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RENOVATING JUSTICE: A Report to the Canadian International Development Agency, Management for Change Program on the Legal Needs Assessment Mission to Ha Noi, Viet Nam (May 1995)

Submitted by:

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EXECUTIVE SUMMARY

In recent years the Government of Viet Nam has formally accepted a number of elements of international human rights law. As part of its current program to modernize its *Penal Code* and *Code of Criminal Procedure*, Viet Nam is trying to bring its laws into compliance with its international undertakings. In 1994, the Vietnamese Minister of Justice asked The International Centre for Criminal Law Reform and Criminal Justice Policy at the University of British Columbia in Vancouver (hereinafter called "The International Centre") to provide information and advice with respect to the protection of human rights in the administration of justice. To that end a delegation from The International Centre visited Ha Noi, May 24 - 31, 1995. The International Centre's team included Dr. John Evans, Ms. Marcia Kran, Dr. Edwin Tollefson, Mr. Mohan Prabhu and Mr. Shawn Davies. Marcia Kran, assisted by Ed Tollefson took the lead on the issues of constitutional rights and international obligations, and John Evans, with the assistance of Mohan Prabhu, took the lead on the environmental law issues.

The International Centre's team was given extraordinary access to senior officials, and to the Minister of Justice and to Justices of the Supreme Peoples Court. Meeting were held with various departments of the Ministry of Justice, with the Institute of State and Law, the Ministry of Science, Technology and the Environment, the Supreme People's Court, the Supreme People's Procuracy, the Ha Noi University of Law, and the International Organizations Department of the Ministry of Foreign Affairs. The Ministry of Justice made most of the arrangements and provided transport and hospitality. The team found the meetings open and productive. In many areas, particularly those dealing with human rights issues, the Vietnamese frequently raised issues directly that we wished to cover but had not yet raised.

At the conclusion of the meetings, representatives of the Vietnamese Ministry of Justice and of The International Centre signed a "Memoranda of Understanding on Cooperation and Support,"(copies attached) in which, subject to the availability of funding, the parties undertake to cooperate over the next eighteen months on projects in the following areas:

--Criminal liability of corporations and other organizations
--Criminal law and the protection of the environment
--Juvenile justice
--The relationship between International law and domestic law in criminal matters
--The implementation of constitutional rights in the *Penal Code*
--The training of judges.
--Economic and Organized Crime

This is the report of The International Centre. The Report sets out the background of the Project; describes Criminal Procedure in Viet Nam; outlines the problems the Vietnamese officials identified with their criminal procedure and environmental protection laws; sets out some additional problems that were identified by the members of the International Centre team and proposes future directions for the implementation of the projects in the Memorandum of Understanding. The report outlines activities that could be understaken with Viet Namese counterparts in areas identified by them as priorities, subject to funding. Based on the results of the initital stage of the cooperation, further projects and exchanges could be planned. The Viet Namese representatives were clearly keen to develop a strong, cooperative working relationship with the International Centre. They expressed the opinion that obtaining Canadian and comparative expertise on law and policy issues in the criminal justice field is critical for their criminal law reform process.

BACKGROUND

In recent years the Government of Viet Nam has formally accepted a number of elements of international human rights law. Inter alia, it has ratified the following covenants and conventions formulated under the auspices of the United Nations:

--the International Covenant on Civil and Political Rights,
--the International Covenant on Economic, Social and Cultural Rights,
--the International Convention on the Rights of the Child, and
--the Convention on the Elimination of All Forms of Discrimination against Women.

Certain provisions of these covenants and conventions set out standards to be met by all signatories with respect to criminal procedure such as an independent judiciary, non-discrimination and equality before the courts, the right to counsel, etc. While some of these protections have already been incorporated into the 1992 *Constitution of the Socialist Republic of Vietnam*, or appear in its *Code of Criminal Procedure*[1], officials of the Vietnamese government indicated to representatives of The International Centre for Criminal Law Reform and Criminal Justice Policy (hereinafter referred to as "The International Centre"), at a meeting held in Ha Noi, in August, 1994, that comparative information and advice on the protection of human rights in the administration of justice is of particular concern in Viet Nam at this time in connection with review processes that are currently underway in relation to the Vietnamese *Penal Code* and the *Code of Criminal Procedure*. An official request for advice and assistance in the field of criminal justice was made to The International Centre by the Minister of Justice, Nguyen Dinh Loc, when he visited Vancouver in September, 1994.

In response to Minister Loc's request, The International Centre, in collaboration with Vietnamese officials, developed two projects for submission to the Canadian International Development Agency: first, an assessment of needs in the area of environmental criminal law and, second, an assessment of legal and institutional needs in the area of human rights in Viet Nam. The projects would involve The International Centre sending teams of experts to Ha Noi in the Spring of 1995 to carry out discussions with officials of appropriate Vietnamese departments and agencies for the purpose of:

-- determining the problems confronting Viet Nam in that particular area,
-- providing information about what is done in Canada and elsewhere in the
International community,
-- and determining what Viet Nam sees as the priorities for legislative action.

The International Centre would then prepare a report on its consultations, with commentary and recommendations as to how it, might be of assistance to the Vietnamese in meeting the problems identified.

The Canadian International Development Agency (CIDA) approved both projects, and arrangements were made with officials in Ha Noi for the visit of the two teams of experts.
In preparing for the visit to Ha Noi, the project team established to conduct "an assessment of the legal and institutional needs in the area of human rights in Viet Nam" concluded that, given the time and budget allocated to the task, it would be necessary to define the Project more precisely. Following a study of English translations of the *Code of Criminal Procedure* and the *Penal Code* of Viet Nam, it was decided that Project should focus on Criminal Procedure in Viet Nam, with priority being given to ascertaining what problems the Vietnamese had identified, and to determining in what ways The International Centre could assist Viet Nam to resolve problems in the Criminal Procedure area in manner consistent with International Human Rights standards.

Similarly, the environmental team reviewed the relevant Vietnamese environmental law and criminal law and reviewed the International law and treaties applicable to environmental protection.

Members of the International Centre arrived in Ha Noi May 24. Preliminary meetings were held with Professor Ian Townsend-Gault of the Centre for Asian Studies, of the University of British Columbia, who has had a number of years experience working with the Vietnamese Ministry of Justice on joint projects, and with Messrs. Christopher Brown and William Young of the Canadian Embassy and CIDA respectively. These meetings yielded affirmations of support and valuable suggestions on how to proceed.

A planning session took place with officials of the Vietnamese Ministry of Justice in the morning of May 26, at which time the Project Leader, Ms. Marcia Kran, explained why the Project proposed to concentrate on Criminal Procedure in Viet Nam and suggested a list of organizations with which consultations appeared to be desirable in order for the Project members to gain a fuller appreciation of the subject. The officials of the Ministry agreed with the emphasis on Criminal Procedure, but advised that because of the fact that some of the organizations suggested were outside the Ministry of Justice, it might not be possible to arrange meetings on short notice. (The Project was subsequently informed that it had not been possible to arrange a meeting with officials of the Ministry of the Interior, which is responsible for the Police. Accordingly, the Project was modified slightly to focus primarily on Criminal Procedure as administered by the Procuracy and the Courts. However, Project members found that to a large extent, questions about the investigative phase could be answered by other officials, particularly those in the Supreme People's Procuracy.)

