

CHALLENGES FOR VIETNAM

IN IMPLEMENTING THE UN CONVENTION AGAINST TORTURE

*Pham Thanh Son, M.A.**

*Nguyen Thu Thao, M.A.***

Abstract: The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) is one of 28 important international conventions on human rights, adopted on December 1, 1984 and effective from June 26, 1987. The Convention is built on the principles stated in the Charter of the United Nations on the recognition of equal and inalienable rights of all members of the human community, which is the basis of freedom, justice and peace in the world and in accordance with other legal documents of the United Nations on human rights.

On November 28, 2014, the National Assembly of Socialist Republic of Vietnam ratified the Convention. The participation in the Convention is a remarkable step in the international integration of Vietnam, affirming that Vietnam is an active and responsible member of the international community, significantly improving the international reputation of Vietnam in the field of human rights, and creating new incentives and foundations to promote the torture prevention in Vietnam. This article provides an overview of the basic contents of the Convention and the challenges for Vietnam in implementing the Convention.

Key words: Convention against torture; United Nations; torture; human rights.

1. Introduction

Torture (and its ‘secondary’ behaviors including punishment, brutal, inhumane or corporal treatment) is a legal as well as ethical and cultural issue. From a cultural and ethical perspective, the United Nations condemns torture as one of the most inhumane and despicable

* Faculty of Law - People's Security Academy; PhD Candidate - School of Law, Vietnam National University, Hanoi.

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** Faculty of Law - People's Security Academy; PhD Candidate - Hanoi Law University.

This paper is part of the doctoral thesis titled “Sending to compulsory detoxification establishments as an administrative handling measure – Biện pháp xử lý hành chính đưa vào cơ sở cai nghiện bắt buộc” that PhD Candidate Nguyen Thu Thao is working on at the Hanoi Law University.

acts committed by humans to their fellow human beings, because torture denies dignity, destroys both the body and mind of the victim who cannot resist. From a legal perspective, under the international human rights law, torture is one of the most serious and severely criticized violations of human rights; under the international criminal law, torture which is conducted systematically and pervasively can, depending on the context, constitute genocide, war crimes or crimes against humanity, and thus the perpetrators can be prosecuted and tried under the Rome Statute (1998). Due to the particularly serious nature of torture, the prohibition of torture is regulated in many documents of international human rights and criminal laws, including the 1948 Universal Declaration of Human Rights (UDHR) (Article 5) ¹, the 1966 International Covenant on Civil and Political Rights (ICCPR) (Article 7) ², and especially the 1984 Convention Against Torture and Other Treatment or brutal, inhumane or humiliating sanctions (UNCAT), etc. Ensuring human rights, including prevention and combat against torture, brutal and inhumane treatment or punishment, and humiliation, to help people in the world develop comprehensively in freedom and peace is also the orientation and goal of socio-economic development of many countries.

On November 7, 2013, the Socialist Republic of Vietnam signed the Convention. On November 28, 2014, the National Assembly of the Socialist Republic of Vietnam ratified the Convention. The participation in the UNCAT is a remarkable step in the international integration of Vietnam, affirming Vietnam as an active and responsible member of the international community, significantly enhancing the reputation of Vietnam in the field of human rights and creating new motivations and foundations to promote the prevention and control of torture in the country.

Before joining the UNCAT, to protect human rights and citizenship, Vietnamese laws have provided a relatively basic and complete mechanism to ensure the right not to be subject to torture, brutal or inhuman treatment and punishment or humiliation. Especially, the 2013 Constitution specifically mentioned the prohibition of torture for the first time. Clause 1 of Article 20 of the 2013 Constitution clearly states: “Everyone has the right to body inviolability, to be protected by the law in terms of health, honor and dignity; not subject to torture, violence,

¹ Article 5 (UDHR): “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

² Article 7 (ICCPR) “No one shall be subjected to torture (or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.

persecution, corporal punishment or any other treatment that infringes on the body, health, or offends honor and dignity”. To implement the UNCAT in Vietnam, on March 17, 2015, the Prime Minister approved the Plan to implement the Convention (under Decision No. 364/QD-TT). Accordingly, the Prime Minister clearly determined that one of the major tasks to implement the UNCAT is to incorporate the provisions of the Convention into national laws. Although there has been a legal basis for torture prevention and control in Vietnam, there are still some gaps that need to be resolved when Vietnam ratifies the Convention. Closing these gaps, completing the legal system, and effectively implementing the UNCAT into practice in Vietnam are now urgent tasks.

