

IMPROVING VIETNAMESE LAW ON HUMAN TRAFFICKING TO ALIGN WITH INTERNATIONAL LEGAL STANDARDS

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I. INTRODUCTION

Human trafficking is tied to modern-day slavery. According to Walk Free 2023, "The Global Slavery Index 2023," modern-day slavery is also known as "forced labour, forced or servile marriage, forced commercial sexual exploitation, human trafficking, slavery-like practices, and the sale and exploitation of children."¹ A look at all these names reveals most of the aspects of human trafficking. Human trafficking, especially of women and children, is showing an increase globally with complex developments. According to the United Nations Office on Drugs and

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¹ Walk Free 2023, "The Global Slavery Index 2023," Minderoo Foundation (2023), <https://walkfree.org/global-slavery-index/>.

Crime, from 2021 to the present online fraud and human trafficking crimes generate annual profits of approximately 280 billion USD with projections reaching 350 billion USD² by 2025. Rowan University has defined human trafficking as “the transnational organized crime of trading and exploiting human beings for profit, whether it be for sex, entertainment, forced labor, or worse³.”

It is estimated that there are 38,000 people in modern-day slavery in Lao People’s Democratic Republic, 83,000 people in Cambodia, and 396,000 people in Vietnam.⁴ In Vietnam, reports and local survey results indicate that human trafficking crimes are becoming increasingly severe and inhumane. They tend to escalate with increasingly sophisticated and cunning methods. They are involving close collusion between domestic and foreign perpetrators. Also, the

² Bienphong, <https://www.bienphong.com.vn/toi-pham-mua-ban-nguoi-gia-tang-tiep-tuc-co-dien-bien-phuc-tap-xuat-hien-phuong-thuc-moi-post465908.html>. (The site is in Vietnamese.)

³ Rowan University, "Transnational Organized Crime" (2024), https://chss.rowan.edu/centers/inter_majors/interdisciplinary_programs/internationalstudies/global_security_resource/global-security-problems-folder/transnational-organized-crime.html.

⁴ *Supra* note 1 at 118.

trafficking of humans is carried out by professional offenders with prior records of human trafficking crimes. In Vietnam, human trafficking crimes have been reported in all 63 provinces and cities, primarily occurring in two forms. First, domestic trafficking (although specific survey data is not available) cases have been detected and investigated involving victims lured from rural to urban areas and then sold to restaurants, karaoke bars, disguised cafes or massage parlors in tourist areas, industrial zones, or along national highways for organized prostitution, forced labor on fishing vessels operating at sea, etc.

Second is cross-border trafficking (accounting for 85% of human trafficking cases), which is mainly concentrated along land border routes between Vietnam and China, Cambodia, and Laos. In this case, China accounts for 75%, Laos and Cambodia about 11%, with the remainder of the victims destined for Thailand, Malaysia, and Russia via land, sea, and air routes.⁵ However, in most cases, Vietnam is more of a

⁵ Ministry of Public Security, "Report No. 520/BC-BCA of the Ministry of Public Security dated June 3rd, 2021, on the 9-year summary of

country of origin and transit for human trafficking victims than a destination. It has been noted that human trafficking is a rampant problem because it shares a long porous border with Cambodia, Laos, and China; there is a vast disparity in economic development between its rural and urban populations that makes the rural poor susceptible to trafficking; and the prevailing high demand for sex workers, brides and cheap labor in the destination countries.⁶

With its advantageous geographical position, Vietnam is not only a point of origin or destination but also a transit area for human trafficking to third countries. Currently, the process of illegal immigration of Vietnamese people to European and American countries continues to evolve complexly. Some of the methods used for unlawful immigration include fake marriages, organizing legal tourism trips, or seemingly work-related trips for Vietnamese people abroad

implementing the 2011 Law on Prevention and Combat of Human Trafficking” (June 3, 2022).

⁶ T. N. H. Anh, "The Way Forward: How Vietnam Can Step Up Its Fight Against Human Trafficking," *Pacific Forum* (Mar. 1, 2024), <https://pacforum.org/yl-blog-61-the-way-forward-how-vietnam-can-step-up-its-fight-against-human-trafficking/>.

