

**AN ANALYSIS OF THE PROTECTION REGIME
FOR TRAFFICKED PERSONS
— FROM THE INTERNATIONAL TO VIETNAM**

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for the award of the Degree of Doctor of Philosophy**

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Abstract

While the magnitude of human trafficking activities is increasing all over the world, the establishment of the *Palermo Trafficking Protocol*¹ in 2000 is seen as a breakthrough amongst international legal responses to human trafficking. The Protocol introduces for the first time an internationally agreed definition of ‘trafficking in persons’ and a set of measures for dealing with human trafficking. The hypothesis of this dissertation is that even though the *Trafficking Protocol* imposes obligations on states to take responsibility for the protection of trafficked persons, they are not enough to guarantee even an efficient, let alone effective protection regime for trafficked persons. This thesis, accordingly, investigates the background and theoretical framework of legal responses to human trafficking, in order to evaluate current responses to trafficking, including protection of and assistance to trafficked persons. This investigation of the international protection regime will provide the background for an assessment of the protection regime applicable to trafficked persons under the Vietnamese legal framework later on in this thesis. The findings of this analysis could also be used as the basis for future research and direction under the international anti-trafficking legal framework.

This thesis will also argue that there are problems with the way that Vietnam (as the country under investigation in this research) has responded to the international regime. Vietnam’s anti-trafficking ‘landscape’ can be understood in terms of several key factors: a prevailing conceptualisation of trafficking as a ‘social evil’, and as a phenomenon focused mainly on trafficking in women and children for prostitution (which is an illegal industry in Vietnam); and the official practices of exploiting and restricting labour migration at the same time, whilst not recognising the close relationship between (restricted) labour migration and trafficking. This thesis argues

¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime)*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) (‘*Trafficking Protocol*’).

that there are gaps between the Vietnamese response, especially with its anti-trafficking law that looks good 'on paper', and the requirements of international standards, especially with regard to implementing anti-trafficking practices concerned with protecting and assisting trafficking victims. The thesis will also point out that, importantly, a regime of protection and assistance to trafficked persons which adequately responds to their protection needs creates a big challenge to Vietnamese policy makers in terms of re-conceptualising human beings (and, in this thesis's context, of trafficked persons and migrant workers) as bearers of human rights instead of tools of the legal system, as is currently the case. This thesis will be useful in terms of its general review of the anti-trafficking framework, in promoting better anti-trafficking practice in Vietnam, and in particular in reviewing its protection regime for trafficked persons. Moreover, this thesis will also be expected to be a useful reference source for amendments to national anti-trafficking legislation as well as for future research on human trafficking and/or on the issue of the protection for trafficked persons in Vietnam.

Declaration

This thesis contains no material that has been accepted for the award of any other degree or diploma in any university or other institution. To the best of my knowledge, the thesis contains no material previously published or written by any other person, except where due reference is made in the text of the thesis, and a list of references is given in the bibliography.



Hoang, Thi Tue Phuong

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Abbreviations and acronyms

AAT	Alliance Anti-Traffic
ADB	Asian Development Bank
AFESIP	Agir pour les Femmes en Situation Précaire (Acting for Women in Difficult Circumstances)
ARTIP Project	Asia Regional Trafficking in Persons Project
ASEAN	Association of South East Asian Nations
CATW	Coalition Against Trafficking in Women
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women (1979)</i>
CEOP	Child Exploitation and Online Protection Centre (Vietnam)
COMMIT	Coordinated Mekong Ministerial Initiatives on Trafficking
COMMIT MOU	<i>Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Subregion (2004)</i> (see 'COMMIT')
CPC	<i>Criminal Penal Code</i>
CRC	<i>Convention on the Rights of the Child (1989)</i>
CSAGA	Centre for Studies in Applied Sciences in Gender, Family, Women and Adolescents (Vietnam)
CTOC	<i>United Nations Convention against Transnational Organized Crime 2000</i>
CWD	Centre for Women and Development (Vietnam)
DOLISA	Divisions on Labor, War Invalids and Social Affairs (Vietnam)
DOLM	Department of Overseas Labour Management (Vietnam)
DSEP	Department of Social Evil Prevention (Vietnam)
ECPAT	End Child Prostitution in Asian Tourism
EU	European Union

EPS	Employment Permit System (Korea)
GAATW	Global Alliance Against Traffic in Women
GMS	Greater Mekong Subregion
ICCPR	<i>International Covenant on Civil and Political Rights (1966)</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights (1966)</i>
ICSW	International Council on Social Welfare
IGOs	intergovernmental organisations
ILO	International Labour Organization
ILO-IPEC	ILO International Programme for the Elimination of Child Labour (see 'ILO' above)
INGOs	international non-governmental organisations
IOM	International Organization for Migration
Lao PDR	Lao People's Democratic Republic
MARD	Ministry of Agriculture and Rural Development (Vietnam)
MOJ	Ministry of Justice (Vietnam)
MOLISA	Ministry of Labour, Invalids and Social Affairs (Vietnam)
MOU	Memorandum of Understanding
MPS	Ministry of Public Security (Vietnam)
NPA	<i>National Plan of Action</i>
NGOs	non-governmental organisations
ODIHR	Office for Democratic Institutions and Human Rights (see 'OSCE')
OSCE	Organization for Security and Co-operation in Europe
PPCs	Project Proposal Concepts (see 'COMMIT')
PRC	People's Republic of China
SAARC Convention	<i>South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children (1998)</i>

SIREN	Strategic Information Response Network (see 'UNIAP')
SOPs	Standard Operating Procedures
SPAs	Sub-Regional Plans of Action (see 'COMMIT')
TIP Reports	US State Department annual Trafficking in Persons reports
<i>TSE Law 2007</i>	<i>Law on Suppression of Human Trafficking and Sexual Exploitation 2007 (Cambodia)</i>
UN	United Nations
UNDP	United Nations Development Programme
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNIAP	United Nations Inter-Agency Project on Human Trafficking in the Mekong Subregion
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
VCWU	Vietnamese Central Women's Union

GREATER MEKONG SUBREGION



Map No. 4112 Rev. 2 UNITED NATIONS
January 2004

Department of Peacekeeping Operations
Cartographic Section

Chapter 1

Introduction

1.1 BACKGROUND OF THE PROBLEM

Trafficking in persons is not a new phenomenon anymore. Although it appeared on the international agenda quite a long time ago, it remains a ‘hot’ issue, and its ‘heat’ does not seem to be decreasing. As has been estimated, hundreds of thousands to millions of people are trafficked across international borders every year and are held in slave-like conditions of forced labour or sexual slavery, becoming victims of human trafficking – thus it is said to be one of the most prosperous and fastest-growing underground industries.¹ It is said that no country is immune from or not involved in human trafficking activities as a country of origin, transit or destination.²

¹ According to the United Nations Office on Drugs and Crime (UNODC), ‘[h]uman trafficking is a big business. Experts, including at the United Nations, estimate the total market value of human trafficking at \$32 billion, of which some \$10 billion is drawn from the initial ‘sale’ of individuals while the remainder represents the estimated profits made from the victims’ work.’ See United Nations Office on Drugs and Crime (UNODC), *Annual Report – Covering Activities in 2007* (2008) 25; See also United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings* (2006) (‘TIP Toolkit 2006’), xix. Additionally, the United States of America Department of State, ‘Trafficking in Persons Report 2012’ (Report, 1 June 2012) invoked the ILO’s global report on forced labour which said that the cost of forced labor worldwide is an estimated US \$20 billion annually and this is the amount of wages as well as other benefits denied to migrant workers by fraudulent labor recruiters in their home countries,

While the magnitude of human trafficking activities is increasing all over the world, the international community is at the same time showing increasing concern over the security issues and the human rights dimensions of the trafficking issue,³ as well as urgently seeking an effective response to it, especially from a criminal justice perspective. The establishment of the Palermo *Trafficking Protocol*⁴ in 2000 can be seen as a breakthrough amongst previous international legal responses to human trafficking.⁵ As a Protocol supplementing the *Convention against Transnational Organized Crime (CTOC)*,⁶ the *Trafficking Protocol* promotes and facilitates cooperation amongst states in the global fight against human trafficking as a criminal justice problem, and maintains a clear focus on targeting the traffickers.⁷ For this

labor brokers in the country of work, and employers who refuse pay wages: 11; See also International Labour Organization (ILO), 'The Cost of Coercion' (Report, 2009), 2. On 1 June 2012, the ILO released its second global estimate of forced labor which claims 20.9 million victims at any time. See International Labour Organization (ILO), 'Global Estimate of Forced Labour – Executive Summary' (Report, 1 June 2012).

² Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation' (2009) 17 *Cardozo Journal of International and Comparative Law* 101, 103.

³ See, eg, United Nations Office on Drugs and Crime (UNODC), *International Framework for Action to Implement the Trafficking in Persons Protocol* (2009), 8; United States of America Department of State, above n 1, 7, 11; See also Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' (2003) 44(2) *Harvard International Law Journal* 473, 473.

⁴ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime)*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking Protocol*').

⁵ See Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012), 31–4.

⁶ *Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) ('*CTOC*').

⁷ Janie Chuang, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13 *Indiana Journal of Global Legal Studies* 137, 142–3.

purpose, the Protocol introduces for the first time an internationally agreed upon definition of ‘trafficking in persons’.⁸ In addition, the *Trafficking Protocol* also introduces a set of measures for dealing with human trafficking from three perspectives: prevention, protection and inter-state cooperation.⁹ However, the fact that this treaty which promotes cooperation on control of international crime also promotes the protection of trafficked persons as one of its central tenets is an important sign of the growing conceptualising of the trafficking issue as a human rights problem.¹⁰ Indeed the central theme of this thesis is the tension between the various objects of the *Trafficking Protocol* and the need to have regard to the human rights dimension of the problem, in order to develop effective legal responses to human trafficking.

In fact victims of trafficking crimes, besides suffering the devastating impact of human rights violations,¹¹ are often either ignored or revictimised by authorities in destination countries whilst awaiting repatriation, and ostracised or marginalised in their countries of origin upon their return and reintegration.¹² It is well known that trafficked persons are often misidentified as illegal or smuggled migrants, are subject to prosecution for status-related offences (such as illegal migration, undocumented work or prostitution), and face deportation or imprisonment rather than being afforded protection.¹³ In many other circumstances, trafficked persons might only be offered some protective and/or supportive measures in return for their cooperation with the competent authorities. Moreover, in some national legislation systems, measures that

⁸ *Trafficking Protocol*, art 3(a) – see Appendix 1.

⁹ *Trafficking Protocol*, art 3(a) – see Appendix 1.

¹⁰ See, eg, Ryszard Piotrowicz, ‘State’s Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations’ (2012) 24 *International Journal of Refugee Law* 181.

¹¹ Suzanne Egan, ‘Protecting the Victims of Trafficking: Problems and Prospects’ (2008) 1 *European Human Rights Law Review* 106, 119.

¹² Cheah Wuling, ‘Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region’ (2006) 3(1) *Essex Human Rights Review* 46, 47.

¹³ Chuang, above n 7, 142–3.

are nominally intended to provide assistance to trafficked persons and to protect their human rights, in practice have the effect of restricting or violating them (for example, through the detention of trafficked persons, as discussed later in this thesis).¹⁴ It is clear but paradoxical that while protecting the rights and interests of trafficked persons is among the purposes of any (legal) initiative framed to respond to trafficking in persons, protection is often overridden by a focus on the criminal justice objectives of anti-trafficking initiatives.

The reasons for this paradoxical practice have most frequently been justified by reference to the 'clandestine' and 'illegal' characteristics of trafficking activities,¹⁵ as well as the difficulties faced in identifying trafficked persons and, consequently, affording them protection. However, it should be noted that another (or perhaps the most) important reason for a criminal justice focus, is states' concerns about migration and traditional (rather than human) security issues.¹⁶ That is, there is a disproportionate focus on the 'clandestine' and 'illegal' characteristics of trafficking activities.¹⁷ In particular, concerns about border control are actually the 'compelling

¹⁴ See sections 3.2.4 of Chapter 3 and 5.3.2.3 of Chapter 5 of this thesis.

¹⁵ See, eg, Melissa Ditmore and Marjan Wijers, 'The Negotiations on the UN Protocol on Trafficking in Persons' (La Strada International, 2003), 83
<[www.lastradainternational.org/Isidocs/6%20The%20negotiations%20on%20the%20UN%20Protocol%20\(NEMESIS\).pdf](http://www.lastradainternational.org/Isidocs/6%20The%20negotiations%20on%20the%20UN%20Protocol%20(NEMESIS).pdf)>; United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons* (2009); International Labour Organization, International Programme on the Elimination of Child Labour (ILO-IPEC), 'Labour Migration and Trafficking within the Greater Mekong Subregion' (Proceedings of Mekong Sub-regional Experts Meeting and Exploratory Policy Paper, ILO, 2001), 37 <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_bk_pb_11_en.pdf>, citing Phil Marshall, 'Globalization, Migration and Trafficking: Some Thoughts from the South-East Asian Region' (Occasional Paper No 1, United Nations Inter-Agency Project on Human Trafficking (UNIAP), September 2001), 7, 12 <http://www.childtrafficking.com/Docs/marshall_uniap_mekong_2001_.pdf>.

¹⁶ This content will be discussed further in Chapter 2 of this thesis.

¹⁷ See, eg, Ditmore and Wijers, above n 15, 84; UNODC, above n 15; Anh Nguyen Dang, 'Cross-Border Migration and Sexuality in Vietnam: Reality and Policy Responses' in Thomas E Blair (ed), 'Living on the Edges: Cross-Border Mobility and Sexual Exploitation in the Greater Southeast Asia Sub-region' (Report, Southeast Asian Consortium on Gender, Sexuality and Health, 2006) 43

priorities' of states when addressing trafficking issues.¹⁸ This situation is exacerbated by the fact that the *Trafficking Protocol* emphasises prosecution¹⁹ and prevention over protection of the human rights of trafficked persons. By contrast, the provisions of the *Trafficking Protocol* regarding protection of trafficked persons are often criticised as being too ambiguous, discretionary and dependent upon states' willingness to implement them,²⁰ rather than being framed as hard obligations like the criminal justice measures.²¹

In the context of the *Trafficking Protocol*, and as the starting point for national (as well as regional) work in defining and stemming trafficking in persons, and particularly in formulating domestic legislation,²² the argument of this thesis is that the obligations which the *Trafficking Protocol* imposes on states to take responsibility for the protection of trafficked persons are not adequate to guarantee an effective protection regime for trafficked persons. Consequently, the *Trafficking Protocol's* limitations in terms of human rights standards need to be recognised and understood comprehensively and rigorously in order to provide stronger and more effective protection for trafficked persons. In this thesis it is argued that an acknowledgment of states' obligations to provide protection and assistance to trafficked persons under established international law – rather than just under the *Trafficking Protocol* framework – is also necessary if states are to develop a better response to trafficking in persons.

¹⁸ Terry Coonan and Robin Thompson, 'Ancient Evil, Modern Face – The Fight against Human Trafficking' (2005) 6 *Georgetown Journal of International Affairs* 43, 45–6.

¹⁹ Although prosecution is not expressly mentioned; it should also be noted that Article 5.1 of the *Trafficking Protocol* implies this through the obligation to criminalise trafficking.

²⁰ Wuiling, above n 12, 62.

²¹ Chuang, above n 7, 142–3.

²² See May-Len Skilbrei and Marianne Tveit, 'Defining Trafficking Through Empirical Work: Blurred Boundaries and their Consequences' (2008) 12 (1) *Gender Technology and Development*, 9; Abramson, above n 3, 474.

1.2 STATEMENT OF THE PROBLEM

Vietnam, a developing country located in the Greater Mekong Subregion (GMS),²³ is a significant source of human trafficking all over the world, and is certainly not immune from the ‘vicious cycle’ of this crime.²⁴ The magnitude and nature of trafficking in Vietnam has become more severe over time, spreading from an initial few particular provinces out to many other areas across the country, as well as across national borders.²⁵ Internally, Vietnamese people are reportedly trafficked from rural areas to cities, as well as between rural areas and between urban centres.²⁶ In terms of international trafficking, Vietnam is mainly a country of origin for trafficking in women and girls for sexual exploitation, for trafficking in children for the purposes of illegal adoption, forced marriage, sexual and labour exploitation and for trafficking in men for labour exploitation.²⁷ Destination countries include Cambodia,

²³ Which consists of six countries: Cambodia, Yunnan Province of the People’s Republic of China, Lao People’s Democratic Republic (Lao PDR), Myanmar, Thailand and Vietnam.

²⁴ Wuiling, above n 12, 47.

²⁵ Thi Tue Phuong Hoang, ‘Legislating to Combat Trafficking in Vietnam’ (Paper presented at Is this the Asian Century? – 17th Biennial Conference of the Asian Studies Association of Australia, Melbourne, 1–3 July 2008) <www.arts.monash.edu.au/mai/asaa/hoangthituephuong.pdf> 4.

²⁶ See, eg, Christina Cacioppo (ed), ‘Can Tho City, Hau Giang Province, and Tay Ninh Province in Southern Viet Nam – The Situation of Migration and Trafficking of Children and Women: A Rapid Assessment’ (Report, ILO Mekong Sub-regional Project to Combat Trafficking in Women and Children, September 2006), 20, 21; Anh Nguyen Dang, ‘Forced Migration in Vietnam: Historical and Contemporary Perspectives’ (2006) 15(1) *Asian and Pacific Migration Journal* 159, 160; Veronique Marx and Katherine Fleischer, ‘Internal Migration – Opportunities and Challenges for Socio-Economic Development in Viet Nam’ (Report, United Nations in Vietnam, 2010), 26. See also section 4.2.1 of Chapter 4 of this thesis.

²⁷ See, eg, Dang, ‘Forced Migration in Vietnam’, above n 26, 167; Cacioppo, above n 26, s 3.1.3; Paula Frances Kelly and Duong Bach Le, ‘Trafficking in Human from and within Vietnam: The Known from a Literature Review Key Informant Interviews and Analysis’ (Report, International Organization for Migration, 1999), 25; Danièle Bélanger, ‘Marriages with Foreign Women in East Asia: Bride Trafficking or Voluntary Migration?’ [2010] (469) *Population & Societies* 1, 3; End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT) International, ‘Global Monitoring – Status of Action against Commercial Sexual Exploitation of

China, Thailand and further countries outside the sub-region. To a lesser extent, Vietnam has also been reported to be a country of destination for Cambodian trafficked people (especially children) and a country of transit. It can be said that the situation of trafficking in persons in Vietnam is no less complex than in any other country in the GMS.

In terms of the Vietnamese national response to trafficking, it should be noted that until recently the main focus has been on trafficking in women and children since the establishment of the *Trafficking Protocol* at the international level. In particular, Vietnam has focused on developing a legal framework aimed at preventing and suppressing trafficking as a crime.²⁸ In the meantime, Vietnam has signed the *CTOC* and recently acceded to the *Trafficking Protocol*.²⁹ It can be said that efforts to respond to the trafficking issue appear to be taken by the Vietnamese government as manifestations of a strong commitment to ending the crime of trafficking, especially

Children – Vietnam’ (Report, 2011), 10; Child Exploitation and Online Protection Centre (CEOP) and British Embassy, ‘The Trafficking of Women and Children from Vietnam’ (Unpublished Report, 2011), 12; United Nations in Vietnam, The Government of Vietnam, ‘Exploratory Research – Trafficking in Boys in Viet Nam’ (Report, January 2012), 6; see more in section 4.3.2.1 of Chapter 4 of this thesis.

²⁸ Hoang, above n 25, 6, citing United Nations Office on Drugs and Crime (UNODC), United Nations Children’s Fund (UNICEF) and Department of Criminal and Administrative Laws – Ministry of Justice (MOJ) of Vietnam, *Assessment of the Legal System in Vietnam in Comparison with the United Nations Protocols on Trafficking in Persons and Smuggling of Migrants, Supplementing the United Nations Convention against Transnational Organized Crime (2004)* (‘*Assessment of the Legal System in Vietnam*’), 3.

²⁹ Vietnam acceded the *Trafficking Protocol* on 8/6/2012. Information available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en, accessed on 23/5/2013.

as it considers combating trafficking an issue of national importance.³⁰ Recently, Vietnam has enacted a specific anti-trafficking law named the *Law on Prevention, Suppression against Human Trafficking*,³¹ illustrating its ongoing focus on criminal justice responses to human trafficking.

As this thesis will demonstrate, although in the Vietnamese context the patterns of anti-trafficking responses are not unique, its anti-trafficking ‘landscape’ can be understood in terms of several key factors: a prevailing conceptualisation of trafficking as a ‘social evil’, and as a phenomenon focused mainly on trafficking in women and children for prostitution (which is an illegal industry in Vietnam); and the official practices of exploiting and restricting labour migration at the same time, whilst not recognising the close relationship between (restricted) labour migration and trafficking. In this thesis, after building upon the above (mis)understandings of trafficking issues, the Vietnamese anti-trafficking policy and its legal framework, including and as the main element, the *Anti-Trafficking Law 2011*, is subjected to close scrutiny, especially in terms of its measures regarding the protection of the rights and interests of victims of trafficking.

1.3 RESEARCH QUESTIONS

Based on the above considerations about the international background for trafficked persons’ protection and the national situation of anti-trafficking policy in Vietnam, the principal questions which this thesis aims to answer are:

³⁰ It should be noted here that the government of Vietnam, in 2010, voiced a strong opposition to the US government’s TIP Report 2010 which placed Vietnam on the Tier 2 Watch list. See L H, ‘Bao cao ve nan buon ban nguoi cua My khong khach quan’, Bao Moi (online) 16 June 2010 <<http://www.baomoi.com/Home/DoiNoi-DoiNgoai/bee.net.vn/Bao-cao-ve-nan-buon-ban-nguoi-cua-My-khong-khach-quan/4417160.epi>> [author’s trans: ‘The Trafficking in Persons Report of the US is not objective’].

³¹ *Law on Prevention, Suppression against Human Trafficking 2011* (Vietnam) No 66/2011/QH12, was passed by Vietnamese National Assembly 12th Legislature, 9th session on 29 March 2011 and entered into force 1 January 2012 (‘*Anti-Trafficking Law 2011*’) [UNIAP trans] <www.artipproject.org/artip_tip_cjs/laws-policies/national/Vietnam/Vietnam%20Anti-trafficking%20in%20Persons%20Law%20Mar%202011%20final%20ENG.pdf> – see Appendices.

- How has the protection regime for trafficked persons developed under Vietnamese national anti-trafficking policy?
- Is this protection regime an adequate response to the requirements of the international regime for trafficked persons' protection?
- Do the relevant measures under the Vietnamese protection regime provide adequate protection and assistance to trafficked persons in Vietnam?
- If the Vietnamese protection regime can be demonstrated to be inadequate, what can be recommended to improve it?

Generally, this thesis will argue that there are problems not only with the international regime for trafficked persons' protection, but also with the way that Vietnam has responded to the international regime.

This thesis argues that international human rights standards, especially in terms of the protection of trafficked persons, should not be limited to the provisions introduced under the *Trafficking Protocol's* framework (Chapter 3). In the course of the review of the international regime of protection for trafficked persons, it will be shown in this thesis that the *Trafficking Protocol* is neither the first nor the only international instrument to take protection as a purpose of anti-trafficking measures, nor the first instrument to discuss the human rights issues of trafficked persons (Chapter 2). This thesis then argues that the regime introduced by the *Trafficking Protocol* is not adequate to protect and assist trafficked persons' human rights and interests (Chapter 3). In other words, it is argued in this thesis that the protection regime under the *Trafficking Protocol* framework does not actually reflect the real situation of trafficked persons, alleviate their difficulties as victims or address their needs in the aftermath of trafficking. By analysing and comparing established international

standards³² on the protection of human rights of victims of crime and human rights violations to supplement the *Trafficking Protocol* regime, this thesis argues that these international standards should be considered as principles from which to build an adequate protection regime for trafficked persons. These standards should be applied from the initial identification process through to reintegration into the community and the provision of remedies for these victims. This investigation of the standards of the international protection regime will then provide the background for an assessment of the protection regime applicable to trafficked persons under the Vietnamese legal framework (Chapter 5). The findings of this analysis will be used as the basis for making recommendations for future research and direction under the international anti-trafficking legal framework (Chapter 6).

In terms of its investigation into the Vietnamese national anti-trafficking policy, this thesis argues that there are gaps between the Vietnamese response, especially with its anti-trafficking law that looks good 'on paper' (that is, which appears to comply with the *CTOC* framework), and the requirements of international standards, especially with regard to national anti-trafficking practices concerned with protecting and assisting trafficking victims. The restrictions of the Vietnamese protection regime stem from a limited conceptualisation of anti-trafficking issues by Vietnam's policy makers, including the definition of trafficking offences, the focus on trafficking in women and children for sexual exploitation, the conceptualisation of trafficked persons as passive victims as well as 'tools of the legal system' under the anti-trafficking legal framework.³³ The thesis will also point out that, importantly, a regime

³² For example, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res, 96th plen mtg, UN Doc A/RES/40/34 (29 November 1985); *Recommended Principles and Guidelines on Human Rights and Human Trafficking – Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, UN ESCOR, UN Doc E/2002/68/Add 1 (20 May 2002) ('*Recommended Principles and Guidelines*'); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res, 60th sess, Agenda Item 71 (a), UN Doc A/RES/60/147 (21 March 2006).

³³ Conversely, it can be observed that the restricted conceptualisation of trafficking issues in Vietnam is in common with the confusion of international anti-trafficking stakeholders, which is exacerbated by ambiguous and problematic provisions of the *Trafficking Protocol*. See also section 2.3.2 of Chapter 2 and Chapter 3 of this thesis.

of protection and assistance to trafficked persons which adequately responds to their protection needs creates a big challenge to Vietnamese policy makers in terms of re-conceptualising human beings who are trafficked persons (and, as shown in this thesis, often also migrant workers) as bearers of human rights. This thesis will critique the Vietnamese government's approach under which trafficked persons are mostly seen as 'tools of the legal system', that is as victims in a criminal justice context rather than as bearers of human rights.

1.4 OBJECTIVES OF THE THESIS

In order to make the arguments of this thesis as set out above, the principal questions have been broken down into several sub-questions as follows:

- How have human trafficking issues (including the issue of the human rights of trafficked persons) been conceptualised at the international level and presented in related international legal instruments and responses so far? Why was the establishment of the *Trafficking Protocol* necessary for the international anti-trafficking response? How does the establishment of the *Trafficking Protocol* fit with the development of an approach to human trafficking issues, particularly the issue of the human rights of trafficked persons? How are human trafficking and the protection for trafficked persons' human rights conceptualised under the framework of the *Trafficking Protocol*?
- How are trafficked persons and their status considered under the terms of international law, in comparison to the *Trafficking Protocol* framework? How are the provisions of protection and assistance to trafficked persons stipulated under the *Trafficking Protocol* framework? How are these protection and assistance measures implemented in practice for trafficked persons? Are they adequate to the demand in terms of protection and assistance needs for trafficked persons' human rights and interests in anti-trafficking practices? Are they problematic and, if so, what are the problems? How are these measures incorporated into specific regional legal instruments and national anti-trafficking laws?³⁴ How do these regional and national measures fit with the protection and assistance practices?

³⁴ Some comparison with these regional legal instruments as well as national anti-trafficking laws will be conducted in Chapters 3 and 5 of this thesis.

- What is the situation of human trafficking and particularly labour migration in the Vietnamese context? How are the issues of trafficking in persons being conceptualised and presented through Vietnamese national anti-trafficking policy? In particular, how does the Vietnamese anti-trafficking framework define ‘trafficking in persons’? How do Vietnamese policy makers perceive labour migration issues and the link between these issues and the issues of trafficking in persons?
- How are trafficked persons and their status perceived in Vietnam and how does this perception affect the way it provides treatment to trafficked persons under the Vietnamese anti-trafficking framework? What protective and supportive measures are trafficked persons entitled to under the Vietnamese anti-trafficking legal framework? Do they reflect the requirements for protection of and assistance to trafficked persons under international human rights standards? Do they adequately respond to the practices of providing assistance to trafficked persons and protecting their human rights and interests in Vietnam?
- If the protection regime for trafficked persons under Vietnamese anti-trafficking policy is not yet adequate, what can be recommended to improve this regime (and generally the national anti-trafficking policy as well)?

1.5 METHODOLOGY OF THE THESIS

In order to reach the objectives as outlined above, the methodology this thesis mainly employs is through a rigorous review and comparison of the relevant legislation and cases, and an extensive survey of the supporting literature and reports. Accordingly, this thesis will survey the documents relating to the main issue – the international and Vietnamese anti-trafficking legal and policy responses. These include international, regional and national legal instruments, as well as their official explanatory documents. Among them, the legal instruments of the European Union are examined as a source of state obligations to combat trafficking and protect trafficking victims that is supplementary to those that have been imposed by the *Trafficking Protocol*. Beside this are legal measures introduced under the legal systems of some countries such as Australia, the United Kingdom and Canada, as important destination countries with well-established anti-trafficking regimes, which are compared when

appropriate. Similarly, some decisions from other jurisdictions relating to trafficking issues shall be referred to when relevant within this thesis. Papers discussing the related issues of human trafficking and reports on anti-trafficking practices from international, regional and national stakeholders, including both government and non-government sources will be other important information sources for the analysis in this thesis.

The most challenging part in this thesis appears to be obtaining figures and information on trafficking practices in Vietnam and Vietnam's anti-trafficking responses.³⁵ Another challenge is the ability to be able to obtain useful qualitative information in this area of research.³⁶ At the beginning stages of working on this thesis, it was planned to conduct extensive interviews with anti-trafficking stakeholders in Vietnam, particularly governmental officials and their counterparts from non-governmental organisations (NGOs), and international non-governmental organisations (INGOs) to get information on anti-trafficking practice. This plan, however, was difficult to achieve, especially in terms of securing interviews with the governmental sector, as potential interviewees were reluctant to talk to a student researcher, especially one of Vietnamese nationality. This can be attributed in part to cultural constraints around talking about trafficking – a very sensitive subject³⁷ within Vietnamese society. Whilst the author did not gain a lot of extra information from the interviews outside of that which is available in published reports, the interviews were

³⁵ See also section 4.3.1 of Chapter 4 of this thesis discussing the situation of data on human trafficking in Vietnam.

³⁶ See Nicola Piper, 'A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania' (2005) 43(1-2) *International Migration* 203; see also Anne T Gallagher and Rebecca Surtees, 'Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who Decides—and How?' (2012) 1(1) *Anti-Trafficking Review* 10.

³⁷ It should be noted here that, as Kneebone and Debeljak pointed out, 'trafficking' was a taboo word in Vietnam a decade ago and 'the government was unwilling to admit to a problem'. See Kneebone and Debeljak, above n 5, 128. See also section 4.3.1 of Chapter 4 of this thesis talking about the political sensitivity of trafficking issue in Vietnam.

useful for gaining perceptions and insights into how human trafficking is conceived in Vietnam.³⁸

Another challenging aspect of this thesis is the survey, analysis and assessment of the provisions of the *Trafficking Protocol*, especially the analysis of the constituent elements of its trafficking definition. The debate around the basic content and meaning of this definition,³⁹ which is central to understanding the process of trafficking, is indicative of the difficulties inherent to building an effective legal response to human trafficking. In relation to the Protocol definition, this thesis summarises the relevant arguments about its meaning and compares and discusses them with corresponding provisions in some other international instruments to argue that the Protocol's definition is ambiguous and difficult to apply in practice. In Chapter 4 of this thesis, the trafficking situation of Vietnam as well as its legal response is summarised and analysed in the context of the country's socio-economic and historical characteristics to illustrate the history of approaching human trafficking in this country. Additionally, the analysis in this thesis is also based on Vietnamese practices of implementing anti-trafficking measures in general, and those on protection and assistance in particular, to make final recommendations for the future from a legislative perspective in Chapter 6 of this thesis.

1.6 CONTRIBUTION OF THE THESIS

Before talking about the (expected) contribution of this thesis to knowledge about human trafficking, it is relevant here to refer to its contribution to the literature on trafficking as one of the outcomes of this thesis. Since trafficking in human beings is an enormous on which knowledge is continually increasing, the literature (which includes reports from NGOs/INGOs working in the field) on trafficking is seemingly covering every area of the issue, including the issue of the protection and assistance

³⁸ See the List of interviews and dates in Appendix 4.

³⁹ See, eg, James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49(1) *Virginia Journal of International Law* 1; Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) *Virginia Journal of International Law* 789.

of trafficked persons.⁴⁰ In this literature, it has been pointed out that the *Trafficking Protocol* is successful in introducing for the first time an internationally agreed definition of the trafficking offence.⁴¹ It has also been argued that the *Trafficking Protocol*, whilst referring to three main purposes of an anti-trafficking framework as to prevent and combat trafficking in person, to protect and assist the victims of such trafficking and to promote cooperation among state parties, it clearly gives priority to the two purposes of inter-states cooperation and prevention.⁴² It has also been pointed out that the protection aspect is constituted only by discretionary measures which do not impose obligations on state parties but depend on their good will to incorporate them into domestic legislation.⁴³ However, the literature on human trafficking from an international perspective has mostly been limited to doing comparative studies between the prosecution, prevention and protection aspects of the *Trafficking Protocol* framework, or in the practices of dealing with trafficking crime at the regional or national levels. This thesis however aims to take the issue one step further as explained below.

Gallagher appears to be the most familiar name in studies on human trafficking, particularly on the history of the establishment of the definition of trafficking crime, the drafting process of the *Trafficking Protocol*, its related debates and their influences on the final texts of the Protocol in general and its definition in particular. Significantly, in Gallagher's recent publication entitled *The International Law of Human Trafficking* (2011), she comprehensively investigates the legal issues of human trafficking. It can be said that this publication has been the most comprehensive study on the legal issues of human trafficking so far. In this book, legal issues surrounding human trafficking are separately examined thoroughly in historical and substantive terms, comparing the provisions of the *Trafficking Protocol* with the corresponding provisions of international law and exposing the shortcomings of those provisions in their translation into practice. The issues discussed in this

⁴⁰ See Chapters 2 and 3 of this thesis.

⁴¹ See section 2.3.2 of Chapter 2 of this thesis.

⁴² See section 2.3 of Chapter 2 of this thesis.

⁴³ See Chapter 2 (section 2.3.2) and Chapter 3 of this thesis.

publication are broad and placed in the purpose of framing states' obligations under international law to combat human trafficking, including to protect and support trafficked persons. It can be said that Gallagher's work is among the most useful reference sources for this thesis, especially Chapters 2 and 3.

Nevertheless, in contrast to Gallagher's book, this thesis investigates not only the legal issues around human trafficking, but especially protection regimes for trafficked persons, with an emphasis on their practical implementation and their value to the process of responding to the crime of trafficking in order to highlight the need for protection and support to trafficked persons. In that sense, by measuring the human rights outcomes against the criminal justice processes, this thesis examines the effectiveness of anti-trafficking responses. Moreover, this thesis develops a theoretical framework under which trafficking is seen not just as an issue of criminal justice, but a human security and human rights issue. This framework is utilised in the thesis for an examination of the current responses to trafficking, including those on protection of and assistance to trafficked persons. This can be seen as the main difference between this thesis and that presented in Gallagher's book. Whilst contributing a new point of view on the conceptualisation of issues related to trafficking and on the obligations of protection and assistance to trafficked persons, this thesis clarifies the necessary relationship between the practical application of anti-trafficking measures and their effectiveness.

Additionally, the main contribution of this thesis is that it is a unique and specific case study of measures for protecting and supporting trafficked persons under national anti-trafficking law – that is, Vietnam. As aforementioned, human trafficking problems started to attract the attention of Vietnamese policy makers around 2004, a long time after the issue began attracting the attention of researchers. Also in 2004, Vietnam's Ministry of Justice – in collaboration with the UN Office on Drugs and Crime (UNODC) and UN Children's Fund (UNICEF) in Vietnam – released an assessment of the Vietnamese legal response in comparison with the provisions of the UN *Trafficking* and *Smuggling Protocols*. This assessment evaluated comprehensively the legal provisions under the Vietnamese framework by contrasting these provisions with the obligations imposed by the Protocols, to support Vietnam's preparation for signing or ratifying these international instruments. Nonetheless, whilst the provisions of the *Trafficking Protocol* remain problematic, especially in terms of the protection regime for trafficked persons, the 2004 assessment did not present findings on this

issue. Moreover, it did not thoroughly study the situation of human trafficking in Vietnam as the basis for its final recommendations, and did not address the appropriate incorporation of the Protocols' provisions into the Vietnamese legal system.

A further valuable source concerning the situation of human trafficking in Vietnam is the literature review conducted by Kelly and Le.⁴⁴ These researchers investigated a broad range of publications on the human trafficking issue up until 1999 and their report is a very useful reference, especially in the Vietnamese context where most studies have not been officially published and are almost impossible to trace. Human trafficking issues were conceptualised somewhat simplistically in this publication as a result of it being at the beginning stage of responding to trafficking in Vietnam (as well as internationally).

Also referring to the situation of human trafficking in Vietnam is a recent publication specifically on human trafficking in the GMS of two authors, Kneebone and Debeljak, titled *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion*.⁴⁵ This publication provides a comprehensive and thorough study of the regional and national responses, including that of Vietnam, to trafficking issues. It also provides case studies of each country's general national policy, and in particular the legal responses on protection and assistance for trafficked persons. Consequently, this publication is also an important reference source for this thesis, especially in terms of its arguments on trafficking discourses in the GMS which have strong roots in the characteristics of human trafficking in the subregion as well as its response. However, being just one of the pilot countries of the research, the Vietnamese national responses to trafficking and its protection of trafficked persons has certainly not been thoroughly assessed in this publication.

Moreover, in order to have better general knowledge of human trafficking, it is essential to have an assessment of international human rights standards for trafficked persons, including (but not limited to) the provisions of the *Trafficking Protocol*. This assessment will not only be a comparative study of the provisions of the *Trafficking Protocol* and corresponding standards agreed by the international

⁴⁴ Kelly and Le, above n 27.

⁴⁵ Kneebone and Debeljak, above n 5.

community regarding protection and assistance of trafficked persons. More importantly, this assessment of international human rights standards for trafficked persons will illustrate the contrast between these standards and the practical requirements of protection and assistance to trafficked persons in a specific country, namely Vietnam. Consequently, this thesis evaluates the Vietnamese legal response to human trafficking in general, as well as the protection and assistance afforded to trafficked persons in contrast to related international standards and practical requirements, and in doing so it provides an opportunity to re-examine the practical value of the measures introduced by the *Trafficking Protocol*.

This thesis will be useful in terms of its general review of the national anti-trafficking framework, in promoting better anti-trafficking practice in Vietnam, and in particular for its protection regime for trafficked persons. In the context of the national anti-trafficking law which has recently been established in Vietnam, this thesis is meaningful insofar as an examination of the adequacy of the law provides an opportunity for its shortcomings to be revealed and fixed sooner rather than later. This will help to minimize any repercussions the law may have on the national response to trafficking and, more importantly, on the human rights and interests of trafficked persons in Vietnam. Moreover, this thesis will also be expected to be a useful reference source for amendments to national anti-trafficking legislation as well as for future research on human trafficking and/or on the issue of the protection for trafficked persons in Vietnam.

1.7 STRUCTURE AND ORGANISATION OF THE THESIS

Corresponding to the sub-questions outlined in section 1.4 above, the chapters of this thesis will be organized as follows:

- **Chapter 1** (this chapter) points out the matters that will be solved, the methodology that will be adopted and the limitations of this thesis.
- **Chapter 2** examines and evaluates historical approaches to the human trafficking issue to date through an examination of the provisions of international legal instruments which can be seen as predecessors of the *Trafficking Protocol*. This chapter also surveys related discourses such as

those concerning traditional security, human security and gendered perspectives as the background for conceptualising the trafficking issue. This chapter then also makes clear that right from the very first international legal instruments on human trafficking, the issue has been approached from a variety of perspectives but mostly following these above trafficking discourses. These different approaches to the human trafficking issue have seemingly been the biggest constraint on reaching a common definition for the trafficking crime and especially a unified and effective anti-trafficking mechanism. This is also the main reason for the establishment of the *Trafficking Protocol* and for the debates surrounding the constituent elements of the trafficking definition and its scope, which in many cases do not reflect the reality of trafficking activities. This chapter, accordingly, also refers to some significant debates within the drafting process of the *Trafficking Protocol* in order to point out the shortcomings that probably influenced the conceptualisation of the trafficking issue at the national level. However, this thesis does not attempt to provide conclusions to all of these debates, except where arguments relate closely to its objective of improving the protection regime.

- **Chapter 3** examines and assesses the international protection regime of trafficked persons. This examination and assessment addresses each element of the protection and assistance of trafficked persons following their experience of being trafficked, including identification processes, reflection periods, return and repatriation processes, community reintegration processes and remedies for trafficked persons. Throughout this examination and assessment, relevant provisions of international law providing for protective and supportive measures are analysed, whilst the difficulties and constraints in the practical implementation of these measures are pointed out. Particularly, some ‘soft-law’ principles and guidelines from a human rights perspective are referred to as basic principles for conceptualising and guaranteeing the necessary protection and assistance towards trafficked persons. These principles include the principle of non-criminalisation, the principle of separating protection and assistance from victim cooperation, and the non-coercion principle. This chapter discusses the status of trafficked persons as victims of crime, victims of human rights violations as well as passive victims, as presented under the protection regime of the *Trafficking*

Protocol. A further important matter relating to the protection of trafficked persons also discussed in this chapter is the dichotomy of trafficked/smuggled persons and the negative impact that this false dichotomy has on the practices of identification, protection and assistance of trafficked persons. However, this thesis does not intend to search for the solutions to the persistence of this dichotomy in the international sphere.

- **Chapter 4** is structurally similar to Chapter 2 and analyses the characteristics of human trafficking and anti-trafficking policy in the Vietnamese context. The issue of internal and regional labour migration of Vietnamese migrant workers is investigated first, together with discussions on economic and social conditions. Whilst exploring the shortcomings of the Vietnamese policy on labour migration, this chapter will also point out that labour migration is in high demand in Vietnam, but that policy makers do not pay appropriate attention to it or recognise its connection with trafficking. It is argued that the current labour migration policy being applied to restrict people's migration for labour does nothing more than push people into clandestine and illegal movements that render them more vulnerable to exploitation. These matters, as this chapter addresses, have not been acknowledged by Vietnamese policy makers. Further, this chapter examines and evaluates the legal responses to human trafficking in Vietnam in comparison with corresponding requirements in international law, as discussed in Chapter 2. Importantly, this chapter investigates the issue of defining trafficking offences under the Vietnamese legal framework and emphasizes that human trafficking is being approached as a social evil and an issue of national pride. This chapter also stresses the reluctance of the Vietnamese government to admit their failure to control and protect their nationals – the biggest constraint on reaching an effective response to the trafficking issue in Vietnam.
- With its structure parallel to that of Chapter 3, **Chapter 5** examines and evaluates the regime of protection and assistance applicable to trafficked persons under Vietnamese law. The first part of this chapter discusses the status of trafficked persons under Vietnamese law and demonstrates that in Vietnam (not only) trafficked persons (but people in general) are treated as tools of the legal system rather than bearers of human rights. This presents another challenge to the Vietnamese legal system (overall, and its law on

prevention and suppression human trafficking in particular) in achieving a timely and effective regime of protection and assistance of trafficked persons. This chapter also investigates the dichotomy of trafficked/smuggled migrants and the practice of misidentifying trafficked persons in Vietnam. The protective and supportive measures under the Vietnamese anti-trafficking framework are then evaluated and contrasted with corresponding measures introduced by international law as discussed in Chapter 3. This chapter also examines some specific issues of the Vietnamese protection regime, including its provisions on victims' rights and, significantly, responsibilities, its protection and assistance measures which conceptualise trafficked persons as passive victims, the process of reintegrating trafficked persons into their communities, and victim support institutions under the auspices of NGOs/INGOs in Vietnam.

- **Chapter 6** summarises the arguments opened and discussed in previous chapters and highlights the contrasts between the international and national levels of the anti-trafficking response. This discussion leads to the main argument of this thesis on the shortcomings of the international anti-trafficking law framework, especially with regard to the protection and assistance of trafficked persons, that need to be properly acknowledged (and solved) in order to be appropriately incorporated into regional and national anti-trafficking practice. Regarding the Vietnamese context, this chapter reasserts the importance of acknowledging the motivations behind the international anti-trafficking movements and the shortcomings of conceptualisations of the trafficking issue at the international level. It also emphasises the importance of implementing practical responses to the crime of trafficking to obtain effective anti-trafficking and protection policies. This chapter then draws conclusion for the whole thesis and makes recommendations for changes to improve Vietnamese anti-trafficking policy, and in particular, its policy on the protection of trafficked persons, as well as recommendations for future research on trafficking related issues.

Chapter 2

Trafficking – Conceptualising the Phenomenon from the International Agenda’s Perspective

2.1 INTRODUCTION

It was not until the establishment of the 2000 *Trafficking Protocol*¹ that the phenomenon of ‘trafficking in persons’ came onto the international agenda as a high priority concern. In the very first year of the twentieth century, trafficking was addressed in some international legal agreements. Even though these legal instruments were not always motivated by a real concern about the trafficking issue, they reflect the initial understandings of the meaning of ‘trafficking’ at that time. Consequently, as asserted by Gallagher: ‘[a] study of the definition of trafficking is, in

¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime)*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) (‘*Trafficking Protocol*’).

many senses, also a study of the history of trafficking in international law'.² Thus the focus of this chapter is on the conceptualisation of trafficking, through an examination of the predecessors of the *Trafficking Protocol*. In particular, the debates and struggles that occurred in the first period of conceptualising trafficking provide an insight into the close relationship between trafficking and other related issues such as prostitution and slavery, and the drawing of a line between them.

Additionally, in the period before the establishment of the *Trafficking Protocol*, the trafficking issue was of much interest within the human rights agenda that formed after World War II. Under this agenda, the trafficking phenomenon was considered to be a subset of other human rights issues, including migrant workers' rights and violence against women and children. A close look at the trafficking concept within these human rights frameworks provides an opportunity to assess the efforts of the international community in dealing with trafficking and their failure to define trafficking. This analysis in turn helps to explain the need for a specific international legal instrument on the trafficking issue, and the role of the *Trafficking Protocol* in the international fight against trafficking.

Any discussion of the conceptualisation of trafficking would be incomplete if it did not include an investigation of the formation of the *Trafficking Protocol*. Considered as a more effective 'weapon' to address the trafficking issue from a criminal justice perspective, the *Trafficking Protocol* was the first instrument of its kind to include an internationally agreed definition of 'trafficking in persons'. In the absence of an international consensus as to what would amount to trafficking as a starting point for international cooperation in the fight against trafficking, this definition was a breakthrough. However, as the analyses in this part will point out, this *Trafficking Protocol* definition, whilst in theory it is reflective of the actual process of trafficking, is difficult to apply in practice. In the meantime, it has become the standard for formulating trafficking offences in regional policy and national legislation. Since the formation of the *Trafficking Protocol*, with its welcome definition of trafficking, its spirit and the meaning have been incorporated into some regional legal instruments. These new developments will also be examined in this chapter to give a complete picture of the trafficking phenomenon.

² Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010)

2.2 THE CONCEPT OF TRAFFICKING BEFORE THE TRAFFICKING PROTOCOL

2.2.1 Prior to the 1949 Convention – The prostitution label

In describing the history of conceptualising trafficking, it is necessary to introduce the four international legal documents directed at trafficking issues in the very early stages of the development of this concept. They include the *1904 International Agreement for the Suppression of the White Slave Traffic*,³ the *1910 International Convention for the Suppression of the White Slave Traffic*,⁴ the *1921 International Convention for the Suppression of the Traffic in Women and Children*⁵ and the *1933 International Convention for the Suppression of the Traffic in Women of Full Age*.⁶ Looking at this list of instruments, it is easy to perceive and argue that these predecessors changed the concept of trafficking from ‘white slave traffic’ to ‘traffic in women and/or children’. Nevertheless, placing these predecessors of the trafficking concept in their context of increasing concern about the movement of women and girls into prostitution and its surrounding moral issues will bring a broader understanding of how trafficking was actually perceived in this period.

In the British-led colonial world of these instruments, there was a fear of the boom in ‘female migration outside the traditional context of family migration’.⁷ Further this new

³ *International Agreement for the Suppression of the White Slave Traffic*, opened for signature 18 May 1904, 1 LNTS 83 (entered into force 18 July 1905) (‘1904 Agreement’).

⁴ *International Convention for the Suppression of the White Slave Traffic*, opened for signature 4 May 1910, 3 LNTS 278 (entered into force 8 August 1912) (‘1910 Convention’).

⁵ *International Convention for the Suppression of the Traffic in Women and Children*, opened for signature 30 September 1921, 9 LNTS 416 (entered into force 15 June 1922) (‘1921 Convention’).

⁶ *International Convention for the Suppression of Traffic in Women of Full Age*, opened for signature 11 October 1933, 53 UNTS 50 (entered into force 24 August 1934) (‘1933 Convention’).

⁷ Joyce Outshoom, ‘The Political Debates on Prostitution and Trafficking of Women’ (2005) 12 *International Studies in Gender, State and Society* 141, 143; Marjan Wijers, ‘Keep Your Women Home: European Policies on Trafficking in Women’ (unpublished manuscript, 1998) 12, cited in Jo Doezema, ‘Loose Women or Lost Women? The Re-emergence of the Myth of “White Slavery” in

trend in migration was ‘oriented more toward labor’. That is, it focused on the migration of white people between some European countries, beginning with immigration into England, then spreading to other countries in Europe and America for the purpose of seeking work, including prostitution.⁸ The growing concern about this type of migration was reflected by some feminist movements concerned with prostitution. Two of the most well-known were the ‘regulationists’, who regarded the existence of prostitution as a ‘necessary evil’ that should be subject to some kind of regulation, and the ‘abolitionists’, who saw prostitutes as victims needing to be rescued and rehabilitated, and who blamed prostitution on uncontrolled male lust.⁹ While prostitution was essentially legalized under the influence of the regulationist movement, the abolitionist movement formed by Josephine Butler fought against the regulation of prostitution. The very first feminist campaigns of the abolitionists were for the abolition of the UK’s *Contagious Diseases Acts* of 1864, 1866 and 1869, which placed controls on prostitution by way of periodic medical examinations to suppress the spread of venereal diseases.¹⁰

In this sense of providing the framework to wage the battle ‘for the virtue of white women’,¹¹ these four international instruments on ‘white slave traffic’ in fact focused

Contemporary Discourses of “Trafficking in Women” (2000) 18(1) *Gender Issues* 23, 40 and also in Gallagher, above n 2, 16.

⁸ See, eg, *1921 Convention*, art 6 referring to the ‘seeking employment abroad’; see also Doezema, above n 7, 25, 27.

⁹ Doezema, above n 7, 26–7. Regarding this categorisation, according to Askola, there have been three phases of feminist movement and their influences on legal policy (on prostitution as well as other women’s perspective) at that time. See Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart Publishing, 2007) 23–6. The third feminist movement — ‘prohibitionist’ with the policy on promoting ending of state revenue from prostitution — is not mentioned here since it has less influence on the current issue of trafficking.

¹⁰ The *1949 Convention* can be seen as a success of the abolitionist movements when the policy of abolishing all kinds of regulation of prostitution was manifested. See United Nations Department of Social and Economic Affairs, *Study on Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8 (United Nations Publications, 1959) 8.

¹¹ Gallagher, above n 2, 55.

on the procuring of women and girls into prostitution abroad.¹² They are alleged to be driven by the pressure of moral panic about the transmission of contagious diseases, especially venereal diseases, through the migration of prostitutes.¹³ It can be seen that these instruments are the first that associated the term ‘trafficking’ with ‘the sensationalized image of young and innocent [white] women being coerced into prostitution in foreign lands’.¹⁴

In spite of being labelled as ‘prostitution’ instruments, these four international agreements did not actually focus on (the abolition of) prostitution per se, especially prostitution in national law. In fact, all of these instruments preserved the authority of those contracting states in terms of regulating domestic prostitution.¹⁵ Furthermore, these instruments also did not address either slavery or ‘practices similar to slavery’ or any other practices that are now associated with trafficking.¹⁶ They actually focused on promoting cooperation among states to prevent and deal with the irregular migration of women and girls into the prostitution industry.

¹² Art 1 of the *1904 Agreement* provided for an authority responsible for the exchange of information on ‘the procuring of women and girls for immoral purposes abroad’. The *1910 Convention* asked its state parties to punish any person who hired, abducted or enticed a woman or girl for immoral purposes. In the meantime, the *1933 Convention* focused on ‘the acts of procuring, enticing or leading away ... a woman or girl of full age, for immoral purposes to be carried out in another country’. See *1910 Convention*, arts 1–2; *1933 Convention*, art 1; see also United Nations Department of Social and Economic Affairs, above n 10, 2; Marlene D Beckman, ‘NOTE: The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women’ (1984) 72 *Georgetown Law Journal* 1111, 1113.

¹³ This fear then resurfaced in the early of the 1990s with the advent of HIV/AIDS and the high possibility of this disease’s transmission through migration. See the next part of the chapter referring to the period of conceptualising the trafficking phenomenon prior to the establishment of the *Trafficking Protocol*. See also Gallagher, above n 2, 16; Outshoom, above n 7, 143; Askola, above n 9, 23; Doezema, above n 7, 24.

¹⁴ Gallagher, above n 2, 55–6.

¹⁵ United Nations Department of Social and Economic Affairs, above n 10, 1; Gallagher, above n 2, 58.

¹⁶ See *Trafficking Protocol*, art 3(a) – see Appendix 1; Gallagher, above n 2, 55.

In terms of definition, these instruments did not provide any official definition of 'traffic' or 'trafficking'. Whilst the *1904 Agreement* covered only the situations of women who 'suffered abuse or compulsion',¹⁷ who in other words were forced or deceived into prostitution in foreign countries,¹⁸ the *1910 Convention* extended its scope to situations of procurement and enticement of women and girls with their consent.¹⁹ The definition of 'white slave traffic' was implied in Articles 1 and 2 of the *1910 Convention*, including the procurement, enticement, or leading away 'even with ... consent, [of] a woman or girl under age, for immoral purposes' and 'by fraud, or *by means* of violence, threats, abuse of authority, or any other method of compulsion ... a woman or girl over age, for immoral purposes'.²⁰ It can be seen from these provisions that the *1910 Convention* introduced, as Gallagher pointed out, the distinction between young and adult victims, and the notion of 'means' factors which was later elaborated in the *Trafficking Protocol* definition.²¹

The *1921* and *1933 Conventions* moved from the notion of 'white slave traffic' to that of 'traffic in women and children' and expanded its scope to the 'traffic in children of both sexes'.²² The *1933 Convention* then moved further to suppress the procurement, enticement or leading away of any women of any age 'even with her consent'.²³ It did not refer to force or coercion (that is, 'means') as a constitutive element of trafficking for either adults or children and, at the same time, it eliminated the notion of consent.²⁴ From this, it can be said that the focus on trafficking in this period was not concerned with forced movement or exploitation but as an issue of illegal international migration.

¹⁷ See *1904 Agreement*, preamble para 1.

¹⁸ Gallagher, above n 2, 57.

¹⁹ See *1910 Convention*, art 1.

²⁰ (Emphasis added).

²¹ Gallagher, above n 2, 57.

²² *1921 Convention*, art 2.

²³ *1933 Convention*, art 1.

²⁴ See Gallagher, above n 2, 58.

After these four international instruments, the League of Nations intended to consolidate them into one unified international convention dealing with prostitution.²⁵ However, the plan was not carried out due to the outbreak of World War II and the issue did not resurface until the establishment of the 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Other* (the 1949 Convention).²⁶ In the period between World War II and the establishment of the *Trafficking Protocol* in 2000, the concept of trafficking was not only raised within the framework of the 1949 Convention, but also under many other human rights agendas. The concept of trafficking in the period from the 1949 Convention to the 2000 *Trafficking Protocol* will be discussed in the next section of this chapter.

2.2.2 The 1949 Convention

The 1949 Convention was adopted by the United Nations (UN) shortly after this organisation's creation in 1945. Instead of consolidating the four previous instruments dealing with trafficking as discussed above, the Convention extended its scope of application to 'traffic in persons', a term that is gender-neutral²⁷ and which includes both trafficking in women and men.²⁸ However, indeed, this Convention seemed not to intend to take into account trafficking in men and boys due to the fact that there was no specific reference to the practice of trafficking in men and boys in the Convention.²⁹

²⁵ United Nations Department of Social and Economic Affairs, above n 10, 2.

²⁶ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature 21 March 1950, 96 UNTS 273 (entered into force 25 June 1951) ('1949 Convention').

²⁷ Susan Jeanne Toepfer and Bryan Stuart Wells, 'The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women' (1994) 2 *Michigan Journal of Gender & Law* 83, 98.

²⁸ Gallagher, above n 2, 59.

²⁹ See *ibid* 15 n 13.

Although it provides for the ‘Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others’, the *1949 Convention* does not give any definitions for these elements. In fact, this Convention requires its state parties to punish two groups of actions (irrespective of the victim’s age or consent), namely: 1) acts of ‘traffic in persons’, which encompass the procurement or enticement or leading away of another person for the purposes of prostitution; or 2) the exploitation of the prostitution of another person.³⁰ As a result, the *1949 Convention* can be regarded as the first (and, so far, the only)³¹ international anti-trafficking instrument dealing with both the *process* of trafficking and its end result.³² Additionally, the *1949 Convention* regarded trafficking as an offence for which consent was irrelevant, as was the case in the *1933 Convention*, by emphasizing the fact that trafficking may occur ‘even with the consent of the [victim]’.³³

Whilst calling for criminalisation of the acts of keeping, managing or financing prostitution,³⁴ the *1949 Convention* requires its state parties to abstain from any regulation or supervision of prostitutes, which can be clearly seen as one of the salient manifestations of an abolitionist approach.³⁵ The Convention, despite its abolitionist stance, does not prohibit prostitution nor demand its criminalisation apart

³⁰ *1949 Convention*, art 1.

³¹ It should be noted that the *Trafficking Protocol* does not follow this stream in terms of criminalizing the exploitation as a separate offence. For more details on this point, see the next section of this chapter.

³² Gallagher, above n 2, 15.

³³ *1949 Convention*, art 1.

³⁴ *Ibid*, art 2.

³⁵ Art 6 of the *1949 Convention* provides that ‘[e]ach [p]arty ... agrees to take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.’ See further the discussion of the abolitionist movement in section 2.2.1 of this chapter.

from requiring state parties to take 'measures for the prevention of prostitution'.³⁶ This has been claimed as an attempt by the Convention's drafters to create a compromise between countries that criminalized prostitution and those that tolerated it under certain conditions in order to attract as many as possible of ratification (as well as to protect prostitutes from being outlawed).³⁷ In addition to the criticisms of this Convention in terms of its failure to distinguish between forced and consensual prostitution, it has also been criticized for not covering other contemporary forms of sexual exploitation, as well as trafficking for purposes other than prostitution.³⁸

Included in the regime of the *1949 Convention* were some measures for cross-border cooperation between state parties that were quite comprehensive in dealing with the practice of moving people from one country to another.³⁹ Even though the *1949 Convention's* protection measures (including rehabilitation),⁴⁰ are central to it, it was criticized by the UN Special Rapporteur on Violence against Women on the basis that:

The *1949 Convention* has proved ineffective in protecting the rights of trafficked women and combating trafficking. The Convention does not take a human rights

³⁶ *1949 Convention*, art 16.

³⁷ Gallagher, above n 2, 59–60. It should also be noted that a similar compromise attends the definition of the *Trafficking Protocol*. See also United Nations Office on Drugs and Crime (UNODC), *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) ('*Travaux Préparatoires*') 347 which asserts that '[t]he protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. ... therefore without prejudice to how States parties address prostitution in their respective domestic laws.'

³⁸ For more information on the criticisms against the *1949 Convention*, see, eg, Gallagher, above n 2, 61; Beckman, above n 12, 1113; Alison Cole, 'Reconceptualizing Female Trafficking: The Inhuman Trade in Women' (2005) 26(2) *Women's Rights Law Reporter* 97; Nora V Demleitner, 'Forced Prostitution: Naming an International Offense' (1994) 18 *Fordham International Law Journal* 163; Stephanie Farrior, 'The International Law on Trafficking in Women and Children for Prostitution: Making It Live Up to Its Potential' (1997) 10 *Harvard Human Rights Journal* 213.

³⁹ *1949 Convention*, arts 13–15.

⁴⁰ See *ibid*, art 16; See also Gallagher, above n 2, 60.

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.⁴¹

In the meantime, the Convention also included other measures on repatriation⁴² and prevention⁴³ alongside requirements regarding prosecution and punishment.⁴⁴ However, the *1949 Convention* has been described as possessing an 'extremely weak' enforcement mechanism.⁴⁵ This has raised the concerns about this Convention.⁴⁶ Yet for more than half a century it existed as the only specialist treaty

⁴¹ See Radhika Coomaraswamy, *Report on Trafficking in Women, Women's Migration and Violence Against Women* UN ESCOR, UN Doc E/CN.4/2000/68 (29 February 2000), [22] (italicisation added).

⁴² *1949 Convention*, art 19.

⁴³ *Ibid*, arts 17, 20.

⁴⁴ *Ibid*, arts 8–9.

⁴⁵ See *Advancement of Women – Traffic in Women and Girl: Report of the Secretary-General*, UN GAOR, UN Doc A/51/309 (1996), [42]. It should also be noted that Article 21 of the *1949 Convention* required contracting parties to report to the Secretary-General of the United Nations on the measures they took to implement the convention. See also Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 1, 10, 16; Coomaraswamy, above n 41, [26]; Farrior, above n 38, 220; Gallagher, above n 2, 62–4.

⁴⁶ It should be noted here that even though the *1949 Convention* seems to be lapsed by its state parties, there have been 18 new state parties to this Convention during the period of 2000 – 2012. This information can be accessed at <http://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20vii/vii-11-a.en.pdf> (retrieved on 13 June 2012).

on trafficking. However in the later instruments described in this chapter, no link is made to the *1949 Convention*.⁴⁷

2.2.3 The trafficking concept under the human rights frameworks

The concept of trafficking has also been approached from a human rights perspective under the frameworks of some related issues such as slavery, forced labour, labour migration, discrimination and violence against women, and the violation of children's rights. Accordingly, before 2000 trafficking was seen as subsets of these practices.⁴⁸ It can be said that, under these human rights frameworks, the trafficking concept came to be focused less on the process of (forcibly) bringing people into exploitative situations and more on its end result, namely exploitative practices. Also in this period of conceptualising the trafficking concept, the understanding was expanded beyond the association of trafficking with prostitution to a broader range of exploitative practices. In other words, these human rights frameworks, whilst equating trafficking with phenomena which are actually the end results of trafficking, did not pay attention to the *process* of trafficking. Remarkably, in none of these human rights frameworks is 'trafficking' actually defined.

2.2.3.1 The framework of slavery, servitude or forced labour

2.2.3.1.1 The framework of slavery or servitude

Slavery can be seen as a (politically and emotionally charged) label which is applied to cover exploitative practices that are generally associated with trafficking, such as debt bondage, forced labour or forced prostitution.⁴⁹ For example, in the ILO *Worst Forms of Child Labour Convention* (No 182) of 1999 in which specific reference to

⁴⁷ See, eg, the *Trafficking Protocol or Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, Council of Europe Treaty Series No 197, 16 V 2005 (entered into force 1 February 2008) ('*European Trafficking Convention*').

⁴⁸ See also Gallagher, above n 2, 64–5.

⁴⁹ *Ibid* 179.

trafficking was made,⁵⁰ as ‘the sale and trafficking of children’, and debt bondage, serfdom and forced or compulsory labour, are categorized as ‘forms of slavery or practices similar to slavery’.⁵¹ In fact, the international community changed to picturing traffic in persons and the exploitation of prostitution as slavery after the adoption and (unsuccessful) implementation of the *1949 Convention*. In 1974, the Economic and Social Council of the United Nations required that the *1949 Convention’s* member states should include their country’s situation of slavery and trafficking in their regular reports submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights.⁵² It should also be noted that this Sub-Commission set up a Working Group on Slavery which, from its outset, ‘considered traffic in women and children to be a form of slavery’.⁵³

In terms of the anti-slavery international legal framework, there are two main legal instruments specifically referring to slavery, including the League of Nations’ *1926 Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*⁵⁴ and the *Supplementary Convention on the Abolition of Slavery, the*

⁵⁰ *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182)*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000).

⁵¹ Ibid, art 3(a); see also Alice Edwards, ‘Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’ (2007) 36(1) *Denver Journal of International Law and Policy* 9, 42.

⁵² See *E S C Decision 16*, UN ESCOR, 56th sess, 1899th mtg, Supp No 2, UN Doc E/DEC/5-22 (LVI) (1974), [7], cited in *Annotations to the Provisional Agenda (Prepared by the Secretary-General)* UN ESCOR, 20th sess, UN Doc E/CN 4/Sub 2/AC 2/1995/1/Add 1 (21 June 1995), [2].

⁵³ Jean Fernard-Laurent, United Nations Department of International Economic and Social Affairs, *Activities of the Advancement of Women: Equality, Development and Peace* (United Nations, 1985) [8].

⁵⁴ *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) (‘*1926 Slavery Convention*’).

Slave Trade and Institutions and Practices Similar to Slavery in 1956.⁵⁵ Whilst calling for ‘the complete abolition of slavery in all its forms’,⁵⁶ the *1926 Slavery Convention* provides a definition of the terms ‘slavery’⁵⁷ and ‘slave trade’.⁵⁸ However, it has not so far clarified the ambit of these terms to make it clear what particular practices can amount to slavery or slave trade (and, relevant to this thesis, to help determine the link between these practices and trafficking).⁵⁹

⁵⁵ *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 40 (entered into force 30 April 1957) (*1956 Supplementary Slavery Convention*).

⁵⁶ *1926 Slavery Convention*, art 2.

⁵⁷ With the term of ‘slavery’ is defined as ‘the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised’. See *ibid*, art 1(1).

⁵⁸ As defined as ‘all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him, all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves’. See *ibid*.

⁵⁹ This is referring to whether a practice can amount to slavery if there is not any power exercised which is a right of ownership. Regarding this, the UN Secretary-General’s Report to the Economic and Social Council in 1953 notes that the definition of slavery in the 1926 Slavery Convention prohibits not just the de facto slavery but the de jure form of it, that means slavery can happen even when no legal right of ownership over a person is exercised. In the meantime, there have been other documents determining that ‘slavery’ would only exist when there is involvement of ‘any or all of the powers attaching to the right of ownership’. See *Slavery, the Slave Trade, and Other Forms of Servitude (Report of the Secretary-General)*, UN ESCOR, UN Doc E/2357 (21 January 1953), 27; *Report of the Advisory Committee of Experts on Slavery*, League of Nations Doc C 189(I) M 145 1936 VI (1936), 24–5; See also Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers, 2008) 74, 79. For the investigation of the ambit of the *1926 Slavery Convention*’s definition of slavery and its relevance to the factual incidence of trafficking in persons, see especially Anne T Gallagher, Gallagher, Anne T, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (2009) 49(4) *Virginia Journal of International Law* 789.

In the meantime, the *1956 Supplementary Convention* referred to practices ‘similar to slavery’,⁶⁰ including *debt bondage, serfdom, servile forms of marriage and exploitation of children*, under the umbrella of the anti-slavery discourse.⁶¹ Since these practices can exist irrespective of exercise of ‘the powers attaching to the right of ownership’,⁶² they appear to be examples of ‘servitude’ or ‘servile status’, which can be understood as ‘human exploitation falling short of slavery’.⁶³ However, apart from the prohibition against these slavery-like practices, the Convention does not make any specific reference to trafficking practices per se.

⁶⁰ See *1956 Supplementary Slavery Convention*, title and preamble.

⁶¹ Art 1 of the *1956 Supplementary Slavery Convention* provides:

- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- (c) Any institution or practice whereby:
 - (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
 - (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
 - (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

⁶² See *1956 Supplementary Slavery Convention*, art 1.

⁶³ Gallagher, *The International Law of Human Trafficking*, above n 2, 182.

Furthermore, the anti-slavery discourse focuses on the exploitative practices as such rather than the process of taking people into exploitive situations as is required under the *Trafficking Protocol* definition. In other words, whilst the framework against slavery or servitude focuses on the practices of exploitation that may be the end results of trafficking, it does not help to understand the process of trafficking. Of course these Conventions are not trafficking-specific treaties and, consequently, do not intend to cover all forms of trafficking. Consequently, whilst there have been quite a few debates on whether or not to regard trafficking as a form of slavery,⁶⁴ it is clear that the concept of trafficking has not yet been clarified under the framework of slavery or servitude. In addition, whilst the current international anti-trafficking frameworks, including the *Trafficking Protocol*, may regard slavery and practices similar to slavery as among the end results of trafficking,⁶⁵ or determine that ‘trafficking can lead to slavery’,⁶⁶ this simply indicates there is a clear link between these two practices. Finally, another fact that should be noted is that slavery is not always the result of trafficking.

2.2.3.1.2 The framework of forced labour

As for the aspect of forced labour, the International Labour Organization (ILO) adopted two important legal instruments, namely the *1930 Forced Labour Convention (No 29)*⁶⁷ and the *1957 Abolition of Forced Labour Convention (No 105)*.⁶⁸ The *Convention No 29* does not refer to trafficking per se⁶⁹ but does provide a

⁶⁴ See *ibid* 177–91. See, especially, James C Hathaway, ‘The Human Rights Quagmire of Human Trafficking’ (2008) 49(1) *Virginia Journal of International Law* 1; Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground’, *ibid* n 59 for relevant arguments.

⁶⁵ *Trafficking Protocol*, art 3(a) – see Appendix 1.

⁶⁶ See the *European Trafficking Convention*, preamble.

⁶⁷ *Convention concerning Forced or Compulsory Labour (ILO No 29)*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932) (‘*1930 Forced Labour Convention*’).

⁶⁸ *Abolition of Forced Labour Convention (ILO No 105)*, opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

⁶⁹ Quite a long time after this adoption, this reference to trafficking (especially) in women and children has been mentioned in a technical paper prepared by ILO submitted to the European Conference on

definition of 'forced labour' as 'all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself voluntarily'.⁷⁰ It should also be noted that the ILO's Committee of Experts in overseeing the member states' reports under the *Convention No 29* has referred to trafficking (of women and children).⁷¹ By contrast, *Convention No 105* calls for the suppression of the use of forced or compulsory labour in contexts which are quite far from human trafficking practices.⁷² However, other instruments adopted by the ILO regarding child labour, including the *Minimum Age Convention*⁷³ in 1973, *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182)* in 1999 are also relevant to trafficking.⁷⁴

Even though the link between the two concepts of trafficking and forced labour is not clear, as well as the link between the frameworks of forced labour and trafficking, it should be noted that the link between lack of enforcement of labour standards and

Preventing and Combating Trafficking in Human Beings (2002). See International Labour Organization, 'Forced Labour, Child Labour and Human Trafficking in Europe: An ILO Perspective' (Paper presented at the EU/IOM STOP European Conference on Preventing and Combating Trafficking in Human Beings – A Global Challenge for the 21st Century, Brussels, 18–20 September 2002) <www.belgium.iom.int/STOPConference/Conference%20Papers/06.%20ILO%20-%20Final%20Brussels%20Trafficking%20Paper%20Sept.%202002.pdf>.

⁷⁰ *1930 Forced Labour Convention*, art 2(1).

⁷¹ International Labour Organization, above n 69, 8.

⁷² See *Abolition of Forced Labour Convention (ILO No 105)*, art 1. In this provision, the Convention announced its suppression of the use of forced or compulsory labour as a means of 'political coercion or education or as a punishment for ... political views', a method of mobilising and using labour for economic development purposes, a means of labour discipline, a punishment for having participated in strikes or a means of racial, social, national or religious discrimination.

⁷³ *Convention concerning Minimum Age for Admission to Employment (ILO No 138)*, opened for signature 26 June 1973, 1015 UNTS 298 (entered into force 19 June 1976).

⁷⁴ See also Edwards, above n 51, 42.

the incidence of trafficking in labour has been recognized by the ILO.⁷⁵ Significantly, the ILO also reveals that:

[T]olerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protection and non-payment of wages are among the factors that contribute to an expanded market for trafficked migrants who have no choice but to work in conditions that are unacceptable....⁷⁶

Whilst 'forced labour' is specified as among the end purpose practices of trafficking, it is also widely accepted that trafficking is forced labour or even that forced labour is 'an easier paradigm to apply than trafficking'.⁷⁷ However, as pointed out by Kneebone

Forced labour will only amount to trafficking when the process elements of the *Trafficking Protocol* definition and the intended purpose ... are present. ... exploitation at destination does not have to occur for trafficking to have occurred under the *Trafficking Protocol*, but actual exploitation is the gist of forced labour.⁷⁸

That means that, even though there are similarities between forced labour and trafficking and forced labour is sometimes a result of trafficking, they are distinct concepts.⁷⁹

⁷⁵ International Labour Organization, above n 69, 9, cited in Edwards, above n 51, 42–3.

⁷⁶ International Labour Organization, above n 69, 9, cited in Edwards, above n 50, 43.

⁷⁷ Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012) 121; see also Farrior, above n 38, 223; Edwards, above n 51, 41.

⁷⁸ Kneebone and Debeljak, above n 77, 123.

⁷⁹ *Ibid.*

2.2.3.2 The framework of labour migration

It can be said that the prolonged focus on prostitution and sexual exploitation in conceptualising trafficking has resulted in underestimation of the intertwining of labour migration issues with the practices of trafficking.⁸⁰ However, it should be noted that the international legal framework concerning the protection of migrant workers to some extent covers the issue of trafficking in persons and introduces some measures to deal with it. As such, these instruments can be considered among the predecessors⁸¹ to the *Trafficking Protocol* in addressing the practices of trafficking in persons, especially from a human rights perspective.

Under the ILO's framework of protection of the rights of migrant workers, its Convention No. 97 of 1949 concerning *Migration for Employment (C97)*⁸² requires its state parties to criminalize the act of promoting clandestine or illegal migration.⁸³ C97 also provides for the protection of the rights of migrant workers by prescribing the equal treatment of migrant workers and national workers in some respects, such as working conditions and trade union membership. Nonetheless, this instrument does not specifically deal with the rights of undocumented/illegal migrants or giving any specific reference to trafficking practice.

In the meantime, the ILO's Convention No. 143 of 1975 concerning *Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of*

⁸⁰ A significant example for this underestimation is that the *Trafficking Protocol* whilst provides for the end result practices of trafficking does not mention the practice of labour exploitation. See *Trafficking Protocol*, art 3(a); see also Bruch, above n 45, 23.

⁸¹ Susan Kneebone, 'The Governance of Labour Migration in Southeast Asia' (2010) 16 *Global Governance* 383, 385; Farrior, above n 38, 218; Shelly Case Inglis, 'Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework' (2001) 7 *Buffalo Human Rights Law Review* 50, 58.

⁸² *Convention concerning Migration for Employment (ILO No 97)*, opened for signature 1 July 1949, 20 UNTS 79 (entered into force 22 January 1952) ('*ILO Migration for Employment Convention*').

⁸³ *Ibid*, art 8 annex I, art 13 annex II.

*Migrant Workers (C143)*⁸⁴ calls for state parties to ‘respect the basic human rights of all migrant workers’ regardless of their legal status in the country of employment and sets out protections for *irregular* migrant workers and their families.⁸⁵ However, this protection for irregular migrant workers is limited to the most fundamental of rights, including the right to life, the prohibition of torture and the right to a fair trial, rather than to the right to equal opportunity and treatment on the same level as nationals.⁸⁶ Furthermore, C143 calls for the prosecution of persons responsible for ‘manpower trafficking’⁸⁷ as well for organizing migration to abusive employment, illegal employment and trafficking of migrant workers.⁸⁸ However, none of these practices is defined within this instrument. C143 also emphasizes the need for cooperative and collaborative measures between state parties to combat clandestine migration and the illegal employment of migrants.⁸⁹

With the same concern about the rights of migrant workers and the exploitation of migrant workers, a study on the exploitation of labour through illicit and clandestine trafficking was prepared in 1975 by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁹⁰ In this report, migrant

⁸⁴ *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No 143)*, opened for signature 24 June 1975, 1120 UNTS 324 (entered into force 9 December 1978) (*‘ILO Migrant Workers Convention’*).

⁸⁵ *Ibid*, art 1 (emphasis added).

⁸⁶ Gallagher, *The International Law of Human Trafficking*, above n 2, 167, citing Ryszard Ignacy Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Clarendon Press, 1997) 103, in which argued that ‘the reference to basic rights is, in fact, extremely limited and should be taken to refer to the most fundamental of rights including the right to life, the prohibition of torture, and the right to a fair trial’.

⁸⁷ *ILO Migrant Workers Convention*, arts 3, 5.

⁸⁸ *Ibid*, art 6(1).

⁸⁹ *Ibid*, art 3; see also Gallagher, *The International Law of Human Trafficking*, above n 2, 167.

⁹⁰ This Sub-Commission is under the Commission on Human Rights under the mandate of the United Nations Economic and Social Council. According to the resolution of this Sub-Commission, Ms Halima Embarek Warzazi, who was appointed as the Special Rapporteur, prepared a study on the exploitation of labour through illicit and clandestine trafficking. The study encompassed the

workers who are illegitimately transported and suffer the exploitation under slavery-like practices or forced labour are regarded as victims of trafficking and of breach of human rights.⁹¹ Also, the Special Rapporteur recommends imposing severe punishments not only against employers, but also traffickers, carriers and those who contribute to the illegal traffic.⁹² Significantly, she calls for states to remove penalties imposed on clandestine immigrants who should be seen as victims of trafficking, and to regularize their status in destination countries.⁹³

The UN then adopted the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*⁹⁴ in 1990, designed to protect the rights of *all* migrant workers and their families 'without distinction of any kind'.⁹⁵ Accordingly, they are to be protected against torture,⁹⁶ slavery, servitude and forced labor,⁹⁷ violence, physical injury, threats and intimidation,⁹⁸ and unfair or arbitrary expulsion.⁹⁹ All migrant workers¹⁰⁰ are entitled to the right of equal treatment with

preliminary report (E/CN 4/Sub 2/351 and Add 1), the Special Rapporteur's statement to introducing the preliminary report (E/CN 4/Sub 2/352), final report (E/CN 4/Sub 2/L 629) with the Special Rapporteur's introducing statement to it and the draft recommendations (E/CN 4/Sub 2/L 636). All these documents were then consolidated in a UN publication on 20 November 1975 under the symbol E/CN 4/Sub 2/L 640. See *Exploitation of Labour through Illicit and Clandestine Trafficking*, UN ESCOR, UN Doc E/CN 4/Sub 2/1986/6 (1986).

⁹¹ Ibid 16, 48.

⁹² Ibid 188.

⁹³ Ibid 189.

⁹⁴ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) ('*Migrant Workers' Rights Convention*').

⁹⁵ Ibid, art 1; see also Gallagher, *The International Law of Human Trafficking*, above n 2, 169–70.

⁹⁶ *Migrant Workers' Rights Convention*, art 10.

⁹⁷ Ibid, art 11.

⁹⁸ Ibid, art 16(2).

⁹⁹ Ibid, art 22.

nationals in relation to conditions of employment and work,¹⁰¹ trade union rights,¹⁰² the right to social security,¹⁰³ the right to emergency medical care,¹⁰⁴ the right to education (of migrant children)¹⁰⁵ and respect for cultural identity.¹⁰⁶ Whilst attempting to contribute to preventing and eliminating the exploitation of all migrants through illegal or clandestine movements and irregular or undocumented situations, the Convention is, however, unclear about the link between these practices and trafficking in migrant workers.¹⁰⁷ Additionally, it seems that the fact that many trafficked persons are migrant workers who have left their homes in search of paid employment in another country is not recognized within this Convention.¹⁰⁸ This makes the Convention, as Gallagher asserts, 'more a tool of advocacy than a source of substantive rights' towards victims and potential victims of trafficking.¹⁰⁹

2.2.3.3 The framework of women and children's rights

In another agenda of the human rights movement, the issue of trafficking has been considered as the 'exploitation of the prostitution of women', and as a form of discrimination and violence against women. Accordingly, trafficking was confirmed

¹⁰⁰ The Convention also imitates the *ILO Migrant Workers Convention* by creating a set of additional rights, including equality of treatment with nationals of States of employment in the legal, political, economic, social and cultural aspects that are applicable only to documented migrant workers and their families. See *ibid*, pt IV, arts 36–56.

¹⁰¹ *Ibid*, art 25.

¹⁰² *Ibid*, art 26(1).

¹⁰³ *Ibid*, art 27.

¹⁰⁴ *Ibid*, art 28.

¹⁰⁵ *Ibid*, art 30.

¹⁰⁶ *Ibid*, art 31(1).

¹⁰⁷ See *ibid*, preamble; see also Gallagher, *The International Law of Human Trafficking*, above n 2, 171.

¹⁰⁸ Gallagher, *The International Law of Human Trafficking*, above n 2, 171.

¹⁰⁹ *Ibid* 176.

not only as a form of violence against women,¹¹⁰ but also ‘a violation of women’s human rights and an impediment to the full enjoyment by women of all human rights’,¹¹¹ that is ‘incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity’, ‘put[ting] women at special risk of violence and abuse.’¹¹² Under the provisions of the *CEDAW*, state parties are required to ‘suppress *all forms of traffic in women* and exploitation of the prostitution of women’.¹¹³

It has been argued that the *CEDAW*, by this requirement, expands the prohibition to cover trafficking for other typical end purposes, such as forced labour or forced marriage as well as forced prostitution.¹¹⁴ It is unfortunate that the *CEDAW* does not give any explanation of the meaning of the phrases ‘all forms of traffic in women’ and ‘exploitation of the prostitution of women’. Additionally, the vague requirement of the Convention to take all ‘appropriate legislative and other measures’¹¹⁵ to suppress undefined acts makes it difficult for state parties to determine what they are obliged to do.¹¹⁶

¹¹⁰ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) (‘*CEDAW*’), art 6.

