

Excessive use of force, and deaths in custody as consequences of loopholes in the national legislation against torture: The Case of Vietnam

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Abstract

Vietnam became a state member of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 2014 and since then many efforts have been made by the State to enforce this Convention. Even so, torture still occurs in the country of which excessive use of force, and deaths in custody is one of the concerns raised by the UN Committee against Torture in its Concluding Observations¹ on the Initial Report of Vietnam on the Implementation of UNCAT.² There are many causes of excessive use of force, and deaths in custody in Vietnam of which the important ones are loopholes in the national legislation against torture.

This paper analyzes selected case of excessive use of force, and deaths in custody recently reported in the Vietnamese state-run media and points out the linkage with discrepancies between the UNCAT and relevant law of Vietnam. The authors argue that Vietnam still needs to amend its legislation, especially the 2015 Criminal Procedures Code and the 2015 Penal Code (revised 2017) to ensure full compatibility with UNCAT. The authors also suggest amending some specific legal provisions to stop the excessive use of force, and deaths in custody in Vietnam in the coming years.

Keywords: Torture, excessive use of force, deaths in custody, Vietnam

Introduction

In spite the fact that freedom from torture is recognized as one of absolute human rights, unfortunately torture may take place in any location, especially where there is a widespread climate of violence. Torture, as defined by international law, is “*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence*

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¹ The Committee against Torture considered the initial report of Viet Nam (CAT/C/VNM/1) at its 1685th and 1688th meetings, held on 14 and 15 November 2018 (see CAT/C/SR.1685 and SR.1688), and adopted the present concluding observations at its 1708th meeting (see CAT/C/SR.1708), held on 29 November 2018.

² The initial report of VietNam is available

at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhss%2bE2M8qeF0DtZNhaOp9sRIMDEefLT%2fcQ1j2zdJMTJGDj%2f%2fxI3kS6ZszteFX70qLf1jup9yUXVftAtC1mHs6UnnGmTRvo0YJUChlZXJqED3>

*of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”*³

From this definition, three essential elements constitute torture are: (i) infliction of severe mental or physical pain or suffering; (ii) the consent or acquiescence of the state authorities; (iii) for a specific purpose, such as gaining information, punishment or intimidation. Torture is characterised and distinguished from other forms of ill-treatment by the severe degree of suffering involved. It is therefore the most serious forms of ill-treatment, which is against human dignity and values protected by international community.

As mentioned above, torture may take place everywhere. High-risk locations are those where interrogation is likely to take place, such as police and gendarme stations, and any other place of detention, both in official and unacknowledged places of detention, especially pre-trial detention.

The greatest risk of torture and other forms of ill-treatment to the accused is in initial phase of arrest and detention, even before they have chance to access to a lawyer or court. This risk remain during the investigation process, from the beginning to its end, especially when a suspect is being held in detention. Incommunicado detention⁴ is probably the single highest risk factor for torture because it has no external monitoring of the interrogation process. Torture is usually less common in regular prisons for convicted prisoners as the investigation process has been completed, but it should be noted that many prisons also hold remand prisoners who are pending trial, as well as sentenced prisoners. A risk for remand prisoners should not be ruled out, especially if the security forces themselves run the prison or are known to be closely associated with it. The risk to remand prisoners may not necessarily exist within the institution itself, but instead with the possibility that they may be transferred back into the custody of the investigating authorities. The conditions of detention themselves may amount to torture or other form of inhuman or degrading treatment. Once torture occurs, not only freedom from torture is violated, but other basic human rights may also severely degraded, such as right to life, right to health, right to liberty and security of person,.... The reality has been reflected in recent cases in Vietnam

1. Excessive use of force, and deaths in custody in Vietnam: Reflection from local media reported cases

Freedom from torture, cruel, inhuman treatment or punishment is guaranteed under almost major international and regional human rights instruments all over the world, including Universal Declaration of Human Rights (UDHR – 1948); International Covenant on Civil and Political Rights (ICCPR – 1966),.... In criminal proceedings, the universal and non-derogable prohibition of torture and other inhuman or degrading treatment or punishment is consequently to be respected at all times, without any exception even in the direst of circumstances.⁵ This means that persons arrested, detained, or otherwise in the hands of police or prosecuting authorities for purposes of interrogation about alleged criminal activities have the right always

³ Article 1(1), UN Convention Against Torture (1984)

⁴ Incommunicado detention is a form of detention, in which the suspect is detained either without acknowledgement or without allowing them access to anyone, such as their lawyer or family

⁵ Article 2, UN Convention Against Torture (1984)

to be treated with humanity and without being subjected to any psychological or physical violence, coercion or intimidation.

