

# **Policing Transnational Crime in Vietnam**

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The Candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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## **Abstract**

Transnational crime is an increasing phenomenon in a diverse and complex late modern societies. This research explores responses to transnational crime in Vietnam, and the place and role of efficiency, fairness and legitimacy therein. Its purpose is to assess the effectiveness and the legitimacy of the policing system for the investigation of transnational crime in Vietnam.

Documentary sources and qualitative research interviews are undertaken to identify and evaluate the compliance with effectiveness and legitimacy in the investigation of transnational crime in Vietnam, within laws, policing strategies, and practices of the investigation of transnational crimes. In addition, a comparative research method is used at some points in the research to suggest possible policy transfers from England and Wales into Vietnam.

To attain this objective, the research investigates the phenomenon of transnational crime and the extent to which it impacts on transnational crime investigations in Vietnam. Using a 'cosmopolitanism' perspective and its key ethical values of effectiveness, fairness and the rule of law, this research first analyses the policing institutional arrangements that are responsible for transnational crime investigation in Vietnam. The research then focuses on the criminalisation of transnational crime and the impact of this on transnational crime investigations. Next, the research considers the legal powers of the police in transnational crime investigation, and assesses the empowerment of investigatory powers to the police, as well as the effectiveness, fairness and the rule of law of those investigatory powers for effective and fair transnational crime investigations.

Finally, this research provides conclusions to suggest that the policing system for investigating transnational crime can be advanced considerably by adopting changes based on standards of legitimacy and effectiveness.

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## List of Abbreviations

- ASEAN: Association of South East Asian Nations
- ASEANAPOL: ASEAN Chiefs of National Police Forces
- CIPA: Central Investigating Agency
- Constitution 2013: Constitution of the Socialist Republic of Vietnam 2013
- DIPA: District-level Investigating Agency
- ECHR: European Convention on Human Rights
- EU: European Union
- FATF: Financial Action Task Force
- GDP: Gross Domestic Product
- HMIC: Her Majesty's Inspectorate of Constabulary
- ICCPR: International Covenant on Civil and Political Rights
- INTERPOL: International Criminal Police Organisation
- NCIS: National Criminal Intelligence Service
- PACE 1984: Police and Criminal Evidence Act 1984
- PIPA: Provincial-level Investigating Agency
- PPF: People's Police Force
- PPS: People's Public Security Force
- PSF: People's Security Force
- RIPA 2000: Regulation of Investigatory Powers Act 2000
- UK: United Kingdom
- UNDP: United Nations Development Program
- UNODC: United Nations Office on Drugs and Crimes
- VCPC 2013: Vietnam Criminal Procedure Code 2013
- VCPC 2015: Vietnam Criminal Procedure Code 2015
- VPC 1999: Vietnam Penal Code 1999
- VPC 2015: Vietnam Penal Code 2015
- WTO: World Trade Organisation



# Chapter 1: Introduction

## 1.1. Background

This thesis is about the investigation of transnational crime in Vietnam with reference to England and Wales and the European Union. It is a topic that cannot be addressed without taking into account frameworks or contemporary conditions such as late modernity, its impacts on sovereignty and other trends that affect the fight against transnational crime in Vietnam. This is because the changes associated with what has been described as ‘late modernity’ have important impacts on the nature of criminal activity, which has become transnational in origin, commission, and effects. In addition, the conception of the police and policing is affected fundamentally by the advent of those social changes labelled as late modernity, for example the fragmentation of social power that comes from the context of globalisation.<sup>1</sup>

It seems that the vast complexity of change and transformation that results from globalisation cannot be illustrated within a single theoretical framework.<sup>2</sup> To some extent, the world can be examined by the theory of modernity, although debates over transformation of modernity and the possible emergence of conditions of late modernity still exist.<sup>3</sup> Modernity refers to specific forms of social life and governance that emerged in Europe in the seventeenth century, and have since been influential globally.<sup>4</sup> A central feature of modernity is the development from a primarily rural and agricultural society to a more modern, urban and industrial society with an attendant bureaucratic infrastructure not to mention a range of problems and challenges. Modernity is associated with the establishment of the nation state. However, since the 1970s, there has been a trend from modernity to late modernity in which world market forces are stronger than even the most powerful nation state.<sup>5</sup> Late modern development makes the world more diverse and mobile; so it becomes easier to travel across borders. In this regard, Leanne Weber and Ben Bowling said that ‘Global flows of all kinds have become more extensive, intensive

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<sup>1</sup> Newburn, T. and Reiner, R., ‘Policing and the Police’ in Maguire, M., Morgan, R., and Reiner, R. (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2012) 756

<sup>2</sup> Nandi, P. and Shahidullah, S., *Globalization and the Evolving World Society* (Netherlands: Brill 1998) 7

<sup>3</sup> Smart, B., *Facing Modernity: Ambivalence, Reflexivity and Morality* (London: SAGE 1999) 16

<sup>4</sup> Giddens, A., *The Consequences of Modernity* (Cambridge: Polity Press 1990) 1

<sup>5</sup> Hirst, P. and Thompson, G., ‘Globalisation and the Future of the Nation State’ (1995) 24(3) *Economy and Society* 408, 414

and faster-flowing.<sup>6</sup> Thus, one main feature of late modern process is the establishment of supranational entities or network entities. The Internet is another significant example of networks crossing national borders. Countries like Vietnam may sign up to organisations such as the Association of South East Asian Countries (ASEAN) to respond to newly emerged transnational competitiveness and new threats to national security. At the same time, this late modern development allows the better management of transnational issues. Yet, it may also reduce the power of national states and rely on supranational entities which are not as capable.<sup>7</sup>

In this context of late modernity, there are also new opportunities for committing transnational criminal activities. In the late modern world, crime can become more diverse and mobile. There are more crime cases which require transcendence of foreign jurisdictions because criminals commit crime across national borders. To some extent, criminals are expanding their networks and global reach to anywhere in the world where there are low risks and high opportunities for criminal activities. To confirm this development, James Sheptycki said that the ‘globalizing world’ has produced transnational criminals of various stripes.<sup>8</sup> As a result, there is a need to restructure policing that exercises sovereign power, and to develop transnational policing with a view to effectively responding to transnational crime.

In more detail, the reasons for this development are as follows. First, forms of bureaucracy in nation states which currently exist seem to be no longer suitable to cope with the growth of diversity and mobility of transnational crime across boundaries. Second, there is a tendency to shift from nation-state governance toward broader formations, which, according to Michel Foucault, is a transformation in governance from a regime dominated by structure of sovereignty to one ruled by techniques of governmentality.<sup>9</sup> The former is associated with the ability of the nation state sovereignty to determine how activities within its territory are governed, whereas the later focuses on desired results through a set of rules, guides, or practiced laws that can be exercised by

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<sup>6</sup> Weber, L. and Bowling, B., ‘Stop and Search in Global Context’ (2011) 21(4) *Policing and Society*, 353

<sup>7</sup> Loader, I. and Walker, N., ‘Policing as a Public Good: Reconstituting the Connections between Policing and the State’ (2001) 5(1) *Theoretical Criminology* 9, 22

<sup>8</sup> Sheptycki, J., ‘Transnational Crime and Transnational Policing’ (2007) 1(2) *Sociology Compass* 485

<sup>9</sup> Foucault, M., ‘Governmentality’ in Burchell, G., Gordon, C., and Miller, P. (eds), *The Foucault Effect: Studies in Governmentality with Two Lectures By and An Interview with Michel Foucault* (Chicago: University of Chicago Press 1991) 87, 101

state or non-state actors, national or international, institutions or individuals. Significantly, there may be two shifts. One is called a shift from government to governance wherein there emerges a relationship between public and private and a move from formal to informal instruments. In fact, in some instances, governments have given over responsibility for regulation to the private sector. The other shift is about a transformation from national to global, where in some instances governance is managed not by national governments but by supra-national bodies such as the European Union, or in the context of this thesis, ASEAN. These developments may have great impacts on public life, especially on the level and distribution of public safety, the vitality of civil rights, and the character of democratic government.<sup>10</sup> Moreover, the changes may pose many challenges to, or jeopardize, sovereign states whose national-level governance, according to Paul Hirst and Grahame Thomson, is ineffective in the face of globalized economic and social processes.<sup>11</sup> There are possibilities in which the state still plays an important role both within and across borders, but its right to exercise sovereign legal and political power is shared with either sub-national, supra-national or multi-national entities whose activities and operation cut across, and often undermine the authority of sovereign government.<sup>12</sup> Policing work that is a part of the national criminal justice system and government power as well is not an exception to the above mentioned transformation. Therefore, the question is whether the responses to transnational crime, particularly the investigation of transnational crime, when the nation state is no longer the only player in the delivery and regulation of, are effective and legitimate.

Vietnam shares in the global process of ‘renovation’ (*Doi Moi*)<sup>13</sup> and international integration. In the late 1980s, Vietnam faced a severe socio-economic crisis. The world was changing, for example the ‘Socialist Block’ of states collapsed. Vietnam set out its ‘*Doi Moi*’ policy which aims to reform Vietnam comprehensively by opening its ‘door’ to the world, though this renovation does not mean a change in the goals of Socialism.

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<sup>10</sup> Bayley, D. and Shearing, C., ‘The Future of Policing’ (1996) 30(3) *Law & Society Review* 585, 586

<sup>11</sup> Hirst, P. and Thompson, G., ‘Globalisation and the Future of the Nation State’ (1995) 24(3) *Economy and Society* 408, 413

<sup>12</sup> Loader, I. and Walker, N., ‘Policing as a Public Good: Reconstituting the Connections between Policing and the State’ (2001) 5(1) *Theoretical Criminology* 9, 10

<sup>13</sup> Vietnamese Communist Party, *Documentary of The Sixth Party National Congress* (Hanoi: Truth Publishing House 1987)

Specifically, this *‘Doi Moi’* policy focuses on reforming both politics and economy.<sup>14</sup> In the area of political reform, this renovation policy strengthens Socialist democracy by ensuring that more power belongs to people. While national unity is implemented, foreign policy for peace, friendship and cooperation is carried out. With regard to economic reform, the *‘Doi Moi’* guideline facilitates the elimination of the subsidized and centralised economy whereas there is a development of a Socialist-oriented market economy, which has many industrial structures, different economic sectors such as private and public, and international economic cooperation.