¹¹¹ See the *Beijing Declaration and Platform for Action – Fourth World Conference on Women* UN Doc A/CONF 177/20/Add 1 (27 October 1995) ch IV, [131], cited in *In-depth Study on All Forms of Violence against Women: Report of the Secretary-General*, UN GAOR, 61st sess, UN Doc A/61/122/Add 1 (6 July 2006), [35].

¹¹² See United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence against Women*, 11th sess, UN Doc A/47/38 (1992) (‘*General Recommendation No 19*’), [14].

¹¹³ *CEDAW*, art 6 (emphasis added).

¹¹⁴ Although the content of this article shows that the *CEDAW* was concerned with both trafficking in women in all of its forms, *and* exploitation of women in prostitution, some argue that the *CEDAW* aimed to end trafficking for prostitution. See Gallagher, *The International Law of Human Trafficking*, above n 2, 65; Farrow, above n 38, 227.

¹¹⁵ *CEDAW*, art 6.

¹¹⁶ Gallagher, *The International Law of Human Trafficking*, above n 2, 64.

Also within the efforts to raise the concern about the discrimination and violence against women, the General Recommendation No.19 revealed some forms of sexual and gendered exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, or marriages organized between women from developing countries and foreign nationals.¹¹⁷ It also noted that 'poverty and unemployment increase opportunities for trafficking in women' and 'force many women, including young girls, into prostitution',¹¹⁸ and referred to the vulnerability of prostitutes to violence and their need for equal protection under law.¹¹⁹ Additionally, General Recommendation No.19 pointed out the links between wars, armed conflicts, the occupation of territories and the increase in prostitution, trafficking in women, and sexual assault of women which 'require specific protective and punitive measures'.¹²⁰ Accordingly, states are required to ensure that '[relevant] laws ... give adequate protection to all women, and respect their integrity and dignity' and that '[a]ppropriate protective and support services should be provided for victims'.¹²¹ As one example of a framework or forum sharing the position of the CEDAW,¹²² the *Inter-American Convention on Violence against Women* specifically uses trafficking as an example of community-based violence against women (as opposed to domestic violence or violence perpetrated or condoned by the state or its agents).¹²³

¹¹⁷ See *General Recommendation No 19*, above n 110, [14].

¹¹⁸ *Ibid*, [14]–[15].

¹¹⁹ *Ibid*, [15].

¹²⁰ *Ibid*, [16].

¹²¹ *Ibid*, [24(b)].

¹²² Following this stream of considering trafficking as violence against women, the Vienna Declaration in 1993 and the Beijing Declaration and Platform for Action in 1995 kept on identifying trafficking as a form of gender-based violence. See *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF 157/23 (12 July 1993), art 18; *Beijing Declaration and Platform for Action*, above n 111.

¹²³ *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 85th plen mtg, Supp No 49, UN Doc A/48/49 (20 December 1993), art 2; see also *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, opened for signature 9

In terms of children's rights, the *Convention on the Rights of the Child (CRC)*¹²⁴ can be seen as an important source of standards in relation to the protection of children against trafficking. Directed to protecting children's rights and dignity, and to the empowerment of children, the *CRC* obliges its state parties 'to take all appropriate national, bilateral and multilateral measures to prevent *the abduction of, the sale of or traffic in children* for any purpose or in any form.'¹²⁵ The *CRC* also calls for the protection of children from all forms of economic exploitation, sexual exploitation and sexual abuse, as well as from the inducement or coercion of a child to engage in any of these forms of exploitation.¹²⁶ Whilst the *CRC* does not give any explanation of what should be understood by the terms 'abduction' and the 'sale' or 'traffic in children', it can be said that the trafficking concept up to this point consistently focuses on exploitative practices which may be the end results of trafficking, more than the process of recruiting or taking children into that exploitation. Apart from trafficking for sexual exploitation, other forms of trafficking in children, such as trafficking for forced or bonded labour and trafficking for adoption, were also conceptualised under the agenda of protecting the rights of children.¹²⁷

Significantly, the *CRC* requires its state parties to 'promote physical and psychological recovery and social integration of a child victim ... in any environment which fosters the health, self-respect and dignity of the child'.¹²⁸ It requires the state to protect children from the involuntary separation from their parents without due regard to their best interests. This extends to protecting their right to reside with their

June 1994, 33 ILM 1534 (entered into force 5 March 1995). Accordingly, 'community-based violence against women' shall mean '[p]hysical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution'.

¹²⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

¹²⁵ *Ibid.*, art 35 (emphasis added).

¹²⁶ *Ibid.*, arts 11, 32, 34.

¹²⁷ See especially Gallagher, *The International Law of Human Trafficking*, above n 2, 66.

¹²⁸ *CRC*, art 39.

parents.¹²⁹ The Committee on the Rights of the Child (established under the *CRC* to monitor its implementation) has also recognised the phenomenon of trafficking for economic exploitation which includes forced and bonded labour, and trafficking for adoption besides its emphasis on trafficking for sexual exploitation.¹³⁰

The scope of the *CRC* was then enlarged by its *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (2000).¹³¹ With an ‘explicitly criminal justice approach’,¹³² the *CRC’s Optional Protocol* requires state parties to protect the rights of child victims and witnesses ‘at all stages of the criminal justice process’.¹³³ Accordingly, states are required to detail ‘the rights of child victims and witnesses in the criminal justice process and the protections to be afforded them’.¹³⁴ The *CRC’s Optional Protocol* concluded through the United Nations Commission on Human Rights in 2000, also extends the scope and reach of the *CRC’s* provisions in relation to sale of children, child prostitution, and child pornography.¹³⁵

¹²⁹ *Ibid.*, arts 9, 10(2).

¹³⁰ See Gallagher, *The International Law of Human Trafficking*, above n 2, 66, citing, for example, United Nations Committee on the Rights of the Child, *Concluding Observations: Democratic Republic of the Congo*, UN Doc CRC/C/COC/CO/2 (2009), [82]–[83] (on sexual and economic exploitation); United Nations Committee on the Rights of the Child, *Concluding Observations: Moldova*, UN Doc CRC/C/MDA/CO/3 (2009), [68] (sexual and economic exploitation); United Nations Committee on the Rights of the Child, *Concluding Observations: Chile*, UN Doc CRC/C/OPSC/CHL/CO/1 (2008), [23] (on forced labour); United Nations Committee on the Rights of the Child, *Concluding Observations: Malaysia*, UN Doc CRC/C/MYS/CO/1 (2007), [95] (on sexual exploitation, forced labour, and adoption).

¹³¹ *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002) (‘*CRC’s Optional Protocol*’).

¹³² Gallagher, *The International Law of Human Trafficking*, above n 2, 67.

¹³³ *CRC’s Optional Protocol*, art 8.

¹³⁴ *Ibid.*, arts 8, 9(4).

¹³⁵ See *ibid.*, art 2; see also Gallagher, *The International Law of Human Trafficking*, above n 2, 67.

Even though the *CRC's Optional Protocol* does not directly deal with the issue of trafficking, it tends to equate trafficking with the sale of children which is defined as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'.¹³⁶ However, the Committee of the CRC Protocol acknowledged the fact that not all instances of the sale of children involve an element of exploitation, which is fundamental to the trafficking definition.¹³⁷

Under the human rights movement, in summary, there has been a plethora of international instruments addressing – even if only by some relatively straightforward prohibitions – some practices of trafficking.¹³⁸ Nevertheless, there was no agreed definition of trafficking formulated under these instruments, and furthermore, none of them specifically and comprehensively addressed trafficking practices per se and,

¹³⁶ *CRC's Optional Protocol*, art 2; see also United Nations Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 39th sess, UN Doc CRC/GC/2005/6 (1 September 2005), [2] and other relating documents of the United Nations Committee on the Rights of the Child, cited in Gallagher, *The International Law of Human Trafficking*, above n 2, 67.

¹³⁷ Gallagher, *The International Law of Human Trafficking*, above n 2, 68; see also section 2.3.2.3 of this chapter.

¹³⁸ Particularly, they are the *CRC* and the *CEDAW*. See also Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground', above n 59, 792; *Review of Priority Themes – Children as Victims and Perpetrators of Crime (Report of the Secretary-General)*, UN ESCOR, UN Doc E/CN.15/1996/10 (21 May 1996), [32]–[36]. The *CRC*, which was also developed in the context of United Nations human rights programme, is the most important international instrument with regard to protecting the human rights of the child. However, in spite of the 'basic guarantees' the Convention includes to protect the fundamental rights and freedoms of children, the implementation of these guarantees in practice has been problematic, primarily because of gaps between the legal provisions and the efficiency/capabilities of practical enforcement. As to protecting the rights of children against exploitation, the *CRC* refers to and (simply) calls on state parties to take measures to protect children against 'illicit transfer and non-return of children abroad' (art 1(1)), 'economic exploitation' (art 32(1)), 'all forms of sexual exploitation, sexual abuse' (art 34(1)); and to prevent 'the abduction of, the sale of or traffic in children for any purpose or in any form' (art 35).

especially, the processes.¹³⁹ The human rights movement, however, has at least given some clearer insight into the factual situations of trafficking, the exploitation as its end result, and the plight of its victims, which helps in drawing attention to the human rights issues which lead to trafficking situations and their consequences.

From these above investigations into the history of conceptualising trafficking from the international aspect, it can be said that trafficking is a complicated and multi-dimensional issue and, therefore, can be approached from different perspectives. However, generally speaking, trafficking should be understood and conceptualised as the practice of bringing people into exploitative situations as well as the practice of exploiting people – that is, the process and end result of trafficking. In terms of this, none of the international anti-trafficking agendas as previously explored appears to be successful in suppressing trafficking or addressing the suppression of trafficking as such.

However, under these frameworks, the security discourse which links trafficking with transnational migration and crime, as a result of human insecurity can also be observed.¹⁴⁰ Kneebone and Debeljak in discussing this issue asserted that the ‘security discourse focused upon narrating trafficking as an external threat to established ways of life (of industrialised countries) and values’, ‘as “the dark side of globalisation”, the threat from the outside forces of organized crime’.¹⁴¹ As these scholars also pointed out, ‘traditional security merges with human (in)security in a somewhat ambiguous mix’ or ‘perverse politics’.¹⁴² Accordingly, the human security discourse, as for example with migrant workers, has been overshadowed by the concerns about trafficking as an issue of illegal migration and about prostitution. But, as will be shown more clearly in the following chapters of this thesis, ‘victims of

¹³⁹ See Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground’, above n 59, 792–3.

¹⁴⁰ Kneebone and Debeljak, above n 77, 62–4, 66.

¹⁴¹ *Ibid* 63–4.

¹⁴² *Ibid* 65.

trafficking are integrated in a continuum of risk and danger’ and ‘anti-trafficking programmes ... focused on alleviating the lack of human security at source’.¹⁴³

By 2000, after nearly half a century of looking at trafficking issues from human rights and other perspectives, the international community still lacked a united approach to the nature and practice of trafficking in order to find an appropriate approach and response. Concerns about the inadequacy of the human rights machinery to respond to trafficking (in minors, especially)¹⁴⁴ were raised in Argentina’s proposal to the UN Commission on Crime Prevention and Criminal Justice, submitted at its 1997 session. This instigated the formulation of the *Trafficking Protocol* — supplementing the *Convention against Transnational Organized Crime (CTOC)*¹⁴⁵ — within a criminal justice framework, as a stronger basis for the fight against trafficking.

2.3 THE TRAFFICKING PROTOCOL AND THE TRAFFICKING DEFINITION

2.3.1 The *Trafficking Protocol* – a supplementation of the *CTOC*

2.3.1.1 The drafting process and the debates

After the end of the Cold War, the perceived threat posed by transnational crime to national and international security (that is, a focus on ‘traditional security’ as explained above) stimulated the work of the UN to strengthen international cooperation against this type of crime.¹⁴⁶ In 1994, the World Ministerial Conference on Organized Transnational Crime in Naples focused its attention on more effective

¹⁴³ Ibid 64–5.

¹⁴⁴ See also *Review of Priority Themes*, above n 138, [13].

¹⁴⁵ *Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) (‘*CTOC*’).

¹⁴⁶ In fact this cooperation dated back to 1975. See Dimitri Vlassis, *The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process*, (October 2002) United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) <<http://www.unafei.or.jp>>.

bilateral and multilateral cooperation against organized transnational crime and, for the first time, considered the possibility of a convention (or conventions).¹⁴⁷ The issue of trafficking, particularly ‘illicit trafficking in children’,¹⁴⁸ and then (more broadly) trafficking in women and children,¹⁴⁹ turned up as part of the agenda of elaborating a Convention in 1997. After an unsuccessful attempt to propose a new convention on trafficking in minors in addition to the *CRC*, Argentina introduced the issue of trafficking onto the criminal justice agenda of the UN Commission on Crime Prevention and Criminal Justice.¹⁵⁰ The initial focus on trafficking in women and

¹⁴⁷ Ibid.

¹⁴⁸ See *Question of the Elaboration of an International Convention against Organized Transnational Crime*, UN GAOR, 3rd Comm, 51st sess, Agenda Item 158, Annex, UN Doc A/C 3/51/7 (1 October 1996). On the agenda of the 51st session of the General Assembly for the question of elaborating a new convention, the Polish Government pioneered in preparing and submitting a draft of United Nations Framework Convention against Organized Crime. In Article 1 of this draft, the Polish drafters slated some kinds of crime that could be put into the second part of the definition, among which was the crime of ‘illicit trafficking in children’ at point (f). The definition under the Polish draft text, despite its inefficiency, has been considered a ‘useful starting point’ for the following discussions on the content of the Convention. See also David McClean (ed), *Transnational Organized Crime – A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2007) 7.

¹⁴⁹ *International Cooperation in Combating Transnational Crime – Implementing of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, and other Possible International Instruments (Report of the Meeting of the Inter-sessional Open-ended Intergovernmental Group of Experts on the Elaboration of a Preliminary Draft of a Possible Comprehensive International Convention against Organized Transnational Crime)*, UN ESCOR, 7th sess, UN Doc E/CN 15/1998/5 (2 February 1998), [14]; see also McClean, above n 148, 8.

¹⁵⁰ See Vlassis, above n 146; *Rights of the Child – Question of a Draft Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, as well as Basic Measures Needed for Their Eradication (Report of the Working Group on its Second Session)*, ECOSOC, 52nd sess, Agenda Item 20(d), UN Doc E/CN 4/1996/101 (25 March 1996). Gallagher in her paper discusses the establishment of the *CTOC* and its Protocols thereto, arguing that these instruments that are directed to addressing some transnational organized crimes and for restoring ‘orderly migration’ as well as for addressing the effect of restrictions in national immigration policy in wealthy countries. See Anne Gallagher, ‘Human Trafficking and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23(4)

children was subsequently expanded to ‘trafficking in persons’ at the commencement of the drafting process.¹⁵¹ The efforts of Argentina were then supplemented by Austria’s concern about the increase in incidents of smuggling of migrants.¹⁵²

In December 1998, an open-ended intergovernmental Ad Hoc Committee was officially established by the General Assembly for elaborating ‘a comprehensive international convention against transnational organized crime and ... international instruments addressing trafficking in women and children ... and illegal trafficking in and transporting of migrants’.¹⁵³ In October 2000, the Ad Hoc Committee eventually completed its mandate after eleven sessions, with the final texts of the *CTOC* and of its two supplementary *Protocols against Trafficking in Persons, Especially Women and Children and against Smuggling of Migrants*.¹⁵⁴ It can be said that the formulation of the *Trafficking Protocol* was motivated by states’ concerns about sovereignty and security issues, which followed from the recognition of the link between trafficking, migrant smuggling and organized criminal groups.¹⁵⁵

Human Rights Quarterly 975, 976. In the meantime, Hathaway argues that the international momentum on the trafficking issue is merely ‘providing a context for developed states to pursue a border control agenda under the cover of promoting human rights’. See Hathaway, above n 64, 26.

¹⁵¹ *Travaux Préparatoires*, above n 37, 322; see also Gallagher, *The International Law of Human Trafficking*, above n 2, 26.

¹⁵² Vlassis, above n 146; Gallagher, ‘Human Trafficking and the New UN Protocols’, above n 150.

¹⁵³ *Transnational Organized Crime*, GA Res 53/111, UN GAOR, 53rd sess, 85th plen mtg, UN Doc A/Res/53/111 (5 December 1998).

¹⁵⁴ There is one more Protocol supplementing the *CTOC* which was approved separately – that is the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition*. See *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 31 May 2001, 2326 UNTS 208 (entered into force 3 July 2005); see further information about the drafting process in Vlassis, above n 146; McClean, above n 148, 11–15.

¹⁵⁵ Gallagher, *The International Law of Human Trafficking*, above n 2, 68, 71.

During the process of drafting the *Trafficking Protocol*, there were important debates about key issues relating to the conceptualisation of trafficking and capturing it in a comprehensive definition.¹⁵⁶ Most of the matters of controversy that arose evolved out of the old debates surrounding trafficking, and some of them have remained controversial ever since the formulation of the trafficking definition.

The first debate related to a coercion requirement and the question of whether voluntary adult migrant prostitution should be covered by the trafficking definition. Downplaying the distinction between voluntary and forced prostitution, the states on one side of the debate argued that prostitution, in its nature, is morally unacceptable and that a coercion element in the definition ‘would lend unfounded legitimacy to prostitution’.¹⁵⁷

On the other side, states claimed that the omission of a coercion requirement and inclusion of voluntary adult migrant prostitution would obscure the difference between trafficking and smuggling of migrants.¹⁵⁸ This debate then quickly moved onto arguments about the consent of the trafficked person, in which the use of the words ‘irrespective of the consent of the person’ in the definition would confirm that traffickers would not be able to use the consent of victims as a defence to escape conviction.¹⁵⁹ By contrast, consent of the trafficked person was argued to be unnecessary due to the presence of ‘consent-nullifying’ behaviours in the definition under the *means* element (applied to trafficking in adults).¹⁶⁰ The drafting Committee

¹⁵⁶ Bruch, above n 45, 7.

¹⁵⁷ See International Human Rights Network, ‘Definition of Trafficking: Transnational Crime Convention, Trafficking in Persons Protocol’, Statement submitted to Sessions 2–11 of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (2000), cited in Gallagher, *The International Law of Human Trafficking*, above n 2, 26.

¹⁵⁸ See Gallagher, *The International Law of Human Trafficking*, above n 2, 26.

¹⁵⁹ International Human Rights Network, above n 157, cited in Gallagher, *The International Law of Human Trafficking*, above n 2, 26.

¹⁶⁰ See Human Rights Watch, Women’s Rights Division, ‘Recommendation Regarding the Protocol on Trafficking in Persons and Smuggling of Migrants’, Statement submitted to 9th Session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (2000), cited in Gallagher, *The International Law of Human Trafficking*, above n 2, 27; International

then rejected the phrase ‘irrespective of the consent of the person’ but reintroduced it in a wordy and, as Gallagher puts it,¹⁶¹ ‘unwieldy’ form, which provides that the consent of the trafficking victim is irrelevant where any of the *means* are found.¹⁶²

The end purpose of trafficking also came into the debates surrounding the definition of trafficking. From the negotiation process of the *Trafficking Protocol*, it can be said that an agreement was reached among the delegates on the need to move beyond the prostitution issue to cover the more contemporary exploitative practices of trafficking, such as forced labour, debt bondage and forced marriage. The debate then focused upon whether ‘use in prostitution’ should be included in the definition as a separate end purpose. One side of the debate pushed strongly for a reference to prostitution on the basis of an abolitionist position,¹⁶³ as appeared in the first period of conceptualising trafficking, especially under the framework of the *1949 Convention* as aforementioned. The opposite side claimed that the inclusion of the issue of voluntary prostitution in the definition would make it unnecessarily broad and would distract the international community’s attention from the real problem of trafficking.¹⁶⁴ As a result, the drafting Committee rejected the phrase ‘use in prostitution’ and replaced it with an ambiguous reference to ‘exploitation of the prostitution of

Human Rights Law Group, ‘The Proposed Definition of “Trafficking”’, Statement submitted to 9th Session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (2000), cited in Gallagher, *The International Law of Human Trafficking*, above n 2, 27.

¹⁶¹ See Gallagher, *The International Law of Human Trafficking*, above n 2, 27.

¹⁶² See *Trafficking Protocol*, art 3(b) – see Appendix 1. This content will be discussed in more detail in the next section of this chapter.

¹⁶³ See previous section of the chapter on feminist movements influencing the concept of trafficking in the first period of conceptualising this phenomenon.

¹⁶⁴ See *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 11th sess, Agenda Item 3, UN Doc A/AC 254/4/Add 3/Rev 7 (19 July 2000), n 10; see also Gallagher, *The International Law of Human Trafficking*, above n 2, 27.

others'.¹⁶⁵ This phrase has been officially explained to mean that the *Trafficking Protocol* addresses only the proportion of prostitution related to the context of trafficking, and not the prostitution issue in general.¹⁶⁶

2.3.1.2 The purposes of the CTOC and the *Trafficking Protocol*

As a criminal justice instrument with the purpose of promoting inter-state cooperation for the effective combating of transnational organized crime,¹⁶⁷ the CTOC sets out basic minimum measures for tackling organized criminal activities. Accordingly, the CTOC emphasizes the requirements it imposes on its state parties to criminalize participation in an organized criminal group,¹⁶⁸ the laundering of proceeds of crime,¹⁶⁹ corruption,¹⁷⁰ obstruction of justice¹⁷¹ and 'serious crime' where the offence is transnational in nature and involves an organized criminal group.¹⁷² Alongside its main focus on criminalisation, the CTOC also addresses the issue of protection of witnesses, and protection of and assistance to victims of those transnational organized crimes.¹⁷³ In the meantime, the importance of measures for preventing this kind of crime has also been emphasized within the CTOC framework.¹⁷⁴

The *Trafficking Protocol*, one of the protocols supplementing the CTOC, particularizes the general purposes of the CTOC to apply in the context of the crime

¹⁶⁵ *Trafficking Protocol*, art 3(b) – see Appendix 1. The ambiguity of this phrase will be discussed in the next section of the chapter.

¹⁶⁶ *Travaux Préparatoires*, above n 37, 374.

¹⁶⁷ CTOC, art 37(2).

¹⁶⁸ *Ibid*, art 5.

¹⁶⁹ *Ibid*, art 6.

¹⁷⁰ *Ibid*, art 8.

¹⁷¹ *Ibid*, art 23.

¹⁷² *Ibid*, art 3(1)(b).

¹⁷³ *Ibid*, arts 24–25.

¹⁷⁴ *Ibid*, art 31.

of trafficking in persons. It has also been noted that the *Trafficking Protocol*, as with the other protocols, shall be interpreted together with the provisions and purposes of its parent instrument.¹⁷⁵ In order to prevent and combat trafficking in persons, as stated in its Preamble, the *Trafficking Protocol* is oriented to 'a comprehensive international approach' that includes measures to prevent trafficking, to punish traffickers and to protect victims of trafficking. Therefore, the *Trafficking Protocol* describes its purposes as (a) to prevent and combat trafficking in person; (b) to protect and assist the victims of such trafficking; and (c) to promote cooperation among state parties.¹⁷⁶ Out of these three purposes, the first and third appear to have become dominant in international responses to trafficking so far.¹⁷⁷

In terms of criminalisation, state parties to the *Trafficking Protocol* are required to criminalize under domestic law the acts set out in Article 3 as well as attempts to commit them, participation as an accomplice, and organizing or directing other persons to commit these acts.¹⁷⁸ With regard to protection of trafficking victims, the *Trafficking Protocol* sets out in Part II minimum standards for guaranteeing victims' internationally recognized human rights. Part III of the *Trafficking Protocol* is devoted to prevention of trafficking and specifically refers to some vulnerability factors which are relevant to protection, such as 'poverty, underdevelopment and lack of equal opportunity'.¹⁷⁹ Furthermore, protecting victims, especially women and children, from revictimisation also constitutes a part of the prevention requirements under the *Trafficking Protocol's* framework.¹⁸⁰

It has been argued that the provisions in Part III of the *Trafficking Protocol* are the cause of a tendency to focus on reducing poverty and empowering women in many anti-trafficking initiatives. This tendency has led, as Kneebone and Debeljak point

¹⁷⁵ Ibid, art 37(4); *Trafficking Protocol*, art 1 – see Appendix 1.

¹⁷⁶ *Trafficking Protocol*, art 2 – see Appendix 1.

¹⁷⁷ Kneebone and Debeljak, above n 77, 103.

¹⁷⁸ *Trafficking Protocol*, art 5 – see Appendix 1.

¹⁷⁹ Ibid, art 9(4) – see Appendix 1.

¹⁸⁰ Ibid, art 9(1)(b) – see Appendix 1.

out, to a continuance of the gendered discourse on trafficking¹⁸¹ that was present in some of the preceding anti-trafficking legal instruments. This consideration is reinforced by the clear emphasis of the *Trafficking Protocol* on trafficking in women and children as the main group of trafficking victims.¹⁸² Although the practice of trafficking, particularly in the GMS, tells a contrasting story,¹⁸³ this focus on women and children has strongly influenced the legislation of most countries in this subregion.¹⁸⁴

For example, under the terms of the *South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution* (2002),¹⁸⁵ the trafficking definition whilst following the three-element pattern of action, means and purpose provide for the content of each element in a much narrower way than those in the *Trafficking Protocol*.¹⁸⁶ Significantly, the *SAARC Convention* focuses only on trafficking in women and children into prostitution.¹⁸⁷ Even though it can have been said that the narrowness of

¹⁸¹ Kneebone and Debeljak, above n 77, 112, 118.

¹⁸² See the *Trafficking Protocol*, art 2(a) – see Appendix 1.

¹⁸³ See, eg, the report from the United Nations Inter-Agency Project on Human Trafficking (UNIAP), ‘Human Trafficking Sentinel Surveillance (Poipet, Cambodia)’ (Report, 2010) in which it has been claimed that the proportion of male victims is even higher than that of female and child victims among those who are trafficked from Cambodia to Thailand.: 44.

¹⁸⁴ Kneebone and Debeljak, above n 77, 112.

¹⁸⁵ *South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, opened for signature 5 January 2002 (entered into force 1 December 2005) (‘SAARC Convention’) <<http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>>

¹⁸⁶ For example, the ‘action’ element under art I (2) of the *SAARC Convention* consists of ‘moving, selling or buying of women and children’, while the ‘means’ element is defined as in art I (5) of the Convention as ‘deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage or any other unlawful means’.

¹⁸⁷ ‘Prostitution’ is defined as ‘the sexual exploitation or abuse of persons for commercial purposes’ in art I (2) of the *SAARC Convention*.

the concept of trafficking provided by the *SAARC Convention* does not detract from the *Trafficking Protocol's* breakthrough definition,¹⁸⁸ it actually represents a step backwards in conceptualising the trafficking phenomenon at the regional level.

In terms of the scope of application of the Protocol, Article 4 provides that the Protocol is to apply to trafficking in persons only where that trafficking is transnational in nature and involves an organized criminal group. However, in the spirit of *mutatis mutandis*, it should be noted that Article 34(2) of the *CTOC* adds that these two conditions do not need to be considered as necessary to the offences of trafficking under domestic law. Kneebone and Debeljak argue that this requirement to criminalize trafficking in persons both in transnational crime contexts and individual trafficking situations is based on a 'traditional (national) security' discourse (without sufficient emphasis on the issues of human security and victims' rights).¹⁸⁹

2.3.2 The Definition of Trafficking in Persons

'Trafficking in persons', as set out in Article 3(a) of the *Trafficking Protocol*, means:

[T]he recruitment, transportation, transfer, harbouring 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 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[.]

¹⁸⁸ Gallagher, *The International Law of Human Trafficking*, above n 2, 46.

¹⁸⁹ *Ibid* 104; see also section 2.2 of this chapter discussing the security discourse of trafficking under the international agenda.

Accordingly, the trafficking definition is comprised of three basic interlinked elements,¹⁹⁰ namely: the ‘action’, including ‘the recruitment, transportation, transfer, harbouring or receipt of a person’; the ‘means’ by which the action has been secured, including ‘threat or use of force or other forms of coercion, of abduction, of fraud, of reception, 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’; and the ‘end purpose’, including, 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’.

While these three elements are all needed for an instance of trafficking in adults to be established, it should be noted that the *means* is not needed to be present in a situation of trafficking in children.¹⁹¹ In other words, where a child is subjected to any of the listed acts for the purpose of exploitation, the crime of trafficking in children will be made out regardless of the *means* used. In practical terms, this makes it easier to identify a case of child trafficking, and also easier to identify victims and prosecute traffickers in comparison with a case of trafficking in adults.¹⁹² However, the situation is not straightforward, even in a typical case of trafficking in persons, as most of the listed constituents of these broader elements remain undefined¹⁹³ or ambiguously defined under the Protocol’s framework. The next section of this chapter will be devoted to examining this situation.

¹⁹⁰ United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto – Part Two: Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (2004) (‘*Legislative Guides – Part Two*’), [32].

¹⁹¹ *Trafficking Protocol*, art 3(c) – see Appendix 1. Additionally, ‘child’ is defined in art 3(d) of the *Trafficking Protocol* as ‘any person under eighteen years of age’.

¹⁹² Gallagher, *The International Law of Human Trafficking*, above n 2, 29.

¹⁹³ See, eg, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of Its First to Eleventh Sessions – Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN GAOR, 55th sess, UN Doc A/55/383/Add 1 (3 November 2000).

2.3.2.1 The element of ‘action’

Article 3(a) of the *Trafficking Protocol* whilst providing for the ‘action’, or the first *actus reus*,¹⁹⁴ of the trafficking crime as including recruitment, transportation, transfer, harbouring or receipt of person does not give any further explanation of these actions. The ‘action’ element, which includes ‘transportation’ and ‘transfer’, has often been used to justify the assertion that trafficking involves movement.¹⁹⁵ On this aspect, it seems to be more correct to assert that whilst the ‘action’ element of the trafficking definition appears to describe a migration process, ‘harbouring’ and ‘receipt’ in themselves do not and, that is, it is not correct to assume that trafficking always involves a migration process.¹⁹⁶

In the meantime, it has been argued that the inclusion of the acts of ‘harbouring or receipt’ in the definition covers the acts of owners and managers and controllers at any place of exploitation, additional to the acts of recruiters, brokers and transporters.¹⁹⁷ Accordingly, ‘harbouring or receipt’ can be understood as ‘maintaining an individual in a situation of exploitation’ and, therefore, operates to bring the end situation of trafficking within the definition.¹⁹⁸ Therefore, as Gallagher argues, the trafficking concept is thereby extended to situations of exploitation even if

¹⁹⁴ The ‘action’ element is the only *actus reus* in relation to trafficking in children, and the first *actus reus* in relation to trafficking in adults. See also Gallagher, *The International Law of Human Trafficking*, above n 2, 29.

¹⁹⁵ See Kneebone and Debeljak, above n 77, 108. During the negotiation process of the *Trafficking Protocol*, it was argued that ‘the trafficking definition should require the movement or transport of a person to a community other than the one in which he (she) lived to ensure that the movement was sufficiently significant to render the person particularly vulnerable to exploitation’. This has been claimed as the view of the Special Rapporteur on Violence against Women, its Causes and Consequences raised at the fourth session of the Ad Hoc Committee (UN Doc A/AC 254/CRP 13). See *Travaux Préparatoires*, above n 37, 354.

¹⁹⁶ Kneebone and Debeljak, above n 77, 108.

¹⁹⁷ Gallagher, *The International Law of Human Trafficking*, above n 2, 30; Kneebone and Debeljak, above n 77, 108.

¹⁹⁸ Gallagher, *The International Law of Human Trafficking*, above n 2, 30.

there was no immediately preceding act of trafficking, and can include such examples as ‘intergenerational bonded labor’ or ‘a working environment that changes from acceptable to coercively exploitative’.¹⁹⁹ Whilst this interpretation is not supported by the official explanatory documents of the Protocol, it needs to be modified.²⁰⁰ In fact ‘harbouring’ and ‘receipt’ can include acts which are part of the trafficking process or ‘journey’. They do not necessarily refer only to the end result. This conclusion is supported by the Council of Europe in collaboration with the UN, which says that ‘harbouring’ shall mean ‘accommodating or housing persons in whatever way, whether during their journey to their final destination *or at the place of exploitation*’, whereas ‘receipt’ shall ‘not [be] limited to receiving persons *at the place where the exploitation takes place* either, but also meeting victims at agreed places on their journey to give them further information on where to go or what to do’.²⁰¹ Accordingly, these acts do not just refer to the practice of exploitation per se or the end result of trafficking. That is, the inclusion of the acts of ‘harbouring’ or ‘receipt’ can be seen as examples of ‘the breadth of the definition’ as they refer to more than just the exploitation practice itself.²⁰²

In terms of the action of ‘recruitment’, which is described in the definition as the first stage leading to exploitation (especially to labour exploitation), Kneebone and Debeljak argue that, at least in the context of the GMS countries, recruitment is not necessarily the beginning of the trafficking process.²⁰³ This is not only due to the fact that a majority of trafficking victims in the GMS move of their own accord, without the services of a recruiter. It is also because that ‘recruitment’ in the GMS region is largely informal and voluntary, with friends, neighbours or family members acting as

¹⁹⁹ Ibid 30–1.

²⁰⁰ Ibid 31.

²⁰¹ See Council of Europe and United Nations, ‘Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs’ (Report, 2009), 78 (emphasis added).

²⁰² See Kneebone and Debeljak, above n 77, 108. It should be noted that the analysis of the third element of trafficking crime — the end purpose — in the next section gives further support to the contention that the trafficking definition does not tend to cover the exploitative practices per se.

²⁰³ Kneebone and Debeljak, above n 77, 108–9.

‘recruiters’ or, in other words, trafficked persons are often assisted in the initial stages by someone known to the victim and their family.²⁰⁴ Kneebone and Debeljak also add that the problem of large scale recruitment is not present within the region, except in certain sectors involving international migration through marriage brokers and recruitment agencies for domestic maids.²⁰⁵ Even in such sectors with the presence of large scale recruitment of workers conducted under a formal system at the beginning of trafficking process, ‘the overwhelming evidence is that most people prefer to make informal arrangements’.²⁰⁶ These characteristics of recruitment practice in the region will be discussed again when analysing the recruitment processes in the Vietnamese context in the following chapter of this thesis.²⁰⁷ It has also been explained that many countries in the region are now turning to facilitating safe migration since they have acknowledged the fact that ‘those who migrate voluntarily are less likely to be deceived than those who rely on someone else’.²⁰⁸

In fact, the ambiguity of the terms, particularly in relation to the ‘action’ element of the *Trafficking Protocol* definition, is leading to the interpretation or implementation of it in domestic legislation in inconsistent ways in different countries in the region, and which are quite different from the focus of the original text. As Kneebone and Debeljak point out in their analysis of the implementation of the *Trafficking Protocol* definition in the GMS, the ‘action’ elements in most national legislation often focuses upon movement, commercial transactions or refers to practice that are similar to slavery, rather than to the acts of the trafficking crime described by the Protocol.²⁰⁹ In general, the fact that the GMS countries often link trafficking with illegal/irregular migration and/or the trade of people and ‘have not given effect to the core notion of

²⁰⁴ Ibid 108.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ See section 4.3.2.3 of Chapter 4 of this thesis.

²⁰⁸ Kneebone and Debeljak, above n 77,109.

²⁰⁹ See *ibid*, 127–61, appendix.

exploitative trafficking’ is not surprising as indeed the *Trafficking Protocol’s* definition does not stress the centrality of the exploitation concept.²¹⁰

2.3.2.2 The ‘means’ element

The ‘means’ element – the second *actus reus* which is exclusive to trafficking in adults – includes ‘the threat or use of force or other forms of coercion, of abduction, of fraud, of reception, 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’.²¹¹ The ‘means’ are for the purpose of showing evidence of obtaining control over another person, and can be seen as the manifestation of unequal relations between traffickers and victims which is at the core of the trafficking crime.²¹² Among these means, some of them such as ‘force’ or ‘coercion’ are direct (by virtue of the way, or process in which a person can be moved into or maintained in an exploitative situation), while the others such as deception and fraud have been categorized as less direct means.²¹³ In the drafting process of the *Trafficking Protocol* it was considered that:

[T]he coercive (physical and psychological) nature of such trafficking is in effect the characteristic that determines the nature and degree of danger of the crime, helping to separate trafficking in persons from the smuggling of migrants.²¹⁴

²¹⁰ Ibid 127.

²¹¹ See the *Trafficking Protocol*, art 3(a) – see Appendix 1.

²¹² Kneebone and Debeljak, above n 77, 109. It should also be noted that among these ‘means’ elements, the element of ‘giving or receiving of payments or benefits to achieve the consent of a person having control of another person’ has been argued to be limited to situations in which *legal control* is exercised by one individual over another (such as a parent over a child, as payments made to parents in the course of child trafficking) or extended to include *de facto control* (that which may be exercised by an employer over an employee). In this case, the position of *de facto control* seems to be more rational on the account that the ‘means’ element is generally irrelevant to child trafficking as noted above. See Gallagher, *The International Law of Human Trafficking*, above n 2, 33.

²¹³ Gallagher, *The International Law of Human Trafficking*, above n 2, 31.

²¹⁴ See *Travaux Préparatoires*, above n 37, 334.

Whilst the trafficking definition focuses on the processes rather than the outcomes, upon actions rather than actual exploitation,²¹⁵ the means employed by the trafficker(s), which prove the intention to exploit a vulnerable person, is arguably the essence of the definition.²¹⁶ It can be said that a causal link between any of the acts of trafficking described above with the intention of exploiting the individual in one of the enumerated ways is sufficient for a trafficking crime established.²¹⁷ In other words, the focus of a trafficking definition should be on the trafficker's intention to exploit that is, on the state of mind of the perpetrator (rather than that of the victim).²¹⁸ This view is also shared by the recommendations of the UNODC Model Law under which a preference to the focus on the state of mind of the perpetrator is suggested.²¹⁹ It should also be noted that a focus on the state of mind of the

²¹⁵ Kneebone and Debeljak, above n 77, 115; see further in section 2.3.2.3 of this chapter.

²¹⁶ See further in Susan Kneebone and Aderajew Teshome (Castan Centre for Human Rights Law, Monash University), Submission on the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, 31 July 2012, 6; see also section 2.3.2.3 of this chapter discussing the 'purpose of exploitation' element of a trafficking crime.

²¹⁷ Ibid 8, citing Gallagher, *The International Law of Human Trafficking*, above n 2, 34 .

²¹⁸ See, eg, the Australian legislation on trafficking in persons and related offences which 'focuses upon [victim]s' vulnerability rather than the intention to exploit' based upon an assumption of 'a direct causal relationship between the "alleged victim and the alleged offender"'. See *Criminal Code Act 1995* (Cth) Divs 270 and 271; see also Kneebone and Teshome, above n 216, 6.

²¹⁹ See United Nations Office on Drugs and Crime (UNODC), *Model Law against Trafficking in Persons* (2009) ('*TIP Model Law 2009*'), 9, suggesting that a focus on the state of mind of the perpetrator could be more protective of victims proposes that 'abuse of power and of a position of vulnerability' could be defined in national law as the 'taking advantage of the vulnerable position a person is placed in as a result of

- (i) Having entered the country illegally or without proper documentation; or
- (ii) Pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance; or
- (iii) Reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical or mental disability; or

perpetrators could promote a more protective approach towards victims, as evidence of their vulnerability is relevant to prove that they were abused or exploited.²²⁰

The most frequent misunderstanding of the trafficking concept, which derives from the ambiguity of the 'means' element, is that trafficking inherently involves *forced* movement. That is, trafficked persons are assumed to be always unwillingly involved in the trafficking process. The 'means' elements can be taken as indicators of a forcible process of trafficking because they play the role of 'consent-nullifying' factors which make the consent (of victims) to the trafficking process (and to the intended exploitation as well) irrelevant.²²¹ In fact, there have been many cases of migrant workers who initially choose to migrate particularly for employment in another country, where there may be a change in the conditions at destination which results in an exploitative situation. This is supported by the examination of Kneebone and Debeljak into trafficking practices in the GMS which reveals that trafficking which involves forcible recruitment and transfer represents 'only a minority of cases, except

-
- (iv) Promises or giving sum of money or other advantages to those having authority over a person; or
 - (v) Being in a precarious situation from the standpoint of social survival; or
 - (vi) Other relevant factors.'

These factors actually go to establishing the reduced capacity of the victim to form a judgment rather than focusing on the state of mind of the perpetrator as they are expected. See also Kneebone and Debeljak, above n 77, 111.

²²⁰ Gallagher, *The International Law of Human Trafficking*, above n 2, 33. This recalls a fact, as provided by a publication of the UNODC, that '[the] qualification of vulnerability is particularly important when States consider establishing guidelines for the status of victims of trafficking and the types of benefits they may receive from the State. It is crucial to understand that victims of trafficking, as vulnerable victims, are in a situation where they have no choice but to submit to exploitation and therefore cannot be held liable for criminal acts that may be committed under duress or as a result of their being trafficked.' See United Nations Office on Drugs and Crime (UNODC), *Combating Trafficking in Persons – A Handbook for Parliamentarians* (2009), 43; see also sections 4.3.3 and 4.4.1.2 of Chapter 4 of this thesis for the application of this in Vietnamese context.

²²¹ Gallagher, 'Human Trafficking and the New UN Protocols', above n 150, 985.

in the case of children who cannot consent to being moved'.²²² In fact, these 'means' elements did not attract much attention from the drafters in terms of any detailed interpretation. Seemingly considering these elements as 'self-evident',²²³ the *Trafficking Protocol* and its explanatory documents give no specific interpretation of them.²²⁴ Consequently, the lack of clarification of the requisite seriousness or extent of the coercion, deception or fraud that could constitute a 'means', as Gallagher argues, whilst creating space for creative interpretations may also result in interpretations that go beyond the intention of the drafters.²²⁵

Among the 'means' elements of the trafficking definition, the 'abuse of power or of a position of vulnerability' can be seen as the most common, at least in the practice of trafficking in the GMS.²²⁶ Kneebone and Debeljak explain that:

²²² Kneebone and Debeljak, above n 77, 110.

²²³ Gallagher, *The International Law of Human Trafficking*, above n 2, 31.

²²⁴ The official explanatory documents of the *Trafficking Protocol* include the *travaux préparatoires* of the *CTOC* and its Protocol and the UNODC's Legislative Guides to the Implementation of the *CTOC* and its Protocol thereto. The *travaux préparatoires* to the *CTOC* and its Protocols whilst giving no further clarification of the elements of 'force', 'coercion', 'abduction', 'fraud' and 'deception' provide some suggestions for some of these elements in the *Trafficking Protocol's* negotiations. Accordingly, the element of 'abuse of authority' (which was then referred to as 'abuse of power') may include 'the power that male family member might have over female family members in some legal systems and the power that parents might have over their children'; or 'the abuse of a position of vulnerability' shall mean 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved'. The 'abuse of a position of vulnerability' is the only element of *means* officially elaborated upon in the *travaux préparatoires*. See *Travaux Préparatoires*, above n 37, 343, 347. Moreover, the explanation of these elements can be found in some of the *Trafficking Protocol's* succeeding legal instrument or interpretative documents, including the Explanatory Report to the *European Convention on Action against Trafficking* and the Model Law against Trafficking in Persons 2000 prepared by the UNODC. See *European Trafficking Convention; TIP Model Law 2009*, above n 219.

²²⁵ Gallagher, *The International Law of Human Trafficking*, above n 2, 30.

²²⁶ *Ibid* 109.

[C]hild victims and young people are sometimes deceived by their own families, or act under duress from the family, or feel compelled to take a position to alleviate the family situation. Women within the region will also move to escape intolerable situations brought about by gender discrimination, or flee mistreatment and abuse by their husbands.²²⁷

Being defined as ‘any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved’,²²⁸ this means element is difficult to apply, due in part to the lack of explanation of its meaning in the *Trafficking Protocol*. It should also be noted that ‘debt bondage’ which is a technique commonly used by traffickers to exercise control over trafficked persons in the GMS trafficking practice is not mentioned as a means factor by the *Trafficking Protocol*.²²⁹

Recently, the UNODC conducted a study on this element as well as other means provided by the trafficking definition of the *Trafficking Protocol* to assist criminal justice practitioners in understanding and applying them. Accordingly, the UNODC’s Guidance Note provides that:

The mere existence of proven vulnerability is not sufficient to support a prosecution that alleges [abuse of a position of vulnerability] as the means by which a specific “act” was undertaken. In such cases, both the *existence* of vulnerability and the *abuse* of that vulnerability must be established by credible evidence.²³⁰

²²⁷ Ibid.

²²⁸ See *Travaux Préparatoires*, above n 37, 347.

²²⁹ Kneebone and Debeljak, above n 77, 121. It should also be noted that the Council Directive 2011/36/EU of the European Parliament and the Council of the European Union of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1 has included this as a form of trafficking.

²³⁰ See United Nations Office on Drugs and Crime (UNODC), *Guidance Note on ‘Abuse of a Position of Vulnerability’ As a Means of Trafficking in Persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (October 2012), s 2.2 (emphasis in origin).

The note also provides that the *existence* of vulnerability 'is best assessed on case-by-case basis, taking into consideration the personal, situational and circumstantial situation' of the trafficked persons.²³¹ Importantly, the situation of vulnerability of a victim 'has also been abused to the extent that the victim's consent is negated' for that vulnerability to constitute a means of trafficking in persons.²³² The *abuse* of a position of vulnerability occurs, according to the UNODC's interpretation, when:

[A]n individual's personal, situational or circumstantial vulnerability is *intentionally used or otherwise taken advantage of*, to recruit, transport, transfer, harbour or receive that person *for the purpose of exploiting him or her*, such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her, and that belief is reasonable in light of the victim's situation.²³³

This means that the investigating/prosecuting authorities have to rely on the state of mind of the perpetrators as well as of the victims to prove the 'abuse of a situation of vulnerability' as the 'means' in a trafficking crime. When the 'abuse of a situation of vulnerability' is to be established as the [sole] means of a trafficking crime, it creates the causal link with the 'acts'.²³⁴

The recent elaboration of the UNODC, as noted above, is most welcome in clarifying this difficult concept of 'abuse of power or of a position of vulnerability' in the *Trafficking Protocol*, which is difficult to apply in practice and more than often ignored in implementation.²³⁵ It has been found that the national anti-trafficking laws of the GMS countries have often ignored the requirement to prove 'the abuse of power or a position of vulnerability' as a 'means' of trafficking, as in the case of the *Law on Development and Protection of Women* (2004) of Lao PDR, or the *Anti-Trafficking in Persons Act* of Thailand which does not include this means or 'other forms of

²³¹ See *ibid*, s 2.3.

²³² *Ibid*, s 2.4.

²³³ *Ibid*, s 2.5 (emphasis added).

²³⁴ *Ibid*, s 3.2.

²³⁵ Kneebone and Debeljak, above n 77, 110.

coercion', but rather focuses on the issue of consent.²³⁶ The *TSE Law 2007* of Cambodia does not include the means prescribed by the *Trafficking Protocol* but rather refers to 'enticement'²³⁷ or 'to induce'²³⁸ which has a different connotation.²³⁹

In relation to the 'vulnerability' of trafficked persons, it should be noted that the *Trafficking Protocol* requires state parties to take measures 'to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity'.²⁴⁰ The Protocol also obliges state parties to establish 'other measures' to prevent and combat trafficking as well as to protect victims, especially women and children, from revictimisation.²⁴¹ In other words, under the Protocol, poverty, underdevelopment, lack of equal opportunity and gender are regarded as vulnerability factors which contribute to the vulnerability of persons to trafficking. However, the fact that the Protocol refers to these factors under the terms of prevention measures of trafficking creates the impression that focusing on reducing poverty and empowering women are the main targets of prevention of trafficking.²⁴² In other words, as is apparent in many anti-trafficking initiatives, the description of these factors suggests that they are the causes of trafficking and lead to a (mis)belief that eliminating these factors will lead to

²³⁶ *Anti-Trafficking in Persons Act 2008* (Kingdom of Thailand) BE 2551, was passed in November 2007 and came into force on 5 June 2008, ss 4, 6(1) [Pravit Roykaew (Office of the Attorney General) trans] <[http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20\(eng.\).pdf](http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20(eng.).pdf)>; see also Kneebone and Debeljak, above n 77, 159–60.

²³⁷ *Law on Suppression of Human Trafficking and Sexual Exploitation 2007* (Cambodia) NS/RKM/0208/005, was passed by the National Assembly of Cambodia on 20 December 2007 and came into effect on 15 February 2008 ('*TSE Law 2007*'), art 8(1) [UNICEF trans] <http://www.no-trafficking.org/content/Laws_Agreement/cambodia_tip_2008.pdf>.

²³⁸ *Ibid*, art 12.

²³⁹ Kneebone and Debeljak, above n 77, 141–2.

²⁴⁰ *Trafficking Protocol*, art 9(4) – see Appendix 1.

²⁴¹ See *ibid*, arts 9(1)(b), 9(1)(b), 9(2) – see Appendix 1.

²⁴² Kneebone and Debeljak, above n 77, 112.

the elimination of trafficking. This also shows that the *Trafficking Protocol* does not distinguish clearly between ‘individual-specific’ vulnerability of the type described in UNODC’s recent study,²⁴³ which establish the ‘means’ or lack of consent necessary to establish exploitation, and general vulnerability factors. Furthermore, these requirements on prevention of trafficking in the Protocol arguably reproduce ‘the gendered trafficking narrative’ and overshadow the conceptualisation of the trafficking involving exploitative processes.²⁴⁴

In fact, there are other general vulnerability factors which are highly relevant in the context of trafficking in the GMS, such as the destruction of the environment by development projects or by climate change, and the building of highways in Lao PDR, land grabs in Cambodia, and the effects of political repression in Myanmar.²⁴⁵ Quite apart from these general ‘causes’, it is often a single event such as debt associated with illness, that may lead people to decide to migrate.²⁴⁶ Trafficked persons are often described as vulnerable because of their status of as illegal migrant workers, or as children of such workers, who lack proper documentation because their births are unregistered, or as members of minority groups who are denied citizenship, or refugees who are regarded as illegal immigrants.²⁴⁷ They are all factors which increase the risk of being exploited. And whilst there is evidence that there is a higher incidence of trafficking amongst these groups, the issue of ‘abuse of power or a position of vulnerability’ must be considered in each individual case.

In short, as this discussion has shown, the ‘means’ element of the trafficking crime which is at the core of the ‘exploitation’ which constitutes trafficking, appears to be the most difficult aspect of the *Trafficking Protocol* to apply in practice. Despite being depicted as the unequal relation between the parties in the trafficking process, the ‘means’ element described in the *Trafficking Protocol*’s definition does not adequately

²⁴³ Ibid; see also United Nations Office on Drugs and Crime (UNODC), *Guidance Note on ‘Abuse of a Position of Vulnerability’*, above n 230, s 2.3.

²⁴⁴ Kneebone and Debeljak, above n 77, 112.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid 113.

acknowledge that it is directed to showing lack of victims' consent to the transaction. Even though the recent interpretative document from UNODC provides significant guidance on these issues, it will take time and effort for change to filter through to the understanding and practice at regional and national levels.

2.3.2.3 The element of 'purpose of exploitation'

The mental component, or *mens rea*, of the trafficking offence, is contained in the words 'for the purpose of exploitation'. This refers to the *intention to exploit* when any act falling within the 'action' element (and through any indicated *means*, in the case of trafficking in adults) is performed.²⁴⁸ However, it should be noted that the intention of exploitation need not be carried out for the crime of trafficking to be established. In other words, a trafficking crime can be constituted even though the exploitation has not yet happened. And, the intention to put a person into an exploitative situation is enough for the third element of the trafficking crime to be fulfilled. Furthermore, the intention to exploit is not necessarily 'initiation-based'²⁴⁹ (that means the intention does not need to exist at the time of recruitment or transportation) but it can be proven in relation to 'any of the acts stipulated in the [*Trafficking Protocol's*] definition'.²⁵⁰ That is, the intention to exploit can be constituted at any point of a trafficking process, no matter whether at the first or the ending stage. As discussed above, a trafficking process may occur through the recruitment, transportation, transfer, harbouring or receipt of person, amongst which recruitment is most

²⁴⁸ Gallagher, *The International Law of Human Trafficking*, above n 2, 36; Kneebone and Debeljak, above n 77, 114. As indicated in a manual issued by the UNODC, this element refers to the purpose 'aimed at by the perpetrator when committing the material acts of the offence.' See United Nations Office on Drugs and Crime (UNODC), *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (2009), Module 1.

²⁴⁹ See Nicola Piper, 'A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania' (2005) in Frank Laczko and Elzbieta Gozdziaik (eds), 'Data and Research on Human Trafficking: A Global Survey' (Special Issue of *International Migration* (vol 43), International Organization for Migration, 2005) 203, 222 where it has been argued that 'the definition could be interpreted as being initiation-based – that is, what the intention of the recruiter or broker was at the time when the recruitment or transport was transacted.'

²⁵⁰ Gallagher, *The International Law of Human Trafficking*, above n 2, 34 (emphasis added).

commonly the first stage leading to exploitation, whilst harbouring or receipt are generally the end of a process.²⁵¹

Another issue with the third element is the meaning of 'exploitation'. Article 3(a) of the *Trafficking Protocol* states that '[e]xploitation 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.' Whilst the *Trafficking Protocol* sets up an open-ended list of common forms of exploitative practice, it does not actually define these practices.²⁵² And, whilst slavery and forced labour are well-known in international law, some of the other practices are unclear and this makes them harder to apply in practice, as shown below. In other words, the central element of exploitation at the heart of the trafficking definition is not immediately apparent in the *Trafficking Protocol* definition.²⁵³

Thus, Hathaway argues that the *Trafficking Protocol* is concerned only with prohibiting forms of dealing which facilitate or would lead to exploitation rather than dealing with the exploitative practices themselves.²⁵⁴ Similarly, Kneebone and Debeljak observe that the definition focuses on processes rather than outcomes of trafficking, upon actions rather than actual exploitation and this leads to problems in understanding what trafficking means in practice. Kneebone and Debeljak agree with Hathaway in general, that the *Trafficking Protocol* fails to completely address the nature of the exploitative practices that amount to trafficking.²⁵⁵

²⁵¹ *Trafficking Protocol*, art 3(a) – see Appendix 1; see also section 2.3.2.1 of this chapter discussing the 'acts' element of trafficking crime.

²⁵² Gallagher, *The International Law of Human Trafficking*, above n 2, 34.

²⁵³ Kneebone and Debeljak, above n 77, 115.

²⁵⁴ Hathaway, above n 64, 10.

²⁵⁵ Kneebone and Debeljak, above n 77, 115; see also the previous section 2.3.2.1 discussing the 'action' element of 'harbouring or receipt of person' and arguing that this element does not cover the practice of maintaining the person in exploitation. Conversely, Gallagher argues that the 'action' element of 'harbouring' combined with the meaning of 'maintenance of a person in a situation of exploitation' absorbs many practices of exploitation. Cf Gallagher, *The International Law of Human Trafficking*, above n 2, 47–8.

Whilst trafficking is a distinct concept from the end results of practices of trafficking, in fact, there is a lot of support for conceptualising trafficking in terms of forced labour, slavery and similar practices.²⁵⁶ This tendency can be partly seen as a result of dealing with trafficking as a general phenomenon under human rights frameworks, over a long period of time.²⁵⁷ More importantly, it is also a manifestation of ‘a trafficking definition that is not easily applied’.²⁵⁸ In the meantime, one may argue that the undefined terms in the definition of the trafficking crime may provide an opportunity for creative interpretation and application of these elements in practice. However, it may also (and most likely will) lead to arbitrary application by state parties in one way or another to achieve their own political objectives, though nominally fulfilling their obligations in dealing with trafficking in persons. In fact, there is a tendency to expand the international legal definition of trafficking during implementation ‘for ... advancing a particular policy agenda’.²⁵⁹ This is certainly creating different understandings of the nature of the trafficking crime which undermines the standardisation of a concept that is crucial to international cooperation in addressing the issue.²⁶⁰

For example, it can be seen that there is non-compliant application of the *Trafficking Protocol’s* provisions in some regional anti-trafficking legal developments after the Protocol. The *European Framework Decision (2002)*²⁶¹ provides a definition of trafficking that is almost identical to that of the *Trafficking Protocol*, with the addition of pornography-related practices as a relevant purpose, and the omission of trafficking for organ removal.²⁶² As to the clarification of the elements of trafficking, the *European Framework Decision* goes further than the *Trafficking Protocol* but the

²⁵⁶ Ibid 123–4.

²⁵⁷ See also section 2.2.3 of this chapter.

²⁵⁸ Kneebone and Debeljak, above n 77, 124.

²⁵⁹ Gallagher, *The International Law of Human Trafficking*, above n 2, 50–1.

²⁶⁰ Ibid.

²⁶¹ *Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings (2002/629/JHA)* [2002] OJ L 203/1.

²⁶² Ibid, art 1.

Framework makes a (seemingly unnecessary) distinction between trafficking for labour exploitation and trafficking for sexual exploitation.²⁶³ The European Union has recently made a proposal to change the definition in the *European Framework Decision* to reflect the common understanding of the trafficking phenomenon presented in the *Trafficking Protocol* and the *European Trafficking Convention*.²⁶⁴

In short, examining the basic elements of trafficking in persons as set out in Article 3 of the *Trafficking Protocol* makes it clear that the concept of trafficking has gradually come to be understood more comprehensively. Having transcended the prostitution issue, the trafficking definition is now accepted to cover a broader range of practices, such as trafficking for labour exploitation, for organ removal, for illegal adoption and forced marriage. However, the very first internationally agreed definition of trafficking in persons is not without its shortcomings. While most of the terms used in the definition are themselves undefined, the fluidity and breadth of these terms does not make it easy for state parties to incorporate them into domestic law, but actually creates the possibility of arbitrary (even partial or selective) application, depending on the will of the legislators. At the same time with that breadth, the *Trafficking Protocol* definition appears to be too imprecise in terms of its depiction of the 'means' used to traffic a person, and the extent to which the ability to consent of an individual can be affected.²⁶⁵ For that reason, the recent UNODC study specifically regarding the 'abuse of power or a position of vulnerability' is welcomed. But overall, the problem with the definition appears to be that it is not readily understood or applied when it leads in practice to a preference for slavery or forced labour paradigms of trafficking.²⁶⁶ As stated above, the gist of the definition is exploitative practices, but this is not readily apparent from its terms.

²⁶³ Ibid. This is unnecessary since both forms of exploitation are covered in the definition.

²⁶⁴ For further information on the process of establishing and altering the concept of trafficking within the European Framework, see Gallagher, *The International Law of Human Trafficking*, above n 2, 44–6.

²⁶⁵ Kneebone and Debeljak, above n 77, 113.

²⁶⁶ Ibid 127.

2.4 CONCLUSION

From the above analysis of the conceptualisation of trafficking, it is clear that trafficking is actually a complex and multi-faceted phenomenon. Looking at it from different perspectives provides an understanding of each dimension of the issue and a comprehensive understanding of the phenomenon as a whole. The history of conceptualising trafficking demonstrates this through the variety of approaches taken to trafficking. Trafficking was equated with the migration of prostitutes or as a manifestation of the sex industry in the very first period of its conceptualisation. It was also conceived of narrowly as a subset of violations against the rights and dignity of women and children. The consideration of trafficking as a subset of slavery or forced labour has also been observed. However, the important point is that none of the previous approaches were successful in seeing all dimensions of trafficking at one time or in giving a whole picture of the phenomenon. Additionally, none of these approaches managed to win the unanimous support of the international community on a definition of trafficking. Therefore, the establishment of the *Trafficking Protocol* with its definition deserves to be highly regarded. Indeed, the definition in the *Trafficking Protocol* succeeds in depicting trafficking as a combination of three elements (rather than just reflecting different aspects of the problem), as well as in acknowledging its historical relationships with other issues such as slavery and/or forced labour.

The definition of trafficking under the *Trafficking Protocol's* framework, however, appears to be, paradoxically, both broad and limited at the same time. It pays attention to listing the constituents of the elements but leaves almost of the terms within it undefined in assuming that their meaning is clear and settled. The definition is broad in the way it describes the 'acts', as well as the end results of trafficking practices, under the 'end purpose of exploitation' element. Noticeably, the breadth of the definition in linking trafficking to both slavery and forced labour is making it difficult for correctly conceptualising trafficking and for the application of the definition per se in practice. In the meantime, the limits of the definition can be observed clearly from the way it depicts the 'means' element of trafficking crime, as 'consent-nullifying behaviour' but refers in general to prevention of vulnerability factors. This in turn downplays the fact that trafficking processes occurring in unequal relations, which is essential to identify and to protect trafficked persons. Moreover, the definition shows a focus on processes rather than the outcomes, upon action instead of actual

exploitation that 'creates a problem in understanding what trafficking means in practice'.²⁶⁷ This means that the core element of trafficking, its focus upon exploitative practices, is buried in the terms of the definition.

Overall however, it should be borne in mind that the definition provided by the *Trafficking Protocol* sets only a minimum standard for implementation at the regional and national levels. Therefore, the abovementioned shortcomings of the definition should be recognised and resolved before being incorporated into anti-trafficking responses and legislation in order to effectively suppress trafficking crime in general and, particularly, to protect victims. They are also important background for the analyses of the Vietnamese anti-trafficking legal response in Chapter 4, as well as for the recommendations made in Chapter 6 of this thesis.

²⁶⁷ Ibid 115.

Chapter 3

Trafficked Persons and The International Protection Regime

3.1 INTRODUCTION

The *Trafficking Protocol*,¹ as discussed in Chapter 2 of this thesis, succeeds with its definition in depicting trafficking as a combination of different elements, and also in representing various relationships between trafficking and human rights issues. The definition provides a minimum standard from which the trafficking offence can be formulated in successor legal instruments at the regional and national levels. However, as argued in Chapter 2, this definition of trafficking which is a complex one, comprising three elements is apparently difficult for states to apply in practice, leading to challenges in accurately conceptualising trafficking. The shortcomings of this definition may make arbitrary and selective interpretations of the elements of the trafficking crime more likely.

¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime)*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking Protocol*').

To supplement the purpose of the *Convention against Transnational Organized Crime (CTOC)* in promoting cooperation among states to prevent and combat transnational organized crime, the *Trafficking Protocol* lists as one of its purposes the protection of victims of trafficking through protecting their internationally recognized human rights, alongside its other purposes of preventing trafficking and punishing traffickers.² Accordingly, trafficked persons are entitled to a special regime of protection and assistance as victims of crime and victims of human rights violations set forth in Part II of the *Trafficking Protocol*. Under this regime, trafficking victims are protected in terms of, for example, their physical safety, privacy and identity, participation in related legal proceedings, supported in their recovery and reintegration, and their right to claim for compensation, as well as being protected from revictimisation.

Furthermore, as stated in the previous chapter, the definition of the *Trafficking Protocol* sets out the substantive content of the offence, such as the *action, means* and *purpose* elements, to illustrate the nature of trafficking and thereby distinguish it from other related phenomena, particularly smuggling of migrants. However, while the *Trafficking Protocol* and its counterpart on Smuggling of Migrants³ attempt to draw a clear line between these two crimes and provide separate and different courses of treatment to trafficked persons and smuggled migrants, they also create a dichotomy of trafficked/smuggled migrants. As a result, trafficked persons are often misidentified as smuggled or undocumented migrants and, consequently, receive almost nothing in terms of special protection and support. This chapter, therefore, will first and foremost illustrate that the confusion of trafficked persons and smuggled migrants remains the primary cause of victim misidentification, the denial of migrants rights (especially trafficked migrants), and the protection of their human rights.

² See *Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) ('*CTOC*'), art 1; *Trafficking Protocol*, preamble, art 1.

³ *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) ('*Smuggling Protocol*').

Examination of the protection regime in the *Trafficking Protocol* also makes clear that it is not effective in forcing states to implement measures to protect victims' rights and interests – only a few of the protection measures are imposed as states' obligations, while most are described as discretionary requirements.⁴ Furthermore, the Protocol — as a criminal justice oriented instrument — focuses primarily on the protection of and assistance to trafficked persons for the sake of effective judicial proceedings, rather than on their needs as victims. This is, as discussed in this chapter, a result of a tension between the criminal justice objectives and discourses, and the human rights goals and discourse indicated under the framework of the *CTOC* and its Protocols. However, besides the protection regime under the *Trafficking Protocol*, there are also principles recommended by the international human rights community and requirements of international law relating to the protection and support of trafficking victims that can be used as a point of reference.⁵ Specifically, the doctrine of state responsibility under international human rights law and its application in the case of *Rantsev v Cyprus and Russia* will then be discussed in this chapter to make clear the positive obligations and the standards of due diligence of states in terms of protection for trafficked persons. Additionally, protective and supportive measures will also be particularly discussed alongside relevant principles and standards of international law. For example, the issues of identification and detention of trafficked persons will be discussed in the context of 'the non-criminalisation principle', and the issue of return and repatriation of trafficked

⁴ Most of the protective and supportive measures provided in Part II of the *Trafficking Protocol* employ discretionary language, while only a few measures are imposed as mandatory obligations on states. For example, state parties are only required to protect the privacy and identity of victims 'in appropriate cases to the extent possible under its domestic law' (art 6(1)); provide to victims 'in appropriate cases' information on relevant criminal proceedings and assistance to enable their views and concerns in those proceedings to be voiced (art 6(2)); consider implementing measures to provide the physical, psychological and social recovery of victims 'in appropriate cases' (art 6(3)); 'endeavour to provide' for the physical safety of victims (art 6(5)); and consider adopting measures that permit victims to remain in its territory 'in appropriate cases' (art 7(1)) – see Appendix 1.

⁵ For example, *Recommended Principles and Guidelines on Human Rights and Human Trafficking – Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, UN ESCOR, UN Doc E/2002/68/Add 1 (20 May 2002) ('*Recommended Principles and Guidelines*').

persons will be discussed in light of the *non-refoulement* principle, to evaluate the protection regime from a human rights perspective.

In short, this chapter will discuss protective and supportive measures provided to trafficked persons from the time they reach the competent authorities until their social reintegration. The discussion accordingly starts with the requirement of a rapid and accurate process for identifying trafficked persons and the provision of assistance to presumed victims of trafficking in the form of, for instance, a reflection period. Following this, the analysis will turn to the whole protection regime of the *Trafficking Protocol*, together with the need to separate the provision of protection measures from victims' cooperation (the non-criminalisation principle), and 'the non-coercion principle'. This chapter will also discuss some other issues closely connected with the rights and interests of trafficked persons, including detention of trafficked persons, granting of residence permits, return and repatriation measures, and remedies. The analysis in this chapter will then also try to give an overall picture of protection regimes that trafficked persons are provided with under international law, especially under an expanded protection regime as recommended by international human rights law and related soft law. Following on from this discussion, this chapter will conclude with some suggested measures which could form important constituent elements of a protection regime, as well as other measures which support that regime's effectiveness.

3.2 TRAFFICKED PERSONS AND ISSUES OF IDENTIFICATION

Before discussing the protection regime, it should firstly be noted that being identified as a victim of trafficking is widely acknowledged to be a primary condition for that person being able to enjoy the protections of such a regime. However, there is a common practice of misidentification of trafficked persons flowing from the conceptual dichotomy of trafficked persons and smuggled or illegal migrants. When misidentified, trafficked persons are denied the special protection and support to which they are entitled. The misidentification of trafficked persons as illegal or smuggled migrants is to some extent even worse than making them invisible, on account of the disadvantages that flow from illegal immigrant status.

3.2.1 Identification of trafficked persons

3.2.1.1 The practice of misidentification of trafficked persons

For trafficked persons, being misidentified as illegal or smuggled migrants⁶ is synonymous in practice with receiving no special protection,⁷ but rather facing the threat of being arrested, detained, charged with various offences and, finally, with being expelled. Unfortunately, misidentification is not an unusual experience for trafficked persons especially those trafficked across international borders.⁸ In the European Union (EU), for example, a trafficked person's lack of legal documents has regularly been used as evidence of his/her illegal immigration status, rendering them subject to immediate deportation as smuggled/illegal migrants.⁹ In the Greater

⁶ See also the *Smuggling Protocol*, art 3 which defines 'smuggling of migrants' as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. According to this provision, a 'smuggled migrant' can be understood as a person who illegally entered into a state of which he/she is not a national or a permanent resident, on the basis of smuggler(s)' procurement for a financial or other material benefit.

⁷ See also section 3.2.1.2 of this chapter discussing the dichotomy of trafficked/smuggled migrants.

⁸ As for internally trafficked persons, see Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010), 280.

⁹ Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart Publishing, 2007), 89; The deportation is reported as 'simply suspended' when trafficked persons' status as victims is established, but will be re-enlivened in cases where the trafficking victim refuses to cooperate with the competent authorities in the prosecution of trafficking offences. In this determination, Askola invokes the B-9 regulation of the Netherlands, which is B-9 of the Aliens Act Implementation Guidelines, previously known as the 'B-17 regulation'. Under this regulation, trafficked persons in the Netherlands are threatened with immediate deportation, which is typically applied to illegal migrants, although they are considered to be victims of crime. Accordingly, '[t]he police are required to inform an alien who may be a victim of trafficking in human beings, even in the case of a minor indication of trafficking in human beings, of her rights under the B-9 regulation and to offer her a period of reflection. This reflection period gives victims the time to decide whether they will file a report, and may be for up to three months, during which the deportation of the victim from the Netherlands is temporarily suspended. If the alien decides not to report the offence, she must leave the Netherlands straight away.' See Anna G Korvinus, Dutch National Rapporteur on Trafficking in

Mekong Subregion (GMS), inadequate identification practices have led to victims being arrested, charged with immigration offences and/or deported, while ‘non-victims’ have been rescued.¹⁰ For example, Lao’s trafficked persons have reportedly been mistakenly identified as illegal migrants by Thai authorities and then been expelled.¹¹ Laotian authorities, unfortunately, rely almost completely on this identification to then detain these victims when they return to their country.¹² It has also been reported that illegal aliens in GMS countries are still routinely deported without undergoing any identification processes to determine whether they are trafficked persons.¹³ In these cases, the immigration status of an individual in a destination country – rather than their possible victimization in an exploitative situation – seems to be the decisive factor determining the treatment they receive, often leading to decisions to detain and/or expel them as irregular migrants.¹⁴

Human Beings, *Trafficking in Human Beings – First Report of the Dutch National Rapporteur* (May 2002) Bureau of the Dutch Rapporteur on Trafficking in Human Beings
<<http://english.bnrm.nl/reports/first/>>; Anna G Korvinus, Dutch National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings – Third Report of the Dutch National Rapporteur* (2004) Bureau of the Dutch Rapporteur on Trafficking in Human Beings
<<http://english.bnrm.nl/reports/third/>>.

¹⁰ Anne Gallagher, ‘Human Rights and Human Trafficking in Thailand: A Shadow TIP Report’ in Karen Beeks and Delila Amir (eds), *Trafficking and the Global Sex Industry* (Lexington Books, 2006) 139, 146–8.

¹¹ Anne T Gallagher, ‘A Shadow Report on Human Trafficking in Lao PDR: The US Approach v International Law’ (2006) 15(1) *Asian and Pacific Migration Journal* 525, 535.

¹² Ibid 536.

¹³ Jerrold W Huguet and Varamon Ramangkura, ‘The Long Road Home: Analysis of Regional and National Processes for the Return and Reintegration of Victims of Trafficking in the Greater Mekong Subregion’ (Report, International Organization for Migration, 2007), 5, 14.

¹⁴ See also European Commission Experts Group on Trafficking in Human Beings, *Opinion No 7/2010 – Proposal for a European Strategy and Priority Actions on Combating and Preventing Trafficking in Human Being (THB) and Protecting the Rights of Trafficked and Exploited Persons* (18 October 2010) European Commission <<http://ec.europa.eu/anti-trafficking/entity.action?id=a566fffc-4285-4d0a-ad29-2e581bd13c79>>, 46.

The causes of misidentification can be traced to various reasons, such as states' reluctance to accept the existence of trafficked persons within their territories and the lack of commitment, understanding and resources devoted to the (anti-) trafficking issue.¹⁵ Additionally, it could also be argued that states prefer to identify an undocumented migrant as smuggled or an illegal migrant rather than a trafficked person, because using the label of 'trafficking victim' is concomitant with heavier financial and administrative burdens on states.¹⁶ In these cases, states rely on the theory of consent,¹⁷ proving a migrant's consent to a migration process in order to classify that person as a smuggled or illegal migrant, regardless of the fact that they have ended up being subjected to forced labour or slavery-like living or working conditions.¹⁸ However, to a certain extent, it could be said that the efforts of international law to distinguish between trafficked persons and smuggled migrants (and maybe even illegal migrants) seem to be the main cause. The need to draw a clear line between these groups of migrants, and the resultant trafficked/smuggled migrant dichotomy, is arguably making the identification and protection of trafficked persons more difficult.¹⁹

¹⁵ Gallagher, *The International Law of Human Trafficking*, above n 8, 278.

¹⁶ Another important reason for this mis-identification is that states seek to avoid incurring obligations imposed by international and national legislation regarding victims of trafficking, which also represent financial and administrative burdens. See Anne Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and Treaties' (2002) 12 *Forced Migration Review* 25, 27.

¹⁷ See the *Trafficking Protocol*, art 3(b) – see Appendix 1; see also the *Smuggling Protocol*, art 3 which defines 'smuggling of migrants' – see above n 6. This has been elaborated that 'smuggled migrants generally consent to being smuggled (though their consent may be retracted)', while it has been argued that trafficking victims do not consent. See United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Smuggling of Migrants (Tool 1 – Understanding the Smuggling of Migrants)* (2010).

¹⁸ Janie Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 *Harvard Human Rights Journal* 65, 88.

¹⁹ See Anne Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8(2) *European Journal of Migration and Law* 163, 176; Susan Kneebone, 'The Refugee–Trafficking Nexus: Making Good (the) Connections' (2010) 29(1) *Refugee Survey Quarterly* 137, 153.

3.2.1.2 The dichotomy of trafficked persons and smuggled migrants

Regardless of what the *Trafficking* and *Smuggling Protocols* provide to distinguish trafficking from migrant smuggling and illegal migration and thereby, trafficked persons from smuggled or illegal migrants,²⁰ trafficked persons and smuggled migrants are often in fact labour migrants who face discrimination, exploitation and violations of their human rights.²¹ In many cases, they are actually ‘go-getters’ or migrant workers who have undertaken to leave their homes and families to pursue a better future via economic migration, and who are threatened with abuse and exploitation in the destination country.²² As migrant workers, both trafficked persons and smuggled migrants should be regarded as the holders of universal human rights, with their rights and interests protected against abuse and exploitation whether or not they migrate through unauthorised or clandestine channels, and whether or not they are classified as ‘irregular’ or ‘undocumented’. To this end, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of*

²⁰ *Trafficking Protocol*, art 3 – see Appendix 1; see also Gallagher, *The International Law of Human Trafficking* (2010), above n 8, 278.

²¹ See Audrey Macklin, ‘At the Border of Rights: Migration, Sex-Work and Trafficking’ in Neve Gordon (ed), *From the Margins of Globalization: Critical Perspectives on Human Rights* (Lexington Books, 2004) 161; International Steering Committee for the Campaign for Ratification of the Migrants Rights Convention, *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (‘*Guide on Ratification of the Migrant Workers’ Rights Convention*’) (30 April 2009) Office of the High Commissioner for Human Rights, 15 <<http://www.ohchr.org/Documents/Press/HandbookFINAL.PDF>>; International Council on Human Rights Policy, ‘Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence’ (Report, 2010), 20.

²² See Melissa Ditmore and Marjan Wijers, ‘The Negotiations on the UN Protocol on Trafficking in Persons’ (La Strada International, 2003), 83 <[www.lastradainternational.org/Isidocs/6%20The%20negotiations%20on%20the%20UN%20Protocol%20\(NEMESIS\).pdf](http://www.lastradainternational.org/Isidocs/6%20The%20negotiations%20on%20the%20UN%20Protocol%20(NEMESIS).pdf)>; Bernadette McSherry and Susan Kneebone, ‘Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into Domain of Human Rights’ (2008) 12(1) *International Journal of Human Rights* 67, 71; United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons* (2009).

Their Families (1990)²³ affirms the protection of migrant workers' generic human rights regardless of their legal status (although further rights are given to those in a 'regular' situation).²⁴

Unfortunately, there is also a dichotomisation of these migrant workers into trafficked persons versus smuggled migrants along the lines of further dichotomies, namely the presence of coercion versus consent to movement, their status as irregular migrants versus victims, and victims versus agents, which has been affirmed by the provisions of the *Trafficking* and *Smuggling Protocols*.²⁵ Together with this simple separation between trafficked persons and smuggled migrants (which does not reflect the complexity of the real situations of these migrants), the Protocols also bifurcate the protection. Accordingly, trafficked persons, especially women and children, who are assumed to be 'innocent' or 'deserving victims', are seen as more deserving of protection than smuggled migrants, who are assumed to be 'culpable and complicit actors' who 'choose to migrate illegally'.²⁶ Consequently, the *Trafficking Protocol* regards trafficked persons as victims of crime and human rights abuses²⁷ and provides a framework for protecting their rights. In contrast, the *Smuggling Protocol* does not classify smuggled migrants as victims and therefore provides only 'a basic

²³ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) ('*Migrant Workers' Rights Convention*').

²⁴ *Guide on Ratification of the Migrant Workers' Rights Convention*, above n 21, 3.5. In this issue, the ILO Migrant Workers (Supplementary Provisions) Convention also calls on ratifying states to 'protect the basic human rights of all migrant workers'. See *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No 143)*, opened for signature 24 June 1975, 1120 UNTS 324 (entered into force 9 December 1978) ('*ILO Migrant Workers Convention*'), art 1.

²⁵ International Council on Human Rights Policy, above n 21, 72.

²⁶ Ibid.

²⁷ See Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012), 125, 216.

level of protection',²⁸ albeit with a call for 'full protection',²⁹ of the rights of smuggled migrants.

The situation is further exacerbated in the case of smuggled migrants³⁰ who are not protected (by the *Smuggling Protocol*) from prosecution for their infringement of immigration regulations.³¹ In fact, the *Smuggling Protocol* maintains an unclear position on whether prosecuting migrants for illegal migration as a domestic offence is allowable.³² While it affirms that 'migrants shall not become liable to criminal prosecution under this Protocol' in Article 5, Article 6(4) states that 'nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.' This ambiguity under the *Smuggling Protocol's* framework has been commented on in the Legislative Guide, which states that:

[A]rticle 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalization of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organized criminal groups. At the same time, article 6, paragraph 4, ensures that nothing in the Protocol limits the existing rights of each State party to take measures against persons whose conduct constitutes an offence under its domestic law.³³

²⁸ International Council on Human Rights Policy, above n 21, 74.

²⁹ See the *Smuggling Protocol*, preamble; see also International Council on Human Rights Policy, above n 21, 74–6 for the contrast between the protection accorded to trafficked persons and that to smuggled migrants.

³⁰ As to the protection of trafficked persons from being similarly criminalized, see section 3.2.4 on the non-criminalisation issue.

³¹ International Council on Human Rights Policy, above n 21, 72; see also Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligation of Non-State and State Actors under International Human Rights Law' (2005) 17 *International Journal of Refugee Law* 394, cited in Kneebone and Debeljak, above n 27, 125.

³² Kneebone, 'The Refugee–Trafficking Nexus', above n 19, 156.

³³ United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto* –

Not only does this dichotomy of trafficked persons as distinct from smuggled migrants not reflect the actual situations of migrants and their need for protection, but it also serves states' interests in maintaining national sovereignty and security, rather than focusing on the protection of trafficked persons and/or smuggled migrants. Further, the dichotomy impliedly encourages national authorities to classify irregular migrants as smuggled rather than trafficked, which is allegedly already occurring in practice.³⁴ This encouragement arguably comes from the state authorities' preference for the quicker, easier and cheaper process of immediate deportation of smuggled migrants in comparison with the 'greater financial and administrative burden' involved in the protection for trafficked persons.³⁵ This negative trend in identification processes cannot, it seems, be reversed unless the false dichotomy of trafficked/smuggled migrants is corrected or, at least in the short-term, identification processes are implemented in a way that promotes rapid, simple and accurate identification.

3.2.1.3 The legal framework for identification of trafficked persons

Acknowledging that 'a failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights',³⁶ the High Commissioner for Human Rights has emphasized that states have an obligation to provide rapid and accurate identification processes for trafficking victims through their domestic anti-trafficking legislation.³⁷ This issue was dealt with by the United Nations Children's Fund

Part Three: Legislative Guide for the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2004) ('Legislative Guides – Part Three'), [50].

³⁴ Gallagher, 'Trafficking, Smuggling and Human Rights', above n 16, 27; see also Kneebone and Debeljak, above n 27, 125.

³⁵ Gallagher, 'Trafficking, Smuggling and Human Rights', above n 16, 27.

³⁶ *Recommended Principles and Guidelines*, above n 5, guideline 2; Explanatory Report, *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, Council of Europe Treaty Series No 197, 16 V 2005 (entered into force 1 February 2008) ('*Explanatory Report to the European Trafficking Convention*'), para 127.

³⁷ *Recommended Principles and Guidelines*, above n 5, guideline 2(1).

(UNICEF) and the International Organization for Migration (IOM) during the drafting process of the *Trafficking Protocol*. Accordingly, these agencies asserted that being identified as a trafficking victim should be enough for an individual to not be immediately deported against his/her will and to be eligible for protection.³⁸ The *Trafficking Protocol* in its final texts, nevertheless, does not refer to the issue of identification. However, its official explanatory document refers to some processes under which ‘the status of victims’ may be established.³⁹ In addition, the *European Trafficking Convention* provides, albeit in simple form, a definition of trafficked persons as ‘any natural person who is subjected to trafficking in human beings as defined’.⁴⁰ More importantly, the Convention devotes its Article 10 to the identification of victims. The article provides that state parties have an obligation to provide identification processes ‘duly taking into account the special situation of women and child victims’.⁴¹ Under this identification process, the role and, therefore, the qualifications of the competent authorities, as well as their collaboration with other relevant organisations, are held to be important elements in avoiding the misidentifications which are so common in practice.⁴²

³⁸ See *Note by the Office of the United Nations High Commissioner for Human Rights (UNHCHR), the United Nations Children's Fund (UNICEF) and the International Organization for Migration (IOM) on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons*, UN GAOR, 8th sess, UN Doc A/AC 254/27 (8 February 2000) (‘*Note by the UNHCHR, the UNICEF and the IOM*’), [9].

