

Criminal Justice Responses to Trafficking in Persons: Challenges for Implementing ASEAN Convention on Trafficking in Persons in Vietnam

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Abstract

Human trafficking is a domestic and transnational crime that poses complex law enforcement challenges to all nations. Vietnam is particularly affected due to rapid growth in labour migration and international tourism. The presumption of law makers is that by improving the criminal justice response to trafficking in persons (TIP), its incidence within the country and beyond its borders will decrease. Inherent in this premise is the assumption that strong legal sanctions deter would-be traffickers. This paper describes Vietnam's criminal justice responses to human trafficking with reference to the legal framework and institutions. Barriers and challenges in implementing the ASEAN Convention on Trafficking in Persons (ACTIP), and the underlying reasons why the current response is inadequate in addressing TIP are identified with a focus on issues associated with victims and trials. The paper argues that Vietnam needs to increase efforts to meet its obligations and standards as set out in the United Nation's Recommended Principles and Guideline on Human Rights and Human Trafficking and ACTIP. In particular, prosecution of traffickers and the protection of victims need to be prioritised.

Keywords: *Human Trafficking, Human Rights, Labor Migration, Criminal Justice, Vietnam*

I. INTRODUCTION

Human trafficking is a major human rights and criminal justice issue globally. It primarily occurs in less developed countries where so many people – compared with the global north- are desperate to make a decent income and the rule of law is both weak and weakly enforced. Legal frameworks to eliminate trafficking in persons (TIP) have been established at international and regional levels but, in general, enforcement at the national level is insufficient. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (known as the Palermo Protocol 2000) provides definitions of human trafficking that emphasise trafficking as a form of transnational crime. The protocol has resulted in counter-trafficking initiatives that focus on border controls and immigration policies. Nevertheless, successful prosecution of perpetrators and strong protection of the rights of trafficked persons continue to lag.¹ The Palermo Protocol and the activities that have flowed from it has been complemented by regional and national legal and policy frameworks, one being the ASEAN Convention on Trafficking in Persons (ACTIP).

Vietnam, an ASEAN member state, is the focus of this article. The nation has a legal framework to deal with trafficking but, as is argued in the body of the article, it is not effectively enforced and so the phenomenon of human trafficking remains entrenched at a high level. Numbers of criminal cases brought to the courts are manifestly only a tip of the iceberg - victims, in large numbers, are still suffering at the hands of traffickers. In Vietnam, statistics documented throughout the country over the past ten years have shown that women and girls are being trafficked as labourers, domestic workers, sex workers, and brides throughout the region and to other countries.² In 2021, for the fourth consecutive year the government reported a decline in convictions in trafficking cases and a decline in prosecutions.³ Until 2022, when it was downgraded to Tier 3, Vietnam had been on the Tier 2 watchlist of the US Trafficking in Persons report for three consecutive years.

In broad terms, this article considers whether Vietnam’s legal and policy frameworks are up to the job and how the criminal justice system can better address TIP. To this end, the authors first outline the legal framework established to

1 Sanja Miliwojevic & Marie Segrave, “Evaluating Responses to Human Trafficking : A Review of International, Regional, and National Counter-Trafficking Mechanisms” in John Winterdyk, Benjamin Perrin & Philip Reichel, eds, *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (Boca Raton: FL: CRC, 2012).

2 Thi H Nguyen & J McIntyre-Mills, “Breaking the Cycle of Trafficking in Vietnam: a Critical Systemic Policy Review” (2021) 34:5 Systemic Practice and Action Research 475–493.

3 U.S Department of State (2022) defines Tier 1 as: Has no human trafficking problem. and the government meets TVPA minimum standards and make annual progress in combatting trafficking. Tier 2: Not fully compliant, but making “significant efforts” to be compliant with the minimum standards. The Tier 2 Watch List is determined by the Secretary of State to “require special scrutiny during the following year”. Tier 3: The government does not fully meet TVPA minimum standards including criteria on resources and the capacity to address severe forms of TIP. Read more at <https://www.state.gov/reports/2022-trafficking-in-persons-report/>. Accessed: 10 June 2023.

address human trafficking, and then presents an analysis of its effectiveness in institutions and criminal justice procedures. The institutional review is limited to policy, prosecution procedures, the judiciary, and assistance services for victims. The article is based on research by the authors. The paper is based on research including legal analysis and authors' interviews with key stakeholders, including representatives of institutions and victims of TIP, namely: government departments and institutions (8), international organisations (3), NGOs providing support to trafficking victims (5), recruitment companies (2), victims of trafficking being supported in shelters (3), returned migrants (4), and migrant networks.

II. VIETNAM'S LEGAL FRAMEWORK RESPONDING TO TRAFFICKING IN PERSONS

Vietnam acceded to the Palermo Protocol in 2012 and ratified the ASEAN Convention Against Trafficking in Persons, especially Women and Children (ACTIP) in 2017. Vietnam became a party to the UN Convention on Transnational Organised Crime in 2011⁴ and signed a Memorandum of Understanding in the Greater Mekong Subregion (GMS) to address human trafficking, before joining the action plan on the prevention of human trafficking of GMS. Vietnam signed the ASEAN Consensus on the protection and promotion of the rights of migrant workers in November 2017. However, Vietnam, unlike most other ASEAN states has not signed or ratified the UN Convention on Migrant Workers. By 2021, Vietnam had entered 14 bilateral mutual legal assistance treaties on criminal areas and 14 bilateral treaties on extradition, which includes dealing with crimes of human trafficking. There remain certain legal gaps in the areas of human trafficking and criminal justice. The current legislation in Vietnam on trafficking is, as is demonstrated below, not yet compatible with the international protocols.⁵

1. Key Laws and Legislation on Human Trafficking

The Law on Combating and Prevention of Human Trafficking (2011) provides a definition of trafficking which is narrow and not in line with accepted new forms of human trafficking. The law states that institutions, led by the Ministry of Public Security on state management on human trafficking, must assist other ministries and local provinces.

