalty cases. Nevertheless, Chinese law still fails to include an explicit ban on the use as evidence in court of all statements extracted through torture and other ill-treatment. People continue to be executed despite strong evidence that their conviction was based on confessions extracted through torture.

**Indonesia's** Constitution prohibits the use of torture. The Indonesian Criminal Code requires that any information a suspect provides to police be free from coercion. Similarly, the law in a number of other countries, including **Afghanistan** and **India**, contains specific protections against coerced confessions. **Afghanistan's** Constitution prohibits torture. Yet torture by police is widespread in these countries and forced confessions are regularly relied upon as evidence during trials. In **Japan** and **Taiwan** heavy and sometimes sole reliance is placed on confessions.

## **TAIWAN**

According to the Ministry of Justice, Taiwan's Criminal Code and other laws contain a total of 57 crimes for which the death penalty may be imposed. Crimes punishable by death include some non-violent offences. The mandatory death penalty was abolished in 2006 and the number of capital crimes has been reduced.

Executions have recently resumed ending a suspension of the death penalty in place since December 2005 despite the government repeatedly stating since 2000 that it intended to abolish the death penalty. In April 2010, without informing lawyers or relatives, Taiwan executed four prisoners. In March 2011, five more executions took place. More than 50 people are under sentence of death.

In 2010, the Taiwan Alliance to End the Death Penalty (TAEDP)<sup>15</sup> and other groups petitioned the Constitutional Court, arguing that several prisoners under sentence of death (including eight who were subsequently executed in 2010 and 2011) had not had proper legal representation at their final trials. The petitions also drew attention to the fact that Taiwan does not have procedures in place for those applying for pardon, amnesty or commutation in exercise of their right under Article 6(4) of the ICCPR. Taiwan's Amnesty Act does not establish procedures for exercising the right to seek pardon and commutation and prisoners have been executed while decisions on their applications for clemency were still pending. In dismissing the petitions, the Constitutional Court said that it was up to the legislature to amend laws governing pardon or commutation and not for the Court to issue rulings in this area.

Although Taiwan is not a member of the UN, the government ratified the ICCPR in 2009, so has chosen to be bound by its provisions in law, policy and practice. The government also passed implementing legislation which came into force in 2009, and committed to ensure that all laws and administrative measures would be aligned with the ICCPR within two years. In 2003, the government revised the Code of Criminal Procedure so that confessions cannot serve as the sole basis of evidence of guilt. The Code already banned courts from using information extracted through torture as evidence and the 2003 changes go further by requiring the court to investigate any claims by the defendant of torture. Yet, in several high profile cases (including that of Chiou Ho-shun), individuals facing the death penalty have been detained for years or even decades despite compelling evidence that they were convicted on the basis of coerced confessions.<sup>16</sup>

**TAIWAN CASE STUDY: CHIOU HO-SHUN**

**“I haven’t killed anyone. Why don’t judges have the courage to find me not guilty?”<sup>17</sup>**

Detained for over 23 years, Chiou Ho-shun has been Taiwan’s longest detained criminal defendant in its longest running criminal case. The case was described recently by his lawyers as “a stain on our country’s legal [history].”

Chiou Ho-shun and 10 of his co-defendants say they were tortured into making confessions and denied the right to communicate with anyone for the first four months of their detention. They were also denied a lawyer during the investigation phase, including during interrogations.

Chiou Ho-shun and his co-defendants later retracted their confessions. They were first tried by the District Court in connection with two separate crimes that took place in 1987: the kidnapping and murder of a nine-year-old boy Lu Cheng and the murder of Ko Hung Yu-lan.

The High Court recognized that violence and threats of intimidation were used during the police investigation. Rather than exclude the confessions from court evidence, the court simply excluded the sections of the interrogation tapes where abuse of the suspects could be heard distinctly. The confessions also included mutual contradictions and discrepancies on key facts.

Chiou Ho-shun was sentenced to death for robbery, kidnapping and murder in 1989. Only he was sentenced to death; of the 11 co-defendants, eight gave up their appeals in order to gain early release, as the period of their detention had exceeded their sentences. However, after release, they continued to assert their innocence and expressed a wish to testify in court. One defendant died before the judgment was confirmed.

Chiou Ho-shun's case has bounced back and forth between the High Court and the Supreme Court for re-trial 11 times. All death penalty cases in Taiwan must be confirmed by the Supreme Court, which may choose to refer questionable cases back to the High Court for re-trial during which new evidence may be submitted by the defence (the number of times this can be done is unlimited).

In 1994, two public prosecutors and 10 police officers investigating the murder of Lu Cheng were convicted of extracting confessions through torture. Police also admitted in 2003 that they had covered up and failed to investigate the fact that another death row inmate had confessed to the murder of Lu Cheng just before he was executed.

After Chiou Ho-shun and his co-defendants were re-convicted at their 10<sup>th</sup> re-trial in the High Court in 2009, the Supreme Court again ruled that the case was flawed, citing among others, claims that the convictions were based on coerced confessions.

The court sent the case back to the High Court for re-trial for the 11<sup>th</sup> time. But again in May 2011 the High Court upheld Chiou Ho-shun’s death sentence. After this ruling, Chiou Ho-shun told the court: “I haven’t killed anyone. Why don’t judges have the courage to find me not guilty?”

On 28 July 2011, Chiou Ho-shun lost his final appeal to the Supreme Court and on 25 August 2011 the Prosecutor General rejected a request to seek an extraordinary appeal for a re-trial.



In April 2010, Taiwan's Legislative Yuan adopted the Criminal Speedy Trial Act which sets a limit of eight years for pre-trial detention, after which the accused person must be released. However, criminal proceedings may continue beyond that period.

The stated purpose of the legislation is to ensure that criminal defendants receive a speedy and fair trial. The Act will come into force gradually. Had the hearings in his appeal continued, Chiou Ho-shun would have been due for release in 2012 under the new legislation.

Chiou Ho-shun could be executed at any time.

## Recommendations to the authorities in Taiwan

- **Stop the execution of Chiou Ho-shun.**
- **Investigate the reports of torture and other ill-treatment, and ensure that all statements resulting from such coercion are completely excluded from any re-trial.**
- **Ensure Chiou Ho-shun is re-tried in proceedings which comply with international fair trial standards.**
- **Suspend all executions and the imposition of death sentences as a step towards the total abolition of the death penalty.**
- **Revise laws and change policies and practices to ensure fair trials in line with international standards.**
- **Ensure that those sentenced to death have an effective opportunity to exercise their right to seek a pardon or commutation of their sentence in line with international standards.**

## INDIA

The Indian Constitution protects the right to life. However, a number of offences are still punishable by death, including murder and conspiracy to murder, and certain drug offences and offences under anti-terrorism legislation. Indian courts continue to hand down death sentences and at least 377 people were thought to be under sentence of death at the end of 2009. The last execution took place in 2004 following a seven-year period in which no executions had been carried out.

Successive legislation providing for trial, conviction and sentence of death for "terrorist offences" has violated international law and standards for fair trial. Of particular concern are: the broad definition of "terrorist acts" for which the death penalty can be imposed; insufficient safeguards on arrest; provisions that allow confessions made to police to be admissible as evidence; obstacles to confidential communication with counsel; insufficient independence of special courts from executive power; insufficient safeguards for the presumption of innocence; provisions for discretionary closed trials; sweeping provisions to keep secret the identity of witnesses; and limits on the right to review by a higher tribunal.

At least 35 people have been sentenced to death after being tried under such legislation in the last 20 years, although the majority of these have been acquitted on appeal or had their sentences commuted. No one has been executed for offences under antiterrorism legislation since 1992 but eight people, including Devender Pal Singh, remain at risk of execution after being convicted and sentenced under such laws.

### **INDIA CASE STUDY: DEVENDER PAL SINGH**

**“It is for the accused to show and satisfy the court that the confessional statement was not made voluntarily,” Supreme Court response to Devender Pal Singh’s allegations of torture, March 2002.**

Devender Pal Singh (also known as Davinder Pal Singh Bhullar) was arrested by police at New Delhi’s international airport in January 1995 for travelling on false documents.

In December 1991, his father and uncle had been abducted and killed by Punjab police (for which a number of police officials have since been indicted) looking for Devender Pal Singh in connection with a bomb attack carried out in support of an independent Sikh state in Punjab. He attempted to flee to Canada in 1994 after hearing that he was wanted by Punjab police in connection with terrorist offences, but was arrested in transit at Frankfurt airport and applied for asylum in Germany. His application was rejected and he was returned to India where he was immediately arrested at the airport.

Police claim that following his arrest at New Delhi airport, Devender Pal Singh confessed to being involved in a 1993 bomb attack in Delhi that killed nine people – a statement which was made when he was first detained and had no access to a lawyer.

