

Roundtable

On the Creation of World Court of Human Rights

MANFRED NOWAK*

Moderator: PROFESSOR JIUNN-RONG YEH
(College of Law, National Taiwan University, Taiwan)

Speaker: PROFESSOR MANFRED NOWAK
(Professor for International Law and Human Rights, School of Law, University of Vienna, Austria; Director, Ludwig Boltzmann Institute of Human Rights, University of Vienna, Austria)

Discussants (in order of appearance):

PROFESSOR MAB HUANG
(Department of Political Science, Soochow University, Taiwan)

PROFESSOR JAU-YUAN HWANG
(College of Law, National Taiwan University, Taiwan)

PROFESSOR WEN-CHEN CHANG
(College of Law, National Taiwan University, Taiwan)

PROFESSOR SHIH-TONG CHUANG
(College of Law, National Taiwan University, Taiwan)

* Professor for International Law and Human Rights, School of Law, University of Vienna; Director, Ludwig Boltzmann Institute of Human Rights, University of Vienna, Austria; Former United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment. Dr. Iuris, University of Vienna (1973). E-mail: manfred.nowak@univie.ac.at.

INTRODUCTION

Human rights have always been an important issue worldwide. It is an honor for National Taiwan University College of Law to have Professor Nowak, a former UN Special Rapporteur on Torture, to provide an overview on the creation of the World Court of Human Rights. Based on the historical context, Professor Nowak discusses the rationale behind the creation of the World Court of Human Rights and provides eight reasons for the need in its creation. In response to the issues raised by Professor Mab Huang and other participants, Professor Nowak further explains the jurisdiction of this court and suggests ways in which Taiwan may participate in this regime if created in the future.

I. OPENING REMARKS

PROFESSOR JIUNN-RONG YEH

This is the second lecture of the Lei Chen Memorial Trust Fund lecture series. National Taiwan University College of Law is honored to have Professor Manfred Nowak with us. The lecture today is on the creation of an international human rights court, and the ideas and motivations behind this significant effort.

I am very pleased to have the opportunity to moderate this session. Also with us today are four local discussants. Let me introduce them one by one. From my left, we have Professor Jau-Yuan Hwang, a professor with this law school. Next is Professor Wen-Chen Chang, the person behind all the cooperation with the Lei Chen Memorial Trust Fund. Next is Professor Mab Huang from Soochow University, a very senior and respected professor in the area of human rights in Taiwan. Also joining us is Professor Chuang Shih-Tung, who just joined our law school this fall.

I think all of us recognize that there have been serious, widespread human rights abuses and violations. These are issues that have come with human civilization, the dark side of modernization, and industrialization and we have to face up to them. In the past, and even now, these problems have to do with war, with political conflicts, and with dictatorship. In recent years, as we have learned, some problems have to do with our structure of industrialization, our marketplace, and even our international trade system. Additionally because of climate change, there has been more and more serious extreme weather affecting human lives and our environment. A great many people have been victimized and become climate refugees seeking humanitarian assistance.

In the context of human rights, we are confronting with a wide array of

complex issues. How to tackle with these issues is indeed a daunting task for all of us. One approach is to create institutions such as courts. We have seen some regional human rights courts in Europe or in America that have functioned effectively. But whether it is possible, feasible, or even desirable to create an international court of human rights certainly requires further thoughtful articulation. Now, ladies and gentlemen, please join me to welcome Professor Nowak to discuss this critical and important topic.

II. SPEECH

PROFESSOR MANFRED NOWAK

Thank you, Professor Yeh and distinguished panelists. As professor Yeh has already mentioned in his introduction, there are many strong challenges to the international protection of human rights today. The issue on creating the World Court of Human Rights is only a small part in a bigger puzzle. The United Nations is in need of major reforms in many areas, starting with the Security Council and then the Human Rights Council that require certain ‘face-lifting.’ These are all major challenges, but today I would place my focus on the creation of the World Court of Human Rights and have my discussions in context of other developments.

1. *A Historical Overview of International Human Rights and Institutions*

In the 1940s when the United Nations (UN) was created, security, development and human rights were the three most important aims and objectives of this global institution. What was the vision of states and eminent individuals at that time working in the Human Rights Commission, such as Eleanor Roosevelt? I think, in their view, the task of the UN is to avoid another Holocaust as they had seen during the World War II.

The Human Rights Commission¹ was the main political body established as a specialized commission under the Economic and Social Council (ECOSOC) in accordance with Article 68 of the UN Charter.² The status of this commission revealed a certain difference between human rights bodies and other UN institutions. For security, we have the Security Council

1. The United Nations Commission on Human Rights (UNCHR) was a functional commission within the overall framework of the United Nations from 1946. However, the UN General Assembly voted overwhelmingly to replace UNCHR with the UN Human Rights Council on 15 March 2006.

2. U.N. Charter art. 68 (“The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.”).

that was vested under Chapter 7 with the power to make binding decisions including economic and other sanctions under Article 41 and the authorization of military force under Article 42.³ The recent use of military force in Libya was such an example. The Security Council is made into a very strong body dealing with international peace and security. For development issue, the second main objective, the ECOSOC was created as one main political body to deal with development issues, along with many other specialized agencies such as the International Labor Organization (ILO), the International Health Organization (IHO), United Nations Educational, Scientific, and Cultural Organization (UNESCO), and many programs such as the United Nations Development Program.

The third objective was on the protection of human rights, a subject matter not quite supported by states as it was seen as interfering with internal affairs of states. Consequently, the institution created to be in charge of this task was not provided with the status as it should have been—one of the main political organs of the United Nations—but instead was placed just as a little commission under ECOSOC with no major powers. The first task of this Commission was to draft the Universal Declaration of Human Rights (UDHR) which was adopted in 1948.⁴ The Commission developed all kinds of visions. For instance, it was recognized that in order to protect human rights, a special body was in need, and this body should not be just somewhere in the secretariat, but the status should be similar to the High Commissioner for Refugees that was already in existence during the time of the League of Nations. As a result, a High Commissioner for Human Rights was created.⁵

During the Cold War, however, those more visionary concepts on the protection of human rights were buried because the two main global powers, the Soviet Union and the United States, could not agree on major

3. U.N. Charter art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”); U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

4. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

5. The High Commissioner for Human Rights is the principal human rights official of the United Nations. The High Commissioner heads Office of High Commissioner for Human Rights (OHCHR) and spearheads the United Nations' human rights efforts. We offer leadership, work objectively, educate and take action to empower individuals and assist States in upholding human rights. We are a part of the United Nations Secretariat with our headquarters in Geneva. The current UN High Commissioner for Human Rights, Navanethem Pillay, was appointed by the General Assembly on 28 July 2008.

innovations. Yet by the end of the Cold War in 1989, because of the revolutions in Eastern Europe and elsewhere, there was emerging a new impetus for human rights. That was the reason that the United Nations agreed to hold a second world conference on human rights. The first one was in 1968 in Tehran. With the end of the Cold War, a new world conference of human rights was surely in need. Many people at that time even said that we could finally implement Article 28 of the Universal Declaration.⁶ It was to further this vision that there was held the World Conference of Human Rights in Vienna in 1993.

I remember this conference very well because my institute was charged with the task of coordinating NGO's inputs. Whoever works in the NGO field, including my friend, Mr. Peter Huang, who is here as representative of the Lei Chen Memorial Trust Fund, knows it well: coordinating NGOs is an impossible task. These organizations do not like to be coordinated. At the time, we had more than 1,500 NGOs with more than 3,000 representatives coming to Vienna. It was a challenging task. But still, the NGOs had a major impact, and some of the big ones like Amnesty International said clearly that there must be an institutional outcome, or otherwise Vienna failed. That was the story behind establishing a high commissioner for human rights.

On the last day of the conference, June 25, 1993, there was an Asia-related conflict between universalists and those who were more inclined to uphold so-called Asian values indicating that they did not wish to have a high commissioner. But, they finally agreed. There were many important compromises. The Asian states eventually accepted that human rights were universal, and that it was a legitimate concern of the international community to protect human rights. On the other hand, western states had to agree that all human rights were indivisible and interdependent. That would mean that economic and social rights were as important as civil and political rights.