³⁹ See details in United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto – Part Two: Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2004)* (‘*Legislative Guides – Part Two*’), [64].

⁴⁰ *Council of Europe Convention on Action against Trafficking in Human Beings and Its Explanatory Report*, opened for signature 16 May 2005, Council of Europe Treaty Series No 197, 16 V 2005 (entered into force 1 February 2008) (‘*European Trafficking Convention*’), art 4(e).

⁴¹ *Ibid*, art 10.

⁴² See *Explanatory Report to the European Trafficking Convention*, paras 128 – 30.

Significantly, the drafters of the Convention appear to have recognized the difficulties inherent in the identification process, as well as the potential for harm to trafficked persons during this process, and have therefore provided for a regime of temporary protection and assistance in the period before trafficked persons are officially identified. Article 10(2) states that:

[I]f the competent authorities have *reasonable grounds* to believe that a person has been the victim of trafficking in human beings, that person *shall not be removed* from its territory until the identification process as victim [...] has been completed [...] and shall likewise *ensure that that person receives the [necessary] assistance* [...].
(emphasis added)

With regard to the ‘reasonable grounds’ for a belief that a person has been the victim of trafficking, the Explanatory Report to the Convention specifies that this does not require ‘absolute certainty’, but merely ‘*reasonable grounds for believing someone to be a victim*’.⁴³ If temporary protection is granted, trafficked persons are to be protected from immediate deportation until ‘completion of the identification process establishes conclusively whether or not they are victims of trafficking’, and to be provided with assistance measures that are available to fully identified victims.⁴⁴ This generous regime is quite similar to the provision in the Convention for a reflection period, which also provides protection of the rights and interests of trafficked persons irrespective of difficulties in the identification process.⁴⁵ The deep concern about the rights and interests of trafficked persons can also be seen in the provision of the Convention that takes into account the age of child victims of trafficking.⁴⁶

However, five years after the establishment of the *European Trafficking Convention* with its progressive provisions on trafficking victim identification, actual identification practices have been assessed by experts on human trafficking in the EU to be achieving unsatisfactory results so far.⁴⁷ At the same time, these experts have voiced

⁴³ See *ibid*, paras 132, 135.

⁴⁴ *Ibid*; see also *European Trafficking Convention*, arts 10(1), 10(2), 12(1), 12(2).

⁴⁵ The provision of a reflection period will be discussed in section 3.2.2 of this chapter.

⁴⁶ See *European Trafficking Convention*, art 10(3).

⁴⁷ See European Commission Experts Group on Trafficking in Human Beings, above n 14, 4.

concerns about ‘the lack of real and effective measures and procedures for the identification of trafficked persons’ under the EU anti-trafficking framework.⁴⁸ In this way, the experts have directed attention to the provision of measures that guarantee appropriate assistance to (presumed) trafficked persons during the identification process, rather than simply focusing on the identification measures themselves.

In short, what is required in order for a ‘rapid and accurate identification of trafficked persons’ to take place in reality, is the implementation of executive measures such as applicable guidelines (with specific criteria and/or indicators),⁴⁹ as well as trained and qualified officials. However, and more importantly, in order to overcome the difficulties inherent in the identification process and the obstacles this process may represent for trafficked persons in restricting their enjoyment of protection and assistance measures, a temporary regime with immediately appropriate assistance and support for presumed victims of trafficking is necessary. To make this clear, the provision of a reflection period — which has recently been acknowledged and implemented — will be examined in the following section.

3.2.2 Reflection periods

As discussed in the previous section, while identification is practically necessary for trafficked persons to obtain protection, and the difficulties with identification remain unresolved, a reflection period is extremely important. While the *Trafficking Protocol* does not provide for a reflection period under its framework, it is provided for in the *European Trafficking Convention*. In Article 13(1), the Convention obliges its state parties to provide a ‘recovery and reflection period’ for a presumed victim who is reasonably believed to be a victim. During this period, this presumed victim shall be

⁴⁸ Ibid.

⁴⁹ One example is the ‘Delphi indicators’ which were developed in 2008 from a joint European Commission – ILO project, implementing the Delphi methodology to reach consensus among European experts on what indicators should be used to characterize the various elements of the definition of trafficking for data collection purposes. See International Labour Organization (ILO) and the European Commission, ‘Operational Indicators of Trafficking in Human Beings (Results from a Delphi Survey)’ (Working Paper, September 2009) <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf>.

protected from ‘any expulsion order against him or her’, and shall be granted a ‘short-term residence permit’.⁵⁰ Also in this period, a presumed victim shall be entitled to appropriate protection and assistance measures to which a fully-identified victim would be entitled.⁵¹

The length of the period is flexible, but 30 days is given as the suggested minimum standard, on the basis that this provides sufficient time for victims to recover and sever ties with traffickers *and/or* to make a decision regarding cooperation with the competent authorities.⁵² It should be noted here that even though the Convention stresses that the purpose of the reflection period is to facilitate the victim’s cooperation with the competent authorities and to make ‘a better witness’, it states that the period is ‘not conditional on [victims’] cooperating’.⁵³ However, the Convention reserves the possibility of excluding the reflection period on the grounds of public order requirements without any further elaboration.⁵⁴ This silence of the Convention raises a concern about arbitrary refusal to grant a reflection period to trafficked persons.

Although the provision of a reflection period has not been widely accepted, it is being offered by an increasing number of states.⁵⁵ An example of a national provision of a

⁵⁰ See *European Trafficking Convention*, art 13(1); *Explanatory Report to the European Trafficking Convention*, para 172.

⁵¹ See *European Trafficking Convention*, art 13(2); *Explanatory Report to the European Trafficking Convention*, para 179.

⁵² See *European Trafficking Convention*, art 13(1); *Explanatory Report to the European Trafficking Convention*, para 178.

⁵³ See *Explanatory Report to the European Trafficking Convention*, paras 174 – 6. The explanatory report also adds that victims’ freedom to decide whether or not to cooperate with the competent authorities in the reflection period cannot be used to exclude their obligation to testify when they are legally required to do so by a judge. As to the requirement of separating protection of trafficked persons from their cooperation with the competent authorities, see also section 3.3.1.1 of this chapter.

⁵⁴ See *European Trafficking Convention*, art 13(3); *Explanatory Report to the European Trafficking Convention*, para 173.

⁵⁵ Gallagher, *The International Law of Human Trafficking*, above n 8, 321.

reflection period can be found under the Australian framework. Victims of trafficking in Australia are entitled to support under the Assessment Stream of the Support Program, and a Bridging Visa which has been increased from 30 to 45 days' duration.⁵⁶ During this period, victims of trafficking are to be provided with protection and support, in particular, with time for them to recover and decide whether they are willing to cooperate with the authorities. In other words, initial support under the Assessment Stream under Australian legislation is to be granted to all trafficking victims, regardless of their willingness or ability to cooperate with investigations and prosecutions of human trafficking offences.⁵⁷

While a reflection period has been introduced as 'an effective best practice and humanitarian measure' for protecting victims from a human rights perspective before their full identification and full protection,⁵⁸ the suggested minimum standard of 30 days has been criticized for being too short for victims to recover from their trafficking

⁵⁶ See Australian Government, *Australian Government Anti-People Trafficking Strategy* (June 2009) <<http://www.ema.gov.au>>.

⁵⁷ It should be noted that under these new arrangements of the Visa Framework in Australia, victims of trafficking who are willing but not able to participate in the criminal proceedings may be eligible for up to 90 days' support and a Bridging F visa for up to 45 days. See *ibid.*

⁵⁸ United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings* (2008) ('*TIP Toolkit 2008*'), 304.

experiences and to consider their decision regarding cooperation.⁵⁹ In addition, it has been argued that the value of a reflection period should not be overstated where it is connected with involvement in criminal proceedings.⁶⁰ The value of a reflection period is also compromised when it is seen from the perspective of public order, under which the granting of reflection periods to victims of trafficking is subject to the requirements of protecting national security.⁶¹

⁵⁹ Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking Who Give Evidence against Their Traffickers' (2002) 14 *International Journal of Refugee Law* 263, 274. Prior to the formulation of the *European Trafficking Convention*, the European Commission Expert Group on Trafficking in Human Being suggested that a reflection period should not be less than three months, and should be followed by a residence permit for a period of at least six months, with the possibility of renewal. While establishing a minimum standard of 30 days, the Convention, in its Explanatory Report, takes into account the reality of providing a reflection period of that length in its member states' legislation currently as well as some other agreements beforehand, in which the possibility of providing a period of more than 30 days is mentioned. See European Commission Experts Group on Trafficking in Human Beings, *Opinion on Reflection Period and Residence Permit for Victims of Trafficking in Human Beings* (18 May 2004) European Commission, [3]-[4] <http://ec.europa.eu/justice_home/doc_centre/crime/trafficking/doc/opinion_experts_group_2004_en.pdf>; see also *Explanatory Report to the European Trafficking Convention*, para 177.

⁶⁰ Askola, above n 9, 89. She also explains that the reflection periods are important because 'victims of trafficking need time more than anything else to recover from the shock and trauma, to realise what they have experienced, and to consider what their options are'.

⁶¹ *European Trafficking Convention*, art 13(3). This has been mentioned in the European Council Directive in 2004 as 'reasons relating to public policy and to the protection of national security'. See *Council Directive of 29 April 2004 on the Residence Permit Issued to Third-country Nationals Who are Victims of Trafficking in Human Beings or Who have been the Subject of an Action to Facilitate Illegal Migration, Who Cooperate with the Competent Authorities (2004/81/EC)* [2004] OJ L 261/19 ('*Council Directive of 29 April 2004*'), art 6(4) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0019:0023:EN:PDF>>. While Article 8(2) of this Directive considered both reflection periods and residence permits as matters of public order, the *European Trafficking Convention* considers reflection periods only from the perspective of public policy.

3.2.3 The non-criminalisation principle

Together with the requirement of an identification process for trafficked persons to first and foremost guarantee their enjoyment of a protection regime, it is also necessary to ensure they receive protection against criminal action that may lead from ‘violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons’.⁶² For victims of trafficking, being subject to criminal liability and consequent punishment for status-related offences they have committed — which is common in the trafficking process — is another basis upon which protection and assistance are denied. Therefore, it is relevant to discuss here the principle of non-criminalisation which has become ‘a widely accepted normative standard’ in protecting victims of trafficking from a human rights perspective.⁶³

Principle 7 of the UN Trafficking Principle and Guidelines is devoted to the principle of non-criminalisation, stating that:

[T]rafficked persons shall not be detained, charged or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.⁶⁴

Whilst the *Trafficking Protocol* is silent on the issue of non-criminalisation,⁶⁵ the *European Trafficking Convention* refers to it in its requirement that state parties — ‘in

⁶² See *Recommended Principles and Guidelines*, above n 5, guideline 2.5.

⁶³ Gallagher, *The International Law of Human Trafficking*, above n 8, 285.

⁶⁴ *Recommended Principles and Guidelines*, above n 5, principle 7.

⁶⁵ Actually, the issue was raised in the conference of the parties of the *CTOC* in 2009. See Conference of the Parties to the United Nations Convention on Transnational Organized Crime, *Report on the Meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009*, UN Doc CTOC/COP/WG 4/2009/2 (21 April 2009), recommendation 1(H), cited in Gallagher, *The International Law of Human Trafficking*, above n 8, 284. Also in this book, the author discusses ‘two potential prisms through which non-prosecution for status offenses’ can be viewed, including the ‘causation model’ and the ‘compulsion model’: *Ibid.*

accordance with the basic principles of [their] legal system[s]' — not impose punishment on victims 'for their involvement in unlawful activities, to the extent that they have been compelled to do so'.⁶⁶ In this provision, the concession that states may deny the application of the non-criminalisation principle on the basis of the 'basic principles of [their] legal system[s]' can be seen as a retreat, especially in comparison with this Convention's concern for victims' rights and interests in connection with other issues, for example, identification and a reflection period. In other words, this qualification does not show a strong encouragement to state parties to change their point of view on criminalisation of victims of crimes or victims of human rights violations (among them, trafficking victims) for their status-related infringements.

In reality, the situation of trafficked persons and criminalisation has been described by the UN Office on Drug and Crime (UNODC) as follows:

Trafficked persons are sometimes treated as criminals rather than as victims, whether in States of destination, transit or origin. In States of destination, they may be prosecuted and detained because of irregular migration or labour status. Alternatively, immigration authorities may simply deport them to the State of origin if their immigration status is irregular. Trafficked persons returning to their State of origin may also be subject to prosecution for using false documents, having left the State illegally, or for having worked in the sex industry.⁶⁷

It can be said that the failure of the *Trafficking Protocol* — as well as the *Smuggling Protocol*, as previously discussed — to eliminate the possibility of trafficked and smuggled persons being subject to criminal liability opens up the possibility of the prosecution of these migrants for their breach of laws, especially national immigration laws.⁶⁸ In fact, it is clear that member states to the Protocols have continued to charge trafficked and smuggled persons with criminal and/or administrative

⁶⁶ See *European Trafficking Convention*, art 26; *Explanatory Report to the European Trafficking Convention*, paras 272 – 4.

⁶⁷ *TIP Toolkit 2008*, above n 58, 253.

⁶⁸ Anne Gallagher, 'Human Trafficking and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23(4) *Human Rights Quarterly* 975, 999.

responsibility for illegal entry or presence in their territory.⁶⁹ This is also closely linked to the practice of detaining victims of trafficking in various ways, from immigration detention centres to shelters assumed to protect and assist victims. In the spirit of the non-criminalisation principle, this practice should be abolished to protect victims of trafficking from further violations of their human rights.

3.2.4 The issue of detention of trafficked persons

Another example of breach of the non-criminalisation principle is the practice of detention of trafficked persons. Detention in connection with trafficked persons' status-related offences may occur in the form of immigration detention (which is commonly applied to unauthorized migrants), police lock-ups or even prisons. However, this does not seem to be the whole picture of the practice of detaining trafficked persons. Detention of trafficked persons has also been reported in the shelters or other support facilities to which they may be compulsorily sent and from which they may be unable to leave when they wish.⁷⁰ No matter what form it takes, detaining trafficked persons violates their human rights in terms of their liberty and freedom of movement.⁷¹ Moreover, detention of trafficked persons either in destination countries or in countries of origin should be seen as an interference with

⁶⁹ *Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime: Consolidated Information Received from States for the First Reporting Cycle*, 4th sess, Agenda Items 2(a), (b), (e), UN Doc CTOC/COP/2005/4/Rev 2 (8 August 2008), [28].

⁷⁰ Gallagher, *The International Law of Human Trafficking*, above n 8, 288; see also Anne T Gallagher and Elaine Pearson, 'Detention of Trafficked Persons in Shelter: A Legal and Policy Analysis' (Research Report, Asia Regional Trafficking in Persons Project (ARTIP), August 2008) <http://www.artipproject.org/artip-project/documents/ARTIP_Detention-Study_0808_final.pdf>; Anne T Gallagher and Elaine Pearson, 'The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking' (2010) 32(1) *Human Rights Quarterly* 73.

⁷¹ See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), art 12(1) which refers to the freedom of movement of (just) those who are legally within the country. See also Gallagher, *The International Law of Human Trafficking*, above n 8, 288–94.

their right to return without undue or unreasonable delay.⁷² Shelter detention of trafficked persons also violates the principle of non-coercion regarding victims' consent to protection and assistance,⁷³ and is a violation of the non-discrimination principle whenever it occurs on the basis of gender discrimination.⁷⁴

Unfortunately, although international law prohibits 'arbitrary detention',⁷⁵ it has been claimed that the right not to detain victims was not accepted by the international community.⁷⁶ Indeed the issue of detaining trafficking victims was not directly addressed in the specialized international and regional treaties on trafficking.⁷⁷ Similarly, the *European Trafficking Convention* does not make any direct comment on the victim detention issue. By contrast, The UN Trafficking Principles and Guidelines explicitly address the detention of trafficked persons as 'inappropriate and illegal', and note that trafficked persons should not, in any circumstances, be held in immigration detention or any other detention facilities.⁷⁸

⁷² See the *Trafficking Protocol*, art 8(1) – see Appendix 1; see also Gallagher, *The International Law of Human Trafficking*, above n 8, 345.

⁷³ See *European Trafficking Convention*, art 12(2) which approaches the issue of victim detention in the context of victim consent to protective measures. In the meantime, its Explanatory Report makes clear that, in principle, 'protection measures should be granted only when the beneficiary persons have consented'. See *Explanatory Report to the European Trafficking Convention*, para 289. See also the discussion on the issue of non-coercion towards protection of and assistance to trafficked persons in section 3.3.1.2 of this chapter.

⁷⁴ Gallagher, *The International Law of Human Trafficking*, above n 8, 289.

⁷⁵ The *ICCPR* stipulates that 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.' See *ICCPR*, art 9(1); see also Gallagher, *The International Law of Human Trafficking*, above n 8, 288–97.

⁷⁶ See United Nations Office on Drugs and Crime (UNODC), *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) ('*Travaux Préparatoires*'), 268.

⁷⁷ *Ibid.*

⁷⁸ *Recommended Principles and Guidelines*, above n 5, guidelines 2.6, 6.1.

Meanwhile, detention of trafficked persons in prisons, immigration detention centres, shelters or welfare facilities is a common practice associated with anti-trafficking measures.⁷⁹ According to the US's annual report on trafficking in persons, while many countries claim not to keep trafficked persons in shelters against their will,⁸⁰ many others allow for the possibility of detention under the auspices of protection, or even authorise this practice.⁸¹ In the EU, the existence of detention centres as a part of return procedures has been accepted and has even been recommended as facilitating the identification and protection of trafficked persons.⁸² In the GMS, states have demonstrated a desire to preserve state control of victims through shelter detention, although they do call for the exclusion of detention executed by *law enforcement authorities*.⁸³ The regional practice of using shelters as an inevitable

⁷⁹ Gallagher, *The International Law of Human Trafficking*, above n 8, 288.

⁸⁰ For example, Nigeria and Thailand as reported in United States of America Department of State, 'Trafficking in Persons Report 2008' (Report, 4 June 2008), 226, 280.

⁸¹ *Anti-Trafficking of Persons (Amendment) Act 2010* (Malaysia) was passed by the Parliament of Malaysia in 15 July 2010 and came into force 15 November 2010, s 51(3) <http://malaysianlaw.my/files/1161_27561.pdf>, cited in Gallagher and Pearson, 'The High Cost of Freedom', above n 70, 78. Under this law, it is a crime for trafficked persons to try to escape from a detention centre. It is also a crime for someone to attempt to assist trafficking victims to escape.

⁸² See European Commission Experts Group on Trafficking in Human Beings, *Opinion No 7/2010*, above n 14, 38.

⁸³ Under the framework of the COMMIT MOU, six countries in the Greater Mekong Sub-region (including Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam) committed themselves to 'ensuring that persons identified as victims of trafficking are not held in detention *by law enforcement authorities*'. See Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT), *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, 29 October 2004 ('COMMIT MOU'), [16] <www.no-trafficking.org/reports_docs/commit/commit_eng_mou.pdf>. Also, the bilateral MOU between Cambodia and Thailand provides that women and child trafficking victims should not be detained in *immigration detention centers*. See *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking* [art 7] (2003). ('Cambodia–Thai MOU 2003') <http://www.no-trafficking.org/resources_laws_cambodia.html> at 28 May 2011. The same provision can be found in *Agreement between the Government of the*

part of return procedures also reveals that trafficked persons may spend anywhere between several months to more than a year in a shelter while waiting for family tracing and assessments to be undertaken in either the country of destination or of origin, or when victims are unable to go home.⁸⁴ It has been reported that it is the norm in GMS countries for children or female victims of trafficking to be automatically placed in shelters, and those who ‘escape’ are pursued and returned by the authorities.⁸⁵

Regardless of the violation of victims’ human rights it represents, shelter detention of trafficked persons has often been justified on the basis of the need to protect victims of trafficking from intimidation at the hands of traffickers’, to prevent them from running away, or to ensure their effective role in the investigation and prosecution of their exploiters.⁸⁶ Although it has been promisingly stated that shelters may help to protect victims’ physical safety, especially against the reprisal of traffickers, the application of this measure, if not based on case-by-case assessments and with victims’ consent, will have the opposite effect. In fact, shelter managers should be responsible for ensuring the consent of victims to be put into shelters, due to victims’ vulnerability after their trafficking experiences and their lack of options aside from shelters.⁸⁷ Victims may run away from shelters due to the fact that their freedom of

Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking, signed 24 March 2008 (‘*Thai–Vietnam Agreement 2008*’), art 6(2) <www.no-trafficking.org/report_docs/legal/thai_vn_coop_elim_tip_en.pdf>.

⁸⁴ See Huguet and Ramagkura, above n 13, 82.

⁸⁵ Ibid.

⁸⁶ For example, as has been referred to in the report of Gallagher and Pearson, detention of victims in shelters has been argued to be justified on the basis of the need to protect victims of trafficking from traffickers’ intimidation, to prevent them from running away, or to ensure their effective role in the investigation and prosecution of their exploiters. See Gallagher and Pearson, ‘The High Cost of Freedom’, above n 70, 87.

⁸⁷ In this period following a trafficking experience, victims are traumatised, full of fear of being intimidated, without legal status in destination countries, or are seen as violators of immigration laws, etc. See Ibid.

movement has been restricted or their basic needs are not being met.⁸⁸ In some cases, trafficked persons have reportedly sought to avoid being identified as a victim in order to evade detention, meaning that they miss the opportunity to receive proper care and protection.⁸⁹

Therefore, whereas immigration detention of trafficked persons should be rejected on the basis of its violation of the non-criminalisation principle as previously discussed, shelter detention of trafficked persons on a routine basis should also be scrutinised carefully.⁹⁰ As concluded by Gallagher and Pearson,

[a]utomatic detention of victims of trafficking is (...) unlawful and never justifiable on policy grounds. Victim detention in a shelter could be legally defensible under certain, carefully circumscribed circumstances. However, the onus remains firmly on the State to advance these justifications on a case-by-case basis and also to demonstrate how the protections provided by international law are being applied.⁹¹

Therefore, even for the purpose of protecting trafficked persons from further harm or providing them with support, whether there is a need to detain a trafficked person should be considered on a case-by-case basis. In the case of child victims of trafficking, the application of shelter detention of these victims needs to be carefully considered on the basis of the best interests of the child.⁹²

⁸⁸ Ibid 107.

⁸⁹ Ibid 112.

⁹⁰ Gallagher, *The International Law of Human Trafficking*, above n 8, 296–7.

⁹¹ Gallagher and Pearson, ‘Detention of Trafficked Persons in Shelter’, above n 70, 26.

⁹² See Gallagher and Pearson, ‘The High Cost of Freedom’, above n 70.

3.3 THE REGIME OF PROTECTION AND ASSISTANCE TO TRAFFICKED PERSONS

3.3.1 The requirement of protection and assistance to trafficked persons

The regime of protection and support for trafficked persons provided under the framework of the *CTOC*, with which the *Trafficking Protocol* is read, includes basic protections which are mandatory, in addition to assistance and support measures, some of which are discretionary.⁹³ Accordingly, the measures provided by the *Trafficking Protocol*, both protective and supportive, should be seen as supplementing the ‘general rules’ set out in Articles 24 and 25 of the *CTOC*.⁹⁴ Regarding the *CTOC*’s protection obligations towards trafficked persons which are, to some extent, imposed more strongly and clearly than those of the *Trafficking Protocol*,⁹⁵ it is also emphasised that:

[G]enerally, the requirements for the protection of victims will be subsumed within legislation providing protection for witnesses. Article 24, paragraph 4, requires States parties to ensure that *those protections will extend to all victims who are also witnesses but, to meet the requirements of article 25, legislators must either extend them to victims who are not witnesses, or adopt parallel provisions for victims and witnesses.*⁹⁶

Therefore, as promulgated by the *CTOC*, victims of trafficking, regardless of their being witnesses or not, are entitled to ‘effective protection from potential retaliation or intimidation’, which may include, to the extent necessary and feasible, physical protection, domestic and foreign relocation, special arrangements for giving evidence

⁹³ See *Legislative Guides – Part Two*, above n 39, [52].

⁹⁴ See *ibid*, [51].

⁹⁵ Kneebone and Debeljak, above n 27, 215.

⁹⁶ See United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto – Part One: Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime (2004)* (‘*Legislative Guides – Part One*’), [366] (emphasis added); see also *CTOC*, art 24.

such as ‘non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons’, and other measures to protect their physical safety during their giving of evidence.⁹⁷ Additionally, Article 25 of the *CTOC*, which is devoted to assistance to and protection of victims, accords access to compensation and restitution to trafficking victims, and opportunities for their views and concerns ‘to be presented and considered at appropriate stages of criminal proceedings’. While giving states discretion in their assessments of the cases, in which it would be appropriate to provide protection to the extent of their available resources and technical capabilities,⁹⁸ the *CTOC* also refers to ‘concrete assistance for as complete a recovery as possible’.⁹⁹

Supplementing the protection and assistance measures stipulated in the *CTOC*, the *Trafficking Protocol* sets out a protection regime under which trafficked persons are regarded as ‘victims of human rights violations’.¹⁰⁰ In terms of protection measures, the *Trafficking Protocol* basically reiterates those stipulated under the *CTOC*’s framework, including protection of the privacy and identity of trafficking victims,¹⁰¹ in (but not limited to)¹⁰² legal proceedings, and their physical safety.¹⁰³ The *Trafficking Protocol* also requires its state parties to protect victims of trafficking from ‘being trafficked again and from other forms of re-victimization’, as well as protection from the retaliation or intimidation of traffickers.¹⁰⁴ With regard to supportive measures, the Protocol expands the *CTOC*’s requirements to include supplying victims with

⁹⁷ See the *CTOC*, art 24; *Legislative Guides – Part One*, above n 96, [350].

⁹⁸ See *Legislative Guides – Part One*, above n 96, [356].

⁹⁹ *Ibid.*, [344].

¹⁰⁰ See further in Kneebone and Debeljak, above n 27, 125.

¹⁰¹ *Trafficking Protocol*, art 6(1) – see Appendix 1.

¹⁰² David McClean (ed), *Transnational Organized Crime – A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2007), 338.

¹⁰³ *Trafficking Protocol*, art 6(5) – see Appendix 1.

¹⁰⁴ *Ibid.*, art 9(1)(b) – see Appendix 1; see also *Legislative Guides – Part Two*, above n 39, [72].

information about legal proceedings, opportunity to present their views and concerns,¹⁰⁵ support for their physical, psychological and social recovery (through measures such as housing, counselling, medical, psychological and material assistance, employment, and educational and training opportunities),¹⁰⁶ and the possibility of receiving compensation.¹⁰⁷ Additionally, the Protocol requires its state parties to consider ‘the age, gender and special needs’¹⁰⁸ of trafficked persons (particularly children) for protective measures. Moreover, the Protocol also provides for the legal status of trafficked persons in destination countries, which implies a residence permit for victims,¹⁰⁹ and imposes obligations on states parties to provide return and repatriation options to trafficking victims.¹¹⁰ Noticeably, the above protection provisions of both *CTOC* and the *Trafficking Protocol* must be read subject to Article 14 of the *Trafficking Protocol*, which preserves ‘the rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law’.¹¹¹

It should also be noted, as Kneebone and Debeljak pointed out, that the protection provisions of the *Trafficking Protocol* need to be read with its provisions regarding prevention and cooperation (in Part III) which ‘assist to explain the scope of and the need for protection obligations’.¹¹² As discussed in Chapter 2, prevention measures in Part III include those for decreasing vulnerability to trafficking, tackling the demand

¹⁰⁵ *Trafficking Protocol*, art 6(2) – see Appendix 1.

¹⁰⁶ *Ibid*, art 6(3) – see Appendix 1.

¹⁰⁷ *Ibid*, art 6(6) – see Appendix 1.

¹⁰⁸ *Ibid*, art 6(4) – see Appendix 1.

¹⁰⁹ *Ibid*, art 7 – see Appendix 1.

¹¹⁰ *Ibid*, art 8 – see Appendix 1.

¹¹¹ Kneebone and Debeljak, above n 27, 216.

¹¹² *Ibid* 214–5.

for trafficking and preventing revictimisation of trafficked persons.¹¹³ Accordingly, the protection provisions in Part II of the Protocol, which contains only general guidance upon the rights of trafficked persons, are assumed to ‘complement Part III obligations to prevent revictimisation of trafficked persons and to reduce demand for trafficking’.¹¹⁴

One thing to be noted with these protection measures in Part II of the *Trafficking Protocol* is that only some of them are provided as obligations to state parties whilst others simply ask state parties to ‘consider applying or endeavour to apply’, or are simply optional.¹¹⁵ Even the measures provided as obligations are accompanied by conditional language, such as ‘in appropriate cases’ or ‘to the extent possible under its domestic law’,¹¹⁶ which limits the extent to which it genuinely mandates the measures. The lack of mandatory obligations within the victim protection regime of the Protocol raises the concern that state parties will regard their obligations to legislate as optional, meaning such measures may be disregarded or ignored.¹¹⁷ In

¹¹³ Prevention obligations also includes awareness-raising and ‘social and economic initiatives’. See the *Trafficking Protocol*, art 9(2) – see Appendix 1.

¹¹⁴ Kneebone and Debeljak, above n 27, 214–5.

¹¹⁵ *Legislative Guides – Part Two*, above n 39, [8]–[9]. In this document, the UNODC provides that ‘[w]henver the words “States are required to” are used, the reference is to a mandatory provision. Otherwise, the language used in the legislative guide is “required to consider”, which means that States are asked to seriously consider adopting a certain measure and make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the legislative guide employs the words “may wish to consider”. Occasionally, States “are required” to choose one or another option (as in the case of offences established in accordance with art 5 of the *CTOC*). In that case, States are free to opt for one or the other or both options.’

¹¹⁶ *Trafficking Protocol*, arts 6(1), 6(2) – see Appendix 1.

¹¹⁷ See Kinsey Alden Dinan, ‘Establishing an International Standard for States’ Treatment of Trafficked Persons: The UN Anti-Trafficking Protocol and the UN Convention against Transnational Organized Crime’ (Paper presented at the Human Rights Challenge of Globalization in Asia-Pacific – US: The Trafficking in Persons, Especially Women and Children, Honolulu, Hawaii, 13–15 November 2002) <www.hawaii.edu/global/project_activities/Trafficking/conference.htm>; Ditmore and Wijers, above n 22, 87.

light of the permissive language of the Protocol, state parties are seemingly being allowed the option to grant protective measures to some victims, while denying them to other trafficked persons without reasonable grounds, or for any reason at all.¹¹⁸

Importantly, for Part II of the *Trafficking Protocol* which does not contain a full set of rights for trafficked persons, it has often been argued that must be shaped by considerations of the doctrine of state responsibility.¹¹⁹ In other words, the state responsibility doctrine, which relates to the responsibility of states in international law for breach of international obligations, and the notion that granting of rights is ineffective without means of enforcements, reinforces the standards contained in the *Trafficking Protocol*.¹²⁰ Accordingly, Kneebone and Debeljak asserted that:

[U]nder international law principles individual states are responsible for acts or omissions which can be attributed to the state, and which cause or contribute to trafficking. Although trafficking of individuals mostly occurs at the hands of non-state actors, states can be liable for breaches of their obligations to prevent and protect trafficked persons. ... the principle that states are responsible for the welfare of persons within their territory and subject to their jurisdiction ... [which] is confirmed by the *International Covenant on Civil and Political Rights* Article 2(1), whereby State Parties undertake 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights ... in the present Covenant, without distinction of any kind...'. This principle derives from traditional international law principles of state responsibility, whereby states are answerable in international law for breach of their international law obligations.¹²¹

¹¹⁸ Ann D Jordan, Initiative Against Trafficking in Persons, International Human Rights Law Group, *Annotated Guide to the Complete UN Trafficking Protocol* (2002) La Strada International <<http://lastradainternational.org/?main=documentation&document=1916>>; Ditmore and Wijers, above n 22, 86; *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: Information Received from States for the Second Reporting Cycle – Analytical Report of the Secretariat*, 3rd sess, Agenda Item 3, UN Doc CTOC/COP/2006/6 (16 August 2006), [13]; *Note by the UNHCHR, the UNICEF and the IOM*, above n 38, [7].

¹¹⁹ Kneebone and Debeljak, above n 27, 217.

¹²⁰ Ibid 213–4; see also Gallagher, *The International Law of Human Trafficking*, above n 8, ch 4.

¹²¹ Kneebone and Debeljak, above n 27, 217 (citation omitted).

An example of the application of the international law other than the *Trafficking Protocol* to deal with a claim for the effective protection of trafficking victims can be found in the case of *Rantsev v Cyprus and Russia*.¹²² In this case, the Russian and Cypriot authorities were alleged to have violated the obligations under Article 4 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹²³ that related to the trafficking and death of the applicant's daughter.¹²⁴ It was found that there had been failures by the authorities to protect the applicant's daughter from being trafficked as well as failure to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there;¹²⁵ particularly in terms of 'tak[ing] any measures to ascertain whether she was a victim of trafficking or had been subject to any exploitation'.¹²⁶ Further, the Court also held that positive obligations flowed from Article 4 of the *European Convention* to provide for 'a legislative and administrative framework to prohibit and punish trafficking',¹²⁷ safeguards for prevention of trafficking and protection of victims and potential victims of trafficking;¹²⁸ to investigate situations of potential trafficking, and to 'cooperate effectively with relevant authorities of other States concerned in the investigation of events which occurred outside their territories' in cross-border

¹²² *Rantsev v Cyprus and Russia* (European Court of Human Rights, Registrar Chamber, Application No 25965/04, 7 January 2010) ('*Rantsev v Cyprus and Russia*').

¹²³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('*European Convention*') art 4, which provides in part that:

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

¹²⁴ Kneebone and Debeljak, above n 26, 218.

¹²⁵ *Rantsev v Cyprus and Russia* [253].

¹²⁶ Kneebone and Debeljak, above n 27, 220.

¹²⁷ *Rantsev v Cyprus and Russia* [285].

¹²⁸ *Rantsev v Cyprus and Russia* [285]–[286].

trafficking cases.¹²⁹ The importance of this decision, as remarked by Kneebone and Debeljak, is that:

[I]t found breaches of specific international human rights law obligations derived from the broad obligations imposed by Part II and III of the *Trafficking Protocol*. It also spelt out the standards of due diligence for those obligations ... [and] built upon other jurisprudence in the area of state responsibility, to align anti-trafficking obligations with other international law obligations.¹³⁰

More concretely, the *European Trafficking Convention*, in the spirit of ‘tak[ing] due account of the victim’s safety and protection needs’,¹³¹ provides for a rather broad protection and assistance regime. Besides incorporating the measures as stipulated by the *CTOC* and the *Trafficking Protocol*, the European instrument also includes some other significant protection and assistance measures for victims of trafficking. In terms of protection measures, the Convention particularizes protection from potential retaliation, such as physical protection, relocation, change of identity and assistance in obtaining jobs.¹³² Regarding assistance, under the Convention victims of trafficking are accorded support for their physical, psychological and social recovery,¹³³ in addition to the ‘necessary medical or other assistance’ and ‘access to the labour market, to vocational training and education’ which are specifically available to victims who have lawful residence.¹³⁴ Moreover, the Convention also

¹²⁹ Kneebone and Debeljak, above n 27, 220, citing *Rantsev v Cyprus and Russia* [289].

¹³⁰ Kneebone and Debeljak, above n 27, 222. These scholars also recalled the fact that, recently, the Special Rapporteur on Trafficking has applied the concept of state responsibility to the right of trafficked persons to adequate and appropriate remedies: *ibid* 222, citing Joy Ngozi Ezeilo, Special Rapporteur on Trafficking in Persons, Especially Women and Children, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/35 (13 April 2011); see more in section 3.3.4 of this chapter discussing the remedies for trafficked persons.

¹³¹ *European Trafficking Convention*, art 12(2).

¹³² *Ibid*, art 28(2).

¹³³ *Ibid*, art 12(1).

¹³⁴ *Ibid*, arts 12(3), 12(4).

introduces some progressive measures, including a recovery and reflection period,¹³⁵ rights to legal assistance and to free legal aid,¹³⁶ and a guarantee of victims' access to compensation through a 'fund for victim compensation', and specifically incorporates into repatriation programs some measures for social integration,¹³⁷ and prevention of re-victimization of trafficking victims.¹³⁸ Furthermore, considerable attention has been paid to the protection of child victims within the European framework, with the purpose of assistance to such victims stated to be the 'the best interests of the child'.¹³⁹

3.3.1.1 Separating protection and assistance from victim cooperation

Turning now to the practice of applying protective and supportive measures to which victims of trafficking are entitled, it should be noted that many of them tend to be conditional upon the cooperation of the victims with the competent authorities in judicial proceedings.¹⁴⁰ Even in an instrument with many progressive measures such as the *European Trafficking Convention*, there are quite a few protective measures offered to trafficking victims, such as 'medical or other assistance',¹⁴¹ 'access to the labour market, to vocational training and education',¹⁴² and especially residence

¹³⁵ See section 3.2.2 of this chapter discussing this issue.

¹³⁶ *European Trafficking Convention*, art 15(2).

¹³⁷ *Ibid*, art 15(4).

¹³⁸ *Ibid*, art 16(5).

¹³⁹ *Ibid*, arts 11(2), 12(1)(f), 16(5), 16(7), 28(3). Under this framework, child victims of trafficking may even obtain the special protection and assistance before the completion of their age determination: art 10(3).

¹⁴⁰ Kneebone and Debeljak, above n 27, 212–3

¹⁴¹ *European Trafficking Convention*, art 12(3).

¹⁴² *Ibid*, art 12(4).

permits,¹⁴³ which are contingent upon victims' cooperation with competent authorities. In the opinion of the European Commission's expert group on trafficking in 2010:

[T]he granting of residence permits to trafficked persons is, by virtue of Directive 2004/81/EC of 29 April 2004 on the residence permit issued to victims of trafficking in human beings, linked in most Member States directly to cooperation with the competent authorities in judicial proceedings, regardless of the consequences such cooperation might have on the trafficked person (e.g. re-victimization, risk of reprisals on the person and on his/her relatives).¹⁴⁴

This closely links to the tension between the underlying criminal justice objectives and discourses, and the human rights goals and discourse indicated under the framework created by the *CTOC* and its two supplementary *Protocols against Trafficking and Migrant Smuggling*.¹⁴⁵ This tension can be seen through in the drafting process of these instruments in which state parties, regardless of being aware of the human rights dimensions of the issues, were often keen to focus upon criminal justice objectives.¹⁴⁶ These two discourses, as mentioned in Chapter 2, 'replicate the struggle to "problematise" human trafficking ... [under which] a securitised and anti-immigration discourse triumphed over a focus on human security'.¹⁴⁷

Further, the cooperation of victims is always desired even in countries where unconditional assistance is guaranteed by law or provided as a victim's entitlement

¹⁴³ Ibid, art 14. Meanwhile, the European Council Directive also recently asserted that 'the residence permit offers a sufficient incentive to cooperate with the competent authorities'. See *European Council Directive of 29 April 2004 (2004/81/EC)* [2004] OJ L 261/19, para 9.

¹⁴⁴ European Commission Experts Group on Trafficking in Human Beings, *Opinion No 7/2010*, above n 14, 4–5.

¹⁴⁵ Kneebone and Debeljak, above n 27, 212

¹⁴⁶ Gallagher, *The International Law of Human Trafficking*, above n 8, chs 5, 6.

¹⁴⁷ Kneebone and Debeljak, above n 27, 213; see also section 2.2.3.3 of chapter 2 of this thesis.

under some legal systems.¹⁴⁸ This desire for successful prosecutions of traffickers is making trafficked persons ‘pawns’ for criminal justice outcomes, rather than subjects of the special protection accorded to victims of crime and of human rights violations.¹⁴⁹ In this sense, making protection and assistance conditional upon victim cooperation is synonymous with the denial of their human rights.¹⁵⁰ Additionally, this conditional approach creates unfair circumstances in which some victims are granted protection while others are rejected on the basis of their choice to not give evidence. More practically, agreeing to cooperate as a trade-off for protection and assistance does not guarantee effective cooperation from trafficked persons, especially in situations where such persons are suffering from physical and psychological trauma, or fear of intimidation.¹⁵¹

Whilst the *CTOC* and the *Trafficking Protocol*, which are primarily criminal justice instruments, unsurprisingly remains silent on this issue, the UNODC’s Legislative Guide to the *Trafficking Protocol* and some other documents prepared by this agency

¹⁴⁸ Gallagher, *The International Law of Human Trafficking*, above n 8, 298; see further in chapter 5 which discusses the protection regime under Vietnamese legal systems with victims’ obligation on cooperating with the competent authorities as a salient feature.

¹⁴⁹ *TIP Toolkit 2008*, above n 58, 251; McSherry and Kneebone, above n 22, 67, 82; Kamala Kempadoo, ‘Introduction – From Moral Panic to Global Justice: Changing Perspectives on Trafficking’ in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (Paradigm Publishers, 1st ed, 2005) vii, xv; Khalid Koser, ‘Irregular Migration, State Security and Human Security’ (Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (GCIM) (September 2005), 10 <www.iom.int/jahia/webdav/site/myjahiasite/shared/mainsite/policy_and_research/gcim/tp/TP5.pdf>; Ditmore and Wijers, above n 22, 85.

¹⁵⁰ See Gallagher, *The International Law of Human Trafficking*, above n 8, 298.

¹⁵¹ *Ibid.*

clearly support the principle of unconditional support.¹⁵² Accordingly, the Legislative Guide asserts that:

[P]roviding support, shelter and protection for victims increases the likelihood that they will be willing to cooperate with and assist investigators and prosecutors, a critical factor in a crime where the victims are almost always witnesses and intimidation by traffickers has repeatedly been cited as a major obstacle to prosecution. *Such support and protection shall, however, not be made conditional upon the victim's capacity or willingness to cooperate in legal proceedings.*¹⁵³

The issue of unconditional assistance has also been referred to under the framework of the *European Trafficking Convention*. Article 12(6) of the Convention states that:

Each Party shall adopt such legislative or other measures as may be necessary to ensure that *assistance to a victim* is not made conditional on his or her willingness to act as a witness. (emphasis added)

Not only does the Convention exclude 'protection' from the ambit of unconditional measures, but its Explanatory Report also refers to the fact that it may be compulsory for trafficking victims to cooperate if they are required to do so according to the national law of states.¹⁵⁴ This uncertainty in a major anti-trafficking legal instrument contributes to the practical difficulties of providing unconditional protection to trafficking victims.

From the perspective of international human rights institutions, separating protection and assistance from the cooperation of victims of trafficking has been strongly supported as a best practice principle in addressing human rights and human trafficking.¹⁵⁵ The most specific and relevant example can be found in the UN's

¹⁵² See *Legislative Guides – Part Two*, above n 39, [62]. See also *TIP Toolkit 2008*, above n 58, 351; United Nations Office on Drugs and Crime (UNODC), *Combating Trafficking in Persons – A Handbook for Parliamentarians* (2009), 49.

¹⁵³ See *Legislative Guides – Part Two*, above n 39, [62] (footnote omitted, emphasis added).

¹⁵⁴ See *Explanatory Report to the European Trafficking Convention*, paras 168, 170, 176; see also section 3.2.2 of this chapter on the discussion of reflection period.

¹⁵⁵ See further discussion in Gallagher, *The International Law of Human Trafficking*, above n 8, 300.

Recommended Principles and Guidelines on Human Rights and Human Trafficking.¹⁵⁶ Principle 8 is devoted to the separation of protection and assistance from victim cooperation, and the UN High Commissioner for Human Rights has recommended that:

States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.

Acknowledging the common practice of making some protection and assistance, particularly residence permits and shelter support, contingent upon the cooperation of victims of trafficking, the UN High Commissioner for Human Rights has also made specific reference to applying this principle in the delivery of these measures.¹⁵⁷ The High Commissioner has noted that supporting trafficking victims by providing safe and adequate shelter should not be conditional on victim cooperation. With regard to residence permits, the High Commissioner has nominated the ‘right to remain lawfully within the country of destination for the duration of any legal proceedings’ as an effective protection measure for victims who are willing to cooperate with authorities, rather than a converse call for separating the granting of residence permits from cooperation. This may be seen as a cause for the fact that residence permits continue to be regarded as rewards for victims’ cooperation instead of a protection for the safety of trafficking victims, as discussed later in this chapter. However, it is promisingly reported that industrialised receiving states are currently moving away from an approach that makes protection conditional upon participation in criminal proceedings.¹⁵⁸

¹⁵⁶ See *Recommended Principles and Guidelines*, above n 5.

¹⁵⁷ See *ibid*, guidelines 4.7, 6.1.

¹⁵⁸ Kneebone and Debeljak, above n 27, 213; see more in, for example, sections 3.2.2 and 3.3.2 of this chapter for the changes in particular protective and supportive measures for trafficked persons under some national frameworks.

3.3.1.2 Assistance to trafficked persons and the requirement of non-coercion

In providing for trafficked persons' protection and assistance, besides the concern about the possibility of using these measures as an exchange for testimony against traffickers to help prosecutions, there is another concern about making these measures compulsory for victims. This fear comes from the dichotomy of trafficked persons and smuggled migrants, in which trafficked persons have been seen as having 'incomplete or no autonomy in the decisions they make'.¹⁵⁹ In this sense, it may be argued that trafficked persons need to be protected and assisted at any cost, even when they are unwilling to receive such protection, in order to establish and deliver protection and assistance measures to these victims. In this vein, victim safety needs have been argued to be sufficient justification¹⁶⁰ for arbitrary shelter detention of trafficked persons against their will. Whilst regarding the provisions of protection and assistance to trafficked persons as states' obligation, it should also be noted that such measures are intended to protect their rights and interests and, therefore, they should have the right to refuse it.¹⁶¹ In other words, no matter how good the protective measures accorded by anti-trafficking laws are for trafficked persons, it is important to inform such persons about the existence of protection and assistance and let them decide whether or not they really want to receive them. This would help to avoid the coercive application of protection and assistance measures to trafficked persons.¹⁶²

Whilst the *Trafficking Protocol* seems not to have anticipated the coercive application of its discretionary provisions on protection of and assistance to trafficked persons, the *European Trafficking Convention* corrects this shortcoming. In its provision of

¹⁵⁹ International Council on Human Rights Policy, above n 21, 83; see also section 3.2.1.2 of this chapter discussing the dichotomy of trafficked/smuggled migrants.

¹⁶⁰ Besides this justification, there are other justifications such as criminal justice imperatives and/or public order requirements used to argue for the application of arbitrary shelter detention of trafficked persons. See Gallagher and Pearson, 'The High Cost of Freedom', above n 70 and Gallagher, *The International Law of Human Trafficking*, above n 8, 297.

¹⁶¹ Gallagher, *The International Law of Human Trafficking*, above n 8, 314–315.

¹⁶² *Ibid* 313.

‘assistance to victims’ in Article 12, the Convention requires its state parties to ensure there is a ‘consensual and informed basis’ for all protection and assistance measures provided to trafficked persons.¹⁶³ Additionally, the Explanatory Report to the *European Trafficking Convention* specifically refers to the right of victims to accept (or refuse) examinations for illness, particularly in relation, but not limited, to HIV/AIDS testing.¹⁶⁴ In order to guarantee a ‘consensual and informed basis’, it may be necessary to ensure that victims of trafficking receive information on support services to which they are entitled.¹⁶⁵

In the context of child victims of trafficking, it has been argued that the requirement of non-coercion need not always be strictly applied. In some specific cases, for example, locating victims in a shelter or applying medical treatment, it is arguably in ‘the best interests’ of trafficked children to do so, and so the consensual requirement is negated.¹⁶⁶ This conclusion is thought to be rational on the basis of the vulnerability of children and because of their lack of full agency.¹⁶⁷ However, it needs to be moderated with assessment measures on a case-by-case basis, to prevent unlawful or arbitrary detention, and to ensure that the measures applied to children are really in their best interests.¹⁶⁸

¹⁶³ *European Trafficking Convention*, art 12(7).

¹⁶⁴ See *Explanatory Report to the European Trafficking Convention*, para 171. It should be noted that this common concern on compulsory HIV/AIDS testing of victims of trafficking regardless of their willingness has been referred to in many soft law documents. See the relevant investigation in Gallagher, *The International of Human Trafficking*, above n 8, 313–314.

¹⁶⁵ Gallagher, *The International of Human Trafficking*, above n 8, 314. This may make a reference to the *European Trafficking Convention*’s provision of recovery and reflection periods in which ‘informed decision’ means that the victim must be in a reasonably calm frame of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers.’ See the *European Trafficking Convention*, art 13; *Explanatory Report to the European Trafficking Convention*, para 174.

¹⁶⁶ Gallagher, *The International of Human Trafficking*, above n 8, 314.

¹⁶⁷ Gallagher and Pearson, ‘The High Cost of Freedom’, above n 70, 99.

¹⁶⁸ See *ibid* 100.

3.3.2 Residence permits

The *Trafficking Protocol* refers to the possibility of residence permits as part of its recognition of the need for victims to remain in destination countries in order to enjoy the protection and assistance measures to which they are entitled. Consequently, in Article 7(1), the Protocol encourages state parties that are destination countries to ‘consider adopting (...) measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.’ Apart from the purpose of supporting victims in their enjoyment of protection and assistance measures, residence permits should also be granted, as stated by the Protocol, by virtue of ‘humanitarian and compassionate factors’.¹⁶⁹ According to this provision, the Protocol does not impose upon state parties an obligation to provide residence permits to trafficked persons, as was proposed during the drafting process of the *Trafficking Protocol*.¹⁷⁰

Moreover, the Legislative Guide notes that these permits may encourage victims to cooperate with law enforcement in criminal proceedings.¹⁷¹ However, this note should not be (mis)interpreted as suggesting the use of residence permits as a trade-off for victims’ cooperation. Rather, it should be noted that remaining in destination

¹⁶⁹ *Trafficking Protocol*, art 7(2) – see Appendix 1.

¹⁷⁰ During the drafting process of the *Trafficking Protocol*, the right of trafficked persons to remain in the receiving countries, at least temporarily, was strongly promoted by human rights advocates. However, the delegates rejected the proposal for an obligation regarding the status of victims of trafficking in destination countries because of their perceived fear that residence permits could encourage illegal migration and benefit the traffickers as a consequence. See *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 9th sess, Agenda Item 3, UN Doc A/AC 254/4/Add 3/Rev 6 (4 April 2000), art 2bis(c); Gallagher, ‘Human Trafficking and the New UN Protocols’, above n 68, 992.

¹⁷¹ *Legislative Guides – Part Two*, above n 39, [68]. This position has been shared by the UN High Commissioner for Human Rights, which states that temporary residence permit shall be granted to victims and witnesses for the duration of any criminal, civil or other actions against suspected traffickers to assist their participation in these proceedings. See *Recommended Principles and Guidelines*, above n 5, principle 9.

countries would probably assist victims with their recovery, allowing them to take back control of their lives and thereby encourage victims to cooperate with the authorities.¹⁷² In other words, promoting effective prosecutions against traffickers should be regarded as the outcome of granting victims residence permits rather than the condition thereof. Consequently, residence permits should be granted to trafficking victims to provide them with a genuine opportunity to consider their legal options without the pressure of giving testimony against traffickers. In cases of victims participating in criminal proceedings as witnesses, the right to remain in the destination country would become a certainty due to their special needs and vulnerabilities.¹⁷³

Whilst the *Trafficking Protocol* and its explanatory document appear to be confused about when a residence permit should be granted to a trafficked person, Article 14(1) of the *European Trafficking Convention* says that a (renewable) residence permit shall be issued to trafficked persons in the two following situations:¹⁷⁴

- a. the competent authority considers that their stay is necessary owing to their personal situation;
- b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

The *European Trafficking Convention* also states more firmly that, alongside criminal justice purposes, the purpose of residence permits is to protect the interests of

¹⁷² See Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women and Global Rights, *Human Rights Standards for the Treatments of Trafficked Person* (January 1999) Global Rights ('*Human Rights Standards for Trafficked Persons*'), standard 20 <<http://www.globalrights.org/site/DocServer/IHRLGTraffickingStandards.pdf?docID=204>>.

¹⁷³ Gallagher, *The International Law of Human Trafficking*, above n 8, 318.

¹⁷⁴ See also the four conditions set out in the European Council Directive (operational in the EU from 2004 prior to the establishment of the *European Trafficking Convention*): (i) his/her stay on the territory is necessary for the investigations or the judicial proceedings; (ii) he/she has shown a clear intention to cooperate; (iii) he/she has severed all relations with traffickers; and (iv) there are no impediments from public policy and national security.: *European Council Directive of 29 April 2004*, [2004] OJ L 261/19, art 8.

trafficked persons, and that granting residence permits prevents immediate returns which harm both victims and the effectiveness of criminal proceedings.¹⁷⁵ However, the Convention also retreats from this position somewhat by paradoxically determining that the '*availability* of a residence permit is a *measure* calculated to encourage [victims] to cooperate'¹⁷⁶ and that:

The aim of these requirements [stipulated in Article 14(1)] is to allow Parties to choose between granting a residence permit in exchange for cooperation with the law-enforcement authorities and granting a residence permit on account of the victim's needs, or indeed to adopt both simultaneously.¹⁷⁷

With these provisions, it can be observed that residence permits have been introduced by the Convention as nothing but bait to secure victims' cooperation. The options offered give states the opportunity to use residence permits 'in exchange for cooperation' rather than granting residence permits on the basis of victims' needs. Additionally, the Convention leaves the issues of the length of residence permits, the conditions for residence permit renewal and, more importantly, the issue of non-renewal or withdrawal of residence permits, to the parties' discretion.¹⁷⁸ It means that residence permits can be withdrawn at any time when victims are considered to be no longer useful to the criminal proceedings and that they must be sent back to their country of origin regardless of any additional risks of retaliation or re-trafficking.¹⁷⁹ Askola, in her research several years ago (2007), accurately summarized this retreat in the *European Trafficking Convention* by calling it the 'talk or walk' rule, under which victims of trafficking must choose to press charges against the traffickers if they wish to remain in the territory, or they must leave.¹⁸⁰

¹⁷⁵ See *Explanatory Report to the European Trafficking Convention*, para 180.

¹⁷⁶ See *ibid*, para 181.

¹⁷⁷ See *ibid*, para 182 (emphasis added).

¹⁷⁸ *Ibid*, paras 187 – 8.

¹⁷⁹ On the practice of granting residence permits in some other (mostly European) countries, see *TIP Toolkit 2008*, above n 58, 317.

¹⁸⁰ Askola, above n 9, 96.

As a foreseeable result, anti-trafficking experts in the EU have recently raised their concerns about the practice of granting residence permits in direct connection with victims' cooperation in many EU countries.¹⁸¹ In this respect (and due to limits on the length of this thesis), the practice of granting residence permits to trafficked persons in the UK can be chosen as a random example. Alongside an offer to all identified trafficking victims of a reflection period of at least 45 days, a renewable temporary residence permit of a minimum of one year may be granted to 'eligible' victims of trafficking who choose to cooperate with the authorities in a criminal investigation or who apply for the extension of a residence permit on the basis of humanitarian protection or asylum.¹⁸² However, it has been noted that while the reflection period is granted on a case-by-case basis, the temporary residence permit is often granted only for victims who choose to cooperate with the authorities in a criminal

¹⁸¹ See European Commission Experts Group on Trafficking in Human Beings, *Opinion No 7/2010*, above n 14, 4–5; see also section 3.3.1.1 of this chapter discussing the issue of separating protection and assistance from cooperation.

¹⁸² The Scottish Government Home Office, 'Update to the UK Action Plan on Tackling Human Trafficking' (July 2008) Anti Trafficking Legal Project, 29 <<http://www.atlep.org.uk/wp-content/uploads/2011/02/Update-to-Action-Plan-2008.pdf>>; Sally Almandras, 'Human Trafficking: UK Responses' (Briefing Note No SN/HA/4324, House of Commons Library, Parliament of the UK, 2010), 12. These new arrangements for victims of trafficking are part of the results of the UK's ratification of the *European Trafficking Convention*. Previously, UK legislators were concerned that a long period of reflection (of a minimum of three months as has reportedly been suggested throughout Europe) may create a 'pull factor' for the flow of trafficking into the country. A period of four weeks has instead been given for victims to decide if they wish to cooperate with the authorities, and up to 16 weeks if they decide to do so. Remarkably, these measures are essentially applied to facilitate the 'co-operation from victims to obtain intelligence to capture the traffickers'. See further in *International Trafficking of Women* (15 September 2004) Commons and Lords Library, Parliament of the UK (HC Deb vol 424 cc472–95WH) <http://hansard.millbanksystems.com/westminster_hall/2004/sep/15/international-trafficking-of-women>. In addition, a shorter reflection and recovery period may also be justified on the basis of the benefit to victims of having early access to legitimate work and services to help with reintegration.: The Scottish Government Home Office, above n 182, 29.

proceeding.¹⁸³ This example of making the granting of residence permits contingent upon victims' cooperation leads one to conclude that the position of trafficking victims in their enjoyment of residence permits has been substantially compromised from their original notion.

Fortunately, the practice of granting residence permits in other countries has shifted strongly towards separating it from the cooperation of trafficked persons with the authorities, as illustrated by the examples of Canada and Australia. In Canada, Bill S-223¹⁸⁴ stipulates that victims of trafficking will be permitted to remain in the country as temporary residents. The short-term permit may be issued for up to 180 days to a 'foreign national [who] may be, or may have been, a victim of human trafficking in, or in the course of coming into, Canada'.¹⁸⁵ Together with being granted this permit, the holder is also eligible for health and social services.¹⁸⁶ Meanwhile, a longer residence permit of three years may be issued to a victim of trafficking¹⁸⁷ if one of the following conditions is satisfied: there is a serious possibility that removal from Canada would be harmful to the victim or his/her family member; the victim is willing to assist authorities in the investigation or prosecution of trafficking or its related offences; or the issuance of the permit is otherwise justified in the circumstances.¹⁸⁸ That means the issuance of the long-term residence permit does not rely solely on a victim's cooperation with the authorities in criminal proceedings, but rather on the victim's individual circumstances. This residence arrangement in Canada can at least be

¹⁸³ The Scottish Government Home Office, above n 182, 29. Otherwise, they are allowed to apply for humanitarian or asylum protection arrangements which previously existed.

¹⁸⁴ *Victim of Human Trafficking Protection Act (Bill S-223)*, S C 2009 2nd sess, 40th Parliament, 57 Elizabeth II <www.parl.gc.ca/Content/SEN/Bills/402/public/S-223/S-223_1/s-223_text-e.htm>.

¹⁸⁵ *Ibid*, s 24(1)(2)(b).

¹⁸⁶ The holder of a short-term victim protection permit will receive benefits from the Interim Federal Health Program and authorization to work or study in Canada. See *ibid*, ss 24(1)(3)(a), 24(1)(3)(b).

¹⁸⁷ *Bill S-223* provides that for a foreign national to be considered a victim of trafficking, he/she must be physically present in Canada and be believed (by the authorities) to have been a victim of trafficking in or in the course of coming into Canada. See *ibid*, s 24(2)(1)(a).

¹⁸⁸ *Ibid*, s 24(2)(1)(b).

regarded as a progressive scheme in not making residence permits simply a guarantee of effective criminal proceedings relating to trafficking cases.

In the case of Australia, there have been significant changes within the People Trafficking Visa Framework to provide victims with some visa arrangements for their stay in the territory of the country.¹⁸⁹ According to the current People Trafficking Visa Framework,¹⁹⁰ since 2009 four types of visa have been offered to trafficking victims, including a Bridging Visa F, a Criminal Justice Stay Visa (CJSV),¹⁹¹ a Temporary Witness Protection (Trafficking) Visa (TWPTV),¹⁹² and a Permanent Witness Protection (Trafficking) Visa (PWPTV).¹⁹³ The requirements for these visas have been adjusted to provide better protection and support which is independent of victim cooperation. Accordingly, a Bridging Visa F, with a stay for a maximum of 45 days, will be granted to all suspected victims of trafficking. It is worth noting that this visa is granted regardless of a victim's value to investigations and prosecutions, upon which it was previously conditional.¹⁹⁴ As for the TWPTV and PWPTV, they have been collapsed into one permanent visa for which a victim can be invited to apply directly when they have a contribution to make to criminal proceedings (which need no

¹⁸⁹ See also Jennifer Burn and Frances Simmons, 'Trafficking and Slavery in Australia: An Evaluation of Victim Support Strategies' (2006) 15(4) *Asian and Pacific Migration Journal* 553; Anna Dorevitch and Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-trafficking Victims under Australia's Migration and Refugee Law' (2008) 9(1) *Melbourne Journal of International Law* 1.

¹⁹⁰ Australian Government, above n 56.

¹⁹¹ *Migration Act 1958* (Cth) pt 2, div 4 (Criminal Justice Visitors).

¹⁹² *Migration Regulations 1994* (Cth) reg 2.07AJ (Class UM, subclass 787).

¹⁹³ *Migration Regulations 1994* (Cth) reg 2.07AK (Class DH, subclass 852).

¹⁹⁴ Previously, a trafficked person would only be granted this visa if he or she appeared to be a 'persons of interest' to the police because of their connection to an alleged trafficking offence or other related offences. See *Migration Regulations 1994* (Cth) sch 2, subclass 060 (Bridging F). Additionally, this Bridging Visa F can be terminated by the Minister (acting on the advice of the Australian Federal Police or law enforcement agencies) at any stage if the victim has been told that he or she is not useful to the criminal justice system anymore. See *Migration Regulations 1994* (Cth) sch 2, cl 060.511(3).

longer be ‘significant’), even before the finalization of the criminal justice process. However, in another type of visa, the CJSV, the length of time that a visa holder is permitted to remain in Australia depends on the period that victims are needed for law enforcement purposes, not the needs of the victims themselves.¹⁹⁵ Nevertheless, these changes in the Australian legislation are significant for their attempt to provide protection and support for trafficking victims without making it conditional upon victim cooperation, a model which should be followed in other regional and national anti-trafficking policies.

3.3.3 Return and repatriation

3.3.3.1 Legal standards on return/repatriation of trafficked persons

For many victims of trafficking, especially those who are trafficked across an international border, return and repatriation are seemingly inevitable unless a permanent residence permit is granted by the destination country.¹⁹⁶ Additionally, it appears that return and repatriation are regarded by destination countries as their absolute right to send back victims of trafficking to their country of origin. However, the *Trafficking Protocol* points out that return and repatriation of trafficked persons involves obligations on the part of both countries of destination and origin, and includes a direction to guarantee for victims of trafficking a safe and, if possible,

¹⁹⁵ Burn and Simmons, above n 174, 561.

¹⁹⁶ Provision of alternatives to repatriation should be noted here, in which victims of trafficking are not permitted to remain in the destination country and not be repatriated to their country of origin either, but are entitled to some ‘legal alternatives to repatriation’ if ‘it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families’. The legal alternatives to repatriation recommended include local integration, inter-country adoption or resettlement in a third country. See *Recommended Principles and Guidelines*, above n 5, principle 11, guideline 6.7; United Nations Children’s Fund (UNICEF), ‘Guidelines on the Protection of Child Victims of Trafficking’ (Technical Notes, 1 September 2006), guideline 3.8; United Nations Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 39th sess, UN Doc CRC/GC/2005/6 (1 September 2005), [89]–[94]; see also Gallagher, *The International Law of Human Trafficking*, above n 8, 351–2.

voluntary return.¹⁹⁷ At the same time, the *Trafficking Protocol* calls upon its state parties to avoid applying immediate repatriation procedures to trafficked persons, with emphasis on considering ‘the status of any legal proceedings related to the fact that the person is a victim of trafficking’.¹⁹⁸ This has been interpreted as guaranteeing for victims of trafficking the opportunity to present their views and concerns in ‘criminal proceedings against alleged traffickers or in relation to other offences (...) or in civil proceedings against alleged offenders’.¹⁹⁹

With regard to the voluntariness of return, the *Trafficking Protocol* does not make any specific reference to this issue aside from its call for ‘preferably voluntary’ repatriation of trafficked persons.²⁰⁰ In the meantime, the Travaux Préparatoires to the Protocol indicates that the phrase ‘shall preferably be voluntary’ is not intended to impose any obligations on state parties in returning victims.²⁰¹ It should be noted that during the *Trafficking Protocol’s* drafting process, the issue of the voluntariness of repatriation was left to state parties’ discretion through bilateral and multilateral agreements.²⁰²

¹⁹⁷ See the *Trafficking Protocol*, arts 8(1), 8(2) – see Appendix 1.

¹⁹⁸ See *ibid*, art 8(2) – see Appendix 1; see also *Legislative Guides – Part Two*, above n 39, [61(b)].

¹⁹⁹ See *Legislative Guides – Part Two*, above n 39, [61(b)]; see also the *Trafficking Protocol*, art 6(2) (see Appendix 1) on the issue of enabling victims to present their views and concerns in legal proceedings.

²⁰⁰ See the *Trafficking Protocol*, art 8(2) – see Appendix 1.

²⁰¹ *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of Its First to Eleventh Sessions – Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN GAOR, 55th sess, UN Doc A/55/383/Add 1 (3 November 2000) (‘*Interpretative Notes*’), [7].

²⁰² It has also been claimed that ‘[a]t the fourth session of the Ad Hoc Committee, some delegations expressed the view that repatriation of the victims should be based on consent. Consensus was not reached regarding repatriation of the victims in the absence of such consent. In this context, bilateral and multilateral agreements should be encouraged.’ See *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 5th sess, UN Doc A/AC 254/4/Add 3/Rev 3 (24 September 1999), n 52. This point of view is also appropriate to the

Similarly, whilst indicating that returns ‘shall preferably be voluntary’ the *European Trafficking Convention* seems to sanction both voluntary as well as involuntary return,²⁰³ as it contemplates the possibility of repatriating victims of trafficking against their will. Such involuntary repatriation, Gallagher argues, ‘effectively amounts to expulsion from a State’.²⁰⁴ She then attempts to invoke the provisions of international human rights law which reject arbitrary expulsion but, unfortunately, this protection is only applicable to trafficked persons who are lawfully within the (destination) country.²⁰⁵ Jordan, on the other hand, appears to be more practical when she claims that involuntary repatriation should be arranged only if requirements for the safety of the victim and their participation in legal proceedings are satisfied.²⁰⁶

recommendation of the UN High Commissioner for Human Rights that the return of trafficking victims be ‘safe (and, to the extent possible, voluntary)’. See *Recommended Principles and Guidelines*, above n 5, [11]. Previously, the United Nations High Commissioner for Human Rights submitted to the Ad Hoc Committee on the Elaboration of a *CTOC* that ‘[s]afe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons. A failure to include provision for *safe and (to the extent possible) voluntary* return would amount to little more than an endorsement of the forced deportation and repatriation of victims of trafficking. When trafficking occurs in the context of organized crime, such an endorsement presents an unacceptable safety risk to victims’. See *Informal Note by the United Nations High Commissioner for Human Rights*, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 4th session, UN Doc A/AC 254/16 (28 June – 9 July 1999), [20] (emphasis added).

²⁰³ See the *Explanatory Report to the European Trafficking Convention*, para 200.

²⁰⁴ Gallagher, *The International Law of Human Trafficking*, above n 8, 346.

²⁰⁵ Ibid; see also *ICCPR*, art 13.

²⁰⁶ See Jordan, above n 118, 25.

3.3.3.2 Safe return and the *non-refoulement* principle

With regard to safety in the return of trafficked persons, guaranteeing a safe return is actually an obligation imposed upon not only destination countries, but also countries of origin and maybe even the third countries.²⁰⁷ According to the Legislative Guide, this obligation to guarantee safe repatriation, as stipulated in Article 8(2) of the *Trafficking Protocol*, ‘also applies to victims who have not been witnesses’.²⁰⁸ In order to ensure the safe return of trafficked persons, countries of origin are required to accept the return of their nationals or residents who are trafficked without undue or unreasonable delay.²⁰⁹ Further, countries of origin are also asked to facilitate the return of their trafficked nationals or residents by verifying their nationality or residence and issuing necessary travel documents.²¹⁰ As it has also been indicated in the *Travaux Préparatoires*, the return ‘shall not be undertaken before the nationality or right to permanent residence of the person whose return is sought has been duly verified’ in order to secure a safe return.²¹¹

Following in the footsteps of the *Trafficking Protocol*, Article 16(2) of the *European Trafficking Convention* requires the return and repatriation of trafficked persons — aside from the requirement of due regard to legal proceedings and, if possible,

²⁰⁷ Gallagher, *The International Law of Human Trafficking*, above n 8, 339 in which she claims that the third countries may be involved in the obligation to guarantee the safe return of trafficked persons when, for example, the settlement of a trafficked person outside the destination countries and countries of origin is necessary. Relating to this argument, it should be noted that the UNODC’s Legislative Guide to the *Trafficking Protocol* indicates ‘relocate the victim’ as a measure that may be applicable to ensure the safety of the victim. See *Legislative Guides – Part Two*, above n 39, [61(c)].

²⁰⁸ *Legislative Guides – Part Two*, above n 39, [61(c)].

²⁰⁹ *Trafficking Protocol*, art 8(1) – see Appendix 1. According to Gallagher, this requirement relates to the right to return of trafficked persons. See Gallagher, *The International Law of Human Trafficking*, above n 8, 345.

²¹⁰ *Trafficking Protocol*, arts 8(3), 8(4) – see Appendix 1; *European Trafficking Convention*, arts 16(2), 16(3), 16(4).

²¹¹ *Interpretative Notes*, above n 201, [74].

voluntary return — to occur with ‘due regard for the rights, safety and dignity of [the victim]’. Accordingly, ‘the rights, safety and dignity’ of victims need to be considered before arranging the repatriation, including ‘the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of his/her identity’.²¹² Further, the *European Trafficking Convention* also refers to conducting a ‘risk and security assessment’ in order to ensure for child victims a return that is in the best interests of the child.²¹³ Significantly, the Convention requires its state parties to ensure victims’ social reintegration and the prevention of re-victimization, and to provide other supports in terms of repatriation programs to repatriated victims.²¹⁴

In addition to the requirement of guaranteeing trafficked persons a safe return, it is relevant to note here the saving clause of the *Trafficking Protocol* indicating the application of provisions of international law which are applicable to the situation of trafficked persons and, in this context, to the right to safe return of trafficked persons.²¹⁵ Therefore, the principle of *non-refoulement* — prohibiting returns to unsafe situations — is of the utmost relevance here. This principle is set out in Article 33(1) of the *1951 Refugee Convention*²¹⁶ as follows:

No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where *his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*. (emphasis added)

It has been argued that application of this principle extends beyond just refugees as defined by Article 1A(2) of the *1951 Refugee Convention* (which includes asylum

²¹² *Explanatory Report to the European Trafficking Convention*, para 202.

²¹³ *European Trafficking Convention*, art 16(7).

²¹⁴ *Ibid*, arts 16(5), 16(6). The issue of social reintegration will specifically be discussed in section 3.3.3.3 of this chapter.

²¹⁵ *Trafficking Protocol*, art 14(1) – see Appendix 1; *European Trafficking Convention*, art 40(4).

²¹⁶ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 2545 (entered into force 22 April 1954) (‘*1951 Refugee Convention*’).

seekers),²¹⁷ to all persons, notwithstanding their immigration status.²¹⁸ Additionally, while the principle of *non-refoulement* is explicitly among the provisions from which member states' may not claim reservation,²¹⁹ it has also been strongly debated as 'a customary principle of law'²²⁰ that arguably imposes an 'indirect responsibility' on states to protect asylum seekers from being subjected to torture, or inhuman or degrading treatment upon return to their country of origin or transit country.²²¹

²¹⁷ An 'asylum seeker' is a person seeking asylum from persecution who has yet to be recognised as a 'refugee' as defined in art 1A(2) of the *1951 Refugee Convention*. But note that the United Nations High Commissioner for Refugees (UNHCR) takes the view that a person who satisfies that definition is a 'refugee' without the need for a determination to that effect. This is known as the 'declaratory' theory. See United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* UN Doc HCR/IP/Eng/REV 1 (1992), [28].

²¹⁸ See further in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009), 11–14; Brian Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 *International Journal Of Refugee Law* 479; , Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007), 244; Sir Elihu Lauterpacht QC and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 78, 116.

²¹⁹ See the *1951 Refugee Convention*, art 42(1).

²²⁰ Kneebone, *Refugees, Asylum Seekers and the Rule of Law*, above n 218, 14. See also Goodwin-Gill and McAdam, above n 218, 345; Donald Greig, 'The Protection of Refugees and Customary International Law' (1984) 8 *Australian Year Book of International Law* 108, 133–4, cited in Nick Poynder, 'Recent Implementation of the Refugee Convention in Australia and the Law of Accommodations to International Human Rights Treaties – Have We Gone Too Far?' (1995) 2 *Australian Journal of Human Rights* 75, 89; Lauterpacht and Bethlehem, above n 218, 87; Cf James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 363–6.

²²¹ Kneebone, *Refugees, Asylum Seekers and the Rule of Law*, above n 218, 14. Relating to the eligibility of trafficking victims' to claim refugee status, the UNHCR has provided some guidelines that state that (even potential) victims of trafficking may lodge a claim for refugee status in some circumstances. It is necessary to prove the controversial requirement of a 'well-founded fear of

Whilst both the *Trafficking Protocol* and the *European Trafficking Convention* refer to the *non-refoulement* principle in connection with the *1951 Refugee Convention*, it should be noted that this principle, alongside its status as a central principle of refugee law, actually has a broader meaning than asylum, especially in the context of protection.²²² Article 3(1) of the *Convention against Torture* can be taken as an example. It provides that ‘no State Parties shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.²²³ A similar principle may also be detected within the provisions of the *International Covenant on Civil and Political Rights (ICCPR)*²²⁴ as well as the *Convention on the Rights of the Child (CRC)*.²²⁵ This

persecution’ in order to be recognized as a refugee. This ‘persecution’ requirement may be generally satisfied by the activities constituting grave human rights abuses inherent in the process of trafficking, if it is unsafe for them to return home. See United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victim of Trafficking and Persons at Risk of Being Trafficked*, UN Doc HCR/GIP/06/07 (7 April 2006) (‘*Guidelines on International Protection*’), [13]; United Nations High Commissioner for Refugees (UNHCR), ‘Refugee Protection and Human Trafficking – Selected Legal Reference Materials’ (Report, 1 December 2008), 12; Ryszard Piotrowicz, ‘Victims of People Trafficking and Entitlement to International Protection’ (2005) 24 *Australian Year Book of International Law* 159, 164–6 for the obstacles to trafficked persons gaining refugee status; Piotrowicz, ‘European Initiatives in the Protection of Victims of Trafficking’, above n 59; Anna Marie Gallagher, ‘Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination’ (2004) 19 *Georgetown Immigration Law Journal* 99 on ‘the causal link’ between the applicant’s well-founded fear of persecution on one of, or a combination of some of, the Convention grounds, which include the applicant’s race, religion, nationality, membership of a particular social group or political opinion.

²²² Gallagher, *The International Law of Human Trafficking*, above n 8, 347, 349.

²²³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 3(1).

²²⁴ *ICCPR*, art 7.

²²⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘*CRC*’), art 39.

means that states, in conducting the return of trafficked persons, need to ensure that they will not be returned to a situation of torture or inhuman or degrading treatment as part of the requirement for safe return.

It should be noted here that, in the opinion of EU experts on the return of trafficked persons to countries of origin, '[w]hile the *Trafficking Protocol* does not clearly provide that this condition of 'safety' is mandatory, it has been argued that, as with voluntary return, safe return is not a mandatory requirement for the Protocol's state parties'.²²⁶ It was also concluded by these experts that:

Trafficked persons are ultimately always obliged to return to their country of origin. Programmes to assist in their 'voluntary' return, which some argue would better be referred to as 'mandatory' return, were in place in all countries. Failing voluntary return, trafficked persons could be forcibly returned. No country examined had developed clear procedures to ensure that the return was conducted with due regard for the rights and safety of the person concerned. Instead issues of safety were only systematically considered in countries where the person had applied for asylum or other forms of international protection.²²⁷

Accordingly, the actual practices of returning trafficked persons to their country of origin draw a very different picture from what might be expected from the above standards of international law. In this illustration, there is the familiar image of persons who have been successfully identified as victims of trafficking but have not been granted a residence permit to remain (because of not cooperating with the authorities in the process of prosecutions) and who end up being deported as undocumented migrants.²²⁸ In the meantime, returns are taking place without due

²²⁶ See Office for Democratic Institutions and Human Rights (ODIHR), *Report: First Expert Meeting on Human Rights Protection in the Return of Trafficked Persons to Countries of Origin* (24 June 2009) Organization for Security and Co-operation in Europe, 3
<http://www.osce.org/documents/odih/2009/12/42014_en.pdf> (italicisation added).

²²⁷ See *ibid* 1.

²²⁸ The report is on the practice of the return of trafficked persons to countries of origin from some destination countries, including the UK, Spain, Germany and Italy, which are all state parties to the *Trafficking Protocol* and the *European Trafficking Convention* (as ratification members or signatories). See Office for Democratic Institutions and Human Rights (ODIHR), *Human Rights Protection in the Return of Trafficked Persons to Countries of Origin – Side Event Report, Human*

regard for the rights and safety of the persons involved, due to a lack of clear procedures.²²⁹ Additionally, there are no independent monitoring mechanisms, for instance, risk assessments, to control and monitor whether a return has been undertaken in a way that respects the safety and dignity of victims.²³⁰ While some return programs have been labelled as ‘voluntary’, the fact that victims of trafficking are not given the option of remaining in the country and have no other options aside from repatriation apparently proves the opposite.²³¹ Moreover, it has also been reported that there is no cooperation between destination countries that repatriate victims, and countries of origin.²³²

A similar situation occurs in the GMS where the lack of provision for trafficked persons to reside in a destination country’s territory in most of the national anti-trafficking legislation makes return most likely the only option.²³³ Returning trafficked

Dimension Implementation Meeting (1 October 2009) Organization for Security and Co-operation in Europe < http://www.osce.org/documents/odihr/2009/12/42013_en.pdf>. The information about the status of ratification of the *Trafficking Protocol* and the *European Trafficking Convention* can be found, respectively, at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en> and < http://www.coe.int/t/dg2/trafficking/campaign/Flags-sos_en.asp> at 11 December 2010.

²²⁹ Ibid 1, 6.

²³⁰ Ibid 2, 5–6.

²³¹ ODIHR, *Report: First Expert Meeting on Human Rights Protection in the Return of Trafficked Persons*, above n 226, 3.

²³² Ibid, 7.

²³³ Huguet and Ramangkura, above n 13, 20. Thailand has recently adopted a new anti-trafficking law which provides for the possibility of a trafficked person receiving permission to stay temporarily or permanently for the purpose of assistance and support or legal proceedings. See *Anti-Trafficking in Persons Act 2008* (Kingdom of Thailand) BE 2551, was passed in November 2007 and came into force on 5 June 2008, ss 37–38 [Pravit Roykaew (Office of the Attorney General) trans] <[http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20\(eng.\).pdf](http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20(eng.).pdf)>.

persons as quickly as possible²³⁴ seems to be a higher priority than safe returns with 'support to ensure [trafficked persons] well-being'.²³⁵ It has been reported that the authorities in some countries do not appropriately distinguish between illegal migrants²³⁶ who are smuggled and those who are trafficked, which leads to a smaller number of trafficking victims being identified than are estimated to be actually present.²³⁷ In some countries there is no systematic process to identify trafficking victims from other returnees, such as in Myanmar and China.²³⁸ In other countries, victim identification policy is in place but there are still many trafficked persons being deported without being identified as such, as has been the case in Thailand.²³⁹ Additionally, victims of trafficking are possibly detained among illegal migrants while waiting for the identification process to be completed, as in the case of Lao or Cambodian trafficking victims returned from Thailand.²⁴⁰ Even though the practice of return and repatriation of trafficked persons in the GMS shows a shift from being 'based upon the migration status of the trafficked person'²⁴¹ to being more concerned

²³⁴ The project proposal concept (PPC) 6 of the Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT) Process Work Plan requires for 'safe and timely repatriation'. See United Nations Inter-Agency Project on Human Trafficking (UNIAP), Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT), 'The COMMIT Sub-Regional Plan of Action (COMMIT SPA) – Achievements in Combating Human Trafficking in the Greater Mekong Subregion 2005 – 2007' (Report, December 2007), 30.

²³⁵ *COMMIT MOU*, above n 83, [20].

²³⁶ Yi Wang, 'Trafficking in Women and Children from Vietnam to China: Legal Framework and Government Responses' (Report, Oxfam Quebec, August 2005), 21.

²³⁷ Huguet and Ramangkura, above n 13, 9, 33.

²³⁸ *Ibid* 13, 24.

²³⁹ See United Nations Inter-Agency Project on Human Trafficking (UNIAP), 'Human Trafficking Sentinel Surveillance (Poipet, Cambodia)' (Report, 2010), 113; Huguet and Ramangkura, above n 13, 12, 28.

²⁴⁰ *Ibid* 20; see also Gallagher, 'A Shadow Report on Human Trafficking in Lao PDR', above n 11; UNIAP, 'Human Trafficking Sentinel Surveillance', above n 239, 113.

²⁴¹ Kneebone, 'The Refugee–Trafficking Nexus', above n 19, 153.

with victims' needs for protection, there are still many more improvements to make to ensure safe return and repatriation processes for trafficking victims.²⁴²

3.3.3.3 Reintegration of trafficked persons

The issue of victims' social reintegration was referred to under the heading of 'victim rehabilitation' in the drafting process of the *Trafficking Protocol*. Accordingly, the physical, psychological and social recovery of victims should be facilitated by specific measures in a manner appropriate to their age, gender and special needs in order to foster their health, self respect and dignity.²⁴³ Although these elements, as we know, are incorporated into Article 6(3) of the *Trafficking Protocol*, the omission of reintegration in the final text is a significant shortcoming of this instrument.