2. Convention (UNCAT) - one of the important international human rights conventions

In the historical aspect, torture has existed for a long time and is part of the judicial system in many countries with many different legal traditions. Studies show that torture appeared very early in ancient Roman history. During this period, torture was seen as the most effective form of truth finding, “the highest form of truth,” and applied to slaves in legal disputes and endorsed by jurists. In societies of different periods, tortures such as crucifixion by Romans, stoning to death by Jews, or sun exposure in deserts by Egyptian were considered necessary to prevent or punish others when believing that they are immoral.

Medieval and modern European courts all used torture, depending on the accused’s level of crime or social status. Torture was considered as a lawful means to obtain confession or other information of crime. Usually, the accused sentenced to death were tortured until revealing the names of their accomplices. In the fourth century, there were views of some of the major thinkers of that time which are controversial about the use of torture. Among them is Aristotle’s view when he argued that “Torture is a kind of evidence, which appears trust-worthy, because a sort of compulsion is attached to it”. However, at the same time, Aristotle also pointed out that “those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are really ready to make false charges against others, in the hope of being sooner released from torture”.

This shows that, even when people used torture as a lawful way, this form reflected the nature of barbarism and immorality and should be condemned. In 1644, a Dutch lawyer, Atonius Matthaëus, warned of the inherent dangers of torture that might put the danger of death to

innocent people. He opined that “the affront to natural justice by torturing an innocent” because “the possibility that the accused person’s perception of truth would be skewed under torture”.

In 1764, Cesare Beccaria published “On Crimes and Punishments”, which is considered to have the most profound influence on criminal justice policy at that time. Beccaria denounced and fiercely condemned the torture. Torture “is a sure route for the acquittal of robust ruffians and the conviction of weak innocents”, he stated.

Legal documents on human rights since the World War II have recognized the right not subject to torture and mistreatment as one of the basic rights of people in general and of the accused in particular. Unlike other rights, the right not to be tortured is considered an absolute right. That is, this right cannot be violated under any circumstances. According to the United Nations Human Rights Committee, the fight against torture is seen as having no limits.

In the context of international law, the definition of torture depends on a legal instrument applied on the basis of the State’s participation in and approval of the UN or regional conventions on human rights. The history anti-torture begins with Article 5 of the UDHR. As a serious human rights violation, torture is one of the first issues to be addressed by the United Nations with the aim of developing international human rights standards. Article 5 of the UDHR states: “No one should be tortured or subject to cruel and inhumane punishment”. On that basis, the Covenant on Civil and Political Rights (ICCPR) in Article 7 continues to emphasize: “No one should be tortured or subject to cruel and inhumane punishment. Especially, no one shall be deprived of freedom as a laboratory object for medicine or science”. This content is also shown in most of the regional and international legal documents on human rights.

On December 10, 1984, the General Assembly of the United Nations adopted the UNCAT (under Resolution No. 39/46). The Convention is open to signatory states. On June 26, 1987, after the Secretary-General of the United Nations received the instrument of ratification of the 20th State, the UNCAT officially entered into force under the provisions of paragraph 1 of Article 27 of the Convention. During the implementation of the Convention, the General Assembly of the United Nations also adopted the Optional Protocol of the UNCAT on 18 December 2002 (OPCAT) under Resolution No. 57/199.

The Convention is one of the 09 fundamental international human rights conventions of the United Nations. By the end of June 2019, the Convention had 166 member states, including

06 ASEAN countries (including Vietnam). The birth and popularity of the Convention affirms the collective efforts and determination of the international community in the fight against torture and cruel, inhumane or degrading treatment or punishment around the world. The approval of the General Assembly of the Convention is a historic event bearing the mark of human progress in the effort to protect people from torture, a breakthrough in the fight against torture worldwide and an effective tool to completely eliminate torture from the life of civilized society.

