The Prohibition of Torture in Malaysia: Walking the tightrope between national practices and international standards

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By Matthew Sands[*]

Introduction

Torture is universally recognised as one of the worst abuses a State can commit against persons under its control. It has a devastating and long-lasting effect on its victims. Beyond the immediate impact on the victim, torture has a corrosive rippling effect on society which infects and degrades a State's commitment to the rule of law, leaving scars on all those who participate in or even tolerate it.

The international community has condemned torture in all its manifestations. The absolute prohibition against torture is recorded in article 5 of the 1948 Universal Declaration of Human Rights:

> *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*

This Declaration, though adopted only among States in existence after the Second World War, was negotiated among people from every continent and included representatives from all regions of the world. It is celebrated as a truly universal declaration, recognising the shared commitments of all States to move collectively towards the achievement of human rights standards for all.[1]

The prohibition against torture and other ill-treatment was hence given binding force in various human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), and more specifically the United Nations Convention against Torture (UNCAT).

Despite the fact that freedom from torture is one of the most basic rights a State can offer its people, some States in the ASEAN region have appeared somewhat reluctant to adopt international commitments to prohibit torture in practice - only half the membership of ASEAN (Cambodia, Indonesia, Laos, Philippines, and

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1 Malaysia adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 3452 (XXX) (Dec 9, 1975).

Thailand) have so far adopted the UNCAT. And though Malaysia has demonstrated its commitment to human rights through accession to a number of important human rights treaties, and a commitment to consider accession of the UN Convention against Torture made during its recent Universal Periodic Review, Malaysia has yet to ratify either the ICCPR or the UNCAT.

The UNCAT was adopted in 1984 and will celebrate its 30th anniversary later in 2014. As we approach this important moment, States parties, international experts and human rights defenders are calling on all States which have yet to adopt this treaty, including Malaysia, to consider whether they have reached a position to do so.

The Scope of the UNCAT and its Normative Basis

The absolute prohibition against torture is recognised as a norm of customary international law and has attained the elevated status of *jus cogens*.[2] It applies whether or not a State has joined the Convention, and may not be excused for any reason, such as alleged inconsistency with religious doctrine or internal armed conflict.

During its examination of crimes committed in the former Yugoslavia, the International Criminal Tribunal for the former Yugoslavia (ICTY) considered what the prohibition of torture meant for States in practice. It ruled that the obligation to prohibit torture is wide-reaching and should include the corollary duty to prevent its occurrence. The Court held: "it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture."[3] Further examinations have confirmed that additional obligations could also fall within the existing duties of States.[4]

Given the wide-ranging obligations on States to prevent and prohibit torture, it is often easily understood that there are some significant advantages for States to ratify and implement the provisions of the Convention, not least as an effective way to reduce the incidence of torture and other forms of ill-treatment in their own jurisdictions.

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2 Definition: "That body of peremptory principles or norms from which no derogation is permitted." http://legal-dictionary.thefreedictionary.com/.

3 *Prosecutor v Furundzija*, ICTY, Trial Chamber Judgement, Case No. IT-95-17/1-T (Dec 10 1998), at 148.

4 Committee against Torture, General Comment No.2 on implementation of article 2 by States parties, CAT/C/GC/2, (Jan 24, 2008), commitments of all States in the Declaration on the Protection of All Persons from Being Subjected to Torture mentioned above; annual UN General Assembly resolutions on torture; including the 2010 Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/64/153.

The UNCAT provides States with detailed advice on essential aspects of effective torture prohibition, prevention, accountability and redress, to fulfil the obligations which bind all States in international law.[5] States parties are free to operationalise the provisions in good faith in any way that is effective to fulfil the promise they have undertaken, thus preserving the obligations of State sovereignty.

The UNCAT and its Optional Protocol are thus two essential instruments to help States effectively implement their international obligation to prohibit torture and other ill-treatment.

The Regime of Reservations and Limitations Used in Human Rights Treaties

While the benefits of treaty adoption are well understood, some States have preferred to adopt treaties while reserving one or more key obligations, raising questions about the extent to which States consent to essential obligations of the treaty.

A reservation is a statement, however phrased or named, made by a State when adopting a treaty which purports to exclude or modify the legal effect of certain provisions of the treaty. The reservation can only be made at the adoption of the treaty, and may be withdrawn later at any time.