Meanwhile, recognition of the need for effective victim reintegration as well as repatriation that avoids revictimisation is growing within the international community.²⁴⁴ As an example, the UN Principle and Guidelines on Human Rights and Human Trafficking recommend that:

[States should consider] ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.²⁴⁵

At the regional level, the *European Trafficking Convention* introduces an effective reintegration of repatriated trafficking victims into society as an important indication of a safe repatriation.²⁴⁶ Also, the Convention suggests that repatriated victims of trafficking should be supported in their social reintegration, including in their

²⁴² See also UNIAP, 'Human Trafficking Sentinel Surveillance', above n 239.

²⁴³ *Travaux Préparatoires*, above n 76, 374.

²⁴⁴ See Gallagher, *The International Law of Human Trafficking*, above n 8, 353–4.

²⁴⁵ *Recommended Principles and Guidelines*, above n 5, guideline 6.8.

²⁴⁶ See also section 3.3.3.2 in chapter on safe return and the *non-refoulement* principle.

reintegration into education systems and labour markets, and be provided with useful contact information for organisations that can support them in the country to which they are returned.²⁴⁷ Additionally, repatriated child victims should be supported with adequate care, family reunion, education and other appropriate care services.²⁴⁸ These supports, while facilitating social reintegration, also aim to reduce the vulnerability of repatriated victims to re-victimization and re-trafficking as well as to intimidation, retaliation, social isolation and stigmatization.²⁴⁹

In the meantime, the *South Asian Association for Regional Cooperation (SAARC) Convention* stipulates some rehabilitation measures including legal advice, counselling, job training and health care.²⁵⁰ In the GMS, albeit without any specific measures, the COMMIT MOU shows the member states' commitment to 'working together to facilitate the successful recovery and reintegration of trafficked persons and to prevent them from being re-trafficked'.²⁵¹ Noticeably, the fact that active cooperation between repatriating and receiving countries is necessary for successful reintegration has also been acknowledged in the aforementioned regional treaties and international and regional policy documents.²⁵²

²⁴⁷ See the *European Trafficking Convention*, art 16(6).

²⁴⁸ Ibid, art 16(5).

²⁴⁹ Gallagher, *The International Law of Human Trafficking*, above n 8, 352.

²⁵⁰ See *South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, opened for signature 5 January 2002 (entered into force 1 December 2005) ('SAARC Convention'), art IX(3) <<http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>>.

²⁵¹ COMMIT MOU, above n 83, art 21.

²⁵² See, for example, the *European Trafficking Convention*, art 16(6); *SAARC Convention*, preamble, art II; *Recommended Principles and Guidelines*, above n 5, guidelines 11.11, 11.12; COMMIT MOU, above n 83, arts 20, 21; see also Gallagher, *The International Law of Human Trafficking*, above n 8, 354.

3.3.4 Remedies

Remedies for victims of crime and victims of human rights violations are among the measures which have become international standards in United Nations' resolutions.²⁵³ Accordingly, trafficked persons, as victims of crime, are entitled to reparations for wrongs²⁵⁴ whilst being entitled to remedies under human rights law as victims of human rights violations.²⁵⁵ This right to remedies of trafficked persons goes beyond the right to the possibility of obtaining compensation, but actually links to an expanded rights regime. As outlined in the recent report by the Special Rapporteur on Trafficking in Persons, an effective remedy for trafficked persons should be conceived as consisting of some key components, including restitution, recovery, compensation, satisfaction and guarantees of non-repetition of trafficking, access to information, legal assistance and regularization of residence status, as well as some other procedural rights necessary to facilitate access to reparations.²⁵⁶

This report also affirms that, with regard to restitution, trafficked persons should be guaranteed restoration to the situation that existed prior to the violation. States therefore are obliged to implement broader measures to address root causes of

²⁵³ See *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res, 96th plen mtg, UN Doc A/RES/40/34 (29 November 1985); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res, 60th sess, Agenda Item 71 (a), UN Doc A/RES/60/147 (21 March 2006) on the international standards for guaranteeing remedies, including restitution and/or compensation to victims.

²⁵⁴ *CTOC*, art 25(2); see also Ezeilo, above n 130, [13], [14]; Kneebone and Debeljak, above n 27, 230.

²⁵⁵ See Kneebone and Debeljak, above n 27 citing, eg, the *ICCPR*, arts 2(3)(a), 2(3)(b), 2(3)(c); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art 13; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 6. These scholars also noted that trafficked persons may also be entitled to civil remedies or administrative remedies as labour migrants: *ibid.*

²⁵⁶ Ezeilo, above n 130, [17].

trafficking and to provide trafficked persons with necessary reintegration support.²⁵⁷ Under the model of restitution, it should be noted that return has not always been seen as the best option for trafficked persons where a trafficked person ‘has lost legal, cultural or social ties with the country of origin and it is no longer in his or her best interest to return to it’.²⁵⁸ With regard to recovery, medical and psychological care, as well as legal and social services,²⁵⁹ have also been specified as part of an effective remedy for trafficked persons. The guarantee of non-repetition requires that the interests of trafficked persons in relation to non-financial forms of damage, such as moral damage or damage to the dignity or reputation of the victim, will be respected.²⁶⁰ Further, states are obliged to guarantee trafficked persons the procedural rights of access to remedies, including access to information and legal assistance, as well as regularization of residence status, which are compatible with the requirements of the *Trafficking Protocol* discussed previously.²⁶¹

In relation to compensation, this remedy should be understood as payment for the injury, loss or damage caused by the offender.²⁶² While the *Trafficking Protocol* does not expressly guarantee the right to a remedy for trafficked persons, there was reference to the right to compensation during the drafting process.²⁶³ Regarding

²⁵⁷ Ibid, [20], [21].

²⁵⁸ Ibid, [23].

²⁵⁹ These services are similar to the supportive measures which are required under Article 6(3) of the *Trafficking Protocol* as mentioned above.

²⁶⁰ Ezeilo, above n 130, [40].

²⁶¹ See the *Trafficking Protocol*, arts 6(2)(a), 6(2)(b), 7 – see Appendix 1.

²⁶² Ezeilo, above n 130, [28].

²⁶³ On the issue of compensation for victims of trafficking, a provision was drafted for the *Trafficking Protocol* which would benefit victims of trafficking by providing for the possibility of obtaining compensation from the gains seized or confiscated from trafficking. *Article 5 bis on ‘Seizure and confiscation of gains’* states: ‘States Parties shall take all necessary and appropriate measures to allow the seizure and confiscation of gains obtained by the criminal organisations from the offences covered by this Protocol. The proceeds from such seizure and confiscation shall be used to defray the costs of providing due assistance to the victim, where deemed appropriate by states Parties and

protecting trafficked persons' access to compensation, Article 6(6) of the Protocol requires its state parties to offer trafficking victims 'the possibility of obtaining compensation for damage suffered' in domestic legislation.²⁶⁴ Regarding this, Kneebone and Debeljak assert that the *CTOC* 'imposes stronger and more elaborate protection obligations' than the *Trafficking Protocol*, at least with mandatory terms (but on the premise that trafficked persons are witnesses in criminal proceedings).²⁶⁵ The *CTOC* does not require that victims are guaranteed compensation or restitution, but 'legislative or other measures *must* provide procedures whereby it can be sought or claimed',²⁶⁶ the *Trafficking Protocol* stipulates that:

Legislation will generally be required if appropriate schemes offering *at least the possibility of obtaining compensation* are not already in place. ... The Protocol does not specify any potential source of compensation, which means that *any or all of the following general options would suffice* to meet the requirement of the Protocol.²⁶⁷

In order to facilitate states in establishing procedures for victims' access to compensation or restitution, the Legislative Guide recommends three options, including (i) provisions allowing victims to sue offenders or others for civil damages; (ii) provisions allowing criminal courts to award criminal damages (paid by offenders); and (iii) provisions establishing dedicated funds or schemes whereby victims can claim compensation from the state for injuries or damages suffered as a result of a

as agreed by them, in conformity with individual guarantees enshrined in their domestic legislation.' See *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, above n 170. However, this provision was rejected (on the ground that there was a corresponding article in the Convention that could be applied on a *mutatis mutandis* basis), and its spirit of requiring member states to use that kind of profit to support the assistance and, in particular, compensation for victims was therefore left out. See Gallagher, 'Human Trafficking and the New UN Protocols', above n 68, 991.

²⁶⁴ Gallagher, *The International Law of Human Trafficking*, above n 8, 362.

²⁶⁵ Kneebone and Debeljak, above n 27, 215–6.

²⁶⁶ See *Legislative Guides – Part One*, above n 96, [368].

²⁶⁷ See *Legislative Guides – Part Two*, above n 39, [60] (emphasis added).

criminal offence.²⁶⁸ States merely need to establish one or more of the three options to satisfy the compensation requirement under both the *CTOC* and the *Trafficking Protocol*.²⁶⁹ Even though the *Trafficking Protocol* can — to some extent — be seen as clearer²⁷⁰ than its parent instrument in terms of compensation, it requires only a ‘legal possibility of compensation’ rather than imposing an obligation on states to provide remedies as under the *CTOC*.²⁷¹

At the regional level, the *European Trafficking Convention* approaches the issue of compensation and legal redress for victims of trafficking in a more comprehensive manner than the *Trafficking Protocol*.²⁷² The Convention shows a desire to ensure that victim compensation is actually attainable, requiring its state parties to provide victims with information on relevant court and administrative proceedings, the procedures for victims to obtain compensation and the right of (illegally present) victims to be granted residence permits.²⁷³ Additionally, the Convention requires that victims of trafficking be provided with legal assistance and free legal aid according to states’ national laws so that they may claim their rights.²⁷⁴ In the meantime, the

²⁶⁸ Ibid.

²⁶⁹ See *Legislative Guides – Part One*, above n 96, [369]; *Legislative Guides – Part Two*, above n 39, [60].

²⁷⁰ The Legislative Guide to the *Trafficking Protocol* states that ‘the possibility of obtaining compensation [provided in art 6(6) of the *Trafficking Protocol*] is similar but not identical to the corresponding obligation under the Convention [as provided in art 25(2)]’. The Legislative Guide to the *CTOC* notes that art 6(6) of the *Trafficking Protocol* — which was drafted later than the *Organized Crime Convention* — is clearer and referring to measures that offer victims of trafficking the possibility of obtaining compensation. See *Legislative Guides – Part One*, above n 96, [369]; *Legislative Guides – Part Two*, above n 39, [60].

²⁷¹ Gallagher, *The International Law of Human Trafficking*, above n 8, 362.

²⁷² Ibid 363.

²⁷³ See the *European Trafficking Convention*, art 15(1); *Explanatory Report to the European Trafficking Convention*, para 192.

²⁷⁴ See the *European Trafficking Convention*, art 15(2); *Explanatory Report to the European Trafficking Convention*, para 195.

Explanatory Report to the Convention elaborates on the meaning of compensation, stating that:

The compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced). (...) victims' right to compensation consists in a claim against the perpetrators of the trafficking - *it is the traffickers who bear the burden of compensating the victims*. If, in proceedings against traffickers, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.²⁷⁵

The Explanatory Report to the Convention also stipulates that if victims cannot obtain full compensation from traffickers, states are required to take some steps through their mandate to establish the legal basis, administrative framework and operational arrangements for compensation schemes to guarantee compensation to victims.²⁷⁶ To this end, the report recommends, as examples, setting up compensation funds, measures or programs for victims' social assistance, and social integration funded by assets of criminal origin.²⁷⁷

A review of compensation practices in the UK found that although compensation mechanisms are in place, trafficked persons are rarely receiving compensation payments.²⁷⁸ This situation has been said to be caused by a lack of adequate compensation schemes for victims.²⁷⁹ In the UK, for example, victims of trafficking are provided with some different options to seek compensation, through either

²⁷⁵ *Explanatory Report to the European Trafficking Convention*, para 197.

²⁷⁶ *Ibid*, para 198.

²⁷⁷ *Ibid*.

²⁷⁸ See Office for Democratic Institutions and Human Rights (ODIHR), 'Compensation for Trafficked and Exploited Persons in the OSCE Region' (Report, 2008) including Albania, France, Moldova, Romania, Russian Federation, Ukraine, the United Kingdom and the United States of America.

²⁷⁹ European Commission Experts Group on Trafficking in Human Beings, *Opinion No 7/2010*, above n 14, 5.

criminal or civil proceedings, or labour law procedures.²⁸⁰ However, there has been no standard practice of informing victims of their right to receive compensation.²⁸¹ Additionally, victims of trafficking cannot apply for a compensation order during criminal proceedings, and cooperating with police in any criminal investigation is a condition of eligibility.²⁸² Meanwhile, access to civil remedies seem to be a very challenging issue for trafficking victims, not only because it is a time-consuming process, but also because no attempt has been made by the UK government to make claims for compensation in this context any less complicated or unrealistic.²⁸³

Whilst the *European Trafficking Convention* recognizes the close link between victims' right to remain and the right to compensation, difficulties associated with obtaining a residence permit have, once again, restricted their opportunities to seek compensation. In this sense, simply providing trafficking victims with procedures and resources for compensation, as required by the *Trafficking Protocol*, is clearly not enough to ensure actual access to compensation. In fact, it has been reported that only a small percentage of trafficked persons in European countries are identified as such, and that they are not made aware of their legal rights, including their right to compensation.²⁸⁴ Other trafficked persons are often deported as undocumented migrants without going through the identification process, giving them no opportunity to access compensation.²⁸⁵ Being denied the opportunity to apply for compensation

²⁸⁰ Anti-Slavery International for the Anti Trafficking Monitoring Group, *Wrong Kind of Victim? One Year On – An Analysis of UK Measures to Protect Trafficked Persons* (June 2010), 116
<http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf>.

²⁸¹ Janice Lam and Klara Skrivankova, 'Opportunities and Obstacles: Ensuring Access to Compensation for Trafficked Persons in the UK' (Report, Anti-Slavery International, 2009), 14. See also Anti-Slavery International for the Anti Trafficking Monitoring Group, above n 280, 118.

²⁸² Lam and Skrivankova, above n 281, 15.

²⁸³ Ibid 16, 20.

²⁸⁴ Global Alliance Against Traffic in Women (GAATW), *Alliance News – Material Justice Seeking Compensation in Trafficking Cases* (July 2007) La Strada International, 33
<<http://lastradainternational.org/?main=documentation&document=1318>>.

²⁸⁵ Ibid 37.

on account of a choice not to participate in criminal proceedings, or on account of illegal immigration status, is a very common experience for trafficking victims, at least in the case of those in the UK.²⁸⁶ In the context of trafficking victims in Germany, Romania and Sweden, the opportunity to obtain compensation depends on the nationality of victims and the length of time they reside in the territory of the destination country.²⁸⁷

The situation is similar in Thailand, where the national law provides for victims of trafficking to claim compensation under labour statutes as well as criminal law.²⁸⁸ Under the criminal law, it has been shown that outcomes of criminal court compensation proceedings largely depend on the criminal charges against the traffickers.²⁸⁹ Under labour laws, the codes and procedures for seeking compensation are complex and unfriendly to trafficking victims, even for out-of-court settlements or court orders.²⁹⁰ More important is the tendency of the local police to make no distinction between trafficking victims and other undocumented migrants, meaning that trafficking victims are often charged with illegal entry and deported before they can make a claim for compensation.²⁹¹

²⁸⁶ Lam and Skrivankova, above n 281, 18.

²⁸⁷ *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: Consolidated Information Received from States for the Second Reporting Cycle*, 4th sess, Agenda Items 2 (a), (c), (d), (e), (f), UN Doc CTOC/COP/2006/6/Rev 1 (9 September 2008), [24].

²⁸⁸ See *Anti-Trafficking in Persons Act 2008* (Thailand) BE 2551, s 35; *Labour Protection Act 1998* (Thailand) BE 2541, was passed on 12 February 1998 and entered into force 19 August 1998), [ch 11] <www.thailaws.com/law/t_laws/tlaw0132a.pdf>.

²⁸⁹ GAATW, *Alliance News – Material Justice Seeking Compensation in Trafficking Cases*, above n 284, 25.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.* 23.

3.4 CONCLUSION

For a crime which involves multiple violations of human rights such as trafficking, the fate of trafficked persons should be the most important consideration in anti-trafficking policies, no matter what the perspective of the drafters. Whether that be human rights or criminal justice, protecting the rights and interests of trafficked persons should remain the priority of a protection regime. Accordingly, trafficked persons should be protected and supported from the time that they come to the attention of the competent authorities until their successful social reintegration. Under such a protection regime, trafficked persons should not be considered as a tool of criminal justice imperatives and only deserving protection when they effectively cooperate in investigations and/or prosecution processes. Neither should the protection of trafficked persons be limited to legal proceedings in which these trafficking victims may be involved. In other words, trafficked persons need to be protected and assisted as victims of human rights violations to assist them to recover from the trauma and effects of the trafficking process. They should be restored to their situation prior to the violations, protected from further harm during and after the legal proceedings they may participate in, and supported in their social reintegration process. Additionally, victims of trafficking need to be protected from the vulnerability of being re-trafficked and re-victimized. All of these requirements of a protection regime recall one fact; that the regime needs to be conceived from a human rights perspective in which the rights and interests of trafficked persons are placed in priority position. This is consistent with the protection purpose of the *Trafficking Protocol* alongside its other purposes of preventing trafficking and punishing the traffickers.

Although national anti-trafficking policies are gradually getting better because more attention is being paid to the rights and interest of trafficked persons, the reluctance of states to recognize the status of trafficked persons as both victims of crime and victims of human rights violations because of the heavier 'burden' they represent by virtue of their protection and support needs, remains a big challenge. In addition, protective measures that states provide for trafficked persons (such as reflection periods or residence permits) are heavily reliant on victims' cooperation, while other measures to protect or support victims, apart from in legal proceedings, (such as protection of physical safety, victims' access to information, legal assistance, or access to compensation) may be disregarded within national legislative frameworks.

The discretionary protection regime encouraged by the *Trafficking Protocol* in this respect exacerbates the reluctance of states to see victims as bearers of human rights. It should therefore be seen as imposing minimum standards rather than completely prescribing the protection regime. In the meantime, the international human rights law standards highlighted in this chapter, including the doctrine of state responsibility, the principles of non-criminalisation, non-coercion, and separating protection from victim cooperation should be seen as central to establishing a victim-centred protection regime.

In order to ensure that trafficked persons obtain timely and appropriate protection and assistance, the first and foremost requirement that needs to be guaranteed is a rapid and accurate identification process. However, in practice the complexity and difficulties of identification of trafficked persons have been exacerbated by the dichotomy of trafficked persons and smuggled migrants. Though trafficked persons should be protected as migrant workers (where appropriate) regardless of their immigration status, they are often misidentified as smuggled migrants or undocumented migrants, and therefore denied protection and threatened with immigration detention or legal liability as a result. The concern is that no matter how good the protection regime, trafficked persons tend to be unable to enjoy that protection due to misidentification. This illustrates the importance of accurate identification as the first and most crucial measure for the protection of trafficked persons. For the time being, during the identification process it is necessary for trafficked persons to be supported with initial assistance in the form of a reflection period which, despite not being addressed in the *Trafficking Protocol*, is increasingly becoming an agreed standard in the protection of trafficked persons. Further, being identified as a trafficking victim should guarantee the trafficked persons' immunity from the criminal action arising from immigration status-related offences.

In terms of protective and supportive measures, states are obliged and/or encouraged by international law to provide for victims of trafficking protection and support for their recovery and rehabilitation, their return and social reintegration, and access to remedies. More importantly, these measures need to be incorporated into domestic law in accordance with the requirements of separating protection and assistance from victims' cooperation with the competent authorities, and in accordance with the non-coercion principle. These requirements will ensure that protective and supportive measures serve the rights and interests of trafficked

persons rather than any other purposes. Similarly, in the return and repatriation of trafficked persons, it should be borne in mind that the guarantee of safe and, 'if possible', voluntary repatriation of victims must be applied in the spirit of the *non-refoulement* principle. In other words, in order to effectively protect and assist trafficked persons on a rights-based approach, it requires more than the existence of protection regimes. The substantive content of such regimes must be underpinned by principles that respect and protect trafficking victims' rights and interests as individuals as much as possible.

Chapter 4

The Conceptualisation of Trafficking in Persons in Vietnam – A Review of Literature and Policy

4. 1 INTRODUCTION

Studying the human trafficking issue in Vietnam shows that although it is not new anymore, it remains a 'hot' issue, drawing much attention from Vietnamese society. This can be seen as partly the result of the strong efforts of the government to prevent and combat trafficking. However, the focus of attention on trafficking in Vietnam has seemingly been dominated by the stereotypical image of women, young girls or even children who have been kidnapped or tricked into brothels operating near the borders of Vietnam and neighbouring countries, or within these countries. That is, the problem of internal trafficking is not recognized. As discussed below, policies addressing trafficking in persons in Vietnam have consequently been focused on trafficking in women and children for prostitution, which is seen as a 'social evil'. The evidence, however, indicates that trafficking in women and children for the purpose of prostitution or external trafficking does not represent a complete picture of trafficking in Vietnam.

In light of recognizing the link between trafficking and labour migration issues, the first part of this chapter will investigate the situation of labour migration and related policies in Vietnam. To this end the economic situation of Vietnam and the policy of renovation ('doi moi'), which was introduced in 1986, will be summarized. As has been broadly acknowledged, although it has created undeniable economic development in Vietnam, the renovation policy has also had significant repercussions for society, including the commercialization of agriculture and a shortage of employment for the rural population. This has led to a flow of migration from rural areas to cities within the country, or across borders into other neighbouring countries, both regularly (legally) and irregularly (illegally), in search of employment. The categories of these labour migrants have been unlimited, including males, females and children. Such migrants have sought jobs in any industry — not excluding prostitution — and many of them have ended up in situations of exploitation, including sexual and labour exploitation. In the meantime, the government appears to have focused only on its official policy relating to labour export, and has remained silent with respect to policies on labour migration in general and protecting the rights of migrant workers in particular. This fact, in turn, shows that Vietnamese authorities do not recognize the link between trafficking and labour migration or that perhaps they are reluctant to admit that their nationals are being exploited in other countries.¹

In the second part of this chapter, the overall situation of trafficking in persons in Vietnam will be investigated. The issue of insufficient data and information on trafficking in persons in Vietnam, as in other countries, is the primary obstacle in achieving a real picture of the trafficking situation. Nevertheless, while waiting for improvements in this regard, such statistical obstacles do not constrain authorities to such an extent as to prevent them from recognizing that trafficking in Vietnam goes beyond the ambit of trafficking in women and children for prostitution. Investigations into patterns, routes and processes of trafficking in persons in Vietnam show that trafficking is happening to men, women and children, and for a broad range of purposes not limited to prostitution. From these investigations it can be determined that trafficking for labour exploitation occupies a much larger proportion of the overall problem of trafficking than is currently acknowledged by the authorities. Further,

¹ Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012), 128.

observations of the processes of trafficking in Vietnam indicate that while exploitation arising from recruitment and debt-bondage are reported as common practices, traffickers and their trafficking methods remain a blind spot in the overall picture of trafficking. Moreover, this part of the chapter also examines the role of vulnerability factors such as poverty, gender inequality and the role of family, and shows that while many anti-trafficking initiatives are devoted to the alleviation of these factors, this does not work to protect migrant workers from exploitation at their destinations.

The Vietnamese national response to trafficking, including its National Plan of Action (NPA), its definition of the crime of trafficking, its social evil approach to trafficking and its commitments to international and regional responses, is discussed in the third part of this chapter. This part will illustrate that Vietnamese anti-trafficking policy appears to persist in its narrow focus on trafficking in women and children for prostitution, even though recent new measures (discussed later in this chapter) were intended to cover trafficking in persons as a whole. It will also show that although there has been significant progress in the development of the Vietnamese anti-trafficking legal framework, it still has a long way to go to become a comprehensive framework. While the blurring of the legal concepts of trafficking and smuggling offences may lead to an unexpected dichotomy of trafficked/smuggled persons (as discussed in Chapter 3) and misidentification of trafficked persons, the utilization of a social evil approach does more harm than good to victims, especially in the resultant stigmatization of trafficked women and girls which inhibits their access to protection and assistance.

Alongside the national anti-trafficking policy, commitments to international and regional frameworks, as well as bilateral commitments, are useful sources of information to understand the viewpoint of the Vietnamese government in responding to trafficking. An examination of these commitments again illustrates that the link between trafficking and labour migration discourse has not been recognised and, consequently, legal efforts to reduce legal barriers to movement between countries, as well as measures to protect the rights of migrant workers, remain absent. This chapter will discuss, in particular, the Coordinated Mekong Ministerial Initiative against Trafficking (known as the 'COMMIT' process)² as an example of a regional,

² The Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) is a process that was initiated by the Governments of the Greater Mekong Sub-region in late 2003 to combat human

progressive anti-trafficking initiative especially in terms of its focus on victims' rights and the role of migration and labour policies in anti-trafficking responses. This framework may serve as a pertinent example for the tendency of regional progressive commitments to overshadow efforts at the national level in responding to the trafficking issue.

4.2 THE CONTEXT OF TRAFFICKING IN VIETNAM

4.2.1 The economic situation in Vietnam

The Socialist Republic of Vietnam, located in South-East Asia, is a country of more than 331 thousand square kilometres, with a population of nearly 86 million³. While its eastern and southern borders face the Pacific Ocean, Vietnam shares its northern border with China, and is bounded by Laos and Cambodia to the west. After a long period under French colonial rule, followed by the civil and American-led wars,⁴ Vietnam was one of the poorest countries in the world.⁵ After the country was fully reunited in 1975,⁶ Vietnam focused all its efforts on rebuilding the political regime,

trafficking in the sub-region. See United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), Social Development Division (SDD), 'Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices' (Report, November 2003); Susu Thatun, 'Mekong Sub-region Committed to Ending Trafficking' (2006) 25(2) *Forced Migration Review* 20.

³ For more information, see the website of the United Nations Vietnam:

<http://www.un.org.vn/en/about-viet-nam/basic-statistics.html> (accessed at 18 March 2011).

⁴ See, eg, Carlyle A Thayer, *War by Other Means: National Liberation and Revolution in Viet Nam 1954-60* (Allen & Unwin, 1989); David G Marr, 'The Vietnam Wars, 1945-1990' (1993) 62(3) *Pacific Historical Review* 394.

⁵ Christina Cacioppo (ed), 'Can Tho City, Hau Giang Province, and Tay Ninh Province in Southern Viet Nam – The Situation of Migration and Trafficking of Children and Women: A Rapid Assessment' (Report, ILO Mekong Sub-regional Project to Combat Trafficking in Women and Children, September 2006), 20.

⁶ This related to the end of the American war and the country's reunification after the fall of the Saigon regime in April 1975. See further in United Nations High Commissioner for Refugees (UNHCR),

and addressing socio-economic, cultural and other issues faced by the fledgling government. Prior to the introduction of the 'doi moi' in 1986, Vietnam had a highly centralized economic system following the model of a Soviet command economy.⁷ The government carried out the nationalization of land and its subsequent redistribution. Industry and other economic activities were brought under state and collective ownership.⁸ In 1986, Vietnam put forward the renovation policy, which was directed to the substantial internal transformation from a centralized command economy toward 'a market system, privatization and the use of market-based means for macroeconomic management', as well as a strategy for growth oriented to (seeking) foreign direct investment and trade liberalization.⁹

The 'doi moi' policy created rapid growth in Vietnam's economy in almost every sector, including agriculture, industrial production and construction, housing, exports and foreign investment. It was reported that under 'doi moi', Vietnamese economic growth averaged six to seven per cent annually and living standards rose across the country between 1990 and 1997.¹⁰ The reforms led to the increased commercialization of agriculture and the replacement of labour with capital inputs. However, 'doi moi', with its concentration on the manufacturing and industrial sectors in cities rather than the agriculture sector in rural areas, did not address the underdevelopment of rural areas where 45 per cent of the population lives in poverty

'Statistics Concerning Indo-Chinese in East and Southeast Asia' (Report, 1992); See also Carlyle A Thayer, 'Ending the Vietnam War', (1977) 1(2) *Asian Studies Association of Australia Review* 58.

⁷ See, eg, Adam Fforde and Stefan De Vylder, *From Plan to Market: The Economic Transition in Vietnam* (Westview Press, 1996); Adam Fforde, 'Economics, History and The Origins of Vietnam's Post-War Economic Success' (2009) 49(3) *Asian Survey* 484; Brian Van Arkadie and Raymond Mallon, *Viet Nam: A Transition Tiger?* (Asia Pacific Press, 2003).

⁸ See, eg, Adam Fforde and Anthony R Goldstone, *Vietnam to 2005: Advancing on All Fronts* (Economist Intelligence Unit, 1995).

⁹ Anh Nguyen Dang, 'Forced Migration in Vietnam: Historical and Contemporary Perspectives' (2006) 15(1) *Asian and Pacific Migration Journal* 159, 160. See also Adam Fforde, 'Contemporary Vietnam: Political Opportunities, Conservative Formal Politics, and Patterns of Radical Change' (2011) 3(2) *Asian Politics & Policy* 165.

¹⁰ Cacioppo, above n 5, 20.

and one-fifth of the population is considered 'surplus labour', resulting in high rates of under- and unemployment.¹¹ This uneven development of rural and urban areas has encouraged a flow of migration from villages to cities in Vietnam.¹² It has also been argued that the loosening of state control over much of the economic sector in the aftermath of 'doi moi' has facilitated the commercialization of agriculture, the release of the rural workforce and their movement to urban areas.¹³ Together with 'the opening economic system that is no longer locally confined, but which is regionally and nationally inter-linked', and people's increasing awareness of income generating opportunities through migration behaviour, the migration of people has expanded from the countryside to the cities as well as across borders.¹⁴

4.2.2 Labour migration and policy in Vietnam

4.2.2.1 Labour migration from and within Vietnam

Migration is not an unknown phenomenon to Vietnam, as the movement of people and relocation of certain population groups was introduced and assisted by the State from the 1980s through to the early 1990s under the policy of the highly centralized economy.¹⁵ Under different programs these redistributions of population aimed to deal with the great disparities between labour supply and natural resources in some areas, reducing population pressure in the densely populated provinces and urban centers, as well as strengthening national defence and security.¹⁶ Further, from 1981

¹¹ According to 1999 World Bank's research, approximately nine million Vietnamese, 17 percent of the working-age population, are openly unemployed, and up to 16 million Vietnamese, another 43 percent of the workforce, are underemployed. See more in *ibid* 20, 21.

¹² *Ibid* 21.

¹³ See Dang, above n 9, 160.

¹⁴ See *ibid*.

¹⁵ *Ibid* 163; Veronique Marx and Katherine Fleischer, 'Internal Migration – Opportunities and Challenges for Socio-Economic Development in Viet Nam' (Report, United Nations in Vietnam, 2010), 20, 24.

¹⁶ Dang, above n 9, 163.

Vietnam started to send migrant workers abroad,¹⁷ firstly to former Eastern bloc countries in Europe, then to some other destinations such as Iraq, Algeria, Germany, Bulgaria and Czechoslovakia, as well as to new destinations in the Middle East and Asia in the early 1990s.¹⁸

Alongside the above state-planned migration,¹⁹ since the 1990s there has been an increasing number of people migrating from and within Vietnam outside of government planning. Often referred to as ‘spontaneous’ migrants,²⁰ there are also short-term, seasonal migrants who tend to find jobs in agriculture, such as gardening, fishing, rice harvesting or tending, who return home after a few months, as well as long-term migrants who are often unskilled workers working in food services (such as restaurants and coffee shops), entertainment (such as karaoke bars, massage parlours and prostitution), construction or factories.²¹ The directions of these flows of ‘unorganized’ internal migration are not limited to movements from rural to urban areas, but also include rural to rural and urban to urban migration.²²

‘Spontaneous’ or ‘unorganized’ labour migration flows from Vietnam direct to other countries in the Greater Mekong Subregion (GMS), also followed the economic boom

¹⁷ Nicola Piper, ‘Gender and Migration Policies in Southeast Asia – Preliminary Observations from the Mekong Region’ (Paper presented at the Southeast Asia’s Population in a Changing Asian Context, Siam City Hotel, Bangkok, Thailand, 10–13 June 2002), 9.

¹⁸ See Anh Nguyen Dang, ‘Labour Migration from Viet Nam: Issues of Policy and Practice’ (Working Paper No 4, International Labour Migration (ILO) Asian Regional Programme on Governance of Labour Migration, January 2008), 2; Piper, above n 17, 9.

¹⁹ Marx and Fleischer, above n 15, 24.

²⁰ Ibid 6, 24.

²¹ Quy Thi Le, *Prevention of Trafficking in Women in Vietnam* (Labour and Social Affairs Publishing House (Hanoi, Vietnam), 2000), 59; Cacioppo, above n 5, 21–2.

²² Marx and Fleischer, above n 15, 26. In this document, it has been reported that there were more internal migrations to rural areas than urban areas at least for a period of time. Accordingly, rural – rural migration in Vietnam involves the movements of people from low agricultural productivity areas to high productivity areas, for example from the densely populated Red River Delta in Northern Vietnam to Central Highland areas.

in Thailand in the late 1990s, that led to the new sub-regional phenomenon of large-scale labour migration.²³ Although the exact magnitude of the flow of labour migration from Vietnam in this period is unknown, it can be ascertained that workers and tradesmen migrated to Cambodia, Lao PDR and border areas of the People's Republic of China (PRC).²⁴ As has been reported, Vietnamese low-skilled workers primarily migrated to the Guangxi Zhuang Autonomous Region and Yunnan province of the PRC, while medium- and/or high-skilled workers and business persons migrated to work in small businesses and fishing or construction industries in Cambodia and Lao PDR.²⁵ Furthermore, many Vietnamese unskilled women migrated to the southern border provinces of the PRC to become wives or to work in the sex industry, as many others did into Cambodia.²⁶

Notably, the proportion of female migrants has increased over time, both on routes of internal migration and out of the country.²⁷ It has been reported that the number of women moving to urban areas and industrial zones has begun to exceed the number of men undertaking such migration as a result of the high demand for female workers in the rapidly developing industrial areas.²⁸ Meanwhile, more and more women migrants are alleged to have gone to Malaysia and Taiwan (China) to work, in response to the demand for Vietnamese female migrant workers within these

²³ Kneebone and Debeljak, above n 1, 67.

²⁴ Asian Development Bank (ADB), 'Migration in the Greater Mekong Subregion: A Background Paper for the Fourth Greater Mekong Subregion Development Dialogue' (Report, 5 May 2009), 12.

²⁵ See Piper, above n 17, 9; ADB, above n 24, 12, 14–15; Ana Revenga, 'Labour Migration in the Greater Mekong Sub-region – Synthesis Report: Phase I' (Report, Institute for Population Studies and Research, Mahidol University, November 2006), 29.

²⁶ See Annuska Derks, 'Trafficking of Vietnamese Women and Children to Cambodia' (Report, International Organization for Migration (IOM), 1998); Piper, above n 17, 9; Zhixiong He, 'Migration and the Sex Industry in the Hekou – Lao Cai Border Region between Yunnan and Vietnam' in Thomas E Blair (ed), 'Living on the Edges: Cross-Border Mobility and Sexual Exploitation in the Greater Southeast Asia Sub-region' (Report, Southeast Asian Consortium on Gender, Sexuality and Health, 2006) 1, 30–1.

²⁷ Cacioppo, above n 5, 22.

²⁸ Marx and Fleischer, above n 15, 23.

economies during this period. Dang describes this trend of the feminization of migration as 'irreversible' in the large scale employment of migrant workers in areas such as the service and manufacturing sectors.²⁹ This feminization of migration has also been recognized in the segment of migrant workers who are sent overseas in labour export programs, of which nearly 45 per cent are female workers.³⁰

With the magnitude of labour migration within and from Vietnam increasing, there has also been a correlative increase in instances of migrant workers being abused or exploited at their destinations. Migrant workers who have travelled abroad as exported labour, despite their legal status as migrant workers, have commonly faced long working hours, intensive labour, hard working conditions and a lack of occupational safety equipment.³¹ It has been reported that after signing labour contracts, workers have been unable to leave their jobs or change their place of employment even when they face poor working conditions, low or unpaid wages, or inhuman treatment.³² Research has shown that Vietnamese migrant workers in Korea are particularly vulnerable to abuse and exploitation, including 'verbal abuse and violent language, being attacked or punished physically, body search although they are female workers, or prohibition to leave their workplace'.³³ Migrant workers suffering from socio-psychological problems and trauma has also been reported in numerous cases.³⁴ Non-payment of wages is another common problem for migrant workers even though migrants' monthly salary rates are specified in their labour contracts. Many migrant workers have to accept under- or non-payment of wages due to their fear of being deported or returning home jobless and imposing heavy financial burdens on their families.³⁵ The fact that migrants do not speak the local

²⁹ Dang, 'Labour Migration from Viet Nam', above n 18, 7.

³⁰ Piper, above n 17, 9.

³¹ Dang, 'Labour Migration from Viet Nam', above n 18, 10.

³² Ibid 7.

³³ Ibid 9.

³⁴ Ibid 10.

³⁵ Ibid 9. The article also cited a report conducted by the Malaysian Trade Union Council (MTUC) which revealed that in 600 case files opened involving 1,200 international migrants, the top violation

language and are not protected by the laws of their destination countries exacerbates their vulnerability to abuse and exploitation.³⁶ Moreover, Vietnamese workers may have breached their labour contracts in the search for higher paying jobs, and hence be residing illegally in the country of destination.³⁷ All these factors leave migrant workers vulnerable to exploitation.

‘Spontaneous’ internal migrants, besides being vulnerable as a result of having left their original community, are rendered even more vulnerable by their inability in many cases to access basic services and attain adequate living conditions, by the differential treatment they receive in the labour market, and the social stigma attached to them.³⁸ Many migrant workers experience discrimination, with their average incomes much lower than those of non-migrants in the same sector.³⁹ Many others also work without formal labour contracts, which places them outside the protection of labour laws and renders them subject to low-security or lower-paid work, without access to social services or health and employment insurance.⁴⁰ This is not to mention some particularly vulnerable groups of the migrant population such as migrant children, women migrants or migrant families with children, who are often excluded from formal support structures due to restrictive policies. Additionally, those who migrate to work in the sex industry or child labourers are more vulnerable due to the illegality of their work or because of their young age.⁴¹ More importantly, migrant workers are as a whole more vulnerable to abuse and exploitation at their

of labour rights during the period 2000 – 2005 was non-payment of wages, followed by unfair dismissal. The debt incurred by the workers or their families because they were required to pay for the service fees of labour export and a large deposit amount of money to the labour export enterprises to guarantee their fulfilment of the obligations of the labour contract’: at 4.

³⁶ Ibid 8.

³⁷ Ibid 7.

³⁸ Marx and Fleischer, above n 15, 28.

³⁹ Ibid 29.

⁴⁰ Ibid 7, 29–30.

⁴¹ Ibid 7, 30–2.

destinations because they are likely to be excluded or inadequately considered in the host government's policies.⁴²

4.2.2.2 Labour migration policy – internal and external

With regard to internal migration, while Vietnam used direct policy interventions to redistribute populations and redirect migration away from the major cities in the 1980s,⁴³ the government has discouraged migration from rural areas to urban centres, particularly to major cities, in order to control population growth in these cities.⁴⁴ However, while there are several ministries involved in the management of some aspects of internal migration — such as the Ministry of Agriculture and Rural Development (MARD), which is responsible for (only) state-organized migration, and the Ministry of Public Security (MPS), which deals with household registration of people who migrate — the management of internal migration in Vietnam is not specifically assigned to any one government ministry. The Ministry of Labour, Invalids and Social Affairs (MOLISA), which is charged with the administration of labour and employment (and is thus particularly involved in the area of labour migration) does not have any specific plan or policy tailored to the needs and risks of spontaneous economic migrants.⁴⁵

The Vietnamese governments' Socio-Economic Development Programme 2001 – 2010⁴⁶ explicitly mentions internal migration but with the aim of reducing spontaneous migration rather than providing a framework for the protection of migrants. Moreover, migrants are stigmatized under Vietnamese policy as bringing more negative consequences to development and society, and are particularly perceived to be the cause of social evils such as HIV infection.⁴⁷ Consequently, there

⁴² Ibid 7.

⁴³ Dang, 'Forced Migration in Vietnam', above n 9, 163–4.

⁴⁴ Ibid 163.

⁴⁵ Marx and Fleischer, above n 15, 17.

⁴⁶ Ibid 16.

⁴⁷ See Communist Party of Vietnam Central Committee, *Strategy for Socio-Economic Development 2001 – 2010*, presented by the Central Committee, 8th Tenure to the 9th National Congress (2001),

are no measures to ensure that migrants have access to basic social services or that their rights will be equally protected in Vietnam.⁴⁸ Rather, spontaneous migration is regulated by applying administrative restrictions or various kinds of isolation policies to migrants and their families.⁴⁹ This practice is clearly at odds with Vietnam's commitment to protect its citizens under the provisions of its Constitution and under the provisions of several signed and ratified international legal instruments and declarations which are relevant to internal economic migrants, including the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁵⁰ and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*.⁵¹

Of the government's policies which adversely affect internal migrants and their rights, the most significant is the 'ho khai', or household registration system, which 'records and restricts changes in people's residency by classifying households into different

cited in Marx and Fleischer, above n 15, 17; General Assembly of the Socialist Republic of Vietnam, *Five Year Socio-Economic Development Plan 2006 – 2010*, Resolution No 56/2006/QH11, Term XI, 9th sess (2006), cited in Marx and Fleischer, above n 15, 17.

⁴⁸ Marx and Fleischer, above n 15, 6, 17.

⁴⁹ Paula Frances Kelly and Duong Bach Le, 'Trafficking in Human from and within Vietnam: The Known from a Literature Review Key Informant Interviews and Analysis' (Report, International Organization for Migration, 1999). Particularly, internal migrants would face some kinds of restrictions because of their status as migrants, such as difficulties in registering with the household registration system (this is compulsory for every citizen), in legalizing their ownership of property such as houses and vehicles, and in registering their children for public schooling, etc.

⁵⁰ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'). Vietnam acceded this Covenant on 24 September 1982 (information available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-3&chapter=4&lang=en), accessed on 8 Mar 2012).

⁵¹ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW'). Vietnam became a signature of this Convention on 29 July 1980 and ratified it on 17 February 1982 (information available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8&chapter=4&lang=en#1) accessed on 8 Mar 2012).

categories that provide differential entitlements, such as the ability to access basic services'.⁵² In Vietnam, household registration is required for access to almost all basic administrative procedures, including motorbike registration, purchasing land, building a house, applying for employment, accessing subsidized medical care, and receiving water and electricity services.⁵³ While people who are registered as permanent residents in the place they reside have full entitlements to government services, temporary residents must pay if they want to use these services.⁵⁴ This has created discrimination against migrants and rendered them more vulnerable to the risk of exploitation in their destination communities. In this regard, the introduction of the new *Law on Residence* in 2006, which reduced the number of residence categories⁵⁵ and relaxed some conditions for obtaining permanent residency, can be

⁵² Marx and Fleischer, above n 15, 6. The authors explain the household registration system is one of the population control measures which were applied in the wartime period as well as in rationing procedures of the central planned economy after the war in Vietnam, to restrict urbanization and mobility. In those periods, this system appeared to be effective in managing population movements due to it was in close links to the government's regime of subsidies, and rations of certain basic necessities and services. There were four categories of residents in this system: the first category was permanent residents (labelled with 'KT1' status) who were entitled to full residential rights (including permission to buy land-use rights, ability to access schools and medical services within their place of residence); the second category was for those who moved to a different district in the same province (labelled with 'KT2' status) with a more limited residential rights, such as they were limited to schooling and other social services in the district where they registered; 'KT3' status was for people who registered in one province but resided in another (people with 'KT3' status generally held a temporary residence permit of 6 to 12 months which could be renewed quite easily, but 'KT3' status residents have more limited rights in comparison with those of 'KT2' status people); 'KT4' category is for individuals without a family, who could not purchase land-use rights nor access certain social services. Accordingly, a migrant who lives in a place for 30 days or more must register their temporary status with the local police and it is not easy to change residential status, especially from a temporary to a permanent one.: at 17.

⁵³ Ibid 17.

⁵⁴ Ibid.

⁵⁵ These 2 categories include temporary and permanent residents. See *Law on Residence 2006* (Vietnam) No 81/2006/QH11, was passed by the Vietnamese National Assembly 11th Legislature, 10th session on 29 November 2006 and entered into force 1 July 2007), chs III, IV [Ministry of

seen as a promising step. However, the recent re-emergence of a tendency towards strengthening restrictions on migrants seeking residence registration in large cities shows that Vietnamese policy makers do not fully recognize their obligation to protect the rights and interests of migrants.⁵⁶

The fact that the Vietnamese government has not taken adequate interest in the migration of their nationals is not just only apparent in their policy on internal labour migration, but also in that on labour migration from Vietnam. The main focus of the national policy is on labour export, which is seen as an effective way to ease the pressure of domestic under- and unemployment, as well as to increase the inflow of remittances and national revenue.⁵⁷ It can be said that the 'strong interventionist approach'⁵⁸ towards labour export activities as prominent under the labour cooperation scheme of the Vietnamese policy in the period of 1980s – 1990s has

Justice trans]

www.vbqppl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3710
>.

⁵⁶ In the initial draft of the Capital Law in early 2010, it was proposed to tighten the requirements on the eligibility for permanent residency in Ha Noi. This suggestion was eventually (and fortunately) dropped from the draft. See Marx and Fleischer, above n 12, 17. In another case, in Resolution No 23/2011/NQ-HDND of the People's Council of Da Nang city, approved on 23rd December 2011, Article 1 item 3 point 9 provides for halting the new household registration for immigrants. According to this, immigrants who move from other areas of Vietnam to Da Nang city will not be allowed to register for permanent resident status, in order to restrict the immigration that leads to the 'overloaded situation' in the city. They believe that the flows of immigrant are threatening the management of the city, especially the social order and security. See Dong Nguyen, 'Da Nang siet ho khau voi nguoi nhap cu', VNExpress (online), 24 December 2011 <<http://vnexpress.net/gl/xa-hoi/2011/12/da-nang-siet-ho-khau-voi-nguoi-nhap-cu/>> [author's trans: 'Da Nang tightens household registration to immigrants']; Thai Son, 'Hang loat noi dung trai luat trong nghi quyet cua HDND TP Da Nang', Thanh Nien (online) 29 February 2012 <www.thanhvien.com.vn/pages/20120229/hang-loat-noi-dung-trai-luat-trong-nghi-quyet-cua-hdnd-tp-da-nang.aspx> [author's trans: 'Many contents contrary to the law in the Resolution of the People's Council of Da Nang city'].

⁵⁷ Dang, 'Labour Migration from Viet Nam', above n 18, 2.

⁵⁸ Piper, above n 17, 8.

gradually been loosened.⁵⁹ It can be clearly observed that Vietnam has changed to a system of labour export which is based on commercial activities by 'sending companies', mainly including employment agencies and public affairs organisations since 2000s.⁶⁰ The government, represented by the Department of Overseas Labour Management (DOLM), established under the MOLISA, is in charge of negotiating and signing labour export agreements with other governments,⁶¹ as well as granting licenses to qualified 'sending companies' (which are in charge of recruiting labour) and supervising their operations.⁶² Importantly, these 'sending companies' are responsible for providing the information on the numbers of arriving workers to

⁵⁹ It can be observed that in the period of 1991 – 1999, the license to dispatch workers for overseas employment was given to state owned agencies; then, from 2000 to date, the license has been issued as business activities to the so-called manpower supply agencies (or sending companies) which can be from other economic sectors. See Consular Department, Ministry of Foreign Affairs of Viet Nam, 'Review of Vietnamese Migration Abroad' (Report, 2012).

⁶⁰ Ibid 17.

⁶¹ Viet Nam has signed labour cooperation conventions and agreements with Bahrain, Bulgaria, Canada, Chinese Taipei, the Czech Republic, Japan, Kazakhstan, Lao People's Democratic Republic (PDR), Malaysia, Qatar, Russia, Slovakia, South Korea and the United Arab Emirates (UAE). Several relevant ministries and agencies of Vietnam have also signed bilateral cooperation agreements with a number of African countries to send them specialists/professionals to work in the fields of education, health and agriculture - top priority areas for authorities there. See also *ibid* 18.

⁶² See Cacioppo, above n 5, 25; Dang, 'Labour Migration from Viet Nam', above n 18, 3–4.

Vietnamese missions abroad and Labour Management Boards,⁶³ appointing representatives to manage and protect the interests of Vietnamese workers abroad.⁶⁴

In reality, the process of applying for an overseas job using labour export channels has often been assessed as involving 'high fees, complicated procedures and overwhelming bureaucracy'.⁶⁵ Further, the licences for exporting labour in Vietnam are alleged to be granted to unqualified and/or irresponsible enterprises who then resell quotas to brokering networks.⁶⁶ While the government has expressed concerns about the involvement of brokers and/or traffickers if they were to privatize labour export activities,⁶⁷ it is a matter of fact that a Vietnamese worker cannot get an overseas job without the involvement of the brokering networks.⁶⁸ These brokers visit households and spread information about work opportunities overseas and (even) 'mak[e] prices'⁶⁹ for their services, instead of providing workers with necessary

⁶³ Which are established in countries where there are great numbers of Vietnamese workers, including Malaysia, Japan, Korea, Chinese Taipei, China, United Arab Emirates (UAE), Qatar, Libya and the Czech Republic. See Consular Department, above n 59, 30.

⁶⁴ See, eg, the *Law on Vietnamese Guest Workers 2006* (Vietnam) No 72/2006/QH11, was passed by Vietnamese National Assembly 11th Legislature, 10th session on 29 November 2006 and entered into force 1 July 2007, arts 27(2), 30, 33, 38(2) [Ministry of Justice trans] <http://www.vbqpl.moj.gov.vn/vbpq/en/Lists/vn%20bn%20php%20lut%20/View_Detail.aspx?ItemID=3788>. It should be noted that the failures in protecting and supporting the rights of Vietnamese migrant workers abroad are being mainly blamed on these sending companies which do not strictly follow the regulations. See also Consular Department, above n 59, 30, 55.

⁶⁵ Cacioppo, above n 5, s 4.1.2.

⁶⁶ Piper, above n 17, 9.

⁶⁷ Dang, 'Labour Migration from Viet Nam', above n 18, 14.

⁶⁸ Ibid 12.

⁶⁹ Normally, the workers are required to pay a number of service fees and a large deposit amount of money to the labour export enterprises to guarantee their fulfillment of the obligations of the labour contract. However, in case of using the brokering services, the workers even have to pay higher for the intermediate commission. For instance, a worker possibly has to pay US\$5,000-6,000 of brokerage fee in hope of securing a place. In another instance, some workers had to pay not less than US\$10,000/person to brokers to go to Japan. See *ibid* 3-4, 12-13.

information about the demands of the labour market as well as the real situation at destinations.⁷⁰ As a consequence, some workers become deeply indebted prior to departure due to the excessive fees requested by brokers, rendering them highly vulnerable to labour exploitation in destination countries where they are required to satisfy the debt.⁷¹ In the meantime, lacking the necessary information about the circumstances in destination countries (such as laws and cultures), about the rights and duties of employers as well as of labourers, it is challenging for migrant workers to integrate into their new working environment and to be protected from exploitative working conditions and other abuses.⁷² In practice, these shortcomings lead to practical troubles for Vietnamese exported labourers in destination countries as abovementioned, such as violations of their rights as workers by employers, or the workers themselves breaching contracts and deserting employment positions to escape exploitation.⁷³ Further it is reported that Vietnamese workers have been dismissed following accidents and have had to choose to work illegally with a strong fear of being expelled.⁷⁴

Seeing these problems purely as cases of recruitment agencies violating government regulations on recruitment procedures,⁷⁵ the government has been urged to apply tougher screening processes in their licensing activities, as well as to monitor the practices of recruitment companies after licensing.⁷⁶ In the meantime, the national policy illustrates the government's persistent focus on expanding the benefits of labour export rather than protecting their nationals throughout this process. Under the law enacted in 2006 for the regulation of Vietnamese labour working overseas under contracts, local placement agencies were generally encouraged to better meet the needs of foreign labour markets and expand the benefits from labour export. In order

⁷⁰ Ibid 3, 12–13.

⁷¹ Ibid 12–13.

⁷² Ibid.

⁷³ Ibid 8.

⁷⁴ Ibid.

⁷⁵ Ibid 13.

⁷⁶ Piper, above n 17, 10.

to reduce workers' vulnerability in destination countries, the law requires workers to take language, cultural and vocational training before they are sent overseas.⁷⁷ However, while requiring workers to equip themselves with this knowledge,⁷⁸ the law does not provide for any measures that would facilitate this learning. Meanwhile, the law refers to reinforcement and punitive measures applicable not only to unlicensed recruitment agencies, but also to workers, with the expectation of reducing and/or terminating the incidence of runaway Vietnamese workers.⁷⁹ While workers must deposit a large amount of money to guarantee their fulfilment of labour contracts,⁸⁰ imposing a harsh penalty is not a logical way to prevent them from breaching the contract overseas, but rather exacerbates their vulnerability to exploitative situations.

No reciprocal effort in terms of legislation protecting the rights of Vietnamese labour migrants in other countries has been observed even though there have been labour cooperation agreements which appear to focus on setting the conditions for Vietnamese nationals to work in these countries rather than establishing the legal protection framework for them while they are abroad.⁸¹ In the meantime, there have also been some strict standards imposed by receiving countries that make it even harder for the legal labour migration of Vietnamese migrant workers, especially those in the low-skilled segment.⁸² It should also be noted that Vietnam is not yet a

⁷⁷ *Law on Vietnamese Guest Workers 2006*, (Vietnam) No 72/2006/QH11, art 42.

⁷⁸ *Ibid*, art 45(2).

⁷⁹ *Ibid*, art 45(6); see also Dang, 'Labour Migration from Viet Nam', above n 18, 14.

⁸⁰ *Law on Vietnamese Guest Workers 2006*, (Vietnam) No 72/2006/QH11, art 23.

⁸¹ See Revenga, above n 25, 64. But see Consular Department, above n 59, 18.

⁸² For example, South Korea introduced the Employment Permit System (EPS) in 2004 which requires that workers must pass the Korean language test before being listed online for recruitment by employers. For many rural labourers, this criterion is quite difficult that leads to the limited access to the EPS and the resort to illicit channels to go overseas with very high costs and many risks involved. It has also been alleged that once selected under this program, the workers cannot leave their jobs nor change their places of employment even when they face poor working conditions, low or unpaid wage, or inhuman treatment. Vietnamese migrant workers in South Korea are also required to renew their contracts each year with their employers and thus becoming subordinated to the will of their employers, making the protection of labour rights impossible. Even though it is said that the EPS

signatory of the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*⁸³ which can be seen as the international standard for addressing violations of rights of migrant workers abroad.⁸⁴ In this sense, it can be said that Vietnamese policy on exporting labour is challenged in terms of its approach to migrant workers as exports or commodities more than bearers of human rights.

Additionally, while the demand for Vietnamese female migrant workers, as well as the feminization of labour migration, has concomitantly increased,⁸⁵ Vietnam has maintained a policy of labour export that is gender-insensitive.⁸⁶ Indeed, Vietnam's policy on exporting labour has no gender-specific provision to protect the rights and interests of female migrant workers.⁸⁷ Notably, there is even the view that married women are better candidates for labour export since 'married women eventually return' to their families in Vietnam.⁸⁸ By contrast, it is relevant to note here that during the 1990s, female workers were banned from engaging in labour contracts for

program would help reduce the contract breaking situation and illegal work and residence in the Republic of Korea, in reality, Vietnamese workers continue to breach their labour contracts in search for higher paying jobs, and hence reside illegally in this country. See Consular Department, above n 59, 25; Dang, 'Labour Migration from Viet Nam', above n 18, 7.

⁸³ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) ('*Migrant Workers' Rights Convention*').

⁸⁴ It has been argued that Vietnamese government is reluctant to participate in the *Migrant Workers' Rights Convention* due to the fear of endangering established markets for its surplus labour and that the focus is on expanding the trade of international labour migration. See Dang, 'Labour Migration from Viet Nam', above n 18, 15.

⁸⁵ Ibid 3.

⁸⁶ Consular Department, above n 59, 55, 58.

⁸⁷ Ibid; Dang, 'Labour Migration from Viet Nam', above n 18, 15.

⁸⁸ Piper, above n 17, 10.

working overseas as domestic helpers or entertainers.⁸⁹ Although restrictions have gradually loosened in the domestic help sector, those in the entertainment sector remain.⁹⁰ If these bans can be used as evidence of the government's concern about the possibility of Vietnamese women being exploited in other countries, then it is clearly inconsistent in its concern. This fact shows that whilst the Vietnamese government will act to protect women from potential trafficking or 'social evil', they are less concerned about exploitation of women in other contexts, particularly in labour migration.

While the government concentrates on labour export activities, with limited quotas for qualified workers who meet the requirements of labour markets with specific needs outside the region,⁹¹ they overlook the potential of labour migration from Vietnam to its neighbouring countries. As aforementioned, flows of unskilled or low-skilled workers from Vietnam to other GMS economies are mostly irregular since the government has not taken much interest in facilitating legal channels for these movements.⁹² Furthermore, these irregular movements are often considered in the context of a traditional security discourse, with many restrictions or bans to prevent them from migrating.⁹³ Without (at least) a passport with a visa (or other equivalent legal document, including that which may be required for certain types of

⁸⁹ See *ibid* 9; Anh Nguyen Dang, 'Labor Emigration and Emigration Pressures in Transitional Vietnam' in Robyn R Iredale, Charles Hawsley and Stephen Castles (eds), *Migration in the Asia Pacific: Population, Settlement and Citizenship Issues* (Edward Elgar Publishing, 2003) 169.

⁹⁰ Piper, above n 17, 9.

⁹¹ See ADB, above n 24, 18; Dang, 'Labour Migration from Viet Nam', above n 18, 7. It has also been reported that many undocumented migrants from southern of Vietnam prefer Cambodia and Malaysia because of these countries' factories seeking unskilled labourers. See also Cacioppo, above n 5, s 4.1.2. citing Kelly and Le, above n 49.

⁹² Amongst GMS countries, Lao PDR is the only state signed labour cooperation agreement with Vietnam. See ADB, above n 24, 12, 14–15; Revenga, above n 25, 29; Consular Department, above n 59, 16.

⁹³ Piper, above n 17, 10.

migration),⁹⁴ a Vietnamese migrant worker can easily become illegal at destination and subject to criminal or administrative sanctions or exploitation/abuse. As is broadly acknowledged, these legal barriers work to exacerbate the vulnerability of irregular labour migrants to exploitation at their destinations rather than targeting smugglers/traffickers and/or ensuring 'border' security. Nevertheless, the Vietnamese government seems not to recognize that legal barriers to migration do more to render movements clandestine through, among others, smuggling or trafficking processes.⁹⁵

In short, Vietnam does not have a coherent approach towards labour migration because of the dichotomies that differentiate between labour movements according to their destination, the motivation of migrants and the involvement of the

⁹⁴ See the *Government Decree 136/2007/ND-CP on Vietnamese Citizens' Exit and Entry* (Vietnam) 17 August 2007, art 3 [Ministry of Justice trans]

<http://vbqpp1.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3370

>. Accordingly, Vietnamese nationals who want to exit Vietnam are required to have a visa appropriate with their purposes by applying with the Vietnamese authorities at the Department of Justice. See also Cacioppo, above n 5, s 6.2.2.

⁹⁵ See *ibid* 12–13; International Labour Organization, International Programme on the Elimination of Child Labour (ILO-IPEC), 'Labour Migration and Trafficking within the Greater Mekong Subregion' (Proceedings of Mekong Sub-regional Experts Meeting and Exploratory Policy Paper, ILO, 2001), 37 <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_bk_pb_11_en.pdf>, citing Philip Guest, 'The Dynamics of Internal Migration in Viet Nam' (Discussion Paper No 1, United Nations Development Programme (UNDP), 1998) for a recent and comprehensive examination of migration in Vietnam. In the meantime, Phil Marshall argues that the lack of freedom of movement of labour could be seen as an important causal factor of trafficking in the subregion, contributing to the fact that 'half of the migrants are irregular'. See Phil Marshall, 'Globalization, Migration and Trafficking: Some Thoughts from the South-East Asian Region' (Occasional Paper No 1, United Nations Inter-Agency Project on Human Trafficking (UNIAP), September 2001), 7, 12 <http://www.childtrafficking.com/Docs/marshall_uniap_mekong_2001_.pdf>. See also Anh Nguyen Dang, 'Cross-Border Migration and Sexuality in Vietnam: Reality and Policy Responses' in Thomas E Blair (ed), 'Living on the Edges: Cross-Border Mobility and Sexual Exploitation in the Greater Southeast Asia Sub-region' (Report, Southeast Asian Consortium on Gender, Sexuality and Health, 2006) 43, 86–7 argued that the migration policy in Vietnam does not adequately reflect 'the interplay between demand for migrant services and emigration pressure'.

government.⁹⁶ In this sense, the government sees labour migration or ‘export’ as a profit-oriented activity important to the economy, and state-planned internal migration as a measure to balance labour supply and natural resources, and to guarantee other social management targets. Conversely, unorganized labour migration within the country or to other economies in the GMS has been discouraged, restricted and even treated as an issue of traditional security and sovereignty. More importantly, as will be discussed below, the link between irregular labour migration, the lack of legal alternatives for migrants and the incidence of trafficking has not been recognized in Vietnam’s official response to trafficking. In other words, labour migration from and within Vietnam, as in the GMS generally, tends to be dealt with as a legal issue separate from the anti-trafficking response, and without much attention to the protection of rights of labour migrants.⁹⁷ Even though the government has recently focused on ‘safe migration’,⁹⁸ this does not go hand in hand with any efforts to remove legal barriers to movement between countries. Similarly, there is no such official ‘safe migration’ policy towards internal migrants.⁹⁹

4.3 THE SITUATION OF TRAFFICKING IN VIETNAM

In order to have a solid background for a general view of the situation of trafficking in Vietnam, it is relevant here to remind ourselves of the definition of ‘trafficking in persons’ as introduced under the framework of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*¹⁰⁰ (discussed in

⁹⁶ Marx and Fleischer, above n 15, 12.

⁹⁷ Kneebone and Debeljak, above n 1, 102, 127.

⁹⁸ See also sections 4.3.3 and 4.4.1.1 below in this chapter for the relevant discussions.

⁹⁹ It should be noted that among the anti-trafficking stakeholders in Vietnam, the International Labour Organisation (ILO) has (a part of) its aim on working to prevent trafficking by facilitating safe migration for labour migrants. See Confidential interview A (Hanoi, 20 March 2008); Confidential interview (Hanoi, 21 March 2008).

¹⁰⁰ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime)*, opened for

Chapter 2). According to that analysis, trafficking in persons is understood as one or more of a set of enumerated *acts*, including ‘recruitment, transportation, transfer, harbouring or receipt of person’, conducted by the *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 (end) *purpose* of, at a minimum, ‘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’.¹⁰¹ This analysis also points out that ‘recruitment’ is often the first stage leading to exploitation, but is not necessarily the beginning of the trafficking process.¹⁰² Additionally, the presence of ‘harbouring’ and ‘receipt’ indicates that trafficking crimes do not happen only through migration processes or through the movement of people.¹⁰³ It has been said that the ‘means’ element is often regarded as concomitant with the ‘act’, meaning that ‘trafficking’ is read as always involving ‘forcible recruitment and transfer’ or ‘forcible movement or action’.¹⁰⁴ Nonetheless, trafficking practices in some regions, such as in the GMS, shows that the ‘abuse of power or a position of vulnerability’ is the most common factor.¹⁰⁵

Among these constituent elements, the means element by which ‘consent-nullifying behaviours’ are established has prevalently been seen as the most important

signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) (*‘Trafficking Protocol’*).

¹⁰¹ Ibid, art 3(a) – see Appendix 1.

¹⁰² Kneebone and Debeljak, above n 1, 108, 150.

¹⁰³ Ibid 108.

¹⁰⁴ See ibid 110, citing Melissa Ditmore, ‘Trafficking in Lives: How Ideology Shapes Policy’ in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work, and Human Rights* (Paradigm Publisher, 2005) 107; Claudia Aradau, *Rethinking Trafficking in Women: Politics out of Security* (Palgrave Macmillan, 2008), 2; Barbara Sullivan, ‘Trafficking in Women’ (2003) 5(1) *International Feminist Journal of Politics* 67, 81.

¹⁰⁵ Kneebone and Debeljak, above n 1, 110.

component in ‘the idea of trafficking’, as well as in ‘the legal and conceptual separation’ of trafficking from smuggling.¹⁰⁶ The definition also acknowledges that the means element is irrelevant in cases of trafficking in children.¹⁰⁷ In the meantime, the definition is ambiguous in asserting that the exploitation element is ‘the gist’ of the definition and the main indicator to identify (if necessary) whether a case is one of trafficking or smuggling of migrants.¹⁰⁸ In other words, as Kneebone asserts, ‘[t]he definition focuses on processes rather than outcomes, upon action rather than actual exploitation.’¹⁰⁹

4.3.1 Data issues

As has been the case with trafficking in many other areas, the whole picture of trafficking of persons in Vietnam has not been effectively depicted due to a lack of systematic and complete data.¹¹⁰ Information on trafficking is limited and scattered, and there are no reliable statistics on the number of persons trafficked in and from Vietnam.¹¹¹ There have been statistics which can, to some extent, be seen as official, gathered by both the government of Vietnam and those of its neighbouring countries, however, these statistics are often conflicting.¹¹² It should be noted that, at the level of the GMS, the improvement in terms of data issue has not seemingly been strongly

¹⁰⁶ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010), 31.

¹⁰⁷ *Trafficking Protocol*, art 3(b) – see Appendix 1.

¹⁰⁸ Kneebone and Debeljak, above n 1, 115.

¹⁰⁹ *Ibid.*

¹¹⁰ Dang, ‘Forced Migration in Vietnam’, above n 9, 166.

¹¹¹ Kneebone and Debeljak, above n 1, 149.

¹¹² For example, see Yi Wang, ‘Trafficking in Women and Children from Vietnam to China: Legal Framework and Government Responses’ (Report, Oxfam Quebec, August 2005), 7 on the conflicting information among the official statistics of some governmental organisations of Vietnam and China on the extent of trafficking occurring between the two countries.

pushed even though countries in the subregion have their commitment under the framework of the COMMIT.¹¹³

Consequently, the number of trafficked persons within and from Vietnam has often been given in the form of estimates whose source or basis have not been established and are thus unreliable.¹¹⁴ As reported, many different estimates (and ‘guesstimates’)¹¹⁵ have been given by different stakeholders due to their different

¹¹³ The six signatories of the COMMIT MOU of 2004 agreed on ‘[d]eveloping procedures for the collection and analysis of data and information on trafficking cases and ensuring that anti-trafficking strategies are based on accurate and current research, experience and analysis’. See Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT), *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, 29 October 2004 (‘COMMIT MOU’), [29] <www.no-trafficking.org/reports_docs/commit/commit_eng_mou.pdf>. See also United Nations Inter-Agency Project on Human Trafficking (UNIAP), Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT), ‘COMMIT 2nd Sub-Regional Plan of Action (COMMIT SPA II 2008 – 2010) – Year One 2008 Annual Report’ (Report, 2008), 28; United Nations Inter-Agency Project on Human Trafficking (UNIAP), Strategic Information Response Network (SIREN), ‘Mekong Region Country Datasheets – Human Trafficking’ (2010), i. Recently, the COMMIT SPA III (2011-2013) with its target 5.1 determining that ‘[d]ata systems collecting key anti-human trafficking data are developed, functioning, and eventually supported by government mandates and budgets’, and that COMMIT SPA III aims to establish functioning data systems that collect and analyse human trafficking data, with the aim of strengthening the empirical basis for anti-trafficking measures. However, these activities relating to data issue have not been ‘denoted’ as ‘high priority’ activities to which all governments are encouraged to complete during the course of COMMIT SPA III. See Coordinated Mekong Ministerial Initiatives on Trafficking 3rd Sub-Regional Plan of Action (COMMIT SPA III 2011 – 2013), finalized at the pre-COMMIT SOM 8/IMM 3 Meeting, January 2011, Bangkok, 7, 36–8 <http://www.no-trafficking.org/reports_docs/commit/commit_resources/commit_spaiii_en.pdf>.

¹¹⁴ Dang, ‘Forced Migration in Vietnam’, above n 9, 167.

¹¹⁵ Nicola Piper, ‘A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania’ (2005) in Frank Laczko and Elzbieta Gozdziaik (eds), ‘Data and Research on Human Trafficking: A Global Survey’ (Special Issue of International Migration (vol 43), International Organization for Migration, 2005) 203, 218.

methods of estimation.¹¹⁶ There has also been a discrepancy between the estimates and the official numbers officially identified.¹¹⁷ This is the case not only in domestic studies, but also in regional research regarding human trafficking in Vietnam.¹¹⁸ In general, data on the trafficking issue in Vietnam is affected by the fact, universally agreed upon, that accurate figures are impossible to come by.¹¹⁹ Reasons popularly given for this dearth of adequate data include ‘the unauthorized and clandestine nature of the activities’, ‘poor data collection’, and ‘the reluctance of victims’ to report trafficking cases.¹²⁰ However, another important reason, which seems to be the most important in the situation of trafficking data in Vietnam, is the inadequacy of the compilation and dissemination of trafficking statistics among authorized institutions at both national and regional levels.¹²¹ Remarkably, this inadequate statistics on human trafficking in Vietnam has been attributed to the political sensitivity of the issue and the government’s fear of outsiders’ political intervention under the guise of concern with human rights if they reveal the real figure on the number of trafficked persons.¹²²

¹¹⁶ For example, see Jerrold W Huguet and Varamon Ramangkura, ‘The Long Road Home: Analysis of Regional and National Processes for the Return and Reintegration of Victims of Trafficking in the Greater Mekong Subregion’ (Report, International Organization for Migration, 2007), 36 on the different estimates from different stakeholders on the number of victims of trafficking between Vietnam and Cambodia.

¹¹⁷ Ibid 45.

¹¹⁸ See, for example, Piper, ‘A Problem by a Different Name’, above n 115; ILO-IPEC, above n 95; Huguet and Ramangkura, above n 116; Wang, above n 112; Kelly and Le, above n 49; Binh Ngoc Vu, ‘Trafficking of Women and Children in Vietnam: Current Issues and Problems’ in Karen Beeks and Delila Amir (eds), *Trafficking and the Global Sex Industry* (Lexington Books, 2006) 33; Dang, ‘Forced Migration in Vietnam’, above n 9; Bac Hong Nguyen, ‘Human Trafficking in Vietnam – Some Human Security Issues’ (Paper presented at the International Development Studies Conference on Mainstreaming Human Security: The Asian Contribution, Bangkok, 4–5 October 2007), 4.

¹¹⁹ Piper, ‘A Problem by a Different Name’, above n 115, 218.

¹²⁰ Vu, above n 118, 35; Dang, ‘Forced Migration in Vietnam’, above n 9, 167.

¹²¹ Huguet and Ramangkura, above n 116, 45.

¹²² Confidential interview (Hanoi, 21 March 2008).

At the national level, the practice has been for each principal governmental agency working in the field to possess their own figures on different aspects of trafficking. Accordingly, the police force (under the Ministry of Public Security) collects figures relating to trafficking cases according to the number of trafficking cases discovered, of traffickers arrested and of offenders charged with trafficking offences.¹²³ Meanwhile, the Border Commander force (under the Ministry of Defence) collects figures on trafficking victims returning from abroad via border gates.¹²⁴ At the same time, the Ministry of Labour, Invalids and Social Affairs (MOLISA) and Vietnam's Central Women's Union (VCWU), which work with victims of trafficking in the reintegration process, have their own relevant statistics.¹²⁵ The important point is that these figures have never been processed systematically into an official data system on human trafficking across the country. Nonetheless, it should be noted that the *Law on Prevention, Suppression against Human Trafficking 2011*¹²⁶ of Vietnam has clearly assigned the task of collating statistics on human trafficking crimes to the Supreme People's Procuracy.¹²⁷

There is one more source of information on human trafficking in Vietnam, namely, the figures from the national system of household registration. As discussed above, whenever a Vietnamese person wishes to leave his or her registered residential location, he or she has to apply to the People's Committee of the relevant ward or commune for a temporary leave permit.¹²⁸ However, it has been reported that not all

¹²³ See Dang, 'Forced Migration in Vietnam', above n 9, 167; Cacioppo, above n 5, s 4.4; Action Aid International Vietnam, 'Report on Survey of Trafficking of Women and Children for Proposing Suitable Intervention Activities' (Report, October 2008), 15.

¹²⁴ Dang, 'Forced Migration in Vietnam', above n 9, 167.

¹²⁵ Action Aid International Vietnam, above n 123, 15.

¹²⁶ *Law on Prevention, Suppression against Human Trafficking 2011* (Vietnam) No 66/2011/QH12, was passed by Vietnamese National Assembly 12th Legislature, 9th session on 29 March 2011 and entered into force 1 January 2012 ('*Anti-Trafficking Law 2011*') [UNIAP trans] <www.artipproject.org/artip_tip_cjs/laws-policies/national/Vietnam/Vietnam%20Anti-trafficking%20in%20Persons%20Law%20Mar%202011%20final%20ENG.pdf> – see Appendices.

¹²⁷ See *ibid*, art 51(2).

¹²⁸ Cacioppo, above n 5, s 4.1; see also section 4.2.2.2 above in this chapter for the relevant discussion.

migrants, whether internal or external, register their movements, and that therefore the number of applications for leave permits does not accurately reflect the number of people migrating from the community.¹²⁹ In the meantime, Vietnam does not have national records for missing persons, meaning that the number of trafficking victims amongst unaccounted-for missing persons cannot be determined.¹³⁰

As a result of this lack of reliable and accurate data on trafficking, many anti-trafficking projects which have been carried out within the region depend on secondary data.¹³¹ This also leads to difficulties in the design of precise countermeasures to trafficking, the formulation and evaluation of anti-trafficking programs, and the development of effective anti-trafficking strategies.¹³² It could be said that, not limited to the situation of Vietnam, no exact picture of the extent of trafficking can be drawn until reliable and accurate data are in place.¹³³ Therefore, it is relevant here to note that the following information on the general situation of trafficking in Vietnam is formed on a foundation of only approximate figures.

4.3.2 The patterns, the routes and the process of trafficking in Vietnam

4.3.2.1 The patterns

The literature on trafficking in Vietnam has so far indicated that Vietnam is a source and destination country for men, women and children trafficked for the main purposes of forced labour and sexual exploitation.¹³⁴ While the focus of much research is on the trafficking of women and children for prostitution, sexual exploitation and forced labour, there are definitely indications of trafficking in men

¹²⁹ Ibid, s 4.1.

¹³⁰ Child Exploitation and Online Protection Centre (CEOP) and British Embassy, 'The Trafficking of Women and Children from Vietnam' (Unpublished Report, 2011), 10.

¹³¹ Piper, 'A Problem by a Different Name', above n 115, 215.

¹³² See *ibid* 202; Huguet and Ramangkura, above n 116, 45.

¹³³ Kelly and Le, above n 49, 8.

¹³⁴ See Dang, 'Forced Migration in Vietnam', above n 9, 167; Cacioppo, above n 5, s 3.1.3.

and, especially, trafficking for labour exploitation, which need further examination to be understood comprehensively.

In a 1999 literature review, Kelly and Le found that trafficking of women in Vietnam is 'widespread and increasing' even though 'no established figures of the extent of the trafficking industry in terms of numbers of women' were available.¹³⁵ Seen as amongst the main groups of trafficked persons, Vietnamese women are broadly believed to be trafficked to China, Cambodia, Laos and Thailand, or further, to countries out of the sub-region such as, for example, Taiwan, Malaysia and Macau, mostly for prostitution or sexual exploitation.¹³⁶ Additionally, the practice of trafficking of Vietnamese women for (forced) surrogacy services in Thailand and Cambodia has recently been uncovered.¹³⁷

In addition, the literature on trafficking in Vietnam has also highlighted the practice of foreign marriages between Vietnamese women/girls and foreigners, which has attracted much attention in the literature since the 1990s.¹³⁸ Kelly and Le quote other research for an emotional picture of this practice as follows:

Women are sold, induced, tricked or sometimes kidnapped to become wives – usually in rural China across the northern border. Some others also are '*married off*' to Asian men from Taiwan, Singapore, Japan, Korea. Alternatively women can become '*mail order*' brides to men in many countries, not all, but predominantly, to Asian men.¹³⁹

In recent studies on the practice of marriage migration of Vietnamese women, it has been reported that thousands of such women have been married to Taiwanese and

¹³⁵ Kelly and Le, above n 49, 25–6.

¹³⁶ Ibid 25; see also Cacioppo, above n 5, s 3.1.3.

¹³⁷ CEOP and British Embassy, above n 130, 12. Accordingly, Thai authorities recently uncovered a baby selling ring operating out of Bangkok, Thailand and Phnom Penh, Cambodia. They were connected to a Taiwanese surrogacy service which profiled the surrogate mothers on their website. During the investigation, 14 trafficked Vietnamese women were identified as being exploited as surrogate mothers for this company.

¹³⁸ Kelly and Le, above n 49, 26.

¹³⁹ Ibid (citation omitted).

Korean men, and that the number has increased over the years regardless of tougher screening processes.¹⁴⁰ There have also been some indications of forced and exploitative marriages, where women are sold off as slaves or domestic helpers, are abused and have their human rights infringed.¹⁴¹ While getting married to foreign men appears to represent an alternative to Vietnamese women and girls who desire to migrate, the emotive image of ‘women and girls [being] picked up as commodities for marriage’ makes this practice closely linked to trafficking in women and prostitution.¹⁴² In other words, international marriage in Vietnam has often been seen as the ‘commodification’ of Vietnamese women that badly impacts the national pride and identity.¹⁴³ In this vein, it has even been suggested in exaggerated style that ‘all foreign marriages are the result of trafficking’.¹⁴⁴ While Vietnamese law has prohibitions on (illegal) brokerage marriages, as international marriages are considered generally as false or for immoral, exploitative or making profit purposes,¹⁴⁵ the government has not yet adopted a coherent policy on this issue.

¹⁴⁰ See Danièle Bélanger, ‘Marriages with Foreign Women in East Asia: Bride Trafficking or Voluntary Migration?’ [2010] (469) *Population & Societies* 1, 3; see also Dang, ‘Forced Migration in Vietnam’, above n 9, 167; Cacioppo, above n 5, s 4.4.

¹⁴¹ Action Aid International Vietnam, above n 123, 17.

¹⁴² Kelly and Le, above n 49, 25.

¹⁴³ See Danièle Bélanger and Tran Giang Linh, ‘The Impact of Transnational Migration on Gender and Marriage in Sending Communities of Vietnam’ (2011) 59(1) *Current Sociology* 59, 63; Xoan Nguyen and Xuyen Tran, ‘Vietnamese – Taiwanese Marriages’ in Wen-Shan Yang and Melody Chia-Wen Lu (eds), *Asian Cross-border Marriage Migration: Demographic Patterns and Social Issues* (Amsterdam University Press, 2010) 157, 158, 172; see also Mai Tam, ‘Ket hon voi nguoi nuoc ngoai: Se co quy dinh ve dieu kien riêng’, Viet Bao (online) 5 May 2006 <<http://vietbao.vn/Xa-hoi/Ket-hon-voi-nguoi-nuoc-ngoai-Se-co-quy-dinh-ve-dieu-kien-rieng/45193313/157/>> [author’s trans: ‘Marriage to foreigners: Specific conditions will be required’].

¹⁴⁴ Kelly and Le, above n 49, 26.

¹⁴⁵ See *Government Decree 68/2002/ND-CP Detailing the Implementation of a Number of Articles of the Marriage and Family Law on the Marriage and Family Relations Involving Foreign Elements* (Vietnam) 10 July 2002, art 16 [Ministry of Justice trans]

As Kneebone asserts, the ‘powerful imagery’ of women being treated as commodities to be exchanged, is influencing the direction of research and policy, which ‘over emphasis[es] trafficking for sexual exploitation’, while ‘less attention is paid to the problem of labour exploitation’.¹⁴⁶ In the Vietnamese context, for example, although it is claimed that internal trafficking of women into domestic work has been happening since 1999,¹⁴⁷ there has been no more research conducted on this specific issue. Similarly, there has been no study on the exploitative situation of Vietnamese women and girls as migrant workers in other countries while, as discussed above, the proportion of female labour migration is increasing.

Children are another group of trafficking victims which are treated in stereotypical fashion. Children have attracted much attention in the literature on trafficking in persons in Vietnam. Accordingly, trafficking in children in Vietnam has been referred to in close connection with other forms of commercial sexual exploitation of children, including child prostitution, child pornography and child sex tourism, both internally and across borders. Vietnamese female children have reportedly been trafficked within the country and across borders to China, Cambodia and Singapore into the sex industry.¹⁴⁸ However, the uncertain nature of the practice of child prostitution in and from Vietnam, and its relationship to trafficking in children, has been described as follows:

Although the real figures of child trafficking in Vietnam are unknown, suggestions that the problem is getting serious are made in the literature by referring to the overall problem of prostitution. ... The ratio of child sex workers was believed to be steadily increasing: 2.5% in 1989, 11% in 1994 and 11.42% in 1995. In recent years, MOLISA and UNICEF estimate that there were up to 200,000 sex workers with about from 7% (UNICEF) to 10.5% (MOLISA) children. Child prostitution may vary from 5% up to

<http://vbqpppl.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10076>; see also Cacioppo, above n 4, s 4.4.

¹⁴⁶ Kneebone and Debeljak, above n 1, 72.

¹⁴⁷ Kelly and Le, above n 49, 26, 28.