There were many important compromises and decisions in Vienna, but the most important one was to replace the former Center for Human Rights with an independent body called the United Nations High Commissioner for Human Rights. We have had some outstanding holders on this position. Mary Robinson,⁷ for example, became the second High Commissioner and was very outspoken on human rights and criticizing governments in defiance with human rights protection. She actually managed, after her first term, to have all the permanent members of the Security Council against her. Not

6. Universal Declaration of Human Rights art. 28, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948) ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.").

7. Mary Robinson, the seventh and first female President of Ireland (1990-1997), and she served as United Nations High Commissioner for Human Rights from 1997 to 2002.

only the United States, People's Republic of China and the Russian Federation, but also the United Kingdom and France were not too eager to invite her for a second term. I think that was the best one could achieve as a High Commissioner for Human Rights: to be balanced and objective. In addition, we also have had Louise Arbour, a former prosecutor at the International Criminal Tribunal for former Yugoslavia (ICTY),⁸ and the present mandate holder, Navanethem Pillay from South Africa.⁹ I think these commissioners perform outstanding jobs on this position.

The second revolutionary and visionary idea came after the Nuremberg and Tokyo tribunals in the end of the World War II. It was about the need of a permanent international criminal court to hold war criminals as well as criminals of human rights violations accountable individually before an international criminal court, which could be found already in the 1948 Genocide Convention of the United Nations.¹⁰ During the Cold War, however, there was no way to have the Genocide Convention fully implemented. After 1989, however, the new spirit and atmosphere prevailed even to the extent that the United States made a proposal to the Security Council in 1992 to establish an international criminal tribunal for the former Yugoslavia. In reaction to some of the worst atrocities—the first genocide in Europe exactly fifty years after the Nazi Holocaust in Bosnia and Herzegovina, the international criminal court was established by the resolution of the Security Council under Chapter 7, a binding resolution.¹¹ Many international lawyers felt that the Security Council went beyond its powers, but on the other hand, it was the highest body that decided itself to what powers it had been entitled to. This was the creation of the ICTY that now still exists, and has been successful. Military and political leaders, not only those of the Bosnian Serbs but also of the Croats and Muslims, have been brought to The Hague, Netherlands, where the ICTY is located. Those brought before trial included former President Slobodan Milošević of Yugoslavia, Mr. Karadzic, the political leader of the Bosnian Serbs, and Mr.

8. Louise Arbour, a former justice of the Supreme Court of Canada and the Court of Appeal for Ontario and a former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda. She has since July 2009 served as President and CEO of the International Crisis Group. She served as United Nations High Commissioner for Human Rights from 2004 to 2008.

9. Navanethem Pillay, the first non-white woman on the High Court of South Africa, and she has also served as a judge of the International Criminal Court and President of the International Criminal Tribunal for Rwanda. Her four-year term as High Commissioner for Human Rights began on 1 September 2008. *See supra* note 5.

10. Convention on the Prevention and Punishment of the Crime of Genocide art. VI, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (“Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

11. S.C. Res. 827, ¶ 7, U.N. Doc. S/RES/827 (May 25, 1993).

Mladić, the military commander who was primarily responsible for the Srebrenica genocide,¹² among other crimes.

In 1994, genocide broke out in Rwanda, which was much more severe with 800,000 people slaughtered for purely ethnic reasons in a few months. The UN, however, was standing by, and did not intervene as it should have done. It was the new government of Rwanda that took the initiative to establish another international tribunal for Rwanda (ICTR), paving the way for the Rome Statute establishing a permanent International Criminal Court in 1998. A very highly contested issue for fifty years suddenly could be solved. In 1998, the Rome Statute of the International Criminal Court was adopted. However interestingly, the government that had originally initiated this whole development, the United States of America, voted against the Rome Statute. It was not the Bush administration but rather the Clinton administration that voted against it, since the government came to realize that the U.S. citizens might also be held accountable for major human rights crimes they might commit all over the world.¹³ Indeed, the very idea of an international criminal court lies in that any individual, whatever his or her nationality is, can be held accountable for the most serious international crimes. The Bush administration even launched a crusade against the International Criminal Court. Yet, a great many states have ratified the statute, and it became an accepted and respected international institution that has been working since 2003 in the city of The Hague.

The third major proposal for a World Court of Human Rights was put forward by Australia in 1947, who thought that, firstly, a declaration was needed, which came into establishment within three years—the Universal Declaration of Human Rights. The second step was a United Nations Convention on human rights, a binding treaty, which must be supervised by a court, which would enable individuals to file a complaint if they feel that their human rights have been violated.¹⁴ The logic was shared by many nations at the time when it was proposed. Among these three major institutional visions, however, the World Court of Human Rights remained the only one that had not been realized even after the end of the Cold War, since many may argue that it is still too utopian or even revolutionary for the UN to adopt such a comprehensive human rights treaty monitoring regime. Today, however, such arguments are no longer convincing. For instance, at the last Human Rights Council, some less powerful governments like

12. During the Bosnian War, more than 8,000 Bosniaks (Bosnian Muslims), mainly men and boys, in and around the town of Srebrenica in Bosnia and Herzegovina were killed by units of the Army of Republika Srpska (VRS) under the command of General Ratko Mladić.

13. HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 1291-310 (3d ed. 2007).

14. See Herbert W. Briggs, *Implementation of the proposed International Covenant on Human Rights*, 42 AM. J. INT'L L. 389, 395 (1948).

Uruguay, Switzerland, and the Maldives indicated their political will to support the creation of a World Court of Human Rights.¹⁵

2. *Eight Reasons for Establishing a World Court of Human Rights*

There are eight reasons for establishing a World Court of Human Rights. The first is in regard with rights and duties, known well to lawyers: if you speak of a right, then there is a right holder. Where there is a labor right, a social right, a civil right or whatever else, there is always a duty bearer on the other hand. If I have a right, somebody else must have a duty. He or she owes something to you because you are a rights holder. If the duty bearer is not living up to his or her obligations to honor your rights, then you should have a remedy, usually a judicial one. That is the logic of rights and duties. Naturally there is a need for an institution that can deliver a binding judgment in regard to rights and duties. If I have a contract with you, for instance about the purchase of a car, and if I pay you the money but you do not give me the car, I must have somebody to whom I can go and say, "Please force him to live up to his contractual obligation." That is the simple logic of rights, and it is also more or less in all legal systems in the world. It is in civil law as well as in common law.¹⁶

We always hear that human rights are the most important rights that we have. These rights are enshrined at the level of constitutional and of international law. Why, then, should the above simple logic of rights and duties not apply to human rights in the sense that having a world court of human rights to address the remedy of human rights violations? We still hear from many governments that this idea is controversial or too idealistic. I think the UN may be still entrenched with a certain Cold War spirit. During the decades of the Cold War, in order to have human rights treaties concluded, it was necessary to have agreements between the Western and socialist countries. It was a difficult task. Many countries did not like to have binding international human rights agreements. For instance, the Soviet Union never liked international monitoring, considering it an interference with national sovereignty. Hence, individual complaints on human rights violations have not been included into any of the UN human rights treaties as a mandatory procedure. In terms of the civil and political rights covenant, we had an optional protocol already in 1966 as an ultimate compromise, which was very difficult to achieve. The protocol was put in a separate document

15. Manfred Nowak et al., *Protecting Dignity: An Agenda for Human Rights*, UDHR 60 (Dec. 19, 2011), http://www.udhr60.ch/agenda/ENG-%20agenda_print.pdf.

16. See Manfred Nowak, *Eight Reasons Why We Need a World Court of Human Rights*, in *INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 697-98* (Gudmundur Alfredsson et al. eds., 2009).

because the Soviet Union would not have accepted the system of “individual complaints” nor ratified the covenant including that system. This was the spirit of the Cold War.¹⁷

The decisions of individual complaints, by an expert body instead of by a court, are termed as “views” rather than “judgments”. The complaints are not complaints, petitions or applications in courts. They are called “communications,” the weakest language imaginable. It is kind of anachronistic that, twenty years after the end of the Cold War, we still have the same five geopolitical groups within the UN: the Asian region, the African one, and the Latin American one, in addition to the Western one and the Eastern European one. Notably, many Eastern European countries are now members of the European Union (EU). When diplomats in Geneva have their pre-consultations, they first go to the EU—the twenty-seven countries from Portugal to Lithuania. They go to lobby the caucus of the EU around eight or nine o’clock, and then at nine or ten, these diplomat split up into the above five groups—hence the Czech ambassador proceeding to the Eastern European group, and the Austrian to the Western group.