For nearly 30 years after the launch of reform and renovation, Vietnam has recorded key achievements in the areas of economic, social and environment development. A significant decrease in recorded poverty and a general improvement in democratization and the better implementation of the rule of law have been secured in Vietnam.<sup>15</sup> During the period from 2000 to 2008, the economic growth rate averaged a 7.85% with a threefold increase of GDP per capital to over USD 1,200 in 2011 from the level in 2000, which lifts the country from the group of poor countries to the group of lower middle-income countries.<sup>16</sup> Significantly, the economic structure of Vietnam has changed dramatically, from being a country with agriculture accounting for more than 40% of GDP just 20 year ago, to being a country where industry and services currently account for around 80% of GDP.<sup>17</sup> In addition, trade liberalization and economic integration have accelerated the industrialization and modernization processes in Vietnam that facilitate the opening and integration of the economy into the regional and world economy with the target of basically becoming ‘a modern-oriented industrialized country’ in 2020.<sup>18</sup> With the effect of the renovation policy, the Vietnamese economy that had strongly depended on the public sector has had growth in the private sector which contributes more than 60% of the country's GDP. Moreover, Vietnam has signed more than 90 bilateral trade

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<sup>14</sup> Vietnamese Communist Party, *Documentary of The Sixth Party National Congress* (Hanoi: Truth Publishing House 1987)

<sup>15</sup> UNODC website, ‘Vietnam Office: Overview’

<<http://www.unodc.org/southeastasiaandpacific/en/vietnam/overview.html>>

<sup>16</sup> The World Bank, ‘Vietnam: Achieving Success as a Middle-Income Country’

<<http://www.worldbank.org/en/results/2013/04/12/vietnam-achieving-success-as-a-middle-income-country>>

<sup>17</sup> Vietnam Government, ‘Implementation of Sustainable Development in Vietnam’, National Report at the United Nations Conference on Sustainable Development (RIO+20), May 2012

<sup>18</sup> Vo, T., ‘Vietnam Country Report’ in Soesastro, H. (eds), *Developing Roadmap toward to East Asian Economic Integration*, ERIA Research Project Report 2007-1-1, (Chiba: IDE-JETRO 2008)138,140



agreements, and has trade relations with nearly 200 countries and territories.<sup>19</sup> Vietnam has become a member of several regional and global forums and organizations such as becoming a member of WTO in 2007.<sup>20</sup>

There is no denying the achievements recorded from the renovation policy. However, several negative social economic consequences resulting from this process have occurred in Vietnam, for example, increasing the occurrence of transnational crime. Transnational organized crimes roughly amount to 2 – 10% of total criminal cases countrywide.<sup>21</sup> Vietnam is considered as an important Southeast Asia transit route for trafficking in illicit drugs.<sup>22</sup> Human trafficking is seen as an increasing problem, and the trafficking of woman in Vietnam is strongly influenced by patterns of global trafficking.<sup>23</sup> During the period of 1998 – 2010, the Vietnam police made enormous progress in preventing and combating crimes, and reduced crimes to around 90,000 to 100,000 crimes each year on average in Vietnam, a decrease by 10.7% from decades earlier.<sup>24</sup> This successful effort partly contributes to sustainable achievement on social order and public safety in Vietnam. According to UNDP Human Development Report 2013, Vietnam ranked at 127 out of 186 countries and is together with the majority of the ASEAN member countries such as Indonesia, Thailand, Philippine, Cambodia and Laos in the Medium Human Development tier.<sup>25</sup>

To implement the ‘*Doi Moi*’ process in Vietnam, one of main tasks of this policy is to undertake legal reform in line with international standards. Moreover, the investigation of transnational crime like other transnational issues should be carried out fairly and effectively. This task is new to Vietnam however, and as a consequence there are many difficulties in the struggle against transnational crime, for instance, in arranging

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<sup>19</sup> Ministry of Planning and Investment, *Vietnam: 2/3 of the Way Achieving the Millennium Development Goals and Towards 2015* (Vietnam: New Technology Printing Joint Stock Company 2010) 14

<sup>20</sup> Vietnam was admitted as a 150<sup>th</sup> member of WTO on 11 January 2007

<sup>21</sup> Nguyen Xuan Yem, *Extradition, Mutual Legal Assistance and Transfer of International Offenders in Crime Prevention* (Hanoi: People’s Public Security Publishing House, 2000) 53

<sup>22</sup> US Department of State, ‘International Narcotic Control Strategy Report’, INCSR volume 1, page 582

<sup>23</sup> UNODC website, ‘Vietnam Country Profile (2005)’

<[http://www.unodc.org/pdf/vietnam/country\\_profile\\_vietnam.pdf](http://www.unodc.org/pdf/vietnam/country_profile_vietnam.pdf)>

<sup>24</sup> Pham Quy Ngo, Remarking speech at 80<sup>th</sup> General Assembly of Interpol,

<<http://www.interpol.int/News-and-media/Speeches#n4305>>

<sup>25</sup> UNDP, ‘Human Development Report 2013’

<<http://www.undp.org/content/dam/undp/library/corporate/HDR/2013GlobalHDR/English/HD R2013%20Summary%20English.pdf>>

extradition and legal assistance with other countries. Besides, transnational crime demands models and mechanisms that empower the police to conduct effective and appropriate investigative methods and activities against transnational crime in the global context. Vietnam has secured some achievements in crime control. From legislation building to law enforcement, a wide range of activities are carried out in order to strengthen the prevention and suppression of crimes, especially transnational crime. However, because, like most other countries that have criminal justice systems developed with little consideration of the need to interact with foreign systems,<sup>26</sup> Vietnam is facing many new and complicated issues that are causing obstacles to Vietnam's policing and criminal justice when the country tries to integrate into the international community. For example, there arises the problem of police ability or power to conduct investigation in other national jurisdictions to pursue transnational crime investigations; or the problem of how to permit and cooperate with other police investigators who request to come into the country for joint investigations. This leads to a question of how the police should tackle transnational crime effectively without impacting on state sovereignty or people's human rights. Are responses by the police to transnational crime always legitimate?

## **1.2. Aims and Research Questions of Study**

It is essential for all research studies to begin with the identification of aims and research questions.<sup>27</sup> Broadly, this study addresses both national and international demands to assess and improve effectiveness and legitimacy of the investigation of transnational crime in Vietnam. Thus, the primary aim of this thesis is to identify and evaluate the compliance with effectiveness and legitimacy in the investigation of transnational crime in Vietnam within anti-transnational crime methods, strategies and regulations in order to assess whether there are frictions and tensions between the national interest and the implementation of international standards. In order to undertake these evaluations, the level of appropriateness consistent with human rights standards such as individual liberty in laws, policing strategies and practices of the investigation of transnational crime will be assessed to justify the structure and legal power in law and police practices. The study examines and considers the current structures for investigating

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<sup>26</sup> Nadelmann, E., *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (Pennsylvania: The Pennsylvania State University Press 1993) xv

<sup>27</sup> Noaks, L. and Wincup, E., *Criminological Research: Understanding Qualitative Methods* (London: Sage 2004) 122

transnational crime, and the nature of police powers and the criminal process. Therefore, a number of objectives and research questions must be tackled.

First, one aim of the thesis is to assess the transnational crime phenomenon and its impacts on policing in Vietnam that will be discussed in Chapter Three. To secure this aim, there is a need to answer the questions of whether and why transnational crime becomes a concern in Vietnam? Is transnational crime considered to be an obstacle that emerges during the course of construction and development of Vietnam in the context of renovation and international economic integration? Are the changes that have occurred in Vietnam and the world bringing or creating transnational crime in Vietnam, as a consequence? Why and to what extent is the phenomenon of transnational crime's impact threatening Vietnam?

This thesis focuses on the assessment of values of effectiveness and legitimacy of appropriate transnational policing, which are scheduled to be mainly explored in Chapter Four. This work is to answer whether Vietnam's policing system needs to build its own values of effectiveness and legitimacy or borrow them from outside of the country? Do factors such as culture and custom as well as political legal ideology of Vietnam impact upon the establishment and assessment of effectiveness and legitimacy in the investigation of transnational crime in Vietnam? In practice, are effectiveness and legitimacy in the investigation of transnational crime secured in Vietnam? Does Vietnam with its distinct legal tradition, culture and resources recognise and apply values of effectiveness and legitimacy that are supposed to come from Western values to develop transnational policing to protect the country's national interest and public safety?

Next, this thesis aims to evaluate policing structures and organisations against transnational crime. To meet this aim, a question that needs to be answered is why the police are tasked as main driving force to deal with transnational crime? Are the police sufficiently independent and expert in terms of responding to transnational crime? The profile of police units must also be discussed. All these debates will be the focus of Chapter Five.

Then, the thesis analyses the common main characteristics of transnational criminal law in Vietnam. To research this issue, the research questions that must be answered are whether there is a change and actual shift or transformation in the way of national governance to cope with transnational issue, especially transnational crime? This assessment will be the objective of Chapter Six.

This thesis also aims to assess legal powers of police in the investigation of transnational crime in Vietnam. The research question for this purpose is whether the police's power and competences are able to ensure success in the fight against transnational crime? Whether the police legal power executed in the investigation of transnational crime is justified as effective and legitimate according to both national interests and the obligations of the implementation of international standards? Is it necessary to amend and improve it to ensure the respect of the individuals' human right? The analysis of all these questions will be performed in Chapter Seven.

In transacting the above aims, the thesis will analyse the practices of crime investigations in regard to transnational crime in Vietnam. The reason for this is to give evidence to prove whether authority prescribed by the laws are applied and come into effects in practices of transnational crime investigations? Is there any difference between the regime of laws and their practical implementation in transnational crime investigation? The analysis of this aim will be mainly reflected in all chapters five, six, and seven when Vietnam related issues are discussed.

