

Roundtable

Torture: Perspective from UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment

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INTRODUCTION

It is an honor of this law school to host a series of the Lei Chen Memorial lectures funded by the Lei Chen Memorial Trust on democracy and human rights. We are exceptionally pleased to have Professor Manfred Nowak as our guest speaker. Professor Nowak teaches in the College of Law at Vienna University and is also a former United Nations (UN) Special Rapporteur on Torture. We also have four distinguished discussants today. The first discussant is Professor Yean-Sen Teng, an authority on international law in Taiwan. He will be followed by Professor Chen-Ju Chen, who is a promising junior scholar on public international law. The last two discussants are two very dedicated and prominent human rights lawyers in Taiwan: Mr. Po-Hsiang Yu who has worked on many major cases involving death penalty and Mr. Kuo-Yen Weng who is a chairperson on the Human Rights Committee of the Taipei Bar Association. The Taipei Bar Association has dedicated a great deal of effort on human rights advocacy in Taiwan.

I. OPENING REMARKS

PROFESSOR WEN-CHEN CHANG

I recall that when I was young I had to sneak into the basement to read the Free China Monthly to learn about criticism of the regime. My little experience highlights the importance of Mr. Lei Chen's involvement in the movement towards democracy and constitutionalism in Taiwan, and the characteristics of this journal and the spirit it represented. Mr. Peter Huang stands out as one of the leading figures that have dedicated their entire lives and energy to advocate for Taiwan's democracy and constitutionalism. We should pay great tribute to these efforts.

Hence I like to reiterate that it has been an honor for this law school to host the Lei Chen Memorial lectures as well as other lectures in the series during this week. Please allow me to introduce Professor Manfred Nowak, our distinguished guest speaker. Professor Nowak is the leading authority of the ICCPR (International Covenant on Civil and Political Rights). Taiwan ratified the two covenants and passed the Implementation Act two years ago. Many government agencies and civil society organizations are now working on how to improve the implementation of the two covenants. It will be interesting to see how this series of lectures may make contributions to this ongoing process.

Professor Nowak previously also served as UN Special Rapporteur on Torture. Given his grave concerns and knowledge about torture victims, he believes that nation states around the world should not use torture to achieve

any ends it is meant to achieve. Professor Nowak went to the Taipei Detention Centre to visit Mr. Chou He Hsun on the first day of his arrival. This is a case involving the death penalty which will be finalized in July. One of the evidence in this case is based on a confession extracted by torture. We may have some very interesting discussions on this case today. Now, please join me with a big applause to welcome Professor Nowak.

II. SPEECH

TORTURE: PERSPECTIVE FROM UN SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

PROFESSOR MANFRED NOWAK

Professor Chang, Peter Huang, distinguished discussants, ladies and gentlemen, it is always a pleasure to come back to Taiwan and a great honor to start this first Lei Chen Memorial lecture. I am very grateful that the Lei Chen Memorial Democracy and Human Rights Public Trust and the National Taiwan University and its College of Law has invited me to hold the lecture here. This first lecture will be on torture and will be very practical; some photos have been included in the handouts. Let me clarify that I am not distributing these photos, I have the permission of the detainees to use these photos for educational purposes and internal use, so please do not use these in any other way for reasons of privacy.

I will not focus too much on legality or ethics; I will try to be as practical as possible. I will begin with the definition of torture. In using the term ‘torture’, we always have to consider other forms of ill treatment, cruel, inhuman and degrading treatment or punishment as we find in Article 7 of the International Covenant on Civil and Political Rights¹ and the UN Convention against Torture.² I will then briefly speak about Special Rapporteurs³ on Torture and explain their role, their responsibilities and the limits to their power. Their main and most important activity is fact-finding missions. I will also give some practical experiences I have had in some of the countries I have visited. This will be followed by conclusions that are

1. International Covenant on Civil and Political Rights, (Oct. 5, 1967), 999 U.N.T.S. 171. [hereinafter ICCPR], art. 7 (stating “[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”)

2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Dec. 10, 1984), 1465 U.N.T.S. 85, 113. [hereinafter CAT].

3. Special Rapporteur on Torture is an expert appointed by the United Nations Commission on Human Rights in resolution 1985/33, to examine questions relevant to torture. See Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, <http://www.cfuw.org/Portals/0/UNSpecialR.pdf>. (last visited June 6, 2012).

unfortunately not too positive, and suggestions for possible follow-up initiatives.

Definition

Article 1 of the UN Convention against Torture provides a legal definition of torture.⁴ It is important to use the term in a fairly restrictive way.⁵ Not every injustice or ill-treatment is torture; torture is not only a violation of human rights, but also a very serious crime comparable to other violent crimes such as homicide and armed robbery. It is not a misdemeanor, as is unfortunately described in many disciplinary criminal codes where torture is not even defined as a crime but a type of disciplinary petty offence.⁶ Torture has various elements, and of course one is the deliberate or intentional, infliction of severe pain or suffering, whether physical or mental.⁷ Severe means quite a high threshold, not every smaller form of ill treatment amounts to torture. On the other hand it is not as high as President Bush and his advisors describe, it is not excruciating pain similar to organ failure or death.⁸ It is somewhere in between. It is a threshold but there are many forms of extracting a confession by means of beatings and other forms such as electric shocks. We know torture dates back to the Middle Ages or

4. CAT, art. 1 (stating “[t]orture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”).

5. Although some professionals in the torture rehabilitation field believe that the definition of torture should be broader, the definition in laws are more restrictive, to exclude organized violence, random violence and national legal punishment. For example, the definition of torture in International Humanitarian Law is similar as that in CAT, Art. 7 of Rome Statute which established the International Criminal Court (ICC) defines torture as “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”. Rome Statute of the International Criminal Court, art. 7 (Nov. 10, 1998), 37 I.L.M. 1002, 2187 U.N.T.S. 90.

6. For example, the crime against torture is not yet codified as an offense under the Taiwan’s criminal law. Yet due to the ratification of ICCPR and International Covenant of Economic, Social and Cultural Rights [hereinafter ICESCR] in 2009, some professionals have urged the codification of such a crime. See Kuochi Jênch’üan Wufá T’uitung Lifa Lienmêng Kung’ai Shêngming [Public Statement on the legislation of Five Human Rights law], Tzu You Shih Pao [THE LIBERTY TIMES], Mar. 3, 2010, available at <http://www.libertytimes.com.tw/2010/new/mar/3/today-o8.htm>.

7. CAT, art. 1.

8. *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). See also UN Commission on Human Rights, *Situation of Detainees at Guantánamo Bay* U.N.DOC.E/CN.4/2006/120 (Feb. 27, 2006) (authoritative reports on the situation of Detainees at Guantánamo Bay).

the ancient times, the methods are principally the same.⁹ Some forms are more sophisticated, in particular psychological methods of torture or what the Americans call ‘enhanced interrogation techniques’ which leave no physical traces.¹⁰ Hence it is important that the definition includes both mental and physical pain or suffering.

According to the Convention, torture is a crime committed by state officials. Purely private torture usually does not fall under this definition, though the Convention speaks of the infliction of pain or suffering by or at the instigation or with the consent or acquiescence of a public official.¹¹ This means that if a mob is torturing or ill-treating a person and police officers are standing next to them and do not intervene at all, this would amount to torture by acquiescence. However, in general since the 1990s the very concept of torture and ill-treatment has also been applied in relation to private forms of torture, particularly in relation to women and children. Consider traditional practices against women such as female genital mutilation, sati or honour crimes; domestic violence against children or women can be considered as torture by acquiescence if the state is not acting under the principle of due diligence.¹² If the state is not enacting any kind of laws to stop domestic violence or Female Genital Mutilation (FGM), or it has a law but does not implement the law at all, this can be considered torture by acquiescence.¹³

As mentioned earlier, intention is an important prerequisite of torture, one cannot torture by negligence. It might be inhuman or cruel treatment but can never amount to torture. However it is not just the deliberate infliction, it is also for a certain purpose. This is what distinguishes torture from cruel or inhuman treatment.¹⁴ It is coercive, the perpetrator wants something. In most cases it is as in the Middle Ages in Europe, the extraction of a confession. 95% of all cases follow the same kind of pattern which is unfortunately standard practice in most countries of the world, not only in the most brutal dictatorships but also in democracies. This is because the administration of justice all too often is not functional, or is corrupt. There is a lot of pressure on the police by the judges, prosecutors, the media and

9. See generally GEORGE RYLEY SCOTT, *HISTORY OF TORTURE THROUGHOUT THE AGES* (2003).

10. See ALFRED MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR OF TERROR 16-17* (2006).

11. CAT, art. I.

12. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008).