Binding judgments by a court on human rights litigation are better than “views” that are not binding. As our moderator, Professor Yeh, has already mentioned, the idea of having a human rights court is nothing new especially in Europe. The Europeans were the first to adopt a binding human rights instrument on the basis of the Universal Declaration of Human Rights adopted in 1948. Two years later, the European Convention on Human Rights (ECHR) was adopted. It deals only with civil and political rights because the institution—the Council of Europe—that adopted this Convention was, classically, a Western organization. Yet, at least in implementing these civil and political rights, the treaty clearly dictated that the final decision on an individual complaint should be with the European Court of Human Rights (ECtHR). In 1998, due to the fact that the court had been flooded with cases, the ECtHR was reformed into a permanent court with fulltime, professional judges, substituting for the previous system in which judges fly to Strasbourg, France for a few weeks per year. The ECtHR now consists of judges who sit in Strasburg all year round. They have no other works because they have enough to do -more than 150,000 cases pending, from which they have been deciding more than 30,000 cases per year. This means that there are about 800 million people in Europe that have the right to launch complaints directly to a professional human rights court.

The Inter-American Court of Human Rights¹⁸ was created under the

17. See Manfred Nowak, *The Need for a World Court of Human Right*, 7 HUMAN RIGHTS L. REV. 251, 252 (2007).

18. The Inter-American Court of Human Rights, which is an autonomous judicial institution of the Organization of American States established in 1979, and whose objective is the application and

American Convention on Human Rights in 1969, and developed some of the most significant judgments in the American hemisphere—primarily in Latin America—because the United States and Canada have not ratified this convention. In the African Union, there is the African Charter of Human and Peoples' Rights, now with an optional protocol which recently led to the creation of an African Court on Human and Peoples' Rights. In the Asia-Pacific region, there is not yet any international political organization dealing with human rights, and thus you do not have any monitoring bodies such as a human rights court here. Although there is now the body of the ASEAN Charter,¹⁹ but it is not yet a functioning regional organization dealing with human rights, nor having any court responsible for handing down judgments on individual human rights.

The UN Commission on Human Rights was replaced in 2006 by the Human Rights Council because, allegedly, the Commission had been too politicized and too selective. However, the Human Rights Council now is even more selective, more politicized than the Commission ever was. One of the institutional advantages of the Human Rights Council is the system of the Universal Periodical Review (UPR): every member state of the UN is subject to a peer review by other states. In principle, states are not the most objective evaluators of the factual human rights situation in other states. More often than not, the UPR is a highly politicized exercise. On the other hand, the UPR process is also based on independent reports. One report is of the state under review, but then the High Commissioner for Human Rights also prepares reports on the basis not only of reliable NGO information, but also of information from the UN treaty bodies and special procedures.²⁰ In

interpretation of the American Convention on Human Rights and other treaties concerning this same matter. It is formed by jurists of the highest moral standing and widely recognized competence in the area of Human Rights, who are elected in an individual capacity.

19. The ASEAN Charter is a constitution for the Association of Southeast Asian Nations (ASEAN). It was adopted at the 13th ASEAN Summit in November 2007, and the ASEAN Charter entered into force on 15 December 2008. The ASEAN Charter has become a legally binding agreement among the 10 ASEAN Member States. Charter of the Association of Southeast Asian Nations, Nov. 20, 2007, 2 J.E. ASIA & INT'L L. 299 (2009), *available at* <http://www.aseansec.org/publications/ASEAN-Charter.pdf>.

20. The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed. The UPR was created through the UN General Assembly on 15 March 2006 by resolution 60/251, which established the Human Rights Council itself. *See* G.A. Res. 60/251, ¶ 5, U.N. Doc. A/RES/60/251 (Mar. 15, 2006), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf. It is a cooperative process which, by 2011, will have reviewed the human rights records of every country. Currently, no other universal mechanism of this kind exists. The UPR is one of the key elements of the new Council which reminds States of their responsibility to fully respect and implement all human rights and

my opinion, if there were a World Court of Human Rights, it would be the court that provided binding judgments that a country violated certain human rights, and with this system, the UPR would make much more sense. The highest political body, the Human Rights Council, should supervise and enforce the judgment of the court, similar to the Council of Europe. If the European Court of Human Rights renders a judgment that Austria had violated certain human rights, the Committee of Ministers of the Council of Europe is in charge of supervising whether or not Austria had complied with the judicial decision.

Since the 1990s, there has been a general consensus that, laden with shortcomings, the treaty bodies as we have today are in need of reform. The state reporting system is totally overloaded. However, every type of reform that has been brought forward, including a super committee—merging all of the UN treaty monitoring bodies into one super committee—would all need an amendment by their respective treaties, a task so difficult that it is probably a mission impossible.

It would be much easier to create a World Court of Human Rights by drafting a new treaty, and then it is up to the states to ratify the treaty. The World Court would then gradually take over functions of the treaty bodies. For instance, if a state is a party to the first Optional Protocol to the International Covenant on Civil and Political Rights, that means the state, for example Austria, would now ratify the statute of the World Court of Human Rights. Henceforth, Austria would subject itself to the jurisprudence and the jurisdiction of the World Court of Human Rights.²¹

The principle of complementarity under the statute of the International Criminal Court (ICC) means that as soon as a state ratifies the Rome Statute, it accepts its jurisdiction. Yet the statute provides that the ICC is only competent if the states themselves are either unwilling or unable to really deal with the respective human rights or war criminals.²² In this way, the ICC can never deal with all criminals in question. The principle of complementarity is also to strengthen national capacities to enforce international criminal law, the formation of which has been an ongoing process, with an increasing number of states creating its own national criminal court for genocide and crimes against humanity and training their judges. If these national courts perform their jobs very well, the ICC would have only little work to do.

fundamental freedoms. The ultimate aim of this new mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur. *Universal Periodic Review*, U.N. HUM. RTS. (Feb. 21, 2012, 3:00 PM), <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.

21. See Nowak, *supra* note 16, at 703-04.

22. Rome Statute of the International Criminal Court art. 17(1)(a), July 17, 1998, 2187 U.N.T.S. 90.

The same principle of complementarity would also apply here in the context of human rights violations. If we had a World Court of Human Rights, states would be encouraged to improve domestic judicial systems for dealing with human rights by means of constitutional courts or special human rights courts. In this statute, there is even a global fund for national human rights protection systems to assist states to improve their domestic, judicial implementation systems for human rights.²³

In a globalized world, states are only one of the main actors. Many transnational corporations have a budget much bigger than that of smaller states. Many global non-state actors, not only transnational corporations but also international organizations, are much more powerful than nation-states. In principle, the UN is bound by UN human rights treaties, but when it comes to holding the UN accountable, there may be a lack of mechanisms since the UN itself is not party to any of those treaties. The same is true if Shell, Exxon, Nike or any of the big transnational corporations violates human rights. While there is corporate social responsibility recognized in the Global Compact,²⁴ it would still be very difficult to hold any of those corporations accountable. Some civil courts have made an attempt, for instance, under the Alien Tort Claims Act in the United States,²⁵ but there has not yet been really successful litigation. With the World Court of Human Rights, the members of the Global Compact would be encouraged to voluntarily subject themselves to the jurisdiction of the court. The same goes to international organizations such as the World Bank, the UN, and the North Atlantic Treaty Organization (NATO), among others. There should be certain incentives for these organizations and corporations to accept the jurisdiction of the World Court of Human Rights. For a country like Taiwan, if even transnational corporations can accept the jurisdiction of the World Court, states that are not yet member states of the UN, should also be entitled to accept the jurisdiction of the Court.²⁶

There are guidelines and principles of the rights of victims to remedy and reparation. This old idea has been recognized and codified in that if one is a victim of a human rights violation, he or she deserves more than a simple judgment saying “yes, you are a victim.” One would need reparations for the harm suffered, whether it is rehabilitation of torture victims in a

23. JULIA KOZMA, MANFRED NOWAK & MARTIN SCHEININ, *A WORLD COURT OF HUMAN RIGHTS: CONSOLIDATED STATUTE AND COMMENTARY* (2010).