Finally, based on these assessments, the study will suggest ways of responding to or reducing the conflicts or tensions between national interest protection and the implementation of international standards with a view to suggesting possible models of police structure and power, as well as to improving the effectiveness and legitimacy of structure and powers necessary for appropriate transnational policing in Vietnam in general, and for the investigation of transnational crime in particular. This aim of the research will be addressed in Chapter Eight where alternative solutions will be recommended.

This research is not primarily a comparative study, although there are some points of comparison in the thesis that focus on the assessment of law and practices between Vietnam and the UK (England and Wales only) from which to explain similarities and differences identified and to use such explanations to develop more extensive theoretical arguments relating to handling of conflict between transnational policing and the rule of law in accordance with national sovereignty and human right within two divergent jurisdictions. According to David Dolowitz and David Marsh, 'although constraints exist, it is common for governments and agents to transfer policies from one nation to another'.<sup>28</sup>

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<sup>28</sup> Dolowitz, D. and Marsh, D., 'Who learns What from Whom: a Review of Transfer Policy Literature' (1996) XLIV Political studies 343, 352

However, the proportion of the thesis concerned with Vietnamese issues is substantially larger than that devoted to England and Wales. The degree and involvement of England and Wales is used as a heuristic device. The comparative element in the thesis will be a learning point to analyse the issues of Vietnam in the field of investigation of transnational crime. Therefore, this thesis employs policy transfer rather than comparative methodology.<sup>29</sup>

The reasons for the comparison with the United Kingdom (England and Wales) being selected are as follows. First, the study is being physically conducted in England and Wales, where many documentary materials for research are available. England and Wales is a well-developed country and with good documentation and open access to official documentation. Second, England and Wales (as a unit), with its open-border, has substantial experience of transnational crime. As a consequence it has had significant success in combating transnational crime. In the meantime, Vietnam and the United Kingdom (England and Wales) have some shared problems in terms of transnational crime, such as human trafficking and drug trafficking. Vietnam and the United Kingdom government are making joint efforts to tackle against transnational crime related to both countries. Third, in comparison with England and Wales, it is worth noting that Vietnam is a different society and with a different (inquisitorial and socialist) legal system. To choose England and Wales as a source country to undertake policy transfer may be useful. While many Vietnamese people may be already aware of a policing system in a civil law system country, looking at the policing system in a common law system such as that in England and Wales can highlight innovation and be of much interest to Vietnamese officials. In this view, it can also provide an additional and different way to successfully assess the effectiveness and legitimacy of the policing system of Vietnam. Finally, to look at the context of England and Wales may help to understand relations with other countries that Vietnam now has a link with including Malaysia, Australia and the United States, all of which are linked to policing problems in Vietnam.

There is also a possible comparison between the European Union and ASEAN, because in the fight against transnational crime, a single country like Vietnam cannot succeed without the regional effort of ASEAN. David Dolowitz and David Marsh have said that 'lessons can be drawn from, or forced upon a political system by, the international

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<sup>29</sup> See chapter 2 for a concept of policy transfer

level.<sup>30</sup> Despite the recent decision by the United Kingdom to leave the European Union, it remains at present a member and was so for the duration of this study and British policing is to some degree, at least for the foreseeable future, subject to decisions and policies of the European Union. Moreover, it is highly likely that whilst the social and economic relationship between Britain and Europe will change as a result of ‘Brexit’, there will be some important continuities, not least in close ties that have been fostered over many years between the British police and their counterparts in mainland Europe. Meanwhile, Vietnam is a member of ASEAN which brings with it some of the same kinds of responsibilities, obligations and benefits in relation to transnational policing.<sup>31</sup>

### **1.3. Key Normative Concepts**

To conduct this thesis, it is necessary to deploy some evaluative concepts: efficiency/effectiveness, and legitimacy. These normative concepts are basic elements which facilitate a critical examination of the fairness and effectiveness of the responses to transnational crime. This is because responding to transnational crime involves the development of transnational relationships which then result in potential clashes of national interests and clashes of values. For example, with regard to clashes of national interests, Britain may ask Vietnam to cooperate in an investigation of a suspect, but Vietnam might refuse because this person possesses sensitive information about Vietnam. To commit to such an investigation might then compromise Vietnam’s national interests. Similarly with regard to human rights, Britain may request Vietnam to provide an arrestee with detention conditions for which it has no capacity, or to allow for instant access to the lawyer in circumstances that are not permitted in Vietnamese legislation. Conversely, Vietnam may seek assistance with crimes which are viewed as legitimate political activities in Britain. Therefore, these critical concepts are introduced briefly below, and are returned to in more detail in Chapter Four.

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<sup>30</sup> Dolowitz, D. and Marsh, D., ‘Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making’ (2000) 13(1) *Governance: An International Journal of Policy and Administration* 5, 12

<sup>31</sup> This point will be explored in chapter 4

### 1.3.1. Efficiency/Effectiveness

In terms of system analysis, effectiveness means task performance that satisfies goal matching, while efficiency is defined in terms of processing costs.<sup>32</sup> Specifically, for the area of policing, these fundamental concepts of efficiency and effectiveness are defined in terms of the relationship between inputs and outputs and their relative processing costs that express ‘Value For Money’ in the management of resources.<sup>33</sup> Although effectiveness and efficiency seem to be similar, there exists a difference between them. Effectiveness is achieving the right goal, for example protecting public safety, whereas efficiency is doing things right like protecting public safety at optimum cost.<sup>34</sup> Moreover, 'while effectiveness is determined by the degree to which it [a specific organization] realizes its goals, efficiency is measured by the amount of resources used to produce a unit of output.'<sup>35</sup> Efficiency and effectiveness are intertwined through the relationship between the allocation of resources and the delivery of service which can be measured by the cost effectiveness of activities and quality of service to obtain policing objectives. A criminal investigative operation that might be successfully completed with evidence collection and arrest could be inefficient, if a number of officers and the cost of the operation were greater than expected. In practice, different styles of policing are applied. These models are: community policing; problem-oriented policing; and deterrence policing. Each model of policing expresses a level of appropriateness in effectiveness/efficiency, reflecting differences in policies, performance standards and style of operations based on the priority and activities as well as available resources of specific societies. Therefore, for measurement of effective policing, two main aspects - policing outcomes and the levels of quality of police service - are usually examined.

### 1.3.2. Legitimacy

According to David Beetham, the legitimacy or rightfulness of political authority comprises three factors: legality, normative justifiability and legitimation. For power to be fully legitimate, three conditions are required: conformity to established rules; the justifiability of the rules by reference to shared beliefs; the express consent of the

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<sup>32</sup> Skogan, W., ‘Efficiency and Effectiveness in the Big-City Police Departments’ (1976) May/June Public Administration Review 278

<sup>33</sup> Drake, L. and Simper, R., ‘The Measurement of Police Force Efficiency: An Assessment of UK Home Office Policy’ (2005) 23(4) Contemporary Economic Policy 465

<sup>34</sup> Bayley, D., *Police for the future* (New York: Oxford University Press 1994) 79

<sup>35</sup> Etzioni, A., *Modern Organisation* (New Jersey: Prentice-Hall 1964) 8

subordinate, or of the most significant among them, to the particular relations of power.<sup>36</sup> For policing activities to be considered as legitimate, it is required: first, that policing power is exercised according to established law; second, that there is consensual obedience and cooperation from the public, and third, that this power has public recognition and affirmation.

In addition, one important aspect of legitimacy is the rule of law. According to the leading British theorist, Albert Venn Dicey,<sup>37</sup> the core of ‘the rule of law’ is that government power ought to be exercised according to the rule of law, with equality before the law, and should be used only in ways which respect the deep attachment of the law for the protection of individual freedom. According to Rachel Kleinfeld Belton, ‘the importance of human rights in Dicey’s first modern conception of the term, which lauds the common law as a way of ensuring that individual rights are not only established but also enforced.’<sup>38</sup> Therefore, the rule of law is essential for the protection of people’s rights and the assurance of limited and accountable government. For example, it is a matter of not only how the police and its power are established, but also whether their activities within foreign jurisdictions are accepted by the public. To achieve this, it is necessary to develop an independent and transparent judiciary that plays an important role in maintaining public confidence by subjecting police to the law.<sup>39</sup> It requires clarity of law, so that the police clearly show they are acting within the law and observing human rights.

There is a close relationship between effectiveness and legitimacy. ‘Success will bring the legitimacy to the police in the eye of the public.’<sup>40</sup> Therefore, there is a need to observe both effectiveness and legitimacy in responding to transnational crime.

#### **1.4. The Originality of the Thesis**

The originality of this thesis resides in the following features.

First, the thesis makes a substantive advance in the existing literature. The thesis looks at a specific issue that nobody has undertaken precisely before. Existing literature about Vietnam does not cover the issue of transnational policing in Vietnam. To illustrate

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<sup>36</sup> Beetham, D., *The Legitimation of Power* (Palgrave Macmillan 1991) 19

<sup>37</sup> Dicey, A., *Introduction to the study of the law of the Constitution* (London: Macmillan 1959) 188, 205

<sup>38</sup> Belton, R., *Competing Definition of the Rule of Law: Implications for Practitioners* (Carnegie Endowment For International Peace 2005) 14

<sup>39</sup> The Commonwealth Charter (March 2013)

<sup>40</sup> Ozdemir, H., ‘Compstat: Strategic Police Management for Effective Crime Deterrence in New York City’, IPES/DCAF Working Paper No. 30, March 2011, page 6



this, the thesis discusses the main arguments that deal with the issue of effectiveness and legitimacy of policing system for the investigation of transnational crime in Vietnam. This issue is worth attention in the context where there are significant changes and transformation in national governance in general and policing in particular following the impacts of globalization. There may be some contradictions or tensions that have occurred during transnational policing practices in Vietnam that need to be solved by considering the international principles of effectiveness and legitimacy such as the rule of law and human rights. Some analyses, including *Issues in Transnational Policing*,<sup>41</sup> and *COPS across borders: The internationalization of U.S. criminal law enforcement*<sup>42</sup> analyze the process of transnational policing and international law enforcement in a specific national jurisdiction. But, these books are not specifically about Vietnam.