The 2015 Penal Code and 2015 Criminal Procedure Code provide a definition of trafficking and traffickers which seeks to make human trafficking a crime and seeks to treat the procedure of human trafficking as criminal. These Codes are compatible with the provisions set out in the Palermo Protocol. Circular No.

4 President's Decision 2549/2011/QĐ-CTN accessed The UN Convention against Transnational Organised Crime.

5 United Nations Trafficking Protocol, *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime. General Assembly resolution 55/25 dd* (2000).

02/2018/TT-TANDTC Decree No. 09/2013/ND-CP (2015) provides for social protection and victim support during legal procedures, including returning victims home and the establishment of support centres.

The Law on Vietnamese Workers Working Abroad Under Contract was updated in 2020⁶ to improve conditions for safe migration. The new law adds provisions for supplementing prohibited acts when sending workers abroad such as: enticing, seducing, promising, advertising, providing false information, or using other tricks to deceive workers. While the government manages labour migration, it also demands that they increase negotiations and cooperation with destination countries to push for greater protections for Vietnamese migrant workers.

The Law on Legal Aid (2017) provides legal assistance for victims through state legal aid centres and legal aid-participating organisations, providing services in provinces and districts via a network of human trafficking protection facilities.

2. Strategies, Policies, Action Plans, and Institutions focussed on Human Trafficking

In 2020 the Government of Vietnam enacted a plan to implement ACTIP, requiring all ministries, related agencies and provinces to enact their own plans to implement ACTIP.⁷ ACTIP raised the need for regional cooperation, with all states expected to have the same approach to investigations and prosecutions, making the region no longer a safe haven for perpetrators.

In 2021, the Vietnam Government enacted a National Plan of Action (NPA) for the prevention and combating of TIP for the period 2021-2025 (with vision to 2030).⁸ The NPA's objective was to 'reinforce detection, inspection, and prosecution, and bring to justice human trafficking criminals'. The NPA was designed to support the implementation of laws on trafficking by: (i) Enhancing awareness of the responsibility and capacity of individuals, families, and all of society; (ii) Reinforcing detection, inspection, prosecution, and bringing to justice human traffickers; (iii) Receiving, verifying, rescuing, protecting and supporting victims in a timely and safe manner; (iv) Completing legislation and effectively implementing policies and laws on human trafficking prevention and fighting; (v) Reinforcing cooperation and implementation of international commitments to human trafficking prevention and fighting.

The NPA assigned the MPS-Criminal Police Office to lead their human trafficking response⁹, supported by border guards (in border areas), the Supreme

6 Ref. 69/2020/QH14. On November 13, 2020, the National Assembly passed the Law on Vietnamese workers working abroad under contracts 2020, to take effect from January 1, 2022.

7 Prime Minister Decision no. 1957/QĐ-TTg dated 20 November 2020

8 Prime Minister's Decision 193/QĐ-Ttg dated 09/2/2021. Read at: <https://vanban.chinhphu.vn/default.aspx?pageid=27160&docid=202653>

9 The Criminal Police Department (C02) and the Investigation Agency of the MPS are responsible for developing guidelines on professional measures to prevent, detect, investigate and handle crimes related to social order, including human trafficking cases. There are

Procuracy¹⁰, Supreme Court, and the Ministry of Justice.¹¹ Agencies for combatting human trafficking were restructured in 2022 to enhance cooperation and collaboration. The NPA was implemented by government and all related ministries and agencies, as well as local authorities, including the Ministry of Public Security (MPS) (responsible for law enforcement and criminal justice,) the Ministry of Labour, War Invalids, Social Affairs (MOLISA) (responsible for protection), and the Ministry of Information and Communications (MIC) (responsible for communications). The border guards, Supreme People's Procuracy, and the Women's Union have all also led and supported roles and sub-components within the NPA. Border guards have largely the same detection, identification, and investigation roles as the MPS within the border areas, the procuracy is responsible for prosecuting traffickers, and the Women's Union provides a prevention and support role in communities, primarily in the northern mountainous region, as well as operating two shelters for female victims of trafficking. It has been reported that a higher percentage of women are trafficked compared to men and a higher proportion of minority women and girls are being trafficked, compared to the Vietnamese majority population.¹²

In the implementation plans of MOLISA and the Women's Union, the two agencies in charge of raising public awareness, specified the target groups and areas to be prioritised and made the focus of legal education and communication campaigns. Provinces incorporated the NPA into their government policies through their own programs and plans and integrated them through a trafficking steering committee for implementation.¹³ In 2021 the NPS added a national trafficking database led by MPS and several additional ministries, such as the Ministry of Agriculture and Rural Development (MARD), to address trafficking in the fishing

corresponding investigating agencies under the provincial police department with functions to identify and investigate trafficking cases. The Bureau for Drug-related Crimes and Prevention of the Border Guard Command identifies and investigates trafficking cases in border areas.