The UNCAT expressly permits reservations in relation to provisions on confidential inquiries (article 20) and references to the International Court of Justice in cases of dispute (article 30), and does not prohibit other reservations. Although other reservations are not expressly prohibited, reservations that are made must still be considered under the rules of general international law. Specifically, article 19(c) of the Vienna Convention on the Law of Treaties requires that permissible reservations must not be incompatible with the object and purpose of the treaty.

Generally, a reservation will be incompatible with the "object and purpose" of a treaty if it affects an essential element of the Convention that is necessary to its *raison d'etre*. Any reservations which attempt to exclude or offend a peremptory norm of international law would necessarily not be compatible with the object and purpose of the treaty.

The object and purpose of the UNCAT is to achieve the shared commitment of all States to absolutely prohibit torture and other forms of ill-treatment. Therefore, any reservation which impedes or negates this objective would necessarily be incompatible with the Convention.

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5 Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988), p 1.

But what is the effect if a reservation is deemed incompatible with the object and purpose of the treaty, and thus invalid? If a reservation is found to be invalid, it might be severed from the treaty ratification or accession. But would that have the effect of rendering the related underlying provision operative or not?

While there remains some academic debate over the consequences of finding a reservation invalid, the majority supports the argument that an incompatible reservation that is declared invalid must also invalidate the adoption of the provision to which it is related.[6] This is due to the fact that a basic principle of State sovereignty requires consent before a State assumes any obligation. The perverse result of this is that the legal effect of the treaty provision will be obviated, regardless of whether the reservation is compatible with international law or not.

The legal effects of allegedly incompatible reservations will no doubt continue to entertain international lawyers for some time. In the meantime, treaty bodies and human rights advocates have taken a much more pragmatic approach. For instance, in response to Malaysia's reservations to article 15 of the Convention on the Rights of Persons with Disabilities, and article 37 of the Convention on the Rights of the Child, which both excuse Malaysia from obligations to prohibit torture and other forms of ill-treatment, both Committees have recommended that Malaysia remove the reservations as soon as possible, noting their inconsistency with the object and purpose of their respective Conventions could risk the protection afforded to vulnerable groups.

Reservations to the UNCAT itself have been quite limited, perhaps reflecting the importance that the international community places on the absolute prohibition against torture. Some 48 of the 155 States parties to the UNCAT entered reservations upon adoption, though only 39 such reservations now remain operative. The vast majority of these reservations exclude provisions expressly authorised in the Convention. Some other reservations, however, have provoked a number of objections from States parties.

The number of reservations to the UNCAT may be compared with those attached to other human rights treaties, such as the ICCPR and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which have both attracted a high number of reservations, particularly from the Middle East and North Africa region States.

Reservations to human rights treaties may be considered necessary for various reasons, but reserving States should always carefully consider the importance of preserving the overall integrity of the text. Reservations may have the significant advantage of enabling States to adopt a treaty that they would otherwise be unwilling or unable to join, and thereafter move towards a position where they are

6 R. Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent", AJIL, vol.96:531.

able to withdraw the reservations and implement all the provisions of the particular treaty. But, if couched in general or overbroad language, reservations can lead to asymmetric obligations, as one State may opt-out of a provision which is valid among other contracting States. This risks undermining the mutuality of obligations underlying the good faith engagement with which States implement treaties.

An example is Pakistan's ratification of the UNCAT in 2010, when it purported to make the treaty subject to 10 reservations, limiting its application to compatibility with provisions of its Constitution, sharia law and certain domestic laws in force. A number of States objected to several of the reservations, as it was unclear to what extent, if any, Pakistan found itself bound to fulfil obligations of the Convention. The reservations used general language, were indeterminate in scope and could not be compatible with the State's commitment to uphold the principles of the Convention. Consequently, the reservations risked undermining the universal prohibition against torture and other ill-treatment. Pakistan subsequently withdrew all incompatible reservations in 2011.

On its ratification to the UNCAT, Botswana also made a reservation to interpret the definition of torture in line with its constitutional prohibition of torture, thus potentially significantly limiting the scope of the treaty.

On adoption of the ICCPR, Bahrain and Mauritius also made broad reservations stating that their obligations in respect of particular provisions would be understood subject to the prescriptions of Islamic sharia law. As with the reservations of Pakistan, the reservations of Bahrain and Mauritius make it unclear to what extent, if any, treaty obligations take effect in the State, and consequently raises concerns as to the commitment of both States to achieve the objectives of the Covenant.