Devender Pal Singh later retracted the confession, stating that he had been “physically manhandled, threatened with encounter extinction [extrajudicial execution] and was forced to sign several blank papers”. He filed a petition with the Supreme Court which refers to “coercion and torture” in extracting the alleged confession.

In his statement to the Supreme Court, Devender Pal Singh said that on the way to the magistrates’ court hearing, “he was told that if he made any statement to the Court [about being tortured], he would be handed over to Punjab Police who would kill him in an encounter.”

Devender Pal Singh was tried under the 1987 Terrorist and Disruptive Activities (Prevention) Act (TADA), a law which lapsed in 1995 following widespread criticism from national and international human rights organizations because it had been misused to arbitrarily arrest, detain and torture thousands of people. Despite its lapse, prosecutions under the Act continue against people suspected of terrorist offences committed prior to 1995.

The only evidence against Devender Pal Singh was his retracted confession. Under ordinary Indian law, confessions are admissible as evidence only if they are made before a judicial magistrate; those made to the police are not. TADA, however, made confessions to police admissible at trial.

Devender Pal Singh was taken before a judicial magistrate who was supposed to verify whether his confession was made voluntarily. However, the judicial magistrate asked only one question – whether the statement was recorded on the particular date. The magistrate did not actually see the statement, and allowed police officials to be present during the hearing.

In August 2001, a special TADA court convicted Devender Pal Singh of committing a terrorist act resulting in death, conspiracy to murder and various other offences and sentenced him to death. Ordinarily, all death sentences passed by a trial court are reviewed automatically by a High Court, with a possibility of further appeal to the Supreme Court, but under TADA, appeal is only to the Supreme Court.

The conviction and death sentence were confirmed by the Supreme Court in March 2002. However, one of the three judges found Devender Pal Singh not guilty, concluding that there was no evidence to convict him and that a dubious confession could not be the basis for awarding a death sentence.

A further review petition was dismissed by the same Supreme Court judges, again by a 2 to 1 majority, in December 2002. A clemency petition to the Indian President was rejected in May 2011 but on 23 August 2011 the Supreme Court admitted a petition seeking to commute the sentence because of the President's delayed rejection of the mercy plea.

### **Recommendations to authorities in India**

- **Stop the execution of Devender Pal Singh.**
- **Ensure Devender Pal Singh is re-tried in a regular court in proceedings which comply with international fair trial standards.**
- **Investigate his complaints of torture and other ill-treatment and ensure that all statements resulting from such coercion are completely excluded from any re-trial.**
- **Suspend all executions and the imposition of death sentences as a step towards total abolition of the death penalty.**
- **Revise laws and change policies and practices to ensure fair trials in line with international standards.**

## **3.2 MANDATORY DEATH SENTENCES**

**“A provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed, and therefore without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair.”**

Supreme Court of India in *Mithu v. Punjab* (1983).

Mandatory death sentences prevent judges from exercising their discretion and from considering all factors in a case, including extenuating circumstances, thus adding arbitrariness to the already unacceptably harsh penalty. Mandatory death sentences are prohibited under international human rights law.<sup>18</sup>

The Human Rights Committee has stated that mandatory death sentences constitute arbitrary deprivation of life.<sup>19</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that they are inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment<sup>20</sup>, and the UN Commission on Human Rights has urged states “to ensure... that the death penalty is not imposed... as a mandatory sentence.”<sup>21</sup>

Many national courts have ruled mandatory death sentences unconstitutional. In 2010, the Supreme Court of **Bangladesh** ruled mandatory death sentences for murder after rape as unconstitutional and instructed legislators to remove all provisions in law allowing for their use. The **Indian** Supreme Court has ruled such sentences for murder unconstitutional<sup>22</sup>, and in June 2011 the Bombay High Court ruled that mandatory death sentences for repeat offences under the 1988 Narcotics Drug and Psychotropic Substances Act violated the right to life.<sup>23</sup> In 2006, the mandatory death penalty was removed from two laws in **Taiwan**.<sup>24</sup>

A number of countries continue to impose mandatory death sentences, particularly for drug offences (see Table on page 7). **Brunei Darussalam, Laos, Malaysia, North Korea, Pakistan**<sup>25</sup> and **Singapore** all impose such sentences for possession of drugs over a certain amount whether or not these amounts provided for in law are relatively small or substantial. Imposing the death penalty for drug offences breaches international legal rules that restrict the use of the death penalty, for only the “most serious crimes.”

## SINGAPORE

Notorious in the recent past for having the highest per capital execution rate in the world, in the last few years the number of executions in Singapore has decreased significantly. According to government figures, three people were executed in 2007, six in 2008, five in 2009 and none in 2010<sup>26</sup>. At least 12 offences are punishable with death and the death penalty is mandatory for murder, sedition, serious firearms offences and drug trafficking. The Law Society of Singapore has condemned mandatory death sentences arguing that sentences should be discretionary with the defendant given the opportunity “to persuade the court that he deserves less than the penalty of death.”

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has argued that the Singapore Misuse of Drugs Act “which partially shifts the burden of proof to the accused”, does not provide sufficient guarantees for the presumption of innocence and may lead to violations of the right to life when the crime of drug trafficking carries a mandatory death sentence.<sup>27</sup> Singapore is not party to the ICCPR but is obliged under customary international law to respect the right to life and comply with the absolute ban on torture and other ill-treatment.

### SINGAPORE CASE STUDY: YONG VUI KONG

**“When we say mandatory death sentence it means basically judges don’t have discretion. Just close your eyes... and execute. Don’t have to look at the person’s background and all that.” M. Ravi, Yong Vui Kong’s lawyer**

Yong Vui Kong, a Malaysian man, was arrested in Singapore in 2007, aged 19, for possessing 47g of heroin. Yong had dropped out of school early and had turned to petty crime as a way of earning money.

Under Singapore's Misuse of Drugs Act, anyone found guilty of possessing more than 15g of heroin is presumed to be guilty of drug trafficking, for which the death penalty is mandatory. As Yong was not able to counter this presumption, the High Court convicted him in 2008 and he was sentenced to death. The court had no discretion to consider mitigating circumstances or pass a lesser sentence.

Lawyers filed an appeal against his conviction but Yong withdrew it in April 2009, saying that he had embraced Buddhism and wanted to acknowledge his crime. Yong petitioned Singapore's president for clemency on the basis of his youth but this was rejected in November 2009.

Yong's lawyer, M. Ravi, appealed against Yong's sentence by challenging the constitutionality of the mandatory death penalty for drug trafficking and seeking judicial review of the clemency process. But in May 2010, the Court of Appeal rejected the appeal. This was the third time it had rejected such a challenge since 1980.

The Court ruled that the right to life in the Singapore Constitution did not imply a ban on inhuman punishment. It rejected the argument that customary international law prohibits mandatory death sentences as an inhuman punishment or a violation of the right to life.

The application for judicial review of the clemency process had argued that the power to grant pardon had been prejudiced by public comments about the case made by the Law Minister, thereby undermining accepted principles of procedural fairness. This was dismissed by the High Court in August 2010. The Court of Appeal dismissed an appeal against the High Court's decision in April 2011, clearing the way for Yong's execution.

The President can only exercise clemency following advice from the Cabinet and thus has little discretion in granting pardons. Clemency for a death sentence in Singapore has reportedly been granted only six times since independence in 1965.

## **Recommendations to the authorities in Singapore**

- **Stop the execution of Yong Vui Kong.**
- **Suspend all executions and the imposition of death sentences as a step towards total abolition of the death penalty.**
- **Revise laws and change policies and practices to ensure fair trials in line with international standards, in particular laws that reverse the presumption of innocence.**
- **Abolish mandatory death sentences.**
- **Ratify the International Covenant on Civil and Political Rights.**

### 3.3 INNOCENT UNTIL PROVED GUILTY

**“Responses to crime, drugs and terrorism must be sure to protect the rights of vulnerable individuals who risk becoming the subject of criminal law and penalties.”**

UN Office on Drugs and Crime, March 2010.<sup>28</sup>

A core principle of international law – enshrined in Article 11 of the UDHR and elaborated in Article 14(2) of the ICCPR – is that anyone charged with a criminal offence must be presumed innocent until and unless proved guilty according to law. This imposes on the prosecution the burden of proving the charge beyond reasonable doubt. The right to be presumed innocent applies not only at trial but also before trial. It applies to the treatment of suspects before criminal charges are filed, and carries through until a conviction is confirmed following a final appeal. The 1984 ECOSOC Safeguards elaborate on this right as it applies to those facing the death penalty, stressing that the death penalty may be imposed only when “the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.”

