

## LEGISLATING TO COMBAT TRAFFICKING IN VIETNAM\*

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### *Introduction*

Even though human trafficking is not a new phenomenon and being discussed at length internationally and from regional to national levels, it still attracts attention and remains a big challenge. As the scale and magnitude of trafficking is continually increasing, seeking an effective approach to tackle this brutal infringement appears to be unpromising.

Vietnam is not immune. Meantime, conveying in official documents the calling for a multi-sector action approach towards the trafficking of persons, analysing Vietnamese legal system on combating trafficking in persons, it can be affirmed that criminal justice response has been clearly dominant. Paradoxically, weaknesses have been found in the

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scheme of law regarding trafficking which makes systematic enforcement and implementation difficult and reducing the efficacy in combating trafficking in Vietnam.

My paper will analyse Vietnamese legislation on criminalizing trafficking in women and children as an example of a country in the early stage of perceiving trafficking as an issue. It will analyse these regulations in comparison with the requirements of international instruments to show that the current legislation gives high priority on criminal justice approach over the aspects of trafficking victims. Additionally, some cases will be cited as evidence for inefficiency of current legislation. As a result, a number of suggestions will be put forward to improve the current Vietnamese legal system by combining a criminal justice and victim-centred approach.

### ***The current patterns of trafficking within, from and into Vietnam***

To begin, Vietnam is located in the Greater Mekong Sub-region (GMS) which consists of six countries (Cambodia, Yunnan Province of the People's Republic of China, Lao People's Democratic Republic (Lao PDR), Myanmar, Thailand and Vietnam) with its general situation of economic limitations.<sup>1</sup> Almost all countries in the region can be characterised as a developing country with many economic and social disadvantages. On the Human Development Index for 2007-2008 of United Nations Development Programme, Vietnam is ranked at 105 out of 177 countries (whereas Laos PDR, Cambodia, Myanmar and Thailand are ranked at the position of 130, 131, 132 and 78 respectively).<sup>2</sup>

In spite of many similarities with neighbouring countries, Vietnam displays specific characteristics of migration. Firstly, Vietnam joined the Asian regional labour market quite late in contrast with other regional countries.<sup>3</sup> In the early stage of sending labour to other countries, Vietnamese's migrant destination largely included ex-socialist countries

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<sup>1</sup> Susu Thatun, 'Mekong Sub-region Committed to Ending Trafficking' (2006) 25 (2) *Forced Migration Review* 20.

<sup>2</sup> From the website <http://hdr.undp.org/en/statistics/> accessed on 28 Sep 08

<sup>3</sup> Dang Nguyen Anh, "Labour Emigration and Emigration Pressures in Transnational Vietnam", in R. Iredale, C. Hawksley and S. Castles (Eds), *Migration in the Asia and Pacific* 169-180, 169. See also IOM, *Labour Migration in Asia – Trends, Challenges and Policy Responses in Country of Origin*, 2003, p. 26

in Eastern Europe. This movement continued until the social and political changes in the Eastern Bloc happened by the early 1990s. Subsequently, a new labour migration flow initiated in 1994 to Kuwait, Lebanon, Saudi Arabia, Libya, Japan and Korea. In 2002, the direction of Vietnamese labour migrants changed markedly and Malaysia became the most significant destination. The migration policy in Vietnam was considered a reflection government policy intervention that is aimed at the management of social, economic and regional imbalances.<sup>4</sup> Consequently, Vietnam has loose cooperation agreements with other regional countries in creating safe labour migration flow<sup>5</sup> whereas it is reported that leaving the country via border posts on the road to China, Cambodia, Laos and Thailand was making up 30 to 40 per cent of actual emigrant.<sup>6</sup>

Secondly, the strict migration control of the Government can also be the push factor of irregular migration and trafficking. For instance, in 2002 Vietnamese female migrants just constituted of 23 per cent of migrant workers whereas this figure of Indonesia, Sri Lanka and the Philippines is 63.1%, 69%, 59.6% respectively. This is an assumed indication of Government policy to try and protect women from exploitation. Indeed, this restricted policy may lead to more irregular migration or trafficking<sup>7</sup> since it has diverted the flow of migrants away from established migration routes to the most dangerous and least populated areas. This policy is also blamed for pushing already vulnerable young women into more dangerous forms of movement, and therefore exacerbating trafficking.<sup>8</sup>

Trafficking in women and children in Vietnam has changed remarkably, from just happening in some provinces to spreading out to many other areas in the whole country, from the mode of domestically trivial acts to further cross-border organized activities. There have been women, girls and children trafficked domestically from the rural

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<sup>4</sup> IOM, above n 3, 35

<sup>5</sup> This is the reason why during the Memorandums of Understanding on Cooperation on the Employment of Workers were signed between Thailand and Lao PDR and Thailand and Cambodia in 2002 and 2003 respectively, Vietnam was not included.