Unfortunately, during the course of detention, in order to gain "*confessions*", excessive use of force such as torture or other ill-treatment are sometimes used in many countries, including Vietnam. The UN Committee Against Torture (UN-CAT) recently raised concerns about "*reports of the physical and psychological suffering of persons sentenced to the death penalty as a result of the particularly harsh conditions of their detention that may amount to torture or ill-treatment, including solitary confinement in unventilated cells; inadequate provision of food and drink; being shackled round-the-clock; being subjected to physical abuse; such persons often commit suicide and develop psychological disorders as a result.*" (CAT, 2018). In practice, in the famous death penalty cases (Ho Duy Hai case) and four other wrongful cases (Nguyen Thanh Chan case, the Nguyen Minh Hung case, and the Han Duc Long case, and Huynh Van Nen case), all the accused claimed that they are all victims of torture conducted by official investigators. Especially, the latter 04 wrongful conviction cases not only "*shocked Vietnamese society*" (Ngoc Quang, 2014) but also raise a question about the journey of seeking justice among community as well as the strictness of the legal system in Vietnam. Below we will analyze the some of above mentioned cases which may consider as typical cases for excessive use of force that led to violation to freedom from torture.

The case of Nguyen Thanh Chan (Thanh Nien News)

On the night of August 15th, 2003, Nguyen Thi Hoan, born in 1972, was found killed in Me village, Nghia Trung commune, Viet Yen district, Bac Giang province. After investigation, the Bac Giang province's police agency has accused Nguyen Thanh Chan of murder. As a result, he was arrested and detained since September 28th, 2003. After that, in both hearing in the first instance by Bac Giang Province People's Court and appeal by the Supreme People's Court, Nguyen Thanh Chan was convicted of murder and was sentenced to life imprisonment. According to the record of the case, at first, Nguyen Thanh Chan confessed his crime, but later, he kept changing his testimony during the investigation and claimed himself innocent. At the beginning of the first instance trial, he also claimed that he had been bowed, beaten, threatened while detaining, and even was forced to practice stabbing straw with a knife so that he could perform again before the court. At the same time, many witnesses could testify for his alibi defence. During his imprisonment in Vinh Quang Prison, Nguyen Thanh Chan and his family continuously filed a complaint to the authority for many years, but to no avail.

On July 9th, 2013, investigation agency of the Supreme People's Procuracy received a typed petition of more than 200 words from Nguyen Thi Chien, Nguyen Thanh Chan's wife. In which, she briefly stated that her husband was enduring unjust conviction by revealing her knowledge on new significant evidence which was discovered by her family in June 2013. She urged the agency to re-conduct an investigation to save her husband. On September 30th 2013, a task group was sent to Bac Giang Province to verify the information provided by Nguyen Thi Chien and Than Thi Hai (a relative of the family). The clue led the investigation to a new suspect, Ly Nguyen Chung, whose stepmother, Nguyen Thi Lanh, accidentally heard he (Ly Nguyen Chung) told his father (Ly Van Chuc) how he committed the crime in ethnic languages. Being

threatened by her husband, Nguyen Thi Lanh could not speak out. In October 2013, the investigation agency persuaded her to tell what she knew by ensuring her safety. The information was later confirmed by Ly Van Chuc, Ly Nguyen Chung's father. Finally, Ly Nguyen Chung turned himself in on October 25, 2013. According to the verdict, on August 15th 2013, Chung, then 15, went to the victim's shop to buy shampoo. After seeing her money box, he suddenly took out a knife and stabbed the woman. He continued to stab her several times, hit her head with empty beer bottles, and suffocated her with a cushion before stealing her two gold rings, the court heard. A day later, he took a bus to Lang Son Province before moving to the Central Highlands province of Dak Lak.

Nguyen Thanh Chan was released in November 2013 after 10 years of imprisonment and was compensated with VND 7.2 billion (about US \$ 320,000).