- 10 The Supreme People's Procuracy (SPP), the national level procuracies and the provincial and district level procuracy prosecute and supervise the legal compliance of criminal proceedings. Although investigation authorities are responsible for bringing criminal charges, the SPP may intervene in those decisions in certain circumstances, such as recension of a decision not to press charges. The procuracy may directly process crime reports or denunciations or directly detect criminal signs or at the request for initiation of the hearing panels (Ref. Article 153 of the 2015 Criminal Procedure Code).
- 11 The Ministry of Justice (MOJ) is the government agency responsible for the state management function of: i) Law formulation and enforcement, ii) examination of legal documents, iii) law dissemination and education, iv) civil and administrative judgment and enforcement, v) judicial assistance and administration, and vi) state compensation. In the human trafficking context, the MOJ is responsible for providing administrative and technical management of legal aid services to different target groups including to victims, witnesses and offenders (The 2011 Law on Human Trafficking Prevention and Combating).
- 12 Steering Committee on National Action Plan on Human Trafficking, *Proceeding of Human Trafficking Prevention Conference. (Ban chỉ đạo Quốc gia phòng chống tội phạm)* (National Steering Committee for Crime Prevention, 2019).
- 13 *Evaluation of Implementation Outcomes of Decision No. 2546/QĐ-TTg of the Prime Minister approving the Counter Trafficking Programme 2016-2020*, by Ministry of Public Security (Hanoi, 2020).

industry and relevant forced labour issues, using the Ministry of Health for guidance and technical support.

In addition, a national committee on combatting human trafficking (called Committee No. 130) was established in 2004 to enhance cooperation between ministries and agencies. From 2021, The Standing Office of Committee 130/CP was moved from Criminal Police Department to Ministry of Public Security Office, in order to be merged with the Standing Office of Committee 138/CP.¹⁴ Cooperation and coordination at the national level was set up through the NSC 138/CP, which covers all types of crimes. The Ministry of Labour Invalid and Social Affairs (MOLISA) became responsible for coordinating social and child protection measures, whilst the Ministry of Public Security (MPS) became responsible for law enforcement related anti-trafficking efforts. There remains no guidance on cooperation measures and/or procedures between these two agencies. Since 2021, the National Committee on combating and preventing human trafficking (Committee 130/CP) has been merged back into the National Committee on combating and preventing crime (Committee 138/CP), led by Standing Deputy Prime Minister Truong Hoa Binh. This has been seen as a slight legal downgrading of trafficking.¹⁵

Labour migration has been increasingly an important way for Vietnamese people to escape poverty, supported by the government's policies regarding labour export strategy, including a financial support scheme for labour export (known as Program 71).¹⁶ However, the scheme was not a success and by the end of 2015, only 30% of the planned 60,000 workers had accessed the programme. Families with property have been able to access mortgages in order to pay the upfront recruitment costs, but many migrants use a range of formal and informal sources when generating the required fees, including banks, moneylenders, microcredit schemes, friends, neighbours and relatives.¹⁷ In addition to high (and increasing) fees paid to recruitment agencies, the issue of paying loans, mortgages, and debts from labour migration quickly becomes a burden for migrant workers and their

14 The Government's Steering Committee for Crime Prevention and Control (SC): Steering Committee 138/CP. The responsibilities of the SC include developing strategies, crime prevention plans and coordinating agencies, organisations and localities in preventing and combating trafficking in persons. The SC is chaired by the Deputy Prime Minister, with members from 23 ministries and government committees, the Government Office, the Supreme Court, the Supreme People's Procuracy, Vietnam Television (VTV), Radio Voice of Vietnam (VOV), and the six socio-political mass organisations, with more delegated leadership from the Ministry of Public Security, including the Border Guard Directorate, Ministry of Foreign Affairs, Ministry of Labor, Invalid, and Social affairs, Ministry of Education and Training, Ministry of Finance, and the Supreme Court and Peoples Procuracy.

15 *The Political Economy of the Criminal Justice Response to Trafficking in Persons.*, by Asia Foundation (Vietnam: Asia Foundation, 2021).

16 In 1998, the Politburo issued Directive 41-CT/TW on labour export, acknowledging it as an 'important and long-term strategy'; Decision 71/2009/QĐ-TTg in 2009 approved the project '*Assisting poor districts in the promotion of labour export to contribute to sustainable poverty alleviation during the 2009-2020 period*'.

17 Lan Anh Hoang, "Debt and (un)freedoms: The case of transnational labour migration from Vietnam" (2020) 116 *Geoforum* 33-41.

families. Migrants are willing to take the risk of becoming irregular in their repayments, breaking their contract¹⁸ for higher pay with another employer if it is taking too long to repay their debt, or being treated poorly. Vietnamese migrants in East Asia face trafficking, exploitation, and forced labour, with guest-worker programs exacerbating their vulnerability. Temporary migration programs contribute to extreme exploitation among legal migrant workers.¹⁹ With these increasing informal systems, migrant workers are at ever greater risk of falling into labour trafficking or other forms of labour and sexual exploitation.²⁰

III. IMPLEMENTATION OF ACTIP: CHALLENGES IN THE CRIMINAL JUSTICE SYSTEM

Despite the development of what appears to be a comprehensive legal framework with strategies and plans, there are key challenges in deploying that framework to reduce and eventually eliminate human trafficking in Vietnam. The challenges, discussed below, include: (1) The issue of treating human trafficking as a transnational crime; (2) Complicated and non-standardised processes and procedures, including identification, investigation and prosecution; (3) Institutional and capacity constraints in the criminal justice system; (4) Limited resources for protection and assistance to victims.