(Poland, Romania, Hungary, etc.). Upon arrival to these destinations, forgery of documents or organizing illegal border crossings into third countries (United Kingdom, France, Germany, etc.) ensues. In other cases, some Vietnamese nationals residing and working illegally in some countries, such as the United States, Australia, UK, Japan, South Korea, Taiwan, etc. face potential risks of trafficking, abuse, and labor exploitation.⁷

To step up the fight against human trafficking crimes, the Vietnamese Penal Code has stipulated provisions for this type of crime with strict legal criteria and severe penalties. Vietnam has been actively fighting trafficking in humans. Vietnam has, for the past two decades, been working towards aligning its domestic laws to the international and legal laws on trafficking in humans. Nevertheless, despite all the efforts, there still remain major shortcomings in the legislation on human trafficking. As a consequence, the gaps in legislation may pose a

⁷ Report No. 93/BC-BCĐ of the Steering Committee 138/CP dated January 24th, 2023, on the situation and results of human trafficking prevention and combat in 2022.

challenge in the understanding and prosecution of human trafficking cases.⁸

According to the “U.S. Department of State 2023 Trafficking in Persons Report: Vietnam,” although Vietnam was still below the minimum international threshold for combating human trafficking, it had made impressive strides in 2022. As a result, it was upgraded to Tier Two watchlist because of its achievements in investigating, prosecuting, and convictions in human trafficking cases. The report further noted that Vietnam actively engaged international agencies in the fight against human trafficking. Also, Vietnam actively prosecuted government officials who were accused of being part of the trafficking syndicates.⁹ Laos, in comparison, is also ranked in Tier Two alongside Vietnam. It appears that one of the significant problems associated with internal human trafficking in Laos is labor-related exploitation. However, Laos was noted to have ramped

⁸ L. T. H. Le & C. Wyndham, *What We Know about Human Traffickers in Vietnam*, 18 ANTI-TRAFFICKING REVIEW 33 (2022).

⁹ U.S. Department of State, “2023 Trafficking in Persons Report: Vietnam,” <https://www.state.gov/reports/2023-trafficking-in-persons-report/vietnam/>.

up its investigations into trafficking cases arising from its Special Economic Zones (SEZ). Laos has opened an Anti-Trafficking Department office in the SEZ. However, within the reporting period, the government of Laos did not secure any convictions for human trafficking crimes, very few victims of trafficking were identified, and victim protection services were unavailable for male victims.¹⁰ On its part, Cambodia has been ranked in Tier Three in the report. Cambodia's effort to fight trafficking in humans is underwhelming. The report notes that the government of Cambodia has not made any notable effort to fight trafficking in humans. It was pointed out that official complicity and corruption involving senior government officials have led to the rampant human trafficking challenges in Cambodia. In the year under review, Cambodian officials did not conduct any investigations or prosecute anyone for crimes related to human trafficking. Unfortunately, trafficking in humans involving forced labor, cyber scam operations, and

¹⁰ U.S. Department of State, "2023 Trafficking in Persons Report: Laos," <https://www.state.gov/reports/2023-trafficking-in-persons-report/laos/>.

working in brick kilns and entertainment spots remains rampant in Cambodia. The contents of this report show that Vietnam has made more noticeable strides toward combating trafficking in humans compared to Cambodia and Laos. However, there are numerous challenges still to be overcome in the fight against this crime.

In Laos, human traffickers mainly target girls and women, and the main destinations are China and Thailand. Subsequently, the girls are primarily sold for commercial sex in Thailand and as brides in China.¹¹ Thailand is on the Tier Two watch list in the U.S. Department of State ranking of nations in the fight against human trafficking. Adolescent girls are trafficked into Thailand to work in the ever-expanding sex industry. Thailand has the largest sex tourism industry in Southeast Asia. It is estimated that the illegal sex industry in Thailand has a turnover of about 6.4 billion/USD annually.¹² It is argued that Bangkok's

¹¹E. Xin, "Human Trafficking in Laos," *The Borgen Project* (June 2, 2022), <https://borgenproject.org/human-trafficking-in-laos/>.

¹²J. Hung, *Why Legalizing Prostitution In Thailand Can Help Bangkok Regulate Commercial Sex And Curb Sex Trafficking Systematically And Institutionally*, 8 *FRONTIERS* (Nov. 6, 2023).