In the case of Nguyen Thanh Chan, "*presumption of guilt*" was applied instead of the presumption of innocence principle, even though the principle was adopted by law at that time. According to Article 10 Criminal Procedure Code of 1988 and Article 9 Criminal Procedure Code of 2003, no one is considered guilty and subject to punishment until the conviction of the Court has been legally effective.

Nguyen Thanh Chan was wrongfully convicted by subjective conclusions of the investigation agency, which were based on insufficient evidence. Besides, other fundamental rights of accused persons in criminal proceeding were also severely violated, such as right to fair trial, freedom from torture, freedom from self-incrimination, right of self-defence,.... In this case, Nguyen Thanh Chan was forced to act against himself before the court; for instance, he was made to practice the stabbing while detaining to perform again in the court. Meanwhile, every kind of undue pressure exercised to obtain a statement from an accused person should be considered illegal according to the law. Record from the lawyer also pointed out shortcomings in the investigation process and a criminal proceeding, but unfortunately, it was ignored at that time, which violated the right to self-defence of the suspect as well. Consequently, the burden of proof was taken by his family instead of responsible actors. And it took as long as more than 10 years to clear his name, but after all, nothing can compare with what he and his family had suffered during that time.

The case of Ho Duy Hai (Tuan V. Nguyen)

On January 13, 2008, two female postal workers were found murdered inside a post office in Long An Province, Vietnam. More than two months later, on March 21, a youth named Ho Duy Hai was arrested, and eight months later, on November 28, he was sentenced to death by a local court, mainly because of the statement he made while in police custody that he had killed the women. Hai later repudiated the confession, saying it had been beaten out of him during marathon questioning and that he was coerced to write the confession. However, on April 29, 2009, Ho Chi Minh City's appellate court upheld the death sentence.

On November 22, 2019, the Supreme People's Procuracy formally asked for a "Cassation trial" – in effect Vietnam's Supreme Court. However, on May 8, 2020, the 17-member Judicial

Committee of the Supreme People's Court upheld Hai's death sentence, effectively denying the petition to the Supreme People's Procuracy.

Since his first trial in 2008, Hai's family and defence lawyer have repeatedly maintained that he was innocent and wrongly convicted. Indeed, his confession was inconsistent with the evidence. No murder weapon(s) were found. Instead, a knife and a chopping board bought from the local market were displayed as the weapons he had allegedly used. His DNA didn't match the blood found at the crime scene, and no witnesses could testify that he was at the crime scene; evidence indicated that the murderer was left-handed and Hai was right-handed.

For the past 12 years, Hai's case has been a typical example of controversial death penalty cases in Vietnam. The case is also particularly related to the presumption of innocence principle stipulated in Article 31 of the current Vietnamese Constitution. In this case, local courts at all levels have based their judgment on Hai's confession while ignoring all inconsistent evidential facts (Tuan V. Nguyen). Hai's case has also caused controversy about the investigative agency's impartiality and the court in conducting legal proceedings.

The presumption of innocence which imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt was inadequately applied in the case. Firstly, in terms of the burden of proving, the investigation had been misconducted since very first phases. The conviction was mainly based on Ho Duy Hai's confession, which was possibly obtained against his will. All the facts that were inconsistent with his confession, such as no murder weapon found in the crime scene, no witnesses, unmatch DNA with the blood found,... were ignored. In principle, with all these pieces of evidence, Ho Duy Hai should be presumed innocent even when he did make a confession of his crime. As pointed out by NA delegate Truong Trong Nghia, evidence collection process has seriously violated the law. Since the murder weapon was not found, to accuse Ho Duy Hai were displayed weapons he had allegedly used (a knife and a chopping board) were bought from the local market. Preservation and forensic analysis of the evidence were misconducted by ignoring unmatched DNA in the blood found at the crime scene.

Secondly, the impartial application of presumption of innocence is also caused by insufficient awareness of this principle. Although presumption of innocence was recognized as a fundamental rule in criminal proceeding, not only in the investigative stage but also in trial, the accused tends to be proved guilty instead of innocent. At the same time, the basic human rights of the accused were violated during the investigation, for instance, the right to remain silent, freedom from torture or other physical punishments,....