24. The United Nations Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.

25. The statute allows United States courts to hear human rights cases brought by foreigner for conduct committed outside the United States. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789).

26. KOZMA ET AL., *supra* note 23.

rehabilitation center, restitution if one's property has been expropriated without good reasons or other forms of satisfaction such as monetary compensation. Up to the present, even the European or the Inter-American Courts are not well equipped to provide human rights victims with proper reparation. With the World Court of Human Rights, we felt that it should have full powers to award the victim adequate reparations.²⁷

Everything discussed above is a private initiative of a few academics and NGOs. We have written a small booklet that included a draft of a full statute for the World Court of Human Rights with a commentary.²⁸ The point is that: it is all prepared; it just needs to be taken up. There was a Swiss initiative by the Swiss Minister of Foreign Affairs on the occasion of the sixtieth anniversary of the Universal Declaration of Human Rights in 2008. I was the rapporteur of a panel of eminent persons chaired by Mary Robinson, and experts from all regions were invited. We drafted an agenda for human rights,²⁹ like the Agenda for Peace from 1992 and the Agenda for Development. In this agenda, we deal with many issues that Professor Yeh had just brought up such as global poverty, climate change, among others. There are more and more states that became interested in this Agenda for Human Rights as well as the idea of the World Court of Human Rights. The International Commission of Jurists,³⁰ for instance, stated its willingness to take it up and lead the way as an NGO. There may be more dynamics, and finally we need to go through a drafting process in the Human Rights Council, or to hold a special conference like the Rome Conference for the ICC. I think the best way would be an adoption by a resolution of the General Assembly of the UN as a treaty to be ratified by states. Thank you very much. I am very interested in your ideas from the panel of distinguished discussants and questions and comments from the audience.

III. COMMENTARY

A. PROFESSOR JIUNN-RONG YEH

Thank you very much, Professor Nowak. It was a very informative and

27. See Nowak, *supra* note 16, at 705-06.

28. KOZMA ET AL., *supra* note 23.

29. Nowak et al., *supra* note 15.

30. The International Commission of Jurists (ICJ) is an international human rights non-governmental organization. The Commission itself is a standing group of 60 eminent jurists (judges and lawyers). The International Commission of Jurists is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The ICJ has played a seminal role in establishing international human rights standards and working towards their implementation. Through pioneering activities, including inquiry commissions, trial observations, fact-finding missions, public denunciations and quiet diplomacy, the ICJ has been a powerful advocate for justice.

insightful lecture. It illustrates your rich experience and great devotion to this area. This undertaking is of great importance, and the NTU law school is very proud to be involved in this effort.

Let us begin with the discussion. We have four discussants. I hope to reserve some time for the floor. In order to do that, I would hope that each of our discussants talk for about eight to ten minutes, so we can save some time for the audience. I arbitrarily assign Professor Huang Mab to begin.

B. PROFESSOR MAB HUANG

Seven years ago, I had twice the privilege of meeting Professor Nowak, and since then, I have followed to some extent his career as a scholar, a practitioner and a rapporteur. I admire his work very much. Now Professor Nowak has given us a very well thought out proposal and a very skillfully crafted statute for the World Court of Human Rights.

I only have three comments. The first comment is that Professor Nowak emphasized, as in some of his earlier works, that the World Court is a purely voluntary measure on the part of the states. In other words, the World Court is a voluntary enterprise. Professor Nowak said that he has had quite substantial supports from Europe and from Latin America, but I am thinking about those people most in need of protection of their human rights, for example those in Asia living under an authoritarian government. Would they benefit from the World Court? Given the situation we are confronted with in Asia, it is not very likely that many of the authoritarian governments would opt in.

The second comment is about the Human Rights Council. So far, and I think Professor Nowak would agree, the appointments to the Human Rights Council have not been as excellent as would have been expected. Given this deficiency and the fact that as Professor Nowak has mentioned, the Council is so highly politicized, I have some reservations on whether we can really expect the Council to enforce binding judgments of the World Court of Human Rights with any sense of justice and fairness. I do not think we can really at this time compare the Human Rights Council with its counterpart, the European Council. We need to face up to the weaknesses of the Human Rights Council.

Referring to the Universal Periodical Review, I think in one of your papers—I do not know if you had in mind the exercise in 2009 of the Universal Periodical Review—you mentioned that in some cases, for instance the People's Republic of China, the exercise of the periodical review is almost a farce. Given this kind of discouraging performance of the Council, how much can we expect when it comes to the enforcement of the judgments of the Court?

Thirdly, in your proposal, Taiwan would be eligible for accession to the World Court of Human Rights. I would like to hear more about what Taiwan needs to do, how to get in, and what obstacles Taiwan would face in opting in. Thank you.

C. PROFESSOR JAU-YUAN HUANG

Thank you, Mr. Chairman, Professor Yeh and our distinguished speaker, Professor Nowak. It is my pleasure to be here and share some thoughts on this wonderful presentation of your ideas about a World Court of Human Rights. I only have one comment and two questions.

If I can summarize my response in one sentence, I may simply say that this is music to my ears. I fully endorse the idea of having a World Court of Human Rights in order to strengthen the current human rights treaties and the communication and compliance procedures as practiced by a variety of human rights treaty monitoring bodies. I do not have any trouble with the complementarity approach, as suggested by you, to invite states around the world to voluntarily opt into this new mechanism.

However, I do have some technical concerns. Here is my first question: what would be the institutional relationship between the World Court of Human Rights and the current international and regional courts? I am talking not only about regional courts of human rights like the European Court of Human Rights, the African Court of Human Rights or the American Court of Human Rights, but also about the ICJ and the ICC. Let me begin with the regional courts of human rights. Supposed Germany or Austria joins this new World Court of Human Rights and accepts its jurisdiction on individual complaints. Then the human rights victims in Germany or Austria would have two choices of courts for their remedy: the European Court of Human Rights and the World Court of Human Rights. If both courts grant jurisdiction on the same case, it would lead to some procedural problems. Should individuals go to the European Court of Human Rights before he or she goes to the World Court, or can he or she simply choose wherever he or she would like to go? Should he or she go to the regional court first, and then if he or she loses, then go to the World Court? In that sense, would the World Court evolve, in a certain way, into a kind of Supreme World Court or World Constitutional Court?

My above question applies to regional courts of human rights and international courts, for example, the ICJ, as well. I noticed that, in your draft statute, the Genocide Convention of 1948 is listed in Annex One. Thus, for those states that accept the jurisdiction of this World Court, the Genocide Convention would also fall within the jurisdictions of this new World Court. However, Article 9 of the Genocide Convention gives the ICJ the jurisdiction

to decide the cases between states involving the Genocide Convention. Furthermore, in your draft statute, you also mention third-party complainants, by which you mean a kind of inter-state complainant. What if we have a controversy over a genocide case? Both the ICJ and the World Court would have concurrent jurisdiction over the same issue. What would be the relationship between the two courts? Or, is there any resolution to this competition or, possibly, the jurisdictional conflict?

My second question should be an easy one and is not technical in nature. This new Court is complimentary in terms of its jurisdiction. Hence, if realized in the future, it would represent a significant progress toward the ultimate form of judicial development of international human rights and in international law. Having said that, I find this proposal is still a very humble and modest one. My question is: would you like this new Court to remain for a long period of time, or even forever? If there is a chance in the future, would you wish to improve it to have greater jurisdictions, or even a sort of compulsory jurisdiction over human rights matters? As we all know, the ICJ has been criticized for its lack of compulsory jurisdiction over international disputes. That might be a factor leading to a kind of inability to settle international disputes over the years. In the long run, therefore, I would like to hear what your ultimate idea of a World Court of Human Rights is. Do you envision an even more powerful World Court of Human Rights with compulsory jurisdictions, as you mentioned, not only over the states but also over non-state entities and NGOs? In conclusion, this proposal is indeed a work of inspiration. I very much look forward to its realization.