1. Human Trafficking as a Transnational Crime

There are legal challenges to defining human trafficking as a crime because it happens across national borders. The question is, how should human trafficking be criminalised given the different laws and procedures of different countries? Susan Kneebone and Julie Debeljak argue that within criminal justice systems, policing strategies alone can prevent human trafficking. The anti-trafficking schemes in the region need to be criminal justice capacity-building.²¹ There is also the question of what level of sentencing should be applied to criminals in order to uphold justice for victims. The U.S Department of State's report on TIP (2019) suggests that 'an effective criminal-justice response to human trafficking should treat the prosecution of cases as seriously as other grave crimes, and governments should hold all perpetrators of trafficking, including intermediaries aware of the intended

18 Corporate Responsibility in Eliminating Slavery and Trafficking (CREST) (2021). *Vulnerabilities and risks to exploitation of Vietnamese migrant workers*. IOM CREST (<https://publications.iom.int/books/vulnerabilities-and-risksexploitation-encountered-vietnamese-migrant-workers>). In some countries, such as Japan, Korea, and Taiwan, visas are linked to a specific contract, so breaking the contract breaches the conditions of the visa, thus making migrants irregular. The fee collected by recruitment agencies is highest in Japan (ranged from 8,000-10,500 USD), then Korea, then Taiwan.

19 Danièle Bélanger, "Labor Migration and Trafficking among Vietnamese Migrants in Asia" (2014) 653 *The Annals of the American Academy of Political and Social Science* 87-106.

20 Authors conducted interviews with returned migrant workers from Japan, Taiwan, and Thailand.

21 Susan Kneebone & Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012).

exploitation, criminally accountable, and should not impose suspended sentences, fines, or administrative penalties in place of prison sentences. Without prison sentences, human traffickers will not be effectively deterred.’ The 2022 Department of State report on TIP also recommends that Vietnam “Vigorously prosecute all forms of trafficking and convict and punish traffickers, including in cases involving forced labour or complicit officials”.²²

Vietnam’s Law on the Prevention and Suppression of Trafficking in Persons (2011) refers to the definition of human trafficking in Articles 119 and 120 of the Penal Code (2009).²³ The 2011 Law on trafficking provides only a narrow and inconsistent definition of human trafficking compared to the Palermo Protocol. This sometimes makes it difficult to identify and assist victims.²⁴ There are also inconsistencies with international law applying to children.²⁵ This law, nevertheless, changed the focus of trafficking from the crime of buying and selling *women*, to the crime of buying and selling *persons* (article 119), which in effect added men and boys to the definition of human trafficking. Article 120 also focuses on the buying, selling and kidnapping of children. The 2011 Law focuses more on prevention of trafficking, including regulating state entities that do business with or provide services to where there is a risk of human trafficking occurring (Article 15). Chapter four of the law also provides procedures on receiving, identifying and the protection of victims. This trafficking law appears to require a two-way exchange, involving the ‘transfer’ or ‘receipt’ of persons, therefore failing to capture the broader criminalisation of ‘recruitment’, ‘transportation’ or ‘harbouring’ under standards of the Palermo Protocol. The Law on Trafficking is thus outdated compared to the updated Penal Code and there are legal gaps that need to be addressed.

The 1985 Penal Code focused on trafficking of women and children (Articles 115 and 119). The 2009 Penal Code previously ignored men, boys, and trafficking for labour exploitation. In it, the trafficking act was narrowly defined as the act of being related to trade and profits. This meant that trafficking was understood to be the act of one person (or a group of people) who transferred a person to another person (or another group of people) to earn money, property or other material profits. This included selling persons to another regardless of the buyer's purpose, buying persons to re-sell to others, using persons as exchange or payment, and buying persons for exploitation, forced labour or other inhuman purposes. The

22 U.S Department of State (2019, 2020,2021,2022). See at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/> and <https://www.state.gov/reports/2022-trafficking-in-persons-report/vietnam/> and https://vn.usembassy.gov/wp-content/uploads/sites/40/VIETNAM-2022-TIP-Report-Country-Narrative-FINAL_11JULY2022-Vietnamese-FINAL.pdf. Accessed 10 June 2023.

23 2009 Penal Code. Art 119 changes: the crime of buying and selling *women*, to the crime of buying and selling *persons*. Article 120 focuses on the buying, selling and kidnapping of children.

24 Oanh Nguyen & Hoan Nguyen, “Human Trafficking and Responses to Identification of and Assistance for Victims of Human Trafficking in Vietnam” (2018) 20:1 Flinders Law Journal 55-94.

25 *Casting Light in the Shadows: Child and youth migration, exploitation and trafficking in Vietnam*, by Kara Apland & Elizabeth Yarrow (Coram International, 2019).

definition of human trafficking or trafficking in persons (TIP) was expanded in the 2015 Penal Code to include transfers of persons for commercial purposes, including labour, sexual exploitation, and trading of human organs.²⁶ The updated definition also considers traffickers to be actors involved in recruitment, transport and retaining victims (Article 150). The new provisions in the code make Vietnamese legislation more compatible with those set out in the Palermo Protocol, but children remain defined as under 16 years of age rather than under 18. The 2015 Penal Code considers traffickers to be actors involved in the recruitment, transport and retaining of victims (Article 150). Article 150 provides that trafficking requires proof of force, fraud, or coercion to constitute an offence. Article 151 criminalises all forms of trafficking including child trafficking. In addition, the Penal Code requires proof of crime based on evidence including perpetrators' confessions and/or victim statements. Consent does not apply in cases of victims below 16 years old.