The Vietnamese officials were very open and frank in their comments and answers. To the extent that some questions were not answered as directly or fully as Project members might have wished, it may have been because of problems in translation, or because certain concepts of our law (such as "proof beyond reasonable doubt") have no equivalent in the Vietnamese system and therefore were not readily understood. Nevertheless the Project members felt that they were able to get a fair understanding of the principles of Vietnamese Criminal Procedure as it is supposed to be applied.[2]

On May 30, at the conclusion of the meetings, a Memorandum of Understanding on Cooperation and Support (hereinafter referred to as the "Memorandum of Understanding") between The Ministry of Justice of the Socialist Republic of Viet Nam and The International Centre was signed by representatives of the two parties. A copy of the Memorandum of Understanding is appended to this report. A similar Memorandum was also signed with the Institute of State and Law (copy attached) covering their interest in economic and organized crime, constitutional rights and corporate liability. Some substantive areas in the two agreements are similar reflecting the high priority that the Government of Viet Nam places on these areas.

THE MANNER IN WHICH VIET NAM'S CRIMINAL PROCEDURE COMPLIES WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

1. Description of Vietnamese Criminal Procedure

The *Criminal Procedure Code* of the Socialist Republic of Viet Nam was adopted by the National Assembly on June 28, 1988. It has been amended in a supplemental fashion in 1990 and 1992. Borrowing heavily from French criminal procedure (which presumably was applied in Viet Nam when that country was part of the French colonial empire) and from Soviet criminal procedure, it is a complete *Code of Criminal Procedure*. It comprises six Parts. Part One, the "General Part", provides a general description of the system and of the rights and duties of the persons involved in criminal proceedings. Parts Two through Six set out the procedure to be followed at each stage of criminal proceedings: Part Two deals with the rules applicable to criminal investigations; Part Three,

with procedure at "first instance" before the courts; Part Four, with the procedure for the review of judgments at first instance by way of appeal or protest during the normal appeal period; Part Five, with the execution of a judgment and decision made by a court; and Part Six, with the review of judgments and decisions after the normal appeal period has expired.

The following is a brief description of the procedure in each stage and human rights questions relevant thereto.

A. The Investigative Stage

Generally speaking, criminal investigations are carried out by the Police, who, as mentioned a-bove, are under the direction of the Ministry of the Interior. In some instances other investigating bodies may be involved: the most obvious instance of this is prosecutions by the military authorities (which we were told are restricted to infractions of military law by military personnel)[3]. However, it should be noted that officials responsible for the protection of the environment are not classed as being "investigating bodies" but rather as being an "inspectorate".

Article 13 of the *Code of Criminal Procedure* (CPC) provides that:
13. When an offence has been discovered, investigating bodies, . . . within the scope of their power, shall initiate a criminal action and adopt measures prescribed for by this Code to determine the offence and deal with the offender. A criminal action shall not be brought except in ac cordance with the grounds and procedures prescribed by this Code.

The CPC has a number of provisions setting out guarantees of legality and respect for the rights of the "defendant". (According to art. 34(1), the term "defendant" is used with respect to a person charged with an offence, and the term "accused" is used for a person whose case has been brought before a court for trial.) For example, art. 11 requires investigating bodies to adopt "all lawful measures to determine the facts of the case impartially, comprehensively and fully, to clarify evidences [sic] of guilt and evidences [sic] of innocence, circumstances tending to aggravate [the] offence and circumstances tending to extenuate [the] offence". This article also places the burden of proof squarely on the bodies conducting the criminal proceeding.

Where there exist grounds to believe that a person has committed a criminal act, the investigating body shall issue a decision "instituting" a criminal case against the defendant. This document must clearly state the time and place of issuance and the details of the offence charged. The body making the decision to institute the criminal case against the defendant must deliver a copy of the decision to the defendant and advise him/her of his/her rights and obligations (art. 103). One of those rights is to request an "alteration" of persons conducting the criminal proceedings on the grounds of involvement, interest or partiality. This right not only applies at the investigative stage but also at the prosecutorial and adjudicative stages (arts. 28 - 34). Another important right is the right to retain counsel (art. 34(2)) of his/her own choosing (art. 37(1)). Once chosen, the defense counsel shall participate in the proceedings from that time onward (art. 36). If the defendant (or accused) does not choose a defense counsel, the investigating body (or later, the procurator or the court) has the duty to request the Bar Association to appoint a defense counsel in cases where the maximum penalty for the offence charged is death, or in the case of a defendant (or accused) who is a juvenile or a person suffering from physical or mental defects (art. 37(2)). Although article 36(2) of the CPC seems to provide defense counsel with the right to see the case file and make copies of information therefrom only when the investigation is completed, the members of the Criminal Procedure Project were told by a legal expert of the Supreme People's Court that the defendant and his/her counsel were entitled to access to the file of the investigative body from the time that the case was instituted. This may have been a recent change, possibly in response to the provisions of art. 9(2) of the *International Covenant on Civil and Political Rights*.

As in countries that have a Continental European type of criminal justice system, the investigating body has the right to interrogate the defendant after a criminal case has been "instituted". There are strict rules as to the conduct of the interrogation, the recording of the questions and answers etc. (arts. 107 and 108). Any coercion or bodily torture are strictly prohibited (art. 5), and articles 234 and 235 of the *Penal Code* make it an offence punishable by up to seven years imprisonment for anyone to inflict corporal punishment or torture during the operation of judicial processes, or by up to five years imprisonment for forcing a person, by unlawful means, to give false testimony entailing serious consequences for the case.[4]

The CPC also contains strict rules, similar to those in Canada, regarding searches and seizures in connection with a criminal investigation (arts. 115 - 124). A search of a person's dwelling or other place, or a physical examination of the person, may only occur where "there exist grounds to believe that instruments, means of an offence, proceeds of crime of [sic] other things, documents concerning the case be [sic] situated on the person, dwelling, places or other premises of the individual" (art. 115(1)). It appears that a warrant is required in most cases (art. 116). A warrantless physical examination may take place of a person under arrest, or where there are strong grounds to believe that a person present at a place being searched is hiding on his/her body something that needs to be seized, but in all cases of bodily examinations, the person conducting the examination and all those present must be the same gender as the person being examined (art. 117). Special rules apply to the search and seizure of correspondence or postal materials, where the warrant must be approved by the procurator (art. 118). Special rules also apply to physical examination of the scene of the crime or the body of the defendant or others by experts (arts. 125 - 134).

Detention during the investigation phase is limited to three days, renewable once for three days if the investigation so requires, and in exceptional cases, this period may be extended for up to an additional three days (making a maximum of nine days). Within 24 hours of taking a person into custody the order of custody must be submitted to the appropriate level of procurator for consideration, and the extensions at the end of three days and six days cannot take place without the approval of the procurator.[5]

It should be noted that the procurator has a supervisory role to pay with respect to investigating bodies, to ensure that investigations are conducted in compliance with the law and in a manner that does not infringe the rights of the defendant, and to that end the procurator has broad powers to refuse approval of decisions made by the investigating body, alter or revoke investigative measures taken, order additional investigations, have the case referred to a different investigator, or take over the investigation directly (arts. 141 and 92(3)).

B. The Prosecution and Trial Stages

If the investigating body decides that there is enough evidence to determine that the defendant committed an offence, it will conclude the investigation and request the prosecution of the defendant. The file is then delivered to the procurator of the court having jurisdiction over the offence (art. 138). The procuracy (which under the 1992 Constitution is accountable to the National Assembly) is organized in a three-tiered structure that matches the three levels of court. If the offence is one punishable by imprisonment for not more than seven years, then normally District People's Court in the territory where the offence was committed will have jurisdiction to try the case originally, unless it is an especially dangerous crime against national security, or it falls within a list of specified crimes (art. 145(1)). Any offence falling outside the jurisdiction of the District People's Court is tried originally by Provincial People's Court of that territory (art. 145(2)), unless the case is especially serious or complex, in which case it is tried originally by the criminal tribunal of the Supreme

People's Court (art. 145(3)). (A high-ranking official of the Ministry of Justice, Dr. Uong Chu Luu, Director of the Department of Criminal Justice and Administrative Law, gave as examples of cases tried at first instance by the Supreme People's Court one case involving mass homicide and another where a government official was charged with corruption involving a large sum of money.)