The case of Huynh Van Nen (VnExpress)

On May 15, 1998, Huynh Van Nen was arrested for allegedly murdering Le Thi Bong and stealing two of her gold rings in Binh Thuan province. Seven months later, he and nine relatives became suspects in a case known as “cashew garden” during which Duong Thi My was murdered in 1993. The latter case was dropped as police failed to find conclusive evidence.

In following year, Nen was sentenced to two years imprisonment for damaging property and life imprisonment for murder and robbery. On October 23, 2000, Nen appealed but was rejected

by the court a year later. Only after the police found the actual murderer of Bong was Nen acquitted and subsequently released from prison on October 22, 2015 after serving nearly 17 years of his life sentence. Huynh Van Nen was accused of murder in 1998 and was sentenced to life imprisonment. After the actual perpetrator was found, Huynh Van Nen was released and compensated for 17 years of imprisonment.

Being cleared his name and compensated with VND18 billion (\$800,000), the suffering he went through was immeasurable. Although, the compensation was claimed to include damage to property, physical and mental health and income lost over the 17 years he was imprisoned, it never can return his health. Huynh Van Nen's health has deteriorated and he has nearly lost sight in one eye, which is consequently caused by torture and abuse in prison.

The case of Han Duc Long

Han Duc Long was accused of child sexual abuse and murder in 2005 and was sentenced to capital punishment. In hearing in both first instance and appeal, he claimed that he made his confession after being tortured while detaining. Finally, in 2017, he was announced to be wrongly convicted and released after 11 years of imprisonment have raised questions about police and investigative agencies' performances. Although the burden of proof is imposed on prosecutorial actors, the investigation process is hardly monitored or reviewed later due to lack of an effective mechanism. The above cases show that in many criminal cases, confession made by the accused is considered more important than evidence. The so-called "*presumption of guilt*" is likely to be applied more often than the principle of presumption of innocence. The state of police and prosecutorial misconduct has also been exacerbated by the lack of protection mechanism of human rights in criminal proceedings such as freedom from torture, right to remain silent,....

Death in Custody: the case in Chi Hoa Prison (Tuoitre.vn)

On Jan 6th 2021, 23-year-old Defendant Duong Quoc Minh was declared to be dead in Chi Hoa Detention Center. According to the official, he protested while police escorted him to work, ran away and threw his head on the ground to die. On February 11th, Chi Hoa Detention Center sent a report to Ho Chi Minh City Police about the death of Duong Quoc Minh, in which, described his death as public order disturbance, died while imprisoned here. Duong Quoc Minh's family said that he was arrested and detained for alleged violating the law in District 1 in August 2019. On January 6th, they received a message from the Ho Chi Minh City police that Minh had died of suicide and asked his family to retrieve the body to bury. On January 8th, when his family went to the HCM City Forensic Investigation Center, Minh, his body was in a coffin. Noticing abnormal signs in Duong Quoc Minh 's corpse including bruises in his face, hives, wrists, knees, his family request the police to investigate and clarify the cause of his death.

According to report of Chi Hoa Detention Center, on January 6th, while prison guards escorted Duong Quoc Minh to work with the No. 1 prison team, which was part of the No. 2 Prison Division, this guy "*has protested, struggled to escape the escort's control, ran away and hit his head on the corridor floor, resulting in injuries.*" The prison officials intervened and withheld Minh to take him to the No. 1 prison team. While waiting to enter the room, Minh has signs of fatigue and difficulty in breathing, so he was taken to the Chi Hoa Hospital in the Chi

Hoa Detention Center. After that, Minh was taken to Trung Vuong Hospital by 115 Hospital Emergency Team. However, the doctor from Trung Vuong Hospital diagnosed that Duong Quoc Minh has died before he was hospitalized, the cause is unknown. Ho Chi Minh City police have not drawn a conclusion on the incident yet.

The case in Chi Hoa Prison was not the exceptional case. As being documented, there are 14 cases of death in custody in the period 2010-2014 due to police violence; 4 cases of unexplained death in police custody; 9 cases of death in custody allegedly attributed either to suicide or illness even when visible signs or proof of torture and ill-treatment exist. The actual number of such cases may be much higher in reality. In another case, 17 year-old Do Dang Du reportedly died in custody on Feb 5th 2015 as a result of severe injuries to the head and body while in custody in Chuong My district, Hanoi, for a “*less serious*” offence, by three of his teenage cellmates who were allegedly instructed with carrying out the assault on Do Dang Du. It is worth mentioning that no conclusion about responsibilities of prison officers at the end of this case (Committee against Torture, para. 20).