¹⁴⁸ Dang, ‘Forced Migration in Vietnam’, above n 9, 167; End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT) International, ‘Global Monitoring – Status of Action against Commercial Sexual Exploitation of Children – Vietnam’ (Report, 2011).

20% depending on geographical areas and is said to be more evident in the south than in the north. IPEC (1998) gives a vague figure of at least 3000 'girls' from the south of Vietnam having been trafficked to Cambodia for prostitution with more than 15% of them younger than 15 years old. ... In some particular areas, like Svay Pak in Phnom Penh, the prostitutes are almost exclusively Vietnamese working in 50 brothels. Their ages varied from 17 to 50 years. Many said to those who researched the area that they were trafficked.¹⁴⁹

In the meantime, a rapid assessment of the issue of children in prostitution in some cities and provinces of Vietnam revealed that in many cases, children reported that they voluntarily engaged in prostitution as a means of survival.¹⁵⁰ Another report has indicated that in the practice of prostitution of young males in Ho Chi Minh City, although pimps do play a significant role, many children reported that they negotiated directly with customers.¹⁵¹ Alongside this, there is also literature on the manifestation of child pornography¹⁵² and concerns about an 'alarming upward trend' in child sex tourism in Vietnam.¹⁵³ It is also believed that children have been trafficked as brides for marriages to men from both Vietnam and China.¹⁵⁴

Trafficking of children in Vietnam has also been related to the issue of child labour. To a smaller extent than child prostitution, children are said to be tricked into working in factories, mines and domestic service, and this is believed to be increasing in the

¹⁴⁹ Kelly and Le, above n 49, 18–19. (citations omitted)

¹⁵⁰ Duong Bach Le, 'Viet Nam – Children in Prostitution in Hanoi, Hai Phong, Ho Chi Minh City and Can Tho: A Rapid Assessment' (Report, International Labour Organization (ILO)/International Programme on the Elimination of Child Labour (IPEC), 2002).

¹⁵¹ ECPAT, above n 148, 11.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Kelly and Le, above n 49, 22. Rather, this seems to be a common practice within the country as well as in some neighbouring countries in the sub-region. See also Kneebone and Debeljak, above n 1, 72 where there is reference to the practice of 'the 'little sister' or 'Mui Tsai' system' that means 'the sale of girl children to another family to become a bride upon maturity' which is popular in Vietnam and China.

internal trafficking aspect.¹⁵⁵ It has also been shown that young women around the ages of 15–17 are being trafficked to China for labour or household work, or to Taiwan with the initial purpose of marriage, but then ending up in forced labour (even in prostitution) or slavery-like conditions.¹⁵⁶ Additionally, child begging, disabled child vendors and infants for adoption have also been claimed as other forms of trafficking of children that need further investigation.¹⁵⁷ It has also been alleged that Vietnamese boys have been trafficked to work in cannabis growing operations in the UK.¹⁵⁸ Vietnam has also been reported to be a destination for Cambodian children who are trafficked to urban areas for forced labour or commercial sexual exploitation.¹⁵⁹

While women and children are conceived of in stereotypical terms as being more likely to be vulnerable to trafficking, trafficking in men has not received much attention in the literature on trafficking Vietnam. This reflects the separation in Vietnam between trafficking and labour exploitation discourses, as well as the cultural ‘inhibitions of males coming forward as victims’.¹⁶⁰ Instances of Vietnamese male migrant workers being tricked into unexpected working conditions in other countries, and the flows of export labour from Vietnam to other countries, began to receive attention in the literature in the 1990s. Furthermore, it has been reported that Vietnamese male labourers have been trafficked to Cambodia, Laos and Thailand across land, and to Korea and Hong Kong by sea, for work on construction sites or in

¹⁵⁵ Kelly and Le, above n 49, 22.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 23–4; See also CEOP and British Embassy in Vietnam, above n 130, 12; United Nations in Vietnam, The Government of Vietnam, ‘Exploratory Research – Trafficking in Boys in Viet Nam’ (Report, January 2012), 6.

¹⁵⁸ CEOP and British Embassy in Vietnam, above n 130, 11.

¹⁵⁹ ECPAT, above n 148, 10.

¹⁶⁰ CEOP and British Embassy in Vietnam, above n 130, 11.

the fishing industry.¹⁶¹ Vietnamese men are also reported to have been trafficked internally for work in factories, brick kilns and gold mines.¹⁶²

4.3.2.2 The routes

As can be seen from the above section on the patterns of trafficking, trafficking in persons from and within Vietnam is taking place along three main routes. Within the country there is the route of internal trafficking of men, women and children from rural to urban areas. Along this route, as stated above, children are trafficked for labour purposes, including begging, street vending, domestic services, working in factories in big cities or in brick kilns and gold mines.¹⁶³ In addition, it is reported that trafficking of babies for adoption internally has also been recognized as an issue due to loop-holes in related policies.¹⁶⁴ To a lesser extent there is also the practice of internal trafficking of women into domestic work and of men into the fishing industry.¹⁶⁵ It should also be noted that this route includes the ‘spontaneous’ migration of Vietnamese people who may end up in exploitative situations but who are not seen as or protected as victims of exploitation.

There are further two other main routes of border-crossing trafficking from Vietnam, including the route from the central and northern provinces to China, and the route from the southern provinces to Cambodia.¹⁶⁶ While Vietnamese people do move further abroad, these routes appear to reflect characteristics of the different geographical areas in Vietnam, as well as the shared cultural, language and economic activities of these areas and the communities in neighbouring countries. In

¹⁶¹ Kelly and Le, above n 49, 28–9.

¹⁶² See CEOP and British Embassy in Vietnam, above n 130, 11; Cacioppo, above n 5, s 3.1.3; ECPAT, above n 148, 10.

¹⁶³ CEOP and British Embassy in Vietnam, above n 130, 11.

¹⁶⁴ Ibid 12.

¹⁶⁵ See Sally Cameron, ‘Trafficking and Related Labour Exploitation in the ASEAN Region’ (Briefing Paper, International Council on Social Welfare (ICSW), November 2007), 171
<<http://www.icsw.org/doc/Trafficking%20Labour%20Exploitation%20in%20ASEAN%2007.pdf>>.

¹⁶⁶ CEOP and British Embassy in Vietnam, above n 130, 10.

other words, the routes of trafficking from Vietnam seem to be determined by the routes of traditional labour migration flows rather than by trafficking networks.

Along the northward route, women and girls are trafficked for marriages, sexual exploitation, labour, household work or to produce a male baby,¹⁶⁷ while boy children are trafficked for adoption due to the shortage arising from China's one-child policy, and men and boys are trafficked to work in gold mines and brick factories China.¹⁶⁸ Along the route from the south of Vietnam to Cambodia, children are trafficked for begging, women and girls are trafficked for prostitution, and male labourers for work on construction sites or in the fishing industry.

4.3.2.3 The process

The process of trafficking in Vietnam has often been depicted as an outcome of recruitment practices and the use of debt-bondage to exercise control over trafficked persons in exploitative situations.¹⁶⁹ As the initial stage of trafficking, the recruitment process has been claimed to occur extensively in rural areas of Vietnam.¹⁷⁰ Accordingly, it has long been recognised that recruiters may be connected to victims, or may be relatives, friends or people from the same village, enabling them to win the trust of such victims and/or their families.¹⁷¹ In other cases, they can be parents or boyfriends who sell their children or girlfriends in order to satisfy their material demands. A recruiter may also be a mere acquaintance or a stranger who offers a good job with high income and an easy life in a large city or another country.¹⁷² It has also been alleged that recruiters may make initial contacts with victims through online

¹⁶⁷ Ibid 12.

¹⁶⁸ See further in Kneebone and Debeljak, above n 1, 148.

¹⁶⁹ Kelly and Le, above n 49, 33–4; see also the Tables 5(I) (on Steps and Traffickers in the Systems of Trafficking Women and Children for Marriage), 5(II) (Steps and Traffickers in the Systems of Trafficking Women and Children for Prostitution), 5(III) (Steps and Traffickers in the Systems of Trafficking of Infants for Adoption): at 35–7.

¹⁷⁰ CEOP and British Embassy in Vietnam, above n 130, 14.

¹⁷¹ See Kelly and Le, above n 49, 31; CEOP and British Embassy in Vietnam, above n 130, 15.

¹⁷² See Kelly and Le, above n 49, 31; CEOP and British Embassy in Vietnam, above n 130, 15.

chat rooms.¹⁷³ Although very little is known about the profiles of traffickers in Vietnam,¹⁷⁴ it can be asserted that they may be professionals in some cases, or recruitment agents with lucrative offers of employment, but they may also simply be people who operate seasonally and who are normally close to victims and therefore more readily trusted. In this sense, trafficking in Vietnam, as in other countries in the sub-region, appears to be more a 'cottage industry' than an organized crime involving large syndicates.¹⁷⁵ The network of trafficking in Vietnam is argued to be comprised more of 'the activities of individuals' than large-scale operations.¹⁷⁶ Although indications of the connection between Vietnamese traffickers and organized international networks are present, the fact is that there is still 'no evidence of the existence of national or international trafficking organisations operating in Vietnam'.¹⁷⁷

In many other instances, the initial stage of trafficking involves the voluntary involvement of the Vietnamese trafficked person due to their desire for employment opportunities or the chance of a better life than that in their place of origin. Women and children, among other victims, who may be uneducated, from poor¹⁷⁸ and/or troubled family circumstances or situations of domestic violence, reportedly choose to migrate as the best way to generate income and assist their families.¹⁷⁹ With this desire, they may migrate to large cities within the country, cross borders themselves or resort to help from relatives, friends or even traffickers, and end up in exploitative

¹⁷³ CEOP and British Embassy in Vietnam, above n 130, 15–16.

¹⁷⁴ Kneebone and Debeljak, above n 1, 150.

¹⁷⁵ Phil Marshall, 'Raising Our Awareness: Getting to Grips with Trafficking in Persons and Related Problems in South East Asia and Beyond' (2005) 20 *Asia-Pacific Population Journal* 143, 146.

¹⁷⁶ Quy Thi Le, above n 21, 82, 100–1.

¹⁷⁷ Kelly and Le, above n 49, 34.

¹⁷⁸ These terms are normally used without any definition or clarification of their meaning in anti-trafficking practice in Vietnam. See more of this discussion in Gita Nasution, *Get in to, Get by, and Get out of Trafficking: Uncovering the Agency of Rural Women in Vietnam* (Master Thesis, Lund University, 2008), s 2.1.

¹⁷⁹ Kelly and Le, above n 49, 26.

situations they did not expect. It can be asserted that in many instances, trafficking in Vietnam does not occur along the lines of the typical myth of female victims kidnapped into prostitution, but in line with labour migration narratives.

The use of debt bondage to maintain control over victims of trafficking in exploitative situations for indefinite periods of time, especially child victims,¹⁸⁰ is a very common component of trafficking in Vietnam. Debt-bondage can be used by traffickers in the form of a salary advance or money given up-front that must be repaid, with trafficked persons then being forced to work until their debt is repaid.¹⁸¹ Additionally, it has been reported that traffickers may demand a series of inflated fees, purportedly incurred from the cost of travel arrangements, accommodation, food and arranging work. Victims are thus bound to these debts and have to do whatever is asked by the traffickers, often in the form of labour or sexual exploitation, to pay off the debt bond. It may take several years to work off such a debt, and victims may not be paid at all, or most of their earnings taken from them, during this period of exploitation.¹⁸²

4.3.3 Vulnerability factors

It is relevant to note here that in Part III of the *Trafficking Protocol*, some vulnerability factors are indicated as issues to be addressed in the prevention of trafficking. Article 9(4) of the Protocol requires state parties to take measures to alleviate 'poverty, underdevelopment and lack of equal opportunity' in order to establish 'comprehensive prevention strategies'.¹⁸³ These factors are believed to be contributors to people's desire to migrate and, consequently, to their vulnerability to

¹⁸⁰ CEOP and British Embassy in Vietnam, above n 130, 17.

¹⁸¹ Cacioppo, above n 5, s 4.4.

¹⁸² CEOP and British Embassy in Vietnam, above n 130, 18.

¹⁸³ United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto – Part Two: Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (2004) ('*Legislative Guides – Part Two*'), [71].

being trafficked, as well as their high risk of being revictimised.¹⁸⁴ In the meantime, the Protocol also obliges its state parties to establish ‘other measures’,¹⁸⁵ such as introducing ‘social and economic initiatives’¹⁸⁶ to prevent and combat trafficking; as well as to protect victims, especially women and children, from revictimisation.¹⁸⁷ It can be argued that the Protocol is making the impression that focusing on reducing poverty and empowering women are the main targets of prevention of trafficking, as it is happening in many anti-trafficking initiatives.¹⁸⁸ Furthermore, as has also been argued, these requirements on prevention of trafficking in the Protocol have the effect of ‘reproduc[ing] the gendered trafficking narrative’ and overshadowing the conceptualisation and the relevance of ‘vulnerability’ to the ‘means’ element of trafficking definition.¹⁸⁹ In other words, the Protocol seems not to recognize that although poverty and gender inequality may create vulnerability of persons to trafficking,¹⁹⁰ this varies between different persons since vulnerability is ‘individual-specific’.¹⁹¹ In the meantime, these factors should not be taken as the ‘causes’ of trafficking, or as factors that automatically lead to trafficking. Such an approach leads to the mistaken belief that the alleviation of poverty and disadvantage is the decisive key to eliminating trafficking.¹⁹²

¹⁸⁴ See the *Trafficking Protocol*, art 9(1)(b) – see Appendix 1; *Legislative Guides – Part Two*, above n 183, [71].

¹⁸⁵ See the *Trafficking Protocol*, art 9(1)(a) – see Appendix 1.

¹⁸⁶ *Ibid*, art 9(2) – see Appendix 1.

¹⁸⁷ *Ibid*, art 9(1)(b) – see Appendix 1.

¹⁸⁸ Kneebone and Debeljak, above n 1, 112.

¹⁸⁹ *Ibid*; see also section 2.3.2.2 of Chapter 2 of this thesis.

¹⁹⁰ See United Nations Office on Drugs and Crime (UNODC), *Guidance Note on ‘Abuse of a Position of Vulnerability’ As a Means of Trafficking in Persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (October 2012), s 2.3 describes these factors as ‘pre-existing vulnerability’.

¹⁹¹ Kneebone and Debeljak, above n 1, 112–13.

¹⁹² Marshall, ‘Raising Our Awareness’, above n 175, 151.

In the literature on trafficking in Vietnam, there are different approaches to the issue of poverty either as a causative factor of migration and/or a root cause of trafficking,¹⁹³ or as a vulnerability factor in individual trafficking situations. It can be seen that the idea that poverty is a main cause of trafficking has been shared by many anti-trafficking stakeholders in Vietnam,¹⁹⁴ not to mention officials and people who live in areas which have been researched, who believe that poverty reduction programs should play a vital role in anti-trafficking interventions.¹⁹⁵ Noticeably, poverty has been seen, at the same time, as a vulnerability factor which ‘push[es] people into the hands of traffickers’ and a root cause of trafficking that needs to be addressed to ‘reduce the risk of trafficking’.¹⁹⁶ A similar approach is adopted in the current Vietnamese *National Plan of Action (NPA 2011 – 2015)* which contains many references to poverty as a general factor that should be addressed to prevent trafficking.

¹⁹³ For example, Kelly and Le, above n 49, 7 reported that ‘poverty’ and ‘the lack of education’ were the two main factors to be considered as causal factors in the research before 1999; Quy Thi Le, above n 21, 66–7 also referred to poverty not just as the cause that leads trafficked persons into being exploited, but as the motivation for traffickers becoming involved in the trafficking process; Duong Bach Le, above n 150, 2 mentions ‘the poor’ and ‘less educated’ as the most basic factors leading to the situation of some ethnic minorities easily getting trapped in trafficking, but argues that the causes of trafficking are much more complicated, such as the disparity between rich and poor, the lack of opportunity for economic development, the factors of family and cultural issues, law enforcement etc; Cecilia Eriksson, *Trafficking in Women in Northern Vietnam – A Study about Anti-trafficking Strategies and Responses from NGOs and Mass Organisations* (Master Thesis, Stockholm University, 2003), 6, 43 <<https://www.forumsyd.org/upload/tmp/uppsats/Vietnam.pdf>> talks about a series of factors facilitating the establishment of the demand and supply sides of trafficking, among which is poverty and other economic, cultural and gender issues etc. See also Dang, ‘Cross-Border Migration and Sexuality in Vietnam’, above n 95, 65–6.

¹⁹⁴ See Eriksson, above n 193, 43; The Asia Foundation, ‘Combating Human Trafficking in Vietnam: Lessons Learned and Practical Experiences for Future Program Design and Implementation (2002 – 2008)’ (Report, August 2008), 4, 6.

¹⁹⁵ Action Aid International Vietnam, ‘Synthesis Report – The Trafficking of Vietnamese Women and Children’ (Report, December 2005), 5, 28.

¹⁹⁶ Wang, above n 112, 10, 18, 22.

By contrast, the role of poverty as an individual vulnerability or motivating factor in making decisions to migrate has been acknowledged.¹⁹⁷ In a recent report on trafficking in boys, poverty is determined to be one of the main factors that may make boys *vulnerable* to trafficking,¹⁹⁸ although more research is suggested since ‘it is ... impossible to make any conclusions about the role of factors like ... poverty and perceived poverty in migration.’¹⁹⁹ This recognition of the possible role of poverty as a vulnerability factor to trafficking has, however, not been reflected in the national anti-trafficking policy. The *NPA 2011 – 2015* contains no directions or policies for addressing or determining how poverty impacts the vulnerability of an individual to trafficking and/or exploitation or how it impacts on individual decisions to migrate.²⁰⁰

A similar argument can be made in relation to gender which is often seen as a causative factor of trafficking in Vietnamese literature, with its dominance of conceptualising trafficking as mainly involving women (and children).²⁰¹ This can be seen as a salient manifestation of the regional and Vietnamese gendered discourse and focus on prostitution²⁰² which also comes from the myth that ‘women and children are trafficked while the men migrate’.²⁰³ In other words, it can be said that in the Vietnamese context it is believed that women and girls are trafficked because of their gendered disadvantage, or that they belong to the group which is most vulnerable to trafficking.²⁰⁴ This can be linked to the 1990s’ restrictions on

¹⁹⁷ Consular Department, above n 59, 9.

¹⁹⁸ United Nations in Vietnam, The Government of Vietnam, above n 157, 12, 45.

¹⁹⁹ Ibid 67.

²⁰⁰ See *National Plan of Action against Crime of Trafficking in Persons during 2011– 2015* (Vietnam) attachment to the Prime Minister’s Decision No 1427/QĐ-TTg dated 18 August 2011 (‘*NPA 2011 – 2015*’), pt VI, s II point 3 [Vietnamese version] <[www.vietlaw.vn/Van-ban/Hinh-su/Quy-dinh-1427-QĐ-TTg-nam-2011-phe-duyet-Chuong--.aspx](http://www.vietlaw.vn/Van-ban/Hinh-su/Quy-dinh-1427-QD-TTg-nam-2011-phe-duyet-Chuong--.aspx)>.

²⁰¹ United Nations in Vietnam, The Government of Vietnam, above n 157, 28, 31.

²⁰² Kneebone and Debeljak, above n 1, 75, 98.

²⁰³ Wang, above n 112, 14.

²⁰⁴ United Nations in Vietnam, The Government of Vietnam, above n 157, 39.

entertainers and domestic workers, who were 'protected' on the basis of their gender as the most vulnerable citizens.²⁰⁵ This leads to the fact that although it has been recognized that trafficking in Vietnam now happens to men, as well as women and children, the gendered focus still remains in the country's anti-trafficking policy.²⁰⁶

Significant in the Vietnamese trafficking context is the issue of the family's role, and family values, and their link with trafficking. The literature in Vietnam has pointed out that family pressure, the responsibility felt towards family and other traditional cultural factors are push factors in the decision to engage in migration, which leads to trafficking for many Vietnamese women and children.²⁰⁷ In many cases in Vietnam family members are reported to be the traffickers of their relatives.²⁰⁸ In other cases, it has been argued that family influence provides intentional or unintentional encouragement to family members to migrate in search of jobs, which in many cases leads to exploitation.²⁰⁹ Kelly and Le even state that 'except in cases of kidnapping, trafficking in persons, be it in women, children, or men, generally involves family decisions'.²¹⁰ Le (2000) has argued that a troubled family life is the main push factor for women to migrate and become trafficking victims.²¹¹ While it should be noted that not all migration ends in trafficking, the influence of family and family values on the willingness of people to engage in migration which leads to trafficking, as Kneebone points out, is complicated and needs more research in order to be understood thoroughly.²¹² Therefore, as with the vulnerability factors discussed above, it should

²⁰⁵ See also section 4.2.2.2 of this chapter.

²⁰⁶ See also section 4.4.1 of this chapter for further discussion.

²⁰⁷ See Kelly and Le, above n 49, 42; Piper, 'Gender and Migration Policies in Southeast Asia', above n 17, 3; CEOP and British Embassy in Vietnam, above n 130, 14.

²⁰⁸ Kelly and Le, above n 49, 32.

²⁰⁹ Ibid 21, 32.

²¹⁰ Ibid 53.

²¹¹ Quy Thi Le, above n 21, 66–72.

²¹² Kneebone and Debeljak, above n 1, 71.

be investigated thoroughly how family and family values may affect vulnerability to trafficking and exploitation, before reaching a conclusive view about its role.

It should also be noted that while poverty, gender and the family's role are issues often discussed as part of the trafficking prevention discourse, there are many other factors which may influence people's decisions or force them to migrate. For example, hydro-power plants-related displacement,²¹³ or the development of the East-West Economic Corridor linking Vietnam (Lao Bao border gate), Lao PDR and Thailand²¹⁴ can be seen as relevant in the context of Vietnam. Moreover, there are many other factors exacerbating the vulnerability of migrants to exploitation, such as their lack of equal opportunity, lack of education, and lack of information or awareness of the risks.²¹⁵ However, it has also been pointed out that, as Marshall argues, the current prevention efforts aimed at reducing vulnerability at the community level are often designed to discourage migration rather than to facilitate safe migration.²¹⁶ Additionally, focusing on migrants' vulnerability factors will detract from efforts relating to factors that facilitate the exploitation at destination points.²¹⁷ In other words, the elimination of these vulnerability factors, even if possible, would not guarantee the elimination of trafficking in persons, since the main issue appears to be a disconnect between people's desire to migrate and an immigration policy that does not provide legal alternatives to facilitate safe migration, or to protect migrant workers' rights at their destinations.²¹⁸ That may be the reason why many prevention programs are directed to reducing poverty or raising awareness but have not had any noticeable effect on decreasing the magnitude of the trafficking problem. As such, a

²¹³ Dang, 'Labour Migration from Viet Nam', above n 18, 165.

²¹⁴ United Nations Inter-Agency Project on Human Trafficking (UNIAP), Strategic Information Response Network (SIREN), 'Human Trafficking Data Sheet – Vietnam' (2008), 3.

²¹⁵ United Nations in Vietnam, The Government of Vietnam, above 157, 7; UNIAP, SIREN, 'Human Trafficking Data Sheet – Vietnam', above n 214, 2; see also UNODC, *Guidance Note on 'Abuse of a Position of Vulnerability'*, above n 190, s 2.3

²¹⁶ Marshall, 'Raising Our Awareness', above n 175, 147.

²¹⁷ Ibid 151–2.

²¹⁸ Ibid 152.

change of focus in anti-trafficking policies to incorporate safe migration programs should be taken into account as a way of opening up legal alternatives for migrant workers, as well as effectively protecting their rights at their destinations, rather than being just another form of awareness raising for people who want to move.

4.4 LEGISLATIVE AND POLICY RESPONSES TO TRAFFICKING

The issue of trafficking has attracted government attention since 1986, when codified offences of trafficking in women and children were introduced under the framework of the *Penal Code 1986*.²¹⁹ Article 115 of this Penal Code provides for the offence of ‘Trading in women’ as a crime against life, health, dignity and honour of human beings, while Article 149 on ‘Kidnapping, trading or exchanging fraudulently of children’ is characterized as a crime against the regulations concerning marriage and family. However, trafficking was not fully understood or considered to be a big issue at this point in time. Additionally, the Vietnamese *Constitution 1992*, while recognizing the human rights of all, also specifically emphasizes the protection of women and children’s rights and prohibits discrimination against them.²²⁰ Vietnam now has two basic legal documents providing definitions of trafficking as well as for other important issues on anti-trafficking, namely the *Penal Code 1999*²²¹ and the *Anti-Trafficking Law 2011*.²²² However, as it will be pointed out in this section, there is an unclear relationship between these two legal documents which creates confusion

²¹⁹ *Penal Code 1986* (Vietnam) approved by the Vietnamese National Assembly on 27 June 1985, entered into force 1 January 1986, replaced by the *Penal Code 1999*.

²²⁰ See *Constitution of the Socialist Republic of Vietnam 1992*, as amended by Resolution 51/2001/QH10 of 10th Legislature of the National Assembly at its 10th session, 25 December 2001, arts 63–5 [Allens Arthur Robinson trans] <[www.vietnamlaws.com/freelaws/Constitution92\(aa01\).pdf](http://www.vietnamlaws.com/freelaws/Constitution92(aa01).pdf)>.

²²¹ *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12, approved by the Vietnamese National Assembly 12th Legislature, 5th session on 19 June 2009, entered into force 1 January 2010, amended by the Amendment 2009 [Ministry of Justice trans] <www.vbqpp1.moj.gov.vn/vbqp/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10467>.

²²² See Appendices 2 and 3.

in the implementation of anti-trafficking measures as well as preventing the Vietnamese response from making a significant difference.

4.4.1 National response to the trafficking issue

4.4.1.1 National Plan of Action

The first *NPA 2004 – 2010*²²³ on anti-trafficking in Vietnam marks the point in time when trafficking became a prominent issue on the national agenda. In this *NPA*, the focus was placed on women and children as the only significant group of victims of trafficking. It makes no specific reference to trafficking in males. The *NPA 2004 – 2010* was divided into two phases with specific objectives: in the first phase (2004–2006) the focus was on raising social and community awareness of trafficking and reducing the crime of trafficking by 20%; the focus of the second phase (2007–2010) was on prevention, reducing the number of trafficked persons by 50%, and on reintegration.²²⁴

In order to concretize the above main targets, the *NPA* introduced four projects with responsibilities assigned to relevant agencies, including:

- 1) Prevention, for which the VCWU would be responsible;
- 2) Investigation and Prosecution, for which the Ministry of Public Security (MPS) would be responsible in mainland areas and the Ministry of National Defense (the Border Commander) in border areas;
- 3) Reception and Reintegration, with the Border Commander being responsible for reception of trafficked persons from other countries, and MOLISA being responsible for reintegration; and

²²³ *National Plan of Action against Crime of Trafficking in Children and Women during 2004 – 2010* (Vietnam) attachment to the Prime Minister's Decision No 130/2004/QĐ-TTg dated 14 July 2004 ('*NPA 2004 – 2010*') [Alliance Anti-Traffic trans] <<ftp://ftp2.allianceantitrafficking.org/alliancea/001%20%Vietnam/NationalPlanofActionVN.pdf>> – see Appendix 3.

²²⁴ *Ibid*, pt II s II point 2.

4) Policy, for which the Ministry of Justice would be responsible.²²⁵

Through this *NPA*, the government also set up a National Steering Committee chaired by a Deputy Prime Minister, with a leader of the MPS as the Vice Chairperson, for coordinating activities within the framework of the plan.²²⁶

The *NPA 2004 – 2010* focused explicitly on trafficking in women and children for prostitution, both internally and transnationally, and recognized the existence of trafficking under the guises of brokerage marriages and illegal adoptions.²²⁷ The *NPA* identified the (objective) causes of trafficking (in women and children) as the social disparity between the rich and the poor, ‘unemployment status’, ‘poor living conditions’, ‘low level of education’ with the emphasis on the ‘influence[s of] bad factors such as unhealthy cultural flow and social evils including prostitution and drugs within the country and the region’.²²⁸ In other words, the *NPA*’s ‘social evil’ approach²²⁹ is shown by its conceiving of trafficking as:

[A]n urgent and pressing problem, badly affecting the society, customs, tradition, social morals and Government laws, destroying family happiness, increasing the risks of HIV/AIDS transmission and resulting in potential impacts on national and social security.²³⁰

The Vietnamese Prime Minister has recently approved a new *NPA* for the period of 2011 – 2015.²³¹ In this new *NPA*, there is a significant shift in the focus of anti-trafficking policies away from trafficking only in women and children to ‘trafficking in persons’. However, the link between trafficking and labour migration discourses has

²²⁵ Ibid, pt II s III point 3.

²²⁶ Ibid, pt III s I.

²²⁷ Ibid, pt I s I point 1.

²²⁸ Ibid, pt I s I point 2.

²²⁹ See also section 4.4.1.3 below in this chapter for further discussion.

²³⁰ Ibid, pt I.

²³¹ *NPA 2011 – 2015*, (Vietnam) attachment to the Prime Minister’s Decision No 1427/QD-TTg dated 18 August 2011.

not been recognized in this new *NPA*. The MPS remains the central agency in the anti-trafficking framework, being responsible for the majority of anti-trafficking measures, including investigation and prosecution, reception and identification of victims, enhancing policy and improving international cooperation.²³² The *NPA 2011 – 2015* clearly illustrates that the focus of the government’s anti-trafficking response is prevention – the spirit of which is expressed in Vietnam’s *Anti-Trafficking Law 2011*, as discussed below.

One point that should be noted is that Vietnam’s *NPAs* show the important role of the VCWU – a mass organisation – in the national anti-trafficking program. In fact, VCWU is a lead agency of the Vietnamese anti-trafficking response with its strong support at the grassroots level.²³³ It is noticeable that the VCWU has a gendered focus, and approaches the issue from the perspective of women and children’s rights, which strongly connects to the narrow focus of Vietnamese anti-trafficking policy as discussed below. The Centre for Women and Development (CWD), a political and social organisation established as a subordinate unit of the VCWU, operates to raise awareness, organizes empowerment activities for trafficked women and children (as well as victims of domestic violence), and provides support services.²³⁴ The CWD also runs a shelter and provides counselling services to victims of trafficking and domestic violence.²³⁵

²³² Ibid, pt IV.

²³³ Kneebone and Debeljak, above n 1, 149–50.

²³⁴ It should be noted that this link between trafficking and domestic violence has also been recognized by the Centre for Studies in Applied Sciences in Gender, Family, Women and Adolescents (CSAGA) – one of few NGOs allowed to operate in Vietnam. The main activities of CSAGA in Vietnam focus on women and children who are vulnerable to gender-based violence, including domestic violence, human trafficking, lesbian rights etc... CSAGA has also cooperated with functional ministries, offices and organisations to support survivors of domestic violence, returned victims of human trafficking and rescue some cases of across-the-border human trafficking.

²³⁵ Peace House Shelter Project was established as a joint effort by Vietnam Women’s Union and Spanish Agency for International Development Cooperation (AECID) to combat trafficking in persons by providing assistance to trafficking victims. Information available at <www.women-bds.com/NewsDetails.aspx?ID=2127> accessed on 14 January 2012.

Despite mentioning the labour migration of women and children within the country and across borders, the *NPA*s do not appear to recognize the link between trafficking and labour migration or to acknowledge the rights of migrant workers. It has recently been reported that the DOLM and IOM have signed off on a project, which appears to be separate from the official program, to promote safe migration from Vietnam through the establishment of a Migrant Resource Centre (MRC).²³⁶ This project will be undertaken by collaboration between the DOLM, VCWU and IOM from November 2011 to June 2013 to provide information and services to Vietnamese labour migrants (with their destination unspecified). Additionally, a website supporting safe migration has been established by the Consular Department (Ministry of Foreign Affairs) in collaboration with the IOM and EU.²³⁷ These efforts of the government to promote safe migration for migrant workers, however, have been carried out separately from anti-trafficking measures. There has as yet been no observable effort to reduce legal barriers to migration, to introduce legal alternatives in migration law, or to protect the rights of labour migrants under labour laws in order to prevent irregular migration and trafficking. The government has not paid much attention to internal trafficking (especially for labour exploitation) even though they recognize the issue of large-scale internal movement.²³⁸ It has even been argued that the Vietnamese government is perhaps reluctant to admit that they have lost control over the trafficking situation.²³⁹

²³⁶ Information available at <<http://www.iom.int/jahia/Jahia/media/press-briefing-notes/pbnAS/cache/offonce;jsessionid=BB598AA022FEC5909119CF4A68BE4A33.worker02/cache/offonce?entryId=31013>> accessed on 14 January 2012.

²³⁷ Information available at <<http://www.dicu.gov.vn/>> accessed on 14 January 2012. This website is oriented to providing information and data on migration for migrants, in order to ‘maximize the positive impacts of migration for the purpose of sustainable development, reducing the negative, the risk of migration’.

²³⁸ See Marx and Fleischer, above n 15.

²³⁹ Opinion from Brosowski – a Hanoi-based NGO leader, in ‘Vietnam: Trafficking victims lured by “friendly” acquaintances’, available at <<http://www.irinnews.org/report.aspx?ReportId=91793>> accessed on 14 January 2012.

4.4.1.2 The definition of the crime of trafficking under Vietnamese law

In terms of a trafficking definition, it should be noted that Vietnam is now legally bound by the international trafficking definition as it has acceded the *Trafficking Protocol* (even though it has not yet ratified the *CTOC*).²⁴⁰ Also, the *COMMIT MOU*, which Vietnam has signed, only ‘encourag[es] the use of the definition of trafficking contained in the [Trafficking] Protocol’, but does not mandate it.²⁴¹

Within the provisions of Vietnam’s *Penal Code 1999*²⁴² (which is currently in force), there are two main articles that refer to trafficking offences (and some further provisions on other offences which are assumed to be related to trafficking).²⁴³ Articles 119 and 120 of the *Penal Code 1999* provide respectively for the criminalisation of the offences of ‘trafficking in women’ and ‘trading, fraudulently exchanging or appropriating children’ without defining the term ‘trafficking’. Accordingly, the basic offence of ‘trafficking in women’, punishable by between two and seven years’ imprisonment, was supplemented by an aggravated offence, committed where the trafficking is for the purpose of prostitution or for the purpose of

²⁴⁰ Vietnam acceded to the *Trafficking Protocol* on 8/6/2012. Information available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en, accessed on 23/5/2013. In the Mekong sub-region, Cambodia, Thailand, Lao PDR and Myanmar have signed or acceded to the *Trafficking Protocol*. See also Kneebone and Debeljak, above n 1, 267–8.

²⁴¹ See *COMMIT MOU*, above n 113, pt 1 [1].

²⁴² *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12, approved by the Vietnamese National Assembly 12th Legislature, 5th session on 19 June 2009, entered into force 1 January 2010, amended by the Amendment 2009 [Ministry of Justice trans] www.vbqpppl.moj.gov.vn/vbqpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10467.

²⁴³ See United Nations Office on Drugs and Crime (UNODC), United Nations Children’s Fund (UNICEF) and Department of Criminal and Administrative Laws – Ministry of Justice (MOJ) of Vietnam, *Assessment of the Legal System in Vietnam in Comparison with the United Nations Protocols on Trafficking in Persons and Smuggling of Migrants, Supplementing the United Nations Convention against Transnational Organized Crime* (2004) (‘*Assessment of the Legal System in Vietnam*’).

sending the victim overseas.²⁴⁴ The increased penalty also applies where the trafficking is organized, professional, of more than one victim or there are multiple counts.²⁴⁵ Meanwhile, the offence of ‘trading, fraudulently exchanging or appropriating children’ in Article 120, which refers to practices similar to slavery, is punishable by between three and ten years’ imprisonment. The aggravated offence in this provision applies where such trade, exchange or appropriation is committed ‘in an organized manner’, ‘for despicable motive’, on more than one victim, for the purpose of sending the victim abroad, for ‘use for inhumane purposes’, for ‘use for prostitution purposes’, in cases of ‘dangerous recidivism’, or where it causes ‘serious consequences’.²⁴⁶ These simple trafficking offence provisions are clearly different from the model of the trafficking definition as introduced by the *Trafficking Protocol*, at least in terms of its three-component structure of acts, means and purpose. Furthermore, they seem to be mainly focused on practices similar to slavery in which women and children are treated as commodities, rather than on the broader concept of trafficking that is internationally accepted.²⁴⁷

This kind of conceptualisation of trafficking under Vietnamese law is again confirmed in an explanatory document to the *Penal Code 1986* which is often used as a reference for interpreting the content of (one of) these trafficking offences. Resolution No. 04/1986,²⁴⁸ created by the Judicial Council of the Supreme People’s Court as a guide for the application of some provisions of the *Penal Code 1986*, provides some guidance on the provision on ‘trading in children’.²⁴⁹ According to this Resolution, trafficking in children is understood as including the acts of buying or selling children

²⁴⁴ See the *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12, arts 119(2)(a), 119(2)(d) – see Appendices 2 and 3.

²⁴⁵ Ibid, arts 119(2)(b), 119(2)(c), 119(2)(e), 119(2)(f) – see Appendices 2 and 3.

²⁴⁶ Ibid, art 120 – see Appendices 2 and 3.

²⁴⁷ See also section 2.3.2 of Chapter 2 of this thesis.

²⁴⁸ *Resolution of the Judicial Council of Supreme People’s Court* (Vietnam) No 04/HDTP on 29 November 1986 for applying a number of provisions of the Penal Code.

²⁴⁹ *Assessment of the Legal System in Vietnam*, above n 243, 12.

for purposes of self-profit.²⁵⁰ In defining the acts that can amount to trafficking in children, the act of buying a child when [the offender] knows that the child is stolen is also included.²⁵¹ From this explanation, it can be said that trafficking under Vietnamese law is conceived of as a *transfer* of a person from one person or group of people, to another person or group of people, for money or other material profits.²⁵² It can also be stated that the definition of trafficking offences under Vietnamese law focuses on ‘trade, profit and illegality’,²⁵³ that is, on the procurement or commercial transaction of a person, which is closer to the narrative of prostitution than the broader practice of exploitation.²⁵⁴ This understanding of trafficking as an illegal trade in persons also appears in anti-trafficking laws of some neighbouring countries as aforementioned.²⁵⁵ Although the 2009 Amendments to the *Penal Code 1999* expanded the ambit of trafficking offences to cover ‘trafficking in persons’ and added the end purpose of ‘removal of organs’, the provisions of both Articles 119 and 120 create a definition of trafficking that is relatively narrow in comparison with that of the *Trafficking Protocol*. The offences were not expanded to cover some other trafficking practices such as forced labour or labour exploitation.²⁵⁶

²⁵⁰ See also United Nations in Vietnam, *The Government of Vietnam*, above n 157, 12.

²⁵¹ *Assessment of the Legal System in Vietnam*, above n 243, 12.

²⁵² *Ibid.*

²⁵³ See also Kneebone and Debeljak, above n 1, 126-7.

²⁵⁴ This consideration has been shared in *Assessment of the Legal System in Vietnam*, above n 241, 22, 28. Accordingly (at least with regard to trafficking in children), the *Penal Code* prohibits the sale of children, which ‘focuses on the seller and the end receiver of the child but not trafficking per se’.

²⁵⁵ For example, the trafficking definition under anti-trafficking law of Laos, Cambodia and Myanmar. See Kneebone and Debeljak, above n 1, 162–70, 133–5, 138–42, 145–7; see also section 2.3.2 of Chapter 2 of this thesis.

²⁵⁶ Such as ‘forced labour or services, slavery or practices similar to slavery, servitude’ as provided in the *Trafficking Protocol*. See the *Trafficking Protocol*, art 3(a) – see Appendix 1.

Trafficking practices related to forced labour are referred to within the provisions of the first specific anti-trafficking law of Vietnam approved in March 2011.²⁵⁷ Articles 3(2) and 3(3) of this Law, under its terms of ‘prohibited acts’, add to the acts of trafficking in persons stipulated in Articles 119 and 120 of the *Penal Code 1999*, the acts of ‘transfer or receipt of persons for sexual exploitation, forced labor, the removal of organs, or for other inhuman [sic] purposes’ and ‘recruitment, transportation, harboring of persons for sexual exploitation, forced labor, the removal of organs or for other inhuman [sic] purposes’. From these described acts of trafficking, it can be seen that the ‘action’ and ‘end purpose’ components of trafficking offences under Vietnamese law are somewhat in compliance with the definition of trafficking introduced by the *Trafficking Protocol*. However, there is no definition of trafficking in children under this anti-trafficking law of Vietnam.²⁵⁸

In the meantime, it should be noted that the ‘prohibited acts’ under the Vietnamese anti-trafficking law is not consistent with the ‘means’ element of trafficking offences under the *Trafficking Protocol* (as discussed in Chapter 2).²⁵⁹ However, there are

²⁵⁷ See the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12 – see Appendix 3. According to article 2(3) of this Law, ‘forced labor’ shall mean ‘the use of force or the threat of use of force, or other means to coerce persons to work against their will.’ However, it does not seem that this practice of ‘forced labor’ is about to cover labour exploitation practice, especially in the condition of the Vietnamese anti-trafficking policy in which the link between trafficking and labour migration issues has not been recognized. See also section 4.2.2.2 of this chapter.

²⁵⁸ This means that Vietnam define minors as people less than sixteen years of age, according to article 1 of the *Law on Child Protection, Care and Education 2004* (Vietnam) No 25/2004/QH11, was passed by Vietnamese National Assembly 11th Legislature, 5th session on 15 June 2004 and entered into force 1 January 2005) [Ministry of Justice trans] http://vbqpp1.moj.gov.vn/vbqp/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=7824 >; see also Kneebone and Debeljak, above n 1, 153–4; Thi Tue Phuong Hoang, ‘Legislating to Combat Trafficking in Vietnam’ (Paper presented at Is this the Asian Century? – 17th Biennial Conference of the Asian Studies Association of Australia, Melbourne, 1–3 July 2008) www.arts.monash.edu.au/mai/asaa/hoangthituephuong.pdf.

²⁵⁹ It should be noted here that, prior to these provisions officially providing for the definitions of trafficking, there have been some other efforts to define or identify trafficking acts within legal documents or other law enforcement’s documents in Vietnam. For example, the Department of Social Evil Prevention (DSEP) under the Ministry of Labour, War Invalid and Social Affairs

‘means’ factors described together with some end result practices of trafficking, including reference to the ‘coercion’ and ‘force’ in ‘sexual exploitation’,²⁶⁰ ‘the use of force or the threat of use of force or other means to coerce persons’ in ‘forced labor’.²⁶¹ The ambit of the ‘means’ element under the Vietnamese anti-trafficking law is clearly narrower than that outlined by the trafficking definition of the *Trafficking Protocol*.

(MOLISA) of Vietnam defines human trafficking in its handbook as ‘abuse and exploitation of migrated [sic] person (internally and internationally) for profit’ and describes three stages: recruitment, transfer, exploitation/abuse. In the *Government Decision 17/2007* the term ‘victim’ was defined as ‘women and children that have been traded, (‘traded’ meaning receiving or giving money or other material benefit), transferred abroad by means of force or threat or other forms of force, kidnapping, deception, abuse of power or position of vulnerability, for the purpose of exploitation (forced prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs). The *Inter – ministerial Circular No 3/2008*, section 2a of Part I whilst defining victims of trafficking referred to some means of trafficking which are rather in compliance with the *Trafficking Protocol*’s definition, namely ‘threat, or use of force, or other forms of coercion’, ‘abduction’, ‘fraud’, ‘deception’, ‘the abuse of power’, or ‘a position of vulnerability’ to be ‘trafficked abroad for receiving of (in exchange for) payments or benefits’. See Ministry of Labor, Invalid and Social Affairs (MOLISA) – Department of Social Evil Prevention (DSEP), *Policies and Regulations on Social Assistance for Returned Women and Children – Victims of Human Trafficking* (Handbook, 2008), 7
<http://www.iom.int/jahia/webdav/shared/mainsite/activities/ct/policies_regulations_vietnam.pdf>; *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* (Vietnam) 29 January 2007 (‘*Government Decision 17/2007*’), art 4 [Alliance Anti-Traffic trans]
<ftp://ftp2.allianceantitrafic.org/alliancea/001%20%20Vietnam/Decision_17_English_translation.pdf> – see Appendix 3; Ministry of Public Security, Ministry of National Defence, Ministry of Foreign Affairs and Ministry of Labor, Invalid and Social Affairs, *Inter-ministerial Circular 3/2008/TTLT-BCA-BQP-BNG-BLDTBXH Guidelines on Process and Procedures of Identification and Reception of Trafficked Women and Children from Abroad* (Vietnam) 8 May 2008 (‘*Circular 3/2008*’), pt I s 2(a) [UNIAP trans] <http://www.no-trafficking.org/report_docs/legal/vietnam/vn_imc_vicid.pdf>.

²⁶⁰ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 2(1), 2(2) – see Appendix 3.

²⁶¹ *Ibid*, art 2(3) – see Appendix 3.

It should be recalled here that this ‘means’ element, including ‘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’,²⁶² depicts the coercive nature of trafficking crimes and, consequently, the vulnerability of trafficked persons, which is an important basis for the requirement of non-prosecution of trafficking victims.²⁶³ Noticeably, the Vietnamese anti-trafficking law does not show any attention to ‘the abuse of power or of a position of vulnerability’ or ‘debt bondage’ which are often seen as the most common means to be used to attain the control over trafficked persons within the GMS.²⁶⁴ This lack of attention to the ‘means’ element from the trafficking definitions appears to reflect more accurately the actual practice of trafficking in Vietnam, which often occurs through voluntary movements. Nevertheless, Vietnamese law, with this lack of attention, actually presents an incomplete conceptualisation of trafficking as a practice of ‘coercion’ and ‘exploitation’, but represents it as a practice of ‘trade, profit and illegality’ as has already been mentioned.²⁶⁵ This certainly contributes to the difficulties in identification of trafficking victims and to their invisibility to the Vietnamese authorities, as discussed in the next chapter.²⁶⁶

²⁶² See the *Trafficking Protocol*, art 3(a) – see Appendix 1.

²⁶³ See also the discussion in sections 3.2.3 of chapter 3 and 5.2.1 of chapter 5 of this thesis.

²⁶⁴ See also section 2.3.2.2 of chapter 2 of this thesis.

²⁶⁵ See also the same point of view in regarding trafficking as ‘illegal’ trade in, for example, the bilateral agreement with Cambodia for the identification and repatriation of trafficked victims in 2009 defined trafficked victims in article 1 as ‘those who have been selected, transported, *illegally* transferred, from Cambodia to Vietnam or from Vietnam to Cambodia by means of threat, use of force, kidnapping, deception, abuse of power or other forms of coercion for the purpose of exploitation.’ See *Cooperation Agreement on Standard Operating Procedures (SOP) for the Identification and Repatriation of Trafficked Victims between the Government of Cambodia and the Government of Vietnam*, 3 December 2009 (‘*Cambodia – Vietnam SOP 2009*’)
<[http://www.baliprocess.net/files/Vietnam/Vietnam%20agreement%20with%20Cambodia_SOP%20for%20id%20and%20repatriat%20trafficked%20victims_Eng%20\(small\).pdf](http://www.baliprocess.net/files/Vietnam/Vietnam%20agreement%20with%20Cambodia_SOP%20for%20id%20and%20repatriat%20trafficked%20victims_Eng%20(small).pdf)>.

²⁶⁶ See section 5.2.2.2 of Chapter 5 of this thesis.

With regard to smuggling crimes, there is no definition of the offence of smuggling of illegal migrants under Vietnamese law. However, Vietnam's *Penal Code 1999* has two provisions criminalizing illegal border-crossings. Article 275 simply provides for the offence of 'organizing and/or coercing persons to flee abroad to stay abroad illegally' without further definition. Meanwhile, Article 274 elaborates on the act of 'illegally leaving or entering the country; illegally staying abroad or in Vietnam' as 'illegally leaves or enters the country or stays abroad or in Vietnam, has already been administratively sanctioned for such act but continuing the violation'. Focusing on the security issue,²⁶⁷ this offence is clear that it does not exclude cases of trafficked persons who cross the border illegally, even though it does not (and is unable to) provide any indicators to help differentiate between trafficked persons and illegal migrants in this case. While the essentially 'coercive' and 'exploitative' nature of trafficking offences is not recognized by the policy makers, the focus in both trafficking and smuggling offences on 'illegality' under Vietnamese law raises serious concerns about the misidentification of trafficked persons in Vietnamese anti-trafficking practice.²⁶⁸

It should be noted that the relationship between the *Anti-Trafficking Law 2011* and the current corresponding provisions under the *Penal Code 1999* is unclear. Under Vietnamese law, a new law does not impliedly repeal the old one,²⁶⁹ and the Penal Code is the only law that criminalizes acts.²⁷⁰ This means that the *Anti-Trafficking Law 2011* does not actually criminalize the listed prohibited acts, nor does it provide

²⁶⁷ This offence has been placed into the group of the crimes of infringing upon administrative management order under the framework of the 1999 Penal Code. See *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12, ch XX.

²⁶⁸ See more in section 5.2.2.2 of Chapter 5 of this thesis.

²⁶⁹ See *Law on the Promulgation of Legal Documents 2008* (Vietnam) No 17/2008/QH12, was passed by the Vietnamese National Assembly 12th Legislature, 3rd session on 3 June 2008 and entered into force on 1 January 2009) [Ministry of Justice trans] [<www.vbqppl.moj.gov.vn/vbqpq/en/Lists/Vn%20ban%20php%20lut/View_Detail.aspx?ItemID=10500>](http://www.vbqppl.moj.gov.vn/vbqpq/en/Lists/Vn%20ban%20php%20lut/View_Detail.aspx?ItemID=10500).

²⁷⁰ Article 2 of Vietnam's *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12 on 'Basis of penal liabilities' provides that '[o]nly those persons who have committed *crimes defined by the Penal Code* shall bear the penal liabilities therefor [sic].' (emphasis added).

for the criminal prosecution of traffickers. In other words, until there is an amendment of the Penal Code regarding trafficking offences, Articles 119 and 120 as currently provided in the *Penal Code 1999* are the only legal basis for the investigation and prosecution of trafficking crimes. However, it is confusingly provided — under the heading ‘Scope of Application’ — that the *Anti-Trafficking Law 2011* is to serve for:

[T]he 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.²⁷¹

Similarly, the unclear relationship between this specific anti-trafficking law and current anti-trafficking legal documents creates confusion in the implementation of anti-trafficking measures, and prevents the Vietnamese response from making a significant difference despite the new law coming into effect.²⁷² In other words, even in light of the new law, it remains uncertain whether the Vietnamese anti-trafficking response has evolved beyond a narrow gendered and prostitution discourse. Conversely, and paradoxically for a law intended to provide, among other things, ‘protection and assistance to victims’, the law does not address the specific needs of women or children as victims of trafficking. In short, it can be said that despite the fact that a specific anti-trafficking law is now in place in Vietnam, there are still many things to do to make it more effective and comprehensive, or even to make it as advanced as those of Vietnam’s neighbouring countries.²⁷³

It should be noted that being named ‘*Law on Prevention, Suppression against Human Trafficking*’, the *Anti-Trafficking Law 2011* obviously has its main focus on the prevention aspect. Under the provisions in Chapter II of ‘Prevention of Human Trafficking’, prevention measures introduced by this Law pay attention to raising awareness of anti-trafficking policies and laws, the tricks and harmful consequences of trafficking, the circumstances which could lead to trafficking, such as international

²⁷¹ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 1 (emphasis added) – see Appendix 3.

²⁷² See also section 5.4 of Chapter 5 of this thesis.

²⁷³ See Kneebone and Debeljak, above n 1, 148.

marriages, child adoption, 'job placement', 'taking of Vietnamese persons abroad for labor or study, cultural or tourism services'.²⁷⁴ The Law also refers to preventive measures to control these activities that could lead to trafficking,²⁷⁵ as well as requiring integration of prevention of trafficking into programs of job placement, vocational training, poverty alleviation, gender equality, child protection, and advancement of women.²⁷⁶ Additionally, the Law calls for a specific concern about 'women, young persons, teenagers, children, students, pupils and residents in border, rural or remote areas, or in areas of socio-economic difficulty' as the mainly targeted victims of trafficking.²⁷⁷

Importantly, the legislation seems to emphasize control measures for preventing trafficking. Accordingly, this Law stipulates measures on 'Order and Safety Administration' through the household registration system (Article 9(1)); supervising of 'persons with criminal records on human trafficking and other persons having signs of commission of the acts stipulated' (Article 9(2)); strengthening border control measures (Articles 9(4), 9(5), 9(7)) and immigration control measures (Article 9(6)). In addition to its prevention aspect, the *Anti-Trafficking Law 2011* also devotes its Chapters IV and V to 'Receipt, Verification and Protection' and 'Support for Victims'.²⁷⁸

4.4.1.3 The social evil approach and trafficked persons

In the context of Vietnamese anti-trafficking policy, one noticeable trend that is present throughout the *NPA* and the official anti-trafficking law is the use of a social evil approach.²⁷⁹ As has been argued, 'social evil' is a vague concept that was

²⁷⁴ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 7, 10 – see Appendix 3.

²⁷⁵ *Ibid*, arts 10, 15 – see Appendix 3.

²⁷⁶ *Ibid*, art 11 – see Appendix 3.

²⁷⁷ *Ibid*, art 7 – see Appendix 3.

²⁷⁸ See further discussion in section 5.2.2.1 of Chapter 5 of this thesis.

²⁷⁹ See *NPA 2004 – 2010* (Vietnam) attachment to the Prime Minister's Decision No 130/2004/QĐ-TTg dated 14 July 2004, pt II s 2(1). As a result, the responsibility for trafficked returnees is assigned to the Department of Social Evil Prevention (DSEP), a branch of the MOLISA. See also

introduced into Vietnamese society 'by virtue of what was seen as the country's increased involvement in a morally polluted world'.²⁸⁰ In Vietnamese terms, social evils such as sex work, using drugs or contribution to the HIV/AIDS epidemic, are acts that violate traditional moral standards and cause bad consequences for families and society.²⁸¹ The fact that the national anti-trafficking policy applies an approach typical of the paradigms of managing and eliminating prostitution indicates that the government recognized the strong link between trafficking and prostitution. However, this also demonstrates that the main concern of Vietnamese authorities is trafficking for prostitution and sexual exploitation despite the persistent link between trafficking and labour migration.²⁸²

The focus on prostitution is an historical issue in Vietnamese legislation. The prostitution system was licensed in Vietnam under French colonial rule, and then during the American war. Consequently, the existence of prostitution in Vietnam has been seen as a repercussion of the colonial periods, and the government has made great efforts to clean it up since the country's reunification.²⁸³ Despite these efforts, a boom in prostitution was recorded from the late 1980s up until the beginning of the 1990s.²⁸⁴ Up to the 2000s, prostitution existed in every province of the country, including in remote villages and rural areas.²⁸⁵

the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 5(1), 11 which less directly admit the social evil approach – see Appendix 3.

²⁸⁰ See Helle Rydstrom, 'Sexual Desires and "Social Evils": Young Women in Rural Vietnam' (2006) 13(3) *Gender, Place & Culture* 283, 283.

²⁸¹ Ramona Vijayarasa, 'The State, the Family and Language of "Social Evils": Re-stigmatising Victims of Trafficking in Vietnam' (2010) 12(1) *Culture, Health & Sexuality* 89, 94.

²⁸² See Quy Thi Le, above n 21, 94; Dang, 'Cross-Border Migration and Sexuality in Vietnam', above n 95, 87–8.

²⁸³ See further in Quy Thi Le, above n 21, 93–4.

²⁸⁴ *Ibid.*

²⁸⁵ Dang, 'Cross-Border Migration and Sexuality in Vietnam', above n 95, 67.

Consequently, combating trafficking in Vietnam has been seen as a matter of national pride in close connection with the prostitution issue — an attitude that is also prevalent in some neighbouring countries.²⁸⁶ However, conceiving of trafficking as a social evil, as has been the case in Vietnam, is problematic not only because it creates a narrow focus in anti-trafficking policies. It also raises concerns about the fate of victims trafficked for the purposes of prostitution and/or sexual exploitation, who are often regarded as the same as sex workers and are therefore similarly targeted. While trafficked persons are considered to be victims under Vietnamese anti-trafficking policy,²⁸⁷ this approach appears to promote the perception of victims as criminals in practice.²⁸⁸ It should be noted that arrests and forced rehabilitation are popular measures applied to Vietnamese sex workers (as well as to brothel owners).²⁸⁹ Further, rehabilitation centers for sex workers are often reported to have ‘unhygienic conditions, insufficiently trained staff, lack of space and overcrowding, lack of segregation between children and adults, male officers having access to female quarters and lack of access to contraception’.²⁹⁰ Moreover, these ‘correctional facilities’ have also been connected with disregard for such rights as freedom from arbitrary and unlawful detention. Instead of rehabilitating people, these centers exacerbate social alienation and stigma and have adverse impacts on sex workers’ ability to socially reintegrate.²⁹¹ As for trafficked persons, being treated as the same as sex workers is synonymous with violations of their rights and interests as victims of human rights abuses. The arrests and forced rehabilitation that trafficking victims may experience in fact stigmatizes them and places them outside of the protection to which they should be entitled.

²⁸⁶ See Kneebone and Debeljak, above n 1, 127.

²⁸⁷ Project 3 of the *NPA 2004 – 2010* (Vietnam) attachment to the Prime Minister’s Decision No 130/2004/QD-TTg dated 14 July 2004 was titled ‘Reception and Support to the Returned Victims of Trafficking’.

²⁸⁸ Vijayarasa, above n 279, 94–5.

²⁸⁹ Dang, ‘Cross-Border Migration and Sexuality in Vietnam’, above n 95, 87.

²⁹⁰ Vijayarasa, above n 279, 94–5.

²⁹¹ *Ibid.*

It has also been argued that the language of ‘social evil’ has had an undeniably negative impact on social attitudes towards victims of sex trafficking, as it has towards sex workers. The social evil approach affects the general public’s perceptions, and instead of supporting victims they regard them as criminals who deserve punishment.²⁹² This language even influences the attitudes of victims’ family members who may ‘turn a blind eye’ to their trafficked relative or express shame towards a relative who has engaged in the ‘social evil’ of sex work.²⁹³ As a result, the social evil approach isolates victims of trafficking for prostitution or sexual exploitation, pushing them into a ‘hidden population’ because of their fear of being labelled as a prostitute on return.²⁹⁴ In this way, the social evil approach inhibits trafficking victims’ access to social services and undermines their ability to reintegrate into society. In other words, it can be said that labelling trafficking as a social evil leads to a ‘stigmatizing burden’ and to a sacrificing of the interests of trafficked women for those of the rest of the community.²⁹⁵

The fact that the *NPA* for the period of 2011 – 2015 does not use the phrase ‘social evil’ at all can be seen as a positive change. However, this change may be shaky, as it is still unclear whether the focus of the new anti-trafficking law has actually moved beyond the shadow of gendered and prostitution discourses, especially when the state persists in presenting trafficking as an issue of national pride that is closely linked to the commercial sexual exploitation of its female and child nationals.

²⁹² Ibid 90.

²⁹³ Ibid.

²⁹⁴ See Dang, ‘Cross-Border Migration and Sexuality in Vietnam’, above n 95, 87–8; or ‘invisible workers’ as talked about by ILO-IPEC, above n 95, 33.

²⁹⁵ Eriksson, above n 193, 70.

4.4.2 International, regional and bilateral commitments

Vietnam has participated in and signed several international commitments relating to the practice of trafficking in persons, including the *Convention on the Rights of the Child (CRC)*²⁹⁶ and its Optional Protocol, the *CEDAW*, and *ILO Convention No. 182 on the Worst Forms of Child Labour*.²⁹⁷ Vietnam also acceded to *ILO Convention No. 29 concerning Forced or Compulsory Labour* in 2007.²⁹⁸ However, the incorporation of these international instruments into domestic policies and the implementation of them are still limited in Vietnam. In addition, as discussed above, Vietnam is not yet a member of the *Migrant Workers' Rights Convention* (1990). This may relate to the fact that Vietnam's authorities do not recognize the link between trafficking and labour migration, and also do not pay much attention to protecting the rights of migrant workers. Moreover, as aforementioned, Vietnam has signed (but not ratified) the *CTOC* but has acceded to the *Trafficking Protocol*.

Regarding regional cooperation on managing labour migration, it is relevant to note here that while the flow of labour migration is complicated, and trafficking remains a major concern, countries in the GMS persist in regarding trafficking and labour migration as separate issues.²⁹⁹ Created under the ASEAN framework, the ASEAN

²⁹⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

²⁹⁷ *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182)*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000). Vietnam ratified this instrument on 19 December 2000. Information available at <<http://webfusion.ilo.org/public/applis/appl-byconv.cfm?conv=C182&hdroff=1&lang=EN>>, accessed on 7 September 2012.

²⁹⁸ *Convention concerning Forced or Compulsory Labour (ILO No 29)*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932) ('*1930 Forced Labour Convention*'). Vietnam ratified this instrument on 5 March 2007. Information available at <<http://webfusion.ilo.org/public/applis/appl-byCtry.cfm?lang=EN&CTYCHOICE=0940&hdroff=1>>, accessed on 7 September 2012.

²⁹⁹ For instance, concerning international instruments on labour migration and the rights of migrant workers, Cambodia is the only state to have signed the *Migrant Workers' Rights Convention*. None of the GMS members have participated in the *ILO Convention concerning Migration for Employment (No. 97)* or the *ILO Convention concerning Migrations in Abusive Conditions and the*

Economic Community Blueprint of 2007 aimed to free up the flow of highly skilled and professional workers, but did not address the situation of the majority of regional migrants who are low-skilled.³⁰⁰ The ASEAN Socio-Cultural Community Blueprint (2009–2015) also aims at strengthening the protection and promotion of migrant workers' rights among member states through 'fair and comprehensive migration policies' under which the rights of all migrant workers would be protected as provided by the spirit of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.³⁰¹ Following these regional commitments, it should be noted that countries in the GMS (including Vietnam) have agreed — under the Subregional Economic Cooperation Program supported by the Asian Development Bank (ADB) — on the regional Human Resource Development Strategic Framework and Action Plan which focuses on, among others, 'facilitating safe labor[sic] migration within the GMS'; particularly in improving labor migration management, strengthening the labor market information systems and code of conduct for employment agencies facilitating cross-border labor migration, improving the access of migrant workers to basic social services in the receiving GMS countries, reviewing social security services in the GMS for migrant workers.³⁰² Some issues have also been pointed out as remaining issues (and will be targeted as priority activities for the GMS Strategic Framework 2012 – 2022) are the 'lack of awareness of the importance of labor migration to supporting economic development in the GMS', 'policy gaps supporting "safe" migration', 'lack of capacity in managing safe labor migration policies and

Promotion of Equality of Opportunity and Treatment of Migrant Workers and Members of their Families (Supplemental Provisions) (No.143). See ADB, above n 24, 22.

³⁰⁰ Ibid 21.

³⁰¹ Association of Southeast Asia Nations (ASEAN), *Blueprint for the ASEAN Socio–Cultural Community (2009-2015)* (2009), [28] <<http://www.aseansec.org/22336.pdf>>.

³⁰² Greater Mekong Subregion Economic Cooperation Program, Tenth Meeting of GMS Working Group on Human Resource Development (WGHRD-10), *Emerging GMS HRD Challenges and Priorities for the GMS Strategic Framework 2012 - 2022* (2011) Asian Development Bank <http://110.164.59.211/gmsinfo/images/stories/regional_cooperation/link_documents/capacity_building/WGHRD_10_Report%2024%20June%202011.pdf>.

regulations'.³⁰³ Importantly, the link between human trafficking and safe migration concerns has also been brought into this framework.³⁰⁴

In addition to the participation into the regional frameworks addressing trafficking as a labour migration issue, Vietnam has strongly focused its response to trafficking in persons on criminal justice matters. At the regional level, Vietnam participated in the ASEAN Declaration on Transnational Crime (1997) in which trafficking in persons was categorized as a transnational crime together with terrorism, money-laundering, drug trafficking and arms smuggling. Vietnam also participated in the first Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime 2002 (Bali Process), in which trafficking in persons was considered as a transnational crime issue, with a high priority given to law enforcement responses.³⁰⁵ Later on in 2005, Vietnam ratified the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters.³⁰⁶

Since 2004, Vietnam has participated in the COMMIT process – a regional attempt to create 'a sustained and effective system of cross-border cooperation and collaboration' to combat human trafficking, which is perceived in this process as 'the denial of [human beings'] most fundamental and inalienable rights'.³⁰⁷ The process

³⁰³ Ibid 57.

³⁰⁴ Ibid 51, 58–60. This thrust regarding the connection between trafficking and safe migration has been set as a support to the COMMIT and subregional action plans in the GMS together with UNIAP.

³⁰⁵ From the website of Bali Process <<http://www.baliprocess.net/>> at 17 June 2008. It should be noted that Vietnam still participates in this regional process.

³⁰⁶ Association of Southeast Asian Nations (ASEAN), 'ASEAN Responses to Trafficking in Persons – Supplement and Update (2007) – Ending Impunity for Traffickers and Securing Justice for Victims' (Report, February 2008), 21; Gerald Smith, 'The Criminal Justice Response to Human Trafficking – Recent Development in the Greater Mekong Subregion' (Report, Strategic Information Response Network (SIREN)/United Nations Inter-Agency Project on Human Trafficking (UNIAP), May 2010), 4. It should also be noted that Vietnam joined ASEAN in 1995.

³⁰⁷ See the *COMMIT MOU*, above n 113, preamble ; United Nations Inter-Agency Project on Human Trafficking (UNIAP), Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT), 'The

stressed as one of its objectives, the desire of ‘establish[ing] a holistic regional response ... [in which] concern for the victim is at the centre of all interventions’.³⁰⁸ The MOU of the COMMIT process has a clear definition of trafficking based on the *Trafficking Protocol*, which covers women, children and men, and encompasses all forms of trafficking and their basis on international standards, including key international Conventions and the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking.³⁰⁹ The COMMIT MOU recognizes the two main trafficking narratives, including the labour migration and the gender-based approach.³¹⁰ Accordingly, it recognises the link between trafficking and the growing demand for exploitative labour and exploitative sexual services whilst emphasising the particular vulnerability and special need of protection of women and children as victims of trafficking.³¹¹ Significantly, the COMMIT MOU seems to maintain the balance between the discourses around criminal justice objectives and human rights.³¹² Therefore, besides its recognized need for a strengthened criminal justice response, the MOU also acknowledges the importance of a ‘victim-centred’ approach. The MOU highlights the importance of identification of victims, and especially the linkages between better identification and treatment of victims and more effective law enforcement.

COMMIT Sub-Regional Plan of Action (COMMIT SPA) – Achievements in Combating Human Trafficking in the Greater Mekong Subregion 2005 – 2007’ (Report, December 2007), annex A.

³⁰⁸ UNIAP, COMMIT, ‘The COMMIT Sub-Regional Plan of Action (COMMIT SPA)’, above n 307, annex B.

³⁰⁹ Ibid, Annex C. They include international instruments and standards for combating human trafficking and, especially protecting victims of trafficking, including the *Universal Declaration of Human Rights*, *Convention against Transnational Organized Crime (CTOC)* and its *Trafficking Protocol*, *CEDAW*, *CRC* and its *Optional Protocols*, *ILO Conventions against Forced Labour* (including *ILO No 29*, *ILO No 182* and *Abolition of Forced Labour Convention (ILO No 105)*, opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

³¹⁰ Kneebone and Debeljak, above n 1, 232.

³¹¹ See *COMMIT MOU*, above n 113, preamble.

³¹² Kneebone and Debeljak, above n 1, 233.

Additionally, the MOU also underlines the role of migration policy, the application of labour laws, and monitoring of labour recruitment companies in combating trafficking.³¹³ In the latest Sub-regional Plan of Action (SPA) III (2011-2013) of the COMMIT process,³¹⁴ it has been recognised that trafficking takes place within a migration framework and that the measures of preventing trafficking need to be more broadly approached on the basis of acknowledging (international labour) migration as a multilaterally beneficial activity.³¹⁵ However, the COMMIT process's focus on victims' rights and the link between migration and labour policies and anti-trafficking responses is overlooked at the (Vietnamese) national level, and especially in bilateral agreements to which Vietnam is a party. In fact, Vietnam has not signed any agreements on labour migration with a country in the GMS.³¹⁶

In the meantime, it should be noted that Vietnam has signed mutual legal assistance and extradition treaties with ASEAN countries including PRC (1998), Lao PDR (1998) and Thailand (2004) that address trafficking in women and children.³¹⁷ Additionally, Vietnam has concluded MOUs with some regional countries for cooperation on eliminating trafficking (in women and children), for example, with Indonesia (2005),³¹⁸ Thailand (2008)³¹⁹ and the PRC (2010).³²⁰ Moreover, Vietnam has also concluded a

³¹³ See *COMMIT MOU*, above n 113, preamble.

³¹⁴ COMMIT SPA III 2011–2013, above n 113.

³¹⁵ Ibid 30; see also Kneebone and Debeljak, above n 1, 254.

³¹⁶ ADB, above n 24, 18–19. Meanwhile, there have been bilateral agreements between Thailand and Cambodia (2002), the Lao PDR (2002), and Myanmar (2003) to regulate labour migration to Thailand.

³¹⁷ See ASEAN, *Blueprint for the ASEAN Socio-Cultural Community (2009 – 2015)*, above n 301, 71; Wang, above n 112, 11–12.

³¹⁸ See ASEAN, *Blueprint for the ASEAN Socio-Cultural Community (2009 – 2015)*, above n 301, 71.

³¹⁹ *Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking*, signed 24 March 2008 ('*Thai – Vietnam Agreement 2008*') <www.no-trafficking.org/report_docs/legal/thai_vn_coop_elim_tip_en.pdf>.

number of bilateral agreements with Cambodia on combating trafficking in women and children and assisting victims (2005),³²¹ as well as agreements specifically dealing with identification and repatriation of trafficking victims (2009).³²² Further, Vietnam has recently finalized an agreement with Laos on preventing and combating trafficking in persons and protection of trafficking victims.³²³ These bilateral agreements promote the enhancement of mutual cooperation in law enforcement and criminal procedures between the two state parties in order to suppress the crime of trafficking in women and children and demonstrate an increasing concern for assisting victims. However, it should be noted that these agreements have not reflected a regional trend in anti-trafficking measures which is 'slowly [shifting] from a female gendered focus to include trafficking of men and boys', 'from prostitution to labour exploitation'.³²⁴ In fact, most agreements retain a focus on trafficking in women and children without acknowledging the link between anti-trafficking measures and labour migration discourse. Consequently, there will be inevitable conflict between a country's anti-trafficking responses at the national level and the responses envisioned by these bilateral commitments.³²⁵

³²⁰ *Memorandum of Understanding between the People's Republic of China and the Socialist Republic of Vietnam on Cooperation Agreement on Prevention and Control of Human Trafficking* (2010), cited in Asia Regional Trafficking in Persons Project (ARTIP), *Laws – Policies: National Legal and Policy Framework around Trafficking in Persons* (October 2011) <<http://www.artipproject.org/artip-tip-cjs/laws-policies-national-ams.html>>.

³²¹ *Agreement between the Royal Government of Cambodia and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking*, 10 October 2005 ('Cambodia – Vietnam Agreement 2005') <http://www.no-trafficking.org/reports_docs/legal/vietnam/mou_vn_cb_eliminate_tips.pdf>.

³²² See *Cambodia – Vietnam SOP 2009*, above n 265.

³²³ *Agreement between the Government of the Lao People's Democratic Republic and the Government of the Socialist Republic of Vietnam on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking*, 3 November 2010 ('Lao – Vietnam Agreement 2010') <www.no-trafficking.org/reports_docs/legal/lao_viet_ht_mou_en.pdf>.

³²⁴ Kneebone and Debeljak, above n 1, 160.

³²⁵ Ibid.

4.5 CONCLUSION

Since trafficking in persons has been recognised as an issue in Vietnam and addressed in legislation, it has always been regarded as a social evil and an issue of national pride connected with prostitution more than anything else. This means that Vietnamese anti-trafficking policy retains a narrow focus on trafficking in women and children for prostitution. This focus seems to be very persistent within the national response, especially when the government purports to have broadened their approach to address trafficking in all persons but *just formally*. In other words, the lack of a strong commitment to suppressing trafficking for labour exploitation by means of criminalizing relevant acts means this expansion is merely formal. The emotional image of women and girls being kidnapped, picked up or traded as commodities persists in influencing Vietnamese anti-trafficking responses, under which 'women' and 'children' are considered in stereotypical terms or as 'passive' victims. The important involvement of the VCWU in anti-trafficking responses in Vietnam can be seen as an indication of this focus on women and children.

In the meantime, trafficking in men and trafficking for labour exploitation in Vietnam is overshadowed in the national anti-trafficking policy. The policy makers seem not to recognize the close relationship between the practices of recruitment and debt bondage and the process of labour migration, even though as 'exported' labour there is evidence of abuse at destination. They appear not to realize that in the reality of trafficking in Vietnam, traffickers can be professionals in some cases, but may also simply be people who operate seasonally and not as part of large syndicates. An examination of the literature on recruitment processes in Vietnam shows that it is not uncommon for trafficked persons to start their movement as voluntary migrants. This challenges the current perception of Vietnamese anti-trafficking policy makers in which trafficked persons are regarded as passive victims who do not consent to illegal migration.³²⁶

Furthermore, the link between trafficking and the discourse on labour migration and migrant workers' rights has not been recognized as it needs be in Vietnam. The connection between irregular labour migration, the lack of legal alternatives for migrants, and the incidence of trafficking has not been recognized in Vietnam's

³²⁶ See section 5.2.1 of Chapter 5 of this thesis.

official response to trafficking. Accordingly, labour migration tends to be dealt with as a legal issue that is separate from trafficking, and without much emphasis on the protection of the rights of labour migrants. Although the government has recently begun to focus on 'safe migration', this has not gone hand in hand with any efforts at removing legal barriers to movement between countries. Similarly, there is no such 'safe migration' policy towards internal migrants. The government does not recognize the need to eliminate the mismatch of people's desire to migrate and the weak immigration policy in order to effectively prevent trafficking in persons.

In terms of the national policy on labour migration, Vietnam does not have a unified point of view towards the issue and under its policy people are treated as commodities or tools of the legal system rather than bearers of human rights. The government uses a relocation policy to serve its socio-economic objectives and labour export activities as an important economic activity to obtain remittances. By contrast, however, the government treats 'spontaneous' or irregular migration as a negative and illegal phenomenon which needs to be discouraged. Consequently, they have applied restrictive policies (such as bans on female migrants, the household registration system, international marriages or other immigration law restrictions) that exclude 'spontaneous'/irregular migrants from formal support structures. In the meantime, no legal alternatives that facilitate 'safe migration' (apart from 'awareness raising' measures) have been offered by the government. Even in its policy of external labour migration, labour migrants are treated as 'exports', without acknowledging their need for protection, while the government focuses on expanding the benefit from labour export rather than on protecting their nationals.

One of the most important things revealed in this investigation of the Vietnamese national anti-trafficking response is the lack of a comprehensive understanding of trafficking. Vietnam is maintaining trafficking definitions that are narrower than the model introduced by the *Trafficking Protocol*. They focus on 'trade, profit and illegality' without a recognition of the essentially 'coercive' and 'exploitative' nature of trafficking and, hence, omit the 'means' element of trafficking crime. This leads to a blurring of the definitions of trafficking and smuggling offences under Vietnamese law and creates difficulties in the identification of trafficked persons, as discussed in the next chapter. Meanwhile, in addition to the unclear relationship between Vietnam's specific anti-trafficking law and other anti-trafficking legal documents, which creates confusion in implementation, there is conflict between national law and bilateral

agreements as well as the problem of incorporation of Vietnam's international and regional commitments into national policy, particularly its anti-trafficking policy.

Chapter 5

Vietnam's Legal Responses on Protection of and Assistance to Trafficked Persons

5.1 INTRODUCTION

In the discussion in Chapter 3 of this thesis, it was pointed out that, as victims of human rights violations, trafficked persons should be protected and supported from the time they come to the attention of the competent authorities until their successful social reintegration. Under such a protection regime, the highest priority should be placed on the rights and interests of trafficked persons, instead of the effectiveness of criminal proceedings to investigate and prosecute the traffickers. Therefore, trafficked persons should never be considered solely as tools for criminal justice, and the protection of trafficked persons should never be limited only to such legal proceedings in which they are involved.

The protection regime, as suggested by international and regional commitments,¹ should assist trafficking victims to recover from the trauma and effects of the

¹ See, for example, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime)*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking Protocol*'); *Recommended Principles and Guidelines on Human Rights and Human Trafficking – Report of the United Nations High Commissioner for Human Rights to the*

trafficking process, restore them to their situation prior to the violations, protect them from further harms during and after any legal proceedings they may participate in, and support them in their social reintegration process. Additionally, victims of trafficking need to be protected from vulnerability to being re-trafficked and re-victimised. As also mentioned in Chapter 3,² a timely and appropriate protection regime should begin with a rapid and accurate identification process under which trafficked persons are protected from being misidentified as smuggled or illegal migrants. The complexity and practical difficulties of the identification process means there is a need to grant all (potential) victims initial assistance in the form of a reflection period. If officially identified as victims of trafficking, they should expect to enjoy other protective and supportive measures as provided by the *Trafficking Protocol* and other international legal and non-treaty instruments. In the meantime, principles such as non-criminalisation,³ non-coercion,⁴ and the separation of protection from victim cooperation⁵ should form the cornerstones of such a rights-based protection regime.

In the Vietnamese context, as discussed in Chapter 4, trafficking in persons has always been regarded as a 'social evil' connected with prostitution and criminal acts.⁶ In fact, Vietnamese anti-trafficking policy, at least until recently, has only focused on trafficking in women and children for prostitution. This focus seems to be very persistent in the national response even though the government has recently

Economic and Social Council, UN ESCOR, UN Doc E/2002/68/Add 1 (20 May 2002) ('Recommended Principles and Guidelines'); Council of Europe Convention on Action against Trafficking in Human Beings and Its Explanatory Report, opened for signature 16 May 2005, Council of Europe Treaty Series No 197, 16 V 2005 (entered into force 1 February 2008) ('European Trafficking Convention').

² See section 3.2.1.3 of Chapter 3 of this thesis.

³ See section 3.2.3 of Chapter 3 of this thesis.

⁴ See section 3.3.1.2 of Chapter 3 of this thesis.

⁵ See section 3.3.1.1 of Chapter 3 of this thesis.

⁶ See section 4.4.1.3 of Chapter 4 of this thesis.

expanded their attention to ‘trafficking in persons’ generally.⁷ However, the lack of a strong commitment to suppress trafficking for labour exploitation⁸ means this new focus, through an expansion of the trafficking definition, is merely formal. Additionally, the link between trafficking and the discourse on labour migration and migrant workers’ rights has not been recognized as it needs to be in Vietnam.⁹ The recognition of trafficking for labour exploitation is therefore limited to the concepts of forced labour or slavery rather than including a broader discourse on the protection of rights of migrant workers at their destination points. In the meantime, the national approach to the trafficking issue as a social evil¹⁰ does more harm than good to victims, especially in stigmatizing trafficked women and girls and inhibiting their access to protection and assistance.¹¹

This chapter will examine the precise status of trafficked persons under Vietnamese law. It will be pointed out that although they are considered to be victims of crime as well as victims of human rights abuses, their rights and interests are not fully recognized and protected. This is closely connected to the fact, as discussed in Chapter 4, that by ignoring the ‘means’ element in its trafficking definitions, Vietnamese law does not acknowledge the coercive nature of trafficking crimes and

⁷ See *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12, approved by the Vietnamese National Assembly 12th Legislature, 5th session on 19 June 2009, entered into force 1 January 2010, amended by the Amendment 2009, arts 119, 120 [Ministry of Justice trans] <www.vbqpl.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10467> – see Appendices 2 and 3; *Law on Prevention, Suppression against Human Trafficking 2011* (Vietnam) No 66/2011/QH12, was passed by Vietnamese National Assembly 12th Legislature, 9th session on 29 March 2011 and entered into force 1 January 2012 (‘*Anti-Trafficking Law 2011*’), art 3 [UNIAP trans] <www.artipproject.org/artip_tip_cjs/laws-policies/national/Vietnam/Vietnam%20Anti-trafficking%20in%20Persons%20Law%20Mar%202011%20final%20ENG.pdf> – see Appendix 3.

⁸ Article 3 of the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12 prohibits trafficking for sexual exploitation, forced labor, removal of organs or for other inhumane purposes – see Appendix 3.

⁹ See also section 4.2.2 of Chapter 4 of this thesis.

¹⁰ See, for example, the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 5(1), 11 – see Appendix 3.

¹¹ See the relevant discussion in section 4.4.1.3 of Chapter 4 of this thesis.

the vulnerability of trafficked persons throughout trafficking processes. Therefore, the first part of this chapter shows that under the Vietnamese legal framework, trafficked persons are not exempted from sanctions for infringements of the law, simply due to their status as 'victims'. In the meantime, this part will show that trafficked persons, besides the rights they are entitled to as victims of crime, are obliged to cooperate with competent authorities. Together with the lack of appropriate attention to the protection of victims' right to participate in legal proceedings as discussed in the next part, this raises a concern about the Vietnamese legal system which sees people as tools of the system rather than bearers of rights.

The next part of this chapter will investigate Vietnamese policy and practice in the identification of trafficked persons. This part will point out that identification (as also with the reception of victims discussed in the following part) depends on the method of return of victims and, therefore, upon the policies and practices of the different governmental agencies involved. Whilst Vietnam's *Law on Prevention and Suppression of Human Trafficking 2011*¹² primarily introduces criteria/grounds for identification of trafficked persons, they are mainly focused on verification of victims' identity rather than exploring the trafficking circumstances and experiences of victims. This verification is then used for the repatriation/return of trafficked persons as quickly as possible rather than providing them with the protection and assistance to which they are entitled as victims of human rights abuses. Further, this part will also point out that Vietnamese law maintains a dichotomy of trafficked/smuggled persons by (criminally or administratively) punishing those who illegally enter or exit the country instead of providing them with protection. This adds to the fact that the 'definitions' of trafficking under Vietnamese law are, as discussed in Chapter 4, narrow and unclear in their validity¹³ and focus on repatriation, even at the cost of deportation of trafficked persons as illegal migrants, raises concerns about the practice of identification in Vietnam.