When the procuracy receives the file from the investigating body, it must decide whether to prosecute the defendant and issue a bill of indictment, remand the case file for additional investigation, or suspend the case either temporarily or permanently. This decision must be taken within 30 days; although the period may be extended by the procurator-general once for up to 30 days in case of necessity (art. 142(1)). The defendant and defense counsel must be informed of the decision. During this period the defendant may be detained if the procurator believes that to be necessary (art. 142(2)).

If the procuracy issues a bill of indictment, it must clearly specify the offence charged; the date, time and place of the offence; the means whereby it was committed; the consequences of the offence; the evidence incriminating the defendant; any aggravating or extenuating circumstances and any other facts important to the case (art. 143(1)). A copy of this bill must be served upon the defendant (art. 142(1)).

Within 30 days of the issuance of the decision, the procuracy must send the case file and the decision thereon to the court. The court has 45 days (or three months with respect to grave offences) to decide whether to proceed with a trial, remand the case for additional investigation or suspend the case either temporarily or permanently. In complicated cases the president of the court may extend this period of time for up to another 30 days. The trial must begin within 15 days (30 days if special circumstances so require) after a decision to proceed (art. 151).

The trial court is composed of a professional judge and two lay judges, unless the accused is c-harged with an offence that may result in the death penalty in which case the court shall consist of two professional judges and three lay judges (art. 160). Unlike the common law jury trial, where the judge decides questions of law and the jury decides questions of fact, in the Vietnamese courts the professional and lay judges both decide on all the issues before the court (art. 16). Where there is a difference of opinion among the members of the bench, a verdict is rendered by the majority (art. 18).

The general rule is that the accused must be present throughout the trial (art. 162(1)), but a court may hear the case in the absence of the accused where the accused has escaped and cannot be found, is abroad and it is impossible to bring him back, or the absence of the accused would not cause any obstacle to the hearing of the case (art. 162(2)).

The CPC makes provision for the participation in criminal trials of persons other witnesses for the prosecution or the defense. As in the French system, persons having civil claims arising out of the criminal transaction may also take part in the criminal trial (art. 166). In addition, the General Part of the CPC (art. 8), refers to the participation of various social organizations and private citizens:

The Fatherland Front, the Trade Union, Association of farmers, Ho Chi Minh Communist Youth Union, Federation of women, other social organizations and citizen [sic] shall have the right and duty to participate in criminal proceedings according to provisions of this Code, make contribution to the struggle against and prevention of crimes, to ensure legitimate rights and lawful interests of citizen [sic].

Investigating bodies, procuratorates [sic] and courts are responsible to create favourable condition for social organizations and citizen [sic] to take part in criminal proceedings.

If the Fatherland Front and its member-organizations discover in stages of proceedings any unlawful action committed by bodies conducting criminal proceedings, they have right to file complain [sic] with authorized bodies as defined for by the Code. The authorized bodies shall consider, resolve the complain [sic] and answer to the public organizations which file the complain [sic].

Article 188 would seem to make specific provision for the reception of "Remarks, reports made by institutions and organizations concerning facts of the case." When asked whether this allowed organizations and individuals to come into court and urge that the court make a particular finding or impose a particular sentence, a legal expert of the Supreme People's Court told members of the Criminal Procedure Project that "You don't want the courts to be too conservative" and that the press have a strong influence on the courts.

The presiding professional judge takes the lead in questioning each witness, but art. 181(2) appears to permit the posing of questions by the lay judges, the procurator and the defense counsel in that order. Other persons participating in the trial may request the presiding judge to ask other questions. The accused is questioned like other witnesses. While the accused is not under a legal obligation to answer (art. 183), and the Criminal Procedure Project members were told by a legal expert of the Supreme People's Court that the accused's silence was not taken to imply an acknowledgment of guilt, the same expert said that it was rare for the accused to remain silent, and when silence occurred it was only in relation to specific questions. The court is required to "examine all circumstances of each fact and each offence" (art. 181(1)). This means that there are no guilty pleas allowed to shorten the process: if the accused admits his guilt in court, this is noted on the file, and the court carries on with the case as usual.

The defense counsel is obliged to be present in the court session. However, except in cases involving an accused who is a juvenile or who is suffering from some physical or mental defect, or where the maximum penalty for the offence is death, the court may proceed in the absence of defense counsel if the latter has submitted a defense to the court in advance of the trial (art. 165). Article 36(3) of the CPC describes the duty of the defense counsel as follows:

Defense counsel shall have [the] duty to assert all means permitted by law to find out circumstances evidencing [the] innocence of the defendant and the accused; circumstances tending to extenuate [the] responsibility of the defendant, the accused, providing them with legal assistance in order to protect their legitimate rights and lawful interests.

In light of the fact that a large percentage of the defense counsel in Viet Nam are employees of the government, do defense counsel in Viet Nam view their role differently than defense counsel in Canada? A member of the Criminal Procedure Project asked an expert on the staff of the Supreme People's Court what defense counsel would do if the accused were to admit to his/her guilt to the counsel. The reply was that it was contrary to the Code for a defense counsel to disclose secrets which have come to them from the accused (see art. 36(3)), but that in such circumstances, defense counsel would invariably advise the accused to disclose his/her guilt to the court, in which case defense counsel would speak to mitigation of sentence. The question was then asked whether if the defense counsel believed the accused was guilty the counsel could withdraw from the case. The reply was that the practice was that the defense counsel did not withdraw.

C. Appeals and Protests

The accused (or any of the civil parties) may appeal, or the procurator may lodge a protest, to the next higher court with respect to a judgment or decision of the trial court that has not acquired "legal

force" (art. 204). A judgment acquires legal force is fifteen days (art. 208)[6], and a decision (for example a decision ordering a permanent or temporary suspension of the case) in seven days (art. 213). Appeals from trials in the District People's Court go to the Provincial People's Court, and appeals from trials in the Provincial People's Court go to the Supreme People's Court. When sitting as an appeal court, the composition of the court is three professional judges and two lay judges (art. 216). The procedure in the appeal court is the same as that used in the trial court (art. 219). Either the procurator or other parties having an interest in the appeal have the right to adduce new evidence (art. 218). The appeal court has the right to affirm or amend the original judgment, dismiss the original judgment and transfer the case for re-investigation or retrial, or dismiss the original judgment and suspend the case (art. 220). In amending the original judgment, the court of appeal may, if there are grounds for so doing, either find the accused guilty of a lesser or greater offence than did the trial court, or increase or decrease the sanction applied (art. 221).

In the case of those few extremely serious or complex cases that are tried by the Supreme People's Court, there is no appeal; however, there may be a review under the procedure set out in the next section.

D. Review of Judgments and Decisions that have Acquired Legal Force

After the time for appeal as of right has elapsed, and the judgment or decision has acquired legal force, the only attack on the judgment is by way of review. Article 22 of the CPC states that higher courts shall exercise supervision over the trial courts of all levels to ensure a unified and strict application of the law, and art. 242 particularizes, providing that the courts have a supervisory jurisdiction to deal with serious errors of law or fact, or cases where the examination or interrogation at the trial was one-sided or insufficient. The procuracy has a duty to supervise compliance with the law in criminal proceedings, and therefore has a primary obligation to assure that such matters are taken up by the court (art. 23),[7] but anyone may report such an error or violation of law to the procuracy or the court so that a protest may be lodged (arts. 243 and 244). The Judicial Committee of the Provincial People's Court shall review protested judgments and decisions rendered by the District People's Court that have acquired legal force; the Criminal Tribunal of the Supreme People's Court shall review judgments and decisions rendered by the Provincial People's Court, and the Judicial Council of the Supreme People's Court shall review judgments and decisions of the Judicial Committee of the Supreme People's Court that have acquired legal force (art. 248). The review is of the whole case and not just the part thereof protested. The supervisory court has powers similar to those of a court hearing an appeal (art. 254); however, while it may find the accused guilty of a lesser offence, or impose a less severe punishment, it may not find the accused guilty of a greater offence, or impose a more severe punishment than that found or imposed by the trial court (art. 257).