In most of the above mentioned cases, excessive use of force including torture and other cruel or inhumane treatment has been used as a “*special method*” in investigation in order to speed up the process of seeking the truth in each case and finally to punish crimes. This common practice partly caused by inappropriate awareness on the issue of government official, including the polices and prison officers, when they actually assume that by taking all possible methods to find out the truth as soon as possible, they are fulfilling their duties. By gaining confession from the accused, the investigation seems to become more and more simple, which also means, the burden of proof is imposed on the accused and their family (for example, the Nguyen Thanh Chan case). Such police and prosecutorial misconduct mainly resulted from the lack of effective mechanisms to monitor and control the activities of judicial bodies.

Besides, detainees are understandably less willing to make allegations of ill-treatment while still in the custody of the investigating forces (pre-trial detention). To make it even worse, not every accused may access to legal aid at very first phase when they are arrested. Right to defence counsel is guaranteed to all the accused in all kind of criminal cases. In case the accused charged with offences punishable by death do not seek the assistance of defence counsel, the investigating bodies, procuracies or courts must request bar associations to assign law offices to appoint defence counsel for such persons or request the Vietnam Fatherland Front Committees or the Front's member organizations to select defence counsel for their organizations' members, according to Art. 76 Criminal Procedure Code 2015. As such, in capital case, defence counsel is compulsorily required. If defence counsel is absent, the trial panels must postpone the court sessions. However, to access to legal representation in criminal case in Vietnam has many difficulties in practice. From January 1st 2018 to May 31th 2019, there were 27,868 cases in the whole country, of which, 15,796 cases (about 57%) have defence counsel. Among 16,042/27,868 cases that came to final judgment, legal assistants have taken part in 13,292 cases (83%), lawyers have only taken part in 2,750 cases (17%). Although the rate of lawyers who took part in criminal cases has increased compared to previous years, it's still low. (Nguyen Thi Pha, 2019)

The fact that the right to legal aid has not been recognized by the Constitution leads to insufficient awareness of this right of both procedure-conducting actors and procedure-

participants. The accused may be unaware of their rights to have defence counsel, and procedure-conducting agencies guarantee such rights. Such limitation in the accused's right enjoyment has been derived from the lack of human rights-based approach in protecting human rights in criminal proceedings. This also caused poor implementation of related provisions on legal counsel in practice.

Relating to issue of detention, the time limit for temporary detention of suspects for investigation shall not exceed 02 months for less serious offences, not exceed three months for serious offences, not exceed four months for very serious offences and especially serious offences. The extension of temporary detention is carried out in accordance with legal provisions.⁶ Although the new Criminal Procedure Code of Vietnam has mark a progress in protecting the right of the accused by decreasing duration of temporary detention,⁷ there's no clear mechanism to verify the necessity of detention. Meanwhile, detention can only be exceptionally resorted to for a legitimate purpose. Without such a purpose, detention will be considered arbitrary (*A v. Australia*). In the course of such arbitrary and unlawful deprivations of liberty, the detainees are frequently also deprived of access both to lawyers and to their own families, and also subjected to torture and other forms of ill-treatment. (OHCHR - 2003). Detention should only be apply in preventive manner, which means, "*the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society—specifically, that they would be likely to commit additional crimes if they were released*". Preventive detention is also used when the release of the accused is felt to be detrimental to the state's ability to carry out its investigation. In some countries the practice has been attacked as a denial of certain fundamental rights of the accused. (Jerry Norton, "*Preventive Detention*", *The Encyclopedia Britannica*)

It should be also noted that anybody can be a victim of torture but some groups seem to be more at risk, for example, people who are membership of a particular political, religious, or ethnic group or minority. A number of death in detention of members of religious and ethnic communities such as the case of Buddhist Nguyen Huu Tan; Hmong Christian Ma Seo Sung; pastor Ksor Xiem of the Motagnard evangelical church⁸ have raised a question in state of inequality and discrimination among different groups of detenees. (Committee against Torture, para. 22)

2. Discrepancies between the UNCAT and current legislation of Vietnam in relation to excessive use of force, and deaths in custody

Firstly, freedom from torture is recognized as constitutional rights⁹ as follows: "*Everyone has the right to physical inviolability and to have their health, honor and dignity protected by law; the right not to be subjected to torture, violence, coercion, applying corporal punishment*

⁶ Art.120, 2003 Criminal Procedure Code; Art.173, 2015 Criminal Procedure Code.