"over-reliance on sex tourism" and the lucrativeness of the industry that raises funds for both its formal and informal development have hampered its fight against sex trafficking.¹³ China is a major destination for sex (bride) trafficking. Many girls and women are trafficked from Laos, Vietnam, Cambodia and other countries of origin. According to the 2020 census, China has 35 million more men than women. This is a result of two main factors: (i) China's one-child policy that ended in 2016 and (ii) a patriarchal society that prefers sons to daughters. Many girls are trafficked into China either by coercion or willingly to get married to Chinese men.¹⁴

Human trafficking is an ever-evolving crime. Economic hardship in some parts of Vietnam has left a notable part of its population susceptible to human trafficking. Economic challenges have led to an increase in trafficking victims. Many unsuspecting Vietnamese are lured into human traffickers' hands

¹³ *Id*

¹⁴ V. Annamalai, "China's Demand for Brides Draws Women from Across Southeast Asia-Sometimes by Force," Migration Policy Institute (Jan. 30, 2024), <https://www.migrationpolicy.org/article/china-bride-migration-trafficking>.

with false promises of jobs. Previously, most of the human trafficking victims were women trafficked into forced commercial sex trade and forced marriages in China. However, there are also many people trafficked into Cambodia and Laos. Official data shows that 93% of the human trafficking victims between 2011 and 2020 were female. However, the number of male victims has been rising. Many of the victims were trafficked for labor exploitation in Hanoi and Cambodia. Notably, male and female victims are trafficked for different purposes. While men are mostly trafficked for forced/ exploitative labor, women are mostly trafficked for sexual exploitation and forced marriages.¹⁵

Another form of trafficking is fetus trafficking. This form of trafficking occurs when children are bought before they are born, and once they are born, they are handed over to human traffickers. The purpose of this transaction might be handing over the newborn baby to people who intend to raise it or for other

¹⁵ Blue Dragon Children's Foundation, "New Trends in Trafficking in Persons, and Solution-Oriented Interventions," *Blue Dragon Children's Foundation* (Mar. 2024).

sinister motives. Unfortunately, currently there is no international document that addresses or defines fetus trafficking.¹⁶ Fetus trafficking is fueled mostly by poverty, high levels of unemployment, low literacy levels, and inadequate information on human trafficking among others. Traffickers tend to target women or young girls with unwanted pregnancies.

Vietnam's shared border with China, Laos, and Cambodia and its long coastline make it susceptible to transnational crime including human trafficking. Research findings indicate that most of the fetus trafficking incidents take place in the Northern mountainous provinces of Vietnam.¹⁷ Fetus traffickers use various methods in Vietnam to lure their unwary victims. One of the ways is that they operate under the guise of humanitarian organizations. They recruit vulnerable pregnant women promising to find families to adopt the babies. The women are then paid and taken to China (away from the prying eyes of Vietnamese

¹⁶ H.L. Thuy, H.T.H. Yen, & N.Q. Bao, *Fetus Trafficking in Vietnam- The new Criminal Method of Human Trafficking*, 10 INTERNATIONAL JOURNAL OF CRIMINOLOGY AND SOCIOLOGY 1594 (2021).

¹⁷ *Ibid.*

authorities) where they give birth and return to Vietnam without the newborn. Traffickers also target pregnant women who find themselves in difficult situations (like being abandoned by their partners, unwanted pregnancies, etc.) and do not want to raise the babies. They lure their targets with an offer of money. Fetal traffickers also target victims who are undergoing financial difficulties like unemployment. They convince them to get pregnant and subsequently surrender the newborn baby in exchange for money. There are even cases whereby driven by difficult financial circumstances, women actively seek buyers for their unborn babies.¹⁸ Currently, Vietnam does not have a specific Law that deals with fetus trafficking. Such cases are prosecuted under “organizing people to flee abroad (article 154) or the crime of organizing surrogacy for commercial purposes (Article 187).”¹⁹

In the international sphere J.H. Pascoe²⁰ noted that there are numerous instances where women are

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ J.H. Pascoe, "International Conference on Child Labour and Child Exploitation: Trafficking in Unborn Children," Federal Magistrates Court of Australia (Aug. 4, 2008).

recruited for fetus trafficking. They are forced into fetus trafficking through debt bondage, they become pregnant after being trafficked, they are paid for the child or lured to give up their child with a promise of a better life for the child. Eventually the trafficked children might be forced into sexual exploitation situations, forced labor, organ harvesting, etc.²¹ Fetus trafficking places the unborn child at the risk of their rights being violated. For example, fetus trafficking could lead to the contravention of the International Convention on the Rights of the Child Article Seven (right to birth registration, nationality and to be cared for by parents); Article Eight (right to identity and family); and Article Nine (right not to be separated from parents).²² It is therefore imperative for states to come up with legislation that would protect the rights of the unborn or children. As it is, although it is difficult to identify potential cases of fetus trafficking, authorities should make all possible efforts to ensure that the rights of the unborn or children are protected.

