



Human trafficking definition under international and Vietnamese legal framework

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Abstract

It is well understood that human trafficking is the criminal exploitation of humans in a wide range of industries and settings. In the global context, there are many signs that this crime is still increasing, not diminishing. There have been some positive developments in examining this crime and specifying anti-trafficking policies. Meanwhile, trafficking of humans in Vietnam has been the subject of increasing national attention, which can be observed in several ways, including: formulating legal initiatives, entering into bilateral agreements with other countries, ratifying and implementing various international treaties, and implementing anti-trafficking activities. In this paper, the author intends to exam the human trafficking definition under international and Vietnamese legal framework.

Keywords: human trafficking, trafficking protocol 2000, Vietnamese law, penal code

1. Introduction

Definitions of human trafficking have a contentious history and have shifted over time. In the early twentieth century, international legal agreements laid out understandings of trafficking at that time (Gallagher 2010; Gozdziaik and Collett 2005) ^[5, 6]. The 1904 *International Agreement for the Suppression of the White Slave Traffic*, the 1910 *International Convention for the Suppression of the White Slave Traffic*, the 1921 *International Convention for the Suppression of the Traffic in Women and Children* and the 1933 *International Convention for the Suppression of the Traffic in Women of Full Age* were all focused on prostitution. The 1904 and 1910 conventions referred to “white slave traffic” (understood as prostitution of white women and girls), the 1921 and 1933 conventions explicitly address the “traffic in women and/or children”. These are the first instruments which use the term “trafficking” (Gallagher 2010; Hoang 2013) ^[5, 7]. These early international agreements focus on the procurement of women and girls for prostitution and do not address other forms of exploitation such as forced labour, debt bondage, or slavery-like practices (Emerton *et al.* 2007; Gallagher 2010) ^[4, 5].

The *United Nations Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others* was adopted in 1949. The Convention requires its state parties to punish:

Any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person. (UN 1949: Article 1)

Although the 1949 Convention addresses the procurement and exploitation of prostitution of others it does not provide any definition of these crimes (Hoang 2013) ^[7]. Moreover, the Convention does not differentiate between forced and consensual prostitution or address other forms of human trafficking other than for the purposes of prostitution

(Emerton *et al.* 2007; Gallagher 2010) ^[4, 5]. It also seems to be a weak mechanism for protecting human rights and fails to account for the trafficking of men and boys for slave labour, as Coomaraswamy points out:

The 1949 Convention has proved ineffective in protecting the rights of trafficked women and combating trafficking. The Convention does not take a human rights approach. It does not regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the ‘evils of prostitution’. As such, the 1949 Convention does very little to protect women from and provide remedies for the human rights violations committed in the course of trafficking, thereby increasing trafficked women’s marginalization and vulnerability to human rights violations. (Coomaraswamy 2000) ^[1].

In 2000, more than 80 countries signed The *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*. The *Trafficking Protocol 2000* is one of the protocols supplementing the *United Nations Convention against Transnational Organised Crime*. The *Trafficking Protocol 2000* aims are: (1) to prevent and combat trafficking in persons, paying particular attention to women and children; (2) to protect and assist the victims of such trafficking, with full respect for their human rights; and (3) to promote cooperation among State Parties in order to meet those objectives (Trafficking Protocol 2000: Article 2).

As described by Gallagher (2010) ^[5] and Kneebone and Debeljak (2012) ^[8], the most significant development of the *Trafficking Protocol 2000* was the formulation of the trafficking definition. Human trafficking is defined as:

[...] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. (Trafficking Protocol 2000: Article 3).

This international definition of “trafficking in persons” provides some parameters that can help to operationalise trafficking for research purposes. This protocol offers the following basic information about human trafficking:

- **Types of action:** There must be an action by the traffickers, in the form of recruitment, transportation, transfer, harbouring, or receipt of persons. The term “recruitment” is often believed to be the first stage leading to exploitation, while the ends of the process are the actions of “harbouring or receipt”. Sometimes the victims are deceived by their friends, neighbours, or their own families. In those cases recruitment is not necessarily the beginning of the trafficking process (Kneebone and Debeljak 2012) ^[8]. Moreover, the “action” element usually involves movement or a migration process to “transport” and “transfer” victims (Gallagher 2010; Kneebone and Debeljak 2012) ^[5, 8].
- **Means of trafficking:** The action must be undertaken by one or more of the following means: force or the threat of force; other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability; and/or giving or receiving of payments or benefits to achieve the consent of a person having control over another person. Although the means may be direct or indirect actions, their purposes are to succeed in exercising control over another person (Gallagher 2010; Kneebone and Debeljak 2012) ^[5, 8]. As Kneebone and Debeljak (2012) ^[8] point out, the abuse of power and abuse of a position of vulnerability are not only the most popular forms of various means outlined in the definition but are also difficult concepts to apply.
- **Types of trafficking-related exploitation:** The action of trafficking must be for the purpose of exploitation. Exploitation shall include, at a minimum: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs. These forms of exploitation tend to transcend borders and industries. For example, with respect to labour exploitation, victims may be forced to work in various industries such as manufacturing, agriculture, construction, or textile (Kneebone and Debeljak 2012; Zimmerman and Borland 2009) ^[8, 21].