<sup>6</sup> Dang, above n 3, 171.

<sup>7</sup> IOM, above n 3, 35

<sup>8</sup> Phil Marshall and Susu Thatun, "Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region", Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work, and Human Rights*, London, 2005, 51.

provinces into sex industry or becoming domestic workers in big cities.<sup>9</sup> Human trafficking also occurs within Vietnam from rural to urban areas from the scale of several provinces and cities spreading out in many other places nation-wide.<sup>10</sup>

At the cross-border level, Vietnam is prominently a source country. Trafficking in women and children from Vietnam occurs in three main routes: from Northern provinces to China, from Southern provinces to Cambodia, and the route to Taiwan, Hong Kong, Republic of Korea, Malaysia, Macau.<sup>11</sup> Women and children are trafficked to Cambodia largely for the purpose of sexual exploitation and forced labour.<sup>12</sup> Vietnamese women and young girls are trafficked to China under the form of “mail-order brides” or lured into prostitutions. In addition, children are also being sold to China for adoption. Vietnamese women are also being trafficked for sexual exploitation, forced labour, fake and servile marriages, exploitative domestic work, or prostitution to some other countries in an apparently smaller scale.<sup>13</sup> Additionally, Vietnam is reportedly the destination of trafficking of children from Cambodia for begging.<sup>14</sup>

Given the lack of official data<sup>15</sup>, and instead depending on the estimation of overseas institutions or unofficial channels from which the figures may not be reliable, compounds the difficulties of combating trafficking in Vietnam. Not surprisingly, estimates of incidence of human trafficking victims are very limited and generally lack empirical merit. Trafficking is a complex issue and accurately estimating the extent of such

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<sup>9</sup> According to a report (for internal distribution only) of 130/CP Steering Committee at the Meeting of Implementing NPA phase II (2007-2010) Hanoi, 2007, p. 23

<sup>10</sup> Nguyen Hong Bac, ‘Human Trafficking in Vietnam - Some Human Security Issues’ (Paper presented at the The International Development Studies Conference on Mainstreaming Human Security: The Asian Contribution, Bangkok, 4-5 October, 2007) 4.

<sup>11</sup> According to (unpublished) report of MOJ on Assessment Vietnamese Legal System on Combating Trafficking in Women and Children – Recommendations, 2008, p.5.

<sup>12</sup> Annuska Derks, ‘Combating Trafficking in South-East Asia: A Review of Policy and Programme Responses’ (Working Paper No 2, International Organization for Migration, 2000) 18.

<sup>13</sup> ActionAid International Vietnam, ‘Synthesis Report: The Trafficking of Vietnamese Women and Children’ (2005).

<sup>14</sup> Paula Kelly and Duong Bach Le, ‘Trafficking in Humans from and within Vietnam: The Known from a Literature Review, Key Informant Interviews and Analysis’ (Working Paper reported to IOM/Radda Barnen/SCF (UK)/UNICEF Vietnam, 1999).

<sup>15</sup> Nguyen, above n 10; See also Vu Ngoc Binh, *Trafficking of Women and Children in Vietnam: Current Issues and Problems* (2006); Karen Beeks and Delila Amir (eds), *Trafficking and the Global Sex Industry* (2006) 35.

underground criminal activity is a difficult task.<sup>16</sup> Official statistics in the number of victims of trafficking is deficient, and fails to include male victims. As a result, males are overlooked in measures combating crime.<sup>17</sup>

The Ministry of Public Security (MPS) reported that there were 209 cases with 449 women and children trafficked being rescued in 2005, yet the figure is supposed to be greater than that and can be up to thousand of people.<sup>18</sup> Moreover, ineffective government's control on its long and absorbent frontier and all the more so, 'there are no indications that high-level government officials are involved in trafficking but instances occur in which local officials at border crossings and checkpoints receive bribes to look the other way'.<sup>19</sup> Vietnam remains at tier 2 that is 'does not fully comply with the minimum standards for the elimination of trafficking' as stated by the U.S. Trafficking in Persons Report (TIP Report). No matter what some researchers criticize the quality of assessments in TIP Report, it is hard to say that these evaluations are trivial and not worth considering, yet they influence the level of foreign support on a country.

