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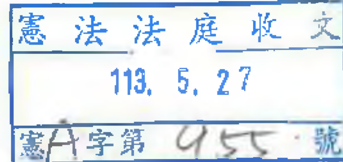

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主旨：檢送「111年度憲民字第904052號王信福聲請案及相關併案共34件聲請案」本會相關補充資料，請查照。

說明：

一、復貴法庭113年4月23日言詞辯論，大法官相關提問之補充。

二、檢送《Manfred Nowak教授對於臺灣死刑制度之法律意見》及參考譯文（詳附件）。

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副本：國家人權委員會

主任委員陳　菊

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Manfred Nowak

Legal Opinion on the Use of the Death Penalty in Taiwan

30 April 2024

When the International Covenant on Civil and Political Rights (ICCPR) has been adopted in 1966, the majority of States in the world still applied corporal and capital punishment. Since capital punishment also interferes with the **right to life**, there was thus a need to insert into Article 6 (as in Article 2 of the European Convention on Human Rights (ECHR) of 1950 or Article 4 of the American Convention on Human Rights (ACHR) of 1969) an **exception for the use of the death penalty**. However, the drafters of Article 6 ICCPR made clear that this exception was not unlimited. At that time, the death penalty was only permitted for the most serious crimes and not in contravention of other provisions of the Covenant, it should not be imposed for crimes committed by persons below 18 years of age etc. In addition, Article 6(6) clearly stated that "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment". **A similar exception for corporal punishment was not necessary** as corporal punishment only interfered with the right to personal integrity and dignity in Article 7 ICCPR, and corporal punishment at this time was simply not yet considered as cruel, inhuman or degrading punishment in the majority of States.

This situation fundamentally changed with the **evolving jurisprudence** by the European and Inter-American Courts of Human Rights as well as the UN Human Rights Committee. By interpreting the respective treaties as "living instruments" to be applied in light of present-day conditions, all three bodies, starting with the case of Tyrer v UK before the European Court of Human Rights in 1978, decided that **any form of corporal punishment constitutes at least degrading, and in many cases cruel or inhuman punishment**, which is absolutely prohibited by Article 7 ICCPR, Article 2 ECHR and Article 5 ACHR. The question, therefore, arose how **capital punishment, the ultimate form of corporal punishment**, could still be permitted when corporal punishment was absolutely prohibited under international law. If corporal punishment is considered as cruel and inhuman or at least degrading punishment in violation of the human right to personal integrity and human dignity, which is also a norm of customary international law, how can capital punishment then be considered as non-cruel, humane or non-degrading?

The next question posed was: If the death penalty is a cruel, inhuman or at least degrading punishment in violation of the right to personal integrity and human dignity, can it then still be reconciled with the **right to life**? The answer is clear: Article 6(2) ICCPR distinctly states that sentence of death must not be imposed "contrary to the provisions of the Covenant". Since the death penalty today is considered as a violation of Article 7, it also violates Article 6(2) ICCPR.

The **prohibition of the death penalty is, therefore, considered as an evolving rule of customary international law**. This is underlined by many **judgments** of the highest domestic courts (most notably the landmark1995 judgment of the South African Constitutional Court in the case S v. Makwanyane, where the Court most convincingly argued that capital punishment violates the right to human dignity) and by the biannual **resolutions of the UN General Assembly since 2007**. While the majority of States at the time of the adoption of the two UN Covenants in 1966 still practiced the death penalty, in 2007 a total of 104 States voted in favour of a **moratorium** with a view of finally abolishing the death penalty, while 54 States voted against. It is

interesting to note that the main argument for a moratorium and the abolition of capital punishment in the UNGA Resolution is the **right to human dignity**, not an alleged violation of the right to life. Since 2007, the number of States voting in favour of a moratorium was steadily increasing from 104 to 125, while the number of those voting against was decreasing from 54 to 37.[1] Almost all **European and Latin American States** have abolished the death penalty and, therefore, voted in favour, but also a clear majority of **African States** did so. The most prominent States who in 2022 still voted against a moratorium were China, the United States, Japan, North Korea, India, Pakistan, the Democratic Republic of Congo, Egypt, Ethiopia, Singapore, Sudan and other Islamic States, such as Iran, Iraq, Saudi Arabia, Qatar, Syria or Yemen. Even in the **Asian region**, a majority of States voted for a moratorium, including Bhutan, Cambodia, South Korea, the Philippines, Malaysia, Mongolia, Myanmar, Nepal, Timor Leste, Fiji, Australia, New Zealand, Jordan, Lebanon and all five Central Asian Republics. Although 37 UN member States voted against a moratorium, only about half of them actually carried out **executions in 2022,** above all the **Peoples Republic of China, Iran, Saudi Arabia, Egypt, the United States, Iraq, Singapore, Kuwait and Somalia.**

