Vietnamese law on extradition in comparison with Article 44 of the UN Convention Against Corruption

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I. Background

1. On 9th December 2003, at Merida – Mexico, Vietnamese Government has signed the United Nation Convention Against Corruption (UNCAC), which indicates the strong commitment of Vietnam in strengthening the fight against corruption at both local and international level. It brings opportunities for Vietnam in enhancing the effectiveness and efficiency of the anti-corruption campaign through international cooperation, technical assistance, experience and information exchange...However, in the process of preparation for ratifying and implementing the Convention, many challenges have raised that requires Vietnam as well as other signed parties to pay much more efforts to handle so as to satisfy the spirit and specific obligations of the Convention. Among these obligations, international cooperation (Chapter IV), and specifically, extradition (Article 44) are so crucial that great consideration should be put in place.

II. Analysis of main contents provided by Article 44 on Extradition of the UNCAC

2. According to paragraph 1 of Article 44, the article will be applied to the offences in accordance with the Convention where the person who is the subject of the extradition request is present in the territory of the requested State Party, in case of the offence requested to extradite is punishable under the domestic law of both the requesting and requested party. Beside, a State Party whose law permits may grant the extradition of a person for any of the offence covered by the Convention that is not punishable under its domestic law (Paragraph 2). In case that the extradition request includes several separate offences and at least one of them is extraditable under Article 44 and some of them are not able to extradite by reason of their imprison period but related to the offences covered by the Convention, the requested State Party may apply the Article 44 to these offences.

3. If a State Party, which considers the extradition have to be based on a treaty, receives a request for extradition from another State Party with which it has no extradition treaty, the Convention can be considered the legal basis for extradition of offences covered by the Article 44. If a State Party does not make the extradition conditional on the existence of a treaty, it is obliged to recognize the offences established in accordance with the Convention as extraditable offences. The Convention states that the extradition conditions shall be in accordance with domestic law of the requested State Party or applicable treaties, including conditions of minimum punishment requirement for extradition and the grounds upon which the requested State Party may refuse extradition (Paragraph 5, 7).

5. Paragraph 11 of Article 44 provides that if the State Party whose territory an alleged offender is found refuse to extradite the person in respect of an offence covered by the Convention upon only one ground that this person is one of its citizens, this State Party shall, at the request of the requesting State Party, has the obligation to promptly submit the case to competent agencies for the purpose of prosecution. The concerning State Parties shall cooperate with each other for ensuring the effectiveness of the prosecution, particularly, on evidentiary and procedural aspects. This provision determines the purpose and desire of the Convention that there will not be any undue reason can be quoted for causing obstacle or excluding the consideration and settlement of the alleged person’s liability. If this person is not investigated, prosecuted or adjudicated by the requesting State Party, he/she must be resolved by the requested State Party, which has not granted the extradition.

The Paragraph 12 stipulates that if the requesting and requested State Party agree to extradite or surrender the alleged person upon sole condition that the extradited or surrendered person will be returned to the requested State Party for exercising a sentence made by the competent authorities of the requesting State Party, the extradition of surrender will be exempted from the obligation set forth in Paragraph 11, Article 44. This provision can be analyzed that a requested State Party, whose domestic law so permit, upon the agreement with the requesting State Party, shall, in lieu of submitting the case to its own competent authorities for prosecution or adjudication of the extradited person who have been adjudicated at the
requesting State Party exercise the results of trial or proceedings at the requesting State Party, implement necessary measures for recognizing and exercising a sentence made by the competent court of requesting State Party.

This spirit is repeated in Paragraph 13 that if an extradition requested for exercising a sentence is refused upon the ground that the requested person is a citizen of the request State Party, this Party shall, in accordance with its domestic law, consider exercising a sentence made by the requesting State Party.

6. For ensuring basic rights of the extradited person, it is provided in the Paragraph 14 that any person regarding whom proceedings are being carried out in connection with any of the offences covered by the Convention shall be guaranteed fair treatment at all stages of the proceedings, including all the rights and guarantees provided by domestic law of the State Party whose territory that person is present.

7. Regarding the exceptions in implementing the obligation to grant extradition according to the Article 44, the extradition request may be refused if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of his sex, race, religion, ethnic origin or political opinions.

III. Extradition according to Vietnamese Criminal proceedings Code

For the first time in the history of criminal proceedings legislation of Vietnam, in November 2003, the National Assembly at its XI Session decided to supplement one part on principles of international cooperation in criminal proceedings and particular cooperation activities of judicial supports such as: extradition; transferring case’s records, documents and evidentiary objects. It is the part 8 of the Criminal proceedings Code including 2 chapters (Chapter 36 and Chapter 37), 7 articles from article 340 to article 346. The aforementioned supplement is very important and an urgent need in the current fight against crimes, both theoretically and practically. Though the part on international criminal proceedings cooperation have been provided generally, this initially have created legal base for widening international cooperation in criminal proceedings so as to effectively fight against crimes, especially transnational or international crimes.