However, the laws in a number of Asia-Pacific countries violate this right, providing in effect for a reversal of the burden of proof in the case of certain crimes. Defendants charged with such crimes in those countries are presumed guilty and the burden of proof is placed on them to prove their innocence rather than on the prosecution to prove guilt.

In **China**, the principle of presumption of innocence is entirely absent from the Criminal Procedure Law. In **Taiwan**, the law was only recently changed to include the presumption of innocence. Those found to be knowingly carrying drugs over a certain quantity in **Malaysia** and **Singapore** are presumed to be guilty of drug trafficking, for which there is a mandatory sentence of death.

#### **MALAYSIA**

In April 2011, Malaysia’s Home Minister announced that 441 people had been executed since 1960 and that 696 prisoners were on death row in February 2011.<sup>29</sup> The majority of those sentenced to death have been convicted under the 1952 Dangerous Drugs Act providing for a mandatory death sentence for trafficking. Murder also carries a mandatory death sentence.

In 2009, the Government of Malaysia stated to the UN Human Rights Council that it was considering reducing the maximum sentence for drug trafficking to life imprisonment.<sup>30</sup> However, no legislative amendments have been introduced so far, and the number of those sentenced to death under this mandatory provision appears to have been increasing in recent years.

Malaysia has not ratified the ICCPR or the UN Convention against Torture but is bound by customary international law to prevent the arbitrary deprivation of life and to prohibit torture and other ill-treatment.

### **MALAYSIA CASE STUDY: REZA MOHAMMED SHAH BIN AHMAD SHAH**

**“It is time for Malaysia to abolish the death penalty... No criminal justice system is perfect. You take a man’s life and years later, you find out that another person did the crime. What can you do?”  
Nazri Abdul Aziz, Malaysian Law Minister, reported in ‘The Online Citizen’, 31 August 2010.**

Reza Mohammed Shah Bin Ahmad Shah, known as Reza Shah, was arrested by police on the evening of 14 August 2000 in a squatter neighbourhood outside Kuala Lumpur. Police said he was carrying a plastic bag which he threw away when they called out to him.

Police located the plastic bag and said it contained almost 800g of cannabis. Reza Shah denied any knowledge of the bag’s contents and stated in court that the police had beaten him to force him to reveal its location.

After arrest, Reza Shah was held at Brickfields Police District Headquarters, a police station which has been the subject of repeated allegations of torture and other ill-treatment.

Reza Shah was detained pending trial for two years and finally tried in August 2002. He was found guilty by the High Court of Kuala Lumpur of possessing 795.3g of cannabis under the Dangerous Drugs Act 1952.

The Act provides that any person found possessing any dangerous drug “shall, until the contrary is proved, be deemed to have been in possession” of that drug. It also states that, unless proved otherwise, the person shall be deemed to have known the nature of the drug. And it presumes that anyone found guilty of possessing dangerous drugs above 200 g of cannabis or 15 g of heroin is also guilty of trafficking those drugs, an offence for which the mandatory sentence is death.

The law thus reverses the suspect’s right to be presumed innocent until proven guilty, a rule of customary international law binding on all countries which imposes on the prosecution the burden of proving the charge beyond reasonable doubt. In a number of cases, judges have handed down mandatory death sentences for drug trafficking with rulings making it clear that their decisions were based solely on the reversal of presumption of innocence in the law, rather than on the basis of the prosecution proving guilt beyond reasonable doubt.

In the case of Reza Shah, once the trial court found that he possessed drugs in the alleged quantities, the law left the court with no discretion but to convict him of trafficking and then to hand down the mandatory death sentence.

In 2006, the Putrajaya Appeal Court overturned the trial court’s verdict. It held that the prosecution had not proved that Reza Shah had knowledge of the bag’s contents. It convicted him for possession of drugs only but not of trafficking, and sentenced him to a jail term of 18 years and 10 strokes of the cane.

In January 2009, the Federal Court overturned the Appeal Court’s judgement in response to an appeal by the prosecution, concluding that Reza Shah had failed to prove that he was not guilty of drug trafficking. It reinstated the death sentence.

Reza Shah has exhausted all his legal avenues for appeal. He has since appealed to the King to commute his sentence. A decision is pending.

## Recommendations to the authorities in Malaysia

- Stop the execution of Reza Shah.
- Suspend all executions and the imposition of death sentences as a step towards total abolition of the death penalty.
- Revise laws and change policies and practices to ensure fair trials in line with international standards, in particular laws that reverse the presumption of innocence.
- Abolish mandatory death sentences.
- Ratify the International Covenant on Civil and Political Rights.

## 3.4 RIGHT TO LEGAL COUNSEL

**“Those sentenced to death often had no access to lawyers, and were convicted following trials in which no evidence was produced or no defence witnesses called.”**

UN Special Rapporteur on extrajudicial, summary or arbitrary executions, commenting on Afghanistan, 2009.<sup>31</sup>

Access to a lawyer from the outset of detention is a key safeguard against torture and other ill-treatment, and essential to ensuring a fair trial. The right to a fair trial requires that the accused has access to a lawyer not only during the trial itself, but also immediately on arrest, during detention, interrogation and preliminary investigations.<sup>32</sup> The Human Rights Committee has stated: “The assistance of counsel should be ensured, through legal aid as necessary, immediately on arrest and throughout all subsequent proceedings to persons accused of serious crimes, in particular in cases of offences carrying the death penalty.”<sup>33</sup>

The right to a lawyer generally means that a person has the right to legal counsel of their choice. If a defendant does not have their own lawyer, they are entitled to have one assigned by a judge or judicial authority. If the defendant cannot afford to pay, assigned counsel must be provided free of charge. The defendant is not as a general rule entitled to an absolute right of choice. However, the Human Rights Committee has stated that in death penalty cases the state should give preference to appointing counsel chosen by the accused, including for the appeal.<sup>34</sup>

The right to counsel means the right to competent counsel. The Human Rights Committee has stated that “In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings. Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused.” It has also stated that if counsel shows “blatant misbehaviour or incompetence” or if the authorities



“hinder appointed lawyers from fulfilling their task effectively,” the state may be responsible for a violation of the right to fair trial under the ICCPR.<sup>35</sup>

The right to be defended by counsel includes the right to confidential communications with counsel and to adequate time and facilities to prepare the defence. In its resolution 1989/64, the UN Economic and Social Council recommended that states provide special protection to defendants in death penalty cases by allowing time and facilities, including the adequate assistance of counsel at every stage of the proceedings, above and beyond that afforded in other cases. According to the Human Rights Committee this includes providing free interpretation services as needed both at trial and during the pre-trial phase.<sup>36</sup> The accused and their counsel should have opportunities equal to that of the prosecution to present their case (“equality of arms”).

Across the region, prisoners facing the death penalty have little or no access to lawyers following arrest and when preparing for trial or appeal processes.

Many of those sentenced to death in **Afghanistan** do not have proper legal representation at the time of their trial. In fact, defence lawyers in **Afghanistan** are normally not even present in the trial court but must submit a written rebuttal of the charges against their client to the court. In **Indonesia** even though the Criminal Procedure Code guarantees the right to be assisted by a lawyer, in practice there are documented cases of defendants who do not have access to a lawyer. In **China**, the authorities may block or make it very difficult for defence lawyers to meet with their clients, gather evidence and access case documents. Lawyers defending clients involved in politically sensitive cases have been subjected to intimidation and excluded from proceedings. Others have had charges filed against them for advising their clients to withdraw forced confessions or for trying to introduce evidence that challenges the prosecution’s case.<sup>37</sup>

In **Japan**, the *daiyo kangoku* system allows the police to detain and interrogate suspects for up to 23 days. In 2008, the Human Rights Committee expressed concern about this system in which the detainee has no access to a lawyer during interrogation on the assumption that a lawyer’s presence would make it harder for police to “persuade the suspect to tell the truth.”<sup>38</sup> The Committee’s concerns were heightened by an extremely high conviction rate based on confessions, the absence of an automatic right to appeal and restrictions on the right to confidential communication with counsel during appeal processes.

## CHINA

At least 55 offences, including non-violent ones such as drug-related offences, carry the death penalty. Thousands are executed every year – more than the rest of the world put together. The exact number remains secret.

In 2007, the Supreme People’s Court reclaimed its power to exercise final review of all death sentences. The Supreme Court can either approve the sentence or return it to the lower courts for re-trial. The authorities have reported a significant drop in executions since the Supreme Court resumed its reviews, but without accurate publicly available data it is impossible to confirm such claims. If the Supreme

People's Court approves a death sentence, execution will follow quickly. The Constitution sets out the power of the Standing Committee of the National People's Congress or the Head of State to issue "special pardons". There is no procedure for individuals sentenced to death to seek pardon or commutation themselves.

All trials, including those resulting in death sentences, fall short of international standards for fair trial. The criminal justice system remains highly vulnerable to corruption and political interference. The police, procuratorate and courts are not independent and remain under the supervision of the Chinese Communist Party.

