

IS VIETNAM READY FOR ITS ACCESSION TO THE CONVENTION AGAINST TORTURE?

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***Abstract:** The Convention against Torture is one of the nine core international human rights treaties. Vietnam now is considering its adherence to the Convention. Once being a member of the Convention, Vietnam is obliged to observe all obligations provided in CAT, particularly the incorporation of the treaty's norms into the domestic law, to give effect of the treaty in the domestic domain. The paper attempts to compare the existing legal provisions of Vietnam and those of CAT, in order to conclude that it is now just a matter of time for Vietnam to accede to this Convention.*

1. Introduction

In 1986, Vietnam started the Doi Moi (or renewal) policy. Since then, Vietnam has obtained remarkable achievements in social, political and economic fields. Thanks to those achievements, human rights of the people have been constantly enhanced, the people's right to be the master of the country is ensured. Vietnam is committed to continue its Doi Moi policy by proactively integrating into the world, enhancing the administrative reforms and building a socialist rule-of-law state of the people, by the people and for the people. The notion of a rule-of-law state of Vietnam is characterized by a constitutional principle that "all citizens are equal before the law" and "human rights in all fields, political, civil, economic, social and cultural, are

respected". It can be said that, in other words, the building of a rule-of-law state in Vietnam equally means human rights of all citizens are respected, promoted and protected.*

Being a member of more than a half number of core international human rights instruments, including the two Covenants constituting the International Bill of Rights, and while human rights in Vietnam have been increasingly ensured for the better both in legal documents and in practice, Vietnam's legal system is still far behind the satisfaction of a rule-of-law state. Therefore, in some areas, there remain "vacuums" and

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"gaps" in the legal framework, consequently leading to the lack of necessary legal mechanisms available to protect human rights.

The fact shows that human rights can be abused and violated in different forms and ways, by any one, including those in their official capacity. As a principle provided in international human rights law, responsibility to ensure the respect for, protection and fulfilment of human rights is vested with the states. The Government of Vietnam is also adherent to this principle. The accession to an international human rights instrument is first and foremost dependent on the political will of a country committed to the protection of human rights of their nationals, at the same time demonstrates the country's responsibility to the international community at large for protecting and promoting human rights. Among the current nine core international human rights instruments, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is considered a particularly important human rights treaty because its issues, torture and ill-treatment, are universally condemned and no country publicly supports them or opposes their eradication.

In the Foreword for the Guidebook "Bringing the International Prohibition of Torture Home" (2006), the Redress Trust, a London-based British non-governmental organization, said the United Nations Convention against Torture is an important achievement in the history of the international campaign against torture and cruel, inhuman or degrading treatment and punishment, and a key tool to combat torture effectively.

Vietnam's policy is to respect for and protect human rights for all. Torture and ill-treatment are also absolutely prohibited by Vietnamese laws, though Vietnam is not yet a member of CAT. Over the last a couple of years, in Vietnam, a number of international seminars on CAT and Vietnam's accessibility to CAT have been held by Vietnamese institutions in collaboration with their foreign partners. Relevant researches are going-on. The drive behind these activities is the Vietnamese Government's green light turned on, expressing its will to take necessary steps to accede to CAT. Specifically, the Government of Vietnam has issued an official dispatch, thereby relevant agencies and institutions are requested to conduct thorough studies and to make necessary preparations for Vietnam's accession to CAT.

2. The states' obligation to implement the Convention

As provided in modern international law, which could be referred as the treaty-based law, the parties to a treaty are legally bound to fulfil and implement the obligations contained in the treaty in good faith (the principle of *Pacta sunt servanda*). So, as not being a member of CAT yet, Vietnam is in principle not legally bound by CAT. If it is understood as such, then there is no point to discuss Vietnam's obligation to CAT. However, the aim of this part is to explore a state's obligation to fulfil and implement a treaty as provided in international law in general and to prevent acts of torture in any territory under its jurisdiction as enunciated in CAT in particular. Furthermore, in order to analyze legal provisions of Vietnam in comparison with CAT, it would be good to assume that Vietnam is already a member of CAT. As a result, the question now is that

what are obligations bound upon Vietnam under CAT?