A few legal challenges of the code are that Articles 150 and 151 require proof of 'transferring' victims, which creates difficulties in prosecuting cases. In practice, it is a difficult and lengthy process to bring perpetrators to account and many victims drop out from investigations. In many cases, returned victims (persons who have returned to Vietnam) do not want to report to the police because they do not want to be known as having been trafficked and/or because the perpetrators are their relatives.²⁷ In the case of victims of human trafficking experiencing sexual harassment or exploitation as labour migrants, they were at times less likely to come forward about their abuses in an investigation or judicial setting due to fears that they may face arrest or deportation for crossing borders without documentation. There are also informal rules related to reporting and pursuing cases related to trafficking, which means few victims report exploitation when they return to Vietnam.²⁸ The requirement for witnesses and concrete testimony does not provide confidence for victims to report and cooperate.

The 2015 Penal Code (Article 150) applied to children between the ages of 16 and 17 years old and required a demonstration of force, fraud, or coercion to constitute a sex trafficking offense; therefore, it did not criminalise all forms of child sex trafficking. Vietnam still imposes administrative penalties and fines on victims of sex trafficking for acts of prostitution (even when forced) and illegal border crossings, which also applies to victims of labour trafficking.

The 2015 Criminal Procedural Code prescribes penalties of seven to 12 years imprisonment and fines of VND 50 million to 200 million (US\$2,170 to US\$8,670) for trafficking for sexual exploitation. These penalties are commensurate with other serious crimes such as rape. Charges and convictions of perpetrators of human trafficking have broad range. Under Articles 150 and 151 of the 2015 Penal Code,

26 Law No 100/2015/QH13, was passed by Vietnamese National Assembly 13th Legislature, 10th session on 27 November 2015.

27 Authors' interviews with victims.

28 Dung Nguyen et al, "Human Trafficking in Vietnam: The Issues and Responses of the Vietnamese Government" (2020) 13:7 *International Journal of Innovation, Creativity and Change* 135-153.

sentences for convicted traffickers range from less than three years up to 20 years imprisonment. Article 150 of the penal code criminalises labour and sex trafficking of adults and prescribes penalties of five to 10 years imprisonment and fines of 20 million to 100 million Vietnamese Dong (VND) (\$867 to \$4,330). Article 151 criminalises labour and sex trafficking of children under the age of 16 and prescribes penalties of seven to 12 years' imprisonment and fines of 50 million to 200 million VND (\$2,170 to \$8,670). These penalties seem insufficient to deter offenders.

In the case of trafficking for labour migration, it is required to prove recruitment, transportation, or harbouring in combination with the act of transfer or receipt of a person (i.e. in exchange for money, for a benefit, etc). In addition, the 2011 Law on Trafficking (still effective) requires evidence on material gain or exploitation. It also provides the definition of trafficking but is not clear on the matter of labour trafficking. The applicability of this legal and policy response to labour trafficking is therefore not complete. The response to human trafficking has mostly been focused on women and children, primarily those exposed to sexual exploitation, which limits the applicability on labour trafficking. As it is difficult to prove someone joining a labour migration scheme was forced or threatened when or after they joined, it is hard to criminalise traffickers. Although amendments of the law provide rules on traffickers in labour migration, there remains procedural constraints to making a criminal case to convict traffickers.

2. Complicated and Non-standardised Procedures

In Vietnam, procedures for identifying, investigating and prosecuting cases of human trafficking are both complicated and also inconsistent with criteria provided by international law. According to Ministry of Public Security, authorities investigated 149 suspected traffickers in 77 cases in 2021 (compared with 144 suspected traffickers in 110 cases in 2020). This figure included seven sex trafficking investigations, three forced labour investigations, and 67 investigations into unspecified exploitation "for the purpose of transferring or receiving money, property, or other material benefit" as defined in penal code Articles 150 and 151. The Supreme People's Procuracy (SPP) submitted 98 cases involving 177 alleged traffickers for prosecution in 2021, compared with 106 cases involving 180 suspects in 2020. Of these, 68 cases involving 120 suspects were accepted for prosecution, including 44 cases under Article 150 and 24 cases under Article 151. The government reported identifying 126 adult victims in 2021, 114 female, 12 male. Also identified were 45 children (compared to 121 victims in 2020, 300 victims in 2019 and 490 identified in 2018).

In the past, as human trafficking was not treated as crime, the prosecution of traffickers was interlinked with prostitution, sexual exploitation, labour exploitation, and irregular migration.²⁹ Some victims may have been penalised for unlawful acts that traffickers compelled them to commit (US Department of State, 2022). The

29 Jyoti Sanghera, "Unpacking the Trafficking Discourse" in Kamala Kempadoo, Jyoti Sanghera & Bandana Pattanaik, eds, *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (2017) 3.

current 2015 Criminal Procedure Code does not accept the victim's consent to be proof of crime, which differs from international instruments (the Trafficking Protocol) which allow victims to consent to their intended exploitation as a means of proving they are the victim of human trafficking.³⁰ Although the consent of victims is not the only factor which constitutes the criminal liability of offenders, victims are only deemed victims when there is an identified offender (a suspect or suspects), which is difficult when the offence occurs overseas. The Criminal Code 2015 also requires investigators to collect evidence to prove acts, means and purposes, given differences in the definition of human trafficking in various local laws compared to the international framework. In addition, Articles 150 and 151 of the Criminal Code require proof of 'transferring' victims. These legal procedures create difficulties when prosecuting cases at the recruitment stage of trafficking.