China has a nearly 100 per cent conviction rate in criminal cases.<sup>39</sup> In 2008, the UN Committee against Torture expressed concern about the "continued allegations, corroborated by numerous Chinese legal sources, of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings."<sup>40</sup>

These concerns echoed those of the UN Special Rapporteur on torture who visited China in 2005, identifying factors that facilitated the use of torture. These factors included: "rules of evidence that create incentives for interrogators to obtain confessions through torture, the excessive length of time that criminal suspects are held in police custody without judicial control, the absence of a legal culture based on the presumption of innocence (including the absence of an effective right to remain silent); and restricted rights and access of defence counsel."

He recommended that legal reforms should conform to fair trial provisions, as guaranteed in Article 14 of the ICCPR, including "the right to remain silent and the privilege against self-incrimination; the effective exclusion of evidence extracted through torture; the presumption of innocence; timely notice of reasons for detention or arrest; prompt external review of detention or arrest; timely access to counsel; adequate time and facilities to prepare a defence; appearance and cross-examination of witnesses; and ensuring the independence and impartiality of the judiciary."<sup>41</sup>

### **CHINA CASE STUDY: LENG GUOQUAN**

Leng Guoquan, a seafood trader, was sentenced to death on 16 December 2009 by the Dandong City Intermediate People's Court in Liaoning province. He was charged with being a leader of a criminal gang engaged in smuggling and trafficking drugs. His conviction followed an unfair trial, and was based on his confession and testimonies from witnesses who have either subsequently retracted their statements or say they were tortured into testifying against him.

Leng Guoquan himself has always denied the charges and says he confessed because he was tortured. Detained on 19 January 2009, Leng Guoquan said he was tortured for three days and three nights while being interrogated by a special police unit. Three police officers bound his hands behind his back. They pushed his head between his legs and punched him. Later, they lit one end of a tube of rolled paper and stuffed the other end into his nose, covering his mouth until he was forced to breathe in the fire. Since January 2009, Leng Guoquan has been interrogated and tortured several more times.

Leng Guoquan has been held at the Fengcheng County Detention Centre since 2009. He was first registered under a false name (Chen Dong), apparently in an attempt to prevent his lawyer and family from finding out where he was held. Since discovering his location, his family have not been allowed to visit him.

His family have appointed four different lawyers to represent him. The judicial authorities forced the first one to resign after he took pictures of Leng Guoquan's scars which he said were a result of torture, while the second and third were denied access to him. The fourth lawyer eventually gained access and met him before his first trial.

This lawyer filed a complaint with the Dandong City Procuratorate in July 2009 claiming that his client had been tortured in custody and calling for an investigation. In August 2010, the Liaoning Provincial Procuratorate concluded that the allegations of torture were unfounded.

At the trial, Leng Guoquan's lawyer had no chance to cross-examine key witnesses. Those who did testify retracted their previous statements. Leng Guoquan's co-defendant said that he had been tortured into confessing. Another witness also said that he had given the police false information. The prosecution did not provide any material evidence to support witness statements (which were subsequently withdrawn) that claimed he was guilty.

At his appeal hearing on 7 December 2010 at the Liaoning Provincial Higher People's Court, Leng Guoquan showed the court the scars on his head, wrists and legs he said were inflicted through torture. Of 56 witnesses called by the defence, only three were heard by the court. On 6 May 2011, the Liaoning court sent Leng Guoquan's case back to the Dandong City Intermediate People's Court for re-trial due to "lack of clarity about the facts" and "lack of evidence." The re-trial took place on 10 October 2011.

## **Recommendations to the authorities in China**

- **Stop the execution of Leng Guoquan.**
- **Ensure Leng Guoquan is re-tried in proceedings which comply with international fair trial standards, especially with regard to his right to effective legal counsel.**
- **Investigate reports of torture and other ill-treatment and ensure that all statements resulting from such coercion are completely excluded from any re-trial.**
- **Suspend all executions and the imposition of death sentences as a step towards total abolition of the death penalty.**
- **Revise laws and change policies and practices to ensure fair trials in line with international standards.**
- **Ensure that those sentenced to death have an effective opportunity to exercise their right to seek a pardon or commutation of their sentence in line with international standards.**
- **Ratify the International Covenant on Civil and Political Rights.**

## INDONESIA

Over 100 people are on death row in Indonesia: about half have been convicted of drug trafficking; many are foreign nationals. Ten people were executed in 2008, compared to 11 executions recorded for the whole of the preceding decade. At least seven people were sentenced to death in 2010, but since 2008 there have been no recorded executions. In August 2010 the clemency law was amended so that those sentenced to death can appeal only once for clemency from the President, within one year of the final verdict.

The Indonesia Constitution prohibits torture, but the government has yet to make torture a criminal offence in its Criminal Code. Following a visit in 2007, the UN Special Rapporteur on Torture concluded that torture is used routinely.<sup>42</sup> Both the UN Special Rapporteur on torture and the UN Committee against Torture expressed concern at the long periods of time that detainees are usually held in police custody before being brought in front of a judge.<sup>43</sup>

Torture remains widespread and forced confessions are routinely relied upon in court. Those charged with crimes carrying the death penalty can be held for up to 231 days before being brought before a judge and tried.

The UN Special Rapporteur on Torture noted that “The overwhelming majority of the detainees interviewed indicated that the ill-treatment was used primarily to extract confessions or, in the case of drug-related crimes, to receive information on drug suppliers.” Some detainees were told they would be spared if they paid a large sum of money. Those who had already gone to trial “reported in unison that their coerced confessions had been used during the court proceedings and that objections they had raised were not considered by the judge, prosecutor or even their own legal aid clerk.”<sup>44</sup>

There are serious concerns around corruption and lack of independence within the judiciary. In 2003, the UN Special Rapporteur on the independence of judges and lawyers concluded that the judiciary in Indonesia was “plagued with corrupt practices”<sup>45</sup> and also that the police “is generally regarded as an institution steeped in corrupt practices.”<sup>46</sup> The Special Rapporteur also found that “the lack of regulation has allowed the legal profession to breach its professional responsibilities owed to the court, the client and society and to seek to improperly influence the judge.”<sup>47</sup> He recommended that the Constitution be amended “to provide a complete separate chapter for the provision of an independent judiciary and an impartial prosecutorial service providing for fair trial procedures in accordance with international standards.”<sup>48</sup>

### INDONESIA CASE STUDY: HUMPHREY JEFFERSON EJIKE ELEWEKE

Humphrey Jefferson Ejike Eleweke (Jeff), a Nigerian man, was arrested for drug offences in 2003 and sentenced to death in 2004.

Jeff was arrested on 2 August 2003 in Jakarta for possessing drugs after police found 1.7kg of heroin in a room used by one of his employees at the restaurant he owned and ran.

He was charged with offences relating to the import, export, sale and trafficking of drugs – offences which carry the possibility of the death penalty. However, Jeff did not have access to a lawyer at the time of his arrest, interrogation or detention. He was detained for a total of five months without legal representation, in breach of Article 14 of the ICCPR as well as Indonesia’s Criminal Procedure Code which guarantees the right to be assisted by and to contact counsel. Indonesia became party to the ICCPR in 2006.

Jeff has claimed that he was repeatedly beaten during interrogation and threatened with being shot if he refused to sign papers confessing to possession of the heroin or if he refused to implicate others. Trial records of April 2004 however, show that Jeff told the court that he was not subjected to any form of coercion,<sup>49</sup> although such statements are themselves sometimes made as a result of threats.

The trial judgement includes the statement that “black-skinned people from Nigeria” are under surveillance by police because they are suspected of drug trafficking in Indonesia. Such a statement raises concerns about the impartiality of the trial process. The ICCPR requires that everyone be given a fair and public hearing by a competent, independent and impartial tribunal. The ICCPR places an explicit obligation on states to respect and protect the rights of all individuals “without distinction of any kind” including race, colour, and national or social origin.

Jeff was convicted of possession and sale of drugs by the Central Jakarta district court and sentenced to death in April 2004. His conviction and sentence were upheld by the Jakarta High Court in June 2004 and the Supreme Court in November 2004.

In November 2004, Charles Kanu, alias Kelly, the former owner of Jeff’s restaurant, reportedly told police that he had organized for drugs to be planted in the restaurant so that Jeff would be arrested and convicted. Charles Kanu later died in prison but several people testified that they had witnessed him making this confession while in prison on drug charges. Such witness statements formed part of an appeal for a review of Jeff’s case to the Supreme Court, which was rejected in September 2007. That same year the court upheld the constitutionality of the death penalty for drug offences.