Provisions relating to states' obligation to implement a treaty can be found first and foremost in Articles 26-27 of the Vienna Convention on the Law of Treaties. These Articles generally govern the observance of treaties within the domestic domain. According to Article 27, it can be interpreted that states should modify the domestic legal order as necessary in order to give effect to their treaty obligations. In other words, states parties must ensure that their domestic law is in line with their obligations under the treaty. So as to make their internal law consistent with their obligations under the treaty, state parties can just simply amend or supplement the existing laws or more comprehensively enact a new law to comply with the terms set forth in the treaty. The fact is that none of the current nine core international human rights instruments obliges states parties to incorporate its provisions into the domestic law; instead, they provide state parties "shall take effective legislative, administrative, judicial or other measures to..."[emphasis added], for instance, which is a rather weak legally-binding term. Though these basic instruments do not formally oblige states parties to incorporate their provisions into the domestic law, this desirable approach can be found in some other non-binding international human rights instruments. For example, paragraph 2 of the Basic Principles and Guidelines on the Right to have a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law – an instrument that is supportive to CAT – provides that "2. If they have not already done so, States shall, as required under

international law, ensure that their domestic law is consistent with their international obligations by: a) incorporating norms of international human rights law and international humanitarian law into domestic law, or otherwise implementing them in their domestic legal system...". The International Covenant on Civil and Political Rights of 1966 (ICCPR) absolutely prohibits torture and ill-treatment. Relating to the domestic application of ICCPR, the Human Rights Committee (HRC) foresees problems that might arise in the translation of treaty obligations into national law, therefore it strongly encourages formal adoption or incorporation of the Covenant into the national law [emphasis added].

CAT requires states parties to take, among others, legislative measures to prevent acts of torture (Article 2.1). Such measures should be understood that states parties have discretion on the procedure they use to incorporate the treaty or to amend, supplement and even enact a new legislation with a view to ensure that the obligations under the treaty are effectively met.

Having said that, one can now point out that the first obligation bound upon states parties under the Convention is to ensure their domestic law in line with provisions of the treaty. So, as a state party to CAT, Vietnam must ensure its national laws, the first in which is the criminal law, consistent with CAT.

As stated in Article 2.1, along with legislative measures, CAT also requires states parties to take administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction. These are considered specific measures to ensure practical implementation of the prohibition of torture, including positive

measures of prevention, ensuring adequate and effective mechanisms to investigate allegations of torture and where sufficient evidence exists, bring to the court the perpetrators for the justice of victims. In other words, states parties must ensure the domestic practice in line with their obligations under CAT. The fact shows that a legal framework available is insufficient. There must be effective, impartial and capable institutions and personnel to materialize such framework. In the *Velasquez Rodriguez v. Honduras* case, the Inter-American Court of Human Rights determined that states parties not only have the obligation not to violate the rights enshrined in the Convention, but they are required to take reasonable steps to prevent situations which are truly harmful to the rights protected.

Another issue relating to the obligation bound upon states parties to fulfil and implement the treaty is the so-called state responsibility. A state is responsible for an internationally wrongful act when conduct consisting of an act or omission is attributable to it under international law and constitutes a breach of an international obligation of the state. What is an internationally wrongful act? It is simply that an act of a state is not conformity with what is required of it by an international obligation, regardless of its origin or character. As provided in the Convention, states parties are obliged to take effective legislative, administrative, judicial or other measures to prevent acts of torture. So, a lack or inadequacy of any such measures as the legislative measure to implement the Convention effectively may result in the state responsibility of those states, even though there is no specific rule that the failure by a state to ensure conformity of its

legislation with its international obligations constitutes a breach entailing state responsibility.

States have a role to play as the creators of and guarantors for the implementation of international law. As guarantors, they must fulfil and implement their obligations under international treaties. The above-mentioned obligations are legally bound upon states parties to any one of the nine core international human rights treaties. Since torture is one of the most abhorrent violations of human rights, all states, whether be states parties or non-states parties to the CAT, are obliged to prohibit and eradicate it as provided in international treaty law and international customary law. Thus, any country, even though it is a non-member of CAT, but as a member of the international community, is anyway obliged to prohibit and eradicate torture. Vietnam is not an exemption in this regard.