13. *Id.*

14. The element that distinguishes inhuman treatment from torture is the absence of the requirement that the treatment be inflicted for a specific purpose. See ICC Rule 90 of customary humanitarian law (June 6, 2012), http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90; see also Nigel Rodley, *The Definition of Torture in International Law*, in *CURRENT LEGAL PROBLEMS* 467-693 (Michael Freeman ed., 2002).

politicians. There is rising crime rates, and the police are expected to be tough on crime and solve these crimes. In many countries the police do not know better than to just arrest those that look suspicious and beating them until the suspect confesses. This is unfortunately standard practice in too many countries of the world. In extracting information, intelligence agencies usually do not need confessions but want relevant information such as about dangers, future terrorist attacks, terrorists or organized crime networks, drug networks. Information, intimidation, punishment, discrimination, there must be a specific purpose and is always a coercive situation.

The last, and in my opinion the most important criteria of definition that is not explicitly written in the Convention is the element of powerlessness and defenselessness of the victim.¹⁵ It is a situation where one individual exercises absolute control over another individual. Incommunicado detention and secret detention are prone to torture. The person is handcuffed, shackled, often stripped naked, suspended, in order not only to intimidate and humiliate but also in order to demonstrate that the perpetrator is in complete control of the victim and can kill the victim. In this situation, the victim is faced with no choice but to cooperate by confessing or providing the information wanted. It is this powerlessness that makes torture such a heinous crime, the use of this powerlessness and the deliberate infliction of severe pain or suffering, often for a long period of time. It is a direct attack on the very core of human dignity and personal integrity. It is comparable to slavery, which is the lawful dehumanization of human beings, and depriving them of their humanity. Torture is doing the same *de facto*,¹⁶ the offender is dehumanizing the victim to an extent. The perpetrator also feels that the victim is not even a human being, which is their own ethical justification of the infliction of torture on another individual.

UN Special Procedures

The UN distinguishes between a system of human rights protection based on treaties such as covenants with expert committees such as the Human Rights Committee etcetera,¹⁷ and the Charter-based system.¹⁸

15. Henry Shue, *Torture*, 7(2) PHILOSOPHY AND PUBLIC AFFAIRS 124 (1978).

16. *Id.*

17. There are ten human rights treaty bodies that monitor implementation of the core international human rights treaties, they are Human Rights Committee for ICCPR; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination for International Convention on the Elimination of All Forms of Racial Discrimination ; Committee on the Elimination of Discrimination against Women for Convention on the Elimination of All Forms of Discrimination against Women ; Committee for CAT; Subcommittee on Prevention of Torture pursuant to the Optional Protocol of the Convention against Torture; Committee on the Rights of the Child for Convention on the Rights of the Child ; Committee on Migrant Workers for International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Committee on

Special Procedures are used in the Charter-based system. Treaties only apply to state parties, that is, states that have ratified, while the Charter-based system applies to all UN member states, perhaps even beyond. The Commission of Human Rights was the main body¹⁹ between 1946 and 2006. The Commission, a political body consisting of states,²⁰ developed a fairly well-functioning system where three main actors cooperate.²¹ The first actors are the member states who also made decisions and were the only ones that could vote.²² There were 53 members at the time. The second actors were hundreds of non-governmental organizations (NGOs) that from the onset had consultative status and went to Geneva every spring.²³ They

the Rights of Persons with Disabilities for Convention on the Rights of Persons with Disabilities ; and Committee on Enforced Disappearance for International Convention for the Protection of All Persons from Enforced Disappearance ICCPR, art. 28; International Covenant on Economic, Social and Cultural Rights part IV; E.S.C. Res. 17, U.N. ESCOR, 22nd mtg, U.N. Doc. E/Res/1985/17 (1985); International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter ICERD] art. 8, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination against Women [hereinafter CEDAW] art. 17, Dec. 18, 1979, 1249 U.N.T.S. 13; CAT, art. 17, Dec. 10, 1984, 1465 U.N.T.S. 85; Subcommittee on Prevention of Torture pursuant to the Optional Protocol of the Convention against Torture; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [hereinafter ICRMW], art. 72, Dec. 18, 1990, entered into force July 1, 2003, 2220 U.N.T.S. 93, 30 I.L.M. 1517 (1991); Convention on the Rights of Persons with Disabilities [hereinafter CPRD], art. 34, G.A. res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (Dec. 13, 2006), 46 I.L.M. 443; International Convention for the Protection of All Persons from Enforced Disappearance [hereinafter CPED], art. 26, G.A. res. A/61/177 (Jan. 12, 2007), reprinted in 14 Int'l. Hum. Rts. Rep. 582 (2007).

18. Other than treaty-based monitoring system is UN Charter-based monitoring system, including the Human Rights Council (succeeding the Commission of Human Rights), and bodies created under the international human rights treaties and made up of independent experts mandated to monitor State parties' compliance with their treaty obligations. Most of these bodies receive secretariat support from the Human Rights Council and Treaties Division of the Office of the High Commissioner for Human Rights [hereinafter OHCHR]. For the information of the treaty-based monitoring system, see UN Human Rights, *Human Rights Bodies*, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited June 8, 2012).

19. The UN Commission of Human Rights is one of the main functional body created in 1946 under the Economic and Social Council, subjected to UN Charter, art. 68, by Economic and Social Council resolution 5 (I) of 16 February 1946. Meanwhile, subjected to art. 72 of UN Charter, the rules of procedure of the functional commissions were adopted by the Economic and Social Council in resolution 100 (V) of 12 August 1947. Later the rules of procedure were revised by times. First revised by the Council in resolution 289 (X) of 6 March 1950, and the present edition embodies all the amendments adopted by the Council since the latter date and contained in the following resolutions and decisions of the Council: resolution 481 (XV) of 1 April 1953; resolution 1231 (XLII) of 6 June 1967; decision of 2 August 1968 (1561st meeting); resolution 1393 (XLVI) of 3 June 1969; decision of 3 June 1969 (1596th meeting), decision of 17 November 1969 (1647th meeting), decision 216 (LXII) of 26 April 1977, and decision 1982/147 of 15 April 1982. E/5975/Rev.1. U.N.Sales No. E.83.1.10, 00300 (1983).

20. E.S.C. Res.U.N.Doc.E/RES/1946/5(1) (Feb. 16, 1946), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/041/47/IMG/NR004147.pdf?OpenElement>.

21. UN Charter, chapter 10 (regulating the constitution of Economic and Social Council and its legal status); Rules of Procedure of the Functional Commissions of the Economic and Social Council (subjected to UN Charter art. 72).

22. *Id.* art. 67.

23. *Id.* art. 71.

are the driving force behind the agenda such as standard setting, implementation, and the naming and shaming strategies. The third actors are independent experts.²⁴ This is based on the principle that fact-finding cannot and shall not be done by the states because they are not objective agents. Fact-finding should be done by independent experts that should report to the Commission, and the Commission should then take the necessary action and resolutions to put diplomatic or political pressure as appropriate. The Commission was replaced in 2006 by the Human Rights Council.²⁵ I was still appointed during this period and the transition to the Human Rights Council was not an easy process.

Special Procedures were created during the period of the Cold War. The first was created in 1967 and was a special working group on the human rights situation in South Africa,²⁶ followed by working groups on Israel, and later Chile and many other countries where there were country-specific Rapporteurs.²⁷ Their task was to assess, primarily by fact-finding missions, the overall situation of human rights in one country. In 1980 the first thematic Special Procedure was created, the UN Working Group on Enforced or Involuntary Disappearances which dealt only with the phenomenon of disappearances but in all countries of the world.²⁸ The second thematic Special Procedure was the Special Rapporteur on Summary Executions in 1982,²⁹ and the third was created in 1985, the Special Rapporteur on Torture.³⁰ There are now more than 30 Special Procedures; almost every right whether economic, social or cultural, such as the rights to health, food and education or violence against women, are subject to thematic mandate holders.³¹ They are usually appointed for three years, and

24. *Id.* art. 70.

25. G.A. Res.60/251, U.N. Doc. A/Res/60/251 (Apr. 03, 2006)

26. E.S.C. Res. 1235 (XLII), 42 U.N. ESCOR Supp. No. 1 at 17, U.N. Doc. E/4393 (June 6, 1967).

27. See High Commissioner for Human Rights, *Role and Function of the Special Procedure of Commission of Human Rights* (Dec. 12, 2005), CHR Dec. 2005/113.

28. C.H.R. Res. U.N. Doc. E/CN4/Res./1980/20.

29. C.H.R. Res. U.N. Doc. E/CN4/Res./1982/29.

30. C.H.R. Res. U.N. Doc. E/CN4/Res./1985/33 (on Torture and other cruel, inhuman and degrading treatment or punishment) (Mar. 13, 1985)
http://ap.ohchr.org/documents/E/CHR/resolutions/E_CN.4_RES_1985_33.pdf.