### ***Participating into international and regional regime on combating trafficking***

In 2000, the UN Convention against Transnational Organized Crime (CTOC) and its supplemented Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (TP) were open for signatory and ratification. The TP is the first international agreement in combating trafficking, which is also evaluated as giving prominence to a criminal justice approach. The central of TP is the three 'Ps' approach which consists of Prevention, Prosecution and Protection. They are three major areas of any anti-trafficking regime, in which the second 'Ps' namely 'Prosecution' seems to be the most important component according to the TP's language.

Vietnam has just signed the CTOC and presented positive attempts preparing for ratification of CTOC and TP . Becoming involved in the instruments which are

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<sup>16</sup> UNIAP website, accessed <http://www.no-trafficking.org/content/Statistics/statistics.htm> on 28 Sep 08)

<sup>17</sup> Nguyen, above n 10, 7.

<sup>18</sup> According to (unpublished) report of MOJ on Assessment Vietnamese Legal System on Combating Trafficking in Women and Children – Recommendations, 2008, p. 9.

<sup>19</sup> U.S. Department of State, *Trafficking in Persons Report*, 2007, Country Narrative, at <http://www.state.gov/g/tip/rls/tiprprt/2007/82805.htm> (accessed on 12 June 2008).

frequently considered as the manifestation of criminal justice discourse, it is not surprising that Vietnamese government has focused on producing a criminal justice response to address trafficking in women and children from and within the country. Consequently, Vietnam is giving special attention to developing a legal regime for the prevention and suppression of human trafficking as a crime.<sup>20</sup>

At the regional level, Vietnam has participated in the ASEAN Declaration on Transnational Crime (1997) in which trafficking in persons is categorized as a transnational crime together with terrorism, money-laundering, drug trafficking, arms smuggling and so on; the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime 2002 (Bali Process) in which combating trafficking as a transnational crime and a high priority on law enforcement response are given.<sup>21</sup> Recognizing the insufficiency of current national responses, the Governments booted the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT process) in 2003 with the feature of emphasis on the coordination between regional countries on all anti-trafficking aspects.<sup>22</sup>

As part of COMMIT process, Vietnam signed Memorandums of Understanding with some regional countries, including Cambodia in 2004, the People's Republic of China in 2006 and recently Thailand in March 2008. These agreements specify the focus on enhancing mutual cooperation in law enforcement and criminal procedures between the two related parties in suppressing the crime of trafficking in women and children; and given the regulations in the TP as the only guideline on terminological issues. The cooperation in protection and assistance victims of trafficking, however, takes a humble place in agenda.

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<sup>20</sup> Ministry of Justice, UNICEF, UNODC 'Assessment of the Legal System in Vietnam in Comparison with the United Nations Protocols on Trafficking in Persons and Smuggling of Migrants, Supplementing the United Nations Convention against Transnational Organized Crime' (2004) 3.

<sup>21</sup> From the website of Bali Process <<http://www.baliprocess.net/>> at 17 June 2008.

<sup>22</sup> Thatun, above n 1

*An overview of the Vietnamese legal regime on combating human trafficking*

Interestingly, the very early legal document regulating trafficking is a penal code. Articles 115 and 149 of 1985 Penal Code defined trafficking/trading in women and children and set a punishment of five to 20 years of imprisonment. Furthermore, the code defined provisions regarding the prohibition of sexual exploitation of children and the prevention and punishment of prostitution. The way of perceiving trafficking in women and children at this stage appears quite primitive with the consideration of trafficking in women and children as domestic crimes.

Subsequently, in the National Programme on Preventing and Combating Crime approved by the Prime Minister in 1998, trafficking in women and children is regarded as a “violence-used crime” (“tội phạm có sử dụng bạo lực”) which should be suppressed “whatever it costs”. Despite the severity of the crime acknowledged, implementation of anti-trafficking activities is not being regulated in any parts of the programme. This can be attributed to policy makers’ incomplete recognition on the severe nature of the crime per se.