While earlier international treaties mainly focus on trafficking for the purposes of prostitution the *Trafficking Protocol 2000* includes the first comprehensive international definition of “trafficking in persons”. The definition represents a notable advancement, which includes a broader range of trafficking activities. It recognises other purposes of

trafficking, including forced labour, slavery, servitude, and the removal of organs. Meanwhile, a comprehensive coverage of trafficking means is provided, including not only explicit means (force, coercion, abduction, deception, and so on) but also less explicit means (e.g. abuse of a victim’s vulnerability) (Emerton *et al.* 2007) ^[4]. Other advantages of the *Trafficking Protocol 2000* are that trafficked persons are viewed as victims, no longer as criminals; all victims, including domestically trafficked persons within their own countries, are protected and the exploitation is the key actionable element in the trafficking process (Raymond 2002) ^[10].

The *Trafficking Protocol 2000* can also be seen as a measure requiring states to take various law enforcement actions, including criminalising trafficking and providing victims with reception, protection, and assistance. Cooperative programmes and information sharing are also other important requirements of the Convention in fighting trafficking (Potts 2003) ^[9]. An essential requirement of any criminal legal framework is to define key elements of the crime. While the *Trafficking Protocol 2000* has been signed by 117 states and ratified by 157 states (USDOS 2013), individual countries, states, and organisations have adopted the Protocol’s definition of trafficking to varying extents. Some have adopted the definition directly, while others have provided alternative definitions. Other countries, states, and organisations have no identifiable definition of human trafficking.

For example, the Council of Europe Convention on Action against Trafficking in Human Beings uses exactly the same definition as the *Trafficking Protocol 2000* in legal documents (Council of Europe 2005) ^[2]. On the other hand, the state of California has drafted its own definition of human trafficking as:

[...] all acts involved in the recruitment, abduction, transport, harbouring, transfer, sale or receipt of persons, within national or across international borders, through force, coercion, fraud or deception, to place persons in situations of slavery or slavery-like conditions, forced labour or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labour, or other debt bondage. (State of California Department of Justice 2014) ^[11].

In summary, the *Trafficking Protocol 2000* offers “a wide-ranging international agreement to address the crime of trafficking in persons, especially women and children, on a transnational level” (Raymond 2002) ^[10]. It develops a global language and provides a legislative framework to define human trafficking in persons, prevent, and investigate the crime, assist trafficking victims, establish national and international collaboration, and facilitates the exchange of information between states. However, adoption of the definition offered by the Protocol has been uneven and is far from universal.

2. Definition of trafficking under Vietnamese law

The Vietnamese Government has paid attention to the issue of trafficking since 1985 when the *Penal Code 1985*¹ first

¹ The *Penal Code 1985* (Vietnam) was approved by the Vietnamese National Assembly on 27 June 1985 and entered into force on 1 January 1986.

codifies the offence of trafficking in women and children. Within the provisions of the *Penal Code 1985*, Articles 115 and 149 respectively provide for the offences of “Trading in women” and “Kidnapping, trading or exchanging fraudulently of children” without defining the term “trafficking”. Moreover, trafficking in persons was not fully understood at the time, although it received attention as a critical issue (Hoang 2013)^[7]. The *Penal Code 1985* was then replaced by the *Penal Code 1999*² which is also the main law criminalizing acts of trafficking in Vietnam (Kneebone and Debeljak 2012)^[8].

The *Vietnamese Penal Code 1999* includes two main articles which provide for the express criminalisation of trafficking offences. They are Article 119 “Trafficking in women” and Article 120 “Trading, fraudulently exchanging or appropriating children” (Vietnamese National Assembly [VNA] 1999). Other criminal offences related to trafficking include: harbouring prostitutes (Article 254); procuring prostitutes (Article 255); rape (Article 111); rape against children (Article 112); organising underage marriage, entering into underage marriage (Article 148); sexual intercourse with juveniles (Article 256); and organising and/or coercing other persons to flee abroad or to stay abroad illegally (Article 275).