31. There are both thematic special procedures and the country-based special procedures. For thematic special procedures, they are: enforced or involuntary disappearances (1980), extrajudicial, summary or arbitrary executions (1982), torture (1985), freedom of religion or belief (1986), sale of children, child prostitution and child pornography (1990), arbitrary detention (1991), freedom of opinion and expression (1993), racism, racial discrimination (1993), independence of judges and lawyers (1994), violence against women (1994), toxic wastes (1995), right to education (1998), extreme poverty (1998), migrants (1999), right to food (2000), adequate housing (2000), human rights defenders (2000), economic reform policies and foreign debt (2000), indigenous people (2001), people of African descent (2002), physical and mental health (2002), internally displaced persons (2004), trafficking in persons (2004), mercenaries (2005), minority issues (2005), international solidarity (2005), countering terrorism (2005), and transnational corporations (2005). Other than thematic

their term can be extended for another three years, but they cannot be appointed for longer than six years. I was appointed from 2004-2010. Mandate holders serve in their individual capacity; it is not a full time job as they are not employed by the UN and are not paid. This is to ensure that they are clearly independent not only from states but also from the UN. These people are usually university professors, but are sometimes retired diplomats or practicing lawyers. In principle anyone can be appointed, but in reality, although they are usually recommended by governments, most appointed mandate holders are distinguished experts. Even now under the Human Rights Council which is even more politicized than the Commission was previously, the practice of appointing individuals works very well. There is geographic balance consisting of people from different regions and gender balance etcetera.

Special Rapporteur on Torture

The role of mandate holders is to receive complaints on a daily basis.³² The UN calls this ‘communications’, which means that there has been evidence that there has been torture or at least a clear risk that a person might be subjected to torture after being arrested and brought to a notorious police detention facility. The family members address local NGOs. Some people might directly contact the UN but in reality this is done via human rights defenders that are usually part of a global network such as the World Association of Torture,³³ Amnesty International,³⁴ or some other NGO, and they usually send the communication on the same day or the following day to the Office of the High Commissioner for Human Rights in Geneva, which is the secretariat that is also servicing Special Procedures. The staffs there then check the reliability of the information and the credibility of the sources. The mandate holder then receives the information and promptly decides whether there is enough information to send an urgent appeal directly to the Minister of Foreign Affairs or whether further information is required.

In any case the information is sent as a credible allegation that has been checked; however the truth of the allegation is unknown. The government, however, has an obligation to ensure that all credible, reliable allegations of

special procedures are country-based special procedures. They are Myanmar (in operation since 1992), Cambodia (1993), Palestinian Occupied Territories (1993), Somalia (1993), Haiti (1995), Cuba (2002), Liberia (2003), Belarus (2004), Burundi (2004), Democratic People’s Republic of Korea (2004), Democratic Republic of the Congo (2004), Sudan (2005) and Uzbekistan (2005).

32. Methods of Works of the Special Rapporteurs on Torture, C.H.R. Res. U. N. Doc.E/CN.4/RES/2001/62, Annex to E/CN.4/1997/7 (Apr. 25, 2001).

33. WORLD ORGANIZATION AGAINST TORTURE, <http://www.omct.org/> (last visited June 6, 2012).

34. AMNESTY INTERNATIONAL, <http://www.amnesty.org/> (last visited June 6, 2012).

torture are immediately investigated by an independent body, and to report the outcome of the investigation to the mandate holder. If the allegations are true, action must be taken against the perpetrator to bring him or her to justice. The victims must also be supported, such as through rehabilitation and other measures. If the allegations are false, the government should not just state that the allegations were fabricated, which unfortunately happens in reality with statements such as 'but he is a criminal so don't believe him'. A report justifying the conclusion that the allegations were false and evidence that the allegations of torture are untrue should be submitted to the mandate holder.

Hundreds and thousands of these urgent appeals and allegation letters are sent to a whole variety of countries around the world. Some governments do immediately investigate and report back while there is never an answer from other governments. Most governments reply acknowledging receipt of the appeals and allegations and state that these matters are taken seriously by their country and will be investigated, but never report back any findings. Reminders may be sent to these countries, and while these have a positive effect sometimes, very often they do not.

As a Special Rapporteur I sent and presented a general report to the Human Rights Council in Geneva every spring, and another report to the General Assembly in New York in October. I decided what general topics to write in those reports. Since I was appointed at the end of 2004 when the so called war on terror was at its height, much effort was dedicated to fighting terrorism, and torture in fighting terrorism was not only used by the United States but by many countries in the world. Secret places of detention were also used. However, I chose different topics such as corporal punishment, capital punishment, and whether these were cruel or inhuman punishments. Conditions of detention were very important to me throughout my mandate and specific issues including children, drug users, lesbians, gays, bisexual or transgendered persons, and persons with HIV/AIDs in detention or prison. Women and torture particularly in the private spheres were among the various topics that I have chosen and then discussed with states and NGOs.

Optional Protocol to the Convention against Torture

Mandate holders also had to conduct fact-finding missions and report the findings. OPCAT, which is the Optional Protocol to the Convention against Torture,³⁵ is what I consider to be one of the most effective means to prevent torture and to improve prison conditions. This is because all states

35. Optional Protocol to the Convention against Torture (Dec. 18, 2002), G.A. res A/Res/57/199 [hereinafter OPCAT]

that ratify this new instrument which was adopted in 2002 have to establish a national preventive mechanism.³⁶ In other words states had to establish an independent commission, often part of a national human rights institution, with different professionals including doctors, psychologists, lawyers and sociologists to carry out unannounced visits on a regular basis to all places where persons are deprived of their liberty, so not only prisons but also police detention facilities, psychiatric hospitals, special detention facilities for migrants, children, drug users etcetera. These unannounced visits can occur at any time, 24 hours a day, and the visitors must be able to speak with detainees in private.³⁷ This is similar to the methodology of fact-finding but on a domestic level this is much more effective. I am head of a commission in Austria only investigating into police detention facilities. We visit the bigger police prisons every two to three weeks which has a deterrent effect because they know that we can speak to everybody so torture in these police detention facilities no longer takes place even in isolated cases because there is transparency so they will no longer be able to cover it up.

Fact-finding Missions

As a Special Rapporteur on Torture, in order to carry out a fact-finding mission I need the invitation of the government. Some governments have standing invitations which is easy; you can accept them and inform them that you will come the following month. Other governments need to be convinced, or they have their own reasons for inviting you, such as to show that there was the bad practice of torture under the rule of their predecessor. Usually it is the former, as I received vast amounts of letters and sent numerous urgent appeals with no results, so I would approach the government to allow me to visit their country and assess the situation in an objective manner. The People's Republic of China was the longest and most difficult to obtain an invitation. My pre-predecessor began to request an invitation in 1995 and when it was finally negotiated it was postponed. I was able to visit China less than one year after my appointment.

However I only accept an invitation when the invitation includes a written guarantee that they accept my terms of reference such as the freedom of enquiry to allow me to speak to victims, witnesses etcetera. There will also be many contacts with different branches of government including the relevant ministers, justices, internal defense and security, Attorney-General, Chief Justices, and sometimes the head of state depending on the country.

36. *Id.* art. 3. (Stating each member states shall establish or maintain a preventive body in the domestic level, the preventive mechanism).

37. *Id.* arts. 17-23. (regulating the legal status and composition of the national preventive mechanism).

The terms will be negotiated with the government as soon as they invite you such as the period of time you will be visiting. It is also important to speak with civil society such as NGOs. Usually I would tell the government that the investigations are done by the UN and I would not be informing the government about the people I would be speaking to as a measure to prevent endangerment to them. Often NGOs only want to meet in secret. Therefore ideally the government keeps out as I undertake the fact-finding mission and speak to the relevant people.

Specifically for torture, which often takes place behind closed doors at night, I insisted on unannounced visits, at any hour of the day, often at night, to police detention centers and spoke with the detainees I selected. I would enter the prison cells rather than asking the detainees to come out, and introduce myself and my team including forensic experts, interpreters and sometimes security personnel. We would then ask the detainee to explain the conditions of the prison and whether they had been tortured or ill-treated. These interviews are done in unsupervised individual interviews not allowing for conversations to be taped. It is important to isolate the prisoner and ensure there are no forms of surveillance in the room selected for interview. No prison guard is allowed to watch us or listen to us. Sometimes this is not easy, as this is not what prison guards are used to, but we have our own security guards, so I insisted. Otherwise the detainees would be endangered and not tell you anything. If I have been tortured and the torturer is standing next to me I would not say that I have been tortured because I know what they would do to me as soon as you leave.