As far as **Taiwan** is concerned, the then **President** in **2009** announced the **ratification**, as a matter of domestic law, of the two UN Covenants, i.e. **at a time when he knew or should have known that there was a clear trend towards abolition of capital punishment as an evolving standard of customary international law** and that even the less severe sanction of corporal punishment had already been declared as a violation of the right to personal integrity and human dignity. In 2011, the Government initiated the process of preparing detailed reports on the rights contained in each of the Covenant, and in 2013 an **International Group of Independent Experts** was invited to come to Taipei and review the compliance of Taiwan with the two Covenants. In their **Concluding Observations and Recommendations** of 1 March **2013** (§ 57), this group of highly renowned independent experts from different world regions concluded that "Taiwan is among a small minority of only 20 States worldwide having carried out executions in 2011. The Experts, therefore, strongly recommend that the Government of Taiwan intensifies its efforts towards abolition of capital punishment and, as a first and decisive step, immediately introduces a moratorium on executions in accordance with the respective resolutions of the UN General Assembly". In their **Concluding Observations and Recommendations** of 20 January **2017,** the group of experts (now renamed International Review Committee) congratulated the Government of Taiwan for having prohibited all forms of corporal punishment in all sectors of society (§ 57). The Committee, however, strongly regretted "that there has been no progress in the abolition of capital punishment as the utmost form of corporal punishment. Despite the fact that international law is increasingly recognizing the death penalty as contrary to the right to human dignity, the number of executions has remained roughly the same in recent years and the Government continues to justify its retentionist attitude by opinion polls, which allegedly prove that a large majority of the population remains in favour of the death penalty" (§ 58). The Review Committee, therefore, urged the current Government of Taiwan and President Tsai Ing-wen to take the lead in raising public awareness against this cruel and inhuman punishment, rather than being exclusively concerned with public opinion" (§ 59). In its most recent **Concluding Observation and Recommendations** of 13 May **2022**, the International Review Committee showed its strongest dissatisfaction with the non-compliant attitude of the Government, its repetition of unfounded arguments and strongly recommended that "the Executive Yuan immediately declare a moratorium on executions. The Minister of Justice should no longer sign

[1] UNGA Res 77/222 of 15 December 2022.

execution orders. All death sentences should be commuted immediately. Prosecutors should no longer seek the death penalty in ongoing and future prosecutions. The President should refuse to authorize executions ..." (§ 72).

Since **Taiwan is not a member of the United Nations, it cannot officially ratify UN human rights treaties** and have its human rights situation examined by the respective UN human rights treaty bodies, such as the Human Rights Committee. That is the reason why Taiwan ratified the two Covenants and other core UN human rights treaties only as a matter of domestic law and **invited internationally renowned human rights experts** to assess the legal and factual situation of human rights by means of reviewing Taiwan's human rights reports in light of all available information, including reports by the National Human Rights Commission of Taiwan and parallel reports of a broad variety of non-governmental organisations. In general, these reviews are highly professional, constructive, conducted in a spirit of mutual respect, and have contributed to many improvements of the human rights situation in Taiwan. The International Review on the two Covenants has attested that "Taiwan has the potential to become the Asian standard bearer in the recognition and enforcement of international human rights, but it will never achieve this as long as capital punishment remains an element of its criminal justice system" (Concluding Observations and Recommendations of 13 May 2022, § 68). The main argument of the Government of Taiwan of not implementing international law and the repeated recommendations of the International Review Committee is the **alleged support of the death penalty by public opinion**. This is a weak excuse: In most countries, the death penalty was abolished against the will of the people who wrongly think that the death penalty has a deterrent effect, but in fact only believe in **retributive or revenge criminal justice**. This is, however, not in line with international human rights law, as Article 10 ICCPR clearly provides a system of restorative and rehabilitative justice. Since international law (Article 7 ICCPR and an evolving standard of customary international law) clearly considers the death penalty today as a violation of the right to personal integrity and human dignity, the **Government of Taiwan has a legal obligation to raise awareness among the general public** that the death penalty is no longer permitted under international law.

Since the Government of Taiwan blatantly failed to comply with its international human rights obligations and repeatedly ignored respective recommendations of those international human rights experts whom it had invited to objectively review Taiwan's compliance with international human rights law, the Taiwan Alliance to End the Death Penalty initiated a **landmark case**, on behalf of 37 individual currently on Taiwan's death row, **before the Taiwan Constitutional Court**. Like other Constitutional Courts in South Africa, Hungary and many other States, the Constitutional Court of Taiwan, therefore, has the historical chance to put an end to this cruel, inhuman and degrading punishment. As other Constitutional Courts, the Taiwanese Court should base its judgment on the right to personal integrity and human dignity (Article 7 ICCPR and customary international law) and not on the right to life. While the right to life is not an absolute right and can be restricted under certain conditions, the prohibition of torture, cruel, inhuman and degrading punishment is an absolute right which does not permit any restrictions or exceptions, even in times of war or other public emergencies.