Jeff is currently held in the Nusakambangan Prison awaiting execution. He has not appealed for clemency from the President as he maintains that he is innocent and should not seek forgiveness for a crime he did not commit.

## **Recommendations to the Indonesian authorities**

- **Stop the execution of Humphrey Jefferson.**
- **Ensure Humphrey Jefferson is re-tried in proceedings which comply with international fair trial standards.**
- **Make torture a criminal offence, investigate reports of torture and other ill-treatment and ensure that all statements resulting from such coercion are completely excluded from any re-trial.**
- **Suspend all executions and the imposition of death sentences as a step towards total abolition of the death penalty.**
- **Revise the Criminal Code and other laws and change policies and practices to ensure fair trials in line with international standards.**

## JAPAN

There are 19 offences that carry the death penalty in Japan, although in practice the death penalty is only imposed for murder. More than 100 people are currently on death row. Between 2006 and 2010 there were 37 executions. All were carried out secretly with those condemned informed just hours before their execution and their family members told only after it had taken place.

Japan's criminal justice system relies heavily on confessions obtained under the pre-trial *daiyo kangoku* system to secure convictions. That system allows the police to detain and interrogate suspects for up to 23 days with limited access to a lawyer. During this time confessions are often obtained through torture or other ill-treatment. Japan has a 99 per cent conviction rate. In 2007, the UN Committee against Torture expressed grave concern "at the large number of convictions in criminal trials based on confessions, in particular in light of the lack of effective judicial control over the use of pre-trial detention and the disproportionately high number of convictions over acquittals." It further expressed concern about "the lack of means for verifying the proper conduct of interrogations of detainees while in police custody, in particular the absence of strict time limits for the duration of interrogations and the fact that it is not mandatory to have defence counsel present during all interrogations."<sup>50</sup>

The Committee recommended that interrogation of detainees be "systematically monitored" through video or other recordings. It further recommended that detainees have access to a lawyer during interrogation.<sup>51</sup> These recommendations were echoed in 2008 by the Human Rights Committee, which added that the state should "acknowledge that the role of the police during criminal investigations is to collect evidence for the trial rather than establishing the truth, ensure that silence by suspects is not considered inculpatory, and encourage courts to rely on modern scientific evidence rather than on confessions made during police interrogations."<sup>52</sup>

Both Committees expressed concerns that the *daiyo kangoku* system violates fair trial standards – undermining the right to presumption of innocence, the right to remain silent, the right of defence, the right not to be compelled to incriminate oneself or confess guilt, and the right not to be subjected to torture or other ill-treatment.

### JAPAN CASE STUDY: HAKAMADA IWAO

**"I could not convince the other two judges that Hakamada was not guilty so I had to convict him as the decision was made by majority. Personally the fact that I had to write his judgement was against my conscience, something I still think about to this day." Kumamoto Norimichi, Shizuoka District Court judge, 2007**

Hakamada Iwao (Hakamada), born in 1936 and a former boxer, was arrested for murder in 1966. He was sentenced to death in 1968.

Following his arrest, police subjected Hakamada to 23 days of intensive interrogation from 18 August to 9 September 1966. He was interrogated without a break for an average of 12 hours a day; on three occasions he was interrogated for over 14 hours. He confessed after 20 days, was interrogated for another three days and then charged. During this period he signed a series of documents purportedly confessing to the crime. Hakamada later signed more confessions, this time prepared by the Public Prosecutor.

Hakamada retracted these statements at his trial, claiming that while he was detained he had been denied food and water, was not allowed to use a toilet, and was kicked and punched. In a letter to his sister he wrote:

“...one of the interrogators put my thumb onto an ink-pad, drew it to the written confession record and ordered me, ‘write your name here!’, shouting at me, kicking me and wrenching my arm.”

Hakamada had had only three short interviews with different defence lawyers prior to trial. During his trial by the Shizuoka District Court in 1968, there were numerous inconsistencies in the evidence. Judges raised concerns that purported confessions presented by the Prosecution with Hakamada’s signature were not signed voluntarily. Of these 45 documents, only one was deemed to have been signed voluntarily and the remainder were declared to be inadmissible as evidence. He was convicted and sentenced to death, and the conviction and sentence were upheld by the Supreme Court in 1980.

In 2007, Kumamoto Norimichi, one of the three judges at the Shizuoka District Court that sentenced him to death in 1968, said he believed Hakamada was innocent:

“Objectively the evidence for him committing this crime was almost none; however, the investigator thought from the beginning that he was guilty, so the police conducted the investigation assuming that he was responsible for the crime. He was detained and coerced into making a confession because the police had arrested him.”<sup>53</sup>

Kumamoto Norimichi could not convince the other two judges that Hakamada was not guilty and was forced to convict him by majority verdict, despite believing in his innocence: “I could not bear the burden of my conscience so I resigned from being a judge ... I felt very guilty myself.”

Hakamada’s defence counsel appealed for a re-trial in 1981 but the application was rejected by the Supreme Court in 1994. A second appeal for re-trial was submitted in 2008 to the Shizuoka District Court; the appeal is still pending.

Protesting his innocence for over 45 years, Hakamada is one of Japan’s longest serving death row inmates. All prisoners who are sentenced to death in Japan are placed in isolation. Other than brief visits from his sister, his lawyer and a select number of supporters, Hakamada has been kept in isolation for over 30 years. He has shown signs of serious mental deterioration.

## Recommendations to the Japanese authorities

- **Stop the execution of Hakamada Iwao.**
- **Ensure Hakamada Iwao is re-tried in proceedings which comply with international fair trial standards.**
- **Investigate the reports of torture and other ill-treatment and denial of the right to effective legal counsel.**
- **Abolish the daiyo kangoku system or bring it into line with international standards, including introducing electronic recordings of the entire interrogation process.**

- Suspend all executions and the imposition of death sentences as a step towards the total abolition of the death penalty.
- Revise laws and change policies and practices to ensure fair trials in line with international standards.

### 3.5 RIGHT TO REVIEW AND RIGHT TO SEEK CLEMENCY

Article 14(5) of the ICCPR requires that anyone convicted of a crime has the right to have his or her conviction and sentence reviewed by a “higher tribunal.” The 1984 ECOSOC safeguards stipulate that in death penalty cases states should take steps to ensure that such appeals are mandatory.<sup>54</sup>

The right to appeal to a higher court against one’s conviction and sentence is a crucial safeguard of defendants’ rights. Reviews by a higher court allow for judicial oversight of how the death penalty is applied to individual cases. More generally, they can allow for concerns about failure to respect safeguards for fair trial to be brought to the attention of the court. Courts can order re-trials and in some cases amendments to legislation or suggest other reforms. But in **Japan**, **South Korea**, and parts of **Pakistan**<sup>55</sup>, there is no mandatory requirement for appeal to a higher court in death penalty cases. And in **North Korea** there is no possibility of appeal at all.

In 2007, the Supreme People’s Court (SPC) in **China** reclaimed its power to review all death sentences passed by lower courts which had long been delegated to lower courts. The Supreme Court can either approve the sentence or return it to the lower courts for re-trial. The authorities have reported a significant drop in executions as a result: In November 2010, Hu Yunteng, head of the SPC research department said the court had rejected, on average, 10 per cent of all death sentences passed by lower courts nationwide every year since 2007, adding that most were rejected because the evidence was inadequate, the process of deciding the punishment was inappropriate or there were other procedural flaws. However, without accurate publicly available data it is impossible to confirm claims of a drop in executions.

Once all judicial appeals have been exhausted, an accused has the right to seek **clemency** – the right to seek pardon or commutation of sentence. This right is provided in the ICCPR and other international instruments,<sup>56</sup> and the domestic practice of almost every country applying the death penalty. This right is so widespread it is considered a rule of customary international law.<sup>57</sup>

The right to seek clemency is not part of a legal procedure, but applies even after all appeals in the judicial process have been exhausted. Clemency is normally sought from the head of state or from a minister with authority in law to grant pardon or commutation.

The Human Rights Committee has stated that this right requires the state to put in place procedural guarantees to ensure its meaningful exercise.<sup>58</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the



right to seek clemency requires there to be procedural guarantees if it is not to become a meaningless formality without genuine consideration of the case. An individual making such an application should be able to raise any considerations which they consider relevant, including matters that may not have been brought before the courts, and should be informed of the process and timing of consideration of their request.<sup>59</sup>

In several countries in the region, clemency procedures are either absent or exist only on paper. In **China**, there is no clemency procedure for those sentenced to death. Pardons or commutations are rare in **Japan** and **Singapore**. The opacity of many clemency processes that do exist in the region permits the executive – whether it be ministers or presidents – to wield their considerable power over the life and death of those under sentence of death in a largely unaccountable manner.