D. PROFESSOR WEN-CHEN CHANG

Thank you, Professor Yeh, the chair, our speaker, Professor Nowak, and all the distinguished guests and commentators. I have three suggestions to the proposal of creating the World Court of Human Rights. The first is about how to create and organize this World Court of Human Rights. In the end of your lecture, Professor Nowak, you suggest the best—and perhaps most feasible—way to establish this court is to have the UN Assembly pass a resolution to propose the Statute of the World Court of Human Rights as a treaty to be ratified by states. I think while this is feasible, it is a rather conservative way of creating such a court. I would instead propose that this court be created by a simple resolution of the UN Assembly, and that it would not have to be on a statute- or treaty-based. I have the following reasons for such an alternative method. I think the UN has had many treaty-based international human rights mechanisms implemented by courts. Professor Hwang already asked you a very complicated question about how these courts in the future may work with one another. It is time now for a

kind of charter-based human rights courts to be established within the UN, and such a court must have the jurisdiction over rights that have already enjoyed the status of *jus cogens* or customary international law. In my view, if any right enjoys *jus cogens* or customary international law status, it is universal, and hence should be enforced strongly by a World Court of Human Rights. To enforce such rights, you need not have the consent of states because those rights are not to be violated under any circumstances by any persons or by any states. Therefore, I would propose that if we create a World Court of Human Rights, we must entrust this Court with the enforcement of those truly universal rights. If the statute for the World Court of Human Rights would be ratified by member states, as Professor Nowak suggests, the member states must be willing to receive the jurisdiction of the World Court of Human Rights over the rights that enjoy the status of *jus cogens*³¹ and customary international law.³² Under such a proposal, the answer to professor Hwang's question would be: the World Court of Human Rights would enjoy primacy on the rights of *jus cogens* and customary international law over other regional or specified courts. That is my first comment.

The second comment is reflected upon my observation of how rights are undermined or infringed in domestic jurisdictions, and how they often cannot obtain their legal remedy within the domestic legal systems. One key factor is often concerned with standing to sue. When their rights are infringed, people often have difficulty claiming their rights in domestic courts because of very narrowly construed jurisprudence on standing to sue or access to courts. If we would have the World Court of Human Rights, the principle of standing to sue, or the expansion thereof, would be on the top of the concerns with this Court. This leads to some concerns about the proposal of Professor Nowak, because it still requires the rights claimer to exhaust domestic remedy. That would actually create a paradox because when individuals' rights are infringed, they often find their rights are not recognized as justiciable rights or not granted with legal remedy in their domestic legal system. In that case, they should be granted with standing to sue at the World Court of Human Rights, as procedural substitute to their domestic courts. This would not be a difficult task for the World Court of Human Rights should it formulate a lenient approach to the understanding of

31. *Jus cogens* means a peremptory norm of general international law, a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". STEINER ET AL., *supra* note 13, at 132-45.

32. Art. 38(1)(b) of the Statute of the International Court of Justice describes custom as "evidence of a general practice accepted as law. Custom is generally considered to have two elements: state practice and *opinio juris*. See generally e.g., BIRGIT SCHLUTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW 10-11 (2010).

rights and standing to sue.

My last point is concerned with Taiwan. I am very fond of the proposal in that the World Court of Human Rights extends its jurisdiction even to transnational corporations, and states are not the only duty bearer in this court. I like to put forward an even more radical proposal extending jurisdictions to subunits of a federal states or autonomous regions of any states. Today, many states adopt a federal system or allow greater autonomies to their subunits. The state of California or New York in the United States, Scotland with the United Kingdom, or Hong Kong Special Administrative Region with People's Republic of China provides good examples. These subunits or autonomous regions must be also eligible for participating the World Court of Human Rights. If that were the case, the Tibetans, for example, regardless of their complicated (national or ethnic) relationship with People's Republic of China, could go to the World Court when their rights are violated. The same protection can be extended to the people in Taiwan or any foreigners in Taiwan. In this sense, the World Court of Human Rights would really function with complimentary jurisdictions to other regional and specified courts.

In conclusion, I would like to thank Professor Nowak once again for bringing this proposal to the audience in Taiwan, and I believe this idea will be widely, deeply, and thoroughly discussed here even after today's lecture.

E. PROFESSOR SHIH-TUNG CHUANG

Thank you Professor Yeh, the chairperson, Professor Nowak, our distinguished speaker, and Professors Mab Huang, Jau-Yuan Hwang, Wen-Chen Chang, and ladies and gentlemen. I am very pleased to be here to comment on Professor Nowak's brilliant speech.

Professor Nowak proposes a noble claim to advocate the creation of the World Court of Human Rights, and this noble claim, in my view, is not only a humanist proposal, but also a decent promotion of the protection of human rights. It is a humanist proposal because Professor Nowak argues that, firstly, that human rights without remedy are an empty promise, and secondly, that the Human Rights Council without a World Court of Human Rights is not a full promise for the promotion and protection of human rights. His decent argument presents a convincing reason, which explains why it is justified that we need a World Court of Human Rights. Inspired by Professor Nowak's noble claim, I attempt to give three remarks to echo his argument, and then offer two questions to invite Professor Nowak to answer. Firstly, I argue that human dignity and human rights are two faces of the human being. Secondly I address the necessary connection between human rights and the rule of law. Thirdly, I attempt to justify the independence of the rule

of law and the World Court of Human Rights. The two questions I would like to pose here are as follows: first, I would like to ask about the state's free decision premise offered by Professor Nowak in his essay, and second, about what Taiwan can do in this noble project.

Let me start from the first remark: human dignity and human rights are two faces of human beings. In my view, human dignity constitutes the moral face of human kind. To justify this argument, I refer to the views of Immanuel Kant and Ronald Dworkin. For Kant, humanity itself is a matter of dignity. In his classical work *The Metaphysics of Moral*, Kant claims that no human being can be used merely as a means, but must always be used at the same time as an end. Kant's view on human dignity, in a word indicates that each person has his or her own moral status, which is above all prices.

To echo Kant's version, Dworkin recently offered a sophisticated argument about human dignity, stating that the concept of human dignity consists of two principles. The first is the principle of intrinsic value, which means that each human life has a special kind of objective value, and the second is the principle of personal responsibility, which means that each person has a moral responsibility to realize his or her own life as a successful life. Both versions of human dignity, though slightly different, confirm the substantive interrelation of moral rights and moral duties. In other words, each person has a moral right to defend his or her dignity, but, at the same time, also needs to undertake the moral duty not to infringe on the moral rights of others. Based on this moral conception of human dignity, it leads us to the argument that human rights constitute the legal face of human beings. That is, human rights are not only the relational aspect of human dignity that justifies the interrelation of moral rights and moral duties; they are also the institutional aspect of implementing human moral rights and duties and the legitimate aspect to enforce a remedy for moral rights violation.

Secondly, based on my first remark, there is a necessary connection between human rights and the rule of law. First of all, I argue that the rule of law is a universal human good because the concept of the rule of law must comprise two meanings: first, the restraint of government tyranny, and second, the preservation of individual liberty. The rule of law, I argue, is a substantive conception. The rule of law as a substantive conception can be developed into three models. First, the minimum model argues that the main aspect of the rule of law is to protect human rights. Second, under the medium model, as a condition of social justice beyond the protection of human rights, the rule of law must also lead to social justice. Finally, the third model defends the maximum conception, which argues that the rule of law should fulfill the requirements of social welfare. Whichever model we prefer, it is, without doubt, that the rule of law has its minimum requirement—namely, the protection of human rights. Furthermore, in order

to strengthen this view, let me refer to one passage in the book titled *The Rule of Law and Human Rights: Principles and Definitions* published by the International Commission of Jurists in 1966.³³ It says that it is essential that men have courts as the last resort to rebel against tyranny and oppression, and human rights should be protected by the rule of law³⁴. For me, the rule of law is the rule of human rights.

The rule of law and the World Court of Human rights are interdependent. First, the rule of law always needs an independent judiciary to defend its goodness, that is, something that restrains government tyranny and preserves individual liberty. Second, since the rule of law as a universal good calls for at least a substantive conception of the rule of human rights, the establishment of a World Court of Human Rights is necessary and legitimate, which supports the claim of the International Commission of Jurists that the World Court of Human Rights is considered to be necessary. This noble appeal has been a board consensus in the community of international jurists.