Understanding the complicated situation of trafficking in women and children, the Prime Minister issued the Decision 130/CP dated July 14, 2005 to approve the National Plan of Action against Crime of Trafficking in Women and Children during the period of 2004-2010 (NPA) which is estimated as a measure to combat trafficking for commercial sexual exploitation.<sup>23</sup> The Government also sets up a steering committee with the duty of coordinating activities within the programme’s framework. Accordingly, there are four main components with five major tasks assigned to ministries, agencies. Particularly, the Central Vietnamese Women’s Union is in charge of raising awareness, the MPS with the duty of investigation and prosecution, the Border Commander (under the Ministry of Defence) is responsible for receiving victims at the border gates, the Ministry of Labour, War Invalids and Social Affairs (MOLISA) with reintegration and recovery, and the Ministry of Justice (MOJ) with reviewing related laws and legal documents and provide

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<sup>23</sup> U.S. Department of State, Trafficking in Persons Report, 2005, Part V Country Narrative, at <http://www.state.gov/g/tip/rls/tiprprt/2005/46614.htm> (accessed 12 June 2008).

inputs for amendments and fresh legislation. Especially, mass organizations such as Vietnam Women's Union (VWU), the Vietnam Youth Union (VYU) also participate in the programme.

The birth of a national programme on fighting trafficking in women and children across the border has strengthened the government's commitment to the issue. The NPA claims that '[MPS] will act as a focal point in cooperation with other agencies, ... from the central to local levels..., the focal point in international cooperation with Interpol and the police of neighbouring countries ...'.<sup>24</sup> Moreover, the MPS is the central point of all collaborative activities as representative of Vietnamese government.<sup>25</sup> Responsible for fighting, preventing and suppressing crime with all sources provided, MPS also takes accountability for reaching the aim of reducing basically the trafficking cases in 2010.<sup>26</sup>

With reference to 'Protection' component, it is significant to note that trafficked persons are allegedly treated as victims rather than criminals under Vietnamese law. In some circumstances where persons involved in violations, for instance, engaging in prostitution, leaving the country without permission, holding counterfeit travel documents, they may be subjected to certain liability. The liability is said that just applied to help people reintegrating into the society rather than to punish them.<sup>27</sup> However, this can be attributed to being non-compliance with the principle of non-criminalising victims. It also conveys that there always be societal and legal stigmatisation waiting for prostitutes, regardless how they have fallen into prostitution voluntarily or forcedly.

### *An analysis from the criminal justice perspective*

The requirement of criminalization of transnational organized crime including trafficking in persons is set out in Article 3 of CTOC. More specifically, requirements for

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<sup>24</sup> See Article 1 of Vietnamese National Plan of Action against Crime of Trafficking in Women and Children during the period of 2004-2010 (2005). In line with the most crucial duty allocated, this law enforcement agency established an specific anti-trafficking unit.

<sup>25</sup> See MPS's report at Meeting on Implementing Component 4 of Programme 130/CP, Hanoi 9 March 06

<sup>26</sup> See Article 1 of Vietnamese National Plan of Action against Crime of Trafficking in Women and Children during the period of 2004-2010 (2005).

<sup>27</sup> Ministry of Justice, UNICEF, UNODC, above n 20, 28

criminalization of human trafficking are set out concretely in Article 5 of the Trafficking Protocol (TP) supplementing the CTOC as follows:

C Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.<sup>28</sup>

As it is also proclaimed in article 3 of TP,

“[T]rafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, or fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Accordingly, trafficking in persons contains three separate elements of action, means and the purpose of exploitation which all must be present “to become operational within a given fact-situation”.<sup>29</sup>

Further to status quo in Vietnam, it can be said that the Penal Code is the main legal instrument regarding trafficking<sup>30</sup> and the only document containing the criminalizing issue on human trafficking even with many legal documents providing punishments on the traffickers and protect the human rights.<sup>31</sup> As other countries attaching high importance to the use of criminal law in an attempt to deal with various problems within society, Vietnam focuses on trafficking as a criminal problem rather than looking at other approaches. Particularly, the Vietnamese Penal Code has promulgated human trafficking in the two main articles and some others on concerning trafficking offences.<sup>32</sup>

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<sup>28</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (2000) Doc. A/55/383, Annex II.

<sup>29</sup> Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 984.

<sup>30</sup> Derks, above n 12, 47

<sup>31</sup> Ha Thi Khiet, ‘System of Recovery and Reintegration for Trafficked Victims in Viet Nam’ (Paper presented at the Parliamentary Conference on Law and Policies to Combat and Prevent Trafficking in Women and Children for Vietnam, Laos and Cambodia, Hanoi, 24-25 June 2005)

<sup>32</sup> According to 1999 Penal Code of the Socialist Republic of Vietnam,<sup>32</sup> trafficking in persons includes: Article 119: Trafficking in women

With regard to the trafficking definition, Vietnamese Penal Code has not provided any regulation on that officially up to now. Even though articles 119 and 120 regulate ‘trafficking in women’ and ‘trading in, fraudulently exchange or appropriating children’ respectively, the provisions do not describe any elements of the crimes. To date, the 1986 Resolution of the Judicial Council of Supreme People’s Court on guidelines for applying a number of provisions of the Penal Code has been the document solely providing a clarification of ‘trading in children’.<sup>33</sup>

