

HEARING OF THE CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

“CHINA’S PERVASIVE USE OF TORTURE”

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Room HVC 210 of the Capitol Visitor’s Center

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Mr. Chairman, Mr. Cochairman, and distinguished Members of the Commission, I am privileged to be invited to participate in this hearing. Having worked closely with the Commission’s staff on the Access to Justice and Criminal Justice sections of the 2015 Annual Report, I saw first-hand what an exceptional group of people you have supporting the Commission.

In my opening remarks, I have been asked to discuss the Chinese government’s track record in implementing criminal procedure reforms aimed at preventing torture as well as concerns about the continuing use of extralegal forms of detention and abuse despite the abolition of reeducation through labor in 2014. I have also been requested to provide policy recommendations.

I want to begin by recognizing that China is undertaking a sizeable basket of reforms, and a sudden, comprehensive overhaul of the criminal justice system is impossible. Reforming a criminal justice system is extremely difficult. The process requires tremendous resources and resolve. For example, the United States still struggles to provide quality criminal defense to indigent defendants. It is understandable that China requires time to implement reforms both because of resource constraints and because of the obstacles inherent in changing entrenched practices of the police, prosecutors, and judges. These transitional challenges are fundamentally different, however, from the government’s decision to selectively ignore legal protections embodied both in Chinese law and international legal norms.

In recent years, the Chinese government has introduced discrete reforms that could decrease the prevalence of torture. The United Nations Committee against Torture flagged a number of these positive aspects in its Concluding Observations of China’s compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Yet each of these reforms needs to be viewed with a critical eye because, as Teng Biao, a Chinese lawyer who has testified before this Commission, astutely explained, “The major problem with rule of law in mainland China is not establishing legal provisions but rather implementing laws.”¹ And here lies the key problem: The Chinese government places perpetuating one-party rule above a robust commitment to the rule of law and human rights.

¹ “专家不看好中共四中全会提出的依法治国”, Radio Free Asia, 28 October 2014, www.rfa.org/mandarin/yataibaodao/zhengzhi/xql-10282014100811.html.

For example, the 2012 amendments to the PRC Criminal Procedure Law that introduced procedures for excluding illegally obtained evidence were welcomed with great fanfare. Use of these procedures, which are focused on excluding statements and do not cover physical evidence, is extremely limited in practice. Admittedly, courts should rarely have to exclude evidence if police and prosecutors are doing their jobs correctly and not relying on illegally obtained evidence. That said, ongoing concerns about the courts' unwillingness and even inability to stand up to the police coupled with personal accounts of coerced confessions stretch the bounds of credulity that the careful work of police and prosecutors accounts for the rare invocation of these rules.

The PRC Criminal Procedure Law also provides that no person shall be found guilty without being judged as such by a court. Nevertheless, the nearly one-hundred-percent conviction rate in China underscores that the determination of guilt in practice occurs before a defendant enters the courtroom. Any movement towards establishing a presumption of innocence has been further undermined by the disturbing practice of televised confessions, effectively replacing formal court proceedings with public shaming. Last month, a Deputy Chairman of the All China Lawyers Association spoke out against televised confessions, warning that they can lead to "trial by public opinion" (舆论审判).² In the past year, for example, videotaped confessions of human rights lawyer Zhang Kai and journalists Liu Wei and Wang Xiaolu were broadcast on China Central Television while they were being held in pretrial detention.

One of the more encouraging recent developments in criminal procedure reform has been the use of audio and video recordings of interrogations. This reform was initially aimed at major criminal cases such as when a defendant faces life imprisonment or the death penalty. China has since broadened use of recordings with an announcement by the Ministry of Public Security in September 2015 that it sought to gradually expand videotaping to all criminal cases.³ The hope is that recording interrogations will both provide evidence of how individual cases are handled and prompt changes in police culture away from coercive practices.

Preliminary indications are, however, that recording interrogations is not significantly changing the culture of extreme reliance on confessions as the primary form of evidence in criminal cases. When I viewed an interrogation room in a Beijing police station last October, the staff was keen to point out the videotaping technology. What I could not help but notice was the slogan "truthfully confess and your whole body will feel at ease" (如实供述, 一身轻松) that was written in large characters on the floor in front of the metal, constraining interrogation chair, otherwise known as a "tiger chair." Faced with this slogan during prolonged questioning makes crystal clear to the suspect that there is no right to silence in Chinese law.

² "朱征夫 嫌犯电视里认罪不等于真有罪", Beijing News, 2 March 2016, http://epaper.bjnews.com.cn/html/2016-03/02/content_624607.htm; *see also* Nathan Vanderklippe, "Prominent Chinese Lawyer Speaks Out Against Televised Confessions", The Globe and Mail, 2 March 2016, <http://www.theglobeandmail.com/news/world/prominent-chinese-lawyer-speaks-out-against-televised-confessions/article28995020/>.