3. Vietnamese laws and CAT's substantive provisions

The criticism on torture would be groundless without referring to the definition of torture in Article 1.1 of CAT. Though the Convention does not formally request states parties to simply copy or incorporate this definition of torture into their domestic laws, but the most effective way to ensure that all acts of torture are outlawed is to insert a definition of torture in conformity with Article 1 of the Convention, minimizing the possibility that domestic courts will fail to interpret the crime in line with international requirements. In other words, understanding and using the definition of torture is key to a successful implementation of CAT; the absence of or inadequate definition of torture commonly results in a lack of understanding of torture or insufficient implementation. Thus,

recently, the Committee against Torture expressed its concerns of inadequate definition of torture provided in the penal laws of some countries. So, by raising its concerns as such, the Committee indirectly encouraged states parties to fully incorporate the definition of torture in the Convention into their domestic laws, whether be in a penal law or a specific law on torture.

As provided in CAT, one needs to understand the meaning of "torture" and "cruel, inhuman or degrading treatment or punishment". There are four elements in the definition of torture in Article 1.1 of CAT: Any act [emphasis added] (1) intentionally inflicted. It means the perpetrator has an intention to commit torture; (2) causing severe pain or suffering, whether physical or mental; (3) for [specific] purposes; and (4) by or at or with an official capacity. By pointing out these four elements, it is clear that within the purposes of CAT, the Convention only obliges states parties to prevent acts of torture committed in the public official domain (police station, prisons, state agencies...). In other words, acts of torture committed outside the public official domain, for instance by gangs..., are not within the purposes of CAT. Do governments take responsibility if they fail to prevent acts of torture in that situation? This could be considered a weak point of CAT.

Though the Convention is equally against torture and other cruel, inhuman or degrading treatment or punishment [emphasis added], it provides no specific definition of the latter. If one reads carefully the definition of torture (Article 1.1) and the wording in Article 16, it can be interpreted that some acts of cruel, inhuman or

degrading treatment or punishment, on the one hand, are acts of torture. On the other hand, there are other acts of ill-treatment that may be deemed as less severe than those provided in Article 1.1. Any other international instrument or national law that prohibits cruel, inhuman or degrading treatment or punishment is not subject to prejudice from the provisions of CAT. This means relevant extensive provisions are welcomed. The Human Rights Committee said that the prohibition of torture and other forms of ill-treatments in Article 7 of ICCPR can be extended to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. Thus, it continued to emphasize that Article 7 covers "in particular, children, pupils and patients in teaching and medical institutions".

In Vietnam, one can see that torture is absolutely prohibited in the first Constitution of Vietnam of 1946. The same token can be found in the succeeding Constitutions. Article 71 of the Constitution of 1992 (amended in 2001) specifies: "Citizens have the right to physical inviolability and to have their lives, health, honour and dignity protected by law. No one shall be arrested without a warrant from the People's Court, or a warrant from or ratification by the People's Procuratorate, except in the case he or she is caught in flagrant violation of the law. The arrest and detention must be in accordance with the law. All forms of persistent coercion, persecution, humiliation and infringement on citizens' honour and dignity are strictly prohibited" [emphasis added]. As per se of this Article, the term "the right to physical inviolability" should be understood equally as "the right to be free from torture"; and the

phrase "all forms of persistent coercion, persecution, humiliation and infringement on citizens' honour and dignity are strictly prohibited" can be interpreted as "acts of cruel, inhuman or degrading treatment or punishment" to be prevented. The spirit of that constitutional provision is transmitted to other relevant acts adopted by Vietnam, especially to the Penal Code.