²¹ *Ibid.*

²² *Ibid.*

Whichever way one looks at the situation, there is no guarantee that a trafficked unborn child would enjoy a full happy life. Even in cases of "adoption" the arrangement is anchored on an illegality and there are no legal safeguards to protect the child post-adoption. This Article aims to identify these legal gaps to enhance the provisions of Vietnamese criminal law, contributing to the effectiveness of combating and preventing this type of crime in practice.

II. FINDINGS AND DISCUSSION

A. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime)

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, is one of three Protocols supplementing the United Nations Convention against Transnational Organized Crime, effective from December 25, 2003, and is the first global legal instrument to provide a

unified definition of human trafficking.²³ The concept of human trafficking defined in this Protocol has enabled member states to have a unified approach and integrate this provision into their national laws, thereby supporting more effective international cooperation in investigating, prosecuting, and adjudicating this type of crime. The Protocol also stipulates provisions for protecting and assisting victims in repatriation in human trafficking cases, prevention, cooperation, and other measures.

Article Three of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children states,

Trafficking in persons, shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the 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

²³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, United Nations Convention against Transnational Organized Crime (December 25, 2003).

exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.²⁴

With this definition, the Convention has identified the elements of human trafficking crimes, including characteristics of acts, means, and purposes, as follows:

- Acts: The objective acts of human trafficking include specific forms such as recruitment, transportation, transfer, harboring, or receipt of persons;
- Means: Human trafficking acts are carried out by means such as the threat or use of force, coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, or giving or receiving payments or benefits to achieve the consent of a person having control over another person. Also, according to Article 3 of the Protocol, if the offender uses any of the means mentioned above or methods, it is

²⁴ UN General Assembly, “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime” (November 15, 2000), <https://www.refworld.org/legal/agreements/unga/2000/en/23886>.

not necessary to prove whether the victim consented or did not consent to being trafficked.

- Purpose: Human trafficking acts are carried out for exploitation. The purpose of exploitation may include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.

B. Optional Protocol on the sale of children, child prostitution, and child pornography

The Optional Protocol on the sale of children, child prostitution, and child pornography (supplementing the United Nations Convention on the Rights of the Child) was adopted by the UN General Assembly on May 25, 2000. It came into effect on January 18, 2002. This Protocol was signed by member states (including Vietnam) aiming at important objectives such as combating and preventing the sale of children, child prostitution, the use or dissemination of child pornography, protecting and supporting victims while

fully respecting their human rights, promoting cooperation between member states, etc.

Article Two of the Protocol provides definitions for the concepts of the sale of children, child prostitution, and child pornography. Therein, the “sale of children” is understood as any act or transaction whereby any person or group of persons transfers a child to another for remuneration or any other consideration.

Article Three of the Protocol also stipulates:

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

a. In the context of the sale of children as defined in Article 2:

(i) Offering, delivering, or accepting, by whatever means, a child for the purpose of Sexual exploitation of the child; transfer of organs of the child for profit;²⁵ engagement of the child in forced labor;

7. This provision does not include cases of legal organ donation.

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;²⁶

b. Offering, receiving, procuring, or providing a child for child prostitution, as defined in Article 2.

The following elements constitute the act of child trafficking:

(1) Act: Any action or transaction (which may involve methods or means such as the use or threat of force, coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, or giving or receiving payments or benefits to achieve the consent of a person having control over another person; or may not require any method or means) whereby a child is transferred from one person or group of persons to another;

(2) Purpose: Exploitation of prostitution or sexual exploitation, forced labor, or removal of organs for profit.

8. This act is usually carried out by giving money or some benefit for the child's parents to agree to give up parental rights, except in cases of adoption for humanitarian purposes. *Ibid.*

Therefore, essentially, the elements of child trafficking are similar to those stipulated in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.

C. ASEAN Convention Against Trafficking in Persons, Especially Women and Children

To demonstrate the commitment and common determination of member states in efforts to strengthen cooperation in preventing and combating human trafficking, especially women and children, on November 21, 2015, Association of Southeast Asian Nations (ASEAN) countries signed the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP).²⁷

Article Two Clause (a) of ACTIP defines trafficking in persons as

the recruitment, transportation, transfer, harbouring or receipt of persons, for the purpose of exploitation by means of the threat or use of force or other forms of

²⁷ Association of Southeast Asian Nations (ASEAN) Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) (2015) at Art. 2-3.