⁷ Comparing to the 2003 Criminal Procedure Code, Criminal Procedure Code 2015 has reduced the extension of temporary detention from 2 times to 1 time for serious offences and very serious offences, from 3 times to 2 times for especially serious offences, hence, decreased total duration of temporary detention for detainees.

⁸ Nguyen Huu Tan was detained and subsequently died while the police alleged suicide, with no independent investigation of the death and whose family was subjected to reprisals from the local police after complaining to the authorities. Ma Seo Sung was arrested and detained by the police and allegedly also committed suicide by hanging, and whose family also received threats of reprisals. Pastor Ksor Xiem of the Motagnard evangelical church died of injuries sustained in police custody; and Montagnard Christian Y Ku Knul died while under arrest and the sign of electric shocks was shown.

⁹ Art 20 (1) 2013 Constitution of Viet Nam

or any other form of treatment which involves in physical violation or violation of health, honor and dignity”. In the light of this Article, 2015 Criminal Code amends and supplements the offence of obtaining testimony by duress (Art. 374); offence of applying corporal punishment (Art. 373); offence of bribing or coercing another person to give testimony or provide documents (Art. 384); concurrently, still provides offences relating to torture similar to the 1999 Criminal Code (The Socialist of Vietnam, para.10). 2015 Criminal Procedure Code also provides principles of strict prohibition of torture (Art.10). The drafting of the Codes not only illumined the light of the new Constitution but also showed the willingness of Vietnamese Government in implementation the UNCAT to which Vietnam is a party member. But it should be noted that torture has not been criminalized in a separate provision specifically prohibiting this crime, in particular the amended Criminal Code. In addition, committing acts of torture at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity is not covered adequately in the laws (Committee against Torture, para. 6). These loopholes on definition and criminalization of torture in national legislation do lead to excessive use of force, even deaths in custody in order to obtain of testimony by duress.

It’s worth mentioning that absolute character of freedom from torture as well as other of non-negotiable rights have not been defined in both Constitution and law. The 2013 Constitution is the first one that adopted the principle on derogation of rights as following: “*Human rights and citizens’ rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national defense, national security, social order and safety, social morality and community well-being.*”¹⁰ As such, the state has the power to restrict all constitutional rights in emergency situations, including freedom from torture and other cruel, inhumane and degrading treatment, that do not comply with international human rights law – specifically, the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights. (Vu Cong Giao, 2016)

Secondly, relating to punishment for the crime of torture and impunity, while taking note that 2015 Criminal Code has provided punishment frame for crimes at different level,¹¹ but in case of torture, the person committing such crime shall only face a penalty of 06–36 months of imprisonment,¹² without aggravating circumstances, which means that a person committing acts of torture in correctional and rehabilitation institutions can actually be penalized by as little as 6 months of imprisonment (Committee against Torture, para. 8). Meanwhile, torture in practice, may amount to serious/very serious crimes since it was conducted by government officials who present state power and violate to serial basic human rights. In this scene, penalty which is not proportionate to such serious crime may lead to government officials misconduct. Besides, less serious crimes have a statute of limitations of 5 years while especially serious crimes have a statute of limitations of 20 years, which may encompass acts of torture (Committee against Torture, para. 10).

¹⁰ Art 14 (2), 2013 Constitution

¹¹ According to Art.27 2015 Criminal Code, punishment may varies from 5 years of imprisonment for less serious crimes; 10 years for serious crimes; 15 years for very serious crimes; and 20 years for especially serious crimes.