E. Reopening of Trial

A judgment or decision that has acquired legal effect may be reopened where, after the decision of the court, it is discovered that testimony of a witness was false, or a judgment was based on false conclusions, or a judgment was based on false or forged material evidence or documents (arts. 260 - 261). Only the Procurator General of the Supreme People's Procuracy (with respect to judgments or decisions of courts of all levels), and the Procurator General of the Provincial People's Procuracy (with respect to judgments or decisions of the District People's Courts) may lodge a protest based on fresh evidence (art. 263). These protests are heard by the same judicial bodies that hear reviews of protested judgments or decisions (art. 266), and after having considered the new evidence, the court may either reject the protest and affirm the judgment or decision, reverse the protested judgment or

decision and order a re-investigation or retrial, or reverse the protested judgment or decision and suspend the case. It cannot, however, modify the judgment or decision (art. 268).

The Deputy Procurator General of the Supreme People's Procuracy told members of the Criminal Procedure Project that such cases were rare, for if the investigating bodies and the procurators have done their jobs all the evidence will have been brought out in the trial. However, he did cite one case where an accused had been wrongly convicted because he was unwilling to implicate his father, who was the actual guilty party. While in jail, the accused told his story to a fellow-inmate, who on release, collected the exculpating evidence and presented it to the procurator. The case was reopened and the conviction was overturned. The Deputy Procurator did not know of any case where the power to re-open had been used to the disadvantage of a person convicted, although this is provided for under art. 265(1).

F. Extra-Ordinary Procedure

Part Seven of the CPC contains special provisions with respect to the trial of a juvenile accused or of an accused who is mentally disordered.

I) Cases Involving Juvenile Defendants/Accused

The special provisions of Part Seven of the CPC (arts. 271 - 290) do not make it clear at what age the special procedures for juveniles begin to apply,[8] but the members of the Criminal Procedure Project were told by Dr. Uong Chu Luu, Director of the Department of Criminal Justice and Administrative Law, Ministry of Justice, that the special procedures applied to person 14 years of age to 20 years of age. The age of criminal responsibility is 14 years: before that time young persons who commit criminal acts are dealt with by administrative means, which may involve working-off the offence or being sent to a re-education centre. Between the ages of 14 and 16 years, there is criminal liability only for serious crimes that were committed intentionally. After age 16, the juvenile is liable for all crimes.

Article 272 of the CPC provides that investigators, procurators and judges conducting a prosecution against a juvenile offender "must be persons furnished with necessary knowledge of psychology, educational science and experiences [sic] in the field of prevention of crimes committed by juvenile [sic]". The Article goes on to direct them to ascertain: the juvenile's age, level of physical and mental development and capability of realizing the consequences of the criminal action; the living and educational conditions; whether the offence was committed under the inducement of an adult; and causes and conditions relating to the offence. If an accused is unable to select a defense counsel, the court must order the Bar Association to provide one (art. 275); although the defense counsel thus provided may be rejected by the accused or his/her legal representative (art. 37(2)).

An effort is made to involve the family and the community in providing support and counsel to the juvenile during trial as well as in the rehabilitation process (arts. 274 and 276). In that same vein, art. 277 provides that at least one of the lay assessors of the court must be either a "teacher or representative of the Ho Chi Minh Youth Union."

Consistent with the emphasis on re-education and rehabilitation, more lenient sentencing provisions apply to juvenile offenders than to adults. Dr. Luu said that neither the death penalty nor life imprisonment can be imposed on a juvenile, and that the maximum term of imprisonment for an accused between 14 and 16 years of age being fifteen years, and for an accused 16 to 20 years of age, twenty years. Moreover, a juvenile who is imprisoned is entitled to "professional training

education" during the term of imprisonment (art. 278(2)), and up to the age of 18 years, a juvenile offender must be detained separately from adult offenders (arts. 278(1) and 278(3). On completing a prison term, the prison authorities must liaise with state and community organizations to enable the juvenile to reintegrate into society (art. 278(4)).

ii) Compulsory Treatment for Mentally Disordered Accused

The CPC provides for compulsory treatment of mentally disordered accused on the decision of the procurator in the investigative phase or of the court in the adjudicative or execution phase of the proceedings (art. 281). The provision would appear to enable the making of such an order in anticipation of a finding that the accused was not criminally at the time of committing a dangerous criminal act, but the translation is not clear on the point. In reply to a question from a member of the Criminal Procedure Project, Dr. Vu Duc Khien, Deputy Procurator-General of the Supreme People's Procuracy, said that treatment could not be ordered if at the time the accused was "aware". He added that often relatives of the mentally disordered accused want him/her detained, and that there is no civil mental health legislation that could be used to deal with the situation. The provisions require the participation of defense counsel in the proceedings "from the time at with [sic] the person [who] committed the act dangerous to society has been proved to be mentally ill" (art. 282(2)), and there is provision for lodging a complaint about a treatment order of a procurator, or appealing or protesting a treatment order of a court just like any other decision of a court (art. 285).

2. Problems in Criminal Procedure Identified by the Vietnamese

As mentioned earlier, Viet Nam is currently in the process of reviewing and revising both its *Penal Code* and its *Code of Criminal Procedure*. The priorities for reform in the area of substantive criminal law seem to be driven primarily by the need for Viet Nam, as part of its policy of *doi moi* (economic renovation), to accommodate, or at least react to, the development of foreign trade and a multi-sectoral economy.[9] In the area of criminal procedure, the policy of *doi moi* results in priority being given to reforms designed to make their procedure more efficient and to satisfy outside observers of Viet Nam's compliance with international standards. The following are examples of problems in criminal procedure that were identified by Vietnamese officials in the meetings that were held in Ha Noi, May 26 - 30, 1995.

A. Jurisdiction of the Courts in Criminal Proceedings

As mentioned above, each of the three levels of people's courts has the jurisdiction to act as a trial court of first instance. The result is that there is no higher tribunal to which the accused may appeal if tried at first instance before the Supreme People's Court. Dr. Uong Chu Luu, Director of the Department of Criminal Justice and Administrative Law, Ministry of Justice, said that this was contrary to international criminal law.[10] Consideration is therefore being given to having all trials of first instance in the District People's Court, with an appeal to the Provincial People's Court, leaving the Supreme People's Court with only supervisory jurisdiction. Another possibility would be to give the Provincial People's Court the trial jurisdiction now exercised by the Supreme People's Court in extremely serious or complex cases, with an appeal therefrom to the Supreme People's Court.

B. Organization of the Court System and the Procuracy

At the present time the courts and the matching levels of the procuracy are organized and located according to the administrative units of the country. The result is that in certain areas the courts are very busy, and in others they are not. Dr. Vu Duc Khien, Deputy Procurator-General of the Supreme People's Procuracy, said that this was inefficient, so officials were considering whether, for the sake of efficiency, there should be a re-organization along functional lines. The difficulty with relocation of facilities on an economic basis is that in certain areas parties and witnesses would have to travel long distances to attend court hearings. [It is not known whether the idea of circuit courts is under consideration.] He also said that consideration was being given to whether there should only be one investigative body and perhaps eliminating the procurator's supervisory role with respect to the actions of investigators.