Vietnamese policies on the protection of and assistance to trafficked persons will be discussed in the next part of this chapter, which will examine the protection of

¹² That is the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12 – see Appendix 3.

¹³ As to whether they supplement or replace the equivalent provisions of the Penal Code, see also the relevant discussion in section 4.4.1.2 of Chapter 4 of this thesis.

trafficked persons' physical safety, privacy and identity, their right to access information and participate in criminal proceedings, their right to a residence permit and rights in relation to repatriation. This part will also point out that there are some progressive agreements at the bilateral level which are not reflected in national law, that provide for protection of victims by way of a reflection period, protection of their physical safety, assistance in the reception and reintegration process, as well as remedies for trafficked persons. This analysis will address the fact that there is little protection of victims and witnesses under Vietnamese law, and will argue that giving testimony cannot change a victim of crime into a witness. Additionally, the lack of attention to victims' right to access and to participate in criminal proceedings, as discussed in this part, again presents a challenge to Vietnam in thinking of people as bearers of rights, rather than just tools for the legal system. The next section will examine the assistance provided to trafficked persons, the national policies and practices on reception, reintegration, victim support institutions, community reintegration and remedies to trafficked persons. This section will discuss the efforts of non-governmental organisations (NGOs) and/or international non-governmental organisations (INGOs) aimed at filling the gaps left by the legal framework and the lack of capacity of the Vietnamese government in supporting trafficked persons, especially in reception and reintegration. Effective collaboration amongst agencies working in the field can be seen, as Kneebone points out, as a salient feature of the Vietnamese 'landscape'.¹⁴ However, this section will also identify the problem of a lack of official concern about the issues of community reintegration and remedies for trafficked persons in Vietnam.

¹⁴ Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012), 154.

5.2 TRAFFICKED PERSONS AND THE IDENTIFICATION ISSUE UNDER VIETNAMESE LAW

5.2.1 Trafficked persons under Vietnamese law

Trafficked persons are regarded as victims of human rights abuses under the *Trafficking Protocol*,¹⁵ and while the same approach seems to have been taken under the Vietnamese framework, their internationally recognized rights and interests are not fully accepted. Prior to the establishment of the national anti-trafficking law, the *Governmental Decision 17/2007* providing Guidelines on Reception and Supporting Community Reintegration of Trafficked Women and Children Returned from Abroad¹⁶ refers to victims in the context of *trafficking in women and children*, in the spirit of respecting their legitimate rights and interests without discrimination against them.¹⁷ This spirit is maintained under the terms of the Vietnamese *Anti-Trafficking Law 2011*, which officially defines trafficked persons as victims, and recognizes their rights and interests. It is noteworthy that, together with the new ‘definition’ of trafficking, ‘victim of trafficking’ under Vietnamese law is now a gender-neutral term that appears to shift the anti-trafficking response to a stronger focus on trafficking in

¹⁵ See, eg, the *Trafficking Protocol*, preamble, arts 6, 7, 8 – see Appendix 1; see also sections 1.3 of Chapter 1 and 3.3 of Chapter 3 of this thesis.

¹⁶ *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* (Vietnam) 29 January 2007 (‘*Government Decision 17/2007*’) [Alliance Anti-Traffic trans]
<[ftp://ftp2.allianceantitrafic.org/alliancea/001%20%20Vietnam/Decision_17_English_translation.pdf](http://ftp2.allianceantitrafic.org/alliancea/001%20%20Vietnam/Decision_17_English_translation.pdf)>
> – see Appendix 3.

¹⁷ *Ibid*, art 3(2) – see Appendix 3; see also Ministry of Public Security, Ministry of National Defence, Ministry of Foreign Affairs and Ministry of Labor, Invalid and Social Affairs, *Inter-ministerial Circular 3/2008/TTLT-BCA-BQP-BNG-BLDTBXH Guidelines on Process and Procedures of Identification and Reception of Trafficked Women and Children from Abroad* (Vietnam) 8 May 2008 (‘*Circular 3/2008*’), s 2(a) pt I [UNIAP trans] <http://www.no-trafficking.org/report_docs/legal/vietnam/vn_imc_vicid.pdf>.

men and boys (even though this is not stated specifically).¹⁸ Article 4(2) of this law sets out as a principle the requirement that '[v]ictims' legitimate rights and interests must be respected, and discrimination or differentiation shall not be made against victims.' Article 6 of this law also explicitly accords trafficking victims rights to the protection of their physical safety,¹⁹ to supporting service regimes²⁰ and to compensation.²¹

However, rather than emphasizing the rights of trafficked persons which should be protected, the new *Anti-Trafficking Law 2011* also provides that victims of trafficking have obligations in relation to the criminal justice outcomes. For example, Articles 6(4) and 6(5) of the new *Anti-Trafficking Law 2011* stipulate that trafficking victims are obliged 'to provide information relating to acts of violation of anti-human trafficking laws and regulations to competent agencies, organizations or persons', and 'to fulfill [sic] competent agencies' requests relating to human trafficking cases'.

Additionally, the omission of the 'means' element from Vietnamese trafficking definitions²² obscures the 'coercive' nature of trafficking²³ and the vulnerability of trafficking victims, which is of particular importance in preventing them from being held liable for 'criminal acts that may be committed under duress or as a result of their being trafficked'.²⁴ As discussed in Chapter 3 in connection with the non-criminalisation principle, international standards require that states provide in their

¹⁸ See also section 4.4.1.2 of Chapter 4 of this thesis.

¹⁹ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 6(1) – see Appendix 3.

²⁰ *Ibid*, art 6(2) – see Appendix 3.

²¹ *Ibid*, art 6(3) – see Appendix 3.

²² See section 4.4.1.2 of Chapter 4 of this thesis.

²³ See United Nations Office on Drugs and Crime (UNODC), *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) ('*Travaux Préparatoires*'), 334.

²⁴ United Nations Office on Drugs and Crime (UNODC), *Combating Trafficking in Persons – A Handbook for Parliamentarians* (2009), 43.

domestic law for the possibility of not imposing punishment on victims.²⁵ Accordingly, trafficked persons should not be detained, charged or prosecuted for their illegal entry into, or residence in, countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.²⁶

The principle of non-criminalisation of trafficked persons is incorporated in some non-binding bilateral agreements between the Vietnamese government and other governments. For example, Article 5 of the Cambodia – Vietnam Agreement 2005²⁷ says:

Trafficked persons shall be considered victims and not violators or offenders of the immigration law. Therefore,

1. Trafficked women and children shall not be charged and prosecuted for illegal immigration or prostitution;
2. Trafficked women and children shall not be detained in an immigration detention centre during the time [they are] waiting the official repatriation process.

Similarly, the Memorandum of Understanding (MOU) between Vietnam and Lao PDR requires ‘the [p]arties’ competent authorities to ensure [that victims] are not detained and/or punished for illegal immigration or any other related administrative offence’.²⁸ Article 6 of the bilateral agreement between Vietnam and Thailand also points out

²⁵ See, eg, the *European Trafficking Convention*, art 26; see also the related discussion in section 3.2.3 of Chapter 3 of this thesis.

²⁶ *Recommended Principles and Guidelines*, above n 1, principle 7.

²⁷ *Agreement between the Royal Government of Cambodia and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking*, 10 October 2005 (‘Cambodia – Vietnam Agreement 2005’), art 5 <http://www.no-trafficking.org/reports_docs/legal/vietnam/mou_vn_cb_eliminate_tips.pdf>.

²⁸ *Agreement between the Government of the Lao People’s Democratic Republic and the Government of the Socialist Republic of Vietnam on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking*, 3 November 2010 (‘Lao – Vietnam Agreement 2010’), art 4(a) <www.no-trafficking.org/reports_docs/legal/lao_viet_ht_mou_en.pdf>.

that ‘trafficked women and children shall be considered victims, not violators or offenders of the immigration law’ and consequently they ‘shall not be prosecuted for illegal entry to the country’ and ‘shall not be detained in an immigration detention centre while waiting for repatriation’.²⁹ The agreement between Vietnam and the People’s Republic of China (PRC) (2010)³⁰ even goes further to determine that victims of trafficking shall not be punished for their acts of ‘illegally entering (or exiting) their national territories or *other illegal acts as an immediate result of being trafficked*’.³¹

Unfortunately, the principle of non-criminalisation as so clearly articulated in these bilateral agreements has not been reflected in the Vietnamese national law against trafficking. In fact, Vietnamese victims of trafficking are not legislatively guaranteed to not be subject to sanctions and criminal penalties. Conversely, trafficked persons who engage in prostitution, or who hold false travel documents or who work (in some specific types of job) without a license may be subject to some legal liabilities.³² For example, as a consequence of the social evil approach,³³ trafficked persons who engage in prostitution are often treated as sex workers and subjected to what is called ‘administrative handling measures’. These measures include compulsorily

²⁹ *Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking*, signed 24 March 2008 (‘*Thai – Vietnam Agreement 2008*’) <www.no-trafficking.org/report_docs/legal/thai_vn_coop_elim_tip_en.pdf>.

³⁰ *Memorandum of Understanding between the People’s Republic of China and the Socialist Republic of Vietnam on Cooperation Agreement on Prevention and Control of Human Trafficking* (2010) (‘*PRC – Vietnam Agreement 2010*’).

³¹ *Ibid*, art 2(A) (emphasis added)

³² See United Nations Office on Drugs and Crime (UNODC), United Nations Children’s Fund (UNICEF) and Department of Criminal and Administrative Laws – Ministry of Justice (MOJ) of Vietnam, *Assessment of the Legal System in Vietnam in Comparison with the United Nations Protocols on Trafficking in Persons and Smuggling of Migrants, Supplementing the United Nations Convention against Transnational Organized Crime* (2004) (‘*Assessment of the Legal System in Vietnam*’), 28–9.

³³ See section 4.4.1.3 of Chapter 4 of this thesis.

sending them to a medical treatment institution to participate in education, vocational training and medical treatment.³⁴ In another example, a person who is trafficked to Vietnam may be subjected to administrative liability for illegally working or conducting activities different from those permitted by their visa in Vietnam.³⁵ Further, trafficked persons who hold false travel documents (passport, visa) may be subjected to criminal liability as stipulated in Articles 266 and 267 of the *Penal Code 2009*.³⁶ It has been claimed that these adverse measures are rarely applied and that they tend to support rather than punish people.³⁷ Nevertheless, it is hard to disclaim the fact that the existence of these measures within the national law is a violation against the international law's principle of non-criminalisation of trafficked persons.

Moreover, trafficked persons who illegally exit and/or enter Vietnam may be subject to administrative or criminal liability as illegal migrants. As discussed previously, Vietnamese law, whilst seeing smuggling of migrants in the context of national security issues, also charges migrants for their unlawful border-crossing.³⁸ Article 274

³⁴ See Thi Tue Phuong Hoang, 'Legislating to Combat Trafficking in Vietnam' (Paper presented at Is this the Asian Century? – 17th Biennial Conference of the Asian Studies Association of Australia, Melbourne, 1–3 July 2008), 21 <www.arts.monash.edu.au/mai/asaa/hoangthituephuong.pdf>, cited Article 26 of the *Ordinance on Handling Administrative Violation* and the *Joint Circular No 12/TTLB/LDTBXH-TC* dated 7 June 1996 of the Ministry of Labor, Invalid and Social Affairs and the Ministry of Finance, giving guidance for State subsidize for people who are sent to Medical Treatment Institution according to *Decree No 20/CP* dated 13 April 1996 of the Government on Promulgation of Regulations of Medical Treatment Institution established under the Ordinance on Handling Administrative Violations.

³⁵ See *Assessment of the Legal System in Vietnam*, above n 32, 37.

³⁶ See the *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12 with its Article 266 is on the offense of 'amending certificates/papers issued by agencies/organizations and using such papers' and Article 267 is on the offense of 'forging seals/documents of agencies/organizations'.

³⁷ See *Assessment of the Legal System in Vietnam*, above n 32, 28–9.

³⁸ See section 4.4.1.2 of Chapter 4 of this thesis; see also Yi Wang, 'Trafficking in Women and Children from Vietnam to China: Legal Framework and Government Responses' (Report, Oxfam Quebec, August 2005), 14.

of Vietnam's Penal Code criminalizes the act of '[i]llegally leaving or entering the country, illegally staying abroad or in Vietnam', stating that:

Those who illegally leave or enter the country or stay abroad or in Vietnam and have already been administratively sanctioned for such act but continue the violation, shall be subject to a fine of between five million dong and fifty million dong or a prison term of between three months and two years.³⁹

As guided by a Joint Circular distributed to relevant Vietnamese governmental agencies,⁴⁰ people who flee abroad and then voluntarily return are not to be prosecuted the first time they illegally exit or enter the country, however, they will still be subject to administrative sanctions such as fines, confiscation of passports or travel documents, or deportation.⁴¹

³⁹ See *Assessment of the Legal System in Vietnam*, above n 32, 16–17.

⁴⁰ See *ibid* 28, citing the Ministry of Internal Affairs, the People's Supreme Court and the People's Supreme Procuracy, *Joint Circular 1/1991/TTLN-BNV-TANDTC-VKSNDTC Guiding the Handling of Persons who Fled Abroad and then Voluntarily Returned* (Vietnam) 17 February 1991 (the validity is unspecified) [Vietnamese version] <<http://vanban.cafeluat.com/van-ban/thong-tu-lien-tich/35197-thong-tu-lien-tich-01-ttln-thong-tu-huong-dan-duong-loi-xu-ly-doi-voi-nguoi-di-nuoc-ngoai-da-tu-nguyen-hoi-huong.html>>.

⁴¹ See *Government Decree 49/1996/ND-CP on Sanctions against Administrative Violations in the Domain of Security and Order* (Vietnam) 15 August 1996, replaced by the *Government Decree 150/2005/ND-CP*, arts 20, 21 [Ministry of Justice trans] <http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=2044>; *Government Decree 150/2005/ND-CP Providing the Sanctioning of Administrative Violations in the Domain of Security and Social Order and Safety* (Vietnam) 12 December 2005, arts 21, 22 [Ministry of Justice trans] <http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6140> which replaces the above *Government Decree 49/1996*. *Contra Assessment of the Legal System in Vietnam*, above n 32, 28 which understated that these sanctions are 'not targeted at trafficked victims who committed the violation under fraud, deception, or coercion, but those who intentionally leave or enter the country without authorization.'

Whilst the protection of smuggled migrants has been called for by the international community,⁴² no such provision has as yet been established under the Vietnamese legal framework. This dichotomy of trafficked/smuggled migrants under the Vietnamese framework can partly be understood from an explanation of the Ministry of Justice of Vietnam in an assessment report which says:

[W]hile trafficked persons have either never consent to the illegal immigrant, or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of the trafficker, on the other hand, migrants have consented to the smuggling. Other [sic] reason is that the smuggled migrants are not totally passive but somehow contribute to the current situation of illegal immigration because there would be no supply without demand. Therefore, the protection given to smuggled migrants is considerably lower than the protection given to trafficked victims.⁴³

This explanation shows once again that the coercive and exploitative conduct at the core of the trafficking crime (which helps distinguish a trafficking case from a smuggling case and, therefore, trafficked persons from smuggled migrants) has not been acknowledged under Vietnamese law. As is broadly accepted, the distinction between trafficking and smuggling practices cannot simply be reduced to whether or not the migrants consented to the illegal migration or whether they acted as active agents or passive victims.⁴⁴ This raises serious concerns about the misidentification of trafficked victims as illegal migrants and, as a result, the denial of protection and assistance to which they are entitled as trafficking victims under Vietnamese law.

The conceptualisation of trafficked persons as passive victims under Vietnamese anti-trafficking policy is also manifested through its frequent use of the term 'rescue'

⁴² See *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) ('*Smuggling Protocol*'), arts 5, 6; see further in section 3.2.1.2 of chapter 3 of this thesis the discussion on the protection of smuggled migrants particularly from criminalisation.

⁴³ See *Assessment of the Legal System in Vietnam*, above n 32, 29.

⁴⁴ See section 3.2.1.2 of Chapter 3 of this thesis.

in anti-trafficking law and implementing legal documents.⁴⁵ This term creates an image of trafficked persons as those who lack self-determination, autonomy or agency and who need ‘the agencies, units or individuals ... to apply necessary measures to rescue’⁴⁶ them or, in other words, intervention from the government. In this sense, it can be said that such a conceptualisation of trafficked persons will affect the way protection responses to trafficking are framed.⁴⁷ Specifically, it leads to insufficient attention being given to the actual circumstances of trafficking⁴⁸ and the individual experiences of trafficked persons right at the beginning in identification process, which occurs in Vietnamese anti-trafficking practice as discussed in the next section. It should also be noted that these characteristics of passive victims are often seen as stereotypical to women and children as victims of trafficking for sexual exploitation in the GMS.⁴⁹ Therefore, the frequency of using the term ‘rescue’ in Vietnam’s *Anti-Trafficking Law 2011* as such may support the concern about its persistence in focusing on trafficking in women and children for sexual exploitation.

⁴⁵ See, for example, the *Anti-Trafficking Law 2011*, (Vietnam) No 66/2011/QH12, art 4(1) provides that ‘rescue, protection, receipt, verification and assistance to victims must be conducted precisely and in due course.’ Article 29 of this Law provides for ‘Rescue, Protection’ of victims of trafficking; and Article 55 of this Law provides for ‘Cooperation of Rescue and Repatriation of Victims – see Appendix 3. Prior to the establishment of this official anti-trafficking law, there have been several legal documents guiding on receiving and supporting trafficking victims in which the term of ‘rescue’ has been used, such as the *Government Decision 17/2007* (Vietnam) 29 January 2007, arts 3(1), 5(2), 26 (see Appendix 3) or the *Circular 03/2008* (Vietnam) 8 May 2008, pt I ss 1(b), 2(c). However, it should be noted that there have been Vietnamese anti-trafficking stakeholders approaching trafficked persons with ‘empowerment’ activities, for example Action Aid Vietnam with their operation on empowerment and protection of the right of trafficking victims from right-based approach. See Confidential interview (Hanoi, 27 March 2008).

⁴⁶ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 29 – see Appendix 3.

⁴⁷ Kneebone and Debeljak, above n 14, 73.

⁴⁸ Ibid.

⁴⁹ Ibid.

5.2.2 Identification of trafficked persons in Vietnam

5.2.2.1 Policy on identification of trafficked persons

As has been analysed in Chapter 3, a rapid and accurate identification of trafficked persons plays an extremely important role in ensuring the protection of their rights and interests. However, identification of trafficked persons has never been an easy process, and not only because of the complexity of the trafficking crime. It has been exacerbated by the fact that the *Trafficking Protocol* does not acknowledge the role of effective identification processes as an integral part of combating trafficking crime.⁵⁰ In addition, as previously discussed in the global context⁵¹ and as relevant to the Vietnamese context, the state's reluctance to accept the existence of trafficked persons within its territory, its lack of understanding and resources, the influence of gendered perceptions about trafficked persons, and the dichotomy of trafficked/smuggled migrants are the main causes of the continuing difficulties in identifying trafficked persons. Consequently, in Vietnam, regardless of the relevant commitments which Vietnam has made, trafficked persons are misidentified or invisible to Vietnam's authorities and, hence, are denied the special protection and support they should receive.

The Cambodia – Vietnam Agreement on Standard Operating Procedures for the Identification and Repatriation of Trafficked Victims determines that identification shall be separate from but based on, among others, verification activities which are mainly on 'verify[ing] the victim's nationality and conduct[ing] family tracing'.⁵² Accordingly, identification of trafficked persons between Cambodia and Vietnam is based on documentary evidence by the two parties, *verification* from the competent authorities, testimonies and evidence given by victims and accused, information from

⁵⁰ See section 3.2.1.3 of Chapter 3 of this thesis.

⁵¹ See section 3.2.1.1 of Chapter 3 of this thesis.

⁵² See *Cooperation Agreement on Standard Operating Procedures (SOP) for the Identification and Repatriation of Trafficked Victims between the Government of Cambodia and the Government of Vietnam*, 3 December 2009 ('*Cambodia – Vietnam SOP 2009*'), art 3(c)
<[http://www.baliprocess.net/files/Vietnam/Vietnam%20agreement%20with%20Cambodia_SOP%20for%20id%20and%20repatriat%20trafficked%20victims_Eng%20\(small\).pdf](http://www.baliprocess.net/files/Vietnam/Vietnam%20agreement%20with%20Cambodia_SOP%20for%20id%20and%20repatriat%20trafficked%20victims_Eng%20(small).pdf)>.

NGOs involved and other sources.⁵³ In the meantime, the PRC – Vietnam Agreement 2010 confirms the need to ‘formulate criteria for identifying victims of transnational human trafficking ... and timely identify the victims’.⁵⁴

However, in terms of national law, the *Anti-Trafficking Law 2011* of Vietnam devotes its Chapter IV to ‘Receipt, *Verification* and Protection of Victims’ rather than to identification of trafficked persons.⁵⁵ Under the terms of this law, ‘verification’ which focuses on ‘identifying preliminary information of the victims’⁵⁶ or ‘verifying the identity record of the victims’⁵⁷ depends on how a person is returned and who receives him/her in Vietnam. Whilst the Ministry of Public Security (MPS) is often designated in bilateral agreements⁵⁸ as the focal agency on the part of Vietnam for the verification of trafficked persons, this task is actually conducted by several governmental agencies. The *Anti-Trafficking Law 2011* sets out the procedures of verifying trafficked persons in Vietnam as follows:

⁵³ See *ibid*, art 1(b).

⁵⁴ *PRC – Vietnam Agreement 2010*, above n 30, art 1(C).

⁵⁵ Emphasis added.

⁵⁶ See the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 24(2), 24(3), 25(2) – see Appendix 3.

⁵⁷ See *ibid*, art 26(1)(a) – see Appendix 3.

⁵⁸ This is in accordance with provisions of several bilateral agreements between Vietnam and its neighbouring countries, under which the focal point agency for victim identification in the part of Vietnam is the Immigration Department under the MPS or the provincial immigration authorities with powers delegated by the MPS. See the *Cambodia – Vietnam SOP 2009*, above n 52, art 2; *Lao – Vietnam Agreement 2010*, above n 28, art 6(3).

Table 1:

Category of persons	Agencies in charge of (receipt and) verification	Relevant provisions of the Anti-Trafficking Law 2011
Victims of domestic trafficking	<ul style="list-style-type: none"> - Commune-level People's Committees - Divisions on Labor, War Invalids and Social Affairs (DOLISA)* - Public Security Agencies 	Article 24
Rescued victims	<ul style="list-style-type: none"> - Public Security Agencies, Border Military or Marine Police - DOLISA 	Article 25
Victims who are returned from abroad**	<ul style="list-style-type: none"> - Foreign-based Vietnamese Representative Missions*** - Ministry of Public Security or the Ministry of National Defense 	Article 26
Victims who return under bilateral agreements	In accordance with relevant bilateral agreements	Article 26(2)
Victims of transnational trafficking who self- return	<ul style="list-style-type: none"> - Self-identify initially - Processed as above (Article 24 – domestic victims) 	Articles 26(3) (and Article 24)

* See footnote below.⁵⁹

⁵⁹ Regarding the role of DOLISA (or MOLISA in general), it has been argued that this governmental agency should not take the role of a focal point agency in activities of reception and protection of trafficked persons whilst the MPS and Border Guard agencies are with better conditions of the first

** Including victims who return from abroad through diplomatic representative missions, consulates or other agencies authorized to conduct consulate functions of Vietnam in foreign countries.⁶⁰

*** Including diplomatic representative missions, consulates or other agencies authorized to conduct consulate functions of Vietnam in foreign countries.⁶¹

As to the identification of trafficked persons under the terms of bilateral agreements, it should be noted that, as abovementioned, arrangements Vietnam has made with Cambodia⁶² and the PRC⁶³ are the most relevant commitments. Whilst these agreements are largely directed to the verification of victims' nationality, and to family tracing, they are non-binding and are, in fact, not effective in reception and identification of trafficked persons at border gates, especially the Vietnam – PRC border. In an interview, an officer of the UN Inter-Agency Project on Human Trafficking in the GMS (UNIAP) Vietnam was concerned that families of Vietnamese trafficked persons had to pay the PRC's police force for their trafficked relatives' repatriation.⁶⁴ Otherwise, the police force from the PRC would not pursue the case and the concerned Vietnamese trafficked persons had to return home by themselves. Meanwhile, their Vietnamese counterparts were unfamiliar with procedures for a trafficking case that requires inter-state cooperation.

The *Anti-Trafficking Law 2011* simply provides that a person can be identified as a victim when he/she is proved to have been trafficked, transferred, received, recruited,

who receive trafficked persons. However, in the opinion of an officer of UNIAP Vietnam, the involvement of police force or border guard commander in activities of supporting trafficked persons may be misunderstood (by the international community) as approaching trafficked persons as criminals who violated immigration laws. This involvement has also unexpectedly brought about the fear/reluctance of trafficked persons that restrains their cooperation with the competent authorities. Confidential interview B (Hanoi, 20 March 2008).

⁶⁰ See the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 26 – see Appendix 3.

⁶¹ As interpreted in *ibid*.

⁶² *Cambodia – Vietnam SOP 2009*, above n 52.

⁶³ *PRC – Vietnam Agreement 2010*, above n 30.

⁶⁴ Confidential interview B (Hanoi, 20 March 2008).

transported or harboured for sexual exploitation, forced labour, the removal of organs, or for other inhumane purposes.⁶⁵ Papers and documents which are proof of a victim's identity, as provided by Article 28 of this law, are documents made by the governmental agencies who are in charge of the verification process as illustrated in the table above.⁶⁶ Those documents include written confirmation from district-level People's Security Agencies, rescuing or investigating agencies, agencies designated to perform a certain number of investigative activities, People's Procuracies or People's Courts, papers or documents that are issued by foreign agencies and certified by foreign-based Vietnamese Representative Missions or by the Ministry of Foreign Affairs.⁶⁷ It can be clearly observed from this provision that identification of trafficked persons in Vietnam is largely carried out for the purpose of verifying trafficked persons' preliminary information or identities rather than their trafficking circumstances or experiences. Whilst the above criteria for victim identification look more like a repetition of a definition of the trafficking crime, the International Organization of Migration (IOM) is supporting governmental agencies in building 'an effective, confidential and non-judgmental mechanism' to identify victims of trafficking.⁶⁸

⁶⁵ See the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 3, 27 – see Appendix 3; *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12, arts 119, 120 – see Appendices 2 and 3.

⁶⁶ See also *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 24–6 – see Appendix 3.

⁶⁷ See *ibid*, art 28 – see Appendix 3.

⁶⁸ Under the terms of IOM's ongoing project on 'Comprehensive Return and Reintegration through Partnership and Collaboration' and its completed project named 'Building Networks of Support for Trafficked Persons in Ha Noi'. See International Organization for Migration (IOM) Vietnam, 'Compendium of Projects' (Report, 1 July 2009). However, there has been no such a mechanism in place up to the time this thesis is written. An interview with an IOM officer in 2008 also reveals that IOM Vietnam – in its cooperation with Cambodian counterparts for victim return – relied on Cambodian competent authorities (including the MPS and the Ministry of Women Affairs) in terms of (the indicators for) identification of trafficked persons whilst awaiting for its own guidelines for victim identification to be developed. Confidential interview (Ho Chi Minh City, 25 April 2008). In the meantime, an officer from UNIAP Vietnam provided the opinion (in an interview in 2008) that the National Guidelines for Victim Identification was assigning to Immigration Police (A18) for

In the process of identification under Vietnamese law, verification from the Public Security Agencies at the communal level where trafficked persons are registered as permanent residents is an important form of proof.⁶⁹ This relates to the Vietnamese policy on household registration as the framework for controlling and monitoring changes in people's residence.⁷⁰ Whilst classifying people into different residential categories with equivalent rights and obligations, the system in fact has been assessed as an obstacle for migrants in accessing certain social services.⁷¹ In the context of identification, it should be noted that many migrants relocate without registering their movement; that is, they remain on the household lists in one area whilst actually living in another. This practice can become an obstacle for competent authorities attempting to verify the identity and living circumstance of trafficked persons prior to their movement and, thus, is an obstacle to the effectiveness of the identification process. Another problem with identifying trafficking victims in Vietnam at the communal level arises from a misunderstanding on the part of competent officers who believe that identification is carried out for the purpose of prosecuting

monitoring the establishment. However, no more information on these Guidelines provided until the writing up of this thesis. Confidential interview B (Hanoi, 20 March 2008).

⁶⁹ See the *Circular 3/2008* (Vietnam) 8 May 2008, pt II; *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 24 – see Appendix 3.

⁷⁰ This is the system for managing the residency of Vietnamese people throughout the country by registration with local authorities. As provided by law, when a person comes to stay for short-term period in an area, he/she has to register for temporary residence, and equivalently, for permanent residence for long-term or permanent stay; when a person leaves temporarily or permanently the area where he/she lives, he/she has to register for temporary absence or change his/her permanent residence to the new area. However, this system does not relate to the permission to exit or entry the country. See also section 4.2.2.2 of Chapter 4 of this thesis discussing this system.

⁷¹ Action Aid International Vietnam, 'Report on Survey of Trafficking of Women and Children for Proposing Suitable Intervention Activities' (Report, October 2008), 17–19; see also section 4.2.2.2 of Chapter 4 of this thesis.

traffickers rather than protecting and assisting victims.⁷² In this sense, a person will only be regarded as a victim of trafficking if the trafficker(s) can be identified or, otherwise, he/she will be refused the status of victim and the protection and assistance to which he/she is entitled.

Noticeably, the Vietnamese government recently issued a Decree setting out the grounds for the identification of victims of trafficking, and providing for the protection of the safety of victims and their relatives.⁷³ However, it is unsurprising to observe that for the main part, in relation to victim identification, the Decree mostly reiterates what has been provided previously as ‘prohibited acts’ in Article 3 of the *Anti-Trafficking Law 2011*, which as mentioned does not have a specific reference to the practice of labour exploitation.⁷⁴ The Decree also provides additional grounds for victim identification (in case the main grounds are not sufficient), including:

- i) the fact that that person was discovered and rescued together with other victims;
- ii) the fact that the rescued person shared a period of living with other victims at a trafficking site and was treated the same as those victims;
- iii) physical and psychological indicators (of being sexually exploited, forced into labour, treated in degrading manners, physically injured, scared, traumatised or ill);

⁷² This is the opinion of Ms. Le Hong Loan, UNICEF Vietnam, cited in Huy Anh, ‘Kho ho tro nan nhan cua nan “buon nguoi”’, *Phap Luat VN* (online) 7 June 2010
<<http://www.phapluatvn.vn/tuphap/201006/Kho-ho-tro-nan-nhan-cua-nan-buon-nguoi-1946378/>>
[author’s trans: ‘It is difficult to support victims of trafficking’].

⁷³ *Government Decree 62/2012/ND-CP on the Grounds for the Identification of Trafficked Victims and Protection of the Safety for Victims and their Relatives* (Vietnam) 13 August 2012, will enter into force 10 October 2012 [Vietnamese version]
<http://moj.gov.vn/vbpg/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=27864>. This Decree was prompted by the need to specify details of the relevant provisions of the *Anti-Trafficking Law 2011* to implement them into practice.

⁷⁴ *Ibid*, art 5(1); see also section 4.4.1.2 of Chapter 4 of this thesis.

- iv) the fact that his/her relative(s) reported his/her disappearance and/or their subjection to any trafficking acts;
- v) other legal information which helps to establish that that person is a victim of trafficking.⁷⁵

It should be noted that these additional grounds actually reflect a better concern about the situation and experience of trafficking victims, which can be seen as a promising sign for a more effective identification and, consequently, protection for trafficked persons in Vietnam.

5.2.2.2 Practices of (mis)identification in Vietnam

From the above discussions of the attitude of Vietnamese anti-trafficking policy towards trafficking victims and its focus on the identification process, it can be asserted again that there have been many trafficked persons who have remained invisible or misidentified to Vietnam's authorities. The first group of invisible victims is trafficked persons who fall outside the scope of the narrow trafficking definition provided by Vietnamese anti-trafficking law.⁷⁶ These are Vietnamese people who have been trafficked for the purpose of labour exploitation, either within and outside of Vietnam, who are not covered under the Vietnamese anti-trafficking framework, regardless of its description of 'forced labour'. They can also include Vietnamese men who are trafficked transnationally or domestically for different purposes, but who are less likely to be identified as victims of trafficking in the trafficking process (due to the shadow of the gendered and prostitution discourses).⁷⁷

The second group of invisible/misidentified victims comes from the existence of the trafficked/smuggled migrant dichotomy within the Vietnamese anti-trafficking responses. As is well known, the fact of criminalisation of illegal/smuggled migrants whilst trafficked persons are considered as victims, leads to the dichotomy of trafficked/smuggled persons under which trafficked persons are subject to (mis)identification as smuggled/illegal migrants and deportation and/or criminal

⁷⁵ Ibid, art 5(3) [author's trans].

⁷⁶ See section 4.4.1.2 of Chapter 4 of this thesis.

⁷⁷ See also sections 4.3.2.1 and 4.4.1 of Chapter 4 of this thesis.

liability for illegal exit/entry from/into the country. It can be said that in Vietnamese anti-trafficking practice, there are many victims of trafficking who are misidentified as illegal migrants when they are found to have consented to their illegal migration or they do not appear to have been passive throughout the trafficking process. The situation is exacerbated for Vietnamese trafficked migrants if they are caught crossing borders illegally a second time.⁷⁸ In such cases there is a high probability that these trafficked migrants will be subjected to criminal liability as illegal migrants. In the meantime, the omission of the 'means' element from the definition of trafficking in Vietnamese law makes illegal migrants who pay for their border crossings more vulnerable to being identified as smuggled migrants and subject to criminal liabilities.

However, it should be noted that in Vietnamese anti-trafficking literature, these practices that lead to the misidentification or invisibility of trafficked persons, and which derive from the shortcomings of national anti-trafficking law, seem not to be fully recognized by the stakeholders. Whilst reporting that Vietnamese trafficked persons returned from neighbouring countries are commonly treated as illegal migrants in mass deportations, both regional and national research has perceived this practice to result solely from weak cooperation amongst the relevant countries rather than looking at the link between weak laws, the dichotomy of trafficked/smuggled migrants and this misidentification practice.⁷⁹

⁷⁸ See further in section 5.2.1 of this chapter.

⁷⁹ Wang, above n 38, 20–1; Jerrold W Huguét and Varamon Ramangkura, 'The Long Road Home: Analysis of Regional and National Processes for the Return and Reintegration of Victims of Trafficking in the Greater Mekong Subregion' (Report, International Organization for Migration, 2007), 36, 38; Save the Children and the National Anti-Trafficking Programme Steering Committee (130/CP) Vietnam, 'Report on Assessing the Return and Reintegration of Victims of Cross-Border Trafficking' (Report, February 2008), 19.

5.3 PROTECTION OF AND ASSISTANCE TO TRAFFICKED PERSONS UNDER VIETNAMESE LAW

5.3.1 Protection of trafficked persons under Vietnamese law

5.3.1.1 Protection of physical safety

In terms of protecting victims' physical safety, the *Trafficking Protocol* requires its state parties to 'endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory'.⁸⁰ This protection is limited to victims' physical safety,⁸¹ not only from the dangers of intimidation and retaliation at the hands of traffickers, but also from the risk of revictimisation.⁸² Consequently, according to this international requirement, the protection of a victim's physical safety is not limited to the criminal proceedings in which that victim may be participating. In other words, states need to provide effective protection of trafficking victims whenever and wherever they are at risk of traffickers' intimidation and/or revictimisation.

In the MOU between Vietnam and Cambodia, the protection is not just limited to the physical safety of trafficking victims. In accordance with the terms of the MOU, each state is required to regulate, to ensure 'the security of trafficked persons'.⁸³ The Agreement between the PRC and Vietnam provides that 'the two parties shall take appropriate measures to protect the personal safety of trafficking victims'.⁸⁴ The

⁸⁰ *Trafficking Protocol*, art 6(5) – see Appendix 1.

⁸¹ See United Nations Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto – Part Two: Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2004)* ('*Legislative Guides – Part Two*'), [57(a)].

⁸² See more in section 3.3.2.1 of Chapter 3 of this thesis.

⁸³ *Cambodia – Vietnam Agreement 2005*, above n 27, arts 5(2), 5(3).

⁸⁴ See *PRC – Vietnam Agreement 2010*, above n 30, art 2.

requirements for the general protection of trafficked persons can also be found in the MOU between Vietnam and Lao PDR,⁸⁵ and the cooperation agreement between Vietnam and Thailand.⁸⁶ In these agreements, the protection of trafficked persons (as well as witnesses and their families) from retaliation or menace *during and after* investigations⁸⁷ or judicial proceedings,⁸⁸ with appropriate measures, as an obligation of the competent authorities of each party is especially stressed.

However, Article 6 of the *Anti-Trafficking Law 2011* is less progressive than the commitment Vietnam has made in its bilateral agreements. It asserts that victims of trafficking have *the right to request* the competent authorities to protect them and their relatives against infringements (or threats of infringement) upon their life, health, honour, dignity and property. This new law also puts forth some protective measures, including temporary shelter, keeping secret the places of residence, work and/or study of victims and their relatives, as well as 'measures to prevent acts of infringement upon or threatening to infringe upon the life, health, honor, dignity or property of victims or their relatives'.⁸⁹ This law, however, also stipulates that these protective measures are subject to the specification of the government under the

⁸⁵ *Lao – Vietnam Agreement 2010*, above n 28, arts 4(1)(b), 4(1)(c).

⁸⁶ See *Thai – Vietnam Agreement 2008*, above n 29, arts 6(2), 6(3), 8.

⁸⁷ *Cambodia – Vietnam SOP 2009*, above n 52, art 4(4).

⁸⁸ *Thai – Vietnam Agreement 2008*, above n 29, art 14.

⁸⁹ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 30 – see Appendix 3. It should also be reported that during the discussion for approving this law, some representatives of the National Assembly of Vietnam argued that the drafted provisions on protection measures for trafficking victims (including providing victims with shelters, with protection at their places of residence, study or work, replacing their accommodation and keeping secret their places of residence, work or study, deterring, warning, preventing those who infringed or threatened to infringe upon life, health of victims and their relatives etc...) are not feasible due to economic difficulties of Vietnam and that this protection regime is a preferential treatment to victims of trafficking crime in comparison with the current regime entitled to other crimes' victims. See Hong Khanh, 'Nan nhan bi buon ban duoc bao ve hon ca tong thong', VNExpress (online) 13 November 2010 <<http://vnexpress.net/gl/xa-hoi/2010/11/3ba22ee1/>> at 18 October 2011 [author's trans: 'Victims of trafficking have been protected better than a president'].

law.⁹⁰ In other words, the government will issue directions and, therefore, decide how this obligation regarding protective measures is fulfilled.

The existing provisions regarding protection of physical safety of victims of crimes in the current criminal procedure law of Vietnam are also relevant to the new *Anti-Trafficking Law*.⁹¹ For example, the *Criminal Procedure Code (CPC) 2003*⁹² which is limited to criminal proceedings, provides that the competent authorities must apply *necessary measures* to protect victims of crimes, witnesses and their relatives when they are threatened with infringement of their life, health, honour, dignity or property.⁹³ The *CPC 2003* also emphasises the same protection for witnesses during criminal proceedings, especially court hearings.⁹⁴

However, the Code and its explanatory documents have not yet specified the application of these above protective measures to victims of trafficking, witnesses or their relatives. The reality of the implementation of these protective measures can be derived from the assessment of the Ministry of Justice of Vietnam in a report to the Steering Committee of the National Anti-Trafficking Programme (130/CP) in 2007 which said:

These above protective measures are stipulated only in principle and cannot be implemented without guidance, particularly with regard to who shall be protected, what protective measures shall be applied, how protection procedures may be requested, and the expenditure for these measures to be undertaken ... Besides, the protection of victims of crime in general and victims of trafficking in particular and their relatives has not been paid proper attention in practice. [...] In court hearings, the

⁹⁰ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 30(2) – see Appendix 3.

⁹¹ See *ibid*, art 30(1)(d) – see Appendix 3.

⁹² *Criminal Procedure Code 2003* (Vietnam) Law No 19/2003/QH11, approved by the Vietnamese National Assembly 11th Legislature, 4th session on 26 November 2003, entered into force 1 July 2004 ('*CPC 2003*') [Ministry of Justice trans] http://vbqpp1.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=8236 >.

⁹³ *Ibid*, art 7(3).

⁹⁴ *Ibid*, arts 55(3)(a), 211(5).

[*Criminal Penal Code (CPC)*] has focused on the protection of witness but not the protection of victims. In order to guarantee the physical safety of victims and witnesses [...] and their relatives in trafficking cases in particular, in the short term, there is need for a Circular giving detailed guidance on the provisions of the [*CPC*]. The Circular shall determine who shall be protected, what protective measures shall be applied, how protection procedures may be requested and where the source of funding to implement these measures. The Circular shall also set out the responsibility of Investigating Agencies to inform victims of trafficking [...] and witnesses about their right to be protected, the measures which can be applied, and the procedures through which they can request protection.⁹⁵

The situation, unfortunately, has not been improved so far, since no Circular (or any other legal document) providing guidance on the provisions of the *CPC 2003* on protection of trafficking victims, witnesses and their relatives has been issued under the Vietnamese framework, up to the time of writing. Moreover, the content of protection of trafficking victims and witnesses, particularly in terms of their physical safety, is often absent in the reports of governmental agencies, demonstrating a lack of attention to this issue from Vietnamese authorities, even after the establishment of the national anti-trafficking law.

It should additionally be noted that under Vietnamese law trafficked persons may not benefit from the witness protection measures even if they give testimony against the traffickers. That is, under Vietnamese criminal procedure law, giving testimony or cooperating with the authorities does not necessarily change a victim of crime into a protected witness.⁹⁶ It depends on whether or not the authorities decide to summon that victim as witness.

⁹⁵ See ‘He thong phap luat hien hanh lien quan den phong, chong toi pham buon ban phu nu, tre em va mot vai kien nghi ve huong hoan thien’ (unpublished report, Ministry of Justice, Vietnam, 2007) in the Meeting of Deploying the National Program of Prevention and Suppresion of Trafficking of Women and Children phase II (2007 – 2010) (unpublished, National Steering Committee 130/CP, 2007) 40 [author’s trans: ‘The current legal framework for prevention and suppression of trafficking in women and children and some recommendations for the improvement’].

⁹⁶ Under the current Vietnamese national law, a witness is a person who knows about some information of a criminal case and, more importantly, is summoned by the competent authorities to act as witness (Article 55(1) of the *CPC 2003*). In the meantime, injured persons under Vietnamese law have to give testimonies if they are requested by the competent authorities; if they refuse to do so without a

Meanwhile, in the Handbook on Guiding the Investigation of Trafficking in Persons Cases,⁹⁷ the need to protect vulnerable trafficked persons from retaliation or intimidation by traffickers, as well as from revictimisation has been stressed. Accordingly, the protection should be given from the process of rescue to investigation, prosecution and judgment of a trafficking case. Measures may include, for example, extracting trafficking victims from the control of traffickers (to avoid being kept as hostages during the rescue process).⁹⁸ During the investigation stage, if necessary, the authorities may take victims to a secret and safe place with regular surveillance to prevent attacks from the traffickers.⁹⁹ Importantly, the protection of victims' physical safety is recommended in this Handbook even after the criminal proceedings.¹⁰⁰ This document is not legally binding; however, its progressive content on protection of victims' physical safety should be seen as the first step of acknowledging international standards on this issue and it is somewhat useful for practical purposes. Recently, the *Government Decree 62 on the Grounds for the Identification of Trafficked Victims and Protection of the Safety for Victims and their Relatives* also refers to the measures of protection for the physical safety of victims and their relatives in terms which are not very different from the provisions discussed above, although they need more specification to be of practical use.¹⁰¹ The Decree

reasonable reason they may be subjected to criminal liability (Article 51(4) of the *CPC 2003*). From these provisions, it could be summarized that giving testimonies to the authorities does not certainly change a victim into a witness under Vietnamese law. See the *CPC 2003 (Vietnam) Law No 19/2003/QH11*, arts 51(4), 55(1).

⁹⁷ Bo Cong An – Tong Cuc Canh Sat va Bo Quoc Phong – Bo Tu Lenh Bien Phong, *So Tay Huong Dan Dieu Tra Vu An Buon Ban Nguoi* (2007), 86 [author's trans: Police Department – Ministry of Public Security and High Command of Border Guard – Ministry of National Defense, *Handbook on Guiding on Investigation of Trafficking Cases*].

⁹⁸ Ibid 87.

⁹⁹ Ibid 88.

¹⁰⁰ Ibid 196.

¹⁰¹ *Government Decree 62/2012/ND-CP on the Grounds for the Identification of Trafficked Victims and Protection of the Safety for Victims and their Relatives* (Vietnam) 13 August 2012, art 7. The protective measures for physical safety include i) keeping confidential the cooperation of protected

also provides that victims and their relatives have the right to decline the protection measures that the competent authorities apply to them and, in that case, they are obliged to protect themselves.¹⁰²

In short, the Vietnamese laws, including the *CPC 2003* and the anti-trafficking law while regarding the testimony of trafficking victims and witnesses as amongst important sources of evidence do not actually care much about their need of being protected in terms of their physical safety. The provisions of that protection are in place, but they just look rather good on paper, whilst their implementation has to wait until the government's direction is issued. This once again¹⁰³ raises concerns about the Vietnamese legal system under which people are seen as tools of the legal system rather than bearers of rights.

5.3.1.2 Protection of victims' privacy and identity

As it has been discussed in Chapter 3, to protect the privacy and identity of trafficking victims, the *Trafficking Protocol* requires that:

In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making *legal proceedings* relating to such trafficking confidential.¹⁰⁴

person(s) with the authorities; ii) keeping secret the information regarding the identity, the place of residence, work, study place and other related information of protected person(s); iii) arranging protection at the place of residence, work, or study of protected person(s), at court hearings and other necessary places; iv) restricting the movements and communications of protected person(s); v) arranging shelters for protected person(s); vi) setting up new places of residence, work, and study for protected person(s); vi) applying *other measures* to prevent and suppress infringements against the life, health, honour, dignity and property of protected person(s) *provided by law* (emphasis added); viii) closed court hearings.

¹⁰² Ibid, art 3(1), 3(2).

¹⁰³ See also the previous section of this chapter discussing the status of trafficked persons under Vietnamese law where they are obliged to cooperate with the competent authorities.

¹⁰⁴ *Trafficking Protocol*, art 6(1) (emphasis added) – see Appendix 1.

Accordingly, the protection of victims' privacy and identity may be carried out through making legal proceedings confidential, for example, by excluding members of the public or representatives of the media, or by imposing limits on the publication of specific information.¹⁰⁵

The bilateral agreement between Vietnam and Lao PDR has acknowledged that the competent authorities must ensure victims' 'confidentiality of information ... during the phase of protection, repatriation and during participation in any criminal proceedings'.¹⁰⁶ Meanwhile, trafficking victims' privacy has also been generally required to be respected under the terms of the PRC – Vietnam Agreement 2010.¹⁰⁷

Vietnam's *Anti-Trafficking Law 2011* has its Article 31 providing for the protection of the personal information of victims. The law says:

1. Agencies, organizations or individuals shall have the responsibility to keep secret the information of victims, unless as otherwise provided for by law.
2. At the request of victims or their lawful representative, courts shall consider and/or decide the commencement of closed court sessions on human trafficking cases.

Whilst it is unclear if the provisions of the *Anti-Trafficking Law 2011* can replace the corresponding provisions of the *CPC 2003* in trafficking cases, it remains relevant to examine these provisions of *CPC 2003*. For the confidentiality of the investigation, Article 124 of the *CPC 2003* provides that the investigator/prosecutor shall inform participants in criminal proceedings and eyewitnesses in advance, and require them to keep the investigation information confidential. However, this provision is not directed to victims' privacy and identity. Additionally, victims are not directly entitled to the right to request the protection of their privacy and identity.¹⁰⁸ In the meantime, the *CPC 2003*'s provision regarding closed hearings reveals that even if a court

¹⁰⁵ *Legislative Guides – Part Two*, above n 81, [53].

¹⁰⁶ *Lao – Vietnam Agreement 2010*, above n 28, art 4(1)(c).

¹⁰⁷ *PRC – Vietnam Agreement 2010*, above n 30, art 2(C).

¹⁰⁸ *Assessment of the Legal System in Vietnam*, above n 32, 33.

hearing is closed, the verdicts are still pronounced in public.¹⁰⁹ Furthermore, application of this provision will depend on the court's justification rather than on the victim's need of being protected.¹¹⁰ Thus, it can be said that these provisions focus on the effectiveness of the investigation rather than specifically upon the privacy and identity of victims. It is unfortunate that there has been, up to now, no indication to suggest that this situation will not also apply under the terms of the Vietnam's *Anti-Trafficking Law 2011*.

5.3.1.3 Protection of victims' right to information and to participate in criminal proceedings

Article 6(2) of the *Trafficking Protocol* guarantees the right of victims to access information and to present their views and concerns in relevant proceedings 'as appropriate'. This is an obligation imposed on state parties to the Protocol. Accordingly, this right of trafficking victims should be respected in every relevant court, administrative and criminal proceeding. In the Vietnamese context, the protection of victims' rights to access to information, legal advice and assistance has not been provided for under either national law or bilateral agreements between the Vietnamese government and its counterparts in neighbouring countries. This can be seen as the strongest indication of a legal system that sees people as tools of the legal system rather than bearers of rights.¹¹¹

Whilst international law considers the issue of access to information and the right to participate in legal proceedings as a natural right of trafficked persons, Vietnamese law sees participating in judicial proceedings and cooperating with the competent authorities as obligations of victims of crime, from which trafficked persons are not immune. The *Anti-Trafficking Law 2011* explicitly provides for the obligations of victims of trafficking in 'provid[ing] information relating to acts of violation of anti-trafficking laws and regulations to competent agencies' and to 'fulfill[ing] [sic] competent agencies' requests relating to human trafficking cases'.¹¹² Moreover,

¹⁰⁹ See the *CPC 2003* (Vietnam) Law No 19/2003/QH11, art 18.

¹¹⁰ *Assessment of the Legal System in Vietnam*, above n 32, 33.

¹¹¹ See above section 5.2.1 of this chapter on trafficked persons under Vietnamese law.

¹¹² *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 6(4), 6(5) – see Appendix 3.

under the terms of the *CPC 2003*, victims of trafficking can be summoned by an investigating body to give testimony without any concern about their willingness (or otherwise) to cooperate.¹¹³ Additionally, the *CPC 2003* also provides that victims (of trafficking) can be required by the investigating body to attend a conference and to confront other witnesses or the trafficker in cases where there is conflict between their testimony and that given by other people.¹¹⁴ This means that victims of trafficking are obliged to participate in judicial proceedings rather than being given the option to do so.

It should be noted that the *CPC 2003* whilst promulgating participation as an obligation of victims also provides them with some 'rights' to support their role in criminal proceedings. These include the right 'to present documents, objects [to be used as evidence] as well as claims', 'to be informed of the investigation results', 'to request the change of procedure-conducting persons, experts and/or interpreters', 'to participate in court sessions; present their opinions and arguments at court sessions in order to protect their legitimate rights and interests', and 'to complain about procedural decisions and acts'.¹¹⁵ However, it should be noted that in the context of trafficking victims, to be protected from revictimisation or further trauma should be among the highest priorities.¹¹⁶ In this sense, these 'rights' under Vietnamese law cannot be seen as an appropriate kind of protection when, on the basis of this involuntary participation, victims' trauma as a result of being trafficked is not being taken into consideration.

5.3.1.4 Residence permits and repatriation of trafficked persons under Vietnamese law

As provided by Article 7(1) of the *Trafficking Protocol*, states are required to consider 'adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.'

¹¹³ *CPC 2003* (Vietnam) Law No 19/2003/QH11, art 137.

¹¹⁴ *Ibid*, art 138.

¹¹⁵ *Ibid*, art 51(2); see also *Assessment of the Legal System in Vietnam*, above n 32, 34.

¹¹⁶ See further in section 3.3.1 of Chapter 3 of this thesis.

The repatriation of trafficked persons, as we already know from the international law perspective, is connected to the obligations of states to guarantee safe and 'preferably' 'voluntary' repatriation.¹¹⁷ Further, destination countries are obliged to ensure that the repatriation of trafficked persons does not influence, or is not linked to their participation in any relevant proceedings.¹¹⁸ However, it should be noted that, as part of the requirement for adequate and appropriate remedies, the model of repatriation requires states to acknowledge that return is not always the best option for trafficked persons if they have lost ties with their country of origin, or when returning is no longer in the best interests of victims.¹¹⁹ These requirements are certainly a relevant consideration when investigating the equivalent provisions under the Vietnamese framework.

Under the terms of bilateral agreements, the repatriation of trafficked persons must be conducted quickly and in such a way as to respect victims' safety, dignity and their best interests.¹²⁰ During the repatriation process, victims are also required to be 'humanely [sic] assisted' by both contracting countries.¹²¹ In slightly different terms, Articles 15 and 16 of the Thailand – Vietnam Agreement (2008)¹²² state that deportation shall not be applied to identified victims of trafficking, and that repatriation 'shall be arranged and conducted in [accordance with victims'] best interests', and with their security guaranteed. This guarantee of security for trafficked persons during the repatriation process is also set out in the agreements between Vietnam and Cambodia,¹²³ as well as Lao PDR.¹²⁴ The agreement between Vietnam and the

¹¹⁷ *Trafficking Protocol*, art 8(2) – see Appendix 1.

¹¹⁸ See *ibid*; see also *Legislative Guides – Part Two*, above n 81, [61(b)].

¹¹⁹ See section 3.3.3.1 of Chapter 3 of this thesis.

¹²⁰ See *Cambodia – Vietnam Agreement 2005*, above n 27, art 11; *Lao – Vietnam Agreement 2010*, above n 28, art 6(1).

¹²¹ *Cambodia – Vietnam Agreement 2005*, above n 27, art 12.

¹²² See *Thai – Vietnam Agreement 2008*, above n 29.

¹²³ *Cambodia – Vietnam Agreement 2005*, above n 27, art 12.

¹²⁴ *Lao – Vietnam Agreement 2010*, above n 28, art 6(3)(d).

PRC, meanwhile, refers to ‘victims’ safe and timely repatriation’, to be conducted ‘as soon as [the victim’s] identity is confirmed’.¹²⁵

Whilst the safe return/repatriation of trafficked persons is rather efficiency-focused, considerations such as voluntary repatriation, residence permits and the protection of victims’ rights to participate in relevant proceedings against repatriation appear not to be acknowledged. Additionally, these bilateral agreements do not consider alternatives to repatriation of trafficked persons that would protect the interests of victims upon their return. No risk assessment process has been set up to ensure that repatriation is the best option for victims or to ascertain whether or not it will be safe for them, following their return to their original country. In other words, repatriation of trafficked persons remains the only established option among the states.

In terms of Vietnam as a destination country, the national law commits to implementing the above bilateral agreements relating to the repatriation of foreign trafficking victims.¹²⁶ Accordingly, ‘the prescribed procedures and the agreements between Vietnam and foreign countries, and protect[ing] the life, health, honour and dignity of victims’ forms the basis of the obligation to create ‘favourable conditions’ and apply ‘appropriate measures’ for the repatriation of foreign victims.¹²⁷ However, as with the bilateral agreements, the Vietnamese national law contains no specific reference to voluntary repatriation, the possibility of foreign victims being granted residence permits to stay in Vietnam, or participation in criminal proceedings against the repatriation.

Although the *Anti-Trafficking Law 2011* does not refer to the possibility of foreign trafficked victims being compulsorily kept in Vietnam in order to ensure their participation in criminal proceedings, it should be noted that Vietnamese policy provides for this. An Ordinance of the Vietnamese Government allows an investigating agency or a court to request a delayed deportation of a foreign

¹²⁵ *PRC – Vietnam Agreement 2010*, above n 30, arts 2(B), 3.

¹²⁶ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 55(2) – see Appendix 3.

¹²⁷ *Ibid* – see Appendix 3.

trafficked victim in order to secure the victim's cooperation.¹²⁸ It should be noted that, in principle, the cooperation of trafficking victims is an important element in the effectiveness of criminal proceedings against traffickers. However, it is even more important to protect the best interests of victims through all the stages of a trafficking case, not excluding the return and repatriation processes. In this sense, the above provision adds more concerns about securing the role of victims as tools of the criminal justice system, rather than considering victims' protection needs during the return and repatriation process, especially given the tendency to regard victims' cooperation as an obligation to the state.

5.3.2 Assistance to trafficked persons in Vietnam

As we already know, supportive measures tend to focus on facilitating victims in their recovery and reintegration, reducing their vulnerability to re-trafficking and revictimisation, as well as supporting them in enjoying the rights and interests to which they are entitled by law. According to the requirements of the *Trafficking Protocol*,¹²⁹ victims of trafficking shall be provided with general assistance, consisting of physical, psychological and material assistance, employment, educational and training opportunities, housing, counselling and information; as well as legal assistance, including information on relevant court or administrative proceedings and the opportunity to present views and concerns in criminal proceedings.¹³⁰

In some bilateral agreements to which Vietnam is a party, these supportive measures have also been explicitly set out. For example, Article 4(1)(d) of the Vietnam – Lao

¹²⁸ See the *Ordinance No 24/2000/PL-UBTVQH10 on Entry, Exit and Residence of Foreigners in Vietnam* (Vietnam) approved by the Standing Committee of National Assembly on 28 April 2000, entered into force 1 August 2000 [Ministry of Justice trans] <http://vbqpppl.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=411>; *Government Decree 21/2001/ND-CP Detailing the Implementation of the Ordinance on Entry, Exit and Residence of Foreigners in Vietnam* (Vietnam) 28 May 2001, entered into force 27 June 2001, art 19(1) [Ministry of Justice trans] <http://vbqpppl.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=9148>.

¹²⁹ *Trafficking Protocol*, art 6 – see Appendix 1.

¹³⁰ See section 3.3.2.2 of Chapter 3 of this thesis.

MOU requires the parties' competent authorities to ensure that trafficking victims are 'being provided with the support of psychological treatment, health care and other necessary services in accordance with the conditions of each country and each individual case'. Moreover, Articles 4(2) and 4(3) of this agreement present specific concerns for 'victims under the age of 18' and victims' children.¹³¹ Similarly, Article 8 of the Thailand – Vietnam Agreement 2008 requires 'trafficked children, women, and their immediate family' to be provided with 'safe shelter, health care, access to legal assistance, and other imperatives for their protection'. In addition, under the terms of the PRC – Vietnam Agreement 2010, the two parties committed to providing trafficking victims with 'appropriate assistance and protection, including accommodation in the way of transfer, legal assistance, physical rehabilitation and psychological consultation'.¹³² The agreement also notes that trafficking victims 'should be accorded with humanitarian treatment and dignity in the process of identification, provisional assistance, repatriation and legal procedures'.¹³³ The agreement specifically stresses the special care of 'victims under age' in the process of protection, repatriation and legal procedures, 'with their interests as juveniles taken into consideration to the greatest extent'.¹³⁴

In the national context, the Vietnamese *Anti-Trafficking Law 2011* refers to 'supporting regimes' that trafficking victims shall be entitled to enjoy.¹³⁵ The supportive measures are then specified in Articles 32 to 36, including support for essential needs and travelling expenses, medical and psychological support, legal aid, support for educational training, vocational training and 'short-term allowances

¹³¹ Article 4(2) of the Vietnam – Lao MOU provides that '[v]ictims under the age of 18 (eighteen) will be taken care of in an age-appropriate manner during protection, repatriation and participation in any criminal proceedings'; whilst Article 4(3) of this agreement provides that '[v]ictims' children who are under the age of 18 (eighteen) and in the company of the victim shall be granted the same protection policy as being provided to victims.'

¹³² *PRC – Vietnam Agreement 2010*, above n 30, art 2(C).

¹³³ *Ibid*, art 2(D).

¹³⁴ *Ibid*, art 2(E).

¹³⁵ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 6 – see Appendix 3.

for overcoming difficulty, and loans'. These supportive measures (excluding 'support for educational training, vocational training' and 'short-term allowances for overcoming difficulty, and loans') are also applied to foreign victims.¹³⁶ The support for essential needs and travelling expenses includes temporary housing, clothing, food, necessary personal tools and expenses for fares and food for victims' travel to return to their places of residence.¹³⁷ The medical and psychological supports, provided through social welfare institutions or victim support institutions,¹³⁸ include 'health care and/or medical treatment expenses'¹³⁹ and support to help victims 'have their psychology stabilized'.¹⁴⁰

In terms of legal aid, victims of trafficking in Vietnam, including Vietnamese and *foreign victims*, are entitled to 'legal aid to apply for permanent residence registration, civil status registration, entitlement to supportive regimes, to claim compensation, and to participate in litigation and other legal procedures in connection with the human trafficking cases'.¹⁴¹ Additionally, trafficking victims who are Vietnamese citizens or stateless persons permanently residing in Vietnam may be eligible for educational and vocational training (including tuition fees and expenses for the purchase of textbooks and school items for the first school year) if they are 'minors in poor household families'¹⁴² or short-term allowances or loans for 'overcoming difficulties', 'if they are poor household family members'.¹⁴³

These supportive measures appear to comply with the requirements of the *Trafficking Protocol* and the bilateral commitments in which Vietnam has engaged.

¹³⁶ Ibid, art 32(2) – see Appendix 3.

¹³⁷ Ibid, art 33 – see Appendix 3.

¹³⁸ Ibid, art 40 – see Appendix 3.

¹³⁹ Ibid, art 34 (emphasis added) – see Appendix 3.

¹⁴⁰ Ibid, art 35 – see Appendix 3.

¹⁴¹ Ibid, art 36(1) – see Appendix 3.

¹⁴² Ibid, art 37 – see Appendix 3.

¹⁴³ Ibid, art 38 – see Appendix 3.

However, as will be discussed in some following sections, these supportive measures are not actually tailored to the situation of trafficking victims in Vietnam, especially with respect to reintegration and the remedies to which they are entitled.

5.3.2.1 Reflection periods or assistance to trafficked persons in the identification process

As discussed in Chapter 3 of this thesis,¹⁴⁴ a reflection period is very important during the identification process for the trafficked persons' enjoyment of protection. Whilst a reflection period is not accorded under the *Trafficking Protocol's* framework, the *European Trafficking Convention* obliges its state parties to provide a 'recovery and reflection period' for a presumed victim who is reasonably believed to be a victim.¹⁴⁵ During this period, this presumed victim is entitled to a short-term residence permit¹⁴⁶ and some appropriate protection and assistance¹⁴⁷ on a basis that is not contingent upon the victim's cooperation with the authorities.¹⁴⁸ The provision of a reflection period has not been widely accepted but it is being offered by an increasing number of states.¹⁴⁹ The provision of reflection periods under the Australian anti-trafficking

¹⁴⁴ See section 3.2.3 of chapter 3 of this thesis.

¹⁴⁵ *European Trafficking Convention*, art 13(1).

¹⁴⁶ Ibid; see also Explanatory Report, *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, Council of Europe Treaty Series No 197, 16 V 2005 (entered into force 1 February 2008) ('*Explanatory Report to the European Trafficking Convention*'), para 172.

¹⁴⁷ See the *European Trafficking Convention*, art 13(2); *Explanatory Report to the European Trafficking Convention*, para 179.

¹⁴⁸ *Explanatory Report to the European Trafficking Convention*, paras 174, 175. The explanatory report also adds that victims' freedom to decision on whether or not cooperate with the competent authorities in reflection period cannot be used to exclude their obligation to testify when they are legally required to do so by a judge. : at para 176. As to the requirement of separating protection of trafficked persons from their cooperation with the competent authorities, this will be discussed in a following section of the chapter.

¹⁴⁹ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010), 321.

framework can be seen as a salient example of concern for victims' interests over their (potential) cooperation with the authorities.¹⁵⁰ Accordingly, victims of trafficking in Australia are provided a length of time to recover and decide whether they are willing to cooperate with the authorities. Under the terms of the Assessment Stream of the Support Program, victims of trafficking – regardless of their willingness or ability to cooperate with investigations and prosecutions of human trafficking offences – are to be provided with protection and support and a Bridging Visa lasting from 30 to 45 days to stay in Australia.¹⁵¹

In the Vietnamese context, supportive measures for trafficked persons before the identification process is completed have been provided for in some bilateral agreements. For example, in the agreement between Cambodia and Vietnam for identification and repatriation of trafficked victims, the two governments agreed that:

[W]hilst awaiting the results of the verification and identification process, the victim shall be moved to the nearest support center and be provided with necessary services such as psychological assistance, health care, meals and accommodation.¹⁵²

In another example of a bilateral arrangement addressing support for victims before the completion of identification process, the MOU between Vietnam and Lao PDR requires the competent authorities to ensure victims are:

[P]rovided with food and accommodation, and protected according to the policies and legal regulations of each country while awaiting the completion of the procedures for their repatriation.¹⁵³

Under the Vietnamese national anti-trafficking law, which does not use the specific term 'reflection period', trafficked persons in Vietnam are entitled to some protective and supportive measures while they await verification and/or identification by the

¹⁵⁰ See further in section 3.2.2 of chapter 3 of this thesis.

¹⁵¹ See Australian Government, *Australian Government Anti-People Trafficking Strategy* (June 2009) <<http://www.ema.gov.au>>.

¹⁵² *Cambodia – Vietnam SOP 2009*, above n 52, art 3(a).

¹⁵³ *Lao – Vietnam Agreement 2010*, above n 28, art 4(1)(b).

competent authorities. Prior to the establishment of the *Vietnamese Anti-Trafficking Law 2011*, *Circular 03/2008* provided that if the primary information collected from trafficked persons specified that they were Vietnamese, they would be provided with protection as citizens, initial support for victims with material difficulties, basic necessities alongside the issuance of travel documents, and other preparations for their repatriation.¹⁵⁴ However, it can be clearly seen that these measures are granted on the basis of victims' nationality instead of their status as a presumed victim of trafficking.

Article 29 of the *Anti-Trafficking Law 2011* provides that:

Where there is ground to believe that a person is trafficked, the agencies, units or individuals stipulated in Article 21 of this Law shall have the responsibility to apply necessary *measures to rescue* [the person]; in case the person is likely to have his/her life, health, honor, dignity and property infringed upon, *protective measures* shall be applied. (emphasis added)

This law, whilst not requiring 'reasonable' grounds for a person to be believed to be a victim,¹⁵⁵ also does not specify what could be seen as 'grounds to believe that a person is trafficked', or, more importantly, what kind of protective measures should be applied to protect him/her from infringements. Aside from the use of the familiar term 'rescue', which implies a conception of trafficked persons as passive victims, this provision can be seen as a progressive element in Vietnam's trafficking victim protection regime. However, it should be noted that during the drafting process of the *Anti-Trafficking Law 2011*, concerns were raised that without 'strict regulations', these provisions might support the 'wrong' victims, that is, those who are not actually victims of trafficking but pretending to be in order to enjoy the support.¹⁵⁶ Whilst

¹⁵⁴ See the *Circular 3/2008* (Vietnam) 8 May 2008, pt II art 2(a)(5).

¹⁵⁵ As it has been required by the *European Trafficking Convention*, art 13; see further section 3.2.2 of chapter 3 of this thesis.

¹⁵⁶ See Huong Nguyen, 'Du thao Luat Phong Chong Buon Ban Nguoi: Nan nhan co quyen yeu cau xu kin', Bao Moi (online) 10 February 2010 <<http://www.baomoi.com/Du-thao-Luat-phong-chong-buon-ban-nguoi-Nan-nhan-co-quyen-yeu-cau-xu-kin/104/3849551.epi>> [author's trans: 'Draft of the Anti-Trafficking Law: Victims have the rights to request close hearings']. Relating to this point of view, it should be also noted that 'assuming false position as victims' is provided as one of the prohibited acts under the terms of the *Anti-Trafficking Law 2011*. This provision shows the above

there has been no guidance from the government on this issue, this may raise another concern about the balance in the law over victims' need for support.

5.3.2.2 Reception and reintegration of trafficked persons in Vietnam

The supportive measures under anti-trafficking frameworks are closely linked to the process of receiving and reintegrating victims. As stated in Chapter 3, in order to achieve effective cooperation in the repatriation of trafficked persons, international law requires countries of origin to facilitate and accept the return of trafficked persons through the verification of victims' nationality and issuance of travel documents or other authorization if necessary.¹⁵⁷ Whilst the *Trafficking Protocol* does not address the reintegration of trafficking victims, providing trafficked persons with necessary reintegration support is an important element for adequate and appropriate remedies for trafficked persons as required by international human rights law.¹⁵⁸

In the bilateral agreements, the requirement for safe and effective reintegration is broadly acknowledged.¹⁵⁹ The contracting states also agree to provide appropriate supportive measures, such as social, medical, psychological and educational support, as well as vocational training to help victims reintegrate into their families and communities. Additionally, and importantly, the states also recognize the need to protect victims of trafficking from social discrimination and stigmatization during their reintegration.¹⁶⁰ This provision is especially meaningful to victims of trafficking for

concern on granting protection and assistance to the wrong person but, in the meantime, raises a question on increasing the hesitance of victims of trafficking to come forward to reveal themselves to the competent authorities in Vietnam. See the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 3(11) – see Appendix 3.

¹⁵⁷ *Trafficking Protocol*, arts 8(3), 8(4) – see Appendix 1.

¹⁵⁸ See section 3.3.1 of chapter 3 of this thesis.

¹⁵⁹ See *Cambodia – Vietnam Agreement 2005*, above n 27, art 13; *Lao – Vietnam Agreement 2010*, above n 28, art 7(1); *Thai – Vietnam Agreement 2008*, above n 29, arts 17, 18.

¹⁶⁰ *Cambodia – Vietnam Agreement 2005*, above n 27, art 13(2); *Thai – Vietnam Agreement 2008*, above n 29, art 17(3).

prostitution or sexual exploitation in the context of the social evil attitude in Vietnam.¹⁶¹

Similar to the provision for identification of trafficked persons as mentioned above, reception of trafficked persons under Vietnamese national law depends on the way they are returned. Articles 24, 25 and 26 of the *Anti-Trafficking Law 2011* introduce processes of reception and support for victims' reintegration, following their categorization as trafficked persons. Under these provisions the Division on Labor, War Invalids and Social Affairs (DOLISA)¹⁶² is in charge of reception and supporting the essential needs of victims of internal trafficking, victims who have been rescued and victims who self-return from abroad.¹⁶³ Victims who are returned from abroad through foreign-based Vietnamese representative agencies are to be received by the MPS or the Ministry of National Defense (MND) in appropriate cases. Thereafter DOLISA is responsible for the transfer of victims to social welfare or victim support institutions, or for supporting their return to their original community if the victim chooses to do so.¹⁶⁴ Therefore, reintegration of victims of trafficking will occur either in victim support institutions or within their original community.

¹⁶¹ See section 4.4.1.3 of Chapter 4 of this thesis.

¹⁶² In the meantime, the Department of Social Evil Prevention (DSEP) under MOLISA issued a handbook on the policies and regulations on social assistance services for trafficked women and children returned from foreign countries. See Ministry of Labor, Invalid and Social Affairs (MOLISA) – Department of Social Evil Prevention (DSEP), *Policies and Regulations on Social Assistance for Returned Women and Children – Victims of Human Trafficking* (Handbook, 2008) <http://www.iom.int/jahia/webdav/shared/mainsite/activities/ct/policies_regulations_vietnam.pdf>.

¹⁶³ See also Table 1 in section 5.2.2.1 above.

¹⁶⁴ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 24(3) – see Appendix 3. Whilst the new law does not specify how long victims of trafficking may remain in these institutions, the *Government Decision 17/2007* provided that they may remain in these institutions for a limited length of time: maximum of 15 days in 'victim receiving institutions' and 60 days in 'victim supporting institutions'. It should be noted that in this Decision, there are two kinds of institutions relating to assisting victims of trafficking; they are victim receiving institutions and victim supporting institutions. This provision has been changed in the new anti-trafficking law into 'social welfare institutions' and 'victim supporting institutions'.

Accordingly, victims are to be provided with the expenses for travelling and for food to enable them to return to their original community, plus medical and psychological support, including health care, medical treatment expenses and psychological support during their stay in social welfare/victim support institutions.¹⁶⁵ They are also provided with legal aid in applying for permanent residence registration, civil status registration, entitlement to supportive regimes, claiming compensation, and participating in litigation and other related legal procedures.¹⁶⁶

During the reintegration process, victims of trafficking from ‘poor household families’ are entitled to support in the form of tuition fees and expenses for textbooks and school items if they are minors returning to school, or alternatively to ‘vocational training’.¹⁶⁷ Additionally, such victims of trafficking may be financially supported in their reintegration with a short-term allowance, or by loans for those who are in need of capital for production or business.¹⁶⁸ However, supporting victims in overcoming social discrimination and stigmatization, as recognised in bilateral agreements, is not referred to in the national policy.

Amongst these above supportive measures for trafficking victims during their reintegration, the measures of mobilizing loan and for legal aid attracted significant attention from stakeholders working on supporting victims even before the establishment of the *Anti-Trafficking Law 2011*.¹⁶⁹ Their concerns derived from corresponding provisions in related legal documents under the Vietnamese framework that are not sensitive to the specific situation of trafficking victims. For example, most victims cannot access the preferential bank loans for the poor, since trafficked returnees are not target beneficiaries of the government’s economic support policies. They may also not meet the requirements set by banks or other related criteria to receive a loan (for example, they may be living with their parents

¹⁶⁵ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 34, 35 – see Appendix 3.

¹⁶⁶ *Ibid*, art 36 – see Appendix 3.

¹⁶⁷ *Ibid*, art 37 – see Appendix 3.

¹⁶⁸ *Ibid*, art 38 – see Appendix 3.

¹⁶⁹ See Save the Children and the National Anti-Trafficking Programme Steering Committee (130/CP) Vietnam, above n 81.

rather than living as an independent household, and if returnees do not belong to a poor household they will not receive any support in the form of loan).¹⁷⁰ In terms of legal support, it has been reported that only 22.2 percent of trafficked returnees received legal support, such as obtaining permanent residence registration, identity cards and birth certificates for their children (who were born abroad).¹⁷¹ Further, Vietnamese law on legal aid has not determined trafficking victims to be potential beneficiaries of this free-of-charge legal aid policy.¹⁷² Re-obtaining identity for self-returnees, who are often not identified as victims, is even more challenging, and this restricts their access to educational and vocational training, loans and other services.¹⁷³

The IOM, a key agency in supporting the Government in the reception and reintegration of trafficked persons, has exerted considerable effort towards enhancing the effectiveness of this activity. This intergovernmental organisation (IGO) supported MOLISA in developing guidelines on victim return and reintegration in the context of the *National Plan of Action*.¹⁷⁴ The IOM has ongoing projects on establishing systematic and sustainable cross-border return and reintegration of

¹⁷⁰ Ibid 15–16.

¹⁷¹ Ibid 14.

¹⁷² See *Law on Legal Aid 2006* (Vietnam) No 69/2006/QH11, was passed by Vietnamese National Assembly 11th Legislature, 9th session on 29 June 2006 and entered into force 1 January 2007, art 10 [Ministry of Justice trans] <http://vbqpp1.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=4753>.

¹⁷³ Save the Children and the National Anti-Trafficking Programme Steering Committee (130/CP) Vietnam, above n 81, 14–15.

¹⁷⁴ This activity is under a completed project of IOM on ‘Assistance to the Government in the Identification of Trafficking Victims and Their Reintegration’ conducted in Ha Noi from Sep 2005 to Dec 2007. See IOM, above n 68, 6. The result of this activity is the Handbook named ‘Policies and Regulations on Social Assistance for Returned Women and Children – Victims of Human Trafficking’ (2008). See MOLISA, DSEP, above n 162. However, this handbook was limited only to the experiences of trafficked women and children. See also Kneebone and Debeljak, above n 14, 152.

Vietnamese women from Cambodia and Thailand, as well as of Cambodian children working as beggars in Ho Chi Minh City.¹⁷⁵ In another project, the IOM has made efforts to support the government with a comprehensive return and reintegration mechanism which is built on the reintegration network,¹⁷⁶ to provide 'relevant and appropriate services through risk assessment and life-skills training, health care and psychological counseling and mental-health treatment'.¹⁷⁷ Additionally, the IOM has also reported on demonstrating a 'proven effective' model of return and reintegration at An Giang DOLISA Assessment Center where, under the assessment of professional staff,¹⁷⁸ trafficked persons are provided with 'a safe and supportive environment', physical and mental health services and support for their future goals and plans.¹⁷⁹ In the meantime, there are other NGOs/INGOs supporting anti-trafficking activities, especially those addressing return and reintegration of trafficked persons in Vietnam.¹⁸⁰ For example, the Asia Foundation provides legal aid support

¹⁷⁵ The project on 'Return and Reintegration of Trafficked and Other Vulnerable Vietnamese Women between Selected Countries in the Greater Mekong Sub-region, Phase II', which is conducted in 4 years in 6 countries of the GMS sub-region. See IOM, above n 68, 7.

¹⁷⁶ A collaboration network set up by IOM and Action Aid in 2006 in Vietnam as an addition to the COMMIT process. See Kneebone and Debeljak, above n 14, 154.

¹⁷⁷ Under the terms of IOM's ongoing project on 'Comprehensive Return and Reintegration through Partnership and Collaboration' conducted in Vietnam. See IOM, above n 68, 7.

¹⁷⁸ It should be noted that this assessment is focusing on the needs of victims of trafficking after being returned/received in Vietnam, to see whether they want reunion with their families and their original community, or if they want to be relocated in new community due to their fear of social trauma and discrimination or due to their loss of family relations. Confidential interview (Ho Chi Minh City, 25 April 2008).

¹⁷⁹ Ongoing project on 'Viet Nam Reintegration Model Development' conducted in An Giang province. IOM also completed another project on this area named 'Trafficking and Victim Prevention Project Phase II' (from 2006 to 2009). See IOM, above n 68, 8, 12.

¹⁸⁰ Organisations working on anti-trafficking in Vietnam include: INGOs (AAT, Oxfam-Québec, Save the Children, The Asia Foundation (TAF), World Vision (WVF), Norwegian Assistance to Vietnam (NAV), Catalyst Foundation, Pacific Links); local NGOs (Blue Dragon Foundation, Center for Studies and Applied Sciences in Gender, Family, Women and Adolescents (CSAGA), SHARE,

and loan programs;¹⁸¹ Action Aid Vietnam establishes networks (legal, medical and psychological) for supporting the reintegration of trafficked victims, especially those without access to government-based services due to their lack of legal registration;¹⁸² and AFESIP (Agir pour les Femmes en Situation Précaire, or Acting for Women in Difficult Circumstances) supports victims of trafficking in Vietnam through legal services, transportation expenses (from the airport or border gates to the victim's house) and counselling services.¹⁸³

5.3.2.3 Institutions for supporting trafficked persons in Vietnam

In the context of maintaining victims of trafficking in support institutions, arbitrary and/or routine detention of trafficked persons is a highly concerning issue from a human rights perspective.¹⁸⁴ Even for the purposes of protecting trafficked persons from further harm or providing them with support, shelter detention of trafficked persons should only be considered on a case-by-case basis. Although the adverse impact of arbitrary detention of trafficked persons and its inherent nature as a

CECEM). Information available at UNIAP website, <http://www.no-trafficking.org/vietnam_action.html>, accessed on 29 November 2012.

¹⁸¹ See The Asia Foundation, 'Anti-human Trafficking Activities Supported by the Asia Foundation (2004 – 2009) – Report to UNIAP for 5 year review of Program 130' (Unpublished Report, copy on file with author – supplied by UNIAP Vietnam, 2009).

¹⁸² It should be noted that Action Aid Vietnam has also supported anti-trafficking by providing credit for high risk groups as preventive measures to reduce the vulnerability of persons to (re-)trafficking. Confidential interview (Hanoi, 27 March 2008); see also Action Aid Vietnam, 'Report to UNIAP on the Project on 'Combating Cross-border Trafficking on Vietnamese Women and Children (2008)' (Unpublished Report, copy on file with author – supplied by UNIAP Vietnam, 2009).

¹⁸³ See Agir pour les Femmes en Situation Précaire (AFESIP) Vietnam, 'Summary Report on the Cooperation Activities in Combating against Women and Children Trafficking of AFESIP in Vietnam from 2004 to 2009 – Report to Steering Committee of 130/CP Governmental Program' (Unpublished Report, copy on file with author – supplied by UNIAP Vietnam, 2009).

¹⁸⁴ See section 3.2.4 of Chapter 3 of this thesis.

violation of human rights appears to be broadly acknowledged, states' desire to preserve control over victims through shelter detention is not easily defeated.¹⁸⁵

In Vietnam, as provided by law, the transfer of a trafficked person into a victim support institution is undertaken on the basis of the victim's willingness¹⁸⁶ (except in cases of victims who are 'helpless children').¹⁸⁷ Although it is claimed that Vietnamese victims of trafficking voluntarily enter into these institutions, it has been reported that only a minority of trafficking victims actually volunteer to come.¹⁸⁸ Whilst this can be seen as another example of the lack of a reliable system of data collection in the country, this conflicting information may also raise another concern about the practices of victim support institutions.

Additionally, whilst there are institutions for supporting trafficking victims in Vietnam,¹⁸⁹ these centers are in fact being used for (compulsory rehabilitation of)

¹⁸⁵ See Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT), *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, 29 October 2004 ('COMMIT MOU'), art 16 <www.no-trafficking.org/reports_docs/commit/commit_eng_mou.pdf> in which six countries committed themselves to 'ensuring that person identified as victims of trafficking are not held in detention by law enforcement authorities'. See also *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking*, 31 May 2003 ('Cambodia – Thai MOU 2003'), art 7 <http://www.no-trafficking.org/resources_laws_cambodia.html> provides that women and child trafficking victims should not be detained in *immigration detention centers*.