¹² According to Art.373 Criminal Code, any person who, in the course of proceedings, trial, or implementing of measures including mandatory attendance at a correctional institution or rehabilitation centre, uses torture or brutally treats or insults another person in any shape or form shall face a penalty of 06–36 months of imprisonment

Thirdly, freedom from torture is recognized as absolute human right, which means any acts of torture should be completely banned. But according to some regulation, person who conducted or ordered the torture shall not be prosecuted in following cases: (i) officers shall bear no responsibility for the consequences of the execution of directions, directives and orders of their superiors, which they have to promptly report to the immediate superiors or higher authority of the order issuers, if they have grounds to believe that such orders are unlawful (Law on the People's Public Security Forces; the Law on Viet Nam People's Army Officers and the Law on Cadres and Civil Servants); (ii) accomplice shall not take responsibility for unjustified force used by the perpetrator while accomplices comprise of organizer, perpetrator, instigator or abettor and that a person who has complicity acts or participation in torture-characterized offences and related offences must take criminal responsibility for his/her crime on the basis of nature and degree of participation (Criminal Code). (Committee against Torture, para. 12)

Fourthly, while the right of detainees has been improve much better in recent years through adoption of principle of presumption of innocence; the right to remain silent; access to legal counsel, ..., not all detainees are able to enjoy fundamental legal safeguards fully in practice (Committee against Torture, para. 16), in particularly the case of prisoners of conscience of political prison. Once convicted, they are confined in special "*Security Sections*" in prisons, where they are isolated from and may be treated differently than the general prisoner population as well. Some of them could not contact their families or lawyers during being held in detention during whole investigation process, which amount to incommunicado detention – the place contains highest risk of torture (ACAT, Section 1.2). Besides, other vulnerable groups such as children, women, religious and ethnic communities may be targeted due to their social status, which may need special care in detention in order to avoid torture.

Fifthly, although duration of temporary detention for detainees has been decreased in total, there is still potential risk of prolonged pre-trial detention, particularly in the case of national security infringements, which may amount to incommunicado detention. Despite the fact that human right of persons deprived of their liberty are guaranteed by law, the longer detention extends, the higher risk of becoming victims of torture the detainees have to face in practice. In addition, Criminal Procedure Code does not provide for appeal of pretrial detention decisions nor does it allow for their legality to be reviewed by a court of law.¹³

Sixthly, the lack of principle in inadmissibility of statements made as a result of torture may has negative impact on practice of excessive use of force including torture and cruel, inhuman or degrading treatment. Widespread practice of torture and ill-treatment of the accused with a view to extracting confessions and other information from them. As being documented, from 2010 to 2015, People's Courts had not handled any cases regarding the obtainment of testimony by duress and bribing or forcing another person to give false testimony or provide false documents. Some detained persons are forced to sign statements previously prepared by the relevant state officials as well as to read confessions in public without any allegation investigation of torture and ill-treatment. (Committee against Torture, para. 28) By discarding all confessions possibly made as a result of torture, excessive use of force conducted by government officer may be excluded.

¹³ Arts. 2, 11 and 16 Criminal Procedure Code

Seventhly, conditions of detention may constitute torture themselves. Both regulations and real conditions of the detention and custody facilities and prisons have been improved better over the last decades, which is reflected by standards of prisons, detention centers, and custody houses; the quality of clothing, accommodation, living, medical care for prison/detenees (The Socialist of Vietnam, para 178 - 182). However, penitentiary facilities in low conditions that taken altogether such as inadequate sanitary and hygiene facilities; insufficient lighting and ventilation; insufficient quality and quantity of food; lack of physical exercise outdoors; inadequate health care including poor medical care, negligence, and deliberate withholding of medical treatment by the medical staff in prisons, non-separation of healthy prisoners from those with contagious diseases, lack of independence of doctors who are employed by the penitentiary authorities; severe overcrowding may amount to ill-treatment or even torture. In particular, the widespread use of “*disciplinary rooms*” where prisoners can be isolated in solitary confinement or small groups for up to three months, restricted communication with family; punitive transfers,... may contribute to excessive use of forces by reduce the chance of victims to seek help in alleging act of torture.