C. Court Authority to Try the Case on Offence revealed by the Evidence

If during the trial it becomes clear to the court on the evidence that the accused should have been charged with a more serious offence, it is not possible for the court to try the accused for it. Instead, the court would have to return the file to the procurator and await a fresh bill of indictment charging the more serious offence.[11] The situation is complicated in that it the offence charged falls within the jurisdiction of the District People's Court, and the offence revealed on the evidence falls within the jurisdiction of the Provincial People's Court, the case would have to be transferred to that court and the procurator of that court.[12] Officials of the Ministry of Justice indicated that difficulties had arisen where the procurator did not then proceed with the more serious charge. It is their view that the court should have the power to proceed to try the case on the offence revealed by the evidence without returning the file to the procurator. They saw this as being part of the principle of "the independence of the judiciary."[13] [One of the members of the Criminal Procedure Project raised the question whether the proposal would be contrary to the accused's right to know in advance of the trial what the charge is.[14]]

D. Judicial Training

The need for reforms in the training of judges was emphasized by officials of the Ministry of Justice and of the Supreme People's Court.

Officials of the Ministry of Justice said that there was a concern about the quality of judgments at the trial level. As mentioned above (see section 1-B The Prosecution and Trial Stages), at the trial level, in cases not involving the possibility of the death penalty, the court is composed of one professional judge and two lay judges (in cases involving the death penalty, two professional judges and three lay judges), each having an equal vote on all questions before the court. The Constitution requires that there be representation of the public on the bench, but it does not say how many such representatives there must be. Therefore, consideration is being given to changing the composition of the trial court to two professional judges and one lay judge. No change is being suggested where the court is acting as an appeal court, where the present ratio of three professional judges to two lay judges is considered to be satisfactory.

Madam Duong Thi Thanh Mai, Deputy Supreme Justice for the Socialist Republic of Viet Nam, also commented on the need for improvement in the quality of court decisions at the District and Provincial levels, saying that such an improvement would reduce the number of cases the Supreme People's Court would have to deal with. While judges must have had a number of years professional experience working in one of the government agencies before their appointment, a law degree is not necessary.[15] She said that there were plans to set up an institute for judicial training,

stressing that this was an important area for comparative study.[16] She expressed the hope that Canada could assist Viet Nam in the development of judicial training programs.

E. Delays in Criminal Procedure

The CPC sets out precise time limits for almost every procedural step, but they are not always met. Concurrently with the implementation of the *doi moi* policy there has been a significant increase in delays at the investigative, prosecutorial and adjudicative stages. In reply to a question from a member of the Criminal Procedure Project about compliance with the international standards regarding a fair and prompt trial,[17] Dr. Hoang Phuoc Hiep, Deputy Director, International Law Department, Ministry of Justice, remarked that Viet Nam was often criticized on this score by agencies such as Amnesty International. While saying that delays are sometimes unavoidable, he referred to instances where delays in providing defense counsel with access to the file had interfered with the ability to prepare a proper defense, and other instances where the procurators seemed to have granted extensions of detention for the purposes of the investigators or prosecutors without adequate reasons being provided. To deal with this latter situation changes to the CPC were being considered which would spell out limitations on the power of the procurators to grant extensions of time. Dr. Vu Duc Khien, Deputy Procurator-General of the Supreme People's Procuracy, accounted for extension of detentions during the investigative stage on the basis that often there were not enough resources to check records or trace witnesses in the initial 3-day detention period.[18]

Madam Duong Thi Thanh Mai, Deputy Supreme Justice for the Socialist Republic of Viet Nam, said that delays in the Supreme People's Court was a serious problem and attributed it to lack of staff coupled with an 800% increase in the number of cases between 1987 and 1955. Her proposed solutions to the problem of delay included the appointment of more judges at all court levels and better judicial training for judges in the lower courts so that there would be fewer mistakes requiring rectification by the Supreme Court.

F. Bail and Interim Release

Under the CPC the decision on whether a defendant/accused should be granted bail or interim release is made by the procurator (art. 142(2)). Officials of the Institute of State and Law said that the procurator would order detention if two of the following three conditions were found to exist: first, the maximum punishment for the crime alleged was more than a year's imprisonment; second, the circumstances of the crime were serious; and, third, there was a danger that the defendant/accused might disappear. As most offences have a maximum penalty of more than one year, the real issue is whether the procurator is satisfied of the existence of one of the other two conditions. There are alternatives to detention, such as restrictions on where the defendant/accused may live, and Dr. Vo Khanh Vinh, Head of the Department of Sociology of Law, Institute of State and Law, said that proposals to restrict the use of pre-trial detention were being considered in the current revision of the CPC. [Leaving the decision on pre-trial detention to the procurator would appear to be inconsistent with art. 9(4) of the *International Covenant on Civil and Political Rights*, which provides that anyone deprived of liberty by arrest or detention has the right to apply to a court for a determination without delay of the legality the detention.]

G. Juvenile Justice

Officials of the Ministry of Justice expressed interest in Canada's *Young Offenders Act* and in particular the provisions allowing the court in certain circumstances to transfer the case to the adult court for hearing and sentencing. Dr. Hoang Phuoc Hiep, Deputy Director, International Law

Department, Ministry of Justice, also noted that Viet Nam detention of juvenile offenders in Viet Nam did not comply fully with international standard, in particular the *Convention on the Rights of the Child.*

3. Topics for Consideration Suggested by the International Centre

The focus of the meetings in Ha Noi was to provide the members of the International Centre with a better understanding of Criminal Procedure in Viet Nam and what changes thereto the Vietnamese thought were necessary or desirable. It would have been premature at that time for members of the Project to have suggested other possible reforms. It was contemplated, however, that in writing this report, observations might be offered as possible guideposts for further collaboration in the context of the Memorandum of Understanding on Cooperation and Support between The Ministry of Justice of the Socialist Republic of Viet Nam and The International Centre, signed in Ha Noi, May 30, 1995. A few such observations have been set out in square brackets in the immediately preceding list of problems identified by the Vietnamese. The following short list sets out additional observations regarding criminal procedure in Viet Nam which might also be considered as areas of further collaborative effort pursuant to the Memorandum of Understanding.

A. The Mentally Disordered Defendant/Accused

In reply to a question from a member of the Criminal Procedure Project, Dr. Vu Duc Khien, Deputy Procurator-General of the Supreme People's Procuracy, acknowledged that there was a major problem in relation to the mentally disordered defendant/accused. Dr. Khien said that in many cases the relatives of the defendant/accused urged the procurator to detain and compulsorily treat the defendant/accused. The situation is aggravated by the lack of treatment facilities or even legislation providing for civil commitment. Although the CPC does require that defense counsel be named for the defendant/accused, there appear to be few options available in the law. In circumstances where there is a serious shortage of treatment facilities and trained mental health professionals an order for compulsory treatment may well be contrary to art. 7 of the *International Covenant on Civil and Political Rights* which prohibits treatment that is cruel, inhuman or degrading.

B. Record-Keeping and Statistics

An accurate and timely record-keeping and statistical system is necessary for efficient management and proper evaluation of any large organization. It seems clear from statements made during the consultations that though a system of record-keeping and statistics exists in Viet Nam it is in need of modernization and improvement. Madam Duong Thi Thanh Mai, Deputy Supreme Justice, spoke of delays and errors in court proceedings caused by problems in obtaining file information; and Dr. Vu Duc Khien, Deputy Procurator-General, Supreme People's Procuracy, explained the need for extensions in investigative and pre-trial detention periods partly on the basis of delays in obtaining the record of the defendant/accused.

In Viet Nam, record-keeping in relation to criminal justice is done manually, and though an effort is made to keep statistics, it is difficult to do in a sophisticated and timely fashion in the absence of computerization. The Vietnamese would obviously like to improve their system so that records could be up-to-date and readily accessible. This is also an area in which Canada has recently developed some expertise.