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. 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.²⁸

Also, in Article Two of ACTIP, a child is defined as any person under 18 years of age. The recruitment, transportation, transfer, harboring, or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons,” even if this does not involve any of the means.

Therefore, unlike the crime of human trafficking, according to ACTIP (which is also consistent with the provisions in Articles Two and Three of the Optional Protocol on the sale of children, child prostitution, and child pornography), the crime of child trafficking only requires elements of act and purpose, without the

²⁸ See also, Tòa án, <https://tttp.toaan.gov.vn/webcenter/portal/tttp/chi-tiet-dieu-uoc?dDocName=TAND024401>.

element of means. This means that merely recruiting, transporting, transferring, harboring, or receiving a child for the purpose of exploitation is considered child trafficking, without the need for the perpetrator to use or threaten to use force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, or giving or receiving payments or benefits to achieve the consent of a person having control over another person.

Article Five of ACTIP stipulates that member states shall, when necessary, adopt legislative measures to establish as criminal offences the conduct set forth in Article Two (trafficking in persons and child trafficking). Criminal offences include attempted offences, organizing, or directing others to commit an offence, and participating as an accomplice. Article Five of ACTIP also stipulates that,

where appropriate, member states shall provide in their domestic law for the following aggravating circumstances to the offence of trafficking in persons and child trafficking: The offence seriously endangered the life or safety of the victim or resulted in the victim's death or suicide;

the offence was committed against a vulnerable person, including a child, an older person, or a person who is unable to care for or protect themselves due to a physical or mental disability or condition; the offence exposed the victim to a life-threatening illness, including HIV/AIDS; the offence involved more than one victim; the offence was committed as part of the activity of an organized criminal group; the offence was committed by a repeat offender; the offence was committed by a public official in the performance of their duties.

In addition to the ASEAN Convention Against Trafficking in Persons, Especially Women and Children, and the two aforementioned Protocols, Vietnam has also signed and become a member of other international Conventions and Agreements related to human trafficking, such as: International Labour Organization (ILO) Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; Agreement between the Government of the Socialist Republic of Vietnam and the Government of the People's Republic of China on Strengthening Cooperation in Preventing

and Combating Human Trafficking; Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking; Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Lao People's Democratic Republic on Cooperation in Preventing and Combating Human Trafficking and Protecting Victims of Trafficking; Agreement between the Government of the Socialist Republic of Vietnam and the Royal Government of Cambodia on Bilateral Cooperation in Preventing and Combating Human Trafficking and Protecting Victims of Trafficking, etc.

D. The extent of internalization of international standards in Vietnamese criminal law regarding human trafficking crimes

Vietnam ratified and internalized the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children on June 8,

2012.²⁹ It was the fourth ASEAN country to ratify ACTIP on January 5, 2017. Vietnam's Penal Code has been undergoing amendments, and one of the most notable amendments was made in 2015. The 2015 amendment broadened the definition of human trafficking and encapsulated such aspects as “forced labour as well as sexual exploitation, removed the means of coercion or force for cases of trafficking in minors, and recognized that both men and women can be trafficked.”³⁰

The Vietnamese Penal Code of 2015 (amended and supplemented in 2017) has internalized international standards on human trafficking in the legal elements of human trafficking and trafficking of persons under 16 years old in two specific articles, including Article 150, stipulating the crime of human trafficking and Article 151 stipulating the crime of trafficking persons under 16 years old.

According to Article 150 of the 2015 Penal Code,

²⁹ UN, “Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children” (June 8, 2012).