Moreover, this study builds on, and contributes to, existing literature in transnational policing that, according to James Sheptycki, does not tell a 'full story', because most papers have not placed a process of transnationalization central to their analysis while considering the effect of globalization and economic liberalisation.<sup>43</sup> There are a number of scholarly analyses on transnational policing, including research of the role of supra-national entities in relation to the fight against transnational crime are closely related to the topic of this thesis, for example, *Policing across the World: Issues for the twenty-first century*,<sup>44</sup> and *Policing the World: Interpol and the Politics of International Police Cooperation*,<sup>45</sup> as well as *In Search of Transnational Policing*.<sup>46</sup> Although these works are 'intended to help law enforcement agencies reduce, transcend or circumvent frictions generated by conflicting sovereignties, political tensions and differences among law enforcement systems'<sup>47</sup>, there has not been an extended study of effectiveness and legitimacy of policing system for the investigation of transnational crime. These sources are also descriptive rather than including normative approaches

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<sup>41</sup> Sheptycki, J., *Issues in Transnational policing* (Routledge London and New York 2000)

<sup>42</sup> Nadelmann, A. E., *Cops Across Borders: The internationalization of U.S. Criminal Law Enforcement* (Pennsylvania: The Pennsylvania State University Press 1993)

<sup>43</sup> Sheptycki, J., 'Transnational Policing' (2005) Vol.1 The Canadian Review of Policing Research 2

<sup>44</sup> Mawby, R., *Policing Across the World: Issue for the Twenty-first Century* (University College of London Press, 1999)

<sup>45</sup> Anderson, M., *Policing the World: Interpol and the Politics of International Police Cooperation* (Oxford: Clarendon Press 1989)

<sup>46</sup> Sheptycki, J., *Issues in Transnational policing* (London: Routledge 2000)

<sup>47</sup> Nadelmann, A. E., *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (Pennsylvania: The Pennsylvania State University Press 1993) 10

which examine how to ensure effectiveness and legitimacy in the responses to transnational crime by specific countries in the context of transnationalization and globalization.

Undeniably, there is limited literature about trans-border crimes in Vietnam. In recent years, some literature on policing has been written in Vietnam, for example, *Bao Ve An Ninh Quoc Gia, Trat Tu An Toan Xa Hoi Trong Tinh Hinh Moi - Protecting National Security, Social Order and Public Safety in the New Context*.<sup>48</sup> However, most of these works are prone to describe the evolution of a specific type of transnational crime, and to examine the surface of transnational policing, instead of the aspects of effectiveness and legitimacy of responses to transnational crime consistent with human right standards, a proper system of police accountability as well as independent judicial authority while interacting with other foreign jurisdictions or supra-national entities. In addition, some background literature that is about policing, politics, and modernity does not cover exactly the issue. In this regard, numerous studies, such as *Van De Xay Dung Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Viet Nam Hien nay – Issues on Building the Rule of Law in the Socialist State of Vietnam Nowadays*;<sup>49</sup> *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam*;<sup>50</sup> *Vietnam and the Rule of Law*,<sup>51</sup> and *Rethinking Vietnam*;<sup>52</sup> *He Thong Tu Phap va Cai Cach Tu Phap o Viet Nam Hien Nay – Justice System and Judicial Reform in Vietnam Nowadays*<sup>53</sup> have identified and highlighted the process of renovation and legal reform of Vietnam. However, limited attention has been paid to the issue of the investigation of transnational crime consistent with the rule of law and human rights. This study provides additional insight into frictions or tension between development of transnational policing and national interest protection, and the impacts of human rights standards.

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<sup>48</sup> Nguyen Xuan Yem, *Bao Ve An Ninh Quoc Gia, Trat Tu An Toan Xa Hoi Trong Tinh Hinh Moi - Protecting National Security, Social Order and Public Safety in the New Context*-, (People's Public Security Publishing House 2008)

<sup>49</sup> Tran Thanh, 'Van de Xay dung Nha nuoc Phap quyen Xa Hoi Chu Nghia Viet Nam Hien nay - Issues on Building the Rule of Law in the Socialist State of Vietnam Nowadays-' (2008) 4(203) Tap Chi Triet Hoc (The Philosophy Journal) 32, 36

<sup>50</sup> Balme, S. and Sidel, M., *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (New York: Palgrave Macmillan 2006)

<sup>51</sup> Thayer, C. and Marr, D., *Vietnam and Rule of Law* (Australia: Panther Publishing and Printing 1993)

<sup>52</sup> McCargo, D., *Rethinking Vietnam* (New York: Routledge 2004)

<sup>53</sup> Dao Tri Uc, '*He thong Tu phap va Cai cach Tu phap o Viet Nam Hien nay - Justice System and Judicial Reform in Vietnam Nowadays*-' (Social Science Publishing House 2002)

Next, most existing literature about Vietnamese issues and context is written by Western authors. For example, *Borrowing Court System: The Experience of Socialist Vietnam*,<sup>54</sup> that identifies and explores tensions manifest during reshaping of the court system from being a political institution into becoming as legal one was written by Professor Penelope Nicholson.<sup>55</sup> This thesis takes a more Vietnamese focus.

Second, the thesis is conducted with distinctive methodological strategies that include qualitative methods. It will generate data, and no one has done this before in Vietnam. The empirical research in this thesis is developed by the researcher who combines his experience in Vietnam with the existing literature to further develop the thesis. The data that are obtained from interviews with a wide range of individuals both in Vietnam and the United Kingdom, together with inputs by representatives of international organization make the study distinct from others on a similar theme. Interview data are innovative and add originality to the thesis. It is more important than the time taken and the footnotes used may suggest.

Third, the research has some comparisons with England and Wales, and ASEAN. These comparisons are undertaken to allow policy transfer. No previous study has made this comparison.

Finally, since this thesis deals with the issue of transnational crime investigation, the result of this thesis could be transferred to other countries, especially those who are integrating into the international community and have similar political, legal and economic conditions.

## **1.5. Overview of the Thesis Structure**

To answer the foregoing thesis questions that are mentioned in section 1.2, the thesis structure is organized as follows.

Chapter Two discusses the methodologies which are used to undertake this thesis. Specifically, a number of research methods such as qualitative interviews will be indicated. There will be an explanation of why these methodology strategies are selected. How do they work with regard to the aims and objective of this research? In fact, are they effective in generating new data to add to the thesis? Therefore, some reflections by the

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<sup>54</sup> Nicholson, P., *Borrowing Court System: The Experience of Socialist of Vietnam* (Martinus Nijhoff Publishers 2007)

<sup>55</sup> Director of Asian Law Centre, Melbourne Law School.

researcher will be given to answer whether the research has selected and applied appropriate methodologies to conduct the research.

Chapter Three discusses the phenomenon of transnational crime and its challenges for policing. It explores the nature of transnational crime and its causes and harms in order to answer the question of whether this type of crime as a phenomenon is dealt with efficiently and appropriately by Vietnam's policing. Is it the amount of crime or type of crime? Is the inability of the police or of the state to respond due to lack of expertise or resources, or the impact of corruption? In summary, this chapter will conduct a literature review survey regarding transnational crime in general and especially in the context of Vietnam.

Chapter Four focuses on discussion of the conceptual framework to assess an 'appropriate' transnational policing system. In this sense, the primary study of this chapter is about ethical values and contexts which will be basis for other further critic issues in chapters Five, Six and Seven. The chapter will discuss ethical values of the effectiveness and legitimacy of an appropriate transnational policing in Vietnam via factors of culture and resources. By comparison with international standards, the relation between transnational policing and human rights as well as the process of transnational policing, will be examined following the analysis of political, judicial and economic conditions and the culture of Vietnam with the issues of human right and sovereignty. As a consequence, the main contents of the values of legitimacy, effectiveness and appropriateness of transnational policing will be indicated with a view to identifying potential gaps between Vietnam practices and international standards of effectiveness and legitimacy in the application of transnational policing. Therefore, the questions of whether and how transnational policing is acceptable will be addressed.

Chapter Five focuses on policing organizations dealing with transnational crime in Vietnam. Within this descriptive analysis, the task and responsibilities of different police forces and units will be revealed and compared with other relevant judicial agencies which deal with transnational crime. As a consequence, a critical analysis of the weaknesses and strengths of the structure of the police force, prescribed by the existing legislation, will be carried out to explore to what extent the fight against transnational crime is successful in Vietnam. This chapter will clarify why the police system in Vietnam follows a militaristic and centralized structure. In this connection, the effectiveness and fairness of the system's transnational policing activities will be examined in conjunction

with political and administrative task. The content of this chapter will be also informed by the results of interviews.

Chapter Six explores why it is important to develop transnational criminal law to tackle transnational crime. In this chapter, the designation of offences will be analyzed in order to answer the question of whether the available set of offences in criminal law help or hinder the police in the fight against transnational crime. Does Vietnamese criminal law in comparison with international standards have an appropriate set of designated offences to cover all wrongdoing which occurs transnationally? Are those crimes or offences worded and conceptualized in ways that ensure efficiency, effectiveness and legitimacy? This can relate to jurisdictional issues. Whether crime which happens in other countries can be crime in Vietnam? Therefore, the question of how far existing criminal law is effective and fair in terms of investigating transnational crime will be answered. Analysis of this chapter will be informed by interview data.

Chapter Seven examines the powers of police prescribed by law in dealing with transnational crime. By looking at the process in which transnational crime is handled by the police, and the methods and abilities of the police, it is indicated whether the police are empowered enough to deal with transnational crime. As a consequence, legislation for empowering the police will be analyzed. This chapter will explore the legitimacy and sufficiency of powers of the police in accordance of the existing legislation in Vietnam and international standards, and England and Wales comparisons. This chapter's argument will be further informed by fieldwork data.