參考譯文

Manfred Nowak 對於臺灣死刑制度之法律意見

當《公民與政治權利國際公約》(ICCPR) 於1966年通過之際，全球多數國家仍實行體罰(Corporal punishment，或譯「肉體懲罰」，是以身體為對象而不致命的懲罰)及死刑。由於死刑侵犯了**生命權**，因此《公約》(ICCPR)第六條中加入**適用死刑的例外規定**（類似於1950年《歐洲人權公約》（ECHR）第二條或1969年《美洲人權公約》（ACHR）第四條）。然而，ICCPR第六條的起草者已明確表明，這類例外情況並非無所限制。當時僅允許在不違反《公約》其他條款的情況下，針對最嚴重罪行判處死刑，並有不得針對18歲以下犯罪者判處死刑等規定。此外，第六條第六項明確指出：「本《公約》締約國不得援引本條內容，而延緩或阻止死刑之廢除」。由於體罰主要干涉ICCPR第七條保障的個人完整性(personal integrity)與人類尊嚴(human dignity)等權利，加上大多數國家並未將體罰視為殘忍、不人道或有辱人格之處罰，因此當時**並未針對體罰做出類似的例外規定**。

隨著歐洲人權法院、美洲人權法院以及聯合國人權事務委員會（UN Human Rights Committee）判例的**不斷演進**，這樣的情況出現本質上的變化。透過將條約各別解讀為適用於現況的「活文書（living instruments）」，前揭三個機構自1978年歐洲人權法院審理Tyrer訴英國案開始，均認定任何形式的體罰皆構成有辱人格的懲罰，在許多情況下更構成了ICCPR第七條、ECHR第二條及ACHR第五條**絕對禁止的殘忍或不人道的懲罰行為**。這引發了一個問題：在國際法絕對禁止體罰的情況下，怎能允許**死刑（體罰的終極形式）**存在。如果體罰被視為殘忍、不人道或至少是有辱人格的處罰，而該行為侵犯了個人完整性及人類尊嚴等人權（同樣受國際習慣法所規範），那麼死刑又怎麼能被視為是非殘忍、人道或不辱人格的懲罰呢？

接下來的問題是：如果死刑是一種殘忍、不人道或至少是有辱人格的懲罰，它侵犯了個人完整性及人類尊嚴等人權，那麼仍然可以說它不違背**生命權**嗎？答案很清楚：ICCPR第六條第二項明確規定，不得「違反《公約》規定」而判處死刑。由於死刑違反了ICCPR第七條規定，它也同樣違反了ICCPR第六條第二項規定。

因此，**與時俱進的國際習慣法有了禁止死刑的規定**。許多國家的最高法院會在**判決**中強調這項規定（最具指標意義的知名案例是1995年南非憲法法院針對S訴Makwanyane案的判決，該院認為死刑侵犯了人類尊嚴之權的說法相當令人信服），而**2007年迄今每半年發布一次的聯合國大會決議**

也同樣強調了禁止死刑。雖然1966年通過聯合國兩公約的多數國家仍然執行死刑，但2007年已有104個國家投票贊成**暫停執行死刑**（**moratorium**），以期最終廢除死刑，另有54個國家投下反對票。值得留意的是，針對暫停執行及廢除死刑，聯合國大會決議的主要爭點在於人類尊嚴這項人權，而非生命權的侵犯。自2007年以來，投票贊成暫停執行死刑的國家數量從104穩步攀升至125，而投票反對的國家數量則是從54減少至37。[1]幾乎所有**歐洲及拉丁美洲國家**都已廢除死刑，因此他們投下了贊成票，而絕大多數的**非洲國家**也是如此。2022年仍然投票反對暫停執行死刑的知名國家包括中國、美國、日本、北韓、印度、巴基斯坦、剛果民主共和國、埃及、衣索比亞、新加坡、蘇丹以及其他伊斯蘭國家（如伊朗、伊拉克、沙烏地阿拉伯、卡達、敘利亞或葉門）。即便在亞洲地區，多數國家也都投票支持暫停執行死刑，包括不丹、柬埔寨、韓國、菲律賓、馬來西亞、蒙古、緬甸、尼泊爾、東帝汶、斐濟、澳洲、紐西蘭、約旦、黎巴嫩及中亞五國。儘管有37個聯合國成員國投票反對暫停執行死刑，只有約半數國家在**2022年實際執行死刑**，其中最為重要的成員國是**中國、伊朗、沙烏地阿拉伯、埃及、美國、伊拉克、新加坡、科威特及索馬利亞**。