The terms “trafficking”, “trading”, “fraudulently exchanging”, or “appropriating” are not defined in the *Penal Code 1999* but in explanatory memoranda, law enforcement documents, or related regulations (Kneebone and Debeljak 2012)^[8], for example “*Government Decision 17/2007/QĐ-TTg on Promulgating the Regulations on Reception of and Community Reintegration Support for Trafficked Women and Children Returning Home from Foreign Countries*”. This regulation does not define human trafficking directly but explains elements of trafficking in its victim terminology:

[...] force, threatening to employ force or other types of force, kidnapping, deceiving or misusing their power or position, the vulnerable condition to traffic (deliver, receive money or another materialistic benefit) ... [on] the purpose of human exploitation (forced sex or other types of sexual exploitation, labour or forced slavery service or working under slavery condition or taking their body parts). (Article 4)

It can be said that anti-trafficking policies and practice in Vietnam in the early part of the twenty-first century consider the issue of trafficking as a strictly criminal problem. However, they mainly focus on the trafficking of women and children (Hoang 2013; Tucker *et al.* 2009)^[7, 12]. Moreover, trafficking under Vietnamese law focuses on “trade, profit and illegality”. *Illegal trade* refers to “a transfer of a person from person/people to another person/people for money or other material profits” (Department of Criminal and Administrative Laws 2004). Therefore, the definition of trafficking in Vietnam more closely resembles a narrow focus on trafficking for the purposes of sexual exploitation and prostitution, rather than the wide-ranging definition involving the practical exploitation of various kinds (Kneebone and Debeljak 2012)^[8].

In the *Amended and Supplemented Penal Code 2009*³ a change is made from “trafficking in women” (Article 119 of the *Penal Code 1999*) to “trafficking in humans”, and “removal of organs” is added. The basic offence shall be “sentenced to between two and seven years of imprisonment”. The increased penalty of between five and twenty years of imprisonment also applies where the trafficking is committed in any of the following circumstances, including: “for prostitution purposes”, “in an organized manner”, “in a professional manner”, “for taking victims’ bodily organs”, “for bringing abroad”, “trafficking in more than one person” and “committing the crime more than once” (VNA 2009: Article 119). The additional penalty of a “fine of between five million and fifty million dong, subject to probation or residence ban for one to five years” may be applied (VNA 2009: Article 119).

Meanwhile, the offence of “Trading, fraudulently exchanging or appropriating children” in Article 120 is punished with between “three and ten years of imprisonment”, which is similar to the penalty in the *Penal Code 1999*. However, the aggravated circumstances, which are punished “between ten and twenty years of imprisonment or life imprisonment”, are revised in Clause 2 of this article, including: “in an organized manner”, “in a professional manner”, “for a despicable motive”, “against more than one child”, “for taking victims’ bodily organs”, “for bringing abroad”, “for inhuman purposes”, “for prostitution purposes”, “dangerous recidivism”, and “causing serious consequences”. 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” may also apply (VNA 2009: Article 120). It can be seen that the understanding of trafficking in the *Amended and Supplemented Penal Code 2009* is still different and narrow in comparison with the *Trafficking Protocol 2000*. For instance, while “exploitation of the prostitution of others” or “the removal of organs” is seen as the purpose of trafficking in the Protocol definition, they are considered as aggravating factors to apply increased penalties (VNA 2009: Article 119, Clause 2). Furthermore, the Penal Code mainly focuses on practices similar to slavery, while some practices such as forced labour are not included (Hoang 2013)^[7]. The term “victim of trafficking” is still not defined in any provision of the Vietnamese Penal Code. However, the shift from trafficking in women to trafficking in humans has brought Vietnam closer to achieving compliance with contemporary international definitions of trafficking (Tucker *et al.* 2009)^[12].

In 2011, a new law entitled *Law on Human Trafficking Prevention and Combat* (referred to as the *Anti-Trafficking Law 2011*⁴) was adopted. The law does not officially define “trafficking in persons” directly, but defines “prohibited acts” related to human trafficking. The regulation also incorporates both international and internal trafficking (Kneebone and Debeljak 2012)^[8]. Article 3 of the Law defines the “prohibited acts”, namely:

1. The trafficking in persons as stipulated in Article 119 and Article 120 of the Penal Code.
2. The transfer or receipt of persons for sexual exploitation,

² The *Penal Code 1999* (Vietnam) Law No. 15/1999/QH10 was approved by the Vietnamese National Assembly on 21 December 1999 and entered into force on 1 July 2000.

³ Amending and Supplementing a Number of Articles of The Penal Code - Law No 37/2009/QH 12. It was approved by the Vietnamese National Assembly on 19 June 2009 and entered into force on 1 January 2010.

⁴ Law No 66/2011/QH12 was passed by the Vietnamese National Assembly on 29 March 2011 and entered into force on 1 January 2012.