3. Eliminating the excessive use of force, and deaths in custody in Vietnam: The way forwards

Becoming party to 7/9 core international treaties human rights, including UNCAT has shown the goodwill of Vietnam Government in fulfillment international commitment in this field. Besides achievements in Nam in the UNCAT implementation process, Viet Nam still faces some difficulties that need to be solved to implement the convention in more effective way, such as: (i) incomplete legal framework on human rights; (ii) shortages in finalcial resources; (iii) inadequate awareness and capacities of public officers; (iv) inadequate awareness of the people on issue of torture (The Socialist of Vietnam, para. 36-40)

To surmount loopholes in the national legislation against torture that lead to excessive use of force, and deaths in custody, Vietnam should follow UN Committee Against Torture’s recommendations selectively, as below:

Firstly, ensure freedom from torture as absolute human right

Freedom from torture as absolute human right can not be infringe at any circumstance, even in state of emergencies according to Art 14 (2) 2013 Constitution of Vietnam. Therefore, principle of the absolute prohibition of torture is ensures to be incorporated in legislation and strictly applied in practice.

Secondly, in terms of legal safeguards against torture, detainees, including those arrested on national security grounds, should be guaranteed to have prompt access to a lawyer of their choice, be promptly brought before a court, be tried in trials that meet international fair trial standards, and not be subject to torture and other forms of cruel, inhuman, and degrading treatment. The use of statements and “*confessions*” extracted by the use of torture in all trials and legal proceedings must be strictly prohibited. Fundamental legal safeguards enjoyed by detained persons includes the right to be informed of the reasons for the arrest or detention; to contact family members or other persons of their choice about their detention; the right to request and receive a medical examination by an independent doctor; have prompt access to legal counsel or legal aid; and have their detention recorded in a register.

Thirdly, in terms of arrests, police custody and detention: (i) conduct prompt, thorough, and impartial investigations into all cases of injury and death in police custody, including forensic examinations by independent medical professionals, and hold to account any state or non-state actors found to have been directly or indirectly responsible; (ii) end the practice of incommunicado detention and enforced disappearances of detainees by ensuring that information about their whereabouts is made available immediately following their arrest to family, friends, legal counsel and courts.

Fourthly, imposing proportionate punishment for the crime of torture and impunity by (i) ensuring that both the crime of torture and the attempt to commit such a crime are punishable with appropriate penalties that are commensurate with the gravity of their nature, regardless of whether there are aggravating circumstances (Committee Against Torture, para.9); (ii) conduct prompt, thorough and impartial investigations into reports of torture and other human rights abuses by authorities in prisons and detention centers. Follow up with appropriate legal action, including criminal prosecution, of identified perpetrators of abuses; (iii) establishing impartial mechanisms for prisoners and detainees to submit complaints without the knowledge of prison guards directly responsible for them, and ensure that complainants are not subjected to punitive reprisals from authorities; (iv) providing compensation and medical treatment to victims of torture and other ill-treatment and their dependents in accordance with the law.

To guarantee the strictness of law against the act of torture, the Criminal Code should be amended in order to ensure that there is no statute of limitations for the crime of torture and that all acts of torture may be prosecuted and punished independently of the time that has passed since the crime was committed. The law should also be amended so that the granting of amnesty and pardon is inadmissible when torture offences are concerned. (Committee Against Torture, para.11)

Fifthly, establish an independent mechanism to exercise oversight over the police and other relevant authorities so that there is no institutional or hierarchical connection between the investigators and the alleged perpetrators, and ensure that all persons under investigation for having committed acts of torture or ill-treatment are immediately suspended from their duties and remain so throughout the investigation, while ensuring that the principle of presumption of innocence is observed. At the same time, Vietnam should establish a national system to independently monitor and inspect all places of detention and receive complaints as well as accept the access to prisons by the International Committee of the Red Cross.

Sixty, relating to death in custody, all alleged cases of deaths in custody and complaints of excessive use of force, both in premises of institutions and on the street must be effectively and impartially investigated in timely manner. Alleged perpetrators of torture and ill-treatment and deaths in custody are immediately suspended from duty for the duration of the investigation. Establishing an independent police complaints commission with which citizens can file complaints against the police may contribute to protect the complainant. (Committee Against Torture, para.21)

Conclusion

Torture is one of the most horrendous violations of a person's human rights. It is an attack on the very essence of a person's dignity. However, while there is an absolute prohibition on

torture under international law, it continues to be widely practised in all parts of the world (OHCHR, 2010), including Vietnam. As mentioned above, there are many factors leading excessive use of force, and deaths in custody, one of them are loopholes in the national legislation against torture.

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