Chapter Eight defines and draws a conclusion as to whether it is necessary to reform the law, which includes criminal law, criminal procedure law, and other methods of governance with regard to transnational crime. Is the reform a better way to be in accordance with, as well as to enhance, effectiveness/efficiency and legitimacy of the struggle against transnational crime while taking due account of the Vietnamese settings and values such as national sovereignty, politics/cultures and economics?

## Chapter 2: Methodologies

### 2.1. Overall Approaches

This chapter focuses on the methodologies which are used to undertake this thesis. In this chapter, there are discussions about the different ways it was possible to approach this research, as well as why and how the main methods chosen to achieve the aims and objectives of the research were carried out.

In order to conduct this research, a socio-legal approach is used as the model. Socio-legal study includes library based theoretical work and empirical work that can feed directly into the policy-making process. In addition, theoretical perspectives and methodologies are informed by research undertaken in other disciplines, bridging the divide between law, sociology, social policy and economy.<sup>56</sup>

The reasons for the use of this multiple approach are as follows. First, socio-legal study is described as ‘an applied field.... in which inviolate law is related to social context.’<sup>57</sup> Therefore, this approach allows understanding of law and its implementation in society, and so the study of laws and legal institutions regarding police power of responding to transnational crime will be conducted from the perspectives of both law and the social sciences.<sup>58</sup> As a result, this research will reveal conflicts and limits of laws and government regulation relating to the structures and powers of police in the area of the investigation of transnational crime. Because of this extra insight, as Roger Cotterrell has observed, ‘Socio-legal scholarship in the broadest sense is the most important scholarship presently being undertaken in the legal world. Its importance is not only in what it has achieved, but also in what it promises.’<sup>59</sup> Thus, the purpose of socio-legal studies in this research indicates that the study of legal power and institutions of the police is to act as a means to assess the effectiveness and legitimacy of the policing system for the investigation of transnational crime, which not only helps understand the system better, but may in turn suggest to Vietnamese law and policy makers ways to reform or improve wherever necessary.

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<sup>56</sup> Stychin, C. and Mulcahy, L., *Legal Methods: Text and Materials* (London: Sweet & Maxwell 2003) 11

<sup>57</sup> Fitzpatrick, P., ‘Distant Relations: The New Constructionism in Critical and Socio-Legal Studies’ in Thomas, P. (eds), *Socio-Legal Studies* (Dartmouth Publishing Company Limited 1997) 148

<sup>58</sup> Harris, D., ‘The Development of Socio-Legal Studies in the United Kingdom’ (1983) 2 *Legal Studies* 315

<sup>59</sup> Cotterrell, R., *Law’s Community* (Oxford: Clarendon Press 1995) 314

There are three main components to the socio-legal approach in this thesis: documentary sources, fieldwork research, and policy transfer. First, this thesis is mainly carried out by library-based research mainly into legal issues and policing literature. In other words, literature reviews and critical analysis, data collection and synthetic collation as well as normative study of typical cases from official reports, records and archive systems are conducted.

In addition, fieldwork data are compiled by way of interviews with key individuals, who have engaged with the transnational policing tasks in Vietnam and the United Kingdom, in order to supplement findings that are drawn during the initial research process. This fieldwork activity is conducted using qualitative approach and strategies.

Furthermore, a comparative analysis of structure and legal powers of the police, and the law on transnational crime, with a focus on the model adopted in England and Wales, will provide additional insights into the strengths and weakness of the Vietnamese policing system for the investigation of transnational crime, in terms of its effectiveness and fairness. However, this thesis does not undertake a comprehensive comparative analysis as such. Rather it adopts a policy transfer process approach. Based on the comparative analysis, and drawing lessons from comparison with England and Wales, possible policy transfer will be considered to suggest appropriate solutions for Vietnam's context. The researcher will explain the difference between comparative analysis and policy transfer later on in this chapter.

## **2.2. Documentary Sources**

In writing this thesis, documentary sources are used as a principal research tool to study the policing system for the investigation of transnational crime in order to clarify its effectiveness and legitimacy.<sup>60</sup> The use of documentary methods means the analysis of documents that contain information about the phenomenon the researcher wishes to study.<sup>61</sup> This documentary method is employed as a technique for categorization, investigation, interpretation and identification of physical sources, most commonly written documents, whether in the private or public domain.<sup>62</sup> The reason for documentary research methods to be used in this thesis is that documentary sources are

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<sup>60</sup> Scott, J., *A Matter of Record* (Cambridge: Polity Press 1990) 1

<sup>61</sup> Bailey, K., *Methods of Social Research* (New York: The Free Press 1994) 294

<sup>62</sup> Payne, G and Payne, J., *Key Concepts in Social Research* (London: Sage 2004) 60

not only more cost effective than other methods such as participant observation, but also provide access to aspects of social settings and their inhabitants that are simply unreachable through any other means, especially in the areas of criminology and criminal justice studies.<sup>63</sup> Moreover, this technique facilitates further understanding through the ability to situate contemporary accounts within an historical context and within the accumulated body of knowledge.<sup>64</sup>

Consideration of documentary sources was the starting point for this research.<sup>65</sup> In general, for the study of this research, a wide range of documentary sources was categorized as relevant and fell into two types: primary documentary sources and secondary documentary sources. Primary documentary sources are the authoritative sources. This kind of document can include statutes, laws, official reports of parliamentary proceedings, judgments of courts, command papers, and government statements about crimes or transnational crime. An example of this type is the Vietnam Penal Code 1999 (VPC 1999). According to Cindy Hill, primary documentary sources such as court and regulatory proceedings are currently one of the best sources of useful data on transnational crime.<sup>66</sup> Secondary documentary sources such as scholarly books contain analysis of primary sources. This type of document can include academic journal articles, books, scientific research publications, and published analyses. In other words, that research is conducted by other researchers. According to Frank E. Hagan, primary documentary sources refer to raw data that are unaccompanied by any analysis or interpretation whereas secondary documentary sources consist of analyses, syntheses, and evaluations of the information.<sup>67</sup> Both primary documentary sources (authoritative/original) and secondary documentary sources (commentaries) should be considered as relevant for the study of this thesis. Primary documentary sources provide reference points to be discussed, whereas secondary literature leads a researcher into a survey in which he can locate his work and show how it is original or how it otherwise relates to other work.

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<sup>63</sup> Berg, B., *Qualitative Research Methods for the Social Science* (Boston: Allyn and Bacon) 189

<sup>64</sup> May, T., *Social Research: Issues, Methods and Process* (London: Open University Press 2011) 191

<sup>65</sup> Noaks, L. and Wincup, E., *Criminological research: Understanding Qualitative Methods* (London: Sage 2004) 106

<sup>66</sup> Hill, C., 'Measuring Transnational Crime' in Philip Reichel (eds), *Handbook of Transnational Crime & Justice* (Thousand Oaks: Sage 2005) 49

<sup>67</sup> Hagan, F., *Research Methods in Criminal Justice and Criminology* (Boston: Allyn and Bacon 2000) 240



The main ways to get access to documentary sources are through either government databases, public libraries, or internet websites. The documents that are available from databases and libraries are constructed systematically and according to established standards, although sometimes access to some records may be restricted to certain groups, for example access to law enforcement records.<sup>68</sup> Moreover, there are more and more documents nowadays posted on internet. Internet websites provide fast and updated information on. It is cheaper to publish and make documents available to the public. Media sources such as newspapers and magazines, which are nowadays commonly published on the internet, also provide a documentary source for qualitative research.<sup>69</sup> Due to the nature of this research, the research will not only generate interpretative accounts of transnational crime acts, investigations, and so on, but also seeks to understand the public's assessment of the topic which is very important to evaluate the effectiveness and legitimacy of policing system for the investigation of transnational crime in Vietnam. Therefore, webpages that contain several kinds of documentary sources from primary documentary sources to secondary documentary sources will be explored for this research.

Handling documentary sources like other areas of social research needs to follow scientific general principles. There are four criteria to assess the quality of documentary sources: authenticity, credibility, representativeness and meaning.<sup>70</sup> However, there are various types of documents with different origins and nature and each form of document requires a different approach.<sup>71</sup> In this regard, this thesis mainly explores the following documentary sources in developing the research.

In terms of primary documentary sources, these documents include laws, government papers (such as police reports, crime statistics) and court judgments. 'The written records and results of political rule, maintained in archives and employed in the formulation and implementation of government policy, are very much the product of the emergence of the modern state.'<sup>72</sup> All these documents 'often convey important and useful information for a researcher's effective use'.<sup>73</sup> Moreover, these documents can generally

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<sup>68</sup> Berg, B., *Qualitative Research Methods for the Social Science* (Boston: Allyn and Bacon) 191

<sup>69</sup> Noaks, L. and Wincup, E., *Criminological research: Understanding Qualitative Methods* (London: Sage 2004) 113

<sup>70</sup> Scott, J., *A Matter of Record* (Cambridge: Polity Press 1990) 19

<sup>71</sup> Mogalakwe, M., 'The Use of Documentary Research Methods in Social Research' (2006) 10(1) *African Sociological Review* 221, 224

<sup>72</sup> Scott, J., *A Matter of Record* (Cambridge: Polity Press 1990) 63

<sup>73</sup> Berg, B., *Qualitative Research Methods for the Social Science* (Boston: Allyn and Bacon) 194

be available from open sources such as public libraries or internet postings, for example laws and their interpretation may be obtained from many public libraries such as the National Library of Vietnam or downloaded from websites, such as Official Website of the Vietnamese Government.<sup>74</sup> Specifically, the researcher found the National Library of Vietnam a very useful source to search for old versions of legal documents, whereas for existing legislation, its drafts and debates were usually found at the website of the National Assembly of Vietnam or the legal databases of the Vietnamese Ministry of Justice.<sup>75</sup> However, to get access to those documents which are classified under governmental regulation for the use of limited audiences, requests must be made. Case files or other policing documents such as crime reports may be found in the libraries of police academies or in the archive system of the Ministry of Public Security. In fact, as a police officer, the researcher was allowed to search for police guidance documents or annual progress reports of the police at the library of People's Police Academy,<sup>76</sup> as well as to find case files and court judgments at the Police Records System.<sup>77</sup>