- forced labour, the removal of organs, or for other inhuman purposes.
3. The recruitment, transportation, harbouring of persons for sexual exploitation, forced labour, the removal of organs or for other inhuman purposes, or for the commission of the acts as stipulated in paragraphs 1 and 2 of this Article.

It should be noted that the “prohibited acts” under this legal document are not consistent with the “means” element of the *Trafficking Protocol 2000*. There are only some “means” factors described in the definition of some types of exploitation, including: “coercion” in “sexual exploitation”; “force” in “sexual slave” and “the use of force” or “the threat of use of force” or “other means to coerce persons” in “forced labour”⁵. The meaning of “the abuse of power or of a position of vulnerability”, which is seen as a very common means in the Greater Mekong Sub-region,⁶ is not detailed in this *Anti-Trafficking Law 2011*. This omission of the “means” element from the definition makes it difficult to understand the “coercive” and “vulnerability” aspects of trafficking (Kneebone and Debeljak 2012: 152)^[8]. Furthermore, the law lacks a strong commitment to suppress trafficking for forced labour, as well as a commitment to not punish trafficking victims for illegal activities they may enter into, such as illegal residence in countries of transit or destination (Hoang 2013)^[7].

Noticeably, no guidance is provided in this document on whether the *Anti-Trafficking Law 2011* supplements or replaces the criminal code provisions and other regulations. This leads to confusion about the relationship between the Penal Code and the *Anti-Trafficking Law 2011* (Kneebone and Debeljak 2012)^[8]. Specifically, the Penal Code is the only law that criminalises acts as provided in the article of “Basis of penal liabilities”. The article provides that “only those persons who have committed crimes defined by the Penal Code shall bear the penal liabilities therefore” (VNA 1999: Article 2). Meanwhile, the “scope of application” of the *Anti-Trafficking Law 2011* includes:

[...] the prevention, detection, handling of human trafficking acts and other acts of violation of laws and regulations of prevention, suppression against human trafficking; the receipt, identifying, protection and assistance to victims; international co-operation in the prevention, suppression against human trafficking; the responsibilities of the government, ministries, agencies and local governments in the prevention, suppression against human trafficking. (VNA 2011: Article 1)

In the *Penal Code 2015*⁷, human trafficking is regulated in five articles: “Trafficking in persons” (Article 150); “Trafficking in persons aged under 16” (Article 151); “Fraudulently exchanging persons aged under 01” (Article 152); “Appropriating persons aged under 16” (Article 153); and “Trafficking, appropriating tissue or body parts of

persons” (Article 154). The prohibited acts of human trafficking under the *Penal Code 2015* are similar to the *Anti-trafficking Law 2011*. Accordingly, some limitations on defining trafficking as discussed before have not improved. The new and strong point is that those regulations define different groups of trafficked victims depending on their ages. The punishment for the offences of “trafficking in persons aged under 16” is normally higher than trafficking in adult persons. For example, a basic offender of “trafficking in persons” is punished with between “five to ten years of imprisonment”, while the punishment for a basic offender of “trafficking in persons aged under 16” is between “seven to twelve years of imprisonment” (VNA 2015: Article 150 and 151).

To summarise, Vietnamese anti-trafficking policies take a positive step towards compliance with international standards and will provide Vietnam with powerful means of protecting human trafficking victims. Recent significant changes, including improving the definitions of human trafficking, have further strengthened the federal Vietnamese position. The operational definition, however, still needs to be broadened. The definition has undergone significant changes recently to address this problem, including expanding the definition of human trafficking and paying more attention to the problem (Tucker *et al.* 2009)^[12]. Future policies should pay more attention to the “means” element in the trafficking definition and forced labour in practice (Hoang 2013)^[7].

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⁵ The definitions of the key terms “sexual exploitation”, “sexual slave”, “forced labour”, and “victim” are provided in Article 2 of the Law:

1. Sexual exploitation means the coercion of persons for prostitution, for being subject matters for the production of pornographic materials, for erotic performance, or for sexual slavery.
2. Sexual slave means persons who, under a dependent situation, are forced to serve other persons for the latter’s sexual demands.
3. Forced labour means the use of force or the threat of use of force, or other means to coerce persons to work against their will.

4. Victim means a person who is infringed upon by the acts stipulated in paragraphs 1, 2 and 3, of Article 3 of this Law.

⁶ The Greater Mekong Sub-region includes six countries, namely Cambodia, China, Laos, Myanmar, Thailand, and Vietnam.

⁷ Penal Code 2015 (Vietnam) Law No. 100/2015/QH13 was approved by the Vietnamese National Assembly on 27 November 2015 and was intended to enter into force on 1 July 2016. However, due to shortcomings in some articles, the Vietnamese National Assembly (VNA) decided to postpone implementing the law until further notice.

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