According to the Resolution, ‘trading in children’ shall mean “the buying or selling a child for personal profit, even buying a child from the stealer or the parents. The act of

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1. Those who traffic in women shall be sentenced to between two and seven years of imprisonment.
  2. Committing the crime in one of the following circumstances, the offenders shall be sentenced to between five and twenty years of imprisonment:
    - a) Trading in women for the purpose of prostitution;
    - b) In an organized manner;
    - c) Being of professional characters;
    - d) For the purpose of sending them overseas;
    - e) Trafficking in more than one person;
    - f) Trafficking more than once;
  3. The offenders may also be subject to a fine of between five million and fifty million dong, to probation or residence ban for one to five years.
- Article 120: Trading in, fraudulently exchange or appropriating children
1. Those who trade in, fraudulently exchange or appropriate children in any form shall be sentenced to between three and ten years of imprisonment.
  2. Committing such crimes in one of the following circumstances, the offenders shall be sentenced to between ten and twenty years of imprisonment or life imprisonment:
    - a) In an organized manner;
    - b) Being of professional characters;
    - c) For despicable motivation;
    - d) Trading in, fraudulently exchange or appropriating more than one child;
    - e) For the purpose of sending them abroad;
    - f) For use for inhumane purposes;
    - g) For use for prostitution purposes;
    - h) Dangerous recidivism;
    - i) Causing serious consequences.
  3. The offenders may also be subject to a fine of between five million and fifty million dong, a ban from holding certain posts, practicing certain occupations or doing certain jobs for one to five years or subject to probation for one to five years.

<sup>33</sup> Ministry of Justice, UNICEF, UNODC, above n 20, 12. It should be elaborated more that the Vietnamese Penal Code generally legalizes crimes in three types: plain regulations, regulations with quotation of other documents and prescriptive regulations, among them the crimes structured under the form of plain regulation will be interpreted in the document like the kind of the above resolution. As a matter of fact, the courts in Vietnam normally and compulsorily wait for these guidelines as the most detailed legislation to make judgment of criminal cases to guarantee for the legal foundation. Time after time, this creates a general rule that the existence of the guidelines will help taking the Penal Code enter into force actually, even if the guideline is not as high in validity as that of the Penal Code.

buying a child or knowing the child is stolen shall be also regarded as crime of ‘trading in children’.” Even if this interpretation just clarifies primarily definition of ‘trading in children’, it is in fact admitted as the official explanation of what is ‘trafficking in women’. Therefore, trafficking or trading in women and children are to be perceived as a transfer of a woman or child from one person or group of people to another person or group of people for money or other material profits.<sup>34</sup>

Comparing to the aforementioned definition, current Vietnamese Penal Code does not address any key factors concerning trafficking either the act, the measures, the consent of trafficking victim or the exploitation which is the most crucial issue in addressing trafficking according to the CTOC and its supplemented Protocol’s promulgation. Even though the Protocol mentions that it is not states’ obligation to stipulate all these factors compulsorily in the anti-trafficking legal system, these components must have somewhat values since their international approval for a sufficient definition of trafficking. The existing formulation on trafficking generally infers that persons carrying out these crimes can be punished in accordance with the provisions on these incidence of violations and in the cases where there is a proof that violators have committed acts of conveying, passing, concealing and receiving persons for the purpose of trafficking then they should be punished for being an accessory to trafficking in persons.<sup>35</sup>

The Penal Code prohibits separately the sale of children which ‘focuses on the seller and the end receiver of the child but not trafficking per se’.<sup>36</sup> Therefore, the factor ‘of the giving or the receiving of payment or benefits’ is interpreted in 1986 Resolution as a purpose of the wrongdoing, and the proof of personal gain as part of the offender is required. Theoretically, this allows Vietnamese law enforcement to prevent and suppress trafficking sooner than that regulated in TP, because the presence of purpose in receiving/generating profits is enough to prosecute traffickers. However, giving the existence of ‘benefit/personal profit’ an integral part makes enforced agencies confused in reality, especially dealing with the cases where the act of receiving/generating profit is

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<sup>34</sup> Ministry of Justice, UNICEF, UNODC, above n 20, 12

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

ambiguous. In other words, nothing can do but giving up unless the purpose and/or the act of receiving/giving profits are demonstrated.