These are my thoughts on Professor Nowak's noble claim, but before I finish my brief remarks, I would like to offer two questions. The first question is a normative issue: Is a victim of human rights violation entitled to launch a complaint even though his or her state does not ratify the statute of the World Courts of Human Rights, and thereby refuses to accept the binding jurisdiction of the Court? The second question is a practical issue: How can Taiwan play an active role in this noble project? What is your suggestion to us?

Once again it has been a great pleasure for me to hear Professor Nowak's brilliant speech. Thank you for inspiring my thoughts, and also the audience for your kind attention.

IV. GENERAL DISCUSSIONS AND RESPONSE

PROFESSOR MANFRED NOWAK

Becoming Part of the Court

Thank you very much. The question and comments raised above were extremely well argued. I would try to meet the challenge, starting with Professor Mab Hwang's comments.

The idea of World Court of Human Right should be based on the treaty,

33. INT'L COMM'N OF JURISTS, *THE RULE OF LAW AND HUMAN RIGHTS: PRINCIPLES AND DEFINITIONS* (1966).

34. *Id.*

and the treaty needs to be ratified by states.³⁵ Otherwise, states have no obligations to follow the decisions made by the Court. I am not expecting that states that have seriously violated human rights would be the first ones to accept the jurisdiction of the Court. However, it has been a big success on the part of the UN that in this relatively short period of history—a little more than sixty years—we have had not only the two Covenants but also several special human rights treaties that were drafted and adopted with universal ratification. The Convention on the Rights of the Child has 195 state parties,³⁶ and the Convention on the Elimination of Discrimination Against Women has 189.³⁷ The Covenants have more than 160. In other words, there is not one country in the world, including North Korea, which would not have accepted at least two or three of the core treaties of the UN. In addition, there has existed some kind of monitoring mechanism on international human rights, to which states have subjected themselves, such as the Universal Periodic Review. While some claimed that the ICC was a utopia, a great many states have nonetheless ratified the statute of the ICC. It will indeed take some time for the World Court of Human Rights to be realized, but I am an optimist. Eventually, the more number of states ratifying such a treaty, the stronger the pressure gets on those states that have not yet ratified. They would not like to be outsiders.

Monitoring and Compliance under Current Institutions

I fully agree with Professor Mab Hwang's assessment of the Human Rights Council and that the way the People's Republic of China (PRC) dealt with the Universal Periodical Review (UPR) process may be a farce. If you would have just listened without knowing any human rights conditions there, you might have been mistaken that the PRC would be the best champion of human rights in the world because the states speaking in the UPR process all were saying that the PRC was excellent in terms of what they have done, and that there were no problems. When the states more critical of the human rights condition in China would like to speak, the time was already over. It was because those states were too late for the registration, and the representatives for the states befriended with China were already standing in

35. I would come to Professor Wen-Chen Chang's very interesting proposal on possibly a charter-based court later.

36. Chapter IV 11. *Convention on the Rights of the Child*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Mar. 10, 2012).

37. Chapter IV 8. *Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Mar. 10, 2012).

line at six o'clock in the morning waiting to sign in. I could give you many other examples like this.

Nevertheless, there is a new way of monitoring human rights compliance, from which one has to learn the lessons. For instance, in the Human Rights Council review today, this idea of signing in at six in the morning has been abolished. We should have different approaches to ensure that every state and NGO ambitious to speak has the opportunity to do so. In that sense, I agree with you that the Human Rights Council is not the best body to supervise and enforce the judgments of the World Court of Human Rights, but the Council can and has improved its work. To some extent, we should also be fair to the Human Rights Council, which, in the last year, became much less selective and more effective. For instance, it reacted very quickly to the massacres in Libya by expelling Libya from the Human Rights Council for the first time, and also encouraging the Security Council to take action. Similarly, in relation to Syria, the Human Rights Council has taken a strong stance.

Taiwan and the Eligibility

Would Taiwan be eligible for the World Court? Yes, definitely. On the one hand, Article 34 of our draft statute includes an all-states clause. All states are open to give their signatures to ratify.³⁸ “All states” includes not merely the members of the UN but also various other actors. In a footnote of our draft statute, we define the term “entities,” by which—in response also to Professor Chang’s thoughtful remarks—we mean that autonomous communities within states or federal states that exercise a certain degree of public powers should be enabled to accept the jurisdiction of the Court. This would definitely bring in states of the federal states or autonomous regions,³⁹ as well as Taiwan.

Jurisdiction and Complementarity

In response to Professor Jau-Yuan Hwang’s remarks on the institutional relations of the World Court of Human Rights with regional or other courts, in the draft statute we have clarified that, procedurally, one cannot first go to the European Court of Human Rights or Inter-American Court and then to the World Court of Human Rights. If this would be allowed, the World Court would probably be dead from the beginning as it would not make sense and bring oppositions from honorable judges in the regional courts. Today, no

38. KOZMA ET AL., *supra* note 23, at 45 (“The present Statute is open for signature, ratification, accession and succession by all States.”).

39. *Id.* at 82.

forum shopping is already part of international human rights law. Nor can one first go to the Human Rights Committee and then to the Committee Against Torture. For there is a general clause that if the same matter has already been subject to a decision under another comparable international body, then it is to be declared inadmissible by the Human Rights Committee or any other UN treaty bodies, and vice versa. Therefore, I think that it is clear that one has to make up one's mind, and if, for example, a German citizen complains about his right to fair trial, he would probably prefer to go to the European Court of Human Rights because the jurisprudence of the court under Article 6 of the Convention⁴⁰ is much more highly developed than the jurisprudence of the Human Rights Committee under Article 14 of the ICCPR⁴¹. The European Court of Human Rights, however, has a very limited jurisdiction. No economic, social and cultural rights are protected under the European Convention. If Germany would accept the World Court of Human Rights and become a state body, and it like all the European states is a party to both Covenants, it would be better for German citizens claiming the right to food or the protection of adequate standard of living to go to the World Court of Human Rights as the European Court had already declared that social rights were inadmissible. Hence, I think one has to make up one's mind before choosing different forums for her or her rights redress.

More difficult is the question of the relationship of the World Court of Human Rights with the International Court of Justice. However, the International Court of Justice does not have any kind of jurisdiction in relation to individual complaints. Instead, it deals only with states and advisory opinions of the UN bodies. In the genocide case, we had litigation like Bosnia and Herzegovina against Serbia; the victims of genocide, however, can not go to the ICJ, and that is why in the draft statute we have

40. 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. The European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.

41. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://law.moj.gov.tw/eng/LawClass/LawContent.aspx?PCODE=Y0000041>.

eliminated the idea of interstate complaints, so as to avoid competition with the ICJ. In reality, as with what Professor Hwang has mentioned in Article 9 of the Genocide Convention,⁴² you would find in all of the core human rights treaties that if there is a dispute among states on the interpretation of the Convention Against Torture or the Convention on the Rights of the Child, you always can go to the ICJ. It is either because states exclude this by means of reservation, or because there would be specific monitoring bodies that stand in a much better position to supervise states' compliance with the treaties. And in that sense, I do not see any kind of competition between the future World Court of Human Rights and the ICJ. If there were an individual as a victim of genocide—hopefully there would be no more genocide in the future—and launched a complaint with the World Court of Human Rights, and at the same time there were also an interstate case before the ICJ, this would not be a disaster, and I think the two courts would mutually respect each other. Courts have been doing this for a long time. For example, there have been very well argued judgments of the Inter-American Court of Human Rights that took into account the jurisprudence of the ICJ and the jurisprudence of the ECtHR, and vice versa. It is good that we have differences in opinions. There would be sometimes different approaches, and I think it is good to learn from each other, and the best interpretation should finally succeed.

On the issue of complementarity, what Professor Hwang indicated is also my optimal solution. Many states call me utopian; I call myself a pragmatic realist. The draft statute is already a compromise. We had a provisional one that was much more far-reaching with the jurisdiction in relation to the UN. We had many discussions with others, and saw that there was no chance, and thus we made these compromises. For instance, I would also add that every state has to establish its own national human rights courts, which I think would be much better, because then you really ensure that all the treaties you have ratified should be incorporated directly into your domestic legal system. That would enhance the domestic protection of human rights. On the other hand, however, many states claim that they do not want to incorporate these human rights into their domestic judicial system because they adopt dualist systems. As a result, we gave up the kind of utopian ideas and made our compromises.

42. Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”).

Jus Cogens and Standing

I think Professor Chang's idea is very interesting—that we should go much further, and do not even need treaties because *jus cogens* or customary international law is already binding and that we should create a World Court of Human Rights as a subsidiary body of the UN. Indeed, the General Assembly has the power to create various bodies like the Human Rights Council. The problem lies in that no one is really sure if *jus cogens* or customary international law exists, or what it is. If you ask an American scholar, they would say that the Universal Declaration of Human Rights is customary international law, whereas I would say definitely not. Rights such as the prohibition of torture and slavery have acquired this particular status, which might be achieved by changing the jurisdiction of the ICJ, because in principle, that is exactly what the ICJ should do—applying customary international law and *jus cogens*. Perhaps there could be another way of having an individual complaint to the ICJ.

With the standing to sue and the exhaustion of domestic legal remedy, I think if there is a functioning domestic system, why not exhaust it first? Only if the domestic remedies are ineffective can you resort to the World Court because we may hope the domestic systems to improve. But surely we like to avoid shortcomings with rigid procedural requirements. Hence, in our draft statute we include the wording that if the World Court finds that these domestic remedies are not effective, they can also dispense with this requirement.⁴³

In regard with Taiwan, I already answered that Article 48 of the draft statute of the World Court include a all-states clause and also allows the subunits of federal states to participate. Unfortunately, I think that if a state has not ratified, individuals of that state cannot hold it accountable with the World Court. There might be an extraterritorial issue, but it is a different one. Right now, the draft statute only extends to states that have voluntarily subjected themselves to the jurisdiction of the Court and has also ratified the respective human rights treaties. That is the general principle unless we follow Professor Chang's novel suggestion in relation to *jus cogens*.

The Role of Taiwan

What could be the active role of Taiwan? That is a good question. I would be glad to include Taiwan in those who are lobbying for the World Court of Human Rights. In particular, it is significant that Taiwan is a country today that has ratified the two Covenants, but the ratification has not

43. KOZMA ET AL., *supra* note 23, at 35.

been formally accepted by the UN for the reasons you all know. Nevertheless, we hope people living in Taiwan to also benefit from the international protection of human rights. We would therefore very much welcome a World Court of Human Rights that accepts Taiwan as a state party as it might accept transnational corporations or federal states in other parts of the world.

PROFESSOR JIUNN-RONG YEH

Thank you very much, Professor Nowak, for your good will towards Taiwan. Now the discussion is open to the floor. I will try to make sure our audience the chance to talk.

Teresa Chu (Spokesman of Falun Dafa Human Rights Lawyers):

Professor Nowak, the distinguished speaker, I have a very short question about international justice. As a lawyer practitioner for many religions who files individual complaints against state perpetrators, I have three questions. Do you have any plan to help those individuals file collective suits in your draft statute of the World Court? Do you offer legal assistance to individuals with different languages and different cultural backgrounds? According to our discussion above, I think you can fully understand that for us this idea is quite new, so how can individuals understand those complicated mechanisms when they pursue a lawsuit with the World Court? I think those practical problems might need to be overcome.

The second issue is that, as our professors mentioned, the United States of America and China are not member states of the ICC, so do you foresee that the U.S. and China would be subject to the jurisdiction of the World Court? Finally, we have an ICC and an ICJ, and now we have a World Court, so what exactly is the relationship between these mechanisms? I think the individual complainant, the rights holder, would have a hard time understanding which court to go to, and I believe no state would educate their citizens how to file a complaint with these mechanisms as they do not like their citizens to pursue these remedies.

Yi-Li Lee (College of Law, National Taiwan University)

Professor Nowak, my question is, as we know, the United States is a leading country to oppose the ICC. Some officials would like to use the principles of separation of powers to criticize the ICC, arguing that the ICC has no other branch to check and balance with its power. In your opinion, would this be a critical question with the World Court of Human Rights?

Prof. Chih-kuang Wu (Department of Law, Fu Jen Catholic University)

I would like to know whether you agree that a successful court can hardly avoid the fate of being flooded with meaningless cases.

PROFESSOR MANFRED NOWAK

Accessibility

Thank you very much. In regard with collective suits, in the way we drafted it, the court may receive and examine complaints from any person, non-governmental organization, or group of individuals claiming to be the victim of a rights violation. That means also collective suits. I think it is important that those who put forth complaints must claim that they themselves have been suffering from a human rights violation.

With regard to legal assistance, first of all, you do not need a lawyer when you lodge a complaint with the World Court of Human Rights. This has been a principle and the practice in the regional human rights courts. Many applicants in Strasbourg for the ECtHR are represented by lawyers because they received legal assistance with the legal aid system. Also, if you win the case before the ECtHR, you always get, in addition to other reparations, all the cost of your lawyers reimbursed.

Access to regional human rights courts is not really the problem, and the same should be true for a World Court of Human Rights. I would even say that there should be a special fund for assisting states to improve their domestic human rights protection systems, and also have a special fund to assist victims who would like to bring complaints to the World Court of Human Rights. In addition, taken from the ICC statute, we also propose a victim witness protection system. It is very important because the victims often do not dare to bring an international complaint because they are afraid of reprisal.

The Role of the U.S. and China

It is true that the U.S. and China are not parties to the ICC. Some of the actions President Bush has taken in order to undermine the authority of the ICC were just outrageous, pressuring other states not to ratify. That has changed, however. First of all, now it is the Obama administration. And in relation to Sudan, for instance, it was the Security Council that reacted to the situation in Darfur indicting Al Bashir before the ICC.⁴⁴ Sudan has not

44. President of the Republic of Sudan since 16 October 1993. Mr. Al Bashir is allegedly

ratified the Rome Statute of the ICC, so the resolution of the Security Council was required. It was the first time the U.S. recognized that the ICC was in existence. The ICC's jurisdiction was further broadened with the situation in Libya this year. The resolution made by the Security Council was with the vote of the U.S., and China at least did not vote against it but merely abstained. Hence, the U.S. is no longer fighting a crusade against the ICC. I believe it will accept and ratify the statute of the ICC or of the World Court of Human Rights depending on future developments. As you know, the U.S. is among those states that always wish to tell everyone in the world what others should do, but when it comes to subjecting themselves to any kind of international monitoring, they say no. The U.S. probably has a worse record than any other country in the world in ratifying international treaties. It is one of the two states that have not ratified the International Convention on the Rights of the Child, the other being Somalia, which at least has a certain explanation because it does not have a government. The U.S. does have a government, but nonetheless, even the Obama administration has not ratified it as yet. The headquarters of the Organization of American States is in Washington. It was actually a creation by the U.S., but when it comes to ratifying the American Convention on Human Rights, however, it is one of the very few states in the whole hemisphere that has not ratified it, which means that you cannot bring a complaint against the U.S. in the Inter-American Court of Human Rights. Nor did the U.S. ratify the optional protocol of the ICCPR. By no means will the bringing of individual complaints against the U.S. be possible. Hence, I am not very optimistic that the U.S. would be among the first ones to ratify a future statute of the World Court of Human Rights. However, you never know if there will be changes. I do not expect China to be among the first states that ratify the statute of the Court, either; however, China has ratified the Covenant on Economic, Social and Cultural Rights, the United Nations Convention Against Torture, and it is at least contemplating also to ratify the ICCPR. I think the pressure on states to become parties to universal human rights treaties is on the increase, and this even applies to states that are as powerful as the U.S. or China.

criminally responsible for ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including: five counts of crimes against humanity: murder—Article 7(1)(a); extermination—Article 7(1)(b); forcible transfer—Article 7(1)(d); torture—Article 7(1)(f); and rape—Article 7(1)(g); two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities—Article 8(2)(e)(i); and pillaging—Article 8(2)(e)(v). Three counts of genocide: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c). *Situations of Case ICC-02/05*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/> (last visited Mar. 10, 2012).