### 3.6 SPECIAL COURTS AND RUSHED PROCEEDINGS

Special courts like those found in **North Korea** and **Pakistan** frequently violate fair trial rights, in particular the right to legal representation, to appeal and not to be coerced into confessing guilt. Some special courts are presided over by military officials rather than an independent judiciary.

In other countries courts operate with expedited procedures during high profile anti-crime campaigns, or sentence people to death for crimes which normally would not be punished so harshly. This has been the case in **China** during “Strike Hard” campaigns regularly conducted against drug trafficking and other offences.

#### PAKISTAN

Courts in Pakistan sentence a large number of people, including juveniles, to death, despite a promise made by the President in 2008 that all death sentences would be commuted. Over 8,000 prisoners are said to be on death row; many have been there for years. The death penalty is most frequently imposed for murder, but can be imposed for almost 30 other offences including those without lethal consequences which fall outside the scope of the “most serious crimes” as interpreted by UN treaty bodies and monitoring mechanisms such as drug crimes.

Pakistan ratified the ICCPR in June 2010. Two months earlier, it had inserted Article 10A into the Constitution (under the 18<sup>th</sup> Amendment) providing for “the right to a fair trial and due process.” However, the judicial system suffers from corruption, lack of independence and discrimination on the basis of gender, religion, ethnicity and social, economic and other status. Statements extracted through torture continue to be used as evidence in court and defendants often face restrictions in trying to access a lawyer or are given state-appointed lawyers who are ineffective.

Rights to fair trial have been further undermined in trials before special courts such as those established under the now-lapsed Special Courts for Speedy Trials Act (see case). Provisions in the Anti-Terrorism Act 1997 allowed civilians to be tried in military courts but two years later the Supreme Court ruled this unconstitutional. Anti-terrorism courts continue to sentence people to death, operating with restricted public access and with the requirement for trials to be completed within seven working days, putting judges under extreme pressure to convict.

In June 2011, the President of Pakistan signed into law the Action in Aid of Civil Powers Regulations. These regulations give the security forces in tribal areas powers to detain people arbitrarily and indefinitely. The regulations also provide for the possibility of imposing the death penalty for a large number of vaguely and broadly defined offences, including non-violent ones. A statement by any member of the security forces or an official is sufficient to convict an accused and there are no procedures in place for appeal against conviction and sentence.

Individuals can also be tried and sentenced to death in Shari'a courts. Under the Islamic provision of *diyat*, families of murder victims can accept payment of "compensation" from the perpetrator in place of execution. However, this leads to arbitrary and discriminatory application of the death penalty, with those lacking financial resources unable to pay compensation, and leaving to the victim's family the power to decide whether or not the individual should be executed. The Human Rights Committee has observed that the possibility for an individual to avoid execution only if the victim's family accept payment of this kind of "compensation" does not constitute a form of pardon or clemency as required by Article 6(4) of the ICCPR.<sup>60</sup>

### **PAKISTAN CASE STUDY: AFTAB BAHADUR**

**"The police tortured me and then after smearing my hands with oil, put those hands around the room and thus the impressions were obtained," Aftab Bahadur.**

Aftab Bahadur was arrested by police in Lahore on 5 September 1992 along with another man, suspected of murder. He was held in police detention for several months without access to a lawyer. Detainees in Pakistan are often held in police custody for weeks at a time and sometimes up to a year while charges are prepared. They are rarely given the chance to challenge the lawfulness of their detention before a court or seek bail.

When Aftab Bahadur finally appeared in court in 1993, he pleaded not guilty, claiming that police had taken him to the scene of the crime and forced him to leave fingerprints. His co-defendant also claimed that he had been tortured and forced to leave fingerprints. The judge noted their claims without comment.

Aftab Bahadur was provided with a state-appointed lawyer at trial who failed to produce any evidence or witnesses in defence of his client. State-appointed lawyers in Pakistan are often poorly trained and paid<sup>61</sup>, and may not represent their clients vigorously unless given further payments by the defendant or their family.

Aftab Bahadur was tried before the Special Court for Speedy Trials No.2 in Lahore on 13 April 1993, convicted of murder and sentenced to death. These courts operated between 1987 and 1994 with exclusive jurisdiction over certain scheduled offences including murder and political offences – including non-violent offences – for which the death sentence could be imposed.<sup>62</sup> They operated outside the regular legal system, were presided over by retired judges and allowed for appeals only to a Special Supreme Appellate Court, again outside the ordinary Supreme Court bench. Strict time limits were placed on bringing cases to trial after charges had been filed, length of hearings, and the appeal process. Although the law establishing these speedy courts was repealed in 1994 a number of people remain imprisoned following trials in these courts, some of them like Aftab Bahadur, under sentence of death.

Aftab Bahadur appealed against his conviction to the Supreme Appellate Court. A lawyer was again appointed by the state to represent him. His appeal application is not dated and contains simply four generic points made on one sheet of paper: that the prosecution failed to establish his guilt beyond reasonable doubt; that there was insufficient reliable evidence to convict him; that he is innocent; and that the trial court judgement was arbitrary and based on conjecture.

The appeal court confirmed the conviction and sentence on 27 March 1994. A mercy petition to the President was filed by Aftab Bahadur in 2010. He is detained in a Lahore jail.

## Recommendations to the President of Pakistan

- Stop the execution of Aftab Bahadur.
- Investigate all claims of torture and other ill-treatment and ensure that statements and other evidence resulting from such coercion are completely excluded from any re-trial.
- Ensure Aftab Bahadur is re-tried by a regular court in proceedings which comply with international fair trial standards.
- Suspend all executions and the imposition of death sentences as a step towards the total abolition of the death penalty.
- Fully comply with obligations under the International Covenant on Civil and Political Rights and revise laws and change policies and practices to ensure fair trials in line with international standards.

## 3.7 INDEPENDENT JUDICIARY

"A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."

Human Rights Committee<sup>63</sup>

Principle 2 of the UN Basic Principles on the Independence of the Judiciary requires that judges must be able to decide matters impartially on the basis of facts and in accordance with the law, free from restrictions, improper influences, inducements, pressures, threats or interferences. There are also UN standards for lawyers and prosecutors which require independence and freedom from improper interference. Despite these standards, in several countries including **Afghanistan, Bangladesh, China, Indonesia, Maldives, North Korea, Pakistan, Sri Lanka** and **Viet Nam**, parts of the criminal justice system – police, prosecutors, lawyers, the judiciary – fail to operate professionally and independently of political or other influences, undermining the right to fair trial.

Following a visit to **Afghanistan** in 2008, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions reported that police, prosecutors and judges acknowledged that corruption and incompetence were widespread in the country and that the criminal justice system was incapable of ensuring respect for due process rights. He therefore recommended a moratorium on all executions to avoid the execution of innocent people.<sup>64</sup> His successor reiterated this recommendation in 2011, noting that approximately 200 death sentences had been passed between February 2009 and April 2010.<sup>65</sup> There have been some unconfirmed reports that a small number of executions had been carried out since April 2010 but the first officially acknowledged execution for several years took place in June 2011 when two men were executed after being convicted and sentenced for murder.<sup>66</sup>

### 3.8 TRANSPARENCY

Under international standards, governments are required to be transparent in the way they apply the death penalty in practice. The Economic and Social Council has urged states to publish regular information about the number of death sentences, executions, sentences overturned on appeal, and commutations or pardons.<sup>67</sup>

If people are given reliable information about how the death penalty is applied, and are able to assess whether fair trial standards have been upheld, they are more able to make an informed decision about whether to retain the death penalty. It was just such information that contributed to the abolition of the death penalty in the Philippines in 2006. The work of campaigners in documenting death penalty cases continues to be crucial to uncovering injustice. That work is regularly frustrated in the Asia-Pacific region. For example, in several countries, the number of executions and related information are considered state secrets. In **Japan** and **Taiwan**, prisoners are executed without advance notice given to families and lawyers. The governments of **China, Malaysia, Mongolia, North Korea** and **Viet Nam** routinely fail to provide public information about executions and judgements in death penalty cases.

## 4. CONCLUSION

“Experience shows that even in the most sophisticated legal systems, mistakes occur which result in wrongful executions. This is a constant risk and no country’s legal system can comprehensively and reliably ensure that such errors do not occur. In relation to lesser punishments, the penalty is neither so severe nor so final, and mistakes can always be rectified. Capital punishment, however, is in a class of its own and the appropriate legal regime governing it cannot be compared to that relating to other sentences.”

UN Special Rapporteur on extrajudicial, summary or arbitrary executions<sup>68</sup>

Every person charged with an offence has the right to a fair trial. Denial of due process in criminal trials represents a rejection of the principle that fundamental fairness and equality before the law are essential to the very concept of justice.