Forensic experts are always part of the visiting team, because when detainees claim that they have been recently tortured and there are scars or traces of torture still visible, they will be examined by the experts in a room where the police or prison guard is not present. Thorough medical examinations by forensic experts, usually highly-qualified doctors, are important in determining age of injury, instrument of torture such as baton sticks, metal bars, wooden sticks etcetera, and distinguishing between torture and self-inflicted wounds. The medical examination findings will then be compared with the story told by the detainee to see if they corroborate.

It is important not only to prove torture but also to document torture which is why I always insist on bringing my photo and video equipment. I insisted on bringing everything I brought in with me and not being stripped searched because we need to document. The government should issue you assurance against reprisals. This is a difficult issue. You can keep the contents of the interview secret. Of course, UN security often knows quite well whether there are any kinds of surveillance devices. Therefore I would usually not conduct interviews in any room that is suggested or offered by the director of the facility. Prisoners know best where they feel safe.

Sometimes it is in the cell so I would ask the other cell mates to leave so that my team could be alone with the detainee. Sometimes they would suggest a room which they are certain has no listening devices. However, you cannot hide the fact that the prisoners were willing to talk, which often leads to reprisal. In Sri Lanka for instance, less than one hour after I had left the antiterrorism department that I visited, I received an sms informing me that all the detainees that I had spoken to had received a heavy beating. I returned to the facility. It is difficult because you can hide the content of the conversation but you cannot hide who you are talking to. Hence they beat them to find out what they had confided to us. Thus you can insist for government assurance that there will be no reprisal but in reality you cannot really avoid it. From an ethical perspective this is the most difficult part. I try to work without body guards but depending on the security situation of the country the UN sometimes insists that security guards are involved.

*Personal Experiences*³⁸

I tried to select countries so that it was a representative sample of the situation of torture around the world today in general. However I am dependent on governments that invited me so for instance I have visited more places in Asia than in Latin America or Africa. But I tried to select countries from all the different regions including Papua New Guinea from the Pacific region, Jamaica from the Caribbean, from Central Asia Kazakhstan, from Arab countries only Jordan although I had received some of the most horrible allegations of torture from countries such as Egypt, Syria or Tunisia. In Asia, Mongolia and China, Nepal, Indonesia, Sri Lanka where the armed conflict with the LTTE was at its height in 2007. Russia, Cuba and Zimbabwe were the frustrating ones where the government invited us, and we prepared the mission and then the governments told us very late that private interview were difficult one week before the scheduled visit so I had to cancel. This was the same case with Guantanamo Bay, on which we did the report but we did not go to Guantanamo Bay because the Bush administration did not want us to speak with the detainees in private. We spoke to some ex-Guantanamo detainees and compiled a very critical report.³⁹ We were the first independent body to demand for the immediate closure of Guantanamo Bay in February 2006. Cuba invited me but then did not want to agree on any dates. Zimbabwe invited me and I was already on

38. Prof. Manfred Nowak served as United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment from 2004 to Oct. 31, 2010. During the six years, he had submitted more than 30 reports on torture. Reports submitted to UN human rights bodies are *available* at http://ap.ohchr.org/documents/dpage_e.aspx?m=103.

39. See text accompanying note 8.

the way to Zimbabwe when President Mugabe changed his mind and I was detained at the airport and sent back so I was not able to carry out the fact-finding mission. For the other countries I was able to undertake the fact-finding missions.

Conclusions

In the majority of the countries of the world, there is routine, widespread, or even systematic practices of torture and in more than 90%, in 17 out of 18 countries, I found at least isolated cases of torture. There was only one country where I did not find even one case of torture and that was Denmark including Greenland. In all the countries there were at least isolated cases, but definitely in more than 50% torture is routinely practiced. States, even parties to the Convention against Torture, simply do not implement their international obligations, and as mentioned at the beginning the main reason for the widespread practice of torture is the non-functioning of their administration of justice and corruption etcetera.

There is a global prison crisis which should be addressed by developing a UN Convention on the Rights of Detainees. Often when I interviewed detainees and asked whether they had been tortured they would say they have been, everybody is tortured there. But that is not their main concern. They may have been tortured by the police during the first 2 or 3 days until they confessed to the crime. However they have now been there for 10 years in overcrowded, unhygienic, terrible prison conditions and the daily suffering is much worse than the three days of torture at the beginning. There is a global prison crisis and an increasing number of prisoners, about 10 million worldwide, but not enough prisons and often very old prisons that are not living up to minimum standards.

Finally, within my institute in Vienna, the Ludwig Boltzmann Institute of Human Rights, on the basis of a project financed by the European Union, we are still working with governments that I visited and are willing to implement my recommendations. We started in Paraguay which is working very well, Georgia somewhat less well, Moldova very well and now we are going to Uruguay and Togo, and we have also been in other countries such as Kazakhstan and recently in Pakistan where there is a willingness to address torture and we can advise the government about the laws they should enact, about other training, and whatever is needed to establish this national preventive mechanism in order to combat torture. We also have this Atlas of Torture website⁴⁰ where we try to provide relevant information on the situation of torture in all countries of the world where we have information

40. ATLAS OF TORTURE, <http://www.atlas-of-torture.org>. (last visited June 6, 2012).

and also on thematic issues.

Thank you very much. I hope this was not too long and depressing. I look forward to the comments by the discussants and the discussion we will have afterwards. Thank you for your attention.

III. DISCUSSION

A. PROFESSOR WEN-CHEN CHANG

Thank you Professor Nowak. We have now seen firsthand that Professor Nowak is the expert in combating torture as he has travelled all around the world to visit places where this terrible crime occurs. From his explanation about his approach to investigations and case examples it is obvious that Professor Nowak is very cautious and careful, and an expert in investigating allegations of torture. Now, Professor Nowak's outstanding lecture will be followed by four experts in Taiwan. We will start with Professor Ye-an-Sen Teng. Thank you.

B. PROFESSOR YEAN-SEN TENG

Thank you. Distinguished guest Professor Nowak, Professor Chang, Peter Huang, distinguished discussants and colleagues, ladies and gentlemen. After listening to Professor Nowak's speech I think all of us are quite shocked to learn the appalling facts that human beings are inflicting such heinous crimes on other human beings. Listening to Professor Nowak's lecture was quite a unique and prestigious experience because we do not have the experience to have this extensive knowledge on torture. As a discussant at this forum, I would like to discuss some concepts that would be beneficial to the understanding of the most important human rights known in the development of recent human civilization. First of all, it is a great honor to be invited to participate in this special occasion in commemorating the true great man of conscience Mr. Lei Chen, who had devoted his life to advocate democracy and human rights during the authoritarian regime of nationalist government ruled Taiwan several decades ago.

To treat human persons humanely at any time and in any circumstances is the fundamental core of human dignity. In this connection, respect for human dignity is the foundation and the basic value of international human rights law. That said, human dignity and human rights, the two most frequently discussed phrases in recent human history are closely interrelated and could be used interchangeably. In fact, there are various and different weights on the construction of human dignity. As in Germany, the notion of human dignity has a status superior to that of human rights. Conceptually,

human dignity is the essence of the notions of human rights and serves as the gauge of the standard for the protection and respect for human rights. In this connection, human rights without the element of human dignity are fallible and could be contentless.

Torture, in that connection, is one of the most heinous crimes against human dignity. The prohibition of torture, inhumane and degrading treatment of human beings is at the core of the notion of integrity of human persons. The link between the right to humane treatment and other human rights of personal integrity and freedoms, namely the right to life and the right to liberty is thus established. The prohibition of torture and other ill-treatment is a norm of customary international law. It even has the force of *jus cogens*, a preemptory norm of international law, which is couched in absolute terms tolerating no exceptions when public order or national security is at stake, and thus cannot be modified by any agreements whether in national or international plane. The non-derogability of the rule even in times of war or state emergency explains the veracity and the significance of human dignity. However, the reality is not so perfect as such, as Professor Nowak's lecture has highlighted, we are living in an imperfect world, fearful of losing our family members, the wealth, the power to rule, thus, those who are detrimental to our endurable interests are thought to be punished, to be humiliated or even better to diminish them. The situation can be the same in all societies, even the most developed societies in which the institution of human rights is highly appraised, not to mention the undemocratic societies in which the notion of human dignity is condemned as emptiness.

The prohibition of torture, cruel, inhuman and degrading treatment or punishment inflicted upon any person is in nature a negative obligation of states. However, the responsibility to protect any human person from being treated inhumanly or tortured connotes the positive obligations of states. In that connection, the question may arise, "what are the limits of positive obligation?" The threshold to hold states accountable to that effect may be far from clear and determinate, but the continuation or the perpetration of the crime in question that is attributable to a state due to its failure to take due diligence to prevent the occurrence of the crime can be a threshold for attributing responsibility to the state.