¹⁸⁶ See the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 24–6 – see Appendix 3.

¹⁸⁷ *Ibid.*, art 26(1)(b).

¹⁸⁸ As reported by AFESIP in Vietnam, the rate of returned victims volunteer to the shelters is only 20 percent. See AFESIP Vietnam, above n 183, 9.

¹⁸⁹ According to (unpublished) reports of NGOs to UNIAP Vietnam on centers/shelters, there have been six shelters, one housing project and two (IOM's) assessment centers. They are mostly under the administration of some governmental agencies (such as the CWD under Vietnam Women's Union or the Department of Labour, War Invalid and Social Affairs (DOLISA)). The reports also include 'Vietnam Shelter's Assessment & Improvement Action Plans'. See United Nations Inter-

victims of sex slavery, of prostitution, of domestic violence, of sexual exploitation and even drug users.¹⁹⁰ These centers are considered more like detention than supporting institutions.¹⁹¹ They lack even the most basic facilities for accommodation, not to mention necessary services for the recovery and reintegration of trafficked persons.

It is clear that the gap created by weak laws and lack of capacity of the government to provide support to trafficked persons in support centers has been filled by NGOs and INGOs working in the field in Vietnam. This demonstrates that the good coordination of activities among government and NGOs/INGOs is a significant feature of the Vietnamese 'landscape'.¹⁹² In fact, besides An Giang Assessment

Agency Project on Human Trafficking (UNIAP) Vietnam, 'Information on Centers/Shelters for Women and Children, Victims of Human Trafficking and Sexual Abuse/Exploitation' (Unpublished Note, copy on file with author – supplied by UNIAP Vietnam, 2009).

¹⁹⁰ Among shelters/centres as aforementioned, there are only three shelters/centers specifically dedicated to trafficked women and children. It has also been reported that victims of trafficking have been put in Centre 05-06 for Rehabilitation of sex workers and drug users. '05' Centres for rehabilitation of sex workers, established on the basis of the Government Resolution No 5/CP dated 29 January 1993 on preventing and suppressing against prostitution, and '06' Centres are for rehabilitation of drug users, established on the basis of the Government Resolution No 6/CP dated 29 January 1993 on enhancing the direction on preventing, suppressing and controlling drugs. See International Organization for Migration (IOM), *Report on Vietnam National Practitioners Forums on (Re)integration of Victims of Human Trafficking in the Greater Mekong Sub-region* (20 October 2010) United Nations Inter-Agency Project on Human Trafficking, 7 <http://www.no-trafficking.org/reports_docs/reintegration_resources/Vietnam_National_Practitioner_Forum.pdf>.

¹⁹¹ It should also be noted that incidents of trainees of these centres who have escaped, been arrested, sent back and 'administratively handled' is not an uncommon practice in Vietnam. See, eg, N Duc, 'Bat duoc 81 hoc vien cai nghien tron trai', *Phap Luat Thanh Pho Ho Chi Minh* (online) 14 October 2012 <<http://phapluattp.vn/20121014125322700p0c1015/bat-duoc-81-hoc-vien-cai-nghien-tron-trai.htm>> [author's trans: 'Arresting 81 trainees escaped from drug rehabilitation centre']; see also information on UNIAP's Shelter Self-Improvement Plans, available at http://www.no-trafficking.org/init_shelter.html (accessed on 11 December 2009).

¹⁹² Kneebone and Debeljak, above n 14, 154. The *Anti-Trafficking Law 2011* even notes the tendency of the Vietnamese Government to individualize these victim supporting institutions when saying that '[v]ictim supporting institutions are institutions established by *Vietnamese individuals or*

Centre as stated above, the IOM has also supported the establishment of an assessment centre in Lao Cai¹⁹³ — a northern border province of Vietnam — and a reception centre in Lang Son province¹⁹⁴ (which was built and managed by Lang Son Women’s Union). Additionally, AFESIP supported the Vietnam Women’s Union to establish and manage two rehabilitation shelters in Ho Chi Minh City (2002) and Can Tho City (2005), where victims are provided with accommodation, health care, psychological recovery, and educational and vocational training.¹⁹⁵ Moreover, Pacific Links Foundation has assisted MOLISA in the establishment and management of an ‘Open House’ in An Giang province, whilst the United Nations Children’s Fund (UNICEF) supports the Border Guard Commander to run a shelter in the Mong Cai border province.¹⁹⁶ However, these shelters/centers have reported that they only target women and children victims of trafficking rather than all trafficking victims.¹⁹⁷

UNIAP, the secretariat of the COMMIT process, introduced in 2009 a project on Shelter Self-Improvement to assist in the assessment and improvement of operations

organizations in conformity with their establishment permits to take part in the performance of the duties stipulated in paragraph 1 of this Article; *their establishment and operation shall not be borne by state budget*. The Government shall specify the conditions and procedures for the establishment of victim supporting institutions.’ See the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 40(2) (emphasis added) – see Appendix 3.

¹⁹³ This belongs to an IOM’s completed project named ‘Comprehensive Counter – Trafficking Project in Lao Cai Province’ conducted from Jan 2008 to Dec 2008. Victims of trafficking shall be provided with counselling, psychological support, life-skills education, vocational training, job placement, support for sustainable livelihood/production, HIV prevention, health care, legal aid and return and reintegration support in this centre. See IOM, ‘Compendium of Projects’, above n 68, 13.

¹⁹⁴ This belongs to an IOM’s completed project named ‘Reception and Reintegration of Trafficked and Other Vulnerable Vietnamese Women Who Have Returned from China’, conducted from 1997 to 2001. This center provides victims with accommodation, immediate care and financial assistance to return home. See *ibid* 14.

¹⁹⁵ See AFESIP, above n 183.

¹⁹⁶ See UNIAP Vietnam, above n 189.

¹⁹⁷ See Kneebone and Debeljak, above n 14, 152.

in these shelters/centers throughout the country.¹⁹⁸ In ‘the localized context’ of these shelters/centers, this project focused on technical training (such as case management, shelter management, strengthening victim referral networks, critical victim protection skills, etc.) as well as shelter cross-assessments, which mostly concern the ‘[material] conditions’ of the shelters/centers.¹⁹⁹ It has also been reported that as a result of the exchange of good practices amongst shelter staff, their awareness of incidents of male labour trafficking and exploitation has increased, as has, consequently, their awareness of male victims. As a result of a one-year operation of the project, the shelter network in Vietnam has proposed Standard Operating Procedures (SOPs) for within-network referrals, as well as standard tools to enhance communication, coordination, and tracking of trends and improvements over time.²⁰⁰ Significantly, the toolkit introduced by UNIAP’s shelter self-improvement project refers to, among other things, freedom of choice (meaning ‘the right to choose to not meet visitors and also to not participate in programs’) and the freedom of movement (meaning ‘free movement within and from the facility; restrictions only in relation to a child where they have been agreed upon in the case management plan to safeguard his/her welfare’), and victim empowerment as appropriate criteria to assess the operation of shelters/centers.²⁰¹ Nonetheless, the extent to which these criteria may influence the final assessment of the operation of shelters/centers is not made clear in the toolkit.

¹⁹⁸ Information on UNIAP’s Shelter Self-Improvement Plans is available at <http://www.no-trafficking.org/init_shelter.html> (accessed on 11 December 2009).

¹⁹⁹ Information on UNIAP Vietnam marking one-year of the ‘Shelter Self Improvement Project’ in September 2010 is available at <http://www.no-trafficking.org/story_vn_shelteranniversary.html> (accessed on 19 March 2012).

²⁰⁰ United Nations Inter-Agency Project on Human Trafficking (UNIAP) Vietnam, *Shelter Self Improvement Project Toolkit* (November 2011) <http://www.no-trafficking.org/reports_docs/shelter/shelter_toolkit_nov2011.pdf>.

²⁰¹ Ibid 9.

5.3.2.4 Community reintegration

Due to the fact that the majority of returnees go straight back to their communities without going through shelters/centers, more attention needs to be paid to supporting victims in their reintegration into the community.²⁰² In many cases, trafficking victims prefer to return to their families or relatives rather than staying in victim support centers.²⁰³ However, as has been reported, returnees are often monitored and supported by local authorities and mass organisations only in the first days after their return.²⁰⁴ According to representatives of local authorities, this is because they do not have enough resources to conduct regular visits to returnees and to support them.²⁰⁵ In a report of Action Aid Vietnam, it has been revealed that ‘returnees and their children have not been given new identity cards and resident registration so it is very difficult to look for jobs’, while others ‘have not received concern and care so they feel uncomfortable and tend to return to the trafficking situation.’²⁰⁶ The difficulties of community reintegration pointed out in this report are a lack of awareness on the part of officials of the needs of trafficked persons and the relevant national policy, lack of funding, medical and health care equipment, a lack of available jobs for returnees, community discrimination, and other personal difficulties of returnees themselves (for example, their lack of qualifications or their health condition prevents them from working).²⁰⁷ Moreover, community-based reintegration activities have been alleged to

²⁰² See Save the Children and the National Anti-Trafficking Programme Steering Committee (130/CP) Vietnam, above n 81, 10.

²⁰³ Ministry of Social Affairs, Veterans and Youth Rehabilitation (MoSVY), ‘The Return and Reintegration of Victims of Trafficking from Cambodia to Thailand 01 July 2004 – 30 March 2005 and Repatriation from Cambodia to Vietnam of Vietnamese Victims of Trafficking from 15 May 1999 – 30 March 2005’ (Report, IOM Cambodia, 2005), 30.

²⁰⁴ Save the Children and the National Anti-Trafficking Programme Steering Committee (130/CP) Vietnam, above n 81, 16.

²⁰⁵ Ibid.

²⁰⁶ See Action Aid International Vietnam, ‘Report on Survey of Trafficking of Women and Children for Proposing Suitable Intervention Activities’, above n 71, 15–16.

²⁰⁷ Ibid 38.

be mostly carried out at a 'basic level of understanding' because of the low capacity of local officers and a lack of clear policies for supporting victims.²⁰⁸

Also in the processes of reception and reintegration of trafficking victims in Vietnam, whilst the commune-level People's Committees appear to play a large role in looking after returned victims,²⁰⁹ it should be noted that household registration in communes remains in itself a big challenge to victims' reintegration.²¹⁰ Beside its function of controlling the flows of migration, as discussed in Chapter 4 of this thesis, the registration system presents challenges for victims (and even the officials who support them) in re-registration of residence. Returnees (especially those who have left their community without registering their temporary absence and have had their names erased from the permanent registration book) find it difficult to re-register for permanent residence (and then re-obtain their rights as citizens).²¹¹ The alteration made to this issue in the national law,²¹² unfortunately, has not yet considered the

²⁰⁸ Save the Children and the National Anti-Trafficking Programme Steering Committee (130/CP) Vietnam, above n 81, 16; however, it does not mean that there is no community-based reintegration; see Thanh Hoa province's community based program on case management which applies to victims of trafficking who are mostly self-returned. The program has been carried out through field visits, regular meetings, case discussion and technical support from World Vision but with limited effectiveness: assisting 13 victims, one case has been returned to family successfully. See IOM, *Report on Vietnam National Practitioners Forums*, above n 190, 2.

²⁰⁹ See, eg, the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 24(1), 24(2) – see Appendix 3.

²¹⁰ See also the relevant discussion in the section 5.2.2.2 of this chapter.

²¹¹ Veronique Marx and Katherine Fleischer, 'Internal Migration – Opportunities and Challenges for Socio-Economic Development in Viet Nam' (Report, United Nations in Vietnam, 2010), 17.

²¹² According to the *Law on Residence 2006*, victims who used to have permanent residence registration in provinces and cities before being trafficked and who return to their province and city are allowed to register permanent residence; all Vietnamese citizens who leave their locality but do not register permanent residence in a new locality will not be erased in the permanent residence registration book. See *Law on Residence 2006* (Vietnam) No 81/2006/QH11, was passed by the Vietnamese National Assembly 11th Legislature, 10th session on 29 November 2006 and entered into force 1 July 2007), art 22 [Ministry of Justice trans] http://www.vbqppl.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=371

situation of returned trafficking victims who move to a new location of residence after returning.

5.3.3 Remedies for trafficked persons in Vietnam

Remedies for trafficked persons, as discussed previously, should include not only a guarantee of the right to apply for compensation, but also restitution, recovery, satisfaction and guarantees against re-trafficking, access to information, legal assistance and regularization of residence status, and some other procedural rights necessary to facilitate access to reparations.²¹³ However, the *Trafficking Protocol* stresses only the right to claim compensation, which includes payment for a wide range of injury, loss or damage caused by the offender.²¹⁴ Specifically, Article 6(6) of the Protocol requires that ‘the possibility of obtaining compensation for damage suffered’ be provided for under national law for trafficking victims.²¹⁵ This can be seen as a minimum guarantee for trafficked persons in terms of remedies.

The provisions regarding remedies for trafficked persons are stipulated quite progressively under Vietnamese law although they are still limited in terms of specific detail regarding implementation of these measures. In bilateral agreements between Vietnam and other countries, the contracting parties have agreed to ensure for victims of trafficking a broad range of ‘legal remedies’.²¹⁶ The remedies to be provided to trafficked persons under these agreements include ‘restitution of any undisputed personal belongings and properties that have been obtained by

[0>](#); see also Save the Children and the National Anti-Trafficking Programme Steering Committee (130/CP) Vietnam, above n 81, 15.

²¹³ See more in section 3.3.4 of Chapter 3 of this thesis.

²¹⁴ Joy Ngozi Ezeilo, Special Rapporteur on Trafficking in Persons, Especially Women and Children, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/35 (13 April 2011), [28].

²¹⁵ Gallagher, above n 149, 362.

²¹⁶ See *Cambodia – Vietnam Agreement 2005*, above n 27, art 6; *Thai – Vietnam Agreement 2008*, above n 29, art 7.

competent authorities’, confiscation of ‘unjust properties’ that offenders have obtained by trafficking or exploiting women and children, ‘compensation from the offender of any damages caused by trafficking’, ‘payment for unpaid services’, and ‘recovery of damages and any other judicial remedies’.

Under the national law, besides provisions setting out some elements of remedies, such as providing victims with medical and psychological care, social and legal services supporting their recovery, and necessary reintegration support as discussed above, Vietnam has also recognized trafficking victims’ entitlement to compensation.²¹⁷ However, the law has not yet provided any specific arrangements for victims to claim damages from being trafficked. For the time being, according to the *CPC 2003*’s provisions, victims of trafficking, as other ‘civil plaintiffs ... suffering from damage caused by offenses’, may ‘file claims for damages’ and ‘suggest the compensation levels and measures to secure such compensation’.²¹⁸ The settlement of compensation can be arranged within the criminal proceedings or in a separate settlement following a civil procedure, if the separation of the claim will not impact the resolution of the criminal case.²¹⁹ Victims of trafficking may also appeal against the part of the judgment relating to compensation.²²⁰

Additionally, provisions for compensation under the *Civil Code 2005* can arguably be applied to the situation of trafficking victims. In accordance with this Code, damages that may be claimed include damages relating to health (the expenses for health recovery, lost remuneration due to health problems),²²¹ spiritual damages (damages

²¹⁷ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 6(3) – see Appendix 3.

²¹⁸ See the *CPC 2003* (Vietnam) Law No 19/2003/QH11, arts 52(1), 52(2)(d).

²¹⁹ *Ibid.*, art 28.

²²⁰ See *ibid.*, art 52(2)(g).

²²¹ *Civil Code 2005* (Vietnam) No 33/2005/QH11, was passed by the National Assembly 11th Legislature, 7th session on 14 June 2005 and entered into force 1 January 2006 (‘*Civil Code 2005*’), art 609 [Ministry of Justice trans]
<http://vbqpp.l.moj.gov.vn/vbqpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6595>.

for the infringement upon honour, dignity and prestige)²²² and damages relating to death.²²³ There have been provisions under national law to guarantee enforcement of civil judgments and, therefore, enforcement of the parts of judgments concerning victim compensation.²²⁴ However, victims of trafficking cannot lodge their claim for compensation if there is no criminal case opened. Even though the law provides for compensation claims under the civil framework, it does not provide a specific procedure for trafficked persons to do so. In fact, there is no practical information on trafficking victims' compensation claims that would enable an assessment of the (in)effectiveness of these provisions.

Whilst the provisions on trafficking victims' access to compensation look 'rather adequate' at first glance,²²⁵ the possibility of obtaining compensation is, in reality, entirely reliant on the traffickers' capacity to pay damages. Without a specific fund for trafficked persons' compensation, victims may go empty-handed whenever traffickers are unable to personally compensate for the damage.²²⁶ In Vietnam, there is no state-based fund or other specific fund for compensating victims of trafficking apart from the traffickers' own resource. It should be noted that in the drafting process of the *Anti-Trafficking Law 2011*, the drafters did consider whether or not there should be a fund for supporting victims, but this option was rejected (by the representative from MOLISA) simply for the reason that 'a state-fund is not necessary'.²²⁷ The case of Thailand should here be recalled, where, alongside a victim's legal right to claim compensation from the offenders for damages caused by human trafficking,²²⁸ the

²²² Ibid, art 611.

²²³ Ibid, art 610.

²²⁴ See *Assessment of the Legal System in Vietnam*, above n 32, 41.

²²⁵ See also *ibid*.

²²⁶ *Ibid*.

²²⁷ See Huong Nguyen, above n 156.

²²⁸ See *Anti-Trafficking in Persons Act 2008* (Kingdom of Thailand) BE 2551, was passed in November 2007 and came into force on 5 June 2008, arts 33, 35 [Pravit Roykaew (Office of the Attorney

government also maintains a state fund 'to subsidize persons who are identified as victims and will provide funds for compensation'.²²⁹ Vietnam's failure to establish a state-fund for the compensation of victims of trafficking in Vietnam shows that the internationally agreed rights and interests of trafficking victims have not been fully recognized in this country, especially amongst policy makers.

5.4 CONCLUSION

Citing a comment of a 2004 assessment report on the Vietnamese legal system in comparison with the *Trafficking and Smuggling Protocol*, that 'overall Vietnamese law and policies are consistent with the provisions of the [UN Convention against Transnational Organized Crime] and the *Trafficking Protocol*,²³⁰ it can be said that the national anti-trafficking law of Vietnam has significantly progressed since then. This progress is represented not only in the establishment of a specific anti-trafficking law under the Vietnamese framework but, more noticeably, in the incorporation of a protection regime for trafficked persons into this national law, as well as the Vietnamese anti-trafficking framework. With this protection regime, trafficked persons in Vietnam for the first time are referred to as victims of crime and victims of human rights abuses, and are officially accorded protection and assistance, especially by a (seemingly) generous regime of supportive measures from the identification process,

General) trans] <[http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20\(eng.\).pdf](http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20(eng.).pdf)>.

²²⁹ This information is from Anti-trafficking Centre Established in Thailand (November 2005) available at <<http://www.humantrafficking.org/updates/264>> (accessed on 19 March 2012); see also the relevant discussion in section 3.3.4 of Chapter 3 of this thesis.

²³⁰ See *Assessment of the Legal System in Vietnam*, above n 32, 60 (italicisation added). Since the time of this assessment, the Government has had some remarkable, albeit not much in effect, efforts orienting to making compliant with the requirement of international law on combating trafficking and, especially, protecting the rights and interests of trafficked persons. Up to the time of submitting this thesis, the Vietnamese government has signed but not ratified the *CTOC* and acceded to the *Trafficking Protocol*. See also section 4.4.1 of Chapter 4 of this thesis.

through to community reintegration and remedies. This protection regime has expanded the beneficiaries of the protection and assistance to *all* trafficked persons, including victims of internal and transnational trafficking, without gendered-based discrimination. Generally speaking, Vietnam currently has an anti-trafficking law that looks good on paper, with its protection regime for trafficked persons quite close to the requirements of international standards. However, there are some progressive provisions in bilateral commitments which are not reflected in national law. Moreover, the practice of applying these ‘good-looking’ provisions to trafficking victims is a different story.

Under Vietnamese law, even though trafficked persons are considered to be victims of crime as well as victims of human rights abuses, and their rights and interests are required to be respected and protected by law, this protection has encountered quite a few challenges. The first challenge is that, under the Vietnamese legal framework, trafficked persons are not exempted from sanctions for infringements (including status-related offences) against, specifically (but not only) immigration laws. This derives from the fact that the policy makers do not really recognize the ‘coercive’ nature of trafficking and the vulnerability of trafficking victims – which is also the result of the omission of the ‘means’ element from the Vietnamese trafficking definitions, as pointed out in the previous chapter.²³¹ This clear violation against international law’s principle of non-criminalisation of trafficked persons prevents victims of trafficking from enjoying the protection and assistance to which they are entitled, and from reporting their cases to the authorities.

The second challenge to the protection of and assistance to trafficking victims under Vietnamese law is the dichotomy of trafficked/smuggled migrants, in which trafficked persons are conceptualised as passive victims who have not consented to the illegal migration, whilst smuggled migrants are believed to be active agents who consented to the smuggling. This raises a serious concern about the misidentification of trafficked victims as illegal migrants, which is synonymous with denying victims protection and assistance. Additionally, the attitude of Vietnamese anti-trafficking policy in regarding trafficked persons as passive victims is not only leading to insufficient attention being given to the actual circumstances of trafficking victims in

²³¹ See section 4.4.1.2 of Chapter 4 of this thesis.

the processes of reception, identification and reintegration, but it also demonstrates Vietnam's persistent policy in focusing on trafficking in women and children for sexual exploitation.

The protection regime for trafficking victims under Vietnamese law has its third — and biggest — challenge in the fact that trafficking victims are often treated as tools of the legal system rather than bearers of human rights. In other words, protecting the rights and interests of trafficking victims as a responsibility of the state has not yet been fully recognized among Vietnamese anti-trafficking policy makers. The fact that the protection of victims' natural rights to access information, legal advice and assistance has not been provided under either Vietnamese national law or bilateral agreements can be seen as the strongest indicator of this attitude. In addition, the *Anti-Trafficking Law 2011* provides that victims of trafficking have obligations to cooperate with the competent authorities in criminal proceedings that they cannot refuse. In another example, whilst there is no specific reference to the possibility of foreign victims being granted residence permits, there is the possibility of deportation of foreign trafficked victims being delayed upon the request of an investigating agency or a court in exchange for a victim's cooperation. In the practice of identifying trafficked persons in Vietnam, it is sometimes believed to be serving the purpose of prosecuting traffickers rather than protecting and assisting victims. In the meantime, there have been suggestions concerning the rights and interests of victims, such as supporting victims during the identification process or establishing a state-based fund for victim compensation, that have been met with opposition (or even disapproval) due to policy makers' concerns about the appropriateness or necessity of providing them for victims.

In this context, it is relevant to note here a concern that arose during the drafting process of the *Anti-Trafficking Law 2011*. It has been argued that a protection regime tailored to victims of trafficking, as required by international law, placed in the Vietnamese context of general protection and support to victims of crime, may look like preferential treatment. However, from an optimistic perspective, this should be seen as an opportunity for Vietnamese policy makers to take an active approach to improving awareness of the human rights issues relating to, but not limited to, trafficking victims. In other words, this provides an opportunity, as well as a challenge, to the Vietnamese legal system to think of people as bearers of human rights rather than just tools of that system.

In terms of protective and supportive measures, the challenge is that whilst many of them are not actually tailored to the situation of trafficking victims in Vietnam, many others do not go further than an in-principle approach, due to the lack of guiding legal documents from the government to implement them. This does not only relate specifically to the anti-trafficking law, but also to other laws and legal documents in the Vietnamese legal framework. This can be seen from the obstacles stemming from the household registration system, through to the processes of reception, identification and community reintegration of trafficking victims in Vietnam. In the meantime, the measures of mobilizing loans and of legal aid for trafficking victims cannot be undertaken effectively due to the insensitivity of the relevant legal measures to the specific situation of trafficking victims in Vietnam. This is also connected to the unclear relationship between the new and the older laws on anti-trafficking,²³² which creates confusion in implementation and prevents the Vietnamese response from making a big difference even though the new law has come into effect.

Meanwhile, the efforts of the anti-trafficking network of NGOs and INGOs working in Vietnam to fill the gap created by weak laws and a lack of government capacity in supporting trafficked persons, especially in reception and reintegration, should also be noted. This effort is actually a dynamic alongside the governmental effort, behind the significant progress in Vietnamese anti-trafficking policies. In that dynamic, these organisations have tried to support governmental agencies in reception, identification and reintegration processes, providing trafficking victims with timely and appropriate assistance as well as improving the operation of the victim support centers they offer. Whilst this strong collaboration can be seen as a bright point on the Vietnamese 'landscape', it should be noted that some of the support from the NGOs/INGOs network in Vietnam is not without problems, such as their persistent focus on female and child victims of trafficking rather than covering all trafficked persons, and their lack of attention to some issues, such as providing remedies for trafficked persons. It should also be borne in mind that these NGOs/INGOs cannot and will never solve all the above issues of the Vietnamese protection regime for trafficked persons. Eventually, it is actually the state's responsibility.

²³² See further in section 4.4.1.2 of Chapter 4 of this thesis.

Chapter 6

Conclusions and Recommendations

In this final chapter I summarise the findings of this thesis and make some recommendations for reform and further research. First I summarise issues arising from the international framework, and then I turn to the Vietnamese response.

6.1 THE INTERNATIONAL RESPONSE TO TRAFFICKING ISSUE: STEPS TOWARDS CONCEPTUALISATION

In exploring the problems of the international protection regime for trafficked persons, I firstly examined the historical development of approaches to the human trafficking issue to date, as presented in the international legal instruments as predecessors of the *Trafficking Protocol*¹ and in this Protocol. In Chapter 2 of this thesis I explored the

¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the United Nations Convention against Transnational Organized Crime)*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking Protocol*').

question of how human trafficking issues (including the human rights of trafficked persons) have been conceptualised from the international perspective. This revealed different discourses of trafficking. They include the 'traditional security' discourse in which trafficking is regarded as an issue of irregular/illegal migration, or of transnational crime, that threatens state sovereignty; and the human security discourse in which trafficking is seen as a result of the lack of human security and trafficking per se is also a situation where human security is absent.² Whilst disparities in the level of prosperity and human security experienced by different communities are leading to the movement of people, the lack of regular migration channels results in irregular migration which exposes migrants to insecurity and vulnerability to exploitation. It was demonstrated that these different approaches to the human trafficking issue pose the biggest constraint in reaching a common understanding of the trafficking crime and especially for developing unified and effective anti-trafficking mechanisms. It was also revealed that these two discourses were present in the debates on the constituent elements of the trafficking definition and its scope, which undoubtedly influenced the conceptualisation of trafficking issues at the national level and especially in Vietnam.

In the 1900s, trafficking was conceived of as a moral issue closely linked to the prostitution industry.³ In this period, the focus was not just on addressing situations of forced prostitution or deceptive procurement into prostitution, but also the procurement and enticement of women and girls into prostitution with their consent, meaning voluntary engagement in prostitution. In other words, this shows the focus was a particular emphasis on suppressing illegal border crossings, and that from the outset trafficking was approached as an irregular migration problem. This traditional security discourse of trafficking then came up again under the framework of the *Trafficking Protocol* as discussed below.⁴

² See also section 2.2 of Chapter 2 of this thesis.

³ See also section 2.2.1 of Chapter 2 of this thesis.

⁴ See also section 2.3.1 of Chapter 2 of this thesis.

In the next decades, the problem of trafficking was addressed under human rights frameworks.⁵ The human rights dimensions of trafficking, especially the rights of migrant workers and of women and children, began to draw the attention of the international community, with a focus on the broader practices of exploitation and human rights violations (including, but not limited to, slavery, servitude, forced labour, the exploitation of migrant workers, and women and children's rights). Significantly, the link between trafficking and labour exploitation on the one hand, and a failure to apply and enforce labour standards on the other, was also recognized.⁶ The framework concerning the protection of migrant workers required states not only to criminalize acts of promoting clandestine or illegal migration, but also to protect migrant workers' rights by ensuring their equal treatment with national workers. Moreover, migrant workers who are illegally transported and suffer exploitation under slavery-like practices or forced labour are regarded as victims of trafficking whose human rights have been breached.

In discourse addressing gender discrimination and violence against women, trafficking was seen as a form of violence against women.⁷ The *CEDAW* framework⁸ also recognised other potential forms of sexual exploitation such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. The framework also drew attention to some facilitating factors of trafficking (such as poverty and unemployment, women's status in society, wars, armed conflicts and the occupation of territories), as well as to prostitutes' vulnerability to violence and their need for equal protection under the law.

In the meantime, the children's right framework drew attention to the protection of children from all forms of economic and sexual exploitation, and sexual abuse, the phenomenon of trafficking for economic exploitation (including forced and bonded

⁵ See also section 2.2.3 of Chapter 2 of this thesis.

⁶ See also sections 2.2.3.1 and 2.2.3.2 of Chapter 2 of this thesis.

⁷ See also section 2.2.3.3 of Chapter 2 of this thesis.

⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13, art 6 (entered into force 3 September 1981) ('*CEDAW*').

labour) and trafficking for adoption, alongside its emphasis on trafficking for commercial sexual exploitation.⁹

Despite a plethora of international legal instruments and agendas addressing trafficking practices from a human rights perspective, no agreed definition of trafficking was formulated at this stage. Furthermore, none of these human rights frameworks specifically and comprehensively addressed trafficking practices per se, or the *processes* and practices leading to the *end result* of trafficking. The human rights approach, however, did at least give some clearer insights into the factual situations of trafficking, the nature of the exploitation as its end result, and the plight of its victims, and drew attention to the human rights issues that lead to trafficking situations and the consequences of trafficking.

Under the framework of the *Trafficking Protocol*, trafficking has been officially perceived as an issue of transnational crime (but that, as discussed in Chapter 2 of this thesis, does not necessarily reflect trafficking practices in Greater Mekong Subregion (GMS) countries or in Vietnam in particular).¹⁰ The *Trafficking Protocol* requires state parties to criminalize trafficking in persons both in transnational crime contexts and individual trafficking situations. The Protocol comprehensively responds to the trafficking issue through its three purposes of inter-state cooperation, prevention of trafficking and protection of trafficked persons. Its emphasis on the transnationality of the trafficking crime, border control measures to prevent irregular international migration and human trafficking confuses the conceptualisation of trafficking and can be seen as a preference for a traditional security discourse.¹¹ This can be seen as a result of the motivations behind the formulation of the *Trafficking Protocol*, namely, states' concerns about sovereignty and (traditional) security issues (or border protection), which derived from a recognition of the link between trafficking, migrant smuggling and organized criminal groups operating

⁹ See also section 2.2.3.3 of Chapter 2 of this thesis.

¹⁰ See also section 2.3.1 of Chapter 2 of this thesis.

¹¹ That is, it prevailed over the human security discourse regarding victims' rights. See also Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012), 104; see section 2.3.1.2 of Chapter 2 of this thesis.

internationally. This background has had a great impact on the implementation of the Protocol, as discussed further.

I next examined the Protocol's trafficking definition — which is often seen as a breakthrough in anti-trafficking discourse — and argued that it is a significant obstacle which creates difficulties in the implementation and development of anti-trafficking measures.

6.2 THE TRAFFICKING PROTOCOL'S TRAFFICKING DEFINITION

The trafficking definition provided in Article 3 of the *Trafficking Protocol* is comprised of three basic interlinked elements, namely the 'action', the 'means' and the 'end purpose', which are all needed for an instance of trafficking (in adults) to be established.¹² It should be noted that most of the listed constituents of these elements remain undefined or ambiguously defined under the Protocol's framework.¹³ The important point with these elements of the trafficking definition is that they can easily be misinterpreted, and consequently, are difficult to apply in practice.

The 'action' element,¹⁴ which encompasses 'transportation' and 'transfer', has often been explained as implying movement, even though 'harbouring' and 'receipt' in themselves do not. The inclusion of the acts of 'harbouring or receipt' in the definition means that it also covers the acts of owners and managers and controllers of any place of exploitation, additional to the acts of recruiters, brokers and transporters. Accordingly, 'harbouring or receipt' can be understood as 'maintaining an individual in a situation of exploitation' and, therefore, operates to bring the end situation of trafficking within the definition. However, as pointed out in Chapter 2, 'harbouring' and 'receipt' can include acts which are part of the trafficking process or 'journey' and they do not necessarily refer only to the end result. In fact, as analysed in Chapters 2

¹² While the *means* is not needed to be present in a situation of trafficking in children; see *Trafficking Protocol*, art 3(c) – see Appendix 1.

¹³ See also section 2.3.2 of Chapter 2 of this thesis.

¹⁴ See also section 2.3.2.1 of Chapter 2 of this thesis.

and 4, in most national legislation in the GMS, the ‘action’ elements focus on movement or transport of persons, and commercial transactions or refer to practices that are similar to slavery.¹⁵ This element of the Protocol is implemented with such variety in different countries in the GMS that its focus is quite different from that of the original text provided by the *Trafficking Protocol*.

Additionally, the action of ‘recruitment’ which in the definition is the first stage leading to exploitation (especially to labour exploitation) is in practice not necessarily the beginning of the trafficking process. As discussed in Chapters 2 and 4 of this thesis, trafficking in GMS countries, particularly in Vietnam, does not necessarily begin with recruitment, and large-scale recruitment (outside of the formal labour market) does not appear to be a common practice. In the Vietnamese context, recruitment may simply be the act of an acquaintance or a stranger who offers a good job with a high income, or an easier life in a large city or other country.¹⁶ Chapter 2 has also pointed out the fact that many countries in the region are now turning to facilitating safe migration since they have acknowledged the fact that ‘those who migrate voluntarily are less likely to be deceived than those who rely on someone else’.

In the meantime, the ‘means’ element — the manifestation of unequal relations between traffickers and victims, the core of the trafficking crime — appears to be the most difficult aspect of the *Trafficking Protocol* to apply in practice.¹⁷ The ‘means’ employed by the trafficker(s), (which comprises the intention to exploit a vulnerable person), is arguably the essence of the definition. This element includes ‘the threat or use of force or other forms of coercion, of abduction, of fraud, of reception, 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’.¹⁸ The focus of the trafficking definition is on the trafficker’s intention to exploit, that is, on the state of mind of the perpetrator rather than the victim. A causal link between any of the acts of trafficking with the intention of exploiting the individual

¹⁵ See also sections 2.3.2.1 of Chapter 2 and 4.4.1.2 of Chapter 4 of this thesis.

¹⁶ See also section 4.3.2.3 of Chapter 4 of this thesis.

¹⁷ See also section 2.3.2.2 of Chapter 2 of this thesis.

¹⁸ See the *Trafficking Protocol*, art 3(a) – see Appendix 1.

in one of the enumerated ways of the ‘means’ is sufficient to establish the trafficking crime.

However, the ambiguity of the ‘means’ element of the trafficking definition and the difficulty in applying it often leads to a misunderstanding that trafficking inherently involves *forced* movement. In this vein, it should be recalled that the means elements can play the role of ‘consent-nullifying’ factors which make the consent (of victims) to the trafficking process (and to the intended exploitation as well) irrelevant. Nonetheless, it is not always the case that the ‘means’ elements can be taken as indicators of a forcible process of trafficking. Unfortunately, as I pointed out in Chapter 2, national anti-trafficking laws in the GMS subregion often omit ‘other forms of coercion’ as relevant ‘means’ and instead focus on the issue of consent.¹⁹ This skips the circumstances of many migrant workers who initially choose to migrate and unexpectedly result in an exploitative situation — which represents a majority of cases in the GMS practice.

Of the ‘means’ elements, the ‘abuse of power or of a position of vulnerability’ seems to be the most difficult aspect to apply, partly due to the lack of explanation about its meaning in the *Trafficking Protocol*. As I explained in Chapter 2, in practice national anti-trafficking laws of the GMS countries omit the concept of ‘abuse of power or a position of vulnerability’. The recent study of the United Nations Office on Drug and Crime (UNODC)²⁰ specifically on this concept thus provides welcome guidance for understanding that both the *existence* of vulnerability and the *abuse* of that vulnerability must be established in a prosecution where this ‘means’ is relevant. That is, the investigating/prosecuting authorities have to establish both the state of mind of the perpetrators, as well as that of the victims to prove the ‘abuse of a situation of vulnerability’ in a trafficking prosecution.

¹⁹ See also section 2.3.2.2 of Chapter 2 of this thesis.

²⁰ United Nations Office on Drugs and Crime (UNODC), *Guidance Note on ‘Abuse of a Position of Vulnerability’ As a Means of Trafficking in Persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (October 2012); United Nations Office on Drugs and Crime (UNODC), *Issue Paper – Abuse of a Position of Vulnerability and other ‘Means’ within the Definition of Trafficking in Persons* (October 2012).

However, the *Trafficking Protocol's* focus under its preventive measures²¹ on reducing vulnerability factors has often been misinterpreted in many anti-trafficking initiatives. This has led to confusion with the relevance of vulnerability on the ability of an individual to consent to a transaction, that is, 'individual-specific' vulnerability as explained in Chapter 2. Unfortunately, these requirements on prevention of trafficking in the Protocol have overshadowed the conceptualisation of trafficking. As described in Chapter 2, the context of trafficking in the GMS highlights the importance of conceptualising the vulnerability factors in each individual case of trafficking and their relevance to the 'means' factors .

The third element of 'end purpose' — as a mental component of the trafficking offence — refers to the *intention to exploit* when any act falling within the 'action' element (through any indicated *means*, in the case of trafficking in adults) is performed.²² It is now clear that a trafficking crime can be constituted even though the exploitation has not yet occurred since the intention to put a person into an exploitative situation is enough for the third element of the trafficking crime to be fulfilled. Furthermore, the intention to exploit can be proven in relation to any of the acts of trafficking definition, no matter whether at the first or the end stage.

The way the *Trafficking Protocol's* definition prescribes this third element of 'end purpose' determines that the definition focuses on processes rather than outcomes of trafficking, upon actions rather than actual exploitation. This leads to problems in understanding what trafficking means in practice as the *Trafficking Protocol* fails to completely address the nature of the exploitative practices that amount to trafficking. In fact, the *Trafficking Protocol* provides an open-ended list of common forms of exploitative practice but it does not actually define these practices. As some of these practices are well-known and long-established as examples of exploitation, such as forced labour, slavery and similar practices, there is strong support for conceptualising trafficking in those terms. This also creates different understandings of the nature of the trafficking crime which undermines the standardization of concepts that is crucial to international cooperation in addressing the issue.

²¹ See *Trafficking Protocol*, art 9(4) – see Appendix 1.

²² See also section 2.3.2.3 of Chapter 2 of this thesis.

In implementing the definition in regional and domestic policy and legislation, there is significant divergence from the focus of the original text in the *Trafficking Protocol* on this third element of the trafficking definition. GMS countries 'have not given effect to the core notion of exploitative trafficking'²³ and often conflate trafficking, illegal/irregular migration, and/or the trade of people.²⁴ In Cambodia, the anti-trafficking law creates a trafficking offence which is tantamount to criminalizing prostitution. Thailand's *Anti-Trafficking in Persons Act* (2008) creates trafficking offences that focus upon 'exploitation', but extends it to issues such as begging, pornography, *coerced* removal of organs and forced extortion. The Vietnamese anti-trafficking law does not officially require a 'means' element to be established for a trafficking crime to be constituted. At the regional level, the trafficking definition of the *South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution* (2002),²⁵ while narrower than the *Trafficking Protocol's* definition, (especially with regard to the 'means' and 'end purpose' elements) addresses only trafficking in women and children for prostitution.

The ambiguities of the trafficking definition of the *Trafficking Protocol* are exacerbated by the existence of the dichotomy of trafficked/smuggled migrants, as discussed in Chapter 3, which does not truly reflect the interrelated and overlapping situations of trafficked and smuggled migrants. In fact, it has been clearly shown that the trafficking victim/smuggled migrant dichotomy leads to significant difficulties in identifying trafficked persons and, therefore, represents an obstacle to their enjoyment of the protection and assistance to which they are entitled.²⁶ In fact, the definition does not reflect the autonomy of trafficked persons in deciding to migrate even if they subsequently end up in exploitative situations. This failure to recognise

²³ Kneebone and Debeljak, above n 11, 127.

²⁴ See also section 2.3.2 of Chapter 2 of this thesis.

²⁵ *South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, opened for signature 5 January 2002 (entered into force 1 December 2005) ('SAARC Convention') <<http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>>.

²⁶ See also section 3.2.1.1 of Chapter 3 of this thesis.

that trafficking can follow from voluntary movement is manifested clearly in the Protocol's protection regime for trafficked persons or, in other words, in the way the protection responses to trafficking are framed. However, the recent study of the UNODC on the 'abuse of power or position of vulnerability', which is mentioned above, shows a desire of the international community to be correctly focused in responding to trafficking. This is also a promising practice for the interpretation and application of the *Trafficking Protocol's* definition at regional and national levels.

6.3 THE TRAFFICKING PROTOCOL'S PROTECTION REGIME

In Chapter 3 I examined and assessed the international protection regime of trafficked persons, and pointed out that the regime introduced by the *Trafficking Protocol* is not adequate to protect and assist trafficked persons' human rights and interests.²⁷ I also argued that the Protocol's protection regime does not actually reflect and respond to the situations and difficulties of victims of trafficking, especially their needs in the aftermath of a trafficking experience. By employing international standards as measures for the protection of the human rights of victims of crime and victims of human rights violation, I argued in Chapter 3 that the *Trafficking Protocol's* standards need to be supplemented. That is, these international standards need to be utilised as principles to build an adequate protection regime for trafficked persons at national levels, as I have argued in this thesis in relation to the Vietnamese context.

Under the framework of the *Trafficking Protocol*, trafficked persons are conceived of as victims of human rights violations (and at the same time as victims of crime) who are entitled to a range of protective and supportive measures. Accordingly, the *Trafficking Protocol* (in accordance with the *Convention against Transnational Organized Crime (CTOC)*)²⁸ provides for protection of privacy and identity in (but not limited to) legal proceedings, protection of physical safety, protection from the (threat

²⁷ See also sections 3.2.1.3, 3.2.2, 3.2.3, 3.2.4 and 3.3 of Chapter 3 of this thesis.

²⁸ *Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) ('*CTOC*'), arts 24, 25; see also section 3.3.1 of Chapter 3 of this thesis.

of or potential) retaliation or intimidation, and protection from re-victimization (as a preventive measure).²⁹ The Protocol also stipulates that trafficking victims shall be provided with information about legal proceedings and given the opportunity to present their views and concerns in these proceedings. It also provides for support for physical, psychological and social recovery (through measures such as housing, counselling, medical, psychological and material assistance, employment, and educational and training opportunities); the possibility of receiving compensation, of legal status in destination countries (including residence permits) and of safe and (if possible) voluntary return/repatriation.³⁰ The measures for victims' social reintegration (including facilitating the physical, psychological and social recovery of victims in a manner appropriate to their age, gender and special needs in order to foster their health, self-respect and dignity) have generally been provided under the *Trafficking Protocol's* framework even though it does not refer specifically to 'reintegration'.³¹ Concerning the return and repatriation of trafficked persons, the *Trafficking Protocol* obliges both receiving and sending countries to guarantee safe and, if possible, 'voluntary' return. The *Trafficking Protocol* also calls upon its state parties to avoid immediate repatriation of trafficked persons and to guarantee victims of trafficking the opportunity to present their views and concerns in related judicial proceedings.³²

Generally, the fact that most of these measures are accorded as discretionary raises the concern that they may not be incorporated and/or implemented within national legal frameworks. This also makes the 'protection' part of the *Trafficking Protocol* the weakest point of this instrument. However, as pointed out in Chapter 3, this can be reinforced in principle by the doctrine of state responsibility under international human rights law, which makes clear the positive obligations and the standards of due diligence of states in terms of protection for trafficked persons.³³

²⁹ See the *Trafficking Protocol*, arts 6(1), 6(5), 9(1)(b) – see Appendix 1; *CTOC*, arts 24(1), 25(1).

³⁰ See *Trafficking Protocol*, arts 6(2), 6(3), 6(4), 6(6), 7, 8 – see Appendix 1.

³¹ *Ibid*, art 6(3) – see Appendix 1.

³² See *ibid*, art 8(2) – see Appendix 1.

³³ See also section 3.3.1 of Chapter 3 of this thesis.

Furthermore, the Protocol — as a criminal justice oriented instrument — focuses primarily on the protection of and assistance to trafficked persons for the sake of effective judicial proceedings, rather than on their needs as victims.³⁴ As discussed in Chapter 3 of this thesis, this is a result of a tension between the criminal justice objectives and discourses, and the human rights goals and discourse indicated under the framework of the *CTOC* and its Protocols. Therefore, whilst the *Trafficking Protocol's* protection regime should be taken as of primary importance in acknowledging the human rights issues associated with trafficking, and in providing trafficked persons with as much protection and assistance as possible, it should also be noted that there are still many regional and national practices that are promising in terms of their conceptualisation of trafficking and provision of protection to trafficked persons. Although making recommendations on changes to the provisions of the *Trafficking Protocol* is not among the main objectives of this thesis, I have argued that the progressive provisions of other relevant international law instruments as well as regional instruments, such as the *European Trafficking Convention*,³⁵ provide useful comparisons and standards.

The *Trafficking Protocol* (as well as the *CTOC*) is mostly silent on important issues regarding the nature and requirements for the protection of trafficked persons' human rights and interests. First and foremost, as mentioned above, the Protocol does not recognize the potential characterisation of trafficking victims as migrant workers, or their self-determination, autonomy or agency in making (migration) decisions.³⁶ That is, it does not acknowledge the dichotomy of trafficked/smuggled migrants, which denies such migrants protection and assistance when they are in fact exploited, and provides considerable challenges to the practice of identification of trafficked persons.³⁷ Further, the *Trafficking Protocol* (as well as the *Smuggling Protocol*) is ambiguous on the issue of non-criminalisation, which has become 'a widely accepted

³⁴ See also section 3.3.1.1 of Chapter 3 of this thesis.

³⁵ *Council of Europe Convention on Action against Trafficking in Human Beings and Its Explanatory Report*, opened for signature 16 May 2005, Council of Europe Treaty Series No 197, 16 V 2005 (entered into force 1 February 2008) ('*European Trafficking Convention*').

³⁶ See above section 6.2 of this chapter.

³⁷ See also section 3.2.1 of Chapter 3 of this thesis.

normative standard' in protecting victims of trafficking from a human rights perspective.³⁸ However, as I just mentioned above, there are useful comparisons and standards in regional instruments. I, therefore, highly recommend that the provision of the *European Trafficking Convention* regarding the issue of non-criminalisation (which required its state parties to not impose punishment on victims for their status-related offences), be followed.³⁹

Additionally, as discussed in Chapter 3, the *European Trafficking Convention's* provisions on defining victims and imposing obligations on states to identify and protect potential trafficking victims during the identification process, should also be seen as a good precedent for implementing legislation. Significantly, the Convention also provides for a regime of temporary protection (from, at least, immediate repatriation) and assistance for presumed trafficked persons.⁴⁰ The Convention also significantly suggests that an age presumption principle should be applied in the identification process.⁴¹ Additionally, as EU experts have also pointed out, measures such as guidelines (with specific criteria and/or indicators) and provision of trained and qualified officials for making 'rapid and accurate identification of trafficked persons' should also be guaranteed. The Australian anti-trafficking framework can be seen as another promising example which provides for victims of trafficking to obtain a bridging visa to reside in the territory, as well as other support services, *regardless of their willingness or ability to cooperate with investigations and prosecutions of human trafficking offences.*

³⁸ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010), 285.

³⁹ *European Trafficking Convention*, art 26; Explanatory Report, *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, Council of Europe Treaty Series No 197, 16 V 2005 (entered into force 1 February 2008) ('*Explanatory Report to the European Trafficking Convention*'), paras 272 – 4.

⁴⁰ *European Trafficking Convention*, arts 10(1), 10(2), 12(1), 12(2).

⁴¹ *Ibid*, art 10(3).

The principle of separation of protection from cooperation⁴² (which is absent under the frameworks of *CTOC* and the *Trafficking Protocol*) should also be strictly guaranteed in interpreting and applying protection and assistance measures, especially with regard to (but certainly not limited to) the provisions of residence permits and shelter support. It should also be noted that the practice of granting residence permits in many countries has now shifted strongly towards separating their provision from cooperation with authorities, as illustrated in the examples of Canada and Australia introduced in Chapter 3.⁴³ By contrast, most of the national anti-trafficking frameworks in the GMS fail to provide a residence permit option, which makes return most likely the only option, and is one reason why the process of identifying trafficked persons remains so problematic.

With regard to the return and repatriation of trafficked persons,⁴⁴ the *non-refoulement* principle (in the *1951 Refugee Convention*⁴⁵) should be provided, with specific reference to the obligation of state parties to guarantee safe and voluntary return of trafficked persons.⁴⁶ This should be accompanied by clear procedures to ensure that returns are conducted with due regard for the rights and safety of the person concerned. In the case of child victims, a ‘risk and security assessment’ is needed to ensure that return is in the best interests of child victims. Further measures relating to social reintegration of victims, prevention of re-victimization and other supports for victims during and after return/repatriation, as suggested by the *European Trafficking Convention*, should be implemented.

⁴² See also section 3.3.1.1 of Chapter 3 of this thesis.

⁴³ See also section 3.3.2 of Chapter 3 of this thesis.

⁴⁴ See also section 3.3.3 of Chapter 3 of this thesis.

⁴⁵ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 2545 (entered into force 22 April 1954) (‘*1951 Refugee Convention*’); see also section 3.3.3.2 of Chapter 3 of this thesis.

⁴⁶ However, it should be noted that in EU countries, involuntary returns appear to be a common practice, in the absence of clear procedures to ensure that returns are conducted with due regard for the rights and safety of the person concerned.

In terms of the non-coercion principle,⁴⁷ the progressive provisions of the *European Trafficking Convention* regarding the right of trafficked persons to decline protection and assistance should be noted. This Convention requires a 'consensual and informed basis' for all protection and assistance offered to trafficked persons.⁴⁸ Closely related to the principle of non-coercion is the issue of victim detention, in light of the prohibition on unlawful or arbitrary detention. This principle is not acknowledged by either the *Trafficking Protocol* or by the *European Trafficking Convention*. Detention of trafficked persons (which, as shown in Chapter 3, is a common practice associated with anti-trafficking measures) occurs in prisons, immigration detention centres, shelters or welfare facilities) and violates trafficked persons' human rights.⁴⁹ In the EU, the use of detention centres as part of return procedures has been accepted as facilitating the identification and protection of trafficked persons. GMS authorities have not supported detention of trafficking victims by *law enforcement authorities*, but have demonstrated a desire to preserve state control over victims through shelter detention. In the practice of this subregion, and of Vietnam⁵⁰ in particular as shown in Chapters 3 and 5, shelter detention of trafficked persons during family tracing and assessments is extremely common, and appears to be regarded as an inevitable part of return procedures.

Further, whilst the *Trafficking Protocol* does not explicitly refer to reintegration,⁵¹ the *European Trafficking Convention* offers a promising precedent by requiring that repatriated child victims of trafficking be provided a social reintegration program which also aims at reducing their vulnerability to re-victimization and re-trafficking, as well as to intimidation, retaliation, social isolation and stigmatization. The *South Asian Association for Regional Cooperation (SAARC) Convention* also provides for some rehabilitation measures, including legal advice, counselling, job training and health

⁴⁷ See also sections 3.2.4 and 3.3.1.2 of Chapter 3 of this thesis.

⁴⁸ *European Trafficking Convention*, art 12(7).

⁴⁹ See also section 3.2.4 of Chapter 3 of this thesis.

⁵⁰ See also section 5.3.2.3 of Chapter 5 of this thesis.

⁵¹ See also section 3.3.3.3 of Chapter 3 of this thesis.

care.⁵² In the GMS, the Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT) MOU⁵³ requires member states to commit to ‘working together to facilitate the successful recovery and reintegration of trafficked persons and to prevent them from being re-trafficked’.⁵⁴

As pointed out in Chapter 3, regarding the remedies for trafficked persons,⁵⁵ the *Trafficking Protocol* (in a strong correlation with the *CTOC*) imposed an obligation on state parties regarding ‘the possibility of obtaining compensation for damage suffered’ for trafficking victims in domestic legislation.⁵⁶ In the meantime, the Protocol is also concerned with (but does not impose as obligations) the issue of trafficking victims’ access to information (about legal proceedings) and regularization of residence status (as mentioned above),⁵⁷ which can be seen as aspects of an effective remedy.⁵⁸ However, it is important to note, as I have also discussed, that the *Trafficking Protocol* does not provide adequate remedies for trafficked persons (in terms of trafficked persons’ right to apply for compensation, restitution, recovery, satisfaction and non-repetition, their access to legal assistance as well as procedural rights necessary to facilitate reparations), nor does it expressly guarantee trafficked persons’ access to remedies. On this point, the model of the *European Trafficking*

⁵² See *SAARC Convention*, art IX(3).

⁵³ Coordinated Mekong Ministerial Initiatives on Trafficking (COMMIT), *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, 29 October 2004 (‘COMMIT MOU’) <www.no-trafficking.org/reports_docs/commit/commit_eng_mou.pdf>.

⁵⁴ *Ibid*, art 21.

⁵⁵ See also section 3.3.4 of Chapter 3 of this thesis.

⁵⁶ Gallagher, above n 38, 362.

⁵⁷ See also section 3.3 of Chapter 3 of this thesis.

⁵⁸ Joy Ngozi Ezeilo, Special Rapporteur on Trafficking in Persons, Especially Women and Children, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/35 (13 April 2011), [17].

Convention is useful as it focuses on facilitating victims' access to remedies by requiring its state parties to provide victims with information on relevant court and administrative proceedings, the procedures to obtain compensation and, significantly, on the possibility of being granted a residence permit.⁵⁹ Additionally, the *Convention* also calls for the provision of legal assistance and free legal aid so that victims may claim their rights.⁶⁰ However, as analysed in Chapter 3, these guarantees for victim's access to remedies must be incorporated into adequate compensation schemes which are in place at the national level. In some EU countries, there is in fact only a small percentage of trafficked persons identified as such, and an even smaller proportion has been granted residence permits to allow them remain to pursue a compensation claim.⁶¹ Moreover, complicated and/or unrealistic procedures and conditionality upon victim cooperation (as under the frameworks of the UK or Thailand) should also be born in mind as common obstacles to victims' access to compensation.

Having completed my summary of the international anti-trafficking framework, and its strengths and weaknesses, I now turn to applying these to the Vietnamese context, in order to make recommendations for changes to policy and implementation.

6.4 THE VIETNAMESE ANTI-TRAFFICKING RESPONSE AND RECOMMENDATIONS

In Chapters 4 and 5 of this thesis I analysed the features of human trafficking and anti-trafficking policy in the Vietnamese context and demonstrated that there are gaps between Vietnamese responses, especially with its anti-trafficking law that looks good 'on paper', and international standards. In particular there are gaps between these international standards and national anti-trafficking practice,

⁵⁹ See the *European Trafficking Convention*, art 15(1); *Explanatory Report to the European Trafficking Convention*, para 192.

⁶⁰ See the *European Trafficking Convention*, art 15(2); *Explanatory Report to the European Trafficking Convention*, para 195.

⁶¹ See also section 3.3.2 of Chapter 3 of this thesis.

especially for protection and assistance to trafficking victims. The restrictions of Vietnam's protection regime derive from some key shortcomings of the official anti-trafficking policy. As pointed out in this thesis, there are five main features of (and also obstacles/challenges to) Vietnamese anti-trafficking policy, including:

- i) the focus on the 'social evil' paradigm and national identity;
- ii) the failure to link the trafficking issue to labour migration and internal trafficking;
- iii) the lack of adequate protective measures;
- iv) the narrow approach to the issue; and
- v) lack of clarity in its law.

Specifically in relation to the Vietnamese national protection regime, in Chapter 5 I demonstrated that trafficked persons are not fully accepted as victims of human rights violations, but they are preferably regarded as passive victims within this regime. This Chapter also highlighted the most significant fact that challenges the protection regime in Vietnam, namely that trafficked persons are considered as tools of the legal system instead of bearers of human rights.

As already explained, although this thesis has investigated the problems of the international protection regime for trafficked persons, it does not aim to find solutions for improving that regime. The final recommendations of this thesis, therefore, will focus on what should be done in terms of Vietnamese anti-trafficking policy and legislation, to improve the national protection regime. Additionally, the following discussion will suggest areas where more research is needed in Vietnam for a more comprehensive understanding and response to the issue. The fundamental principle adopted in making these final recommendations is that the standards and measures which are suggested and/or obliged by the *Trafficking Protocol* and other international standards shall be seen as the 'musts', whilst the other measures should be provided on the basis of trafficking victims' needs.

6.4.1 The first feature: Focus on ‘social evil’/national identity

The first salient feature of the conceptualisation of trafficking in Vietnam is that it is seen within a ‘social evil’ paradigm, and connected with strong feelings about national pride and political identity.⁶² This approach reflects a stereotypical understanding of trafficking that is strongly linked to prostitution and sexual exploitation in Vietnam. Even though the ‘social evil’ paradigm is not explicitly mentioned in the texts of the new *National Plan of Action (NPA) 2011– 2015*⁶³ or the national anti-trafficking law of Vietnam,⁶⁴ it is hard to believe that this absence will make a positive difference to the national policy.

Doing more harm than good, this conceptualisation of trafficking as a social evil raises concern about the fate of victims of trafficking, particularly those who are sexually exploited, who are often regarded as sex workers, and are therefore targeted as such in policy. For trafficked persons in Vietnam, being treated the same as sex workers is synonymous with committing violations of their rights and interests as victims of human rights abuses, as discussed in Chapter 4, including but not limited to arrests and forced rehabilitation, and the negative impacts of the social attitude towards victims of sex trafficking. As a result, the social evil paradigm isolates victims of trafficking of prostitution or sexual exploitation, pushing them into a ‘hidden population’, inhibiting their access to social services and undermining their ability to reintegrate into society.

⁶² See also section 4.4.1.3 of Chapter 4 of this thesis.

⁶³ *National Plan of Action against Crime of Trafficking in Persons during 2011– 2015* (Vietnam) attachment to the Prime Minister’s Decision No 1427/QĐ-TTg dated 18 August 2011 (‘*NPA 2011 – 2015*’) [Vietnamese version] <www.vietlaw.vn/Van-ban/Hinh-su/Quy-dinh-1427-QĐ-TTg-nam-2011-phe-duyet-Chuong--.aspx>.

⁶⁴ See also *Law on Prevention, Suppression against Human Trafficking 2011* (Vietnam) No 66/2011/QH12, was passed by Vietnamese National Assembly 12th Legislature, 9th session on 29 March 2011 and entered into force 1 January 2012 (‘*Anti-Trafficking Law 2011*’) (see Appendices), arts 5(1), 11 [UNIAP trans] <www.artipproject.org/artip_tip_cjs/laws-policies/national/Vietnam/Vietnam%20Anti-trafficking%20in%20Persons%20Law%20Mar%202011%20final%20ENG.pdf>, which less directly admits the social evil approach.

Alongside the paradigm of ‘social evil’, trafficking in Vietnam is also seen within a traditional security discourse as an issue of irregular/illegal migration constituting a threat to state sovereignty, illustrated by the fact that the state punishes its nationals for leaving the country without permission.⁶⁵ This traditional security discourse also leads to a focus on the illegality of both trafficking and smuggling crimes and perpetuates the difficulties in distinguishing between trafficked persons and illegal/smuggled migrants in Vietnamese anti-trafficking practice. Meanwhile, there is reluctance on the part of the government to admit that they have lost control over their nationals, and that their people are being exploited in other countries⁶⁶ (and therefore, turning a blind eye to the exploitation of their people — also through labour migration both internally and transnationally — as pointed out in the next part). In other words, the fact that trafficking has been conceptualised as a social evil and as an issue of national identity in a traditional security discourse in Vietnam also influences (and reflects) the narrow focus of the Vietnamese government’s anti-trafficking policy on trafficking for prostitution or sexual exploitation.⁶⁷ Its blindness to the sphere of trafficking for labour exploitation, and the connection between trafficking and labour migration issues is the biggest second obstacle to the anti-trafficking response of Vietnam in achieving a comprehensive protection regime for trafficked persons.

Recommendation 1

Whilst this focus arises from cultural and political factors of Vietnam which cannot be changed in the short-term, it is important that Vietnamese policy makers acknowledge the adverse impacts of this focus on the fate of victims of trafficking, and the need to minimise them throughout related law and policy. It should be also noted that the need for recognizing the link of the issue of trafficking to labour

⁶⁵ See *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12, approved by the Vietnamese National Assembly 12th Legislature, 5th session on 19 June 2009, entered into force 1 January 2010, amended by the Amendment 2009, art 274 [Ministry of Justice trans] [7](http://www.vbqppl.moj.gov.vn/vbqpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10467); see also section 4.4.1.2 of Chapter 4 of this thesis.

⁶⁶ See also section 4.4.1.1 of Chapter 4 of this thesis.

⁶⁷ See below section 6.4.4 of this chapter.

migration and internal trafficking must be recognised; as well as the need for enforcing and enhancing the protective and supportive measures for trafficking victims as recommended below (see Recommendations 2 and 3). Thus the following is recommended:

- Raising awareness of human trafficking as a human rights issue rather than simply an issue of national security and identity;
- Eliminating obstacles as the results of the social evil paradigm to the process of protecting and supporting trafficking victims in Vietnam (for example, obstacles regarding identification processes, policies on supporting trafficking victims during and after reintegration);

6.4.2 The second feature: Failure to link the issue to labour migration and internal trafficking

In Chapter 4 I pointed out that trafficking in and from Vietnam seems to be closely connected with labour migration, with victims voluntarily migrating for employment and then ending up being exploited, rather than being forced, deceived or kidnapped by organized trafficking syndicates to be taken into exploitation.⁶⁸ However, the Vietnamese government applies a policy that discourages the internal movement of people. It also criminalizes unauthorised cross-border migration without permission as mentioned. In Vietnamese policy, migrants are generally seen as bringing negative consequences to development and society and as being the cause of social evils. This casts doubt on commitments made by the government in creating laws and participating in the development of regional and transnational legal agreements to protect the rights and interests of their nationals.

The current Vietnamese policy on managing and encouraging labour export renders migrant workers more vulnerable to labour exploitation. Moreover, Vietnamese labour export policy does not protect Vietnamese nationals as migrant workers, but regards them as exports as presented in the focus of the *Law on Vietnamese Guest Workers 2006*⁶⁹ on expanding the benefits of labour exportation (while failing to address the

⁶⁸ See also section 4.3.2.3 of Chapter 4 of this thesis.

⁶⁹ *Law on Vietnamese Guest Workers 2006* (Vietnam) No 72/2006/QH11, was passed by Vietnamese National Assembly 11th Legislature, 10th session on 29 November 2006 and entered into force 1 July

violations against migrant workers' rights).⁷⁰ Furthermore, Vietnam has maintained a gender-insensitive policy towards exporting labour regardless of the fact that demand for Vietnamese female migrant workers, as well as the feminization of labour migration, has concomitantly increased.

By ignoring the needs of internal labour migrants, the Vietnamese government does not pay any attention to supporting or reducing the risks for spontaneous (economic) migrant workers within the country. Moreover, the current effort of the Vietnamese government to prevent trafficking (which is often focused on reducing vulnerability at the community level) does nothing to facilitate safe migration. The government's recent focus on safe migration does not actually go hand in hand with any efforts to remove legal barriers to movement between countries or to facilitate internal migration. In other words, these efforts to promote safe migration for migrant workers remain separate from the national anti-trafficking response.

The failure of Vietnamese policies to protect the rights of migrant workers and to facilitate safe migration, and to link these policies with the national anti-trafficking response, also reveals that Vietnamese policy makers do not recognise the human security aspect (as mentioned above when discussing the international perspective) of trafficking. In other words, the fact that the anti-trafficking responses should not be limited to criminalizing trafficking and prosecuting traffickers, but should also include protecting human security and the rights of the person who is a victim of the exploitation, has not been acknowledged in Vietnam. Consequently, it can be seen, as will be summarized in the following section of this chapter, that trafficking victims are not fully accepted as victims of human rights violations in Vietnam. Thus, the following is recommended:

2007 [Ministry of Justice trans]

<http://www.vbqpl.moj.gov.vn/vbpq/en/Lists/vn%20bn%20php%20lut%20/View_Detail.aspx?ItemID=3788>.

⁷⁰ See also section 4.2.2.2 of Chapter 4 of this thesis.

Recommendation 2

- Promoting the law/policy to facilitate and reduce the risks of international and internal safe migration and to protect the equal rights of spontaneous/unorganized/irregular migrants (both internally or internationally); incorporating these measures into the prevention aspect of the anti-trafficking framework;
- Enhancing the policy on managing and encouraging labour export (such as Vietnam's *Law on Vietnamese Guest Workers 2006*) in order to provide better protection for labour migrants' rights and interests, such as providing better information and training for migrant workers, to ensure protection from labour exploitation and other abuses in destination countries;
- Paying attention to and developing gender-sensitivity in labour migration policies, including and especially exported (overseas) labour;
- Removing legal barriers to movement and providing for alternative legal channels for labour migration within and from Vietnam;
- Abolishing the restrictions applied to internal spontaneous migrants, including (but not limited to) the household registration system;
- Re-examining the current provisions on criminalisation of cross-border migration without permission in Vietnamese law, and adjusting it in orientation to regarding this as a human rights issue;
- Considering participating in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*,⁷¹ signing bilateral arrangements on labour migration with countries in the GMS;

6.4.3 The third feature: Lack of protective measures

Under Vietnamese anti-trafficking policy, trafficked persons are generally perceived as passive victims who lack self-determination, autonomy or agency, and who need the intervention of the government to 'rescue' them.⁷² This approach affects the way

⁷¹ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) ('*Migrant Workers' Rights Convention*').

⁷² See also section 5.2.1 of Chapter 5 of this thesis.

protection responses to trafficking are framed, and leads to insufficient attention being paid to the actual circumstances of trafficking and the individual experiences of trafficked persons. Noticeably, as discussed in Chapter 5, the concern of Vietnamese policy makers to use 'strict regulations' to exclude the 'wrong' victims raises serious questions about the appropriateness of the current law to deal with victims' rights and interests.⁷³ Rather, identification of trafficked persons in the Vietnamese context focuses on the 'verification' of preliminary information/identity rather than on determining whether or not they are victims of trafficking by virtue of their individual trafficking circumstances.⁷⁴ Similar to this emphasis on verification, the reception of trafficked persons under Vietnamese national law is categorised according to the way they have returned.⁷⁵ Also, in terms of supportive measures, victims of trafficking are entitled to a support regime,⁷⁶ largely on the basis of their categorization (as Vietnamese or foreign victims)⁷⁷ or on the basis of their family household situation, instead of being tailored to their circumstances and individual needs in the reintegration process.⁷⁸

Additionally, victims of trafficking in Vietnam are entitled to a broad range of support for their reintegration in the form of financial support,⁷⁹ medical and psychological support⁸⁰ and legal aid.⁸¹ However, the measures supporting victims in overcoming social discrimination and stigmatization have not been incorporated into the domestic anti-trafficking policy. Notably, the principle of non-coercion has not been

⁷³ See also section 5.3.2.1 of Chapter 5 of this thesis.

⁷⁴ See also section 5.2.2 of Chapter 5 of this thesis.

⁷⁵ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 24–6 – see Appendix 3.

⁷⁶ *Ibid*, art 6 – see Appendix 3.

⁷⁷ *Ibid*, art 32(2) – see Appendix 3.

⁷⁸ See also sections 5.3.2.2, 5.3.2.3 and 5.3.2.4 of Chapter 5 of this thesis.

⁷⁹ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 34, 35, 37, 38 – see Appendix 3.

⁸⁰ *Ibid*, arts 34, 35 – see Appendix 3.

⁸¹ *Ibid*, art 36 – see Appendix 3.

appropriately integrated into Vietnamese anti-trafficking law even though the criteria of freedom of choice and movement of victims and victim empowerment, as well as their possibility of declining protection⁸² have started to come to the attention of anti-trafficking stakeholders and policy makers in Vietnam, as pointed out in Chapter 5. With respect to community reintegration, in addition to the difficulties presented by household registration policies, the greatest challenges seem to be the lack of clear policies, lack of awareness on the part of officials, a lack of capacity, funding, and medical and health care equipment, and the obstacle of community discrimination.⁸³

One more point that should be noted is that under the Vietnamese anti-trafficking framework, trafficked persons are not really seen as victims of human rights abuses, and their internationally recognized rights and interests are not fully accepted.⁸⁴ The principle of non-criminalisation of trafficked persons is not acknowledged in the Vietnamese national law against trafficking. Similarly, protection of trafficked persons (as well as witnesses and their families), especially their physical safety, their safety from retaliation or menace during and after judicial proceedings, their right of access to information, legal advice and legal assistance, all of which are prominent in the internationally accepted protection regime, has often been under-represented within Vietnamese anti-trafficking policy.⁸⁵

Meanwhile, provisions regarding remedies for trafficked persons, despite being stipulated quite progressively under Vietnamese law, are still limited to 'in principle' provisions rather than concrete measures to be implemented.⁸⁶ Under the terms of Vietnamese national law, potential remedies include medical and psychological care,

⁸² See *Government Decree 62/2012/ND-CP on the Grounds for the Identification of Trafficked Victims and Protection of the Safety for Victims and their Relatives* (Vietnam) 13 August 2012, will enter into force 10 October 2012, art 7 [Vietnamese version] <http://moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=27864>; see also section 5.3.1.1 of Chapter 5 of this thesis.

⁸³ See also section 5.3.2.4 of Chapter 5 of this thesis.

⁸⁴ See also section 5.2.1 of Chapter 5 of this thesis.

⁸⁵ See also section 5.3.1 of Chapter 5 of this thesis.

⁸⁶ See also section 5.3.3 of Chapter 5 of this thesis.

social and legal services, and recovery and reintegration support. In terms of compensation, the *Anti-Trafficking Law 2011* of Vietnam recognizes a victim's right 'to be entitled to compensation',⁸⁷ and compensation settlements can be arranged together with the criminal proceedings or in a separate settlement following a civil proceeding if such a course would not affect the settlement of the criminal case.⁸⁸ However, a claim for compensation under the criminal justice framework remains impossible if no criminal case is opened, while any attempt under the civil framework seems not feasible due to the lack of specific procedures for victims of trafficking. Vietnamese policy makers have not yet created a state-based victim compensation fund.

In all, the Vietnamese legal framework remains flawed insofar as it treats trafficking victims as tools of the legal system. Accordingly, the verification/identification process for trafficked persons in Vietnam appears to serve the aim of prosecuting traffickers rather than protecting and assisting these victims.⁸⁹ Further, the *Anti-Trafficking Law 2011* imposes upon trafficked persons, among other victims of crime, an obligation to participate in judicial proceedings and to cooperate with the competent authorities without any concern for their willingness to cooperate.⁹⁰ This obligatory cooperation on the part victims of trafficking is supported by some 'rights' provided by the *CPC 2003*, however, these do nothing to address victims' needs for protection against

⁸⁷ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, art 6(3) – see Appendix 3.

⁸⁸ *Criminal Procedure Code 2003* (Vietnam) Law No 19/2003/QH11, approved by the Vietnamese National Assembly 11th Legislature, 4th session on 26 November 2003, entered into force 1 July 2004 ('*CPC 2003*'), art 28 [Ministry of Justice trans] <http://vbqppl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=8236>; see also *Civil Code 2005* (Vietnam) No 33/2005/QH11, was passed by the National Assembly 11th Legislature, 7th session on 14 June 2005 and entered into force 1 January 2006 ('*Civil Code 2005*'), arts 610, 611 [Ministry of Justice trans] <http://vbqppl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6595>.

⁸⁹ See also section 5.2.2 of Chapter 5 of this thesis.

⁹⁰ *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 6(4), 6(5) – see Appendix 3; *CPC 2003*(Vietnam) Law No 19/2003/QH11, art 137.

being re-victimized or further traumatised.⁹¹ Furthermore, the provision on the confidentiality of investigations in the *CPC 2003* is not in fact directed to the protection of victims' privacy and identity or to victims' rights to request this protection.⁹² It should be noted that even in a closed hearing, which may be undertaken for the sake of the jury rather than the victim's safety, verdicts are still pronounced in public. This means that the purpose of the law is aimed at improving the effectiveness of criminal justice processes rather than addressing victims' needs, specifically regarding the protection of their privacy and identity.⁹³ No specific reference to residence permits, safe and voluntary repatriation for foreign victims of trafficking has been included in Vietnamese anti-trafficking policy. However, this policy allows foreign victims to remain (even compulsorily) in the country of destination to ensure their participation in criminal proceedings, without any regard for their needs and interests, as discussed earlier.⁹⁴

While the national anti-trafficking framework disregards quite a few important issues concerning protection of and assistance to trafficked persons, these issues have been addressed in bilateral agreements entered into by Vietnam.⁹⁵ Bilateral arrangements between Vietnam and its neighbouring countries refer to the principle of non-criminalisation, protection from retaliation or menace during and after judicial proceedings, reintegration support measures (not excluding the protection of trafficked victims from social discrimination and stigmatization), supportive measures for trafficked persons prior to the identification process, and a broad range of 'legal remedies'. However, these bilateral agreements are not legally binding documents, so their progressive protection and assistance measures for trafficked persons do not carry much influence, especially as they are not reflected in the national anti-trafficking framework.

⁹¹ *CPC 2003* (Vietnam) Law No 19/2003/QH11, art 51(2).

⁹² *Ibid*, art 124.

⁹³ See also section 5.3.1 of Chapter 5 of this thesis.

⁹⁴ See also section 5.3.1.4 of Chapter 5 of this thesis.

⁹⁵ See discussion in section 5.3 of Chapter 5 of this thesis.

It should also be noted that while the safe return/repatriation of trafficked persons is addressed in bilateral agreements with Vietnam, measures such as voluntary repatriation, residence permits and the protection of victims' right to participate in relevant proceedings against repatriation, appear not to be acknowledged. Additionally, these bilateral agreements do not consider alternative options for repatriation of trafficked persons to ensure the best interests of victims upon their return. No risk-assessment process has been set up to ensure that the repatriation is the best option for victims, or to assess whether or not it would be safe for them following their return to their original country. In other words, repatriation of trafficked persons remains the only option provided for among the countries. Even though these bilateral agreements have not provided for a comprehensive protection regime, they provide progressive principles which should be incorporated into domestic policy, as a strong indication of respect for bilateral commitments from Vietnam.

In summary, it is important to recognize that the protection regime under the Vietnamese framework lacks many of the protective measures to which trafficked persons are entitled under international law as summarized in the first part of this concluding chapter. The greatest challenge for this protection regime is to recognize the fact that trafficked persons are bearers of human rights and to implement those rights.

In the meantime, this thesis also points out, as the fourth salient feature of the Vietnamese anti-trafficking response, that a narrow approach to the issue of trafficking is being maintained, and is therefore another obstacle to framing a better response. In light of the above, the following is recommended:

Recommendation 3

- Removal of the obligations imposed upon trafficked persons (regardless of whether Vietnamese or foreign victims), to participate in judicial proceedings and cooperate with the competent authorities provided by the *Anti-Trafficking Law 2011*.
- Specification of the grounds and indicators for identifying trafficked persons as victims of trafficking, based on their individual circumstances and/or experiences;

- Establishment of the main centers for reception, identification and categorisation of victims of trafficking on the basis of their situation/circumstances and needs;
- Stipulating the principle of non-criminalisation of trafficked persons in the Vietnamese national anti-trafficking legal framework; exempting trafficked persons (with due regard also to their presumed trafficking victim status) from criminal and other liabilities they may be subject to due to their status-related infringement;
- Making clearer the spirit of the principle of non-coercion (which requires respect for victims' autonomy in receiving protection and assistance on *an informed and consensual basis*), and separation of protection from victim cooperation as a standard for each of protection and assistance measures in the protection regime;
- Ensuring that protection measures for trafficked persons are compliant with international standards; incorporating the progressive provisions concerning the protection and assistance for trafficked persons provided in bilateral agreements into which Vietnam has entered into national law;
- Development of a systematic policy on repatriation of trafficked persons which guarantees safe and voluntary return; development of a system of residence permits for trafficked persons that is linked to other protection and assistance measures; development of criteria for risk-assessment processes prior to return/repatriation processes; consideration of the possibility of alternative options for repatriation of trafficked persons;
- Enhancement and supplementation of support measures for victims of trafficking from the time prior to identification until reintegration on the basis of their situation, their difficulties and their need of being supported; promoting awareness of the social discrimination and stigmatization that occurs towards trafficking victims during the reintegration process; development of a clear policy on community reintegration of trafficking victims and making clear its link to others in the national policy, for example the household registration system; clarifying the procedures for accessing compensation and optimizing the possibility of obtaining compensation for trafficked persons;
- Development of criteria for assessing the operation of shelters/centers (with reference to the criteria as outcomes of the UN Inter-Agency Project on Human Trafficking (UNIAP)'s 2009 project on Shelter Self-Improvement, for

example, victims' freedom of choice, freedom of movement and/or victim empowerment), as discussed in Chapter 5.

6.4.4 The fourth feature: A narrow approach to the trafficking issue

In general, Vietnamese anti-trafficking policy maintains a narrow approach to the trafficking issue which, first and foremost, demonstrates a persistent focus on trafficking in women and children whilst disregarding trafficking in men.⁹⁶ This narrow focus seems unchanged within the Vietnamese national response, even though the government purports to have broadened their approach by addressing trafficking in all persons. Meanwhile, it should be noted that women and child victims remain the only target of quite a few anti-trafficking stakeholders in Vietnam, such as non-governmental organisations (NGOs) and international non-governmental organisations (INGOs), with their programs aimed at supporting trafficking victims, especially in the reintegration process.⁹⁷

In addition, Vietnamese anti-trafficking policy also reveals its narrow approach to the trafficking issue in regarding prostitution,⁹⁸ the 'removal of organs',⁹⁹ sexual exploitation and forced labour¹⁰⁰ as merely end result practices of trafficking, even though the circumstances of trafficking in the country reflect a more complicated situation.¹⁰¹ Whilst the policy has begun to address forced labour, no specific clarification of this practice has been given that would allow its ambit under the Vietnamese framework to be clearly understood. It is also relevant that Vietnam has participated in the development of, and signed, several international legal instruments regarding exploitative practices such as forced labour, child labour and

⁹⁶ See also section 5.2.1 of Chapter 5 of this thesis.

⁹⁷ See also section 5.3.2.3 of Chapter 5 of this thesis.

⁹⁸ See *Penal Code 1999* (Vietnam) Law No 37/2009/QH 12, arts 119(2)(a), 120 – see Appendices 2 and 3.

⁹⁹ See *ibid*, arts 119, 120 – see Appendices 2 and 3.

¹⁰⁰ See the *Anti-Trafficking Law 2011* (Vietnam) No 66/2011/QH12, arts 3(2), 3(3) – see Appendix 3.

¹⁰¹ See also sections 4.4.1.1 and 4.4.1.2 of Chapter 4 of this thesis.

discrimination against women.¹⁰² However, the incorporation of these international instruments into domestic policies and, consequently, the practical implementation of them, are still limited in Vietnam.¹⁰³

The lack of awareness and ambiguity in Vietnamese anti-trafficking policy towards the obvious exploitative practices as abovementioned is largely due to a lack of systematic and complete data and information,¹⁰⁴ which can only be remedied by conducting comprehensive research into these practices in Vietnam. Also, it should be noted that the need for comprehensive studies on these exploitative practices as background for the establishment and improvement of anti-trafficking policy, has not been recognised in the national policy. Moreover, the examination of Vietnamese trafficking practices in Chapter 4 of this thesis shows that there are indications of exploitative situations that need further investigation. For example, among the significant practices that need be thoroughly examined to gain an entire picture of trafficking and a comprehensive response to it in Vietnam are the following practices: trafficking in men for labour exploitation internally and transnationally; international marriages between Vietnamese women/girls and foreigners and the issue of trafficking for forced/exploitative marriages; internal trafficking of women into domestic work; child labour and commercial sexual exploitation of children (such as child prostitution, child pornography and child sex tourism); the issues of child begging, disabled child vendors and infants for adoption, both internally and across borders, and the link between these practices and trafficking. Moreover, the narrow approach to trafficking issues under Vietnamese anti-trafficking policy can also be observed through the priority it gives to the aspects of criminalisation/prosecution and

¹⁰² Including the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*') and its Optional Protocol; the *CEDAW*; *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182)*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000); *Convention concerning Forced or Compulsory Labour (ILO No 29)*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932) ('*1930 Forced Labour Convention*').

¹⁰³ See also section 4.4.2 of Chapter 4 of this thesis.

¹⁰⁴ See also section 4.3.1 of Chapter 4 of this thesis.

prevention of trafficking,¹⁰⁵ but not to the related aspects of protecting trafficked persons and other human rights issues. Therefore, the following is recommended:

Recommendation 4

- Criminalizing the act of trafficking in men, bearing in mind that the current focus (on women and child victims) of quite a few anti-trafficking stakeholders in Vietnam should not be seen as reflective of the trafficking situation as a whole;
- Criminalizing other exploitative practices apart from practices of prostitution, removal of organs, sexual exploitation and forced labour, when it is relevant to the Vietnamese trafficking context, including paying attention to addressing forced labour and labour exploitative practices;
- Considering becoming signatory of international legal instruments regarding exploitative practices such as forced labour, child labour and discrimination against women and incorporating their provisions into national laws;¹⁰⁶
- Establishing a policy on collecting and systemising data and information on trafficking issues in Vietnam;
- Implementing the recommendations for future research set out at the end of this chapter.

6.4.5 The fifth feature: Lack of clarity in the law

As discussed in Chapter 5, the most significant manifestation of the lack of clarity in the Vietnamese anti-trafficking law is the unclear relationship between the *Anti-Trafficking Law 2011* and other laws in the Vietnamese legal system dealing with trafficking (such as the relevant provisions of the *CPC 2003* and the *Civil Code 2005*) and the lack of specific clarification for trafficking offences.¹⁰⁷ This creates confusion in the implementation of anti-trafficking measures, and prevents the Vietnamese response from making a significant difference despite the new law coming into effect. The lack of clarity in the Vietnamese anti-trafficking law is also exacerbated by the

¹⁰⁵ See also section 4.4.1.2 of Chapter 4 of this thesis.