In the Asia-Pacific region, thousands of people are being sentenced to death and executed every year after unfair trials which fail to comply with international standards, undermining the rule of law and violating the rights to life and to freedom from torture and other cruel, inhuman or degrading treatment or punishment.

In compiling this report, a number of cases have been reviewed which clearly demonstrate that who will be executed and who will be spared is often determined not only by the nature of the crimes but also the defendants’ ethnic or other identity, their economic or social status, or their ability to understand and navigate through the trial process, the availability or adequacy of legal aid and defence counsel, and other factors that determine whether they are able to challenge unfairness in a criminal justice system that propels them towards death.

In calling for caution in reopening discussions about whether the **Philippines** should reintroduce the death penalty into its laws (having abolished it in 2006 and becoming a party to the Second Optional Protocol to the ICCPR after a sustained campaign by abolitionists highlighting its unfairness), the President commented in January 2011 that without a perfect judicial system, the possibility would always arise that people could be wrongly convicted.<sup>69</sup>

Only abolition of the death penalty can guarantee that no innocent person will be executed. ADPAN opposes the death penalty as a matter of principle and is asking all countries in the region to take measures to suspend its use and commute all death sentences with a view to total abolition. It is abolition that demonstrates a society’s true commitment to fairness and justice rather than apologies after wrongful executions. Apologies can never be enough.

## **Recommendations to countries which retain the death penalty**

- Establish a moratorium on use of the death penalty as provided by UN General Assembly resolutions, as a step towards the total abolition of the death penalty.
- Commute all death sentences.
- Revise laws, policies and practices to ensure fair trials in line with international standards, especially upholding the presumption of innocence, the right to legal counsel, and the protection against forced confessions and discrimination.
- Pending abolition, ensure full compliance with international standards restricting the use of the death penalty, particularly applying it only to the “most serious crimes” and abolishing the mandatory death penalty.

## ENDNOTES

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- <sup>1</sup> “Taiwan urged to scrap death penalty after wrongful execution,” *Earth Times*, 31 January 2011, at <http://www.earthtimes.org/articles/news/365144,death-penalty-wrongful-execution.html>.
- <sup>2</sup> “Abolish death penalty, it’s incorrect to take someone’s life, says Nazri”, *The Star*, 29 August 2010.
- <sup>3</sup> “Taiwan pays compensation for wrongful execution”, BBC News, 27 October 2011, at <http://www.bbc.co.uk/news/world-asia-pacific-15476561>.
- <sup>4</sup> Amnesty International, *Death sentences and executions, 2010* (Index: ACT 50/001/2011).
- <sup>5</sup> Crimes against the Military Code under the Military Forces Act.
- <sup>6</sup> Report on transparency on the death penalty, 2006, UN Doc. E/CN.4/2006/53/Add.3.
- <sup>7</sup> The term treaty bodies refers to committees of independent experts established under respective UN human rights treaties to monitor states’ compliance with their treaty obligations. They include the Human Rights Committee which monitors implementation of the ICCPR and the Committee against Torture which monitors implementation of the Convention against Torture.
- <sup>8</sup> Resolution 1984/50, Resolution 1989/64, Resolution 1996/15.
- <sup>9</sup> Eighth quinquennial report of the Secretary-General: Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, UN Doc. E/2010/10, December 2009, para. 136.
- <sup>10</sup> See ECOSOC 1989/64, para. 1(a).
- <sup>11</sup> Adopted by ECOSOC resolution 1984/50 and endorsed by UN General Assembly resolution A/RES/39/118.
- <sup>12</sup> General Comment 6 of the Human Rights Committee, 1982.
- <sup>13</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/4/20, January 2007, paras. 39-53.
- <sup>14</sup> Bill Savadove, “Stop Torturing Suspects to Get Confessions, Says Prosecutor” *South China Morning Post*, 21 November 2006.
- <sup>15</sup> TAEDP is a member of the Anti-Death Penalty Asia Network (ADPAN).
- <sup>16</sup> The “Hsichih Trio case - in which the High Court found three people sentenced to death almost 20 years ago on the basis of coerced confessions not guilty in November 2010 after 13 re-trials - bears many similarities to that of Chiou Ho-shun. See Amnesty International, *Taiwan: Justice delayed in “Hsichih Trio” case*, (AI Index: 38/005/2010).
- <sup>17</sup> “Longest Case Runs Even Longer,” *Taipei Times*, 13 May 2011, at <http://www.taipetimes.com/News/taiwan/archives/2011/05/13/2003503132/1>.
- <sup>18</sup> See the section on “Prohibition of the mandatory death penalty” in the report of the Special

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Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/4/20, 29 January 2007, para 54-62.

<sup>19</sup> Pagdayawon Rolando v Philippines, Communication No. 1110/2002, Views of the Human Rights Committee, UN Doc. CCPR/C/82/D/1110/2002, 8 December 2004, para 5.2.

<sup>20</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/2005/7, para 80.

<sup>21</sup> Resolution 2005/59, adopted on 20 April 2005.

<sup>22</sup> *Mithu v. State of Punjab* (1983) 2 SCR 690.

<sup>23</sup> *IHRN v. Union of India*, Bombay High Court, 16 June 2011.

<sup>24</sup> "Taiwan limits mandatory penalties", *China Post*, 29 January 2007 at <http://asiadeathpenalty.blogspot.com/2007/01/Taiwan-limits-mandatory-penalties.html>.

<sup>25</sup> In March 2010 it was reported that the federal law minister had asked his ministry to amend the Control of Narcotics Substances Act 1997 and remove the mandatory death penalty provision on the basis that it was harsh and un-Islamic (Human Rights Commission of Pakistan Annual Report 2010, published April 2011). However, the mandatory death penalty remains in force as of mid-2011.

<sup>26</sup> [http://www.mha.gov.sg/news\\_details.aspx?nid=MjE0Nw%3D%3D-occ0vMiT7bl%3D](http://www.mha.gov.sg/news_details.aspx?nid=MjE0Nw%3D%3D-occ0vMiT7bl%3D).

<sup>27</sup> Report of the Special Rapporteur, UN Doc. E/CN.4/1997/60/Add.1, para. 438.

<sup>28</sup> "Drug control, crime prevention and criminal justice: A Human Rights Perspective", UN Doc. E/CN.7/2010/CRP.6-E/CN.15/2010/CRP.1, 3 March 2010.

<sup>29</sup> "Time to abolish death sentence", *Malaysia Today*, 3 April 2011, at <http://www.freemalaysiatoday.com/2011/04/03/time-to-abolish-death-sentence>.

<sup>30</sup> UN Doc. A/HRC/11/30/Add.1, response to recommendation 10, referred to in UN Doc. A/65/280.

<sup>31</sup> Report on Mission to Afghanistan UN Doc. A/HRC/11/2/Add.4, 6 May 2009, para. 65.

<sup>32</sup> Concluding Observations of the Human Rights Committee: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28.

<sup>33</sup> Concluding Observations of the Human Rights Committee: Trinidad and Tobago, UN Doc. CCPR/CO/70/TTO, 3 November 2000, para.7.

<sup>34</sup> See *Pinto v. Trinidad and Tobago*, (232/1987), 20 July 1990, Report of the HRC, (A/45/40), Vol. II, 1990, at 73.

<sup>35</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 38.

<sup>36</sup> UN Human Rights Committee, General Comment 32, UN Doc. CCPR/C/GC/32, 23 August 2007, para 32. See similarly ECOSOC Resolution 1996/15, para. 4.

<sup>37</sup> See *Amnesty International, China: Against the law: Crackdown on China's human rights lawyers*, 30 June 2011 at [http://www.amnesty.org/en/library/info/ASA 17/018/2011.en](http://www.amnesty.org/en/library/info/ASA%2017/018/2011.en).

<sup>38</sup> Concluding Observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/JPN/CO/5, 18



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December 2008, para. 17-19.

<sup>39</sup> According to the China Law Yearbook, in 2009 the combined conviction rate for first- and second-instance criminal trials was 99.9 percent.

<sup>40</sup> Concluding Observations of the Committee against Torture: China. UN Doc. CAT/C/CHN/CO/4, 12 December 2008, para. 11 at <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CHN.CO.4.pdf>.

<sup>41</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to China. UN Doc. E/CN.4/2006/6/Add.6, 10 March 2006, paras. 73 and 82(j).

<sup>42</sup> Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Indonesia, UN Doc. A/HRC/7/3/Add.7, 10 March 2008, para. 64.

<sup>43</sup> Concluding Observations of the Committee against Torture: Indonesia, UN Doc. CAT/C/IDN/CO/2, 2 July 2008, para. 10.

<sup>44</sup> Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Indonesia, UN Doc. A/HRC/7/3/Add.7, 10 March 2008, para. 22.

<sup>45</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers: Mission to Indonesia, UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003, para. 81.

<sup>46</sup> UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003, para. 90.