There are varied reasons to limit access to these primary documentary sources in Vietnam. First, for legislation, it is possible to obtain laws via different research 'gates' such as public libraries, but their interpretation and guidance documentation, which are necessary to implement these laws according to the nature of Vietnamese legal system are sometimes harder to find. These supporting interpretations and guidance documents are sometimes not issued to the public. Thus, one may not be able to gain a full picture in terms of legislation. Nonetheless, because of the nature of the codification system that the Vietnam legal system follows, court case judgments are not an important source. Second, there may be several issues concerning the availability of government papers. Because of Vietnam's relatively low income, there are few publications issued on paper. Likewise, few government agencies have websites which can be used to publish government policies and papers. Besides, a culture of secrecy is a more important factor that hinders the availability of government papers. This culture of secrecy originates from historical experiences in which Vietnam underwent several wars or conflicts with outsiders. This

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<sup>74</sup> See more at Official Website of the National Library of Vietnam, <<http://nlv.gov.vn/ef/en/>>; Official Website of the Vietnam Government, <<http://www.chinhphu.vn/portal/page/portal/chinhphu/trangchu>>

<sup>75</sup> Official Website of the National Assembly of Vietnam, <<http://quochoi.vn/Pages/default.aspx>>; The legal databases of Ministry of Justice, <<http://www.moj.gov.vn/pages/vbpq.aspx>>

<sup>76</sup> The library is located at People's Police Academy, address: Co Nhue, Tu Liem, Hanoi, Vietnam

<sup>77</sup> This police record system is located at 54 Tran Hung Dao street, Hanoi, Vietnam

experience shaped the way the country manages information - a strong emphasis on secrecy is seen as vital to national security and there is great concern that state secrets might be used by countries seeking to oppose or destabilise Vietnam. In fact, it is sometimes difficult to obtain government document sources due to the document containing some sensitive content such as those relating to national security. Several issues such as operational organization, equipment and combat planning of the police for instance have never been opened to the public, according to broad regulations of the Vietnamese legislation on state secrets protection.<sup>78</sup> Vietnam, as a One-Party regime, does not always have open debates between the government and its critics. To protect its interest, the government may put these issues in publications and only open them within the ruling Party, but not to the public. Thus, to some extent there is less critical debate in Vietnam than in the United Kingdom. Moreover, in regard to the usage of government official documents, it is also necessary for researchers to bear in mind that government reports may not be entirely neutral, because 'they are shaped by the political context in which they are produced and by the cultural and ideological assumptions that lie behind it.'<sup>79</sup> Publications of those that are in line with governmental policies are often more openly available.

In terms of secondary documentary sources, this research has used non-governmental studies, scholarly publications, and books both by Vietnamese and non-Vietnamese authors, and all kinds of documentary sources regarding to publications of law and policing available from the British library network and international domain such as ASEAN, UNODC and Interpol. These kinds of documents play a very important role in this research, and provide rich information about theories and international laws and even case studies to investigate and critique the thesis topics related to aspects of effectiveness and legitimacy of the policing system. These documentary sources can create a broad view on researching the issues that the thesis is pursuing.

But it is easier to get access to these secondary documentary sources in the United Kingdom than in Vietnam. Taking academic research or academic journals/books as examples, on the one hand, the documents are fragmented in storage in Vietnam. Some documents may be missing, for example books in library may be damaged or incomplete due to careless use. On the other hand, like primary sources, there are not many critical

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<sup>78</sup> Ordinance on State Secrets Protection, No. 30/2000/PL-UBTVQH10, issued on 28 Dec. 2000, article 6

<sup>79</sup> Scott, J., *A Matter of Record* (Cambridge: Polity Press 1990) 60

publications because of the nature of sensitive issues that people do not want to be seen as opposing the government's interests. Even, in cases such as records of conference regarding policing issues, speeches are not recorded or documented for later use. Speakers may not want to be recorded or documented due to their habit or preference of being able to change later what was said. Besides, for Vietnam, money for research as well as their publication is an issue. Due to the shortage of finance and resources to produce documents, there are not many publications available for researchers, especially in the field of criminal justice and policing. There is limited publishing of expensive books because there is insufficient market for those publications. Not many people can afford to buy them. Therefore, it is not easy to find relevant documents.

In summary, a culture of secrecy and other conditions in Vietnam are important factors which determine the availability of documentary sources in Vietnam.

### **2.3. Qualitative Research Data**

As explained earlier, documentary sources are an appropriate method for the study of this thesis. However, there are some limitations in using documentary sources for the study of this thesis as is commonly the situation: 'Naturally, not all research questions can be answered through the use of archival data or at least not archival data alone.'<sup>80</sup> Not only is there the issue of access to the documentary sources, but also the facts that are used to critique and understand the research questions sometimes are not fully available in the written documents. Some documents contain only limited information or partial or biased information. Therefore, to attain the objectives of this thesis, original fieldwork data is needed beyond documentary sources. Specifically, this fieldwork will inform those chapters which focus on Vietnam's laws and practices in chapters Five, Six and Seven.

#### **2.3.1. Why Was a Qualitative Research Approach Chosen?**

In this connection, a qualitative approach is a useful tool to explore the effectiveness and legitimacy of a policing system for the investigation of transnational crime in Vietnam. Qualitative fieldwork is chosen as an important method of generating data, instead of quantitative data gathering. The reasons are as follows.

First, this thesis involves some abstract discussion which is about the effectiveness and fairness of the investigation of transnational crime. The selection of an applied

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<sup>80</sup> Berg, B., *Qualitative Research Methods for The Social Sciences* (Boston: Allyn and Bacon 2001) 195

research method depends on what the thesis is trying to find out. Qualitative research focuses on exploring the perceptions of people,<sup>81</sup> and this thesis requires an evaluation of legal application and an understanding of those laws in the investigation of transnational crime, which is not documented statistically. There is a need to know the views of different people, including law enforcement officials, legislators, policy makers and others who may give comments on how the law is understood and applied. The meaning of social phenomena could be better explored through narrated perceptions and experiences.<sup>82</sup> Thus, subjective evaluations that are in some sense perceptions from their own actions are considered as primary sources to explore the meanings and limitations of applied laws and practices. Moreover, the nature of data taken from qualitative research is rich and deep for the interpretation of actions.<sup>83</sup> In addition, qualitative research allows investigators the chance to alter and even add data collection processes during the research in order to focus upon issues that were not previously assumed to be of important at the time of the beginning of the research.<sup>84</sup>

Second, there is an issue of sampling. It is not easy to find a large amount of quantitative data regarding transnational crime. Transnational crime cases are not as many as domestic crimes such as theft or murder. In the meantime, there is no official measurement procedure to produce statistics on transnational crime in Vietnam. Thus, qualitative research, which usually emphasizes practices and meanings rather than quantification in the collection and analysis of data, is more feasible for this thesis.<sup>85</sup>

Third, for this thesis, there is insufficient time to undertake quantitative research. Moreover, it is difficult to access official records. At the same time, Lesley Noaks and Emma Wincup have suggested that qualitative should not be seen as a second best or a kind of fall back to be employed for critical assessment of some areas where there is no quantitative data available.<sup>86</sup>

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<sup>81</sup> Silverman, D., 'Quantitative/Qualitative' in Jenks C. (eds), *Core Sociological Dichotomies* (London: Sage 1998) 78

<sup>82</sup> Malterud, K., 'Qualitative Research: Standards, Challenges, and Guidelines' (2001) 358 *The Lancet* 483

<sup>83</sup> Bryman, A., *Quantity and Quality in Social Research* (Oxford: Routledge 1998) 94

<sup>84</sup> Hagan, F., *Research Methods in Criminal Justice and Criminology* (Boston: Allyn and Bacon 2000) 19

<sup>85</sup> Bryman, A., *Social Research Methods* (Oxford: Oxford University Press 2008) 366

<sup>86</sup> Noaks, L. and Wincup, E., *Criminological research: Understanding Qualitative Methods* (London: Sage 2004) 11

### 2.3.2. In-Depth, Face to Face and Semi-Structured Interviews

Qualitative research potentially includes several diverse research methods such as participatory observation, focus group, and qualitative interviewing, to name the main methods.<sup>87</sup> This research has chosen to select the qualitative interviewing as the means of finding out how the policing system for the investigation of transnational crime works, in terms of legitimacy and effectiveness. The reasons for this selection are as follows.

First, the characteristics of qualitative interviewing, which maintains and generates conversations with people on a specific topic or range of topics, can yield rich insights into people's biographies, experiences, opinions, values, aspirations, attitudes and feelings.<sup>88</sup> According to Steinar Kvale, the purpose of the qualitative research interview is to describe and understand the meanings of central themes in the life world of the subjects; a core task in an interview is to understand the meaning of what the interviewees say.<sup>89</sup> This will help to describe and understand opinions or evaluations, especially regarding the powers and structure of the police in legal system for the investigation of transnational crime that can be obtained from perceptions and experience of individuals involved. Besides, if it is agreed by interviewees, interviews provide the opportunity for interviewers to make use of audio-visual aids for the research, for example the use of tape recorder during the interview, in order to ensure the quality of interview as well keep a record of it for later analysis.

Second, for data collection fieldwork for this thesis, interviewing is probably the most appropriate approach. Interviewing is preferable to participant observation, which 'refers to a variety of strategies in which the researcher studies a group in its natural setting by observing its activities and, to varying degrees, participating in its activities.'<sup>90</sup> In this sense, the researcher immerses himself in the day to day activities of the people whom the researcher is attempting to understand.<sup>91</sup> When the researcher attends a scenario, he may have impacts on how people behave. According to Alan Bryman, 'people's knowledge of the fact that they are being observed may make them behave less

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<sup>87</sup> Bryman, A., *Social Research Methods* (Oxford: Oxford University Press 2008) 369

<sup>88</sup> May, T., *Social Research: Issues, Methods and Process* (London: Open University Press, 2001) 120

<sup>89</sup> Kvale, S., *Interview: An Introduction to Qualitative Research Interviewing* (London: Sage 1996) 31

<sup>90</sup> Hagan, F., *Research Methods in Criminal Justice and Criminology* (Boston: Allyn and Bacon 2000) 211

<sup>91</sup> May, T., *Social Research: Issues, Methods and Process* (London: Open University Press, 2001) 148

naturally.<sup>92</sup> The researcher also has some problem when he attends to observe other people. For example, it may require the researcher to spend an extended period of time in the social life of those he studies while the researcher only has a limited period of less than three months to do his whole fieldwork study.