General principles of international criminal proceedings cooperation (Article 340 of the Criminal proceedings Code)

8. Principles of respect for independence, sovereignty, territorial integrity and non-intervention in the domestic affairs of other States, equality and mutual benefit. These are basic principles in every international relations, both bilateral and mutual relations, and covered by the United Nation Charter. The principles play very important role especially in the international context that cooperation is required for peace, democracy and social development while still exist differences in political regime and ideology. “Independence, sovereignty” are sensitive issues in international relations. There will be no cooperation if this affects the independence, sovereignty of the nation. Thus, independence, sovereignty is pre-condition for any international relation in its true meaning. Beside, “equality and mutual benefit” will contribute to the sustainability and development of the cooperation relation.

9. Principles of compliance with the national Constitution and fundamental principles of international law. These principles give the tendency for international cooperation, and in another words, it sets the scope of cooperation. Agreements in international criminal proceedings cooperation can be made only in the case of non-infringement upon the national Constitution and fundamental principles of international law. In this context, the term “fundamental principles of international law” need to be indicated clearer, whether it is used in a narrow or wide definition. This also is a difficult issue, in both theoretical and practical aspects. Fundamental principles of international law in this Article can be understood in a wide definition and that are not limited solely in the scope of fundamental principles of criminal proceedings, although most of them are in the scope of criminal proceedings. These principles include, inter alias: independence, sovereignty, territorial integrity, non-intervention in the domestic affairs of other States, equality and typical principles of criminal proceedings such as: equality before law, open adjudication, the right to defense...

10. Principles of compliance with international treaties that Vietnam is a Party and domestic legal system of Vietnam. In international cooperation, if there are differences between international and national law, Vietnam will gives priority for application of international law, except the case that the application
undermines the Constitution or basic values or public order of Vietnam. The principles ensure that Vietnam will comply with all of its international obligations in line with our practical capacity and context.

11. Principle of reciprocity. This is also a principle of international cooperation ensuring the balance and benefit of each party in the cooperation relations. This principle is taken case by case when there are no existences of treaties that regulate the issues required for cooperation. However, in any case, the cooperation under the principle of reciprocity must not violate the domestic law and international law and custom.

**Extradition according to Vietnamese Criminal proceedings Code**

12. Request for extradition and grant of request for extradition

*Article 343 of the Criminal proceedings Code provides:*

Pursuant to the international treaties that Vietnam has signed or accessed and under the principle of reciprocity, Vietnamese authorities that are competent in exercising criminal proceedings may:

- Request relevant foreign competent authorities to extradite an offender or convicted person to Vietnam for initiating criminal proceedings or exercising the sentence;
- Extradite the foreigner who commit an offence or convicted by an effective judgment that is present in territory of Vietnam to requested State for initiating criminal proceedings or exercising the sentence.

Generally, extradition in criminal procedure is transferring a person from one country to another country for carrying out criminal proceedings or serving sentence. This is an important content directly related to jurisdiction and foreign policy of States, especially in the international context that differences in political system and ideology are still exist. Hence, this also is one of the most sensitive issues in negotiation and signing mutual and bilateral treaties. In order to resolve this difficulty, most of mutual treaties use the regulation called “compromise” in which Parties to the treaties agree to extradite the offender if requested and in the case of refusing the extradition request, normally when the person who is the subject of the extradition request is citizen of requested party, permitted by the domestic law, the requested State that refused to extradite “shall be obliged to promptly submit the case to its competent authorities for the purpose of prosecution. The competent authorities will make decisions and initiate criminal proceedings in line with the procedures adopted to other offences that have the same level of seriousness according to its domestic law. The concerned State Parties shall cooperate with each other in procedural and evidentiary aspects for ensuring effectiveness of the prosecution”.

Document for requesting extradition includes:

- Name of the authority requesting for extradition;
- Name, citizenship, location or other information of the identity of the person who is the subject to extradition request, and if possible, description with pictures, fingerprints of the person;
- Description of the offending acts committed by the person and name of the offence;
- Level of material damage caused by the offences.

Attached to requesting document for initiating legal proceeding shall be the notarized copy of the arresting decision that describes the offending acts; quote of the legal normative document providing the offence committed by the requested person.

Regarding requesting document for exercising a lawfully effective sentence, shall be enclosed notarized copy of the lawfully effective sentence and quote of the legal normative document used as the ground for making the sentence. If the extradited person has exercised one part of the sentence, the enforced part shall be stated clearly.