The section of the Code, which is most compatible with CAT's norms is Chapter XII – "Crimes of infringing on human life, health, dignity and honour". The first crime listed in Chapter XII of the Code is murder (Article 93). There are a number of circumstances related to the crime of murder, for instance murder while performing official duties, killing in a barbarous manner and etc. CAT just provides the consequence caused by acts of torture and ill-treatment and does not recognize that the excessive severity of torture may lead to death. However, under CAT, the perpetrator may be subjected to punishment only for the crime of torture. Article 93 of the Code does not explicitly include circumstances where severe torture can amount to the victim's death, for example killing in a barbarous manner or killing in an organized manner. But, it could be a possible case. As such, state responsibility of Vietnam as a state party to CAT in such case is to punish perpetrators for the crime of torture in advance of imposing a penalty for the crime of murder. It would be, thus, an extensive provision and a good contribution to CAT if more explanations are made to include acts of torture in circumstances linked to the crime of murder under Article 93 of the Code. Other crimes having some implications of torture or ill-treatment listed in this Chapter include those provided in Article 97, Article

98, Article 99, Article 100, Article 104, Article 105, Article 107, Article 110, Article 111, Article 112 and Article 121 and etc.

It is very challenging to point out what crimes punished under the above mentioned provisions may be regarded also as acts of torture or ill-treatment. On the one hand, there is no exhaustive list of acts as such to compare with included in CAT and on the other hand, the wording of these articles is not clear. More clarification or explanation is needed thereto. For instance, Article 97 provides: "(1) Those who while performing their official duties cause death due to the use of violence beyond that permitted by law shall be sentenced to between two and seven years of imprisonment...", or Article 98 prescribes: "(1) Anyone who unintentionally causes death to another person shall be sentenced to between six months and five years of imprisonment...". So as to determine a violent act "beyond that permitted by law" or an act committed "unintentionally", it is necessary to first of all define what violent act is permitted by law and how or what criteria used to measure an unintentional act, etc. These questions are very relevant to the determination and prevention of acts of torture and ill-treatment.

Under the Rome Statute of the International Criminal Court (ICC), torture can be part of the crime of genocide, crimes against humanity or a war crime. Within the purposes of the Penal Code of Vietnam, Chapter XXIV of the Code regulates the crimes undermining peace, against humanity and war crimes. In accordance with Article 1.2 of CAT and the Rome Statute, torture is *prima facie* understood to be a crime subjected to punishment under this Chapter XXIV. In other words, provisions in Chapter XXIV are self-

executing against torture. For example, Article 343 against war crimes prescribes: "Those who, in time of war, give the order for or directly undertake the murder of civilians, wounded persons, prisoners of war, the looting of property, the destruction of population quarters, the use of banned war means or methods, and/or commit other acts in serious violation of the international law or international treaties which Vietnam has signed in or acceded to, shall be sentenced to between ten years and twenty years of imprisonment, life imprisonment or capital punishment" [emphasis added]. Perhaps, this is the most specific section of the Code that implies the absolute prohibition of torture and demonstrates the responsibility of Vietnam to ensure that "all acts of torture are offences under its criminal law" (Article 4.1, CAT). However, it is necessary again to clarify what acts within the scope of this Chapter XXIV are "in serious violation of the international law or international treaties which Vietnam has signed in or acceded to".

The prohibition of torture and ill-treatment may be found in major laws and by-laws of Vietnam, including among others the Criminal Procedures Code (2003), the Civil Code (1995), the Law on the Protection, Care and Education of Children (amended 2004), the Labour Code (2002), the Ordinance on the Enforcement of Imprisonment Penalties (1993), and in various Government's decrees.

One of the explicit points that one can realize when reading provisions in the above-mentioned legal documents is that they are aimed at preventing as much as possible acts against the life and dignity of all persons. This aim makes the mentioned provisions both superfluous and insufficient.

They are superfluous because a violation is unnecessarily repeated but has already implied from another violation previously committed. For instance, an infringement on body is already implied in the infringement on the life; or ill-treatment also covers humiliation. But, at the same time, it is insufficient when there is a lack of explanation of a violation. The prohibition of torture is implied, while that of ill-treatment is explicitly stated. A lack of explanation in this situation may lead to a possibility that an act of torture can be punished by an inappropriate penalty and the same is true for acts of ill-treatment. This failure may lead to the state responsibility to fulfil and implement properly CAT, though the state party is committed to punish such crimes.