Thank you for your kind attention.

C. PROFESSOR WEN-CHEN CHANG

Thank you Professor Teng for reminding us of the strong connection between human dignity and human rights. We often forget that human dignity is the foundation of the universal human rights. Professor Teng's remarks will now be followed by Professor Chen-Ju Chen.

D. PROFESSOR CHEN-JU CHEN

Good afternoon everyone, good afternoon Professor Nowak, Professor Chang, Mr. Huang and distinguished discussants and guests. It is my great honor to participate in this event. Let me introduce myself first, this is my second year of teaching and I am currently teaching at National Chengchi University. I always say that I started studying public international law after I started to teach so I am not an expert in this field. As I never formally had the chance to work for human rights or any relevant issues, I really appreciate this opportunity to participate in this event.

Please allow me to talk about some history about the regulations on torture. In the late 19th century, the original idea to prohibit torture was first seen in the prohibition of the mistreatment of prisoners of war.⁴¹ At the time, it was in paragraph 16 of the Instructions of the Government of Armies of the United States in the Field in 1863.⁴² The provision focused on prohibiting the mistreatment of prisoners of war. Later, with the development after the Second World War, the prohibition was no longer confined to the situation of war but was in a more general form, and the general principle was that the rule applied to all situations. This general principle stated that no one should be subject to torture or cruel, inhuman or degrading punishment or treatment. This principle has been regulated in various conventions, including ICCPR⁴³ and other regional conventions, such as the European Convention,⁴⁴ American Convention,⁴⁵ and African Charter.⁴⁶

With this development, in 1987, the specific Convention against Torture came into force, titled the 'Convention against Torture and Other Cruel or Inhuman and Degrading Treatment or Punishment.' This convention

41. International Humanitarian Laws which prohibited torture to combatants, prison of wars and civilians during the warfare. They are Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (Aug. 12, 1949), 6 U.S.T. 3114; 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (Aug. 12, 1949), 6 U.S.T. 3217; 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (Aug. 12, 1949), 6 U.S.T. 3516; 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, (Aug. 12, 1949), 6 U.S.T. 3316; 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (June 8, 1977), 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (June 8, 1977), 1125 U.N.T.S. 609; Convention on the Prevention and Punishment of the Crime of Genocide, (Dec. 9, 1948), 78 U.N.T.S. 277.

42. Instructions for the Government of Armies of the United States in the Field (Lieber Code), (Apr. 24, 1863), art. 16.

43. ICCPR, art. 7.

44. Convention for the Protection of Human Rights and Fundamental Freedoms, (Nov. 4, 1950), E.T.S. No. 5; 213 U.N.T.S. 221.

45. American Convention on Human Rights, (Nov. 21, 1969), O.A.S.T.S. No. 36; 1144 U.N.T.S. 143.

46. African Charter on Human and Peoples' Rights, (June 27, 1981), 1520 U.N.T.S. 217, 245.

recognizes the international jurisdiction for the international crime of torture. Mr. Huang mentioned that Taiwan is not a contracting party of this convention, but I would say that since the prohibition of torture has been stated in the ICCPR, it to certain extent constituted customary international law,⁴⁷ and although Taiwan is not a participating party of this specific convention its listed obligations under international law is still binding on Taiwan as already stated in the various conventions.⁴⁸

Under Article 1, paragraph 1 of this convention, torture is defined as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official.’⁴⁹ This definition raises one question. This definition focuses on the act of states because it emphasizes the role of public officials or official capacity. The question is whether the non-state actor should also be required to comply with this obligation to prohibit torture. There are some non-state actors, including de facto regimes, unofficial groups, and groups with close links to the states which may still be considered to be responsible for the torture. It may happen in some states, where the torture by non-state actors is not regulated or is not within the scope of the international human rights law. So my question would be whether it is possible under the current international law regime to regulate the torture by non-state actors.

Moreover, there are various conventions regulating torture which also consider the prohibition of torture as absolute, permitting no limitations or exceptions. Essentially, torture is prohibited and there are no acceptable justifications. However, in an interview in 2010, Professor Nowak emphasized that torturing and secret prisons still exists and is de facto

47. See STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS & MORALS* 136-48 (3rd ed. 2008). See also LOUIS HENKIN, *THE AGE OF RIGHTS* 19 (1990); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 319 (1996); Edward D. Re, *The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts*, 33 CAL. W. INT'L L.J. 137, 160-62 (2003).

48. In fact, the Taiwanese legislature had ratified the ICCPR and the ICESCR in 2009, despite Taiwan's ratification of the two Covenants and accession to CEDAW were all rejected by Secretary General of the UN in reference to the 1971 resolution that expelled Taiwan. After ratification, the Government of ROC made its voluntary compliance with CRC, followed by subsequent domestic legislature and the Act to Implement the ICCPR and the International Covenant on Economic, Social and Cultural Rights [hereinafter Implement Act] establishes its own monitoring system in article 6 by setting up a human rights reports system. Implement Act, art. 6. See also e.g., Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11(3) PAC. RIM L. & POL'Y 531, 537 (2002); Wen-Chen Chang, *An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan*, 4(3) NTU L. REV. 203, 222-33 (2009); Wen-Chen Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 N.C. J. INT'L L. & COM. REG. 593, 597-98 (2011).

49. See generally CAT, art. 1.

despite being prohibited by law. My question is why there is a disparity between the rules and reality. Is there any possibility that this discrepancy can be fixed? Truly, there are questions about the challenges between the rules and reality, and the role of non-state actors. These are not unusual in public international law.

In addition, there are a lot of regional human rights conventions in Europe,⁵⁰ America⁵¹ and Africa.⁵² Is there a need for the development of human rights rules in Asia? I would like to know Professor Nowak's opinion on this because he has been to a lot of Asian countries, including China. If it is necessary, how can this concept be developed in Asia? With these questions, I conclude my discussion. Thank you.

E. PROFESSOR WEN-CHEN CHANG

Thank you Professor Chen. These are interesting and wonderful questions. Professor Chen was modest in saying that she was not an expert in international human rights law. As I mentioned to Professor Nowak this morning, Taiwan was expelled from the UN and the entire international legal community. Between 1971 and 1994, this law school did not have a single international human rights seminar. The very first international human rights seminar was in 1994 when Professor Long-chi Chen, an international human rights professor who was blacklisted for a very long time, returned to Taiwan from the US to give a lecture. Now we move from the theoretical terrain of torture to the more practical aspects of torture victims and legal issues in Taiwan and beyond. Let us welcome Mr. Po-Hsiang Yu, a lawyer who has been working first hand on many important cases.

F. MR. PO-HSIANG YU

Thank you. I apologize to Professor Nowak because firstly I am also not an international human rights expert, and even worse my English is not good. I can understand more-or-less but not speak very well, so my discussion will be in Chinese.

We have a large audience, many of you are young, and I believe many of the young audience are not familiar with this topic. I myself have been through a period when the Taiwan government was not closely associated with the international society. During that period the government of Taiwan was out of control and could do whatever they wanted. I was lucky because my family and I did not suffer during that time. However, my parents always

50. *Supra* note 44.

51. *Supra* note 45.

52. *Supra* note 46.

told me not to say anything in schools, not to express my own opinion in schools and I remember these words deeply. Many of you here do not have this kind of experience. Today, I would like to share a case with you, the case of Chou He Hsun, also known as the Lu Zhen case. This case actually took place during that terrifying period. In that period the government was so powerful that it was difficult to combat with the government. It was 1988 and the situation in the police stations was terrifying beyond words. I would like you to hear a recording of an interrogation during that time.

I would like to provide an introduction to the background of this case to contextualize the video you will watch later. This case took place in 1988 and involved a child called Lu Zhen. Many of the elder audience may know this case very well. In 1988, Lu Zhen was kidnapped by criminals. His father was very brave and spent a lot of time and effort searching for his child, and the media helped a lot. They broadcasted recordings of the kidnappers and tried their best to find Lu Zhen. The kidnappers demanded a \$1million ransom and after obtaining the money they never returned the child. The child was never found. In 1989 the police announced that they had found the criminals. The kidnappers were Chou He Hsun and his partners. The police reported that they were a criminal group in their 20s led by Chou He Hsun. The only evidence was the confessions by Chou He Hsun and his partners. They had 288 copies of the confession. This was because they could never find the body of Lu Zhen. In the confession Chou and his partners would state the location of the body but the police would not find the body when they went to the place described, so this process kept repeating and the plot of the kidnapping kept changing every time they interrogated Chou He Hsun and his partners. They acquired 288 confessions, all detailing different procedures and locations where they hid the body. However, the investigators still charged him based on these confessions.