The Convention consists of 33 articles, divided into 03 parts with the following specific contents: Articles 1 to 16 provide for the concept of torture and obligations of the Contracting States to strictly prohibit, punish, and prevent torture acts as well as protect torture victims; Articles 17 through 24 provide for the reporting obligations of member states to the United Nations Committee against Torture and the authority of the Commission, the activities of the United Nations Special Rapporteur on the torture, the rights of states to declare signature, ratification or accession to the Convention; Articles 25 through 33 include provisions relating to the signing, ratification, accession, entry into force and amendment of the Convention.

3. Issues posed by the Convention for a Member State

In terms of content, the UNCAT poses a lot of obligations and responsibilities to member states, especially the obligation to criminalize torture, implement legislative, executive, judicial or other effective methods to prevent torture; not deport, return or extradite if there are sufficient grounds to believe that the person is at risk of torture; require establishing jurisdiction; take deterrent measures to initiate criminal proceedings or extradite; obligation to prosecute in case of non-extradition; provide that torture criminals can be extradited in agreements to which a member state has signed or acceded; the obligation to support each other in the criminal proceedings; require the full dissemination and propagation of the prohibition of torture and the training of staff involved in the arrest, interrogation or handling of individuals who may be arrested, detained or imprisoned; ensure a prompt and fair investigation; ensure the right to complain, the right to compensation of the tortured and the obligation to prevent other forms of treatment or other brutal, inhuman or degrading human treatment or punishment which have not been to the extent of torture.

In terms of form, among the provisions on the order and procedures of the Convention are the provisions on the Committee against Torture and Dispute Settlement, which state:

- The Anti-Torture Committee ensures that the member states take the UNCAT seriously. The Commission is well organized (Articles 17 and 18 of the Convention) and has many important functions and duties (Articles 19 and 20). However, some powers of the Committee against Torture are in effect only for a UNCAT member state when that authority is declared by the State (Articles 21, 22). The Convention also permits the reservation of certain powers of the Commission (Article 20).

- Disputes between member states regarding the interpretation or application of the Convention are settled through means such as negotiation, arbitration, the International Court of Justice (Article 30).

With regard to the reservations, the Convention provides that the member states can declare not to recognize the authority of the Committee under Article 20, which is the authority of the Committee against Torture in requiring the member states to cooperate in checking information containing valid evidence that torture is being systematically carried out in the territory of that Member State. Accordingly, a member of the Anti-Torture Committee can also conduct secret investigations, inspections on the territory of a country, this may lead to the release of adverse news reports and reports for the country. being investigated and supervised.

On the other hand, member states also have the right to declare that they are not bound by the provisions on the settlement of disputes between member states regarding the interpretation or application of the Convention at the time of signing, ratification or accession to the Convention. Accordingly, if the settlement cannot be resolved through negotiation, one of the parties has the right to request arbitration. If within 6 months from the date of the request for arbitration, the parties still cannot agree on the organization of the arbitration, one of the parties has the right to submit the dispute to the International Court of Justice by a request in accordance with the Statute of the Court. The submission of a dispute to the International Court of Justice requires the consensus of all parties involved in the dispute, which ensures the discretion of Vietnam in each specific dispute settlement case.

In terms of basic rights and interests, the member states (including Vietnam) will enjoy the rights and benefits as follows:

First, receiving international support and cooperation from other member states in the criminal proceedings for crimes related to torture;

Second, having the right to nominate citizens to participate in the Committee against Torture;

Third, having the right to reserve certain contents of the Convention;

Fourth, having the right to propose amendments to some contents of the Convention.