Of course, any State party to the Convention may object to any reservation, irrespective of whether the reservation complies with the rules of international law. However, due to the vertical nature of human rights treaties which create obligations and duties towards its people, rather than other States, it is questionable what practical effect an objection has. An objection may prevent a State from taking advantage of the reservation in its exchanges with another State, but that facility does not prevent a State from relying on it to exclude the right from persons within their control.

The limited effect of State objections creates a gap that may only be filled by treaty bodies themselves. As noted by the Human Rights Committee in their consideration of reservations to the ICCPR, it is not a role that can logically be fulfilled by anyone else. As noted above, human rights treaty bodies have often taken the pragmatic approach to recommend that States parties remove offending reservations at the earliest opportunity.

The (Im)balance Between International Standards and Specific National Practices such as Corporal Punishment

Malaysia has reported that corporal punishment is a form of punishment provided for under its existing laws, and that it is unable to support the assertion that equates whipping and other forms of corporal punishment with torture.[7] This position would appear inconsistent with the fact that corporal punishment has widely been recognised as a prohibited form of punishment. For instance, the Human Rights Committee has stated in its General Comment number 20 (1992) that the prohibition against torture and other ill-treatment must also extend to prohibit corporal punishment, "including excessive chastisement ordered as a punishment for a crime or as an educative or disciplinary measure."[8] This considered view was developed from a number of individual communications to the Committee in which it was found that, "irrespective of the nature of the crime that is to be punished, however brutal it may be, it is of the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant."[9] The Committee against Torture, the Committee on the Rights of the Child and the Special Rapporteur on torture have all echoed similar views.[10]

Corporal punishment is also prohibited by a number of universally accepted international standards, including the historic UN Standard Minimum Rules (SMR) for the Treatment of Prisoners, which was adopted unanimously in 1955.[11]

Some States have noted that the UNCAT provides some flexibility, and point to the second sentence of article 1(1) which provides that "torture" does not include pain or suffering caused by lawful sanctions. For instance, on accession to the UNCAT, the United Arab Emirates "confirm[ed] that the lawful sanctions applicable under national law, or pain or suffering arising from or associated with or incidental to these lawful sanctions, do not fall under the concept of 'torture' defined in article 1 of this Convention or under the concept of cruel, inhuman or degrading treatment or punishment mentioned in this Convention."

However, it is now settled practice that the "lawful sanctions" clause is understood to refer to sanctions that are both lawful in domestic and international law. This is a logical consequence of the alternative whereby any act of torture would be considered lawful if permitted under domestic law. This cannot be so, and as a

7 Malaysian Addendum to the Report of the Working Group on the UPR, A/HRC/25/10/Add.1, (March 4, 2014), at 8 and 10.

8 CCPR, *General Comment No.20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7)* (1992), para 5.

9 CCPR, *Osbourne v. Jamaica*, Communication No. 759/1997, (April 13, 2000), para 9.1.

10 Report of the Special Rapporteur on torture Manfred Nowak, UN General Assembly, UN Doc. A/60/316, (Aug 30, 2005), para 19 *et seq*.

11 SMR Rule "corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences."

result, only acts which are lawful under international and domestic law may fall within this narrow exception. It therefore follows that as corporal punishment is contrary to international law, it cannot be considered a lawful sanction in accordance with UNCAT article 1(1).

Malaysia's adoption of some other human rights treaties has shown the potential positive impact of international membership and scrutiny. After its ratification of the CEDAW, the government delegation engaged in a frank and constructive dialogue with the Committee on the Elimination of Discrimination against Women, announced the removal of some reservations and recognised the opportunity to review others. The removal of some reservations to the CEDAW is welcome, and Malaysia's commitment to consider the removal of further reservations may be further supported.[12]

Malaysia's dialogue during its initial review before the Committee on the Rights of the Child should also be commended. Again, the government delegation noted that some reservations had been withdrawn and pledged to withdraw others, including the reservation to article 37 which prohibits torture and ill-treatment, which Malaysia recognised was contrary to the CRC.[13]

On Reflection, Whether There is a Way to 'Walk the Tightrope' Towards Full Adoption of International Standards for Malaysia

Should Malaysia wish to accede to the UNCAT in the near future with the advantage of reservations, the reservations should be as precise and narrow as possible, and relate to a particular provision, so that all stakeholders understand exactly what obligations Malaysia has agreed to fulfil. Stakeholders should encourage the government to accept that reservations should be understood as temporary measures and encourage the government to periodically reconsider whether such reservations remain necessary. No reservation should attempt to avoid the *raison d'etre* of the treaty, nor exclude a non-derogable peremptory norm.