The procedure for identifying victims, including the receipt and repatriation of victims, is provided in a multi-ministerial joint circular.³¹ Although the government utilised criteria in the Coordinated Mekong Ministerial Initiative Against Human Trafficking (2014) procedure for identification of victims, those are not widely employed in practice. Those criteria include individuals engaged in provision of commercial sex services, individuals transiting border stations, workers in the fishing and seafood processing industries, migrant workers returning from abroad, and child laborers. Vietnam's procedure requires victim identification, witnesses testimony, or investigation results, with documents and evidence necessary. A victim must subsequently be certified and given one of the following: (i) a victim certificate provided by a police station in a rural district, urban district, town or provincial city; (ii) a victim certificate provided by rescue agencies; (iii) a victim certificate provided by the investigating agency, People's Procuracy or People's Court; or (iv) papers and documents proving victim status issued by foreign authorities which are authorised by overseas Vietnamese representative agencies or the Vietnamese Ministry of Foreign Affairs consular services. Victim certificates provided by the rescuing agency or through consular services the most easily obtained. Victim certificates from the police or investigating agency are only issued upon sufficient investigation and verification of evidence, or in cases where offenders were arrested or identified and are therefore more difficult to obtain, especially for victims returning to Vietnam from abroad by themselves.³² Despite these provisions, the victim identification process continues to be cumbersome and complex, requiring sign-off from multiple ministries before victims can be formally identified and provided with services.³³

There is a gap in the law that affects identification of child victims of human trafficking. Article 151 of the 2015 Penal Code defines children as persons under the age of 16 years, in line with the 2016 Law of Children. Persons who are 16 years

30 Ref. Decision 02/2019/HĐTP dated 11/1/2019 of Supreme Court on guiding implementation of art 150 and 151 of the Penal Code

31 Circular No. 01/2014/TTLT-BCA-BQP-BLDTBXH-BNG

32 2011 Law on Human Trafficking Prevention and Combating human trafficking

33 *Trafficking in Persons Report*, by US Department of State (Washington D.C: Office to Monitor and Combat Trafficking in Persons, 2021) Also, see notes of authors' interviews with KIIs.

of age and older are thus defined as adults. Consent is only relevant if a child is 16 and older, meaning child victims of 16-18 years of age will need to go through court process when there is a case against a trafficker.

Lack of a ‘victim-centred approach’ in victim identification procedures makes for delays and complications in the investigation and prosecution processes. For example, when called on to identify 37 corpses of Vietnamese people found in a shipping container in the UK in 2019³⁴, Vietnam undertook a long and complicated procedure to accept they were victims of human trafficking, because the government needed to find and convict perpetrators, while the UK considers deceased people to be victims immediately in their victim identification process.

Investigations into human trafficking involve cumbersome procedures and lack a victim-centred approach. As a result, the number of cases investigated and offenders apprehended has decreased in recent years. Increased numbers of alleged traffickers have been charged and prosecuted, but at the same time there has been a decrease in numbers of investigations and convictions.

The lack of a ‘victim-centred’ approach in lengthy and complicated investigations discourages cooperation and thus fails to identify victims promptly. Moreover, trafficked persons who return by themselves (self-rescue) are generally not considered to be victims if they do not go through identification and investigation procedures. They are often absent in reporting to police or to any investigating body, including self-reported human trafficking bodies. Victims who escape exploitative situations commonly do not report their experience to police.³⁵ If they are handed over at Vietnam’s international border, they often lack sufficient identity documents and it takes a long time to have such documents verified at their place of origin. Many victims do not want to engage in lengthy interrogation but instead want to go home immediately. Victims of trafficking find the investigation procedure complicated and inadequate in delivering justice.³⁶ As noted above, the identification procedure does not include ‘self-returned’ people. Although the law encourages self-reporting of trafficking, most persons (an estimated 60%) do not report due to stigma.³⁷ As such, the identification of victims depends on legislation methods to widen the definition of trafficking to include all victims; overseas and

34 New York Times. (Nov 7 2019). Online: <https://www.nytimes.com/2019/11/07/world/europe/essex-lorry-deaths-victims.html> ;’ The Guardian 21. Dec 2020. <https://www.theguardian.com/uk-news/2020/dec/21/essex-lorry-trial-two-found-guilty-over-deaths-of-39-vietnamese-people>. Accessed 20 Sept. 2022. RTE, 8 April 2020: NI lorry driver admits manslaughter over Essex lorry deaths <https://www.rte.ie/news/courts/2020/0408/1129383-essex-lorry-driver/>

35 *What Makes People Vulnerable to Human Trafficking? Profile of Victims of Human Trafficking in Vietnam*, by Blue Dragon (Hanoi: Blue Dragon Children’s Foundation, 2021).

36 Authors’ Interviews with KIIs-victims.

37 Tien Hoang Le, *Human Trafficking in Vietnam: Preventing Crime and Protecting Victims Through Inter-Agency Cooperation* (PhD, Queensland University of Technology, 2017) [unpublished].

internal, men and women, children and youths, and all people who return on their own.³⁸

There are several key obstacles, including the prosecution procedure. The number of cases prosecuted has reduced when, given the scale of the problem, it would be expected that case numbers would have increased. From 2016-2020, the People's Courts processed 568 cases with 1,082 traffickers, of which 1,008 were convicted. In 2020, the court system convicted 136 individuals (compared with 174 in 2019), including 84 cases under Articles 150 and 151 of 2015 Penal Code; 71 regarding 'sexual exploitation', 10 cases of forced labour, and three cases of either sex or labour trafficking. In the same year, the People's Procuracies prosecuted 161 alleged traffickers involved in 102 cases, compared with 156 in 91 cases in 2019.³⁹ Victimisation is a difficult obstacle to achieving justice for victims. For example, Vietnam imposes administrative penalties and fines on victims of sex trafficking for acts of prostitution (even when forced) and illegal border crossings.⁴⁰ During Covid's lockdown, interviews with key informants from Peace House and MOLISA uncovered a decrease in cases reported involving transfer across international borders. This can cause trafficked persons to remain trapped, facing increased violence and unsafe conditions. Without documentation, international trafficking victims risk further victimisation and lack access to social protection and healthcare.⁴¹ The victims during covid had to wait much longer in trafficked countries, before being transferred back to Vietnam after lockdown.