C. The Role of the Judiciary

Viet Nam recognizes the need for improvements in the training of the members of the judiciary at all levels. The Memorandum of Understanding signed in Ha Noi, May 30, specifies that "the parties shall undertake activities to facilitate the training of judges". As a signatory to the *International Covenant on Civil and Political Rights* Viet Nam also recognizes the right to be tried by a court that is not only "competent" but also "independent and impartial" (art. 14(1)). Any training program therefore should focus not only on judicial competence but on judicial independence and impartiality as well.

In addition to joint programs of judicial training, the parties to the Memorandum of Understanding could perhaps collaborate on a study to determine what if any amendments are necessary to the CPC and any other relevant enactments to ensure that they are in compliance with the standard set out in art. 14(1) of the Covenant (cited above). In reply to questions from a member of the Criminal Procedure Project, Madam Duong Thi Thanh Mai, Deputy Supreme Justice, stated that judges were independent; but in describing their appointment and tenure, she indicated that the Fatherland Front played an integral role in the selection of judges at all levels, and that judges may be removed at the end of a five-year probationary period following their appointment. These are some factors that could give rise to a suspicion that judges may not feel entirely independent and impartial in certain cases. That is not to suggest that the Fatherland Front, or any other group, in Viet Nam does exercise improper influence over court proceedings, or that the judges feel constrained to toe the party line. Nevertheless, the government of Viet Nam may consider it to be prudent to enact amendments that would remove any doubts about judicial independence, for the perception of outsiders that judges are subject to improper influences will tend to undermine Viet Nam's efforts to establish its credibility as a modern state that honours its international human rights commitments.

ENVIRONMENTAL PROTECTION AND THE ROLE OF THE CRIMINAL LAW

This part of the report summarizes the discussions which the International Centre's team had on two issues: (a) the protection of the environment through the criminal law, and (b) the criminal liability of organizations.

PRINCIPAL POINTS EMERGING:

Several points, worthy of note, are highlighted below.

The first important point is that the Viet Namese *Penal Code* is now being revised.

Second, criminal offences are found only in the *Penal Code*, not in other legislation; hence, it is necessary to locate a corresponding offence section in the *Penal Code* if an infringement of a regulatory provision is to be prosecuted. There does not appear to be a constitutional impediment to locating a criminal offence in a regulatory statute, but the practice against it has been invariable.

Third, even where there is authority to prosecute a regulatory offence, there was no instance where a prosecution had in fact been launched for an environmental offence. The main reasons for this are that the enforcement provision of the current *Penal Code* is a blanket provision, it is overly broad, there is a lack of enforcement capacity, and regulatory offences are not considered by prosecutors of the Ministry of Justice in the same light as street/common crimes (such as murder, sexual assault, theft mischief, etc.), there being a difference of perception between the procuracy and enforcement officials of other ministries that are concerned with the environment, health and labour.

Fourth, with respect to criminal liability of legal persons, the objections to making corporations criminally liable appear to be grounded on jurisprudence rather than on any constitutional impediment.

Viet Nam has signed and ratified a large number of international conventions and agreements, both multilateral and bilateral, a list of which is appended to this report. Among the conventions that relate to the protection of the environment are the United Nations Convention on the Law of the Sea, 1982, Convention for the Prevention of Pollution by Ships, 1973 and the 1978 Protocol to that Convention (MARPOL 1973/1978), the Vienna Convention for the Protection of the Ozone Layer, 1985 and the 1987 Montreal Protocol thereto, the United Nations Framework Convention on Climate Change, 1992 and the United Nations Framework Convention on Biological Diversity, also of 1992. Viet Nam has not signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989, but the issue is under study.

The governing domestic legislation on the subject matter of these conventions, such as the *Law on Environmental Protection*, adopted in 1993 and came into effect in January 1994, and the environment provisions of the recent *Law on Foreign Investment in Viet Nam,* 1994, the maritime code, the petroleum law, and the decrees of the President or the National Assembly, provide authority to the government to implement the conventions. Of particular significance are those conventions that contain offence provisions since, as stated earlier, it is necessary to locate a corresponding provision in the *Penal Code* in order to enforce their criminal provisions.

RIGHTS OF PROTECTION OF THE ENVIRONMENT:

The constitutional basis for the enactment of the 1993 *Law on Environmental Protection* is the 1992 *Constitution of the Socialist Republic of Viet Nam* referred to in the 1993 *Law on Environmental Protection.* This Law contains several provisions, e.g. articles 4, 5, 6, 11 and 12 that give citizens certain rights to protect the environment and impose certain obligations in relation thereto.

Asked about what the specific content of these rights were, the officials were unsure because there have been no instances where the rights were asserted by citizens or interpreted by the courts. The International Centre's team described such rights as information, consultation, participation in decision making, objection to proposed projects without in-depth environmental assessment, etc., which could logically follow from the constitutional protection of the environment and which in some countries, including Canada (e.g. the province of Ontario), have been provided in legislation under such names as *Bill of Environmental Rights*. Considerable interest was shown by the officials in the possibility of entrenching such rights in law.

Furthermore, while there may not be a direct link between the constitutional rights and the criminal justice system, one could find support in several provisions of the *Code of Criminal Procedure* through which these rights could be asserted. For example, articles 24 gives citizens the right to complain and denounce officials for failure to enforce; articles 39 to 42 give injured persons, civil plaintiffs and persons having interest to participate in criminal proceedings against persons charged with offence. (These provisions resemble those in the French P*enal Procedure Code*, which are being used in France by victims, environmental groups, etc. to claim compensation).

On the basis both of the 1992 Constitution and the 1993 *Law on Environmental Protection,* and by drawing support from provisions of the *Code of Criminal Procedure*, there is considerable scope for Viet Nam to develop a detailed policy on conferring environmental rights and imposing duties and obligations on the Viet Namese people and the means by which they are to be implemented.

ROLE OF CRIMINAL LAW IN THE PROTECTION OF THE ENVIRONMENT - SPECIFIC DISCUSSIONS ON, AND ISSUES RAISED IN RELATION THERETO:

The *Penal Code* of Viet Nam contains very few provisions concerned with the protection of the environment. A few articles were referred to by the Ministry officials, such as articles 179 and 180. There was also a blanket provision (article 195) by which the violation of any law or regulation can be prosecuted by the procuracy.

On the other hand, the 1993 *Law on Environmental Protection* (and, perhaps, other sectoral laws) contains numerous provisions which control a wide range of activities that are detrimental to the environment. In addition, article 29 of the 1993 Law prohibits some activities when they exceed the prescribed limits, and a few are strictly prohibited, i.e., notwithstanding any prescriptions in that regard (e.g. uncontrolled exploitation of minerals leading to environmental damage; causing massive destruction in exploiting or harvesting animal and plant resources).

The remedies available under the *Law on Environmental Protection* (and other sectoral laws) are either administrative or civil, such as remedial measures, compensation and damages. Where the nature and extent of the violation, and its consequences, are particularly severe, article 50 authorizes criminal prosecution. Here, the blanket provision of the *Penal Code* would apply.

In order to initiate criminal prosecution, the State procuracy, which has the sole responsibility therefor, has to rely on referrals by inspectors of the Ministry of Science, Technology and Environment (MOSTE). The 1993 *Law on Environmental Protection* gives MOSTE the function of State management of environmental protection, and therefore inspectors of this Ministry have the authority to refer violations which they consider to be serious enough to report to the procuracy.