<sup>47</sup> UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003, para. 94.

<sup>48</sup> UN Doc. E/CN.4/2003/65/Add.2, 13 January 2003, para. 108.

<sup>49</sup> Court decision, April 2004, no. 2152/PID.B/2003/PN.JKT.P.

<sup>50</sup> Conclusions and recommendations of the Committee against Torture: Japan, UN Doc. CAT/C/JPN/CO/1, 3 August 2007, para. 16.

<sup>51</sup> Conclusions and recommendations of the Committee against Torture: Japan, UN Doc. CAT/C/JPN/CO/1, 3 August 2007, para. 16.

<sup>52</sup> See Concluding Observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 19.

<sup>53</sup> Testimonies from Judges and Prosecutors on the Death penalty, Amnesty International Panel /Discussion, 2008, Index; ACT 50/018/2008.

<sup>54</sup> ECOSOC Resolution 1984/50, para. 6.

<sup>55</sup> The 2011 Action (In Aid of Civil Powers) Regulations (see section on "Special Courts") in operation in the Federally Administered Tribal Areas of the country with retrospective effect from 2008 also fail to provide procedures for appeal to a higher court against conviction or sentence, including the death penalty.

<sup>56</sup> Article 6(4) of the ICCPR, ECOSOC resolution 1984/50, para. 7.

<sup>57</sup> The Inter-American Court of Human Rights in the Case of *Fermín Ramírez v. Guatemala*, Judgement of 20 June 2005 (Merits, Reparations and Costs), at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_126\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_126_ing.doc), para. 109 concluded that "the right to grace forms part of the international corpus juris."

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<sup>58</sup> Kennedy v Trinidad and Tobago, 845/1998, 26 March 2002, para 7.4.

<sup>59</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/9/3, May 2008, para. 59-67.

<sup>60</sup> Concluding observations of the Human Rights Committee: Yemen, UN Doc. CCPR/CO/84/YEM, 9 August 2005, para. 15.

<sup>61</sup> According to some sources as little as less than \$US 5 per hearing. See Human Rights Watch, Letter to Pakistan's Prime Minister to Abolish the Death Penalty, 17 June 2008 at <http://www.hrw.org/en/news/2008/06/15/letter-pakistans-prime-minister-abolish-death-penalty>. See Amnesty International, *Pakistan: Special Courts for Speedy Trial*, AI Index: ASA 33/23/91, November 1991.

<sup>62</sup> See Amnesty International, *Pakistan: Special Courts for Speedy Trial*, AI Index: ASA 33/23/91, November 1991.

<sup>63</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19.

<sup>64</sup> Report on Mission to Afghanistan, UN Doc. A/HRC/11/2/Add.4, 6 May 2009, paras 65 and 89. See: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.4.pdf>.

<sup>65</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Follow-up to country recommendations: Afghanistan, UN Doc. A/HRC/17/28/Add.6, May 2011, para. 77-78, at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-28-Add6.pdf>.

<sup>66</sup> "Afghan mass killers first to be hanged by Karzai government", *Washington Post*, 20 June 2011 at [http://www.washingtonpost.com/world/afghan-mass-killers-first-to-be-hanged-by-karzai-government/2011/06/20/AGq8gwcH\\_story.html](http://www.washingtonpost.com/world/afghan-mass-killers-first-to-be-hanged-by-karzai-government/2011/06/20/AGq8gwcH_story.html).

<sup>67</sup> ECOSOC Resolution 1989/94, para. 5.

<sup>68</sup> Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/2005/7, 22 December 2004, para. 60.

<sup>69</sup> GMA News, "Imperfect justice system makes PNoy frown on death penalty," 19 January 2011 at <http://www.gmanews.tv/story/210933/imperfect-justice-system-makes-pnoy-frown-on-death-penalty>.

## **ANTI-DEATH PENALTY ASIA NETWORK (ADPAN)**

### **List of Member Organisations**

**Action for Peace and Human Rights (APHR), Sri Lanka**

<http://prisonnotes-aphr.blogspot.com/>

**Amnesty International (AI)**

<http://www.amnesty.org/>

**Asia Pacific Youth Network (APYN)**

<http://www.apyouth.net/>

**Australians Against Capital Punishment (AACP), Australia**

<http://aacp.wordpress.com/>

**Banglar Manabdhikar Suraksha Mancha (MASUM), India**

<http://www.masum.org.in/>

**Catholic Human Rights Committee (CHRC), South Korea**

**Center for Prisoners' Rights (CPR), Japan**

<http://www.jca.apc.org/cpr/>

**Commission for "The Disappeared" and Victims of Violence (KONTRAS), Indonesia**

<http://www.kontras.org/>

**Civil Rights Committee of the Kuala Lumpur and Selangor Chinese Assembly Hall (KLSCAH)**

**Community of Sant'Egidio, Italy**

<http://www.santegidio.org/index.php?&idLng=1064>

**Criminal Justice Coalition, Australia**

**Democratic Commission for Human Development (DCHD), Pakistan**

<http://www.dchd.org.pk/>

**FORUM-ASIA, Thailand**

<http://forum-asia.org/>

**Forum 90, Japan**

**Human Rights Commission of Pakistan (HRCP), Pakistan**

<http://www.hrcp-web.org/default.asp>

**Hong Kong Society for Community Organization (SoCO), Hong Kong**

[http://www.soco.org.hk/index\\_e.htm](http://www.soco.org.hk/index_e.htm)

**Imparsial, Indonesia**

<http://www.imparsial.org/>

**Individual and Community Rights Advocacy Forum (ICRAF), Papua New Guinea**

**Lawyers for Human Rights International (LHRI), India**

<http://www.lfhri.org/>

**Lawyers for Liberty, Malaysia**

<http://www.lawyersforliberty.org/>

**Lembaga Bantuan Hukum Masyarakat (LBH Masyarakat), Indonesia**

[www.lbhmasayarakat.org](http://www.lbhmasayarakat.org)

**Malaysians Against Death Penalty and Torture (MADPET), Malaysia**

<http://madpet06.blogspot.com/>

**Murder Victims' Families for Human Rights (MVFHR), USA**

<http://www.mvfhr.org/home>

**National Centre for Women and Children (NCWC), Tonga**

<http://civilsocietytonga.org/?p=9>

**Odhikar, Bangladesh**

<http://www.odhikar.org/>

**Pacific Concerns Resource Centre, Fiji**

**People's Union for Civil Liberties (PUCL), India**

<http://www.pucl.org/>

**Philippine Human Rights Information Center (Philrights), The Philippines**

<http://philrights.org/>

**Prison Fellowship Pakistan (PF)**

<http://www.pfi.org/national-ministries/asia/pakistan>

**Singapore Anti-Death Penalty Campaign (SADPC), Singapore**

**Singaporeans for Democracy (SFD), Singapore**

<http://www.sfdonline.org/>

**Taiwan Alliance to End the Death Penalty (TAEDP), Taiwan**

<http://www.taedp.org.tw/>

**The CONSENSUS, Mongolia**

**Think Centre, Singapore**

<http://www.thinkcentre.org/>

**Union for Civil Liberty, Thailand**

<http://www.fidh.org/-THAILAND-UNION-FOR-CIVIL-LIBERTY-UCL->

**World Coalition against the Death Penalty, France**

<http://www.worldcoalition.org/modules/accueil/>



## WHEN JUSTICE FAILS

### Thousands executed in Asia after unfair trials

More people are executed in the Asia-Pacific region than in the rest of the world. Add to this the probability that they were executed following an unfair trial and the gross injustice of this punishment becomes all too clear.

In many countries in the region the right to a fair trial is blocked by laws which deny due process. Even where due process safeguards exist in principle, they often do not apply in practice. Courts continue to rely on confessions extracted through torture as evidence in criminal trials. They impose mandatory death sentences for crimes such as drug trafficking. They place the burden of proof on the accused, depriving them of the right to be presumed innocent. Access to a lawyer before, during and after trial is regularly denied, and in some countries the independence of the judiciary is far from assured. And in times of alleged security crises, states often resort to special courts, condemning people to death after hasty proceedings.

This report highlights laws and practices in the Asia-Pacific region which undermine international standards of fair trial. It includes cases from China, India, Indonesia, Japan, Malaysia, Pakistan, Singapore and Taiwan.

Failures of justice in trials that end in a death sentence cannot be reversed. Only abolition of the death penalty can guarantee that the innocent are never executed.

ANTI  
DEATH  
PENALTY  
ASIA  
NETWORK

Launched in 2006, ADPAN is an independent cross-regional network that campaigns for an end to the death penalty across the Asia-Pacific region. ADPAN is independent of governments and any political or religious affiliation. Members include lawyers, NGOs, civil society groups, human rights defenders and activists from 23 countries.

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