Whilst Vietnam has provided for the non-criminalisation of victims for any violation committed under their status as victims, in practice most identified victims will not be fined for such violations anyway, such as in cases of illegal border crossing. On the other hand, persons who cannot prove or provide any information/evidence that they are TIP victims may risk being fined as there is no unified guidance from central agencies. As a result, such victims of trafficking do not have confidence in their reintegration process and avoid reporting offences.⁴²

38 Van Oanh Nguyen, *The role of police in identifying and assisting victims of human trafficking for sexual exploitation: An empirical study in Vietnam* (Doctoral Thesis, Flinders University, 2019) [unpublished].

39 Brief report of the NSC on the implementation of the National Plan of Action on Anti-Human Trafficking period 2016-20 (NPA), disseminated on the 24th of June 2020, National Steering Committee for Human Trafficking Prevention and Combat (Steering Committee 130/CP). Also, see MPS 2020. US Department of State TIP report 2021.

40 Ref. Decision 150/2005/NĐ-CP dated 12/12/2005 in the field of public order and public security.

41 Maria Grazia Giammarinaro, "Special Rapporteur on trafficking in persons, especially women and children 'The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons'" (2020), online: <<https://respect.international/wp-content/uploads/2020/06/The-impact-and-consequences-of-the-COVID-19-pandemic-on-trafficked-and-exploited-persons.pdf>>.

42 Authors' Interviews with trafficked victims.

3. Institutional Capacity to Respond to Human Trafficking

In addition to the matters discussed above, there are institutional constraints in the identification of victims of trafficking. The job of identification mainly lies with border guards. This is because victims are returned to Vietnam by authorities of foreign states or are placed around the border area to make their own way home. Identification at borders prioritises women since most returned trafficked persons are women aged between 15-30 years old age. Men being trafficked are not as prominently reported.⁴³ There are also capacity constraints in victim identification. Interviews with key informants (KIIs) of related ministerial and law enforcement officials highlighted that whilst there have been improvements, training on victim identification and initial victim support is still inadequate and efforts focus more on prevention than on dealing with the aftermath. In any case, even though there are guidelines on victim identification, border guards, law enforcement, and other officials consistently fail to identify victims.⁴⁴

There are also some challenges in cooperation and collaboration of internal agencies involved in trafficking.⁴⁵ The implementation of a national action plan is limited by a lack of effective inter-agency collaboration. Primary challenges to awareness-raising campaigns include limited cooperation due to uneven uptake of collaboration activities, lack of communication down the chain of command to share up-to-date and accurate information, and inflation of estimates of participation in anti-trafficking activities. The poor cooperation between police and border guards in terms of protection, investigation and transfer of victims of trafficking slows victim identification and transfer to safe shelter.⁴⁶ Because most identified trafficking cases are cross-border or abroad, investigation agencies have to rely on foreign authorities to collect information for investigations, which is slow. Informal channels between police departments in different countries are often more effective but, even so, information collected is not often used as evidence before the court to make criminal cases.⁴⁷

4. Protection and assistance to victims

Criminal justice responses need to include protection in the form of legal support and other services upon return and measures to promote reintegration with respect for human rights (ACTIV, ASEAN 2015). There remain several key challenges in meeting standards of protection and assistance to victims of human trafficking in Vietnam.

The fact that persons aged 16 to 18 years are defined as adults excludes them from special care and protection measures. The 2015 Criminal Procedure Code

43 *TIP reports of Vietnam*, by United States Department of State (2021).

44 Author's Interview of KIIs.

45 *Le, supra* note 37.

46 *Ibid*

47 Ministry of Public Security. 2020. Evaluation of Implementation Outcomes of Decision No. 2546/QĐ-TTg, dated 31st December 2015 of the Prime Minister approving the Counter Trafficking Programme 2016-2020. Ministry of Public Security. Hanoi

requires that child-sensitive and gender-sensitive judicial and referral/support systems separate children from adults.⁴⁸ A specialised court means that judges and court officials need specialised training and accreditation to hear and support cases involving juveniles. Juvenile victims and their families and guardians should be provided with adequate information during legal proceedings as to their rights and related issues by law enforcement, the judiciary and the referral/support system.⁴⁹

The National Plan of Action on Anti-Human Trafficking period 2016-20 provides very limited resources for provinces to receive victims assistance cover, including reintegration supplies through provision of education, food, health care and legal aid.⁵⁰ In 2021, provinces and cities supported 100 victims, of whom 79 were safely protected, 90 were supported with essential needs, 55 were supported with travel expenses, 45 were supported with medical assistance,⁵¹ 34 victims obtained legal aid, 50 victims got psychological support, 19 victims got initial hardship allowance, 10 victims got loan support, and 12 victims got job support.