13. Refusing extradition

Provided by in the Article 344 of the Criminal proceedings Code is:
1. Vietnamese authorities that are competent in exercising criminal proceedings **refuse to extradite** in one of following cases:

a) The person requested for extradition is one citizen of Vietnam;

b) According to domestic law of Vietnam, the person requested for extradition can not be initiated criminal proceedings or forced to exercise the sentence due to the termination of effective time period of other lawful causes;

c) The person requested for extradition for initiating criminal proceedings has convicted by Vietnamese court by a lawfully effective judgment on the offending acts that stated in the extradition request or the case has been suspended according to this Code;

d) The person requested for extradition is present in Vietnam for the potential reason of being treated unfairly in the requesting State for differences of race, religion, nationality, ethnic, social class or political opinion.

2. Vietnamese authorities that are competent in exercising criminal proceedings **may refuse to extradite** in one of following cases:

a) Acts of the person who is the subject of extradition is not considered an offence according to Vietnamese criminal law;

b) The person requested for extradition is being carried out criminal proceedings in Vietnam on the acts stated in the extradition request.

There is a need to divide the refusal of extradition into 2 levels as follows:

Firstly, the case that competent authorities are obliged to refuse extradition. Law of many countries have similar regulations in order to determine its sovereignty, protect legal safety for citizens and comprehensively enforce fundamental principles of criminal law.

Secondly, the case that competent authorities are given the discretion of refusing or granting extradition is provided in Paragraph 2, Article 344 of the Criminal Code. This can be said to be a flexible regulation making easy conditions for competent authorities in criminal proceedings to implement the principle of reciprocity that brings benefit for its nation while independence of national sovereignty is still ensured.

However, in the case of refusing extradition request, the competent authorities have the obligation to inform the relevant foreign authorities and clearly state the reason on which the extradition request has been refused.

IV. General assessment of the compatibility of Vietnamese law to UNCAC in Extradition

14. Governing scope of the Article 44 is provided by in Paragraph 1, 2 and 3 in which extradition have to be grant providing the offence that is subject to the extradition is punishable under domestic law of both the requesting and requested State Party. If the offence is not punishable, the extradition is discretionary and encouraged. In this regard, Vietnamese law regulates indirectly that extradition might be refused if “acts of the person who is the subject of extradition is not considered an offence according to Vietnamese criminal law” that means Vietnamese authorities shall grant extradition provided that the offence subjected to the extradition is offence and punishable under Vietnamese law.

15. Regarding legal base for extradition, in Paragraph 5,6 and 7, the Convention states requirements for State Parties that make extradition conditional on the existence of a treaty and State Parties who do not require this condition. Paragraph 1of Article 343 of the Criminal proceedings Code is in compliance with this requirement while legal bases for extradition are international treaties signed or accessed by Vietnam and/or principle of reciprocity. Accordingly, the Convention (Article 44) will be considered the legal base for extradition when it has the binding effect on Vietnam.

16. Both Paragraphs 15, Article 44 of the Convention and Paragraph 1, Article 344 of the Criminal proceedings Code provide exceptions for granting extradition (or bases for refusing extradition). Hence, requested Party **may refuse** to extradite one person if there are substantive grounds for believing that the person requested for extradition because of his/her sex, race, religion, nationality, ethnic, origin of political opinions (the Convention). In this regard, there a small difference in the Criminal proceedings Code that ...
those competent authorities shall refuse extradition request upon reasons which are mostly similar to the aforesaid reasons except the reasons of sex and origin but added the reason of social class.

17. Paragraph 11 provides the obligation of the requested State Party refusing the extradition request upon sole reason that the person requested for extradition is one of its citizens to submit the case promptly to the competent authorities for the purpose of carrying out criminal proceedings. This is also stipulated “traditionally” in many treaties on international judicial cooperation. In this respect, the Criminal proceedings Code provides only that the Vietnamese competent authorities shall refuse to grant extradition if the person subjected to the extradition request is Vietnamese citizen. In order to satisfy the aforesaid obligation of the Convention, Vietnam needs to consider supplement the further regulations on obligations and procedures for competent authorities to submit the case for the purpose of carrying out criminal proceedings.

18. The Article 44 has specific provisions ensuring the basic rights of extradited person that this person shall be guaranteed fair treatment at all stages of the proceedings, including all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present. The Criminal proceedings Code has not regulated these issues.

Vietnamese legal system on international criminal proceedings cooperation, including several current treaties on legal assistance and especially the newly supplemented part on international cooperation in criminal proceedings of the Criminal proceedings Code, has created general framework for the fight against international and transnational crimes of Vietnam. However, these regulations still only are general and initial. In order to promote the effectiveness and efficiency of the international cooperation in fighting against crimes in general and satisfy the requirements of the UNCAC in particular, it need to be developed by widening and deepening the current framework with the supplement of further specific provisions.