³ "所有刑案讯问将全录音录像", Beijing News, 22 September 2015, <http://www.bjnews.com.cn/news/2015/09/22/378359.html>.

The primacy of confessions as evidence was accentuated when I was fortunate to view part of a criminal trial in Beijing this past December. The case largely turned on whether the defendant threatened the alleged robbery victim, but the alleged victim was not called as a witness. In fact, the court announced that no witnesses would be called, which is the case in the nearly every criminal trial. The judges focused almost solely on statements made by the defendant while in custody.

The Chinese government has introduced procedures to keep interrogators separate from suspects outside the interrogation room, to medically examine detainees upon arrival at police stations, and for recordings to be transferred promptly to the courts. What are lacking are additional reassurances that these procedures are sufficiently rigorous to prevent tampering with the process. The Committee against Torture noted the lack of independent medical examinations, the lack of independence of the officials charged with investigating allegations of torture, and the lack of independence of the auditing system to verify the recordings' accuracy.

The value of recordings is further limited if the court does not view the interrogation process with a skeptical eye, if the defense has a difficult time accessing the recordings, or if there simply is no defense lawyer, which is true for most criminal cases in China. Suspects need lawyers in order to understand their rights and then have someone advocate for those rights. No recording, even if completely accurate, can ever replace this crucial role that lawyers play. Yet the Chinese government is taking an increasingly hostile stance towards defense lawyers who zealously advocate for clients' rights. Defense lawyers risk reprisals by the government rather than praise for their contributions to the rule of law. The Committee against Torture expressed deep concern for the recent crackdown on defense lawyers stating, "This reported crackdown on human rights lawyers follows a series of other reported escalating abuses on lawyers for carrying out their professional responsibilities, particularly on cases involving government accountability and issues such as torture and the defence of human rights activists and religious practitioners."⁴

The plight of defense lawyers is epitomized by the December conviction of renowned civil rights lawyer Pu Zhiqiang on charges of "inciting ethnic hatred" and "picking quarrels and provoking trouble" through comments on his microblogs. Among the issues raised in the Committee against Torture's Concluding Observations were prolonged pretrial detention, restrictions to the right to access a lawyer, and prosecution based on broadly defined offenses, all of which directly apply to Mr. Pu's case. Further connecting Mr. Pu's case to the Committee's observations, one of the many sensitive cases for which Mr. Pu provided representation prior to his detention was that of a Communist Party official who was tortured to death while subjected to the Party's disciplinary system.

Turning to forms of detention outside of the formal criminal justice system, in December 2013, the Chinese government announced the end of the longstanding practice of reeducation through labor. This welcomed decision brought China a step closer to compliance with the International Covenant on Civil and Political Rights, which China signed in 1998 but still has yet to ratify. Despite reeducation through labor's abolition, alternative ways of depriving people of their liberty persist in

⁴ Committee against Torture, "Concluding Observations on the Fifth Periodic Report of China", 3 February 2016, para. 18.

the forms of so-called “administrative” or otherwise non-criminal measures, blatantly extralegal actions, and disciplinary actions by the Chinese Communist Party against its own members.

Examples of continuing methods of arbitrary detention include the use of psychiatric facilities to detain people who do not necessarily have mental health conditions; compulsory drug treatment centers to detain drug addicts; “legal education centers” to detain Falun Gong practitioners and people who petition the government, among others; and “custody and education” centers that are largely used against sex workers and sometimes their customers. Each of these measures has at least some basis in Chinese law but does not satisfy international requirements for the legal review that must precede long-term deprivation of a person’s liberty.

The Chinese government also takes actions without any legal basis to silence voices perceived as threatening to the existing political structure. Measures range from home confinement (sometimes called “soft detention” for the Chinese term 软禁) to holding people at secret detention sites known as “black jails.” The very fact that these are extralegal measures and thus not officially recognized by the Chinese government complicates efforts to estimate their prevalence. Nonetheless, repeated, credible accounts have surfaced, many of which are documented in the Commission’s annual reports. The Committee against Torture itself stated that it “remains seriously concerned at consistent reports from various sources about a continuing practice of illegal detention in unrecognized and unofficial detention places”⁵

The Committee against Torture also expressed concern that the nearly 90 million members of the Chinese Communist Party may be held under a disciplinary process called *shuanggui* (sometimes translated as “double designation”), which requires them to appear for interrogation at a designated time and place.⁶ The almost complete lack of transparency makes it difficult to evaluate the extent to which the Party’s procedures comply with international human rights norms though reports have documented severe physical and mental abuse while Party members were detained.