As pointed out earlier, one of the weak points of CAT is the scope of its application. CAT is only applied where torture is committed in the official domain, "by a public official or other persons acting in an official capacity" (Article 1.1, CAT). So as compared to CAT, the scope of application of Vietnamese laws against torture and ill-treatment is broader, covering all persons. However, it is like the Convention itself, more explanation to acts of torture and ill-treatment is needed, particularly the term "torture" is hardly found in any Vietnamese legal document. This always likely leads to its failure of implementing the obligation of preventing and eradicating torture and ill-treatment due to a lack of an adequate definition of torture as concerned by the Committee against Torture.

Not expelling, returning ("refoulement") or extraditing a person to another state "where there are substantial grounds for believing

that he would be in danger of being subjected to torture" is a fundamental principle in international human rights law. Thus, states are obliged to make legal provision to ensure that this principle is respected. This principle can be enunciated in a number of laws, such as laws on immigration or refugees, extradition, and even in administrative regulations.

In Vietnamese laws, this principle is provided in the Law on Vietnamese Nationality, the Criminal Procedures Code. Extradition is specifically defined in Article 2.7 of the Law on Vietnamese Nationality as: "The hand-over by one country to another country of a person, who commits a criminal act or is convicted with a criminal sentence that has already taken legal effect and is present on the former's territory, so that the latter shall examine such individual for penal liability or impose a penalty against him/her". This definition is merely aimed at addressing a technical issue, which is the interpretation of words as made in any legal document. The matter lies in that whether extradition is implemented or not, it depends on a couple of other issues such as the nature of criminal acts, the practice of states where they are supposed to be expelled, returned or extradited to, persons who have the authority to decide extradition, etc. Because after all, the utmost aim in any the mentioned case is to protect a person from being subjected to torture or ill-treatment due to unwell-founded grounds.

The prevention of possible acts of torture or ill-treatment from being inflicted on Vietnamese nationals by another state is clearly stated in the Law on Vietnamese Nationality. According to this provision, even when a Vietnamese citizen commits a serious crime in a territory under the

jurisdiction of another country but now is hiding in Vietnam, he/she shall not be extradited to the extradition requesting country. Though this provision is in line with international human right law and international customary law, Vietnam must ensure that it has a sufficient legal framework to punish such crimes, including the crime of torture, in line with the obligations bound upon it under CAT.

Except "where there are substantial grounds for believing that he would be in danger of being subjected to torture", CAT allows states parties to expel, return or extradite an offender to another country. Complying with international treaties to which Vietnam is a signatory or has acceded to and on the reciprocal basis, Vietnamese law also allows the extradition of a person to an appropriate country. Article 343 of the Criminal Procedures Code of Vietnam (amended 2003) stipulates that the authorities of the Socialist Republic of Vietnam competent to carry out legal procedures, may may extradite a foreigner, who commits a criminal act or is convicted with a sentence that has taken legal effect and in present on the territory of the Socialist Republic of Vietnam, to a requesting country in order to examine his/her criminal liability or impose the penalty against him/her. The most concerned question for competent authorities in deciding to extradite a person is how to identify "substantial grounds". In line with CAT and international human rights law in general, the state party is obliged to assess whether there are substantial grounds for believing that a person would be in danger of being subjected to torture where he/she is expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. So,

though there are extraditable offences and extradition is made in line with international treaties or bilateral agreements, Vietnamese competent authorities must substantially ensure the offences extradited are beyond the "substantial grounds" as provided in CAT and other international human rights treaties. Once such "substantial grounds" are founded, Vietnam can refuse the extradition request submitted by another country, even with which Vietnam has no extradition treaty.