During this period Chou He Hsun and his partners had been in detention immediately after arrested by the police, and had been put in incommunicado detention before prosecution. Consequently, they could only talk to their lawyers. Though the incommunicado detention has been lifted after the prosecution, they have still been detained for years. However these suspects were so young that they did not have any lawyers in police stations and district prosecutors' offices. This case has been investigated for 23 years and Chou He Hsun is still in detention. The other defendants were sentenced lightly, and because they had been through several trials, receiving a lighter sentence each time, in the end they refused to appeal again because they just wanted to leave the prison. This left only Chou He Hsun and another two defendants till in detention. The other defendants all said that they gave up on appealing because they wanted to leave the prison, but they insisted that they did not commit the crime. I personally firmly believe that their

treatment within the detention centre in the first 4 months were definitely torture or inhuman treatment. After the 4 months of torture and 23 years of detention and trial, Chou were always sentenced to death, and his two partners, Wu and Lin, has been sentenced to 10 and 17 years in prison respectively. These three people were always being sentenced to death and they have lived in this terror for 23 years. They have faced multiple pressures, firstly from the trials, and secondly the restriction on freedom in the detention centre. This is torture to them. Not many would be familiar with the situation within the detention centre before the former president Chen Shui-Bian detained. Prisoners only started getting hot water for baths and showers around 2 years ago. These people had been living in these kinds of situations for 23 years and facing the threat of the death penalty. Can this kind of pressure be called torture or inhuman treatment or punishment?

The government actually charged the police officers that tortured Chou because the video was published. These police officers were sentenced with the crime of coercion, but they were not charged for harmful behaviors because it is almost impossible for the investigators to find wounds on Chou He Hsun and the other two defendants. However I believe that the police officers have the techniques to torture people without leaving any wounds on their body and it is also proven that police have used different methods to force victims or suspects to give confessions. The case of Chou He Hsun is only one example. Chou He Hsun has suffered from torture but we still insist on giving him the death penalty. Can this kind of behavior be tolerated by the two covenants?

G. PROFESSOR WEN-CHEN CHANG

The first question was concerning the torture Mr. Chou suffered for 4 months during the investigation in order to extract the confessions. That was clearly torture to Mr. Yu. But what about the subsequent 23 years, the fact that his case went back and forth between the Supreme Court and the High Court, and he was put in the detention centre not knowing when or what the definite results of this case would be?

The second is that our Control Yuan has already investigated this case in 1993 and the police misconduct was clearly found and stated in the Control Yuan report and some police officers were subsequently sentenced. But the sentences of those police officers were light and not in proportion to what Mr. Chou had suffered. Mr. Yu was wondering given the stated and investigated cases, why these findings had no contribution to Mr. Chou's case and why Mr. Chou was still found guilty and sentenced to the death penalty. Is there any repatriation, any way this guilt founded from evidence

extracted by torture could make any contribution to Mr. Chou's case? The last question regarding whether the two Covenants from the International Human Rights norms can make any difference in Mr. Chou's case.

Now I would like to invite Mr. Kuo-Yen Weng to discuss with us some practical and hands on experiences.

H. MR. KUO-YEN WENG

Like Mr. Yu, I must first apologize to Professor Nowak because I cannot speak English well either so I will be speaking in Chinese. I also read some papers Professor Nowak wrote including some areas mentioned in his presentation. Professor Nowak has made so many visits to different states which have caused me to reflect on Chou's case. From the recording, it is clear that the police officers tortured or ill-treated Mr. Chou. Torture was commonly seen many decades ago in the years of white terror. Taiwan is a democracy now and claims that torture no longer occurs, however, is this true? As a lawyer I have seen so many similar things happen in Taiwan that I think there is a big disparity between what is happening in Taiwan and what is regulated in International two covenants. I would like to share some practical cases I have come across or some stories or cases may be known to the audience. As Professor Nowak mentioned, we are now facing a huge global crisis relating to prison conditions, which is also an issue in Taiwan. Taiwan's condition is better, because we do not lock up 50 or 60 persons in the one same cell. However detainees in detention only started to have hot water for their showers after our previous president was imprisoned. Thus the quality of these prisons is still not improved.

Another issue is medical quality in prisons or detention centers. There was news about a detainee who had diabetes. He had one leg amputated prior to imprisonment. When he imprisoned, the prison and warden shackled the prisoner to prevent him from escaping. The shackles would hurt the ankle of this prisoner, and given the fact that this prisoner had diabetes, he was easily injured by the shackles. He consequently had to have his other leg amputated. The obvious issue here was how the prison and the warden could possibly think this prisoner would be able to run away with one leg. I think this probably constitutes inhuman treatment if not torture because it was greatly detrimental to this prisoner's health.

Another case is the case of the prisoner, Mr. Wang. He is a prisoner who has been sentenced to death. He had some medical problems affecting his nervous system but the prison did not provide him with appropriate medical treatment. He is and now a paraplegic because proper treatment was delayed by the prison. Clearly, the medical services in prison are not good enough or

not sufficient and the health of these prisoners is compromised.

Another case comes from my personal experience. My client suffered from schizophrenia and he has been detained for 4 years while his case has been ongoing. Due to his sicknesses, he has major delusions. He thought the police officers or the police in the station implanted chips in his body to monitor his every movement. This prisoner does not have insight, he is not aware of the fact that he is sick which is common in patients with schizophrenia. If people tell him that he is psychologically ill, this prisoner would become very angry and irritated and attack the person. Doctors have already said that he should be sent to a medical facility for help but the detention centre is not willing to do so, and is also not providing any medicine to him on the sole basis that the patient denies being sick. The judges also questioned why people keep saying he is sick when this patient is not delusional and is not lying. During the past 4 years, the patient's psychiatric condition has deteriorated significantly without any medical help. So I would say that this behavior or act constitutes ill-treatment or inhuman treatment if not torture. This is what actually happens in Taiwan today, not in the past. We continue to request for bail, and we will make appeal to Supreme Court. We have a letter of commission to speak on behalf of this prisoner so we state that this prisoner has schizophrenia, but this patient denies that he is sick. Based on Taiwanese regulations, the letter of commission must be signed by the person himself and not the family members for an appeal to a higher court. This is where the problem arises. We want to use his medical condition as an appealing cause, but this patient is not willing to sign and we cannot sign it for him. So this case has been delayed and prolonged in the courts. It has been slowed for so long that the prisoner cannot be sent for the medical help that is greatly needed. I can see that the psychological condition of this prisoner has been deteriorating and I think that it is inhuman treatment if not torture.

Another issue, as Professor Nowak mentioned, is private torture or private inhuman treatment in Taiwan. I am referring to foreign migrant workers because they have very lousy work conditions in Taiwan. Many migrant workers come to Taiwan to care for the elderly or those that suffer great illnesses. During the night they have to take care of these patients, but during the days their employers ask them to work at breakfast cafes or other stores. However, the original purpose of coming to Taiwan was to take care of sick people. Consequently, many of these migrant workers have to work for more than 12 -15 hours per day for more than one or two years. These migrant workers cannot file a complaint because their passports have been confiscated by their employers. Another incidence is concerning a Muslim migrant worker was forced to eat pork by her employer, which is not permitted in the Muslim religion. The conditions these migrant workers are

facing may not constitute torture but amounts to either inhuman treatment or degrading treatment. We commonly see these types of treatment around our lives or in court cases. Inhuman treatment or cruel-treatment is still very common and there is a need to eradicate this.

IV. RESPONSE

PROFESSOR NOWAK

First of all thank you very much for all the comments, and questions that you have raised. I will try to respond in order. To Professor Chen-Ju Chen with the first question about de facto regimes, since torture is defined in relation to states. De facto regimes are also held accountable, on my missions I always tried to go to certain areas which were not under the control of the states government. For instance when I visited Georgia I went to Abkhazia and South Ossetia and I found torture there, even the death penalty, although Europe is a death penalty free zone. The same happened in Transnistria, Moldova, but also in Sri Lanka where people were tortured by the LTTE, and in Nepal where there was systematic torture by the military, the police, and also by the Maoists particularly in forcibly recruiting people. That is one thing, but your question went beyond, in general to non-state actors. That is difficult, how can we hold them accountable? Of course under international humanitarian law, Article 3, which is common to the four Geneva conventions, there is no question that all combatants⁵³ should be held accountable. One of the reasons for the call for a World Court of Human Rights is this inability to hold international organizations and transnational corporations accountable despite them being bound by human rights law. We will discuss that tomorrow.