With regard to the focus group method, there are also difficulties to apply it to collect data for this thesis, because the focus group method is ‘an interview with several people on a specific topic or issue,’<sup>93</sup> not an individual interview. There may arise problems of group effects. People may find it difficult to speak their minds in front of other people, especially to give criticisms about their organization. They may feel that they are doing something wrong or will suffer retribution. Therefore, the researcher would not get sufficient facts or opinions. Thus, in group contexts, the ‘participant may be more prone to expressing culturally expected views than in individual interviews.’<sup>94</sup> Participants may be influenced by the norms of their peer group when assessing the effectiveness and legitimacy of the policing system for the investigation of transnational crime.

As a result, qualitative interviewing is more suitable for collecting data for this thesis. However, there are different types of qualitative research interview. This thesis employed the in-depth, face to face, semi-structured interview. The explanation for this choice is as follows.

First, the semi-structured interview is a useful tool for this thesis, because it allows the implementation of a number of predetermined questions and/or special topics that are typically asked of an interviewee in a systematic and consistent order, but still allowing freedom to digress.<sup>95</sup> On the one side, it allows interviewees to express their views freely and openly. On the other side, the semi-structured interview has a series of questions that are in general form of an interview schedule but is able to vary questions or change a sequence of interview to suit different patterns of interviewee’s behaviour.<sup>96</sup> (This point will be further discussed at the section 2.3.3.1 with regard to two patterns of interviewee’s behaviour that the researcher faced during his fieldwork). The interview schedule and list of questions that explore the deep meanings and complicated issues help the interviewer

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<sup>92</sup> Bryman, A., *Social Research Methods* (Oxford: Oxford University Press, 2008) 467

<sup>93</sup> *Ibid.*, 473

<sup>94</sup> *Ibid.*, 489

<sup>95</sup> Berg, B., *Qualitative Research Methods for the Social Sciences* (Boston: Allyn and Bacon 2001) 70

<sup>96</sup> Bryman, A., *Social Research Methods* (Oxford: Oxford University Press, 2008) 196

to concentrate on the specific topic that is closely related to the thesis topic on the investigation of transnational crime. Especially, it is helpful to ensure coverage of all 'key issues' even if a limited time is available for each interview.<sup>97</sup> Moreover, to investigate the topic of this thesis, the semi-structured interview provides more benefit than other interview methods such as structured interviews and unstructured interviews, because it gives the researcher opportunity to explore further. The structured interview that is the typical form in survey research provides very little room for participants to express their own opinions on legitimacy and effectiveness of the transnational policing system.<sup>98</sup> In the meantime, the unstructured interview, which typically has only a list of broadly expressed topics or issues that are to be covered, allows interviewees to talk about the policing system for the investigation of transnational crime much less focus.<sup>99</sup> But, due to this open character of the unstructured interview, it may be difficult to standardize and yield findings for this thesis which involves distinct types of participants and topics.

Second, the potential conflicts in regard to effectiveness and legitimacy in the investigation of transnational crime are complex phenomena. They require an analysis and evaluation of laws and practices by participants. Thus, an insightful study of an individual's experiences conducted by in-depth interview is useful to not only describe what they think of the issue, but also to give their own evaluations about why and how the issue in question is processed in the way it is. Moreover, when in-depth interviewing is employed, the meaning of questions can be expanded and tested more deeply. The assumptions that may be proposed by the interviewer can be verified by responses from the interviewee's experiences in detail. In this regard, this kind of interview is excellent for hypothesis-generating or exploratory research about the legal system for the investigation of transnational crime in term of effectiveness and the rule of law.<sup>100</sup> Furthermore, the in-depth interview is a preferred method of research when the research is dealing with sensitive topics such as transnational policing,<sup>101</sup> because the interviewer has the chance to investigate in-depth issues to find out meanings behind the story by

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<sup>97</sup> Hancock, B., *Trent Focus for Research and Development in Primary Health Care: An introduction to qualitative research* (Trent Focus 1998) 10

<sup>98</sup> May, T., *Social Research: Issues, Methods and Process* (London: Open University Press 2001) 125

<sup>99</sup> Bryman, A., *Social Research Methods* (Oxford: Oxford University Press, 2008) 196

<sup>100</sup> Hagan, F., *Research Methods in Criminal Justice and Criminology* (Boston: Allyn and Bacon 2000) 174

<sup>101</sup> Alejandra Gomez-Cespedes, 'Organised Crime in Mexico' in Brookman, F., Noaks, L., and Wincup, E. (eds), *Qualitative Research in Criminology* (Ashgate 1999) 158



probing with follow-up questions which cannot take place in the case of structured interviews. In this case, the researcher asked questions, which are not included in the interview schedule but follow things said by interviewees, in order to get the interviewees to elaborate their answers on specific values of effectiveness and fairness of the Vietnamese transnational policing system. (This issue will be further explained at section 2.3.3.1 on the preparation of interview schedule).

Third, the face to face interview format is chosen to explore perceptions and meanings of conflicts that might have occurred with the values of effectiveness and legitimacy in the course of the investigation of transnational crime that may involve different kinds of people who may not be willing to respond due to the sensitive manner and working regulations. Therefore, the face to face interview is an appropriate way to approach respondents and get a high rate of response more than other methods such as mail survey.<sup>102</sup>

Fourth, this method, in which the interviewer can work face to face with the respondent, will help avoid misunderstanding when conducting the interview because there is a support from context and conversational interaction between interviewee and interviewer. ‘The interview is a stage upon which knowledge is constructed through the interaction of interviewer and interviewee roles.’<sup>103</sup>

For the success of interviews, there is a need to consider a number of factors that may influence the interview strategy. These factors include the characteristics of the research population, the sensitivity of the topic, the location of the interview and time scale.<sup>104</sup> The characteristics of research population may relate to issues of sampling, for example whether the interview involves working with vulnerable groups, whereas the sensitive of topic and the location of the interview and time scale may indicate other ethical issues, for example whether the location of interview enables the interviewee’s own safety and peace of mind while participating and answering frankly during the interview. Thus, all issues such as the development of interview schedule, selection of sampling, conducting of the interview, data transcription and analysis are required to be

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<sup>102</sup> Hagan, F., *Research Methods in Criminal Justice and Criminology* (Boston: Allyn and Bacon 2000) 175

<sup>103</sup> Kvale, S., *Interview: An Introduction to Qualitative Research Interviewing* (London: Sage 1996) 127

<sup>104</sup> Noaks, L. and Wincup, E., *Criminological Research: Understanding Qualitative Methods* (London: Sage 2004) 78

prepared and considered carefully.<sup>105</sup> In other words, the success of the interview strategy is very much subject to how interview data is generated and analyzed. Each of these elements can be explained further as follows.

### **2.3.3. Generating Data**

After the research interview technique was chosen, the researcher adapted the strategy and its processes to generate research data. The main points of this adaptation are as follows.

#### **2.3.3.1. Preparation of the Interview Schedule**

In order to successfully conduct interviews, an interview guide was prepared. Advance preparation is necessary for the interaction of an interview.<sup>106</sup> An interview schedule reveals the topics and their sequence in the interview.<sup>107</sup> In addition, the terms and questions regarding the topics are prepared in easily understandable way with a view to prevent misunderstanding of what is asked of the interviewee. Moreover, with prepared questionnaires, interviews can be standardized. Therefore, for the success of this thesis, the interview schedule consisted of the following sections (the Interview Schedule is reproduced in Appendix 3).

Its first part focused on a limited range of demographic and general career background questions to establish the profile of the interviewee. The remaining part was for open questions. They were questions to identify any possible conflicts with the criteria such as effectiveness, legitimacy and especially protection of human rights. The questions were prepared in the way to encourage respondent to answer in their own words.<sup>108</sup> A list of topics, such as policing structures, criminal law, and police powers that had been identified by the researcher, was raised through questions that helped the interviewer to keep control over the interview.

Aside from these open questions, there were follow-up questions that helped the interviewer investigate in-depth issues following the previous questions and answers, because not all issues could be estimated in advance. Moreover, by asking follow-up

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<sup>105</sup> Hancock, B., *Trent Focus for Research and Development in Primary Health Care: An introduction to qualitative research* (Trent Focus, 1998) 10

<sup>106</sup> Kvale, S., *Interview: An Introduction to Qualitative Research Interviewing* (London: Sage 1996) 126

<sup>107</sup> *Ibid.*, 129

<sup>108</sup> Meadows, K., 'So You Want to Do Research ? 3. An Introduction to Qualitative Methods' (2003) 8(10) *British Journal of Community Nursing* 465

questions such as 'In what ways'...or 'what do you mean by that?', the level of conflicts or comparison of findings with other standards such as effectiveness and legitimacy was considered to determine the impacts or alternative solutions of the conflicts to people and society. For example, the researcher asked the question 'In what ways do you think the police have insufficient training on transnational crime?' in order to encourage interviewees to give reason for their assessment of insufficient training. Probing that issue involves asking follow-up questions to concentrate, expand, clarify or further explain the response given was a way to supplement answers that had not provided enough information for the purposes of the study.<sup>109</sup>

One of main features of the qualitative research method, especially semi-structured interview, is its ability to render rich and deep data. When conducting interviews with different people, these interviewees were asked similar questions in order to make it possible to compare the variety of answers. Actually, as indicated in Appendix 1, there are six different interview schedules. Because the research has six different categories of interviewees, specifically police officers, legal officials, procurators, legislators, lawyers, and foreign experts, six different interview schedules were used to get more specialized information from each category of interviewee. To have a fruitful engagement with these subjects, the researcher did vary the language to suit their own contexts to help them understand and answer the questions. In other words, the researcher varied questions and changed sequences of question to suit to different categories of interviewees. For example, interviewees other than the police usually did not like to answer question about police structure because they did not understand the structure as well as the police did. Therefore, in-depth questions, for example about the working mechanism of investigating agencies, were often not answered by the interviewee. Instead, the researcher moved on to ask next questions. However, despite there being six different interview schedules, they were also structured around the same four themes: demographic information of interviewee, policing structure, criminal law, and criminal justice process. Thus, every interview schedule has four common sections which are the same for every interviewee. In this sense, all interviews were conducted based on the same task, which aims to examine and assess laws, structures and police powers with regard to transnational

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<sup>109</sup> Hagan, F., *Research Methods in Criminal Justice and Criminology* (Boston: Allyn and Bacon 2000) 181

crime investigations. The researcher could compare answers one to other between different categories of interviewees.