In terms of basic obligations, together with the above-mentioned rights and interests, states must fulfill the basic obligations as a member State, including:

First, accepting the Convention's definition of torture (which includes mental torture);

Second, being responsible for enacting and implementing legislative, executive, judicial or other effective measures to prevent torture in the territory of its jurisdiction;

Third, ensuring that all torture is a violation of criminal law and must be punished with appropriate measures;

Fourth, ensuring the laws, policy and mechanism for implementing complaints, denunciations and compensations for victims of torture;

Fifth, assisting as much as possible other member states in preventing torture;

Sixth, reporting about the measures taken to fulfill the obligations under the Convention to the Commission against Torture via the Secretary-General of the United Nations within one year after the date of entry into force of the Convention. Then, every four years, Vietnam is required to submit additional reports on the new measures taken as well as other reports at the request of the Committee against Torture.

4. Issues for Vietnam when ratifying and implementing the Convention

For the development and completion of the law, after ratifying the UNCAT, in the realization of the Government's Plan on the implementation of the UNCAT, the ministries and branches of Vietnam have been reviewing, amending, supplementing and promulgating a number of new legal documents under the following basic orientations:

(1) Complete the provisions on torture-related crimes in the Criminal Code (as amended) in accordance with the definition of torture in the Convention;

(2) Complete the relevant provisions of the Criminal Procedure Code to better ensure human rights, especially the rights of arrestees and detainees;

(3) Continue to develop and perfect the documents guiding criminal judgment execution; speed up the development of projects on Law on temporary custody and temporary detention, Law on organization of criminal investigation agencies and documents guiding the implementation;

(4) Study and propose to complete the provisions of the Civil Code, the Law on State Compensation Liability, Law on Complaints, Law on Denunciations;

(5) Develop and promulgate legal documents on professional ethics for cadres and civil servants, ensuring respect for human rights while on duty;

(6) Research and review laws on workplace violence, gender violence, domestic violence, violence against children and vulnerable groups to make synchronous adjustments to protection of these groups, which is consistent with Article 16 of the Convention.

Due to the development and issuance of annual legal documents and the above Plan, up to now, the legal framework of Vietnam to implement the Convention has been more complete, which is evidenced in the following:

Firstly, in addition to the provisions of Clause 1 of Article 20 of the 2013 Constitution, the right not to be subjected to brutal torture or punishment, inhumane or humiliating is provided for in many legal documents in various fields such as criminal, administrative, civil laws, etc. From 2015 up to now, many important laws directly related to the prevention and control of brutal, inhuman or degrading torture or punishment have been enacted, amended and supplemented, including: Criminal Code 2015 (amended in 2017), Civil Code 2015, Criminal Procedure Code 2015, Law on Enforcement of Temporary Custody and Temporary Detention 2015, Law on Legal Aid 2017, Law on State Compensation Liability 2017, Law on Denunciation 2018, etc. In addition to recognizing rights, legal documents also prohibit the torture, brutal, inhumane treatment or punishment, such as the prohibition of torture, harassment, and humiliation under the Criminal Procedure Code (Article 10), Law on enforcement of temporary custody and temporary detention (Article 4, Article 8), Law on organization of criminal investigation agencies (Article 14), etc.

Second, the Criminal Code has been amended to be more consistent with the provisions of the Convention. Although there is no specific provision on torture, at present, all acts of torture, brutal treatment or punishment, inhumanity or humiliation as governed by the Convention are considered a crime. In addition, Vietnam's legal documents which are directly or indirectly related to the Convention such as the Criminal Procedure Code, Law on the Execution of Criminal Judgments, Law on Enforcement of Temporary Custody and Temporary Detention, The Law on Mutual Judicial Assistance, the Law on Lawyers have also shown that Vietnam has a relatively complete legal system on the protection of human rights in general and anti-torture in particular, consistent with the general principles and standards of the Convention. Basically, it can be observed that Vietnamese law has a fairly high level of compatibility with the Convention.

Third, Vietnamese law currently has provisions to prevent the torture, brutal treatment or punishment, inhumanity or humiliation, especially in criminal proceedings, enforcement of criminal judgments. These include provisions recognizing the rights of individuals at risk of torture, treatment or punishment, brutality, inhumanity or humiliation, such as persons in custody or detention. (Law on enforcement of temporary custody and temporary detention), the person serving a prison sentence (the Law on Enforcement of Criminal Judgments), etc. Some preventive measures are also present in the regulations on the functions and duties of state agencies, law enforcement officials, for example the Law on Organization of the Criminal Investigation Agency, Law on Organization of the People's Courts, Law on Organization of the People's Procuracies, the Law on the People's Public Security Forces, etc.