Malaysia is among several States that accepted recommendations during their last UPR of the UN Human Rights Council to continue to undertake appropriate steps towards the adoption of the UNCAT.[14] This process should be undertaken earnestly, as Member States of the Human Rights Council will be eager to hear about the progress of Malaysia at the next opportunity for review.

12 CEDAW, Concluding Comments on Malaysia, May 31, 2006, CEDAW/C/MYS/CO/2.
13 CRC, Initial Report on Malaysia, March 30, 2010, CRC/C/SR.1216.
14 One of the many recommendations accepted in principle by Malaysia during its recent UPR was the recommendation to "consider favourably acceding to the international treaties, to which it is not yet party." Recommendation by Tanzania in UPR Working Group Report on Malaysia, UN Doc. A/HRC/25/10, (Dec 4, 2013), at 146.20.

The commitment to remove whipping on children as a permissible punishment from the Child Act 2001 and replace it with community service demonstrates a willingness to reconsider how corporal punishment is used. In its preparation for the adoption of the UNCAT, Malaysia would be wise to seize the opportunity to host a wide national debate on the use of corporal punishment against all detainees, and reflect on how best to fulfil its existing international duty to prohibit the use of torture and other ill-treatment.

However, rather than focussing on the inconsistencies between national practices and Convention standards, a more positive approach would be to recognise and celebrate ways in which Malaysia has already taken steps towards the fulfilment of international standards. For instance, a roundtable discussion hosted by the Human Rights Commission of Malaysia (Suhakam) in 2011 on the UNCAT revealed a number of measures already undertaken which are aimed specifically at the prevention of torture. These measures include providing human rights training to police recruits, the use of video recording during interrogations, and providing access to places of detention for visits by the Human Rights Commission. These positive steps all serve as a strong foundation on which Malaysia could now consider accession to the UNCAT.

Malaysia has traditionally preferred to wait until its law and practice is consistent with international treaties before accession. This approach has some advantages, and many partners, including international non-governmental organisations, the Office of the High Commissioner for Human Rights, State development agencies, and the recently established State-led Convention against Torture Initiative[15] will surely all be ready to offer assistance to enable Malaysia to progress in the right direction. However, I would recommend that accession may instead be seen as the first step towards the achievement of international standards, rather than the last.

It should be recalled that the risk of torture and ill-treatment is always present in every country in the world. As demonstrated by the war against terrorism, no-one is immune from the risk of torture. Even States with a previously robust adherence to the rule of law have been shown to use torture with disastrous effects in the name of national security. Our recent experience of such shameful practices demonstrates that the risks posed by torture are challenges which all States share. This is also the approach of the Committee against Torture, which makes recommendations to all States after a constructive dialogue with government delegations during each review. No State can claim that it has completely eliminated torture, and it is clear that States could always look at more effective ways to reduce the risk of torture and ill-treatment in places of detention.

15 APT, "'States launch long term anti-torture initiative", (March 4, 2014), www.apt.ch/en/news_on_prevention/states-launch-long-term-anti-torture-initiative/#.U9pv_fmSzxA. (accessed July 31, 2014).

Accession to human rights treaties puts in train a process of national reflection with State agencies (police, security and detention officials), parliamentarians, the general public and other stakeholders that enables States to take stock of current practices and conduct a review of measures already undertaken. It is only through a positive and ongoing relationship of frank discussion with the Committee against Torture, and through an earnest commitment to achieve Committee recommendations, that Malaysia can best achieve the shared promise to prohibit torture and ill-treatment.

Conclusion

In 2011, the Chairman of Suhakam concluded that Malaysia was ready to accede to the UNCAT and there was no reason for not doing so. I would like to strongly echo these words. As a proud member of the international community, Malaysia has already undertaken various obligations aimed at the fulfilment of the promise to prohibit torture and other forms of ill-treatment. The international community is now looking forward to Malaysia taking further positive steps towards fulfilling its own UPR commitment to examine possible accession of the UN Convention against Torture and its Optional Protocol at the earliest opportunity.

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