Basically, the provision as regards the refusal of extradition in the Criminal Procedures Code of Vietnam (Article 344) is implicitly or explicitly in line with obligations bound upon Vietnam as stated in Articles 4-9 of CAT. However, it is imperative for Vietnam to clarify and specify what "acts, crimes" it means here; whether these acts and crimes are equally provided as acts of torture and ill-treatment that amount to torture. As mentioned earlier, acts of torture and ill-treatment are still generally prescribed in the Penal Code of Vietnam, even the term "torture" is not stated at all. Furthermore, the grounds on which Vietnamese competent authorities use to refuse the extradition are incompatible with the "substantial grounds" provided in Article 3 of CAT. A person may face discrimination on such grounds, but he/she may not be subjected to torture or even acts of ill-treatment amount to torture. Thus, more specific explanation is needed about what offences can and can not be extraditable, and the grounds for a refusal of extradition need to be extended to cover the "substantial grounds" provided in Article 3 of CAT and other international human rights instruments.

Any member of CAT is also legally bound by other obligations such as education and information regarding the prohibition against torture for law enforcement personnel, civil or military, medical personnel, public officials and others (Article 10); systematic review of interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment (Article 11); ensuring for a person to enjoy the right to complain and to have his case promptly and impartially examined by competent authorities (Article 13); ensuring the right to obtain redress, fair and adequate compensation, full rehabilitation (Article 14).

4. Concluding observations

Torture and ill-treatment are among the most abhorrent violations of human rights and human dignity. Hence, all states are bound by the absolute prohibition of torture under international human rights law, be it as a matter of treaty law like the International Covenant on Civil and Political Rights, or international customary law.

The right of individuals to be free from torture and other cruel, inhuman or degrading treatment or punishment is firmly established in international human rights treaties and international humanitarian law conventions. On the other hand, as a principle provided in the international human rights law, states have the duty to respect, protect and fulfil the implementation of human rights for all. As such, states parties to an international human right treaty are legally bound to fulfil and implement the obligations

contained in the treaty. Vietnam, if adheres this Convention, shall assume the obligation of incorporating of the Convention's norms into the domestic law.

Through the above discussion of states' obligations to implement the Convention in general and analysis of Vietnamese laws in particular, one can say that given the existing domestic legal framework and its traditional and cultural values, Vietnam should join the international community in an effort to prevent and eradicate this abhorrent violation of human rights by acceding to the Convention. This recommendation is made on the following grounds:

Firstly, the Vietnamese nation embraces traditional and cultural values that are in line with universal humane values, in which human rights and dignity are fully respected. The State of Vietnam holds the view that human beings are both the goal and the driving force of the cause of national construction. Acceding to CAT means that Vietnam is firmly committed first to protect human rights of all its citizens, to prevent its citizens from being subjected torture.

Secondly, the existing Vietnamese legal framework is basically aimed at preventing and prohibiting against torture and other cruel, inhuman or treatment or punishment, reflecting the spirit of CAT and other international human rights treaties regarding the prohibition against torture and ill-treatment.

Thirdly, Vietnam has ratified and acceded to a number of international human rights instruments and international humanitarian law conventions. For legally-binding treaties like ICCPR and

CRC, without any reservation to provisions regarding the prohibition of torture and ill-treatment, Vietnam is obliged to respect, protect and fulfil the implementation of these treaties. This means whether Vietnam is a member of CAT or not, it is already legally bound to prevent, prohibit and punish acts of torture and ill-treatment.

Fourthly, ratifying or acceding to CAT is important both as a symbolic step and as a means to strengthen the prohibition against torture. For Vietnam, it is a symbolic rather than a substantive step as it is pointed out in the previous paragraph. Moreover, acceding to CAT certainly brings in a reputable position for Vietnam in the international community.

Finally, the Government of Vietnam has expressed its will to accede to the Rome Statute of the International Criminal Court and the Convention against Torture. Furthermore, the Penal Code of Vietnam contains a separate section (Chapter XXIV) providing crimes undermining peace, against humanity and war crimes. Torture is part of crimes against humanity and war crimes, which are under both the Rome Statute and CAT. In the relationship between these two instruments, acceding to either of them will be a further advance step towards accession to the other.

The above-mentioned facts show that acceding to the Convention against Torture is just a matter of time for Vietnam. The sooner it accedes to the Convention, the deeper Vietnam proves that it is continuously committed to integrate into the world community and to fulfil its responsibility to protect human rights for all.