¹⁰⁶ See above n 102.

¹⁰⁷ See also section 4.4.1.2 of Chapter 4 of this thesis.

fact that no specific clarification of trafficking offences has been attempted to date. This situation may be repeated with the *Anti-Trafficking Law 2011* of Vietnam, which contains protective and supportive measures for trafficking victims, many of which await specification from the government to come into effect.¹⁰⁸ Thus the following measures are recommended:

Recommendation 5

- Amending the provisions of the current Vietnamese *Penal Code* regarding trafficking offences, namely Articles 119 and 120 of the *Penal Code 1999* in light of the corresponding provisions of the *Trafficking Protocol* and the concept of trafficking provided by the *Anti-Trafficking Law 2011*;
- Clarifying the content and elements of trafficking offences through official explanatory/guiding documents;
- Making clear the relationship between the *Anti-Trafficking Law 2011* and the *CPC 2003* in terms of protection measures for trafficked persons and harmonising them (when it is necessary) on the basis of recommendations regarding protective measures suggested above;
- Specifying the protective and supportive measures accorded in the *Anti-Trafficking Law 2011* as much as possible.

In light of all the above, the following are recommended as areas for future research on trafficking:

Recommendation 6: For future research on (anti-) trafficking in Vietnam

- Research into a broader range of end result practices, such as investigating the practice of international marriages between Vietnamese women/girls and foreigners and its connection to trafficking for forced/exploitative marriages; child labour, commercial sexual exploitation of children (such as child prostitution, child pornography and child sex tourism), the placing of infants for adoption and the link to trafficking practices;
- The need for incorporation of the government's commitments to international legal agreements regarding protecting their nationals' rights and interests

¹⁰⁸ See, eg, section 5.3.1.1 of Chapter 5 of this thesis.

from exploitative practices such as forced labour, child labour, discriminations against women;

- The incidence of internal trafficking;
- The practice of trafficking in men and the exploitation throughout labour migration; exploitation of people in labour migration internally and transnationally and the link to trafficking;
- The adequacy of support measures for trafficked persons prior to the formal identification process, the appropriateness of victim support shelters/centres;
- Comparative research on systems of victim compensation for trafficked persons and applicability to Vietnam;
- Studying the consequences of involuntary repatriation of trafficked persons in the Vietnamese context;

This thesis comes to the conclusion that even though the *Trafficking Protocol's* framework appears to be progressive and comprehensive, actually it is not and, therefore, its provisions should not be taken as the only legal source for building a legal response to trafficking. Conversely, signing to and/or ratifying the *Trafficking Protocol* should not be accepted as an end in itself, or as a substitute for the effort of fine-tuning an anti-trafficking response, especially in terms of protective measures for trafficked persons. In the case of Vietnamese national anti-trafficking policy, whilst its effort to be a part of international commitment to fight against human trafficking (including the *CTOC* and its *Trafficking Protocol*) is meaningful to some extent, recognising its shortcomings and overcoming them is more important for a better response. The recognition of these shortcomings in the Vietnamese national response to trafficking will assist in moving towards necessary improvements in its policy. In the context of this thesis, this recognition, as shown above, was used as the basis for making recommendations for changes within the Vietnamese anti-trafficking framework and for future research.

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Appendices

APPENDIX 1

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

(EXTRACT)

Article 2. Statement of purpose

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

Article 3. Use of terms

For the purposes of this Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, 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;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring 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 set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

II. Protection of victims of trafficking in persons

Article 6. Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations,

other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7. Status of victims of trafficking in persons

in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8. Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9. Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

IV. Final provisions

Article 14. Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including

international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Conventionⁱ and the 1967 Protocolⁱⁱ relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of nondiscrimination.

ⁱ United Nations, *Treaty Series*, vol. 189, No. 2545.

ⁱⁱ *Ibid.*, vol. 606, No. 8791.

APPENDIX 2 – TABLE OF RELEVANT LEGISLATION
ON TRAFFICKING OFFENCES AND TRAFFICKED PERSONS IN VIETNAM

<i>Penal Code 1999</i>	
TRAFFICKING IN PERSONS	
<u>Offences</u>	<u>Penalties</u>
<p>Art 119(1) Trafficking in women</p> <p>Those who traffic in women shall be sentenced to between two and seven years of imprisonment.</p>	<p>2–7 years imprisonment + 5–50mill Dong fine + probation or 1–5 year residence ban</p> <p>Art 119(2) Higher penalties if trafficking:</p> <ul style="list-style-type: none"> - is for the purpose of prostitution - is in an organised manner - is of professional character - is for the purposes of organ removal - is for sending the victim overseas - involves more than one victim - occurs more than once <p>5–20 years imprisonment + 5–50mill Dong fine + probation or 1–5 year residence ban</p>
<p>Art 120(1) Trading in children</p> <p>‘trading, fraudulently exchanging, or appropriating children in any form’ is prohibited</p>	<p>3–10 years imprisonment + 5–50mill Dong fine + other probations</p> <p>Art 10(2) Higher penalty applies if:</p> <p>trading fraudulently exchanging or appropriation</p> <ul style="list-style-type: none"> - in an organised manner - in a professional manner - for a despicable motive

	<ul style="list-style-type: none"> - of more than one child - for the purpose of sending them abroad - for inhuman purposes - dangerous recidivism, or - causing serious consequences <p>10–20 year imprisonment + 5-50mill Dong fine + other probations</p>
<i>Law on Prevention and Suppression Against Human Trafficking 2011</i>	
DEFINITION OF VICTIM OF TRAFFICKING	
<p>Art 2 defines a ‘victim’ as a ‘person who is infringed upon by the acts stipulated in paragraphs 1, 2 and 3, of Article 3 of this Law’.</p> <p>Art 3 Prohibited Acts:</p> <ol style="list-style-type: none"> 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, forced labor, the removal of organs, or for other inhuman purposes. 3. The recruitment, transportation, harboring of person for sexual exploitation, forced labor, 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. 	
OTHER OFFENCES – Art 3 cont.	
<ol style="list-style-type: none"> 4. Coercion of persons to commit any of the acts stipulated in paragraphs 1, 2 and 3 of this Article. 5. Conducting brokerage to help other persons commit any of the acts stipulated in paragraphs 1, 2 and 3 of this Article. 6. Revenge or the threat of revenge of victims, witnesses, denunciations, their relatives or persons who deter the acts stipulated in this Article. 7. Misuse of the prevention, suppression against human trafficking for illegally obtaining profits or committing illegal acts. 	

<p>8. Obstruction against denunciation, notification and handling of the acts stipulated in this Article.</p> <p>9. Differentiation or discrimination against victims.</p> <p>10. Disclosure of the information of victims without their consent, or their lawful representatives.</p> <p>11. Assuming false position as victims.</p> <p>12. Other acts of violation of the provisions in this Law.</p>
<p>RIGHTS AND OBLIGATIONS OF VICTIMS</p>
<p>Art 6</p> <ul style="list-style-type: none"> - To request competent persons, agencies or organisations to apply measures to protect themselves and their relatives - To enjoy the supporting regimes and to be protected - To be entitled to compensation - To provide information relating to acts of violation of anti-human trafficking laws and regulations to competent agencies, organisations or persons - To fulfill competent agencies' requests relating to human trafficking cases.
<p>GROUNDINGS FOR IDENTIFYING AS VICTIMS</p>
<p>Art 27(1)</p> <p>A person may be identified as a victim if one of the following grounds is found:</p> <ul style="list-style-type: none"> a. Such person is a person who is trafficked, transferred or received as stipulated in paragraphs 1 and 2, Article 3 of this Law; b. Such person is a person who is recruited, transported or harboured as stipulated in paragraph 3, Article 3 of this Law.
<p>PROTECTION OF AND SUPPORT FOR VICTIMS</p>
<p>Art 29 Rescue, Protection</p> <p>'apply necessary measures to rescue [the person]; in case the person is likely to have his/her life, health, honour, dignity and property infringed upon, protective measures shall be applied'.</p>

Art 30(1) Protection of the Safety

- Provision of temporary shelter
- Keeping secret the places of residence, work or study of victims and their relatives
- Measures to prevent acts of infringement upon or threatening to infringe upon the life, health, honour, dignity or property of victims or their relatives
- Other protective measures as stipulated by criminal procedure law.

Art 31(2) Protection of the Personal Information Secret

‘courts shall consider and/or decide the commencement of closed court sessions on human trafficking cases’.

Art 32(1) Supportive Regimes

‘Victims who are Vietnamese citizens or stateless persons permanently residing in Vietnam’ are eligible for the following supportive regimes:

- Support for essential needs and travelling expenses
- Medical support
- Psychological support
- Legal aid
- Support for educational training, vocational training
- Short-term allowances for overcoming difficulty, and loaning.

Art 32(2)

Victims as foreigners shall be entitled to the supportive regimes stipulated in subparagraphs a, b, c and d, paragraph 1 of this Article.

Art 32(3)

Minors who accompany victims shall be entitled to the supportive regimes stipulated in subparagraphs a, b and c, paragraph 1 of this Article.

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

SUPPORT FOR TRAFFICKED PERSONS IN COMMUNITY REINTEGRATION

Art 9

Victims shall be entitled to some support as follows:

- Notifying the victims' families and their local authorities on their wish of home return and to provide them travel costs, food expenses for their self return
- Caring about victims' pre-community reintegration health care, psychological care at the victim community integration supporting units
- For the children victim alone: notifying their relatives to receive them or allocate someone to take them to their relatives' residence; transferring the orphans to the social sponsoring unit

Art 20 Psychological support

Victims should be helped with 'their psychological stabilization right at the time of receipt and long the whole process of community reintegration'.

Art 21 Legal procedure support

The victims returned to their residence are considered to re-issue their records, identity cards. The victims' children accompanying their mothers with no birth certificate are entitled to make their birth procedure according to the current legal regulation.

Art 22 Education learning and vocational training support

1. Children victims continue their schools are financially supported for their textbooks and learning aids in their first school year.
2. The victims returned to their home areas are considered to participate in the vocational training.

Art 23 Initial difficulty and loan support

1. The returned victims under the poor household or difficult family status are

<p>supported once with the initial difficulty allowance.</p> <p>2. The victims in need of loan for production, business are considered, facilitated with loan from the Bank for Social Policy, the Poor Women support Fund as legally regulated.</p>
<p><i>Government Decree 62/2012/ND-CP on the Grounds for the Identification of Trafficked Victims and Protection of the Safety for Victims and their Relatives</i></p>
<p>RIGHTS AND RESPONSIBILITIES OF VICTIMS</p>
<p>Art 3(1) Rights of victims and their relatives</p> <p>a) Proposing competent authorities to apply protective measures when their life, health, honour, dignity or property are infringed or threatened to be infringed</p> <p>b) Decline protective measures which are applied by the competent authorizes</p> <p>Art 3(2) Responsibilities of victims and their relatives</p> <p>a) Fulfill the request from the competent authorities in applying protective measures</p> <p>b) Being self-responsible for their safety when they decline protective measures or not fulfilling the request from the competent authorities in applying protective measures</p>
<p>PROTECTION OF TRAFFICKED PERSONS</p>
<p>Art 7 Protection for the safety of victims and their relatives</p> <p>Depending on specific case and factual circumstance, competent authorities may apply one or more of the following protective measures to guarantee the safety of victims and their relatives:</p> <ol style="list-style-type: none"> 1. Keeping confidential of the giving of testimony and/or witness of victims and/or their relatives 2. Keeping confidential of information relating to identity, privacy, residence, working or studying location of victims and/or their relatives 3. Arranging the protection at the place of residence, work or study of victims

and/or relatives, in the trial and other necessary locations

4. Restricting the movement and communication of victims and/or their relatives
5. Arranging shelter for victims and/or their relatives
6. Arranging a new place for residence, work, study for victims and/or their relatives
7. Applying preventive measures to prevent the acts of infringement or of threatening of infringement of the life, health, honour, dignity and property of victims and/or their relatives
8. Closed court sessions

APPENDIX 3 – SOME SIGNIFICANT LEGAL DOCUMENTS ON
ANTI-TRAFFICKING OF VIETNAM

**NATIONAL PLAN OF ACTION AGAINST CRIME OF TRAFFICKING
IN CHILDREN AND WOMEN DURING 2004-2010**

*(Attachment to the Decision No.130/2004/QĐ-TTg dated 14/7/2004 of the Prime
Minister)*

[Alliance Anti-Traffic (unofficial) translation]

Part I

**SITUATION OF TRAFFICKING IN CHILDREN AND WOMEN AND PREVENTION
ACTIVITIES**

I. THE SITUATION OF TRAFFICKING IN CHILDREN AND WOMEN

1. Situation: In the recent years, especially since the transition of economy into socialism-oriented market mechanism, the situation of trafficking in children and women has become more and more complicated and serious and tends to increase. A proportion of children and women are trafficked within the country, mainly from rural and mountainous areas to cities and towns for prostitution. The remaining is trafficked to other countries in various forms and for different purposes. According to incomplete statistics, there have been, so far, tens of thousands of Vietnamese women and children trafficked across border, mainly through paths and border gates in the Northern and South Western boundaries. In the North, the trafficked children and women are used as prostitutes in service establishments or illegal wives while in the South, most of them work as sex workers in large cities and bordering provinces. These areas are also places to transit victims to further countries in the region. In addition, the deceit and trafficking in women to Taiwan through marriage brokerage,

the trafficking in children to abroad in the form of child adoption appears to be extremely complicated and difficult to control over the past few years. Trafficking in children and women has been becoming an urgent and pressing problem, badly affecting the society, customs, tradition, social morals and Government laws, destroying family happiness, increasing the risks of HIV/AIDS transmission and resulting in potential impacts on national and social security.

2. Cause:

Objective cause:

In the context of market economy and international integration, many socio-economic problems exist, especially the difference between the rich and the poor and unemployment status. In several rural and remote areas, the local people suffer extremely poor living conditions and low level of education. Many women and children in especially difficult circumstances attempt to seek job opportunities in urban areas or abroad. Furthermore, as influenced by bad factors such as unhealthy cultural flow and social evils including prostitution and drugs within the country and the region, the national criminals in cooperation with the international ones take these as advantages for their illegal practices.

Subjective cause:

The awareness of the seriousness, necessity and responsibilities for the prevention and combating of trafficking in children and women amongst Party Committees, authorities, agencies and mass organizations at different levels is still limited. The prevention and combating of trafficking in children and women has not been done in a comprehensive and synchronous way. There is lack of close coordination among relevant authorities. The implementation structure is not well established to meet the requirements on prevention and fight against trafficking in children and women in a new context.

II. PREVENTION AND FIGHT AGAINST TRAFFICKING

2.1. Achievements in prevention and combating activities

Over the past few years, the prevention and combating of trafficking in children and women are always set in line with the prevention and combating of criminals and social evils in general. After the approval of the Directive No. 766/TTg dated September 17th, 1997 of the Government and the Resolution 09/1998/NQ-CP dated July 31st 1998 with regards to “**Strengthening the prevention, combating of criminals in the new situation**”, the prevention and combating of trafficking in children and women has been given more attention by the concerned authorities and achieved some initial results.

- The prevention focuses on communication and education on laws and policies, tricky practices of traffickers in order to enhance the local people’ awareness and vigilance; state management of security, management over hotels, guest houses, restaurants,... management over the brokerage business of marriage with foreigners, child adoption by foreigners, entry-exit management,.. in order to timely discover criminals and trafficking cases. For the returned victims, relevant agencies such as Border Guard, Police, MOLISA and mass organizations in close cooperation with local authorities help these people settle down their livings, seek jobs, and reintegrate into the community.

- Combating trafficking: While the trafficking in children and women is getting more and more serious, the police force acting as the lead agency in combating crimes, implement different measures to discover, prevent and combat the crime of trafficking in children and women in collaboration with other relevant authorities.

As reported by police from provinces and cities, the police forces at all levels have disclosed and arrested thousands of trafficking cases with thousands of traffickers in women and children (both inside and outside the country). Of this, 1,818 cases were prosecuted with 3,118 criminals committed trafficking of women; 451 cases were prosecuted with 672 criminals committed trafficking, exchanging or abusing children

(According to Article 119, 120 of the 1999 Criminal Code). During 5 years alone of implementing Directive No. 766/TTg of the Prime Minister (1998-2002), the police and border guard forces at all levels quashed 921 cases with 1,807 traffickers in children and women.

Many large-scale and well-organized networks of trafficking in children and women to other countries in the region have been disclosed and handled by the police and border guard agencies. From 1998 to 2002, the People's Courts at all levels prosecuted thousands of criminals committed trafficking in children and women in accordance with the Article 119, 120 of the Criminal Code (1999). Most criminals were sentenced strictly in conformity with the laws.

- International cooperation: Over the past years, the international cooperation in actions against trafficking in children and women has strengthened significantly. Vietnam has been involved in related international documents, signed Agreements of bilateral legislative support and particularly coordinated with neighbouring countries to fight against crimes, especially the cross-border trafficking in children and women.

Under the leadership of the Government, several relevant Ministries and agencies have implemented anti-trafficking projects funded by international organizations such as UNICEF, ILO, IOM, UNODC and others.

In general, the implementation of the projects have made significant contribution to prevention and combating of trafficking in children and women, especially in the fields of communication and education, legal study, situation survey and analysis, capacity building training to the staff of key Ministries, agencies and localities.

2.2. Some constraints in the prevention and combating of crime of trafficking in children and women

Though some results have been achieved, there remains a lack of synchronous coordination among agencies from the central to grassroots levels in prevention and combating of trafficking in children and women. A leading agency responsible for

setting up a collaboration mechanism does not exist. The proportion of investigating and disclosing trafficking cases remains very low compared to the actual situation. The investigation into the situation appears to be occasional and untimely. It is passive in disclosing trafficking cases that are mainly based on the complaints from victims or their families. The residence management (both permanent and temporary) has not been done properly, especially in remote and rural areas. The legislative system relating to prevention and combating of trafficking in children and women has not been completed. In particular, the number and status of the trafficked children and women living abroad has not been known. The staff working in this area in relevant agencies at all levels has not been updated with basic knowledge; There lacks internal and external information; distribution of its force and facilities for combating traffickers of women and children fails to meet the requirements in the current situation.

Part II

CONTENTS OF THE NATIONAL PLAN OF ACTIONS AGAINST TRAFFICKING IN CHILDREN AND WOMEN DURING 2004-2010

I. LEADING POINT OF VIEWS

1. Prevention and combating of trafficking in children and women is a significant social issue which needs to be put in the relationship between prevention and combating of crimes and socio-economic issues under the leadership of the Party Committees and authorities at various levels with the involvement of different agencies, mass organizations and the whole society.
2. Focus is given to prevention. There is a need for close linkage between prevention and fighting against trafficking in children and women and community reintegration for victims in line with the Party's guidelines and policies, Government laws and international laws.

II. OBJECTIVES

1. General objective

To make significant changes in awareness and actions among different levels, departments, mass organizations and the whole society on prevention and combating of trafficking in children and women in order to prevent and basically reduce the number of trafficked women and children by 2010.

2. Specific Objectives

2.1. From 2004-2006

- Raise the awareness and understanding of the community on the tricks, causes and consequences of trafficking in children and women; Improve the respect and implementation of laws on prevention and combating of trafficking in children and women in particular and crimes in general of every citizen and organization.
- Develop and mandate legal executing agencies; Reinforce the legislation and social management to prevent and combat trafficking in children and women.
- Prevent and combat trafficking to reduce 20% of crimes related to trafficking in children and women in target areas.

2.2 From 2007-2010

Synchronize preventive measures and actively combat trafficking to reduce more than 50% of trafficked children and women nationwide; Provide assistance to trafficked women and children who return to their hometown for re-integration into the community.

III. CONTENTS AND MAIN COMPONENTS OF THE NPA

1. Contents

1.1 Basic survey, situation analysis and forecast of trafficking criminals; Setting up of database related to trafficking in children and women.

1.2 Communication, education and encouragement of local people to identify, prevent and combat traffickers.

1.3 Synchronization of preventive measures among the families, communities, agencies and organizations.

1.4 Fight against trafficking in children and women and other related crimes, especially highly-organized transnational crimes of trafficking in children and women.

1.5 Support to education, job opportunities, community re-integration for trafficked women and children. Funding and construction of receiving centers for returned victims.

1.6 Strengthening and capacity building training to staff working on prevention and combating of trafficking in children and women.

1.7 Development and finalization of legal documents related to prevention and combating of trafficking in children and women.

1.8 International cooperation in prevention and combating of trafficking in children and women, especially cross-border trafficking in conformity with the national and international laws.

2. Main components of NPA

2.1. Component 1: Education and communication in the community on prevention and combating of trafficking in children and women

Focus on regular advocacy and education communication under various forms; Organize communication campaigns at-risk target groups in the whole country, especially in targeted areas; Integrate the advocacy on prevention and combating of crimes and social evils; Develop cultural families, healthy communes, streets without social evils; Provide support and counselling to the families of victims and vulnerable women and children.

The Central Viet Nam Women' Union is the key agency with the involvement of the Committee for Population, Family and children, Ministry of Culture and Information, Youth Union and other Ministries and Departments.

2.2. Component 2: Combating trafficking in children and women

Focus on prevention, identification, investigation and sanction of trafficking in children and women and women and other related crimes, particularly cross-border trafficking in children and women and internationally organized crimes.

Arrest criminals who are hidden themselves, prevent them from committing further crimes and becoming new criminal organizations.

Sub-component 1: the Ministry of Public Security is the key agency to implement in the inland areas.

Sub-component 2: the Ministry of Defense (Border Guard Command) is the key agency to implement in the bordering areas.

The Committee for Population, Family and Children, Ministry of Justice, Ministry of Foreign Affairs, People's Supreme Court, People's Court of Investigation and other ministries and department will coordinate with these key ministries.

2.3. Component 3: Receipt and support to women and children victims returning from abroad

Focus on close monitoring border gates: Coordinate with public security forces and border guards of bordering countries and relevant authorities to make necessary procedures to receive and provide support to returned victims.

The Border Guard Command will be the key agency in-charge-of receiving victims and complete handing over procedures. MoLISA will coordinate with other ministries, departments and local authorities to carry out education activities and help the victims quickly settle down their livings and re-integrate into the community.

2.4 Component 4: Development and strengthening of legal framework in relation to the prevention and combating of crime of trafficking in children and women

Conduct research; Develop and strengthen legal framework as well as legal documents relating to prevention and combating of trafficking in children and women in terms of: criminal law, administration, marriage, child adoption involving foreigners, tourism and labor export, exit-entry management, prosecution, and community reintegration of victims.

Ministry of Justice will be the key agency in this component with the involvement of Ministry of Foreign Affairs, Ministry of Public Security, Ministry of Defense (Border Guard Command) and other Ministries and departments.

Part III

IMPLEMENTATION ARRANGEMENT

I. Management

- The contents of the NPA relate to different areas under the management of various Ministries and agencies. Therefore, the NPA needs to be synchronously implemented under close cooperation among Ministries, agencies and mass organizations.
- It is imperative to set up a National Steering Committee for the National Plan of Action against crimes of trafficking in children and women chaired by a Deputy Prime Minister. Vice Chairperson is an official from MoPS. Its members are from other relevant ministries, agencies such as Ministry of Foreign Affairs, Ministry of Justice, Ministry of Labour, Invalids and Social Affairs, Vietnam Central Women' Union, Committee for Population, Family and Children, Ministry of Planning and Investment and Ministry of Finance.
- Provincial Steering Committees will be established with the similar memberships.

II. Assignment of Responsibilities

1. Ministry of Public Security:

- Act as standing agency of the National Steering Committee, responsible for assisting the Government in coordinating and implementing the NPA; Appoint a full-time taskforce in-charge-of prevention and combating of trafficking in children and women; Provide guidance and instruction to provincial Police Departments to implement the NPA.

- Act as a focal point in cooperation with other relevant ministries, agencies and People's Committees of provinces and cities, to monitor the situation and collect the statistics of the women and children trafficked or illegally transported to other countries.

- Identify the targeted areas; Instruct the police forces at all levels to strongly apply professional practices in order to disclose, prevent and quash trafficking networks.

Manage temporary and permanent residence at commune, ward and town levels; Mobilize people, in cooperation with the Vietnam Fatherland Front and mass organizations, to participate in the prevention, disclosure and fighting against crimes, and in maintaining social security.

- Together with relevant departments and local People's Committees, examine and handle illegal matching service establishments, child adoption involving foreigners, and tourism and labor export services violating the laws in sending people abroad.

- Strengthen organizational structure and specialized staffs from the central to local levels to timely detect, quickly investigate and strictly handle the organizations and individuals breaking the laws on prevention and combating of trafficking in children and women and illegal sending of women and children abroad.

- Be a focal point in international co-operation in prevention and combating of trafficking in children and women; Coordinate with Interpol and the Police of

neighboring countries, especially China, Cambodia to detect, prevent, and combat cross-border trafficking in children and women.

- Regularly update the situation and prepare annual report to the Prime Minister with recommendations for difficulties and constraints.

2. Ministry of Defense (Border Guard Command)

- Strengthen control measures at border gates in order to prevent illegal sending of women and children abroad.

- Act as a lead agency and co-operate with relevant Ministries and Departments to receive and support the returned women and children victims who are trafficked outside the country boundary.

- Collaborate with the national and international Police such as China, Cambodia,... to detect and prevent the illegal cross – border transportation of women and children.

- Coordinate with relevant agencies in propagating and mobilizing people in border areas to involve in combating trafficking in children and women.

3. Ministry of Foreign Affairs

- Act as leading agency and coordinate with the Ministry of Public Security in political issues and external relations; Cooperate with foreign countries to prevent and combat of trafficking in children and women to abroad; Update the situation and number of trafficked children and women who are living abroad; Establish appropriate policies to work with international organizations and countries involved in elimination of illegal sending of Vietnamese women and children abroad.

- Co-operate with mass organizations and people to mobilize and take advantage of the assistance from international NGOs in handling this issue.

4. Ministry of Labor, Invalids and Social Affairs

- Act as a lead agency and co-operate with the Ministry of Public Security, Border Guard Command, the Ministry of Public Health, Committee for Population, Family and Children, Vietnam Central Women' Union, People's Committees at various levels to organize vocational training, job placement, community re-integration for the cross-border trafficked women and children who returned home and send whom suffering from social diseases to health treatment centers.
- Conduct research and update the list of jobs and vocations in which the use of woman and child labor is prohibited with the aim to prevent them from being abused.

5. Ministry of Justice

- Act as a lead agency and co-operate with other Ministries and Departments to develop and strengthen the legal system on prevention, combating and handling of crimes relating to woman and child trafficking; Organize legal dissemination and education on prevention and combating of trafficking in children and women.

6. Ministry of Planning and Investment

- Coordinate with the Ministry of Finance to allocate budget to anti-trafficking programme and include it in the annual plan to be submitted to the Prime Minister for consideration and approval.

7. Ministry of Finance

- On annual basis, provide guidance to prepare cost estimate for the NPA until 2010 in accordance with the State Budget Law; Examine the management and utilization of budget; Take the lead role in review of appropriate measures and propose them to the relevant authorities in order to mobilize funding from national and international sources.

8. Vietnam Central Women' Union

- Act as a lead agency and co-operate with relevant Ministries, departments, agencies mass organizations and local authorities to organize dissemination, education and counseling activities at the community on prevention and combating of women and child trafficking.

- Coordinate with the Ministry of Labour, Invalids and Social Affairs to provide support and assistance to returned victims for re-integration into the community.

9. Committee for Population, Family and Children

- Act as a lead agency and co-operate with relevant Ministries, departments and agencies to prevent child trafficking and commercial sexual exploitation.

10. Ministries, Ministerial – level agencies and Government agencies

- Work out plans to direct the implementation of measures to combat and prevent woman and child trafficking within their responsibilities and authority.

11. People's Committees of provinces and cities

- Be responsible to implement the NPA and its components, especially the Component 1, 2 and 3; Develop specific plans suitable to the local situation; Select locations for pilot implementation to draw lessons learnt; Clearly define the responsibilities of the Chairmen of district and commune People's Committee in the implementation of the NPA.

12. Supreme People's Court, Supreme People's Court of Investigation

- Strengthen instructions to branch agencies at local levels; Closely co-operate with other law enforcement agencies in investigating, prosecuting and handling crimes of trafficking in children and woman in a timely and strict manner.

11. Vietnam Fatherland Front, Vietnam General Confederation of Labour, Vietnam Veterans' Union, Vietnam Farmers' Union, Vietnam Central Women's Union, Central Youth Union

- Closely co-operate with Ministries, departments, and authorities of different levels to advocate and mobilize local people to actively involve in prevention and combating of woman and child trafficking.

III. Funding for implementation of the NPA

Funding is mobilized from various sources:

1. State budget: Every year, the Government reserves an amount of funds to implement the NPA, objectively support key tasks and components.

2. Local budget: On annual basis, the locality should actively develop plans and allocate funding for prevention and combating of woman and child trafficking, and integrate it into other programs and projects in the area.

3. Other sources inside and outside the country (contributions of community and international sponsors...)

The funding from the state budget allocated annually according to the State Budget Law is to be planned and submitted by the Steering Committee to the Government for approval.

The Ministries, Departments, People's Committees of provinces and cities are responsible to implement, regularly monitor and follow-up the NPA, develop periodic and yearly plans to appropriately and effectively implement the NPA and projects.

Penal Code 1999

(Law No 37/2009/QH 12, approved by the Vietnamese National Assembly 12th Legislature, 5th session on 19 June 2009, entered into force 1 January 2010, amended by the Amendment 2009 (No. 37/2009/QH12))

(Extract)

[Ministry of Justice of Vietnam, official trans]

Article 119.

Trafficking in women

1. Those who traffic in women shall be sentenced to between two and seven years of imprisonment.

2. Committing the crime in one of the following circumstances, the offenders shall be sentenced to between five and twenty years of imprisonment:

- a) Trading in women for the purpose of prostitution;
- b) In an organized manner;
- c) Being of professional characters;
- d) For the purpose of sending them overseas;
- e) Trafficking in more than one person;
- f) Trafficking more than once.

3. The offenders may also be subject to a fine of between five million and fifty million dong, to probation or residence ban for one to five years.

Article 120.

Trading in, fraudulently exchanging or appropriating children

1. Those who trade in, fraudulently exchange or appropriate children in any form shall be sentenced to between three and ten years of imprisonment.

2. Committing such crimes in one of the following circumstances, the offenders shall be sentenced to between ten and twenty years of imprisonment or life imprisonment:

a) In an organized manner;

b) Being of professional character;

c) For despicable motivation;

d) Trading in, fraudulently exchanging or appropriating more than one child;

e) For the purpose of sending them abroad;

f) For use for inhumane purposes;

g) For use for prostitution purposes;

h) Dangerous recidivism;

i) Causing serious consequences.

3. The offenders may also be subject to a fine of between five million and fifty million dong, a ban from holding certain posts, practicing certain occupations or doing certain jobs for one to five years or subject to probation for one to five years.

LAW ON PREVENTION, SUPPRESSION AGAINST HUMAN TRAFFICKING

(Law No 66/2011/QH12, passed by Vietnamese National Assembly 12th Legislature, 9th session on 29 March 2011 and entered into force 1 January 2012)

[United Nations Inter-Agency Project on Human Trafficking (unofficial) translation]

Pursuant to the 1992 Constitution of the Socialist Republic of Vietnam, a number of articles of which have been amended and supplement in accordance with Resolution No. 51/2001/QH10;

The National Assembly enacted the Law on Prevention, Suppression against Human Trafficking.

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of Application

This Law shall stipulate 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.

Article 2. Use of Terms

In this Law, the following terms are understood as follows

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 dependent situation, are forced to serve other persons for the latter's sexual demands.
3. *Forced labor* 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, Article 3 of this Law.

Article 3. Prohibited Acts

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, forced labor, the removal of organs, or for other inhuman purposes.
3. The recruitment, transportation, harbouring of persons for sexual exploitation, forced labor, 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.
4. Coercion of persons to commit any of the acts stipulated in paragraphs 1, 2 and 3 of this Article.
5. Conducting brokerage to help other persons commit any of the acts stipulated in paragraphs 1, 2 and 3 of this Article.
6. Revenge or the threat of revenge of victims, witnesses, denunciators, their relatives or persons who deter the acts stipulated in this Article.
7. Misuse of the prevention, suppression against human trafficking for illegally obtaining profits or committing illegal acts.

8. Obstruction against denunciation, notification and handling of the acts stipulated in this Article.

9. Differentiation or discrimination against victims.

10. Disclosure of the information of victims without their consent, or their lawful representatives.

11. Assuming false position as victims.

12. Other acts of violation of the provisions in this Law.

Article 4. Principles of Prevention, Suppression against Human Trafficking

1. Measures to prevent, detect and handle the acts stipulated in Article 3 of this Law must be carried out consistently.

2. Rescue, protection, receipt, verification and assistance to victims must be conducted precisely and in due course. Victims' legitimate rights and interests must be respected, and discrimination or differentiation shall not be made against victims.

3. The role and responsibility of individuals, families, communities, agencies and organizations are brought into play in the prevention, suppression against human trafficking.

4. The acts stipulated in Article 3 of this Law must be deterred, detected, investigated and handled strictly, precisely and without delay.

5. International co-operation in the prevention, suppression against human trafficking must be strengthened in accordance with the Constitution and law of Vietnam, and international practices.

Article 5. The State's Policy of Prevention, Suppression against Human Trafficking

1. The prevention, suppression against human trafficking shall be included in the programs of prevention, suppression against crimes, social evils, and shall be combined with other socio-economic development programs.

2. Domestic and foreign agencies, organizations and/or individuals are encouraged to co-operate in or finance the prevention, suppression against human trafficking; domestic individuals and/or organizations are encouraged to establish victim supporting institutions in accordance with law.

3. Reward and commendation shall be given to individuals, agencies or organizations for their achievements in the prevention, suppression against human trafficking; [preferential treatment] regimes and policies must be secured in accordance with law for participants, who have suffered life, health or property damage, in the prevention, suppression against human trafficking.

4. Annually, the State shall allocate state budget to the prevention, suppression against human trafficking.

Article 6. Rights and Obligations of Victims

1. To request competent persons, agencies or organizations to apply measures to protect themselves and their relatives when they are infringed upon or threatened to be infringed upon in terms of life, health, honour, dignity and property.

2. To enjoy the supporting regimes and to be protected in accordance with this Law.

3. To be entitled to compensation in accordance with law.

4. To provide information relating to acts of violation of anti-human trafficking laws and regulations to competent agencies, organizations or persons.

5. To fulfil competent agencies' requests relating to human trafficking cases.

CHAPTER II

PREVENTION OF HUMAN TRAFFICKING

Article 7. Provision of Provision of Information, Dissemination and Education on the Prevention, Suppression against Human Trafficking

1. Provision of information, dissemination and education on the prevention, suppression against human trafficking aim at heightening the awareness and responsibility of individuals, families, agencies, organizations and communities in the prevention, suppression against human trafficking; heightening people's vigilance over and encouraging their active participation in the prevention, suppression against human trafficking.

2. Provision of information, dissemination and education on the prevention, suppression against human trafficking shall cover:

- a) Policies and laws of the prevention, a suppression against human trafficking;
- b) Tricks and harmful consequences of the acts stipulated in Article 3 of this Law;
- c) Behavioural skills in case of suspicion of human trafficking;
- d) Measures and experience of the prevention, suppression against human trafficking;
- e) Responsibility of individuals, families, agencies and organizations in the prevention, suppression against human trafficking;
- f) Fight against any differentiation or discrimination against victims;
- g) Others relating to the prevention, suppression against human trafficking.

3. Provision of information, dissemination and education on the prevention, suppression against human trafficking shall be carried out by means of

- a) Face-to-face talk or meeting;
- b) Provision of materials;
- c) Mass media;
- d) Activities in educational institutions;
- e) Literary, artistic and community-based activities, and other cultural forms;
- f) Others in conformity with law.

4. Development of networks on grassroots disseminators; active participation of social organizations.

5. Provision of information, dissemination and education on the prevention, suppression against human trafficking must be strengthened for women, young persons, teenagers, children, students, pupils and residents in border, rural or remote areas, or in areas of socio-economic difficulty, and in areas where a large number of human trafficking cases occur.

Article 8. Advice on the Prevention of Human Trafficking

1. Provision of legal knowledge of the prevention, suppression against human trafficking.
2. Provision of information of tricks of human trafficking, and guidance on skills to act in case there is suspicion about human trafficking.
3. Provision of information of the rights and obligations of victims, and guidance on methods to exercise the rights and obligations.

Article 9. Order and Safety Administration

1. Monitoring of family members and registered inhabitants through the residence administration, and strengthening of the examination on family member

registration, permanent residence, temporary stay, occupation or provisional absence in the areas.

2. Strict supervision of persons with criminal records on human trafficking and other persons having signs of commission of the acts stipulated in paragraphs 1, 2, 3, 4 and 5 Article 3 of this Law.

3. Effective management and use of archives, identity information and judicial record to serve the prevention, suppression against human trafficking.

4. Strengthening of patrol and control of border gates, border areas, islands and on the sea for the purpose of prompt detection and deterrence of the acts stipulated in paragraphs 1, 2, 3, 4 and 5, Article 3 of this Law.

5. Provision of advanced equipments at international border gates for the purposes of identifying persons and verifying quickly and accurately fake papers or documents; upgrading of control and checking equipment at border gates or checkpoints.

6. Management of the issuance of identity documents, papers valid for exit or entry; application of advanced technology in the production, issuance, management and control of identity documents and papers valid for exist or entry.

7. Co-operation with the functional agencies of countries sharing the same border lines in the border patrol and control for the purposes of preventing, detecting or deterring the acts stipulated in paragraphs 1, 2, 3, 4 and 5, Article 3 of this Law.

Article 10. Management of Business Activities and Services

Supportive activities for marriage between Vietnamese citizens and foreigners, offering or receipt of child for adoption, job placement, taking of Vietnamese persons abroad for labor or study, cultural or tourism services, and other conditional business activities or services that can be easily misused must be regularly and strictly managed and controlled for the purposes of prompt detection and

prevention of the abuse of such activities for the commission of the acts stipulated in paragraphs 1, 2, 3, 4 and 5, Article 3 of this Law.

Article 11. Combining the Prevention of Human Trafficking with Socio-Economic Developments Programs

The Government, ministries, agencies and local governments need to combine the prevention of human trafficking with programs of prevention, suppression against crimes, of prevention, suppression against social evils, of job placement, of vocational training, of poverty alleviation, of gender equality, of child protection, of advancement of women, and with other socio-economic development programs.

Article 12. Individuals Participating in the Prevention of Human Trafficking

1. Participating in the prevention of against human trafficking.
2. Notifying or denouncing without delay the acts stipulated in Article 3 of this Law.

Article 13. Families Participating in the Prevention of Human Trafficking

1. Providing information to family members of human trafficking tricks, and measures on prevention and suppression against human trafficking.
2. Co-operating with school, agencies, organizations and social mass organizations in the prevention, suppression against human trafficking.
3. Taking care of and assisting victims who are family members for their integration into communities and family life.
4. Encouraging victims who are family members to co-operate with competent agencies in the prevention, suppression against human trafficking.

Article 14. Schools and Educational or Training Institutions Participating in the Prevention of Human Trafficking

1. Strict management of study and other activities of pupils, students and trainees in accordance with prescribed regulations.
2. Carrying out extra-curricular dissemination and education on the prevention, suppression against human trafficking according to grades and disciplines.
3. Creating favourable conditions for pupils, students and trainees who are victims to have educational and vocational training, and to integrate into communities.
4. Co-operating with families, agencies and organizations to implement measures to prevent and suppress human trafficking.

Article 15. Prevention of Human Trafficking within Business and/or Service Organizations or Establishments

1. Organizations or establishments, which run business and/or provide services in fields of support for marriage between Vietnamese citizens and foreigners, offering or receipt of child for adoption, job placement, taking of Vietnamese persons abroad for labor or study, cultural or tourism services, and other conditional business activities or services that can be easily misused for the commission of the acts stipulated in paragraphs 1, 2, 3, 4 and 5, Article 3 of this Law, shall have the responsibility:

a) To sign labor contracts in writing with labourers; to register labouring with local labor administration agencies;

b) To have information of clients to be provided with services, and notify competent agencies at request for the purpose of management;

c) To undertake to comply with laws and regulations of prevention, suppression against human trafficking;

d) To co-operate with or create favourable conditions for competent agencies in the inspection and checking of the activities of such organizations or establishments.

2. Labourers working in the organizations or establishments stipulated in paragraph 1 of this Article must comply with laws and regulations of permanent residence registration management, and undertake in writing not to violate laws and regulations of prevention, suppression against human trafficking.

Article 16. Mass Media Agencies Taking Part in the Prevention of Human Trafficking

1. Promptly providing precise information of the policies and laws of prevention, suppression against human trafficking; truly showing the human trafficking situation and the prevention, suppression against human trafficking; introducing models of good practices of prevention, suppression against human trafficking, and effective patterns of prevention, suppression against human trafficking.

2. Keeping secret the information of victims.

3. Combining the prevention, suppression against human trafficking with other news and propaganda programs.

Article 17. Vietnam Fatherland Front Committee and Its Member Organizations Taking Part in the Prevention of Human Trafficking

1. Conducting and co-operating with state competent agencies to disseminate and propagate the policies and laws of prevention, suppression against human trafficking; encouraging people to comply laws and regulations of prevention, suppression against human trafficking, and to actively participate in the detection, denunciation and deterrence of the acts stipulated in Article 3 of this Law.

2. Proposing to state competent agencies necessary measures to prevent, detect and handle the acts stipulated in Article 3 of this Law.

3. Providing advice and taking part in the provision of advice on prevention, suppression against human trafficking.
4. Participating in vocational training, employment and other supportive activities to help victims integrate into communities.
5. Monitoring the implementation of laws and regulations of prevention, suppression against human trafficking.

Article 18. Vietnam Federation of Women Unions Taking Part in the Prevention of Human Trafficking

1. Disseminating, educating and encouraging women and children to heighten their awareness of compliance with laws and regulations of prevention, suppression against human trafficking.
2. Taking part in the establishment of networks of grassroots disseminators of prevention, suppression against human trafficking.
3. Performing the responsibilities stipulated in Article 17 of this Law.

CHAPTER III

DETECTION, HANDLING OF ACTS OF VIOLATION OF LAWS AND REGULATIONS OF PREVENTION, SUPPRESSION AGAINST HUMAN TRAFFICKING

Article 19. Denunciation and Notification of Violation Acts

1. Individuals shall have the responsibility to denunciate the acts stipulated in Article 3 of this Law to Public Security Agencies, commune-level People's Committees, or any agencies or organizations.
2. In detecting, or receiving any denunciation or notification of, the acts stipulated in Article 3 of this Law, agencies or organizations shall have the duty to handle such according to their competence or to notify without delay competent agencies of such in accordance with law.

Article 20. Detection of Violation Acts through Inspection or Examination

1. Agencies or organizations shall have the responsibility to regularly examine the performance of their functions and duties by themselves; if any acts stipulated in Article 3 of this Law are detected, they must handle such acts according to their competence or propose the handling of such acts in accordance with law.

2. Competent agencies or organizations shall, through their inspection or examination, actively detect and/or handle the acts stipulated in Article 3 of this Law according to their competence or propose the handling of such acts in accordance with law.

Article 21. Detection, Prevention of Violation Acts through the Prevention, Suppression against Crimes

Agencies, units or individuals under People's Public Security Force or People's Army that are assigned with duties of prevention, suppression against human trafficking shall have the competence and responsibility:

1. To act as focal points or co-operate with relevant agencies in detecting, preventing and handling the acts stipulated in paragraphs 1, 2, 3, 4 and 5, Article 3 of this Law in the areas they are in charge of;

2. To apply prescribed reconnaissance measures to detect or deter the acts stipulated in paragraphs 1, 2, 3, 4 and 5, Article 3 of this Law;

3. To request individuals, agencies or organizations to provide related information or documents for the detection, investigation and handling of the acts stipulated in paragraphs 1, 2, 3, 4 and 5, Article 3 of this Law;

4. To apply necessary measures to protect victims, denunciators, witnesses and their relatives in case their life, health, honour, dignity and property are infringed upon, or are threatened to be infringed upon.

Article 22. Dealing with Notification or Denunciation of Violation Acts

1. Dealing with notification or denunciation of human trading crimes shall be conducted in accordance with provisions in the Criminal Procedure Code.
2. Denunciation of violation acts of laws and regulations of prevention, suppression against human trafficking shall be dealt with in accordance with law on denunciation.

Article 23. Handling of Violation

1. Any person who commits the acts stipulated in Article 3 of this Law shall, depending on the nature and extent of the violation, be disciplined or prosecuted for criminal liability; if damage occurs, he/she shall be held liable for compensation in accordance with law.
2. Any person who abuses his/her power or position to shield, ignore, wrongly handle, or not to handle the acts stipulated in Article 3 of this Law shall, depending on the nature and extent of the violation, be disciplined or prosecuted for criminal liability; if damage occurs, he/she shall be held liable for compensation in accordance with law.
3. Any person who assumes false position as a victim shall, in addition to being handled in accordance with law, be obliged to reimburse the sum that he/she has received as financial aid.

CHAPTER IV

RECEIPT, VERIFICATION AND PROTECTION OF VICTIMS

Section 1 RECEIPT, VERIFICATION OF VICTIMS

Article 24. Receipt, Verification of Domestically Trafficked Victims

1. Victims or their lawful representatives may come to commune-level People's Committees, or agencies or organizations at the nearest to declare their trafficking cases. Agencies or organizations that receive the declaration shall have the responsibility to transfer the victims to commune-level People's Committees in the

areas where the head offices of the agencies or organizations are located. The commune-level People's Committees shall notify such to Divisions on Labor, War Invalids and Social Affairs. In case of necessity, the commune-level People's Committees that have received the victims shall meet the essential needs of victims.

2. Within a 3-day time limit as of when they receive the notification from the commune-level People's Committees, the Divisions on Labor, War Invalids and Social Affairs shall receive and support victims, and co-operate with Public Security Agencies at corresponding level in identifying preliminary information of the victims in case the victims haven't possessed one of the papers or documents stipulated in Article 28 of this Law.

3. After receiving the victims, the Divisions on Labor, War Invalids and Social Affairs shall, on basis of the papers or documents stipulated in Article 28 of this Law, or the identifying results of preliminary information of the victims, provide travelling expenses to the victims in case they return their place of residence by themselves; inform their relatives so that the relatives come to receive the victims, or designate persons to take the victims to the areas where the victims' relatives reside in case the victims are children; do procedures to transfer the victims to social welfare institutions or victim supporting institutions in case the victims are in need of health or psychological care, and express their will to remain in social welfare institutions or victim supporting institutions. In case, the victims haven't possessed any papers or documents that prove them victims, the Divisions on Labor, War Invalids and Social Affairs shall request Public Security Agencies at corresponding level to conduct verification.

4. Within a 20-day time limit as of the date of receipt of the requests made by the Divisions on Labor, War Invalids and Social Affairs, the Public Security Agencies at corresponding level shall have the responsibility to verify and respond in writing to the Divisions. For cases of complex nature, the time limit may be extended but not exceeding 2 months.

Article 25. Receipt, Verification of Rescued Victims

1. Public Security Agencies, Border Military or Marine Police that have rescued victims shall, in case of necessity, have the responsibility to meet the essential needs of victims, and transfer them to Divisions on Labor, War Invalids and Social Affairs near the areas where the victims have been rescued.

2. After receiving the victims, the Divisions on Labor, War Invalids and Social Affairs shall implement the provisions stipulated in paragraph 3, Article 24 of this Law. In case the victims haven't been confirmed as victims by the rescuing agencies, the Divisions on Labor, War Invalids and Social Affairs shall co-operate with the Public Security Agencies at corresponding level to identify the preliminary information of the victims prior to the provision of travelling expenses to the victims or the transfer of the victims to social welfare institutions or victim supporting institutions.

Article 26. Receipt, Verification of Victims Who Return from Abroad

1. Receipt and/or verification of victims who return from abroad through diplomatic representative missions, consulates or other agencies authorized to conduct consulate functions of Vietnam in foreign countries (hereinafter referred to as "Foreign-based Vietnamese Representative Missions") shall be conducted as follows:

a) Foreign-based Vietnamese Representative Missions shall receive and deal with the information and/or documents on the victims, and co-operate with the Ministry of Public Security in verifying the identity record of the victims, issuing necessary documents and doing procedures to take them back the country; b) The competent agencies of the Ministry of Public Security or the Ministry of National Defense shall receive the victims, and shall provide fares and food expenses during their travelling and guide them to apply for the supportive regimes stipulated in Articles 34, 35, 36, 37 and 38 of this Law if the victims express their will to return their place of residence by themselves. If they do not have any place of residence or they express their will to remain in social welfare institutions or victim supporting institutions, [the competent agencies] shall transfer them to such institutions. [If] the victims are

children, [the competent agencies] shall inform their relatives so that the relatives come to receive the victims, or designate persons to take the victims to the areas where the victims' relatives reside; [if] the victims are helpless children, [the competent agencies] shall do procedures to transfer them to social welfare institutions or victim supporting institutions.

2. The receipt of abroad-trafficked victims who meet the requirements to return Vietnam under bilateral agreements shall be conducted in accordance with such bilateral agreements.

3. The receipt and/or verification of abroad-trafficked victims who return the country by themselves shall be conducted in accordance with provisions in Article 24 of this Law.

Article 27. Grounds for Identifying as Victims

1. A person may be identified as a victim if one of the following grounds is found:

a) Such person is a person who is trafficked, transferred or received as stipulated in paragraphs 1 and 2, Article 3 of this Law;

b) Such person is a person who is recruited, transported or harboured as stipulated in paragraph 3, Article 3 of this Law.

2. The Government shall specify paragraph 1 of this Article.

Article 28. Papers, Documents Proving as Victims

1. Written confirmation made by district-level People's Security Agencies in accordance with paragraph 4, Article 24 of this Law.

2. Written confirmation made by rescuing agencies in accordance with Article 25 of this Law.

3. Written confirmation made by investigating agencies, agencies designated to perform a certain number of investigative activities, People's Procuracies or People's Courts.

4. Paper or document proving as victims that are issued by foreign agencies and legalized by Foreign-based Vietnamese Representative Missions or by the Ministry of Foreign Affairs.

Section 2

PROTECTION OF VICTIMS

Article 29. Rescue, Protection

Where there is ground to believe that a person is trafficked, the agencies, units or individuals stipulated in Article 21 of this Law shall have the responsibility to apply necessary measures to rescue [the person]; in case the person is likely to have his/her life, health, honour, dignity and property infringed upon, protective measures shall be applied.

Article 30. Protection of the Safety of Victims, the Relatives of Victims

1. Measures to protect the safety of victims and their relatives shall include:

a) Provision of temporary shelter in case the life or health of victims or their relatives is likely to be threatened;

b) Keeping secret the places of residence, work or study of victims and their relatives;

c) Measures to prevent acts of infringement upon or threatening to infringe upon the life, health, honour, dignity or property of victims or their relatives in accordance with law;

d) Other protective measures as stipulated by criminal procedure law.

2. The Government shall specify the protection of the safety of victims, their relatives.

Article 31. Protection of the Personal Information Secret of Victims

1. Agencies, organizations or individuals shall have the responsibility to keep secret the information of victims, unless otherwise as provided for by law.

2. At the request of victims or their lawful representative, courts shall consider and/or decide the commencement of closed court sessions on human trafficking cases.

CHAPTER V

SUPPORT FOR VICTIMS

Article 32. Eligible Persons and Supportive Regimes

1. Victims who are Vietnamese citizens or stateless persons permanently residing in Vietnam shall, depending on the circumstances stipulated in Articles 33, 34, 35, 36, 37 and 38 of this Law, be entitled to the following supportive regimes:

- a) Support for essential needs and travelling expenses;
- b) Medical support;
- c) Psychological support;
- d) Legal aid;
- e) Support for educational training, vocational training;
- f) Short-term allowances for overcoming difficulty, and loaning.

2. Victims as foreigners who are trafficked in Vietnam shall, depending on the circumstances stipulated in Articles 33, 34, 35 and 36 of this Law, be entitled to the supportive regimes stipulated in subparagraphs a, b, c and d, paragraph 1 of this Article.

3. Minors who accompany victims shall, depending on the circumstances stipulated in Articles 33, 34 and 35 of this Law, be entitled to the supportive regimes stipulated in subparagraphs a, b and c, paragraph 1 of this Article.

4. The Government shall specify the supportive regimes, the procedures for implementation of the supportive regimes for victims.

Article 33. Support for Essential Needs and Travelling Expenses

In case of necessity, victims shall be provided with temporary housing, clothing, food and other necessary personal tools on basis of actual conditions, and according to their sex, age, health characteristics. If victims are willing to return their places of residence but are unable to pay their fares and foods during their traveling, they shall be provided with such expenses.

Article 34. Medical Support

During victims' stay in social welfare institutions or victim supporting institutions, provision of health care and/or medical treatment expenses to victims shall be taken into consideration if they are in need of health care for health recovery.

Article 35. Psychological Support

Psychological support shall be provided to victims to help them have their psychology stabilized during their stay in social welfare institutions or victim supporting institutions.

Article 36. Legal Aid

1. Victims shall be provided with legal counselling for the purpose of prevention of re-trafficking, and with legal aid to apply for permanent residence registration, civil status registration, entitlement to supportive regimes, to claim compensation, and to participate in litigation and other legal procedures in connection with the human trafficking cases.

2. The procedures for legal aid shall be implemented in accordance with legal aid law.

Article 37. Support of Educational Training and Vocational Training

1. Victims who are minors in poor household families shall be provided with tuition fees, and expenses for purchase of textbooks and school items for their first school year if they continue their schooling.

2. Provision of vocational training to victims shall be taken into consideration when they return their areas if they are poor household family members.

Article 38. Short-Term Allowance for Overcoming Difficulty and Loaning

1. Victims on return to their areas shall be once provided with short-term allowance for overcoming difficulty if they are poor household family members.

2. Loans to victims shall be taken into consideration in accordance with law if victims are in need of capital for production or business.

Article 39. Agencies, Organizations Providing Support for Victims

1. Commune-level People's Committees that have received victims, or Public Security Agencies, Border Military or Marine Police that have rescued victims shall provide support to the victims to meet their essential needs.

2. Divisions on Labor, War Invalids and Social Affairs shall provide travelling expenses to victims in case they return their places of residence by themselves.

3. Social welfare institutions, victim supporting institutions shall provide support to meet the essential needs of victims, and provide psychological support and medical support to victims.

4. State-run legal aid centers and other organizations that provide legal aid services shall provide legal aid to victims.

5. Departments for Labor, War Invalids and Social Affairs shall provide short-term allowance for overcoming difficulty to victims; co-operate with Health Departments and Departments for Education and Training in providing health, educational training and vocational training supports to victims.

Article 40. Social Welfare Institutions, Victim Supporting Institutions

1. Public-run social welfare institutions shall perform the following duties to support victims:

a) Receiving and providing shelter for victims;

b) Providing support for essential needs, health care and psychological support to the victims according to their sex, age and will, and on basis of the institutions' availability;

c) Providing education on living skills and vocational guidance to victims;

d) Evaluating victims' possibility of integration into communities, and providing information of supportive policies, regimes and services for victims in communities;

e) Providing necessary information to functional agencies for the prevention, suppression against the acts stipulated in Article 3 of this Law;

f) Co-operating with relevant agencies to take victims to their places of residence;

g) Co-operating with Public Security Agencies to verify victims.

2. Victim supporting institutions are institutions established by Vietnamese individuals or organizations in conformity with their establishment permits to take part in the performance of the duties stipulated in paragraph 1 of this Article; their establishment and operation shall not be borne by state budget. The Government shall specify the conditions and procedures for the establishment of victim supporting institutions.

CHAPTER VI

RESPONSIBILITIES OF THE GOVERNMENT, MINISTRIES, AGENCIES AND LOCAL GOVERNMENTS IN THE PREVENTION, SUPPRESSION AGAINST HUMAN TRAFFICKING

Article 41. State Management Responsibility for the Prevention, Suppression against Human Trafficking

1. The Government conducts the uniform state management of the prevention, suppression against human trafficking.
2. The Ministry of Public Security shall have the responsibility to assist the Government in performing the state management of the prevention, suppression against human trafficking, and in performing the duties and powers as stipulated in Article 42 of this Law.
3. The Ministry of National Defence, the Ministry of Labor, War Invalids and Social Affairs, the Ministry of Health, the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Culture, Sports and Tourism, the Ministry of Education and Training, the Ministry of Information and Communications and other ministries and ministerial-level agencies shall, within their respective [prescribed] duties and powers, co-operate with the Ministry of Public Security in the performance of the state management of the prevention, suppression against human trafficking, and in the performance of the duties and powers as stipulated in Articles 43, 44, 45, 46, 47, 48, 49 and 50 of this Law and related laws.
4. People's Committees at all levels shall, within their respective [prescribed] duties and powers, have the responsibility to perform the state management of the prevention, suppression against human trafficking in their areas, and to perform the duties and powers as stipulated in Article 52 of this Law.

Article 42. Responsibility of the Ministry of Public Security

1. In performing the state management of the prevention, suppression against human trafficking, the Ministry of Public Security shall be responsible for:

a) Proposing to the Government the development and improvement of laws and regulations of prevention, suppression against human trafficking; concluding or acceding to international legal instruments relating to the prevention, suppression against human trafficking;

b) Drafting and submitting to competent agencies to promulgate, or promulgating according to its competence normative legal documents, programs and/or plans on prevention, suppression against human trafficking;

c) Acting as the focal point, or co-operating with relevant ministries, agencies and People's Committees of provinces or centrally-run cities in organizing the implementation of normative legal documents, programs and/or plans on prevention, suppression against human trafficking;

d) Acting as the focal point and co-operating with relevant agencies and organizations in the issuance and implementation of regulations of training and re-training for officials working in the field of prevention, suppression against human trafficking;

e) Acting as the focal point and co-operating with relevant agencies and organizations in making statistical reports of the prevention, suppression against human trafficking; in making of summing-ups of experience and practices, and multiplying patterns on prevention, suppression against human trafficking;

f) Inspecting and checking the implementation of laws and regulations of prevention, suppression against human trafficking;

g) Effecting international co-operation of prevention, suppression against human trafficking.

2. In the prevention, suppression against human trafficking, the Ministry of Public Security shall be responsible for:

a) Arranging forces for the performance of duties of prevention, suppression against human trafficking;

b) Managing social order and safety to prevent human trafficking;

c) Instructing Public Security Agencies to perform duties of receiving, verifying, supporting victims in accordance with provisions in Articles 24, 25 and 26 of this Law;

d) Launching movements with public participation in the prevention, detection and suppression against crimes, and in the maintenance on social order and safety.

Article 43. Responsibility of the Ministry of National Defence

1. Acting as the focal point and co-operating with relevant ministries and agencies in disseminating and encouraging people in border areas and islands to take part in the prevention, suppression against human trafficking.

2. Instructing Border Military, Marine Police to perform duties of prevention, suppression against human trafficking in border areas and on the sea in accordance with law, [and] to receive, support victims in accordance with provisions in Articles 25 and 26 of this Law.

3. Managing security and safety in border areas, islands and on the sea for the purpose of preventing human trafficking.

4. Effecting international co-operation of prevention, suppression against human trafficking according to its competence.

Article 44. Responsibility of the Ministry of Labor, War Invalids and Social Affairs

1. Drafting and submitting to competent agencies for issuance of supportive policies for victims; providing guidance on the implementation of supportive measures for victims according to the competence.
2. Managing, guiding, checking and inspecting the support for victims.
3. Instructing the combination of the prevention, suppression against human trafficking with programs of poverty alleviation, vocational training, job placement, prevention and suppression against social evils, gender equality and child protection.
4. Providing guidelines to social welfare institutions, victim supporting institutions in providing support to victims.
5. Co-operating with the Ministry of Health, the Ministry of Education and Training in instructing the provision of health, educational and vocational training supports.
6. Managing, guiding, checking and inspecting the job placement, the taking of Vietnamese persons abroad for labouring, and the recruitment of foreigners for working in Vietnam for the purposes of preventing and combating the misuse of such activities for human trafficking.
6. Effecting international co-operation of prevention, suppression against human trafficking according to the competence.

Article 45. Responsibility of the Ministry of Health

Instructing, guiding health institutions to co-operate with social welfare institutions and victim supporting institutions in the provision of health support to victims.

Article 46. Responsibility of the Ministry of Foreign Affairs

1. Providing instructions and guidelines to foreign-based Vietnamese representative missions in the protection of Vietnamese citizens who are abroad-trafficked victims; co-operating with Vietnamese competent agencies and foreign competent agencies

in verifying victims and doing procedures to take victim as Vietnamese citizens back the country.

2. Co-operating with the Ministry of Public Security and other agencies competent to effect international co-operation of prevention, suppression against human trafficking.

Article 47. Responsibility of the Ministry of Justice

1. Co-operating with the Ministry of Public Security and relevant agencies in the drafting of, improvement of, and monitoring the implementation of laws and regulations of prevention, suppression against human trafficking.

2. Organizing, guiding the legal dissemination and education on prevention, suppression against human trafficking.

3. Managing, guiding, checking and inspecting supportive activities for marriage, the offering and receipt of children for adoption for the purposes of preventing and combating the misuse of such activities for human trafficking.

4. Guiding state-run legal aid centers, and organizations that provide legal aid to provide legal aid to trafficked victims in accordance with law.

5. Co-operating with the Ministry of Public Security and relevant agencies in effecting international co-operation of prevention, suppression against human trafficking.

Article 48. Responsibility of the Ministry of Culture, Sports and Tourism

1. Instructing the combination of the prevention, suppression against human trafficking with cultural, tourism and family programs.

2. Managing, guiding, checking and inspecting international and domestic tourism activities, and the activities of establishments for tourist stay and of tourist service providers for the purposes of preventing and combating the misuse of such activities for human trafficking.

3. Organizing and guiding the dissemination on prevention, suppression against human trafficking in local areas, and in the business activities of establishments for tourist stay and tourist service providers.

Article 49. Responsibility of the Ministry of Education and Training

1. Instructing the combination of knowledge of prevention, suppression against human trafficking with extra-curricular programs to the extent of being suitable to the requirements of different grades and disciplines; the dissemination and education on prevention, suppression against human trafficking for pupils, students and trainees.

2. Instructing schools and educational institutions under the national educational system to perform the duties stipulated in Article 14 of this Law.

3. Managing, guiding, checking and inspecting the taking of persons abroad for study for the purposes of preventing and combating the misuse of such activity for human trafficking.

Article 50. Responsibility of the Ministry of Information and Communications

1. Instructing mass media organizations to perform the duties stipulated in Article 16 of this Law.

2. Strictly managing, and regularly checking and inspecting postal, telephone, telex and internet services for the purposes of preventing and combating the misuse of such services for human trafficking.

Article 51. Responsibility of People's Procuracies and People's Courts

1. People's Procuracies and People's Courts shall, within their respective functions, duties and powers, handle strictly and without delay acts of violation of laws and regulations of prevention, suppression against human trafficking; have the responsibility to co-operate with relevant agencies and organizations in the prevention, suppression against human trafficking.

2. The Supreme People's Procuracy shall make statistics on human trafficking crimes.

Article 52. Responsibility of People's Committees at All Levels

1. Within their functions, duties and powers, People's Committees at all levels shall have the responsibility:

a) To combine the prevention, suppression against human trafficking with socio-economic development programs;

b) To organize the implementation of the prevention, suppression against human trafficking;

c) To allocate budget for the prevention, suppression against human trafficking;

d) To handle strictly and without delay acts of violation of laws and regulations of prevention, suppression against human trafficking;

e) To conduct the management of safety and social order for the purposes of prevention and suppression against human trafficking.

2. In addition to the implementation of the provisions in paragraph 1 of this Article, commune-level People's Committees shall have the responsibility:

a) To act as focal points and co-operate with Vietnam Fatherland Front Committees at corresponding level and their member organizations to facilitate the provision of advice on the prevention, suppression against human trafficking at grassroots level.

b) To receive victims and to support victims in accordance with provisions in paragraph 1, Articles 24 of this Law;

c) To create favourable conditions for victims to integrate into communities.

CHAPTER VII

INTERNATIONAL CO-OPERATION IN THE PREVENTION, SUPPRESSION AGAINST HUMAN TRAFFICKING

Article 53. International Co-operation Principles

The State of Vietnam shall implement its international co-operation policies in the prevention, suppression against human trafficking on basis of equality, voluntariness, respect for independence, sovereignty.

Article 54. Effecting International Co-operation

1. On basis of provisions in this Law and the relevant international treaties of which Vietnam is a member, Vietnamese competent authorities shall effect co-operation programs with relevant agencies of other countries, international organizations, foreign individuals and organizations in strengthening legal capacity, information provision, technology and training of prevention, suppression against human trafficking.

2. Co-operation between Vietnamese relevant agencies and relevant agencies of foreign countries in dealing with specific cases on human trafficking must be in accordance with provisions of the international treaties of which Vietnam and related countries are members. In case Vietnam and related countries haven't acceded to the same international treaties, Vietnamese functional competent agencies shall effect international co-operation on basis of reciprocity and in accordance with Vietnamese national law, and international law and practices.

Article 55. Co-operation of Rescue and Repatriation of Victims

1. The State of Vietnam shall create favourable conditions for Vietnamese functional agencies to co-operate with relevant agencies of other countries in the rescue and protection of trafficked victims.

2. The State of Vietnam shall create favourable conditions for the repatriation of victims who are foreigners to the countries where they hold the nationalities or their last places of residence are; apply appropriate measures for the repatriation of victims in accordance with the prescribed procedures and the agreements between Vietnam and foreign countries, and protect the life, health, honour and dignity of victims.

Article 56. Mutual Legal Assistance

Mutual legal assistance relationship between Vietnam and related countries shall be conducted in accordance with international legal instruments of which Vietnam and such countries are members, or on basis of reciprocity accordance with Vietnamese national law, and international law and practices. The State of Vietnam shall give priority to countries that sign bilateral legal instruments with Vietnam on mutual legal assistance in the prevention, suppression against human trafficking.

CHAPTER VII

IMPLEMENTATION PROVISIONS

Article 57. Implementation Effect

This Law shall come into force on 1st January 2012.

Article 58. Implementation Guidance

The Government shall specify the Articles and provisions in the Law that the Government is designated to do so; provide guidelines on other necessary contents of this Law to meet the state management requirements. This Law was passed by the National Assembly of the Socialist Republic of Vietnam, Legislature XII at its 9th session on.....March 2011.

PRESIDENT OF THE NATIONAL ASSEMBLY

Nguyen Phu Trong

REGULATIONS on
Receipt and Support to Community Reintegration of the Trafficked Women and
Children Returned Home from Overseas

*(Enacted together with Decision No. 17/2007/QĐ-TTg dated January 29th, 2007
of the Prime Minister)*

[Alliance Anti-Traffic (unofficial) translation]

Chapter I

GENERAL PROVISIONS

Article 1. Regulation scope

This Regulation prescribes the step order, procedures, regulation and policy, responsibilities and obligations of agencies, organisations in their receipt and support to the community reintegration of the trafficked women, children returned home from overseas.

Article 2. Subjects of application

1. The trafficked women, children returned (hereinafter called as victim) holding their Vietnamese nationality before their being trafficked with their residence in Vietnam.
2. Children, being the victims' children as stipulated at Section 1 of this Article, holding their Vietnamese nationality.

Article 3. Principles of receipt and support to community reintegration

1. The receipt of victims returned by the foreign party has to be verified by the Ministry of Police (or the Police of the bordering province authorized by the Ministry of Police).

The rescued and returned victims via the borders and not by the foreign party have to be verified by the provincial border guards.

2. The victims' legal right and benefits have to be respected and no discrimination towards victims has to be exercised.

3. The State encourages the domestic and foreign organisations and individuals to participate the support for the victims to stabilize their lives and reintegrate into their communities.

Article 4. Terminology

Victims as defined in this Regulation are women, children threatened by a person or a group of people resorting to 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) to take them abroad 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).

Chapter II

STEP ORDER, PROCEDURES TO RECEIVE VICTIMS

Article 5. Agency to receive information on victims

The diplomatic representation agency, the consulate or other agency assigned to perform their consulship of Vietnam abroad (hereinafter called as the overseas Vietnamese representation agency), the Police agency, the Border Guard have their responsibility to receive and coordinate with the concerned agencies to process information on victims provided by the foreign party.

Article 6. Processing information on victims

1. The Ministry of Police (or the bordering provincial Police authorized by the Ministry of Police) take responsibility to verify, respond to the written requests from

either the foreign party or the overseas Vietnamese representation agency with the information on victims staying overseas. The timing of verification, response do not exceed 45 days, since the date of receiving the request.

2. The provincial Border Guard take responsibility to verify the information on the rescued or self-returned via the border (non-returned by foreign party) victims. The timing of verification, response do not exceed 30 days, since the date the victim is rescued or discovered.

Article 7. Procedures of receipt

1. Within the duration of 2 days, since the date of receiving the verification results, the Ministry of Police (or Police of the provinces, central cities authorized by the Ministry of Police), the provincial Border guard have to notify the agencies specified in Article 5 of this Regulation to respond to the foreign party with the list of victims either agreed or refused (clearly mentioning the reason why not) to receive, to agree on the timing, location and organisation of receipt.

2. After receiving the returned victims, the responsible receiving agency has responsibility to make procedures to clarify their personal records, identity, reason of being trafficked; make the personal record for each victim for the management, statistics, follow-up.

3. The Ministry of Police (or the bordering provincial Police authorized by the Ministry of Police) issue the home return certificate to use on travel and to re-register their resident records with the local authorities.

Article 8. Certification of self-returned non-received victims

1. The People's Committees of communes, where the non-received victims return have responsibility to collect information, make records and prepare a document letter of transfer to the district Labour – Invalids and Social Welfare division for certification and send to request the Labour – Invalids and Social Welfare Department for certification of victim.

2. Within the period of 05 days, since the date of receiving the record and letter of request from the commune People's Committees, the Labour – Invalids and Social Welfare Department has responsibility to make a list of all victims and prepare a document letter to request the provincial Police agency for verification.

3. Within 15 days, since the date of receiving the letter of request from the Labour – Invalids and Social Welfare Department, the provincial Police agency has responsibility to provide the office response on verification result in writing for the Labour – Invalids and Social Welfare Department to consider, make decision of handling in line with its competence.

Article 9. Post-receipt support

Within the maximum of 03 days, since the date of receiving victims, the receiving agency has to handle the support to victims as follows:

1. To notify the victims' families and their local authorities (via the Labour – Invalids and Social Welfare Department) on their wish of home return and to provide them travel costs, food expenses for their self return.

2. The receiving units hand over the victims in need of pre-community reintegration health care, psychological care to their Labour – Invalids and Social Welfare Department to continue the care right at the victim community integration supporting units (hereinafter called as the victim supporting unit).

For the children victim alone, the victim supporting units have responsibility to notify their relatives to receive them or allocate someone to take them to their relatives' residence; to coordinate with the concerned agencies to transfer the orphans, supportless children to the social sponsoring unit for management, fostering.

Chapter III

ORGANISATION AND OPERATION OF UNITS IN CHARGE OF RECEIVING AND SUPPORTING VICTIMS

Article 10. Units in charge of receiving victims

1. The Police posts at the International airports, the Police of bordering districts selected by the provincial, city Police assigned by the Ministry of Police, the Border Guard posts organise the receiving units for victims returned home from overseas.
2. The Ministry of Police, the Ministry of National Defence consider, decide the establishment, dissolution and specific regulation on organisation, operation of the victim receiving units according to the specifications of this Regulation.

Article 11. Tasks of units in charge of receiving victims

1. To receive victims returned home from overseas
2. To coordinate with the concerned agencies, organisations: Labour – Invalids and Social Welfare, Health, the Committee for Population, Family and Children, the Women’s Union the receiving units, to provide first support on food, accommodation, health and counselling to victims; to transfer the victims to the Labour – Invalids and Social Welfare agency of the receiving place.

Article 12. Units in charge of supporting victims

1. The victim supporting unit is an entity established by the Chairman of the provincial People’s Committee, where the bordering entry belongs to. The Department of Labour – Invalids and Social Welfare assists the Chairman of the People’s Committee to consistently handle the state management on the victim supporting units.
2. The Chairman of the provincial People’s Committee considers, decides the establishment or utilisation of the social units, medical facilities under the local Labour – Invalids and Social Welfare sector in service to the victim support.

3. Up to the actual conditions, situation of the receiving and supporting victims to community reintegration, the Chairman of the provincial People's Committee regulates the scale, rule and personnel (or use the staff contingency of the social units, medical facilities) in service to this work.

Article 13. Tasks of units in charge of supporting victims

1. To organise the support on health, psychology, education to victims after receiving in line with their age, wishes and the carrying capacity of the units.
2. To educate victims the living skills, occupation orientation and job introduction.
3. To evaluate the victims' community integration ability, to provide information on policies, services in support to victims at the communities.
4. To support the concerned agencies to continue their verification of victims' records, addresses and taking them home with their families, communities.

Article 14. Victims' stay in Units in charge of receiving victims and Units in charge of supporting victims

1. The victims' period of stay at the receiving units does not exceed 15 days, since the date of receiving.
2. The victims' period of stay at the supporting units does not exceed 30 days; victims in need of health, education support, children in difficult family status can extend their stay longer but not over 60 days, since the date of receiving.

Chapter IV

REGULATIONS AND POLICY FOR VICTIMS

Section 1

ALLOWANCE REGULATION AT UNITS IN CHARGE OF RECEIVING VICTIMS AND FOR VICTIMS FINANCED BY OVERSEAS FUNDING SOURCE, OVERSEAS VICTIMS

Article 15. Management system

Victims staying at the receiving and support units have to be managed, to abide by their rules and the related legal regulations.

Article 16. Allowance regulation

1. After being received, victims are given once clothes, blanket, mosquito net, necessary personal supplies.
2. The victims' monthly food norm at the receiving and supporting units is applied as those of the social units managed by the Labour – Invalids and Social Welfare sector.
3. During the period of stay at the receiving units, victims' accommodations are arranged in line with their age, sex and health status.
4. When returning to their home residence, victims are supported to travel expenses, food while travelling, entitled to policies on support to community reintegration as regulated.

Article 17. Medical support regulation

1. Victims in need of medical treatment to recover their health are considered to support their medical check-up and medicament expenses.
2. The in-hospital expenses are covered by the Department of Labour – Invalids and Social Welfare from the state budget line to support victims as regulated on the partial payment of hospitalisation fee at the public health units.

Article 18. Regulation for dead victims during their stay at the units in charge of receiving and supporting victims

Within the period of stay, if the victim is dead, the victim receiving unit or victim supporting unit has to immediately notify the Investigation Police, the People's procuracy and the concerned residential agencies, close relatives (if any) to handle as legally regulated.

Article 19. Support to victims received according to the bilateral agreement and overseas victims

1. The returned victims with the financial support from the foreign party or international organisation are entitled to regulations specified in the agreements with the concerned foreign party or international organisation.
2. The victims' return organised by the overseas Vietnamese representative without foreign financial support will be considered to provide the return expenses and food, accommodation expenses within the waiting period to return home in addition to their entitlement of regulation for the post-received victims.

Section 2

POLICY TO SUPPORT COMMUNITY REINTEGRATION

Article 20. Psychological support

The functional agencies when performing their receiving and supporting victims should have measures to help victims with their psychological stabilization right at the time of receipt and long the whole process of community reintegration.

Article 21. Legal procedure support

The victims returned to their residence are considered to re-issue their records, identity cards. The victims' children accompanying their mothers with no birth certificate are entitled to make their birth procedure according to the current legal regulation.

Article 22. Education learning and vocational training support

1. Children victims continue their schools are financially supported for their textbooks and learning aids in their first school year.
2. The victims returned to their home areas are considered to participate in the vocational training. Vocational training is performed by the local system of Vocational Training Centres.

Article 23. Initial difficulty and loan support

1. The returned victims under the poor household or difficult family status are supported once with the initial difficulty allowance.
2. The victims in need of loan for production, business are considered, facilitated with loan from the Bank for Social Policy, the Poor Women support Fund as legally regulated.

Chapter V

EXECUTION PROVISIONS

Article 24. The Ministry of Labour – Invalids and Social Welfare

1. To preside over the community reintegration support to victims; to perform the first support to victims at the receiving units in coordination with the Ministry of Police, the Ministry of National Defence (the High Command of Border guard).
2. To study and enact the policy on support to victims; to instruct the establishment and organisation of operation of the victim support units, assistance regulation for vocational training, loan support; to guide the operation of supporting activities to victims transferred by the Ministry of Police, Border Guards; to instruct the Departments of Labour – Invalids and Social Welfare of the provinces, central cities to organise the performance of first support to victims at the receiving, supporting

units for victims' community reintegration, the verification of self-returned nonreceived victims.

3. To preside over, guide the organisation of operation the statistics, survey on the situation of returned victims, to evaluate the receipt, support to victims' community reintegration, to make reports to the Government on a periodical basis.

4. To perform the international cooperation in the area of support to victims; to develop projects to submit to the Government in case of foreign funding.

Article 25. The Ministry of Police

1. To preside over the receipt of victims returned by the bilateral agreements or via the diplomatic way; to directly receive at the airports, at the bordering ports in coordination with the Ministry of National Defence (the High Command of Border Guard).

2. To preside over and to guide the step order, verification procedures, receipt of victims in coordination with the Ministry of National Defence, the Ministry of Foreign Affairs, the Ministry of Labour – Invalids and Social Welfare.

3. To guide the Police of bordering provinces to arrange the receiving places and instruct the receipt of victims returned by the foreign party; to guide the control, check the number of returned victims to re-register their records, issuance of their personal identity cards.

4. To guide the statistics, definition of the number of self-returned victims in coordination with Ministry of Labour – Invalids and Social Welfare. To perform the legal regulations on protection, support to victims; the international cooperation in the area of receipt as per the assigned tasks.

Article 26. The Ministry of National Defence

1. To guide the High Command of Border Guard to preside over the receipt of the rescued victims, victims returned via the border and not returned by the foreign

party; to directly or in coordination with the Ministry of Police receive victims returned by the foreign party at the bordering entry points according to the bilateral agreements or via the diplomatic way.

2. To guide the provincial Border guard force the organisation of receiving units at the Border posts.

Article 27. The Ministry of Foreign Affairs

To guide the overseas Vietnamese representative agencies in coordination with the functional agencies at home and the concerned agencies abroad on the verification, receipt and protection of the overseas victims' legitimate rights and benefits, to employ the international cooperation in the receipt of victims.

Article 28. The Ministry of Justice

1. To guide the local legal department to operate the legal aid activities for victims; to instruct the birth registration procedures for the victims' children.

2. To study, develop and complete the legal system on victim protection, support in coordination with the concerned Ministries, sectors and organisations.

Article 29. The Ministry of Finance

1. To allocate fund to the Ministries, sectors, localities according to the current state budget allocation and in coordination with the concerned Ministries, sectors to control the utilization of fund to operate the receipt and support to community reintegration for victims.

2. To preside over, coordinate with the Ministry of Labour – Invalids and Social Welfare, the Ministry of Police, the Ministry of National Defence (the High Command of Border Guard), the Ministry of Foreign Affairs the specific regulation on different norms of victim support, expenses for verification, receipt activities and to guide the utilization of foreign funding sources.

Article 30. The Ministry of Planning and Investment

In coordination with the Ministry of Finance to allocate state budget in the annual budget plan, submit to the Prime Minister for consideration, approval. To develop the working mechanism in support to the localities having difficulty in their building and upgrading the social facilities to support the returned trafficked women, children.

Article 31. The Committee for Population, Family and Children

To guide the Committees for Population, Family and Children of the provinces, the central cities in coordination with the local concerned sectors to operate the receipt, support to community reintegration for children victims, children of the trafficked women returned home from overseas; to control, inspect the enforcement of child rights (victims and victims' children) after their community reintegration.

Article 32. The Ministry of Health

To instruct the Health Departments of the provinces, the central cities in coordination with the local concerned Department, Committees, sectors to organise the medical check-up for victims when required by the units in charge of receiving and supporting victims.

Article 33. The Central Vietnam Women's Union

To guide and steer its various levels in coordination with the concerned sectors to provide the supporting services to victims during the process of receipt and support to community reintegration.

Article 34. The People's Councils, People's Committees of provinces and central cities;

1. To guide the operation of the local concerned sectors on receipt and support to community reintegration for victims.

2. To arrange fund for the receipt and support to the victims' community reintegration. To organise the mobilisation of local funding sources to assist victims' life stabilization.

3. To guide the concerned sectors' operation on reporting, statistic regulations in the receipt and support to community reintegration for victims.

Article 35. Funding

1. The fund to operate the receiving and supporting activities of community integration for the victims consists of:

a) Expenditure on investment in upgrading, building facilities, equipment, devices in service to the receipt and support to victims;

b) Expenditure on the organisation of verification, receipt and support activities of the functional concerned agencies to victims;

c) Expenditure on support to community integration for victims according to the specifications in Section 1 and 2 Chapter IV of this regulation.

2. The funding source to spend on what specified in Item 1 of this Article is allocated in the annual state budget of the ministries, the sectors and localities according to the current state budget allocation and is mobilized from the domestic and foreign organisations, individuals in line with the legal regulation./.

FOR THE PRIME MINISTER

VICE MINISTER

TRUONG VINH TRONG

APPENDIX 4 – LIST OF INTERVIEWS AND DATES

Interviewees' organisations	Place of interview	Type of interview	Date of interview
UNIAP Vietnam	Ha Noi	Confidential	20 March 2008
ILO Vietnam	Ha Noi	Confidential	20 March 2008
UNODC Vietnam	Ha Noi	Confidential	21 March 2008
Action Aid Vietnam	Ha Noi	Confidential	27 March 2008
IOM Vietnam	Ho Chi Minh City	Confidential	25 April 2008