COMPLIANCE AND ENFORCEMENT OF ENVIRONMENTAL LAW:

While the 1993 *Law on Environmental Protection* was proclaimed by presidential decrees, there are very few regulations which implement its provisions. The Law is too new to develop close coordination between these two State agencies or to develop a compliance and enforcement policy for making decisions on when to proceed administratively and when to refer serious breaches to the procuracy. Thus, there is a real need to provide assistance to the Ministry of Justice to develop instruments of coordination and decision-making. In addition, there is a need to establish a system of sanctions based upon the seriousness of the offences and their consequences. Since, under the current criminal justice system of Viet Nam, criminal offences can only be incorporated in the *Penal Code*, it would be desirable, as well as timely, to take advantage of the opportunity of the current revision of the *Penal Code* , and include specific environmental offences in the new *Penal Code* that correspond to the offences in the environmental protection law and other sectoral laws (i.e., the petroleum law, forestry law).

In this regard, the Viet Namese officials at meetings both at the Ministry of Justice and the Institute of State and Law, showed considerable interest in comparative and international law developments on crimes against the environment. The International Centre's team referred to recent draft Convention of the Council of Europe, the Association internationale de droit pénal (AIDP), the model domestic law of crimes against the environment produced at an International Meeting of Experts held in Portland, Oregon, U.S.A. ("Portland report"), under the International Centre's auspices, as well as the Central American model of crimes against the environment. The Portland report was given to the Viet Namese officials, and the other materials referred to have been sent.

The International Centre's team also referred to the Capacity Building monograph that was produced by the United Nations Crime Prevention and Criminal Justice Branch and distributed at the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Cairo, Egypt in May 1995. The team described several proposals contained in the monograph which were designed to assist developing countries and countries in transition in the development of compliance and enforcement policies, instruments and mechanisms. The International Centre has sent copies of the monograph to the Ministry of Justice and the Institute of State and Law.

As a result of all these discussions, and at the specific request of the officials, the memorandum of understanding concluded between the Ministry of Justice and the International Centre on Tuesday, 30 May, contains a proposal to cooperate on four issues including the role of criminal law in the protection of the environment.

ISSUE OF CRIMINAL LIABILITY OF ORGANIZATIONS, ESPECIALLY CORPORATIONS:

Another issue of particular interest to officials of the Ministry of Justice and the Institute of State and Law is the criminal liability of corporations and other legal entities. The Viet Namese legal system has no provision for corporate criminal liability. This does not stem from any constitutional impediments but from established jurisprudence and the reluctance to implement radical changes. Viet Namese researchers tend to regard the exclusive liability of individuals as an impediment to the protection of the environment, because a vast proportion of environmental degradation is (or will be) caused by operations of corporations and other legal entities, for example, companies engaged in natural resource exploration and development. They showed keen interest in learning from comparative law studies how other countries, including civil law countries in Europe, grapple with the problem.

A brief description of the laws relating to criminal liability of corporations and other legal entities in both common law and civil law countries was given by the International Centre's team, who referred in particular to the expert panel discussion held at the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Cairo) in May 1995, the XVth International Penal Law Congress of the AIDP held in Rio in 1994 and the resolution adopted at that Congress, and the report of the International Meeting of Experts held in Portland in 1994. A copy of the workshop report, which contained a brief note on the panel discussion, was given to the Ministry and Institute officials and additional copies have been sent together with copies of the Canadian presentation, a copy of the XVth AIDP Congress resolution and a copy of the 1992 proceedings of the Ottawa colloquium, which was the basis for that resolution, and the report of the International Meeting of Experts (Portland report).

The Viet Namese officials indicated a strong desire for assistance in introducing corporate criminal liability in the current revision to the *Penal Code*, with due consideration of the legal the legal framework in Viet Nam. They requested that this item be one of the priorities included in the Memorandum of Understanding concluded between the Ministry of Justice and the International Centre.

SUMMARY: POSSIBLE AREAS OF ASSISTANCE REGARDING ENVIRONMENTAL PROTECTION.

1. The constitution provides certain general rights and obligations regarding the environment but nothing specific has been done to give meaning to the general provisions. On the basis both of the 1992 *Constitution of the Socialist Republic of Viet Nam* and the 1993 Law on Environmental Protection, and by drawing support from provisions of the *Code of Criminal Procedure*, there is considerable scope for Viet Nam to develop a detailed policy on conferring environmental rights and

imposing duties and obligations on the Viet Namese people and the means by which they are to be implemented.

2. In addition, there is a need to establish a system of sanctions based upon the seriousness of the offences and their consequences. This could be done by including specific environmental offences in the new *Penal Code* that correspond to the offences in the environmental protection law and other sectoral laws (i.e., the petroleum law, forestry law).

3, Viet Nam has a general legal framework for environmental protection but regulations and enforcement and compliance measures are not developed. Also required is a policy framework for implementation of such measures and for effective cooperation among the various departments necessarily involved.

4. Effective environmental protection will require that criminal liability extend to corporations and other legal entities. The Viet Namese are keenly interested in developing their law to include criminal liability for corporations.

FOLLOW-UP TO THE HA NOI MEETINGS

The Memoranda of Understanding provide a framework for cooperation between the Vietnamese Ministry of Justice, the Institute of State and Law and The International Centre for the next eighteen months. The stated objective is "to develop a cooperative relationship in legal research in areas of mutual interest and expertise." In article 2, of the Memorandum of Understanding with the Ministry of Justice sets out five priority areas for cooperation between the parties:

2. l Criminal liability of corporations and other organizations;
2.2 Criminal law and the protection of the environment;
2.3 Juvenile justice;
2.4 The relationship between International law and domestic law in criminal matters; and
2.5 The implementation of constitutional rights in the *Penal Code.*

The Memorandum of Understanding with the Ministry of Justice sets out three concrete proposals for action:

3. In particular, the parties shall undertake activities to facilitate the training of judges.
4. As well, the Parties shall exchange information on legal developments on a regular basis, including providing copies of legislation upon request.
5. Cooperation shall include conducting research, preparing papers and reports, organizing symposia and seminars, offering study tours, placements and pursuing other activities which further the aims of the cooperative endeavour.

Similarly the Memorandum of Understanding with the Institute of State and Law sets out the following areas of potential cooperation:

3. The Parties will engage in comparative research projects in areas of concentration, beginning with: a. Constitutional rights and the rule of law; b. Criminal law and the protection of the environment, in particular, the issue of the liability of corporations and other organizations; and c. Economic and organized crime.

It must be noted, however, that article 1 of the Memoranda of Understanding makes all of these proposed cooperative ventures subject to "the availability of funding", and in order to obtain funding it is, of course, necessary to have a plan of action for the implementation of the statement of statements of principle and intent. The following is an outline of a possible implementation strategy.

A. Objectives of the Proposed Initiatives

While the general objective of the Memorandum of Understanding is stated as the development of a cooperative relationship in legal research in areas of mutual interest and expertise, each party also appears to have more tangible objectives. For the Vietnamese Ministry of Justice, establishing a cooperative relationship with The International Centre is not an end in itself, but rather a means to assist in the modernization of Vietnamese criminal justice system with a view to making it efficient, effective and fair, as well as consistent with international norms of human rights. Helping Viet Nam to achieve these objectives is the primary objective of The International Centre, to be achieved in collaboration with relevant Canadian government departments and the University of British Columbia and Simon Fraser University.

C. Activities

C.(i) Exchange of Information

The first step towards the goal of solving problems identified by the Vietnamese therefore must be to provide them with information about Canadian and International law. This can be done most effectively if there is an exchange of information between the parties, so that each gains a basic understanding of the other's system and is able to make meaningful comparisons. When this has occurred, Viet Nam can decide what things it wants to change, and the second step, involving the giving of advice on specific problems, may take place.

For each priority area, the first step -- the exchange of information with a view to identifying problems -- requires the development of a program designed to fill in the information gaps of each of the parties. The starting point should be an exchange of selected relevant materials -- enactments, reports, journal articles, research papers etc. (preferably translated into the other's language).