In 1990, Lan (a Vietnamese woman) married a Chinese man and moved to live in China. In July 2006, another Chinese man named Thanh asked for Lan's help to find him a wife with the price of 3,000 Yuan (Chinese currency). Lan went back to her hometown and brought one of her acquaintance, Mai to China with the promise of finding Mai a job and help her getting married with a Chinese man. The two women are arrested at the border. The result of investigating process has indicated that Lan used to take her sister along to China to marry a Chinese man. Lan then received 5,000 Yuan from this man. The problem is that Thanh and Lan's sister are all consent to being helped to get married to Chinese men and they are not exploited.

In 2005, Si and Nam, a twin brothers got acquainted with Thu and Ngoan, then deceived them to Vietnam-China border for shopping and transferred them to sister of Si and Nam, a woman named Van. The woman after that passed the two girls to prostitution in China to receive 12 million Vietnam dong. Subsequently, Thu escaped from the prostitution and contacted her relatives to help pay ransom for her. When Thu had returned home, she denounced the illegal act of Si and Nam. However, the authorities cannot prove that Si and Nam received money or any kinds of benefit from Van, so they are just accused to the offence of organizing and/or coercing other persons to flee abroad or to stay abroad illegally according to article 275 of Penal Code instead of the offence of trafficking in women.

Actually, analysing Vietnamese current legislation, it is apparently implied that the law makers constructed these regulations initially on the background of internal trafficking as those in 1985 Penal Code. '[F]or the purpose of sending them abroad\overseas' is stipulated in article 119 and 120 as aggravating circumstances which magnify the seriousness and punishment on offences correspondingly. Thus, the essential level of these offences is merely about domestic trafficking. However, these regulations show that

trafficking in women and children is fortunately prohibited as broad wrongdoings rather than simply prostitution-related activities.

In this legal system, trafficking in persons and its concerning activities are scattered in widespread offences. There have been some provisions regulating conducts which may come along with trafficking beside the two main offences on trafficking in women and children. Regarding the accomplice of trafficking or organizing/directing other persons to commit trafficking, Vietnamese legislation has regulated a general rule on ‘accomplice’ in article 20 of Penal Code. Generally, this provision covers all the conducts of participating, organizing or directing people to commit a crime and certainly can be used in the case of trafficking, but not for trafficking only. Hence, there is no specific content applied for trafficking solely.

Defining the age at which a person remains a child has been another problem in the legislation on criminalizing trafficking. Based on the legal, historical, cultural traditions and economic social circumstances, Vietnamese law provides that a child is a person who is under 16 ages<sup>37</sup> so that persons from 16 to below the age of 18 is not a child or adult as well. This creates a loophole in the legislation where the traffickers who commit trafficking activities may be impunity just because the victim consented to being trafficked and (s)he is between the age of 16 and 18 for instance.

There has also been another significant gap in the law when trafficking in males is not covered. No official explanation exists to clarify this exclusion other than blaming on no case of trafficking in men within and from Vietnam detected as it said in some informal arguments. As I have mentioned above, trafficking in men fails to be included in anti-trafficking legislation due to the lack of official statistics. Actually, trafficking in males still occurred, particularly in Lao Cai, a Northern mountainous province of Vietnam. Anecdotal evidence of trafficking of men for purposes of labour exploitation, forced labour, not excluding the sexually exploitative purpose and taking the internal organs appears despite not being a popular phenomenon in all surveyed areas.

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<sup>37</sup> This stipulation is in accordance with the Article 1 of the Law on Protection, Care and Education of Children 1991.

In April 2007, five young men who are ethnic minority people live in Thanh Binh commune, Muong Khuong district, Lao Cai province were promised to take along to China to find a job by two Chinese women. When they arrived, the two women transferred the guys to other people. Then, the young men were forced to work in a brick-making shop under the condition of involuntary servitude. After a period of time, two out of five guys escaped, returned to Vietnam and denounced the crime. Even though Vietnamese police claimed the Chinese authorities' cooperation to solve the case, the remained three young men have not been found and the case has been lacking because of no legal foundation.

The concern about the comparability between criminal sanctions existing to the gravity of crime is a question frequently asked when examining a criminal legislation. With regard to trafficking in women and children, anti-trafficking legislation must recognize trafficking as a serious crime<sup>38</sup> - “an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”<sup>39</sup>. Accordingly, trafficking of women and children in Vietnamese legislation is not totally a serious crime since the least sentence applied is just 2 year of imprisonment. As stated by the Article 8 of the Penal Code,<sup>40</sup> trafficking in women and trading in children are all less-serious offences if they fell into the first terms. Furthermore, imprisonment is not the only stipulated criminal sanction that can be imposed on a trafficker. As for this issue, Vietnamese legislation on trafficking can be regarded as an effective one with providing for other supplemented

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<sup>38</sup> Mohamed Y. Mattar, 'Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 (2) *Tulane Journal of International and Comparative Law* 372.