至於**臺灣**則是在**2009年**由**總統**宣布**批准**聯合國兩公約，並將其納入國內法，**時任總統知曉或應該知曉廢除死刑已然成為國際習慣法與時俱進下的規範及明顯趨勢**，即便是情節較輕的體罰也被視為侵犯個人完整性與人類尊嚴等人權。針對每項公約所載權利，該國政府已於2011年起著手編纂詳細報告，並於2013年邀請**國際獨立專家小組**來到臺北，審查臺灣遵守兩公約的情況。在**2013年**3月1日提出的**結論性意見與建議**（第57段）中，這群來自世界各地的知名獨立專家得出如下結論：「臺灣是2011年全球僅有的20個死刑執行國之一。在**2017年**1月20日提出的**結論性意見與建議**中，專家小組（當時已更名為國際審查委員會）針對臺灣政府禁止社會各界實施任何形式的體罰（第57段）表達祝賀之意。不過，委員會對於「廢除死刑此一最大程度的體罰形式並未取得任何進展深表遺憾。儘管國際法逐漸承認死刑有違人類尊嚴這項人權，但近年來死刑的執行數量基本上仍維持不變，政府仍持續透過民調來證明保留死刑的態度是合理的，而民調證實：絕大多數民眾仍然贊成死刑」（第58段）。因此，審查委員會敦促臺灣執政政府及蔡英文總統帶頭提高公眾對這類殘忍及不人道懲罰的認識，而非只是關注輿論」（第59段）。國際審查委員會於**2022年**5月13日提出的**最新結論性意見與建議**中，針對政府未履行承諾的態度、重複提出無理

[1] 聯合國2022年12月15日第77/222號決議。

論據表達最強烈的不滿，並且強烈建議「行政院立即宣布暫停執行死刑」；法務部長不應再簽署死刑執行令；所有死刑判決應立即予以減刑；檢察官不應針對正在進行以及未來即將進行的起訴案件提出死刑要求；總統應拒絕授權執行死刑...」（第72段）。

臺灣並非聯合國會員國，因此無法正式批准聯合國人權公約，人權事務委員會等聯合國人權條約監督機構（UN human rights treaty bodies）也無法針對臺灣的人權狀況進行審查。因此，臺灣只能批准兩公約及其他聯合國核心人權條約並將其國內法化，同時**邀請國際知名人權專家**根據現有資訊(包含臺灣國家人權委員會的報告以及各類非政府組織的平行報告)來審查臺灣的人權狀況，據此評估關於臺灣人權的法律及現況。整體而言，這些審查具有高度的專業性與建設性，秉持相互尊重的精神，為改善臺灣人權狀況做出了許多貢獻。兩公約的國際審查（International Review on the two Covenants）證實，「臺灣有機會成為亞洲在國際人權認知及執行方面的標竿，但只要死刑仍是刑事司法體系中的一部分，臺灣就永遠無法實現此一目標」（**2022年**5月13日提出的**結論性意見與建議**，第68段）。臺灣政府不執行國際法以及國際審查委員會一再提出之建議，原因在於該政府聲稱**輿論支持死刑**。這個理由相當薄弱：大多數廢除死刑的國家，在廢除死刑時都是違背民意的，因為民眾錯誤地認為死刑具有嚇阻效果（deterrent effect），而事實上民眾往往只相信**報應式或復仇式的刑事司法懲罰**。然而，這樣的作法並不符合國際人權法規範，因為ICCPR第十條已經明確規定了恢復性或修復式司法（restorative and rehabilitative justice）制度。由於國際法（ICCPR第七條以及與時俱進的國際習慣法標準）明確認定現行的死刑侵犯了個人完整性與人類尊嚴等人權，因此**臺灣政府負有提高公眾意識的義務**，使其了解國際法不再允許死刑。

由於臺灣政府公然不履行國際人權義務，並且一再無視該政府邀請的國際人權專家針對該國履行國際人權法狀況所提出的客觀審查建議，因此臺灣廢除死刑推動聯盟（Taiwan Alliance to End the Death Penalty）代表臺灣37名待決死刑犯，向臺灣憲法法庭提起了這個**具有里程碑意義的死刑釋憲案**。一如南非、匈牙利和其他眾多國家的憲法法庭，臺灣憲法法庭擁有終結殘忍、不人道及有辱人格處罰的歷史性機會。臺灣憲法法庭應該和其他憲法法庭一般，將判決依據建立在個人完整性及人類尊嚴的權利之上（ICCPR第七條及國際習慣法），而非以生命權為基礎。生命權並非絕對權利，在某些條件下可以受到限制，但禁止酷刑、殘忍、不人道及有辱人格之處罰卻是一項絕對權利，不允許存在任何限制或例外，即便在戰爭時期或處於其他公共緊急狀態下皆然。