³⁰ *Supra* note at 5.

human trafficking is the use of force, threat of force, deception, or other means to carry out one of the following acts:

- a) Transferring persons for money, property, or other material benefits;
- b) Receiving persons for money, property, or other material benefits;
- c) Transferring persons for sexual exploitation, forced labor, organ harvesting, or other inhumane purposes;
- d) Transferring or receiving persons for sexual exploitation, forced labor, organ harvesting, or other inhumane purposes;
- đ) Recruiting, transporting, harboring other persons for transferring or receiving persons for money, property, or other material benefits, or for sexual exploitation, forced labor, organ harvesting, or other inhumane purposes.³¹

According to Article 151 of the 2015 Penal Code, trafficking of persons under 16 years old is understood as carrying out one of the following acts:

- a) Transferring persons under 16 years old for money, property, or other material

³¹ Vietnamese Penal Code of 2015 (2017 amended).

benefits, except for humanitarian purposes; b) Receiving persons under 16 years old for money, property, or other material benefits, except for humanitarian purposes; c) Transferring persons under 16 years old for sexual exploitation, forced labor, organ harvesting, or other inhumane purposes; d) Receiving persons under 16 years old for sexual exploitation, forced labor, organ harvesting, or other inhumane purposes; đ) Recruiting, transporting, harboring persons under 16 years old for transferring or receiving persons for money, property, or other material benefits, or for sexual exploitation, forced labor, organ harvesting, or other inhumane purposes.

Although the provisions of international law have been maximally reflected in the legal elements, the provisions of the Vietnamese Penal Code on these two crimes still have some differences, specifically using the term “*mua bán người*” (buying and selling of persons) to name the crime instead of “*buôn bán người*” (trafficking in persons) as stipulated in international standards.

Linguistically, the term “*mua bán người*” in Vietnamese has a broader meaning than “*buôn bán người*.” “*Mua bán*” means the act of exchanging

between parties for money or equivalent means of exchange. “*Buôn bán*” is the act of buying goods at a low price and selling at a higher price for profit. In Vietnamese law, trading prohibited items in the market is considered a law violation. Suppose they satisfy the objective elements of a crime. In that case, they are defined as “*mua bán*” (buying and selling) acts, such as buying, selling, appropriating human tissues or body parts (Article 154), illegal trading of narcotics (Article 251), etc. Meanwhile, (prohibited) acts of buying goods and reselling for profit, if professional and satisfying the elements of a crime as stipulated by law, are prosecuted for trafficking crimes such as smuggling or trading in prohibited goods.

Consider “giving or receiving payments or benefits to achieve the consent of a person having control over another person” not as a means but as a purpose of the criminal act. The 2015 Penal Code stipulates that one of the objective acts of human trafficking is “the act of transferring or receiving persons for the purpose of receiving money, property, or other material benefits.” By international standards, the element of “giving or

receiving money, property, or other material benefits” is considered a criminal means. This means that it has been actually carried out, leading to the act of transferring or receiving persons. In contrast, under Vietnamese law, the exchange for money, property, or other material benefits does not necessarily need to have been actually carried out; it is sufficient to prove that there was such a purpose for the act of transferring or receiving persons to constitute a crime.

Although still identifying the objective act of human trafficking as including the act of transferring or receiving persons for exploitation, Vietnamese law also stipulates it as a case of human trafficking if the above act has the purpose of obtaining money, property, or other material benefits. Therefore, the Vietnamese Penal Code stipulates that transferring or receiving persons for the purpose of receiving money, property, or other material benefits is one of the forms.

Although still identifying the purpose of exploitation in human trafficking, including the case of organ harvesting, Vietnamese law has a more specific differentiation to suit the nature and level of social

danger of the act. In international law provisions, one of the purposes of human trafficking is to remove the victim's organs for profit. The acts of human trafficking and trafficking of persons under 16 years old in the Vietnamese Penal Code also stipulate the element of “removing the victim's organs.” However, in practice, “victim's organs” include parts with different roles and nature, thus reflecting various levels of social danger of the act.³² The victim's organs may consist of parts that determine the victim's life (such as heart, liver lobes, etc.) and parts that do not end life (kidneys, corneas, etc.). International law does not differentiate in human trafficking crimes regarding cases where victims have different body parts appropriated. Meanwhile, according to Vietnamese law, if the offender has removed the victim's organ, causing the victim's death, they may be prosecuted for murder.³³ Therefore, although internalized, the mentality of preventive Vietnamese law has a more

³² Vietnamese Penal Code.

³³ Art. 6 Cl. 1 of Resolution No. 02/2019/NQ-HĐTP dated January 11, 2019, guiding the application of Articles 150 and 151 of the 2015 Penal Code.

detailed differentiation based on the unnatural and upgraded level of social and medical danger of the criminal act, thereby enhancing the deterrent and informational effect.