Fourth, Vietnamese law also recognizes the rights to complain, denounce and compensate for victims of torture, brutal treatment or punishment, inhumanity or humiliation. These rights are recognized in the Law on Complaints, Law on Denunciations, Law on State Compensation Liability and a number of other legal documents such as the Criminal Procedure Code, Law on Temporary Custody and Temporary Detention, etc.

Fifth, the protection of human rights and the right not to be tortured are also regulated in many other relevant legal documents such as the Labor Code, the Marriage and Family Law, the Law on Prevention and Anti Domestic Violence, Law on Gender Equality, Law on Legal Aid, Law on Children, etc.

For the dissemination and propaganda to raise awareness of the implementation of the Convention, the Convention is a human rights convention with content related to many fields of

social life, with many difficult contents. Therefore, the implementation of the Convention must be carried out in stages, in accordance with the actual situation and conditions of Vietnam.

Propaganda, dissemination, education and awareness raising activities on anti-torture for a large number of cadres, civil servants, public employees and people in general, the contingent of cadres and civil servants who directly handling administrative violations, investigating, prosecuting, adjudicating, and executing judgments in branches and levels outside the People's Public Security branch, the People's Army and those at risk of being subject to torture, brutal treatment, punishment, inhumanity or humiliation in particular have not been given adequate attention, implemented evenly or regularly in branches, levels and localities; the quality and effectiveness of this work have not met the requirements; methods of dissemination are not diverse. In addition, the legal and professional qualifications of public employees are not uniform, so they may not understand correctly or completely about the obligations and responsibilities of individuals. Therefore, personal abuse of power while on duty might still happen. This also causes certain difficulties for competent agencies in managing and training staff. In addition, in some localities, the economic life and intellectual level of the people are not high; in areas with a large number of ethnic minorities, the propagation and dissemination of the relevant contents of the Convention and the law still faces many difficulties due to the differences in customs and culture, the problem of explaining the spirit of the law into the languages of ethnic minorities, etc.

Therefore, the dissemination and propagation of the Convention to all officials and people must also be done regularly and continuously in an easy to understand and comprehend method. For civil servants, it is necessary to regularly guide and foster legal and professional skills to improve their capacity and qualifications to avoid possible abuse of power.

In fact, in some localities, there are still violations of the law on anti-torture in arrest, detention and investigation across the country, limiting and affecting the inalienable rights of to body, legal protection of health, honor and dignity, the right of the people not to suffer torture, violence, persecution, corporal punishment or any other form of treatment. Some cases show signs of injustice related to the use of torture, force, and corporal punishment, which incited public opinion and reduce people's trust in proceedings of state agencies. People are still passive and fail to promptly prevent or combat violations of the law on anti-torture. In some cases, there are infringements of the right not to be brutally and inhumanly tortured, treated or punished, or

humiliated, but the violations fail to be promptly denounced. Therefore, it is necessary to study and perfect the mechanism of inspection and supervision of legal compliance by agencies and procedural officers, especially in investigation and detention activities. In this regard, it is important to promote the supervisory role of the Judiciary Committee and members of the National Assembly, and at the same time, facilitate the conditions that allow the mass media to regularly monitor the performance of judicial agencies, including detention facilities.

In addition, it is necessary to study and perfect the regulations to ensure that testimony obtained from torture, corporal punishment or harassment of any kind will not be used as evidence of accusation at all procedural stages.

In order to effectively implement the above activities, it is necessary for the State to develop separate and long-term programs, policies and mechanisms to combat torture (or put in the general programs, policies and mechanisms on human rights protection), which mobilizes the participation of civil society organizations, media agencies, and legal circles; at the same time, it is necessary to strengthen dialogue, international and regional cooperation in torture prevention and control activities, etc.

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