<sup>39</sup> See article 2, *United Nations Convention against Transnational Organized Crime* Doc. A/55/383, adopted by Resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations. Entered into force on 25 December 2003.

<sup>40</sup> Article 8.- Definition of crime

2. Based on the nature and extent of danger to the society of acts prescribed in this Code, crimes are classified into less serious crimes, serious crimes, very serious crimes and particularly serious crimes.

3. Less serious crimes are crimes which cause no great harm to society and the maximum penalty bracket for such crimes is three years of imprisonment; serious crimes are crimes which cause great harm to society and the maximum penalty bracket for such crimes is seven years of imprisonment; very serious crimes are crimes which cause very great harm to society and the maximum penalty bracket for such crimes is fifteen years of imprisonment; particularly serious crimes are crimes which cause exceptionally great harms to society and the maximum penalty bracket for such crimes shall be over fifteen years of imprisonment, life imprisonment or capital punishment.

sentences which can be applied together with imprisonment, such as a fine, probation or residence ban, a ban from holding certain posts, practicing certain occupations or doing certain jobs.

Trafficking in persons has been distinguished from human smuggling despite just in a simple level. In the Vietnamese law, the general term of “smuggling of illegal migrants” is not used; instead we make it in details as “organizing and/or coercing other persons to flee abroad or to stay abroad illegally’. This crime is located in article 275 which belongs to the Chapter of crimes of infringement upon administrative management order (Chapter XX). This indicates that the criminal offence involved in human smuggling is considered a crime against the state whereas trafficking in persons is one against the individuals.<sup>41</sup>

### *An analysis from the victim-centred perspective*

Victim of trafficking is regarded ideologically the most important component of any prototypical anti-trafficking legislation. In TP, the article 6 announces obviously the necessity of assistance to and protection of victims of trafficking, including protect their privacy and identity, providing them supportive service appropriated with particular cases. Requirements regarding trafficking victim are set out in Articles 6, 7 and 8 of the TP.

These measures to protect the victims, the witnesses of trafficking and their families are all stipulated in Vietnamese law to some extent. As stated by Vietnamese law, foreign persons who illegally enter Vietnam may be subjected to deportation, excluding the temporary remain for participating in investigation and prosecution of perpetrators.<sup>42</sup> This regulation seemingly satisfied the requirements on protecting trafficking victims promulgated in the TP<sup>43</sup> which guarantee for the successful prosecution of traffickers if there is an effective law enforcement existing. In addition, the most important issue under the human rights aspect is the non-penalization of trafficked persons has been

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<sup>41</sup> Mattar, above n 38, 370

<sup>42</sup> See article 19 of Decree No. 21/2001/ND-CP dated May 28, 2001 of the Government providing in detail the Ordinance on Exiting and Entering the Country.

<sup>43</sup> Kerry Carrington and Jane Hearn, *Trafficking and the Sex Industry: from Immunity to Protection* (2003) [9] Parliamentary Library < <http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib28.htm>> at 14 July 2008.

investigated in a report assisted by some UN agencies.<sup>44</sup> Accordingly, the treatment of trafficked persons is evaluated as relatively sufficient and that trafficked persons are treated as victims instead of criminals.

Unfortunately, protection trafficking victims is rationally not stipulated in Penal Code due to the task of a criminal statute.<sup>45</sup> In Vietnamese law, apart from the regulations on criminalizing trafficking in Penal Code, the regulations concerning victim of trafficking spread in variety of legal documents. Paradoxically, they can be found in Penal Code under the form of placing the responsibility on trafficked persons for the act of illegally exit or enter the country, holding false travel document, or working without permission in labour law. Nevertheless, there remains a problem of some measures stipulated to apply for the persons involved in some infringements due to their situation as trafficked persons that are not mentioned in the above report. The liabilities binding on the trafficked persons are compulsory measures and might re-victimize the sufferers even if it is stated as ‘mainly for the purpose of supporting them to reintegrate into the society’.<sup>46</sup>

Besides, persons who engaged in prostitution are not prosecuted. In place of that, they shall be subjected to so-called ‘administrative handling measures’ that sending them to a medical treatment institution for the time of three to eighteen months<sup>47</sup> to participate in education, vocational training and medical treatment.<sup>48</sup> Since there is no other options for the prostitutes even if they are not willing to admit the measures, these treatments look like enforcement measures rather than assistance. The regulation on precluding the application these measures to children under the age of 16 reinforces the forced nature of these measures. Once again, the uneasy regulation on prostitutes represents the obstacle in typically Asia tradition societies in their way to find a comprehensive approach to tackle trafficking.