Why there is such a big implementation gap is a good question. I think that the main reason why people in detention are treated and I quote what many have told me 'worse than animals – you would not like to treat your dog as we are treated' is the lack of empathy for persons behind bars. In most societies, prisons have a double meaning and function. It is to of course lock in prisoners but to also lock out society. Most people have never been in prisons and do not want to be there, they do not want to know what is happening behind prison walls. There is a conception, a belief that if people are in prison, they must have done something wrong, even though many have not been tried yet, and are only suspected of committing a crime, or are illegal immigrants. Hence people are more concerned about other issues than

53. Instructions for the Government of Armies of the United States in the Field (Lieber Code), art. 16.

the rights of detainees and prisoners. So it is very difficult and usually it is the poorest of the poor that are faced with these circumstances, so I often call torture and inhuman prison conditions the privilege of the poor. If you have money you can bribe yourself out via the police, prisons, authorities, judges. Unfortunately, if you examine reports of Transparency International, the judiciary is in many countries the most corrupt departments of governments. It is very sad, because it is the judiciary that should protect you from others, but in many countries it is very corrupt. Secondly, there is impunity. This is bringing me to another question that was later raised in relation to the obligation to make torture a crime and to bring the perpetrators to justice. Today, police or other security officers who torture are almost never brought to justice. And as long as they do not have to fear any kind of sanctions, torture will continue to be practiced in the future.

In regards to whether there is a need to develop human rights rules or organizations in Asia, of course there is, although there is no all Asian political organization and I do not think there will ever be. Asia is too heterogenic; you cannot compare the Asia Pacific region with Africa, which is much more homogenous, or Latin America or Europe.

There are sub-regional organizations including the OSCE in central Asia, the Asia Pacific forum on national human rights institutions. There is also a human rights body foreseen in the Asian Charter of 2007, but I think it is much more important to really strengthen, the universal system for the protection of human rights in relation to Asia because Asia is failing in two ways. On the one hand there is no effective regional system for the protection of human rights, but also Asian states are less willing to ratify UN treaties than African or Latin American or European states. So my call is to strengthen the role of the UN in the Asian region.

As for Mr. Yu, you related to the case of Mr. Chou whom we visited this morning. Firstly, I personally feel, as I felt with many other detainees whom I visited, that he has a very well documented credible allegation of torture, as we have seen in the video. But secondly, there were the consequences, he was subjected to torture for the purpose of acquiring a confession, and on the basis of these confessions he was then sentenced, approximately 11 times because it was this ping pong, so for 23 years he has been living in detention. He was shackled for 18 years of detention, very degrading treatment. He was in solitary confinement for four years. Together, all this amounts to cruel and inhuman treatment and for him personally it was this insecurity as to whether he would finally be sentenced to death, whether he would be executed or not, that was probably much worse than the first weeks of torture under which he had confessed to the crime. There have been many other violations of the Covenant on civil and political rights. The right to fair trial also means that justice should not be delayed. A criminal trial lasting for

23 years is an obvious violation of the principle of fair trial under Article 14 of the covenant.⁵⁴ In the beginning, Mr. Chou did not even have a defense lawyer, so there have been many violations, and the Human Rights Committee has stated very clearly that in death penalty cases, it is axiomatic that Article 14, the right to fair trial, is followed very scrupulously by governments. Otherwise the outcome, the death sentence, will not only be a violation of Article 14 but a violation of the right to life under Article 6.⁵⁵ There is also a general principle that you should never use a confession extracted by torture in a criminal trial against the accused. So there have been many different violations of the Covenant. Courts should apply the Covenant via the Implementation Act, when applying the Criminal Code and the Criminal Procedure Code. If you could submit this case to the Human Rights Committee I would be fairly sure, looking at the case law of the Human Rights Committee in relation to the death penalty in Jamaica and other states, the Human Rights Committee would find there has been a violation of the Covenant.

Mr. Yu also raised the issue of the medical quality in prisons and I would like to agree with you that when I speak about a global prison crisis it is not just the overcrowded and unhygienic conditions, etcetera. In most detention facilities worldwide there is no or only very poor-quality medical treatment due to lack of funds and lack of empathy. Prison directors often told me ‘not my problem if a prisoner is ill.’ Many people get infected, with HIV or tuberculosis for instance, in prisons, but do not receive treatment. The prison claims that they do not have the money to provide treatment, but welcome the prisoners to ask their families to bring them medications. However it is a state obligation to provide medical treatment as well as economic, social and cultural rights, including the right to food. Similarly, in many prisons it is the obligation of families to bring food to the prisoners. That works for prisoners with a family that can afford to bring them food and are within close proximity. However for prisoners that do not have family or the means, they are dependent on others to provide them with food. These situations occur in many prisons, however I think the situation here in Taiwan is much better.

The medical treatment, as in the case of your prisoner with schizophrenia, and religious practices and norms should obviously be respected. Muslim prisoners should not be provided with pork for instance, and prisoners should also be able to practice their religion in prison as far as possible. However, in reality there are also big disparities. For instance in Sri Lanka, although I found systematic torture by the anti-terrorism police, the

54. ICCPR, art. 14.

55. *Id.* art. 6.

main prison in Colombo respected the freedom of religion and had religious facilities for all the different religions including Mosques etcetera and the prisoners could practice their religious rituals. In certain African countries, such as in Togo, the freedom of religion was respected, but the hygienic conditions were terrible. So there are major differences in the implementation of the rights of prisoners.

Mr. Weng speaking about your experiences, and the question I wrote down was regarding why there are such disparities between Asia and Europe. We learned a lot from European events such as the Nazi Holocaust, events where the worst human rights violations were committed by Europeans against Europeans not so long ago, and established a regional organization within the Council of Europe. Since after the end of the Cold War, all former communist states with one exception, Belarus which is a dictatorship, are also members of the Council of Europe which is based on three main values: pluralist democracy, the rule of law, and human rights. The European Convention and the Court of Human Rights are the major guards of this system. The Russian Federation and Turkey are also part of this system; there are approximately 800 million people in the Council of Europe. Every victim has the right to apply directly to the European Court of Human Rights after exhausting domestic remedies. The court is composed of professional full time judges. Every year there are many thousands of cases, and about 2000 judgments passed by the European Court of Human Rights every year. This has developed the culture of human rights. My own country, Austria, was very much against being supervised by this European Court of Human Rights. Today the European Convention is part of our Constitution and is much more important than the classical, old Bill of Rights in the Austrian Constitution. If the European Court tells Austria that it is violating the Convention and we have to implement, Austria does implement, even changing the constitution. Austria has changed the Constitution three times in order to implement judgments of the European Court of Human Rights.

The question of organ harvesting in China was raised. It is very well known to me, thanks to the Canadian David Matas' and David Kilgour's investigations. I took up the case and like other cases, I did not know whether the allegations were true but it was credible, it had been checked and in particular there is a statistical correlation between the repression against Falun Gong practitioners and the dramatic rise in organ transplantations. And at the same time we do not really know where all the organs are coming from. Some of them come from persons on death row. There is the practice that people who are going to be executed are placed under pressure to 'voluntarily' sign that they donate their own organs for organ transplantation. One of the problems is that the Chinese government is still not willing to provide data on how many people are executed. Now,

however, every death penalty must be approved by the Supreme People's Court, which is an improvement, so that is why we have told the Chinese government since this is the case then it is no longer so difficult to tell us how many cases were approved by the Supreme People's Court and how many of those people have been executed. The estimates that we get do not match by far the number of organ transplantations. I told the government that if these allegations are true, it is terrible. They have an obligation to provide me the answers to all my questions. For instance, how many organs are obtained from persons who are sentenced to death? Are there many voluntary donations? It is not really traditional in China. These numbers can be added up and then the source of all the other organs must be accounted for. There is an allegation they come from Falun Gong practitioners. It is the obligation of the government to provide me with answers but I never received any, they just refuted this allegation and said it was totally false but never provided more scientific answers explaining this high number and very rapidly rising number of organ transplantations which are on the market much cheaper than in Europe or the U.S.A. However, since it was after my mission that this issue arose, I had no other choice than to just use this futile process of communication.

In regards to team composition, I was lucky because as mentioned before, Special Procedures are a service run by the Office of the High Commissioner for Human Rights in Geneva. However due to lack of resources, I usually do not have more than 2 assistants. There was usually one human rights person from Geneva accompanying me but I also received funds from the Austrian, Swiss and other governments for the Ludwig Boltzmann Institute of Human Rights in Vienna so I had an excellent team of about five people working with me. I went on every mission with one other human rights expert from Geneva and 2 from Vienna, so there were 4 human rights people, of which at least 2 were always women. It is important in the female prisons that the women interview the prisoners and not the men. Other members of the team depend on the mission. There are always forensic experts. I was lucky I had the best forensic experts in the world. Duarte Vieira from Portugal, for example, is the president of three main international associations of forensic medicine, and Derrick Pounder from Scotland along with many other top forensic experts. I learned a great deal from them and they were of invaluable help. If I needed interpreters, it is very important that you do not recruit them in their country, so I brought for instance two Chinese interpreters who are employees of the UN in Geneva or in other countries. Security personnel came with me only if absolutely necessary and again they were UN security personnel, usually from Geneva because these missions were serviced by the Office of the High Commissioner in Geneva.