The World Court vis-à-vis the ICC and ICJ

As for the relationship between the ICC, ICJ and the World Court, as an individual, one can neither go to the ICC nor the ICJ. The ICJ is really the main UN court for interstate disputes on all kinds of international questions. Thus, whenever there is a dispute between two states as to whether or not one is violating treaty law or customary international law, it is the ICJ that decides. It might also relate to genocide or another human rights treaty, but primarily it is about the law of the sea and other issues totally different from human rights issues. The ICC is a criminal court, so it is not that individuals go to the ICC, but the other way around. The ICC is a classical criminal court, holding individuals accountable. In other words, it is the prosecutor who decides whether or not there should be an indictment in relation only to state parties, unless the Security Council transfers the situation to the ICC.⁴⁵ If the court agrees on the indictment, an international arrest warrant will be issued, and then there will be a criminal trial. It has a human rights implication, because crimes against humanity are nothing but the most gross and systematic human rights violations, and war crimes are human rights violations in times of armed conflicts, and genocide is the most serious human rights violation. However, it is not an individual complaint of the victim against the state; instead, it is a public prosecutor and the court that hold individual perpetrators accountable. In contrast, the World Court of Human Rights would be accepting the opposite. It is the individual that can bring a complaint against states or other non-state actors for their violation of International human rights law.

Caseload and Division of Labor with Other Courts

The ECtHR, as many people think, is a victim of its own success. They had to introduce further amendments to the European Convention for Human Rights in order to deal with their heavy caseload. Despite the time and effort it takes, they are managing well. The ECtHR decides in one year much more cases than all the UN treaty bodies have had since the 1970s combined, which would give you an idea of how much the UN complaint procedures are accepted. The Human Rights Committee, which is overall the most successful one, has altogether decided approximately two-thousand cases, about the number of binding judgments by the European Court in one year. I think it will take many years before the World Court is established, and the complaints will eventually come. If the World Court of Human Rights succeeds, then it should engender the positive effect that more and more

45. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

complaints are coming, by then, we should discuss what needs to be done. Professional judges should be dealing with these problems from the very beginning; if it is really becoming a major problem, then the national protection systems should be improved. Human rights protection is primarily state responsibility. Only when states really do not live up to their responsibilities can one as an alternative go to an international court.

Human Rights, Global Governance, and the Court

This brings me to the last question. We are not living in a world where human rights are protected all over, and many people say that they are getting worse and worse, in particular if you take the new huge challenges with globalization and the crises with the financial markets or the climate. From my point of view, the end of the Cold War created a paradigm shift and a new opportunity, and much was achieved in the 1990s. Notwithstanding genocides in Rwanda and other tragedies, it was a successful decade. The fact that human rights and its monitoring body play an important role in the UN peace missions is something unthinkable in the 1980s, to say nothing of other successes of the 1990s like the Millennium Development Goals, among others.

The last decade was a lost decade, however. It has to do with the 9/11 and aftermath. Not only has terrorism become a huge problem, but also anti-terrorism. Other developments, such as the power of the financial markets, also affect human rights. Having experienced another paradigm shift, we are now challenged by enormous human rights problems. The Arab Spring is, for me, comparable to the revolutions in Eastern Europe in 1989. It was a new wave of movements coming in the region with the worst human rights record. All of those countries are under dictatorships where torture and other forms of oppression are rampant and systematic. It is the people there who are saying that we have had enough of dictatorships and oppressions; we want freedom and we want human rights. It is not the Islamic fundamentalists, but instead the young people connected by the Internet with the help of the international community. Hopefully this will have further effects on people in the region, but it might also become a global movement. What you have now is the Occupy Wall Street movement and Global Action Days from Australia all the way to the United States. More and more people are demonstrating for human rights and against the power of the states, the banks and financial markets. They are demonstrating for human rights.

The second decade in the twenty-first century might become, again, a human rights decade, a time to realize that we need to take action. For instance, Tuvalu might be the first nation to disappear because of global warming. This is a global issue because it is not their fault; it is the fault of

all of us and, in particular, industrialized countries, which are creating global climate change. Thus, we should take up the responsibility. You cannot solve these problems on a national scale, so we need global governance based on our main values, that is, democracy, the rule of law, and human rights. That should be the basis for a new international order, but with effective global institutions independent from states. The ICC is the first of such institutions that is independent, and that it is the public prosecutor, instead of states, who decides whether or not somebody should be prosecuted.

The High Commissioner for Human Rights is another of these institutions, representing the conscience against major human rights violations. The World Court for Human Rights would be yet another one. The UN Charter had foreseen already that there would be a United Nations standing military. It would be much better if in the face of gross violations, the Security Council would authorize the use of force under Article 42.⁴⁶ With such a standing military, the Secretary General would not have to ask states “Would you be so kind as to please provide us with troops?” and then have them say “No” or “Yes, but not ground troops”. That UN force would not be US soldiers or Pakistanis; they are the United Nations soldiers in order to implement the collective security system. That is what I mean by global governance, and I think that development in that direction would be coming to us much faster than most of us think today.

PROFESSOR JIUNN-RONG YEH

I am grateful to have found that those people who are pushing forward some great agenda are often equipped with certain optimism and marvelous ideas. Such attitude is indeed vital, especially in the area of human rights and has some implications for Taiwan, since the island is in need of optimism in order to move forward. It takes a lot of energy, however, to raise such critical issues as human rights. The law school is honored to cooperate with the Lei Chen Memorial Fund to host a forum like this. But this is not the end. Another lectures and discussions will be held on Friday and Saturday, and I hope all of you will continue to participate. Thank you for your participation today.

46. U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

REFERENCES

- Briggs, H. W. (1948). Implementation of the proposed International Covenant on Human Rights. *The American Journal of International Law*, 42, 389-397.
- Charter of the Association of Southeast Asian Nations, Nov. 20, 2007, 2 J.E. ASIA & INT'L L. 299 (2009), available at <http://www.aseansec.org/publications/ASEAN-Charter.pdf>.
- Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.
- Convention on the Prevention and Punishment of the Crime of Genocide arts. VI, IX, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.
- Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
- G.A. Res. 60/251, ¶ 5, U.N. Doc. A/RES/60/251 (Mar. 15, 2006). Retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf
- International Commission of Jurists. (1966). *The rule of law and human rights: Principles and definitions*. Geneva, Switzerland: Author.
- International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171. Retrieved from <http://law.moj.gov.tw/eng/LawClass/LawContent.aspx?PCODE=Y0000041>
- International Criminal Court. Situations of Case ICC-02/05. Retrieved from <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/>
- Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789).
- Kozma, J., Nowak, M., & Scheinin, M. (2010). *A World Court of Human Rights: Consolidated statute and commentary*. Vienna, Austria: Neuer Wissenschaftlicher Verlag.
- Nowak, M. (2007). The need for a World Court of Human Rights. *Human Rights Law Review*, 7(1), 251-259. doi: 10.1093/hrlr/ngl026
- Nowak, M. (2008). *Protecting dignity: An agenda for human rights*. Retrieved from http://www.udhr60.ch/agenda/ENG-%20agenda_print.pdf
- Nowak, M. (2009). Eight reasons why we need a World Court of Human Rights. In G. Alfredsson, J. Grimheden, B. G. Ramcharan, & A. Zayas (Eds.), *International human rights monitoring mechanisms* (2nd ed., pp. 697-706). Leiden, the Netherlands: Koninklijke Brill NV. doi: 10.1163/ej.9789004162365.i-728
- Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.
- S.C. Res. 827, ¶ 7, U.N. Doc. S/RES/827 (May 25, 1993).

- Schlutter, B. (2010). *Developments in customary international law*. Leiden, the Netherlands: Martinus Nijhoff.
- Steiner, H. J., Alston, P., & Goodman, R. (2007). *International Human Rights in Context: Law, Politics, Morals* (3rd ed.). New York, NY: Oxford University Press.
- The European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.
- U.N. Charter arts. 41, 42, 68.
- United Nations Human Rights. (2012, February 21). Universal Periodic Review. Retrieved from <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>
- Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

世界人權法院的建立

Manfred Nowak

摘 要

臺大法律學院非常榮幸邀請到奧地利維也納大學法學院Manfred Nowak教授，同時也是前聯合國反酷刑調查官，帶來關於為何應建立世界人權法院的演講。Manfred Nowak教授從歷史的角度出發，解釋建立世界人權法院的理論基礎，並且提出八個需要建立世界人權法院的理由。同時，在回應黃默教授及其他與會學者的提問時，Manfred Nowak教授也討論了世界人權法院的管轄權問題，並對臺灣在世界人權法院可以扮演的角色提出建議。