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<sup>44</sup> Ministry of Justice, UNICEF, UNODC, above n 20

<sup>45</sup> Mattar, above n 38, 362

<sup>46</sup> Ministry of Justice, UNICEF, UNODC, above n 20, 28

<sup>47</sup> See Article 26 of the Ordinance No. 44/2002/PL-UBTVQH10 dated July 2, 2002 on Handling Administrative Violations

<sup>48</sup> See Joint Circular No. 12/TTLB/LDTBXH-TC dated June 7, 1996 of the Ministry of Labor, Invalid and Social Affairs and the Ministry of Finance giving guidance for State subsidize for people who are sent to Medical Treatment Institution according to Decree No. 20/CP dated April 13, 1996 of the Government on Promulgation of Regulations of Medical Treatment Institution established under the Ordinance on Handling Administrative Violations.

Reference to Vietnamese labour law, there is no kind of working permission apart from doing business in specific lines of work or pursuing some distinctive professions that require business license or professional practicing license. Neither administrative nor criminal liability accordingly can be applied for trafficking victims working without authorized permission abroad.<sup>49</sup> However, the regulation on Article 21 Decree No. 49/CP dated August 15, 1996 of the Government<sup>50</sup> stipulates that foreign victims can be subjected to administrative liability for illicitly working or carrying out the activities other than those approved in their proscribed visa in Vietnam. Although in practice the punishment is rather rare, its existence is against the principle of non-criminalization in which trafficking victims should be immune from such liability every time they committed an illegal act as long as those acts are related to their trafficking.

The Penal Code and its explanatory documentation maintains a treatment regime that is not in favour of the principle of non-criminalization for victims. Persons who illegitimately cross the national border shall be subjected to the offence of illegally leaving or entering the country, illegally staying abroad or in Vietnam according to article 274<sup>51</sup> of the Penal Code. Whereas there has been no official guidelines of how to distinguish trafficking victims who violated under fraud, deception or coercion from those who do these acts deliberately, it is hard to protect trafficking victims from being punished. And, no matter what the trafficked victims are bound to the criminal liability, they may be subjected to administrative liability.<sup>52</sup> Unfortunately, the same situation happens to the persons who hold counterfeit travel documents according to the articles 266 and 267 of Penal Code.

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<sup>49</sup> Ministry of Justice, UNICEF, UNODC, above n 20, 28

<sup>50</sup> See Decree No. 49/CP dated August 15, 1996 of the Government on the Administrative Punishment against Violations in the field of Social Security and Order.

<sup>51</sup> Article 274. Illegally leaving or entering the country; illegally staying abroad or in Vietnam  
Those who illegally leave or enter the country or stay abroad or in Vietnam, have already been administratively sanctioned for such act but continue the violation, shall be subject to a fine of between five million dong and fifty million dong or a prison term of between three months and two years.

<sup>52</sup> See Decree No. 49/CP dated Aug. 15, 1996 of the Government on the administrative punishment against violations in the field of social security and order.

### ***Conclusion***

Examining the Vietnamese legislation on criminalizing trafficking in women and children indicates that it insufficiently meets the requirements for prosecuting traffickers. The prerequisite on protection the right of victims of trafficking, especially the principle of non-criminalization for trafficked persons are not to be regarded appropriately. Vietnam should also be recommended to pay more attention to migration issue as a feeding source of trafficking rather than just focus on criminal justice response.

Vietnamese government is attempting to reinforce the current legal system on combating trafficking, particularly in regulating or criminalizing trafficking in Penal Code. However, this act just satisfies the short-term target. For a more favorable aim, a specific anti-trafficking law is indispensable in order for an effective response to trafficking. This specified law, with a thorough process of issuance will be hopefully guarantee the accountability of state and its law enforcement agencies in protecting victims' rights.

The experience of Vietnamese legal system is an convincing evidence of ineffective anti-trafficking measure in which criminal justice response can be the answer for every questions. It is time to reconsider the TP's requirements on assistance and protection trafficking victims. These requirements need to be tightened up to the extent of incorporating in domestic law as a compulsory obligation.