Although still identifying the objective act of human trafficking as including recruiting, transporting, and harboring other persons, according to Vietnamese law, these acts must be associated with the purpose of transferring or receiving persons for money, property, or other material benefits; or for transferring or receiving persons for exploitation. Thus, according to this provision, the objective act of human trafficking includes two different forms: (i) direct human trafficking acts comprising transferring or receiving persons and (ii) indirect human trafficking acts comprising recruiting, transporting, or harboring persons. However, these indirect acts must aim to carry out the direct acts. This is the most fundamental difference in Vietnamese law provisions on human trafficking compared to international standards. This provision has narrowed the scope of acts considered

human trafficking or child trafficking as stipulated in international treaties to which Vietnam is a party.

E. Defining Children in Child Trafficking Crimes as Persons under 16 Years Old

The reason why the Vietnamese Penal Code does not have the crime of Child Trafficking but only the crime of Trafficking of Persons under 16 years old is because Vietnamese law defines children as persons under 16 years old.³⁴ In comparison, all international conventions define children as persons under 18 years old. “A child means every human being below the age of eighteen years unless under the law applicable to the child. A majority is attained earlier.”³⁵ This provision means that member states can determine the age of majority earlier but are encouraged to define the age of children as under 18 years old. Therefore, the Convention defines children as persons under 18 years old based on determining the major transition point from the “child” stage to the “adult” stage.

³⁴ Vietnam Law on Children, Cl.1 (April 5, 2016).

³⁵ *Ibid.*

In Vietnamese law, the concept of “children” is not identical to the concept of “minors.” The provision of “under 16 years” for children is also the basis for stipulating the age of criminal responsibility in criminal law, according to which persons aged 16 and above are criminally responsible for all crimes, except for crimes where the law stipulates the subject must be 18 years old or older. Meanwhile, persons under 18 years old are the basis for stipulating the handling approach, applying criminal law to juvenile offenders, and applying friendly procedural procedures for participants in proceedings when they are minors.³⁶

In summary, the most significant difference in the provisions of international law and Vietnamese law on human trafficking crimes is that international law emphasizes the purpose of the crime (sexual exploitation, labor exploitation, organ harvesting, etc.), so the objective acts in the crime structure have the same significance. Meanwhile, Vietnamese law focuses on the act (exchange, buying, and selling), so

³⁶ Vietnam Penal Code (2015), “Chapter XII of the 2015 Penal Code, amended and supplemented in 2017; Chapter XXVIII of the 2015 Criminal Procedure Code.”

the objective acts have a hierarchical differentiation into direct acts (receiving, transferring) and indirect acts (recruiting, transporting, harboring, etc.). Therefore, besides the purpose of exploitation, this crime also has another purpose (to exchange money, property, or other material benefits).

III. CONCLUSION

After multiple revisions, the provisions of the Vietnamese Penal Code on Human Trafficking and Trafficking of Persons under 16 years old have now been fundamentally improved, meeting the requirements of internalizing international conventions to which Vietnam is a party. However, to fully adopt the values of international law and enhance the effectiveness of combating human trafficking crimes, the provisions of the Vietnamese Penal Code on Human Trafficking and Trafficking of Persons under 16 years old need to be further improved in the following aspects:

Firstly, the exchange of property or material benefits in human trafficking crimes should be

considered as a means rather than the purpose of the crime. In essence, human trafficking crimes ultimately aim at exploiting victims (sexually, for labor, or for body parts, etc.). The property or material value exchanged between parties only serves as a means or tool. The value exchanged is only the seller's purpose but not the transaction's common purpose. Meanwhile, although exploiting the victim is the direct purpose of the buyer, it is also the common purpose of both parties and becomes the ultimate goal of the crime. The buyer has accepted this intent and purpose and becomes an accomplice with the seller in the human trafficking case.

However, Vietnamese law emphasizes the act of exchanging money, property, or other material benefits to severely punish the treatment of humans as commodities traded in the market. This demonstrates respect for and protection of human rights, including personal rights, in line with moral values and Vietnam's socio-cultural and legal traditions. However, considering the exchange of money, property, or other material benefits as the purpose of

the crime will affect individuals' rights to be guaranteed fairness and equality in law and affect the consistency with international standards. This is because, according to international standards, the nature and level of social danger of human trafficking crimes are reflected in the purpose of exploiting victims; the act of transferring or receiving persons for money, property, or other material benefits does not constitute human trafficking if it is not for exploitation. In this case, Vietnamese law is more stringent than international standards. Vietnamese law does not differentiate between cases of transferring or receiving persons for money, property, or other material benefits without the purpose of exploitation and similar cases but with the purpose of exploitation. For this reason, when stipulating the legal elements of trafficking persons under 16 years old, the Vietnamese Penal Code has to add many other details, such as “except for humanitarian purposes” or “for other inhumane purposes,” to exclude the purpose of exploiting victims in the objective act.