This concerning state of affairs leads to the question, what are the implications for US policy? I encourage US policymakers to think of efforts to improve human rights in China on three levels: multilateral, bilateral, and unilateral.

Multilaterally, engaging China through international bodies like the United Nations Committee against Torture emphasizes that China is being judged by the yardstick of international human rights norms to which China has voluntarily subscribed, not by standards unilaterally imposed on China by the United States or other countries. China has rejected the vast majority of requests by UN special rapporteurs who have asked to visit China, in part because of the highly critical report issued by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment following his visit to China in 2005. The international community’s unceasing requests for first-hand information have symbolic power even if China continues to block access. That in itself is telling of what the rapporteurs might find.

⁵ *Id.* at para. 42.

⁶ *Id.* at para. 44.

Bilaterally, the official US-China Human Rights Dialogue and slightly less official Legal Experts Dialogue are important forums for high-level bilateral discussions, though I think we must keep our expectations very modest for these forums' ability actually to spur legal reform in China. The discussions can, at a minimum, provide a window into what topics the Chinese side is willing to discuss and to what degree. For example, a conversation regarding police use of violence at the most recent Legal Experts Dialogue underscored how unwilling the Chinese side was to even broach the topic of use of violence as part of the highly secretive investigations conducted by the Party's disciplinary forces.

Non-governmental organizations like the National Committee on US-China Relations further serve an important role in organizing bilateral meetings between American and Chinese experts. Although the Chinese co-organizers usually are at least quasi-governmental bodies, such meetings provide a less formal venue for an exchange of views than government-to-government dialogues, especially when combined with time to chat informally outside of the conference hall. These ancillary conversations restore my faith that there are many reform-minded individuals both within and outside the government who are working, albeit within a very constrained space, to further criminal justice reforms. Building interpersonal ties is not an immediate deliverable but instead lays the groundwork for long-term cooperation after the current political winds shift, whenever that may be.

As an academic, I further want to highlight the role played by American universities in cooperating with Chinese counterparts both to hold conferences on topics like interrogation techniques and to welcome Chinese visitors to the United States so that they can see with their own eyes how our system operates in practice. It is helpful, for example, to explain to a Chinese audience how American courts determine whether evidence was illegally obtained. It is infinitely more powerful to have them watch a suppression hearing in a US court, especially one in which a police officer testifies—a virtually unheard of event in China. American efforts to increase use of bail and other forms of release pending trial can likewise be instructive to Chinese authorities as they take preliminary steps to implement revisions to the PRC Criminal Procedure Law that call on prosecutors to use pretrial release for suspects who do not require detention.⁷

Finally, the increasing resistance by the Chinese government to engage meaningfully in discussions regarding human rights sometimes requires taking a unilateral approach. I was in Beijing when Pu Zhiqiang's trial date was announced. The US Embassy, along with a number of other countries, requested that a representative be able to attend the trial. Having become accustomed to hearing courtrooms are "small" and "full" in similar sensitive cases, I do not think that the US Embassy staff was the least bit surprised when the request was denied. Undeterred, the US Embassy not only released a statement expressing grave concerns about Mr. Pu's treatment but also had a senior diplomat read the statement outside the courthouse.

The United States needs to keep showing up and standing up for the principles that are core both to our country's values and more generally to international human rights norms. When the Chinese government will not engage, we still need to make our voice heard. Such statements may not have a

⁷ PRC Criminal Procedure Law, article 93; 人民检察院办理羁押必要性审查案件规定(试行), issued by the Supreme People's Procuratorate on 13 January 2016.

direct, measurable impact on the Chinese government's practices, but they are heard by people in China who have seen their human rights, as well as those of friends and family, violated. Literally taking a stand on the courthouse steps also reaffirms to ourselves that, despite instances where our own government has transgressed human rights norms, we remain committed to the fundamental dignity and rights of all human beings.

When President Obama addressed treatment of detainees in the aftermath of 9/11 at a 2014 press conference, he recognized that "we tortured some folks."⁸ He continued that a detailed government report addressing instances of torture "reminds us once again that the character of our country has to be measured in part not by what we do when things are easy, but what we do when things are hard."

While in China last December, several Chinese scholars and practitioners suggested that we stop focusing so much on the "exceptional" cases when there have been marked reforms to the criminal justice system as a whole. I responded that the character of China's criminal justice system has to be measured not just by the handling of the relatively easy run-of-the-mill criminal cases like petty thefts and assaults, but also by the blatantly politically motivated prosecutions, even if such cases represent a relatively small percentage of all criminal cases. The Chinese government's failure to live up to the legal standards that it sets for itself in these hard cases undermines the legitimacy of the entire system.

Thank you for this opportunity to provide a statement. I look forward to our discussion with the Commission.

⁸ Press Conference by the President, 1 August 2014, <https://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president>.