C.(ii)Study Tours and Placements

series of illustrated lectures, structured interviews, guided tours of relevant facilities, demonstrations of new techniques etc.

C.(iii)Meetings and Symposia

C.(iv)Advisory services (legislation and policy)

After an exchange of material has taken place, on-site visits of one to two weeks to Canada and Viet Nam, such as took place in Vancouver in February and Ha Noi in May, 1995, should be arranged. There, in a series of structured meetings, questions project members have after going through the materials could be addressed.

The second step, the provision of advice on specific problems, would take place when Viet Nam feels that it has identified the problems and has prepared draft legislation. At this stage, the draft provisions could be commented on by The International Centre and its network of experts on these issues.

D. Initial Phase

At this stage, only a preliminary timetable can be offered.

In relation to Criminal Procedure area, on-site visits in Vancouver and Ha Noi have taken place, and the exchange of information is nearly completed. An exchange of materials has also occurred with respect to reform of the *Penal Code*. Therefore, with respect to both of these areas it should be possible to move on to step two, the advisory stage, in which the Ministry of Justice would submit drafts of proposed reforms to The International Centre for commentary and criticism.

Discussions are about to take place with regard to the nature and objectives of the proposed training program for judges. When these have been agreed upon, an exchange of materials, followed by a visit of Vietnamese judges to Canada for a program of structured meetings can take place. Realistically, it would appear unlikely that these meetings could be held before late 1995 or early 1996. In this context it should be noted the Chief Justice of Canada has invited President Pham Hung of the Supreme People's Court of the Socialist Republic of Viet Nam to come to Canada in the late summer of 1995 for a conference of Chief Justices from around the world. It is hoped that President Hung will be able to attend the conference and also to stop over in Vancouver to meet with the British Columbia Supreme Court and officials of the Bar, and to visit the Law School at the University of British Columbia. At this time useful discussions could take place on the proposed training program for judges.

Juvenile Justice was one of the topics addressed peripherally in the May meetings in Ha Noi, and this report contains a short description of the treatment of juvenile offenders in the Vietnamese criminal system. Discussions regarding the exchange of information about Juvenile Justice, Step One of the Project, have begun, with mid-1996 being a tentative completion date for this stage. This will depend, of course, on the urgency assigned to the project by the Ministry of Justice.

E. Budget Considerations

[To be completed by The International Centre]

F. Benefits

Just as the Canadian justice system has benefitted by looking at what is done in other countries -- the Charter of Rights and Freedoms, legal aid, compensation of victims of violent crime all represent Canadian modifications of laws and programs that existed elsewhere -- so the Viet Nam justice system, after a long period of isolation, will benefit from the exposure to ideas from the western democratic world. Improvements in the justice system will do much to assure respect for the human rights of Vietnamese citizens, and, indirectly, will bring them economic benefits, as investors from other countries develop a sense of confidence in the fairness of the system and the competence and independence of the Vietnamese judiciary.

But Canada also will benefit from this cooperation. Not only is it consistent with our foreign policy of promoting human rights around the world, but study of foreign legal systems gives us new insights into our own system. Moreover, the apparently irreversible trend to economic globalization is forcing Canadians to deal with legal systems in every part of the world. Viet Nam, with an industrious, literate population of 70,000,000, is bound to become both an important consumer and producer of goods, so it is in Canada's interest to develop an information resource base on Viet Nam for use by government, universities or the private sector.

ENDNOTES

1. Unfortunately, the copy of the translation provided to The International Centre by Vietnamese officials was deficient in that it lacked articles 42(a) to 82 inclusive, relating to the latter part of Chapter Three ("Persons Participating in Criminal Proceedings") and all of Chapters Four ("Evidence"), Five ("Deterrent Measures") and Six ("Protocol, Period and Costs of Trial"). Articles 8 through 71 of the *Penal Code* of the Socialist Republic of Viet Nam were also missing from the text provided to The International Centre.

2. It is, of course, not possible for the Project members to assert that these principles are always honoured in practice. Such a finding could only be based on extensive empirical studies, involving observations at all stages of Vietnamese criminal procedure and interviews with practititioners and defendants/accused, which were quite beyond the resources of this Project even if permission to conduct such research could have been obtained.

3 See art. 92(2). In addition to the police and the military, border security units, the customs service and the forestry inspection service are vested with certain powers to conduct investigations (art. 93).

4. The Criminal Procedure Project members were also told by Dr. Vu Duc Khien, Deputy Procurator General that where the court finds that important evidence was obtained illegally, it orders the release of the accused.

5. The provisions regarding arrest, custody and bail fall within arts. 61 - 77, which, unfortunately, were omitted from the English translation of the CPC that was provided to The International Centre (see supra, note 1). The above comments are based on a treatment of this matter found in a paper entitled "Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment", prepared for the Commission on Human Rights (fifty-first session), by the Working Group on Arbitrary Detention (E/CN.4/1995/31Add.4), at pages 4-5.

6. An appeal may be brought after this time limit provided that the appeal court considers the delay to be justifiable (art. 209).

7. With respect to the death penalty, art. 228 provides that within two months of receipt of the judgment and case file, the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuracy must decide whether to lodge a protest against the judgment according to the supervision or re-opening procedure.

8. Unfortunately, a number of the provisions that contain references to juvenile offenders are among articles, which, as mentioned in note 1 (supra), were missing from the text of the CPC and the *Penal Code* provided to The International Centre.

9. Dr. Le Minh Tam, Vice Rector of the Ha Noi University of Law, told members of the Criminal Procedure Project that law reform must emphasize developments in the economic system. In this context he mentioned the need to pass laws in relation to economic crimes, crimes against property, crimes against public order, the environment; the continental shelf; and the protection of foreign investors coming to Viet Nam.

10. *International Covenant on Civil and Political Rightss* (art. 14(5)).

11. Article 170 of the CPC provides that a court may only try the accused for the specific offence prosecuted by the procurator.

12. Art. 149.

13. See supra, note 10, at art. 14(1).

14. Ibid., at art. 9(2).

15. Madam Duong Thi Thanh Mai said that a much higher percentage of female professional judges held law degrees than did male professional judges. Of Viet Nam's professional judges in the Supreme People's Court, the Provincial People's Court and the District People's Court, 16%, 26% and 25% respectively are women. For the most part, women judges deal with civil matters such as family law and succession where they have had more experience.

16. There are a number of institutions where a legal training may be obtained, but by far the largest is the Ha Noi University of Law, operating under the auspices of the Ministry of Justice. Members of the Criminal Procedure Project were told by Dr. Le Minh Tam, Vice-Rector of the University, that it had about 5000 full-time students and about 12,000 part-time, with 230 full-time lecturers and 170

part-time. Approximately 30% of the lecturers are women. It has six departments, which, listed in order of size, are (1) the Department of Private Law (civil and criminal), (2) the Department of Economy, (3) the Department of Administration, (4) the Department of International Law, (5) the Department of Graduate Training and Judicial Training, (6) the Department of Part-time Training. It has also started a doctoral program. Mark Sidel, in an article entitled "Law Reform in Viet Nam: the Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training", 11 UCLA Pacific Basin Law Journal 221 (1993), traces the development of legal education and research in Viet Nam. At pp. 253-255 he deals with judicial education, indicating that there is a difference of opinion as to whether this should be under the control of the Supreme People's Court or the Ministry of Justice.

17. See supra, note 10, at arts. 9(3) and 14(1).

18. Dr. Khien did not seem to believe changes were necessary. He explained that as part of its supervisory power over investigations, the procurator could and often did order the investigative agency to release the defendant. With regard to pre-trial detention during the prosecutorial stage, Dr. Khien said that custody could only be ordered where the crime charged had a maximum penalty of at least a year's imprisonment, and then only if there was a danger that if left at large the accused might not appear for trial or might interfere with the investigation.

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