Secondly, for the group of acts, including recruitment, transportation, and harboring of persons, it is unnecessary to stipulate the purpose as “to carry out other acts” (for example, to receive or transfer). Instead, the purpose should be stipulated as “for the exploitation of victims.” Defining the purpose of these objective acts through another objective act creates a logical contradiction. Considering how the elements of the objective aspect are defined, recruitment, transportation, transfer, harboring, or receipt of persons are all different forms of the objective act of human trafficking; moreover, the acts of receipt and transfer have already been defined as independent forms within the objective aspect. Therefore, in terms of hierarchy, these acts should be placed in equal positions; one act cannot be the purpose of another. The current method of definition in the Vietnamese Penal Code inadvertently emphasizes and elevates the role of receiving and transferring victims in constituting the crime, overshadowing the purpose that this crime aims to achieve.

Meanwhile, according to international standards, the purpose of exploiting victims is the most decisive factor in determining the nature and level of social danger of human trafficking crimes. Therefore, provisions of international law define the recruitment, transportation, and harboring of persons for the purpose of exploitation as human trafficking acts without requiring the element of intent to receive or transfer or whether the actual transfer or receipt of persons has occurred. Amending the Penal Code's provisions on recruitment, transportation, and harboring of persons only to be associated with the purpose of exploitation demonstrates Vietnam's commitment to international conventions, especially the United Nations Convention against Transnational Organized Crime. Simultaneously, it aligns Vietnamese law with the laws of other member states of the Convention, creating a unified mechanism for sending, receiving, and resolving requests for mutual legal assistance in criminal matters related to this crime.

Thirdly, it is necessary to add commercial legal entities as potential subjects of the crime. According to the Vietnamese Penal Code, commercial legal entities must bear criminal responsibility for certain crimes, mainly environmental or economic management crimes.³⁷ Regarding human trafficking, commercial legal entities may also be involved in cases of recruitment, transportation, transfer, harboring, or receipt of persons for labor exploitation or forced labor services. Therefore, it is necessary to expand the scope of criminal liability for commercial legal entities in this type of crime, primarily to prevent situations where criminal entities have tight organizational structures, operating transnationally or multinationally.

Fourthly, it is necessary to add the act of trafficking fetuses to the legal provisions of this crime to establish a mechanism for handling such cases. According to the criminal laws of Vietnam and many countries worldwide, a subject is considered a human being with human rights and civil rights when they are

³⁷ *Supra* note 11 at Art. 76.

born. However, in current practice, fetus trafficking is no longer rare, violating ethics and traditional customs and threatening the peace and right to protection of children even before birth. The act of fetus trafficking tends to increase and become more complex, especially in the context of cases involving organized crime networks. The subjects carrying out fetus trafficking are concealed by sophisticated forms such as tourism, contract signing, labor export, brokered marriages, adoption through commercial legal entities, etc. In reality, fetus trafficking is carried out within the period of pregnancy so applying the legal framework of human trafficking is not appropriate. According to international conventions on children's rights, children, including fetuses, need to be protected from the time they are in the womb. Fetus trafficking adversely violates human rights and children's rights. This poses a challenge for international law and national laws (including Vietnam) to have an appropriate legal framework to handle these criminal acts, protect the safety of fetuses and pregnant women, and prevent acts of coercion, deception, enticement, or exploitation of

pregnant women to sell fetuses in dependent or desperate situations.

However, when considering including fetus trafficking in the group of human trafficking crimes, both international law and Vietnamese law need to identify this as an independent form of action separate from the combination of actions analyzed above. This is because, in terms of the object, human trafficking aims to protect people who have been born and are still alive. In terms of purpose, the acts mentioned above all seek to exploit the victim. Meanwhile, the object and nature of fetus trafficking may not be related to these characteristics. Therefore, from the perspective of international and national laws, fetus trafficking should be defined independently alongside the group of human trafficking acts. If it is determined that the subsequent development of the case after the child is born satisfies the purpose of human trafficking (for exchange of material benefits or exploitation), then it should be treated as human trafficking; if that purpose cannot be determined, it should be proven as fetus trafficking.