The support and assistance mechanisms for victims rely on provincial resources as well as on NGOs and social service centres. While support services often include NGOs and local social services centres, NGOs sometimes engage in identification and support the reintegration of victims. The issue of resources and the capacity to provide support in the long run for TIP victims continues. One place which victims can reach out to is NGOs such as Peace House, run by the Vietnam Women Union. Since 2007, Peace House has received 400 victims of human trafficking.⁵² The Peace House Centre also provides assistance for returned migrants or other trafficked persons, including safe shelter, legal support for identification of victims and other reintegration programmes. Other NGOs, such as Pacific Links, provide preventative aid and communication programs. They also have shelter centres such as Nhan Ai House in Lao Cai province, at the border with China, which provides support to all victims of trafficking. Blue Dragon is another NGO that provides legal support to victims. They report receiving about 2000 cases in 63 provinces, with an average of 150-170 cases a year. Between 2021 and 2022, cases increased to their highest level at 300.⁵³ The trafficking of women and girls through the border to China is a clear issue, given that Chinese men often seek Vietnamese women for marriage, to the alleged economic benefit of both parties.⁵⁴

48 Articles 30, 38 and 45 of the 2014 Law on Court Organisation.

49 Circular No. 02/2018/TT-TANDTC of the Supreme Court, and the Joint Circular No. 06/2018/TTLT-VKSNDTC-TANDTC-BCA-BTP-BLĐT BXH

50 The Prime Minister issued the Decision 130/2004/QĐ-TTg and currently the Decision 2546/QĐ-TTg to approve Vietnam's national action plan (VNAP).

51 *Discussion Report: Results of receiving, verifying, protecting and supporting trafficked victims returning from 2016 to 2020 and proposing directions in the coming period*, by Ministry of Invalid and Social Affairs (MOLISA) (Hanoi: Ministry of Labour, War Invalids, and Social Affairs, 2020).

52 Author's Interview with VWU's Peace House, Jan 2022

53 Author's Interview with Blue Dragon representative, Jan 2022

54 Pengli Huang, "Dependent or breadwinner? Vietnamese brides reshaping gender roles at the China-Vietnam border" (2017) 4:1 *The Journal of Chinese Sociology* 16.

Vietnam has been a particular source for wives, with some estimates that over 100,000 Vietnamese women are married to Chinese men.⁵⁵

MOLISA established Hotline 111 to support child rights issues in 2013. This has included support of trafficking issues since 2019. The hotline continues to provide counselling on trafficking cases of children and women at risk, including connection to support and social assistance shelters if needed. In 2021, the hotline connected agencies to provide support for 45 victims, compared with 59 cases in 2020. A total of 21,046 calls to the 111 Hotline have been reported, of which 16,130 were to enquire about information on human trafficking, 421 cases for rescue and 457 cases for victim assistance.⁵⁶

Amongst victims who have sought assistance from MOLISA, many are in the 16 to 18 age group which, as noted above, are not defined as children under TIP assistant programs. In addition, the 2017 law on Legal Aid includes provisions for victims of trafficking to receive free legal aid, however it is only available in cases of victims with poor socio-economic status and generally excludes returned labour trafficking victims who cannot prove their poor status to receive free legal aid.⁵⁷

IV. CONCLUSION

This article has outlined the legal and policy framework in Vietnam in response to human trafficking in its various forms. There are several challenges to the criminal justice system in responding to trafficking, which have been identified. First, the legal framework is not strongly focussed enough on making human trafficking a serious crime. Human trafficking is not considered a matter of human rights or a grave crime. As a result, prosecution of perpetrators is not strongly pursued and trafficking remains prevalent and will likely grow. These points apply especially to newer forms of trafficking, such as labour migration, that provide opportunities for traffickers to use of labour migration programs for exploitation without much risk of being prosecuted. Second, the criminal justice system is not optimally designed due to the narrow definition of human trafficking included in different applicable laws and their inconsistency with international instruments. The ‘legal gap’ on age exclusions means that persons aged 16-17 years are not protected under child protection provisions if they fall victim to trafficking. Third, complicated and ineffective procedures required for identification, investigation and prosecution make it hard for perpetrators to be prosecuted. Fourth, lack of a ‘victim-centred’ approach to justice means that victim participation, testimony, and confessions are not considered as evidence before the court. This leads to lengthy and complicated

⁵⁵ Wei Li, “Matching Vietnamese brides with Chinese men, marriage brokers find good business – and sometimes love”, *The Conversation* (10 January 2020), online: <<http://theconversation.com/matching-vietnamese-brides-with-chinese-men-marriage-brokers-find-good-business-and-sometimes-love-127977>>.

⁵⁶ <https://nhandan.vn/hon-21-nghin-cuoc-goi-toi-duong-day-nong-ve-phong-chong-mua-ban-nguoi-111-post668241.html> accessed on 3 Feb 2022

⁵⁷ Authors’ Interviews with KIIs, Feb 2022

investigations that, among other limitations, require perpetrators to certify that a victim is in fact a victim. This article suggests that laws and policies should be modified to be compliant with international instruments on human trafficking, especially regarding the definition of human trafficking, to facilitate the process of investigation and prosecution. By making legislation and policy more coherent, the scope and types of trafficking can be recognised, especially when covering the high risks posed to 16-17-year-olds. Furthermore, it is important to enhance the capacity of criminal justice institutions related to human trafficking, especially the agencies dealing with cross-border crime. In light of this, this article also suggests that there is a need to enhance cross-sector cooperation on human trafficking and improve investigations, holding traffickers accountable. Cooperation between government, non-government, and law enforcement agencies is highly necessary for jointly responding to human trafficking and to provide protection and assistance to victims.

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