In terms of the differences between the Human Rights Commission and the Human Rights Council, in general I think that the Human Rights Council, at least at the beginning, was worse than the Commission in terms of selectivity, but also, politicization, and pressure on Special Procedures. Previously, Special Procedures had never had any pressure or interference with their independence. The Human Rights Council forced us to adopt a so-called code of conduct for special procedures and was always threatening us. It is really censorship by the states. For instance, my mandate was torture, inhuman, degrading and cruel treatment or punishment, but I raised the question of corporal punishment by simply asking: what is cruel, inhuman or degrading punishment? Now what comes to mind? To my mind: corporal punishment and perhaps capital punishment. When I raised these questions, I got very strong reactions, particularly from Asian states such as Singapore, China, Pakistan etcetera that I was violating the code of conduct that I was raising issues which had nothing to do with my mandate. Although we did our joint report on secret detention in the fight against terrorism, they asserted it had nothing to do with our mandate and we were violating the code of conduct. So there is a lot of pressure and it depends on how assertive you are. At a certain point it was not clear whether I would be reappointed, Jordan put a lot of pressure on the Human Rights Council to terminate my mandate because I had quite clearly criticized Jordan. However, the new appointees are really as professional as before. We were apprehensive that with the new procedure now they would appoint people who are not independent, but that is not the case, and the Universal Periodic Review is an improvement because the reports of treaty parties and special procedures are used in the Universal Periodic Review, and it is taken very seriously.

In relation to the question raised by Amnesty International, which was regarding whether states have an obligation to punish perpetrators of torture, states are obliged according to the UN Convention against Torture. However under general international law including the Covenant, the states are not directly obligated. Violations of human rights do not usually have to be crimes unless this is specifically mentioned. If torture is practiced on a widespread or systematic level, then it is a crime against humanity, or a war crime in armed conflict, under the Statute of the International Criminal Court, and under the principle of complementarity also, state parties to the Statute must make this a crime against humanity under their domestic criminal law.

But in individual cases of even summary executions, torture, disappearances etcetera, states only have an obligation to criminalize and bring the perpetrator to justice if they have ratified the respective treaties. The Convention against Torture, the Convention against Enforced Disappearances, clearly stipulates this obligation. There are 149 state parties

to the Convention against Torture, the clear majority of states in the world. The problem again is the implementation gap. Only a minority of countries make torture a crime in accordance with the definition and with appropriate penalties in their Criminal Code. However we are putting a lot of pressure on appropriate implementation, and there has been improvement, so more and more states make torture a crime under domestic criminal law, but problems arise in the next step, which is to investigate the allegations of torture. This is the real problem, because currently in most countries of the world, the police investigate allegations of torture, thus the police are investigating allegations against themselves. This leads to compromised investigations because it is often the direct superior or colleagues of the alleged torturer that investigates the allegations. Their main concern is that the suspected person will be sentenced and they have no interest whatsoever in proving that their colleague has tortured the prisoner. A body that has full police investigation powers but at the same time is independent from the police and the ministry of internal affairs is required. Very few countries have this. If you have it like in the UK, it is effective, and has a deterrent effect because there are quality investigations. In most countries, including my own country, it does not work. So that is another clear recommendation that I have provided to most governments in the world.

Tolerating the torture of fellow detainees by other prisoners obviously amounts to torture by acquiescence and is a very widespread method. The prison guards do not want to do the dirty job so they ask the prisoners to torture their fellow detainees. There is a lot of inter-prisoner violence, and the hierarchies in prisons are often exploited. For example in Togo, when I talked to a prison director about prison discipline he said it was none of his business, they call it 'bureau interne' it is internal, the prisoners deal with it. They do deal with it in their own way, and there are very strict prison hierarchies. The strong guys actually control the prison and there is a lot of interprisoner violence, in particular against the most vulnerable. It is a state obligation to provide discipline and order in every prison and not just leave it to the prisoners to deal with each other.

As to the issue of foreigners not being able to sue the Taiwanese government, I will have to pass on to those who know the Taiwanese law much better than I do. However, litigation before the courts should not be affected by whether the alleged victim is a foreigner in a migration detention center or a Taiwanese citizen. However I do not know what the precise problems are in Taiwan.

The most difficult situation I have met was in Equatorial Guinea where systematic torture was a government policy. We were threatened quite often by the military and the government but nevertheless we undertook our investigations. There is no civil society there whatsoever, the International

Committee of the Red Cross had left the country, so it was very difficult and in a situation where a lot of pressure was placed on us, it became the only country where we finally cancelled the press conference in the country because we were unsure whether we would be able to leave the country. I have also mentioned Zimbabwe earlier.

Besides, the practice of torture in the “war on terror” is perhaps the most lasting negative effect of the Bush administration. Torture has been practiced in many countries, in Latin American dictatorships, communist countries, in many countries torture is nothing new. But it was always denied, because governments knew that this is illegal, it is violating a norm of *jus cogens*. The difference with the Bush administration is that it tried to justify torture. They claimed it was not torture because they had a very narrow definition, but enhanced interrogation techniques such as waterboarding are obviously torture. What happened in Guantanamo Bay is torture,⁵⁶ there is no other word appropriate. But they always tried to justify that it was something else. That has been changed by Obama. Obama was very clear from the very beginning that these torture methods no longer existed and that the secret black sites of the CIA no longer existed. Obama’s failure is that he did not actually hold those perpetrators accountable or provide the victims with reparation for the harm suffered during the Bush administration. But the most lasting effect is that it has undermined the absolute prohibition of torture. In many countries where I visited, governments openly questioned why I was investigating them because if even the U.S., which invented Human Rights 200 years ago and was always telling others that they should comply with Human Rights, openly torture, why should we not torture as well? These countries argued that they also have terrorists, so if even the US officially practices torture, it must not be so bad. That is a long lasting effect in today’s states. It is implicated that in the situation of a ticking bomb implying that every good American police officer would in such a situation torture. However, the legal and ethical answer is very clear, torture is prohibited in any case and there is no justification for torture even in times of armed conflict and in times of terrorisms. Even in the worst ticking bomb scenarios, torture is never allowed. It is one of the very few absolute and non-derogable human rights not to be tortured, and for good reasons. That is what we learned from the Nazis etcetera, as soon as torture is allowed in extreme exceptional cases you open Pandora’s box. The ticking bomb scenario is an ethical dilemma but torture is still not allowed. And if torture is committed, the perpetrator should be held accountable and we have cases where this has been done. So in a ticking bomb scenario, there is almost never a situation where there is 100% certainty that the person actually has

56. UN Commission on Human Rights, *supra* note 8.

the key to the ticking bomb. It is hypothetical, but it has a significant impact on academic, political and media campaigns because torture has been seen to become a public event in the United States. People were listening and looking every evening to the hero of the TV series “24”, who was a torturer.

PROFESSOR WEN-CHEN CHANG

Thank you. It is impressive that Professor Nowak answered all of the questions with such depth of knowledge and patience. I must also thank this audience for their incredible patience with my bad management of chairing this session, which has been prolonged for an extra hour. However, we can see a great need in this law school and Taiwan, for this in-depth human rights education. It is good that this is only the first lecture, the second lecture on tomorrow will be on Work for the Human Rights and on Saturday the third lecture will be on the implementation of ICCPR. As a small token of appreciation for the first lecture we would like to present Professor Nowak with two books, ‘The National Taiwan University Law Review’ where all three lectures will appear later as roundtables. All the discussions today will be in print and published worldwide in the American and European databases in March. Thank you very much Professor Nowak.

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論酷刑、殘忍、非人道與不名譽對待 聯合國人權事務特別報告員的觀點

Manfred Nowak

摘 要

臺灣大學法律學院很榮幸能夠主辦雷震民主人權紀念講座的一系列活動。我們特別雀躍能夠邀請到Professor Manfred Nowak，擔任我們的講者。Professor Manfred Nowak，目前任教於維也納大學法學院，他亦為聯合國前人權事務特別報告員，主要職務範圍與調查酷刑相關。今天我們將會有四位傑出的與談人。第一位與談人是鄧衍森教授，臺灣國際法的權威。接下來的與談人是陳貞如教授，一位前景看好的國際公法年輕學者。最後兩位與談人是在臺灣非常致力奉獻於人權保護事務的兩位優秀人權律師：尤柏祥律師與翁國彥律師。尤律師曾經參與許多與死刑有關之重大刑案之辯護。翁律師是臺北律師公會人權委員會主委。臺北律師公會長年以來，對於人權的提倡，做出相當大的貢獻。