Even, in each category of interviewee, the researcher sometimes varied the prepared questions in the way to make the questions suitable for each individual within that category group. But, there was no change to the essence of those questions. Thus, although there were a variety of responses, these responses still answered the points in each set question. The researcher still compared their answers within that category group. For example, in fact, for some police officers who did not like to speak their own views, the researcher asked indirect questions: ‘What do the most people think about the laws on investigative methods which are used in transnational crime investigation, or need to be used?’, then followed up by ‘Is that what you feel too?’ in order to get their own views. In the meantime, other police officers, who were willing to speak on their mind, were asked straightly: What do you think about the laws on investigative methods which are used in transnational crime investigation, or need to be used?’

From the experience of the application of the interview schedule, there seem to be two types of behaviours from respondents whom the researcher interviewed. One type of behaviour is resistance and suspicion. These respondents were very careful with their words, especially any criticisms to the government policy. Moreover, their answers sometimes did not respond directly to the questions of the researcher. Before giving answers, these respondents always required the researcher to explain or repeat questions specifically in order to verify whether there is any hidden reason the researcher did not reveal while asking that questions. In addition, to cope with this type of behaviour, the researcher usually varied his questions or asked more follow-up questions to make clear or confirm ideas. Typical respondents who represent this type of behaviour were often interviewees from the police or those who hold a certain position in the State’s organs such as in the National Assembly. The reason for the appearance of this type of behaviour mainly originates from those interviewees’ own working culture which tends to encourage them to speak in line with government policy and the Party’s lines rather than to criticize the government’s policing system. On the other hand, the other type of behaviour of respondent was open. This type of respondent usually answered straight to the questions. These respondents are mainly individuals who do not work for Vietnamese government agencies, for example lawyers or foreign respondents. Conversation between these respondents and the researcher often lasted longer. There are several reasons for this type of respondent’s behaviour. First, these respondents are knowledgeable about

transnational crime and related issues, and they were keen to talk and spend a long time on the interviews. These respondents seemed pleased to be able to discuss with the research on effectiveness and effectiveness of the policing system. Second, while not many existing forums discuss this topic, the respondents thought the interview organized under this fieldwork was a good chance for them to debate about transnational crime. Specifically, these respondents said they welcomes the research because it was interesting.<sup>110</sup>

### **2.3.3.2. Sampling Strategy**

On the basis of the objectives and structure of this thesis, purposive sampling was selected. Purposive sampling strategies are designed to emphasize understandings of chosen individuals or groups' experience or for developing theories or concepts.<sup>111</sup> In order to have successful interview outcomes that are credible and useful to the thesis, it was necessary to develop a suitable sampling strategy that not only yields or supports findings, but also considers other factors such as time, budget and other resources constrains that might influence the sampling design.<sup>112</sup> In this regard, Kirsti Malterud confirmed that the importance of sampling is closely related to validity.<sup>113</sup> Who becomes a sampling source depends very much on what materials or information the thesis seeks to answer the research questions. The researcher has a background as a police officer, which was itself an issue for selection. A choice in sampling sources initially could be affected by this. So, the researcher did not choose those who were his friends and colleagues. In addition, he also did not select potential respondents from those he has worked with before, or whom he might work in the future.

To conduct qualitative research for this thesis, a research design that followed from the problem and critical issues of the policing system for the investigation of transnational crime was developed.<sup>114</sup> Therefore, practical experiences and observations about laws and practices in the investigation of transnational crime, that were developed through application of investigative powers and the outcome of its use, were to be

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<sup>110</sup> Interviewees IE2, IG6

<sup>111</sup> Denvers, K., and Frankel, R., 'Study Design in Qualitative Research-2: Sampling and Data Collection Strategies' (2000) 13(2) *Education for Health* 263, 264

<sup>112</sup> Patton, M., *Qualitative Research and Evaluation Methods* (Thousand Oaks: Sage 2002)

<sup>113</sup> Malterud, K., 'Qualitative Research: Standards, Challenges, and Guidelines' (2001) 358 *The Lancet* 483

<sup>114</sup> Hagan, F., *Research Methods in Criminal Justice and Criminology* (Boston: Allyn and Bacon 2000) 68

obtained from those whose legal status or work assignment were relevant. These persons helped understand the tension or friction between national interest protection and the implementation of international standards by exploring their experience, attitudes and views.<sup>115</sup> On the one side, these participants were persons such as legislators, investigators, judicial officials, and policy makers who use or have influence on the powers to respond to transnational crime. On the other side, persons such as victims and witnesses were considered to be also relevant in order to give comment on how effectively and fairly the powers and structure for the investigation of transnational crime are performed. However, the knowledge and ability to generalize the issues on the part of the victims and witness and even suspects was likely to be limited. In addition, offenders or victims' involvement in the research required potential consideration of difficult ethical issues.<sup>116</sup> For example, the investigation may give negative effects to the victims by causing them to revisit painful events when some things which have taken place in the past are recalled.<sup>117</sup> Therefore, the lawyers or barristers who acted as their representatives were interviewed instead. The lawyers or defense counsel could present ideas about the application of law and its impacts on the criminals and victims. Conducting interviews with lawyers or defense counsel who have background different from officials made the research richer with a varied range of views which can be compared. Moreover, in order to ensure the objectivity of the research data, some international experts, who are involved transnational policing in Vietnam, but were not under pressure from the Vietnamese political system, were also invited to participate in the interview. In this sense, the sampling selected for this study, which consisted of representatives from various agencies both from inside and outside Vietnam, differs from each other in terms of characteristics and views. In total, there were 32 interviewees.

Since this research purposely chose a sampling strategy to represent a range of characteristics and views that are relevant to understanding the effectiveness and legitimacy of the policing system for the investigation of transnational crime, individuals who were interviewed for this research were not meant to be representative of a population.<sup>118</sup> To some extent, the small number of interviewees gives rise to a problem

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<sup>115</sup> Meadows, K., 'So You Want to Do Research ? 3. An Introduction to Qualitative Methods' (2003) 8(10) *British Journal of Community Nursing* 464

<sup>116</sup> Finch, E. and Fafinski, S., *Criminology Skills* (Oxford: Oxford University Press 2012) 280

<sup>117</sup> *Ibid.*, 282

<sup>118</sup> Bryman, A., *Social Research Methods* (Oxford: Oxford University Press, 2008) 391

of generalization. Generalizability refers to the degree to which findings can be generalized across social setting or a larger study population.<sup>119</sup> It would be hard to establish general population for this research because some information such as the police ‘population’ is categorized as confidential, and could not be obtained in Vietnam. However, the findings of this research though not generalizable to a whole population might be generalizable in a theoretical sense.<sup>120</sup> Moreover, the chosen methodology, in-depth, face to face and semi-structured interview, aims to generate an in-depth analysis. Thus, instead of statistical sampling and its precise population, the researcher sought an understanding of views and assessments on legitimacy and effectiveness of police structure and powers for investigating transnational crime, in terms of the context in which the research was conducted. The further details of the sampling selection process for this research are as follows.

**Table 2.1. Types of Vietnamese Organisations and Individuals involved in the interviews**

Ordinal number	Types of work assignment		Number of interviewees
	<i>Name of institutions</i>	<i>Interviewee</i>	
1	Committee of National Defense and Security of the National Assembly	Legislators / N.A. deputies	2
2	Ministry of Public Security	Police officers	14
3	Ministry of Justice	Judicial officials	2
4	Supreme People’s Procuracy	Procurators	2
5	Vietnamese Bar Federation	Lawyers	6
Total			26

For the Vietnamese component, with regard to the investigation of transnational crime in Vietnam, interviews were held with those who work either in the Ministry of Public Security (*Bo Cong an*), or the Supreme People’s Procuracy (*Vien Kiem Sat Nhan*

<sup>119</sup> Ibid., 376

<sup>120</sup> Ibid., 391

*Dan Toi cao*), or the Committee of National Defense and Security of Vietnamese National Assembly (*Uy ban Quoc phong va An ninh cua Quoc Hoi*), Ministry of Justice (*Bo Tu phap*) or the Vietnamese Bar Federation (*Lien Doan Luat Su Vietnam*). The reason for selecting representatives from the above mentioned agencies is that the work assignment and functions of each agency has important impacts on the crime investigative activities in Vietnam.<sup>121</sup> Therefore, sampling sources could be derived from the five following institutions whose tasks involve the issue of transnational crime, as shown in Table 2.1 below. Moreover, these institutions are procedure-conducting bodies and participants in policing proceedings in Vietnam according to Criminal Procedure Code of Vietnam.<sup>122</sup>

To conduct interviews with appropriate persons who could give as much their own opinions or evaluation on the policing system for the investigation of transnational crime as possible for this thesis, the following criteria for inclusion were specified in terms of each type of agency.

First, for individuals from the Committee of National Defense and Security of National Assembly, the participant has to be involved in the preparation and submission of any legal proposals in the area of police work to be approved by the Parliament. Moreover, this participant must have knowledge of transnational crime. Based on information from the website of this Committee,<sup>123</sup> and having consulted with leaders of this Committee, it is indicated that the Committee has 35 members, but only nine of them are familiar with transnational policing. Thus, 26 individuals were excluded from a list of potential interviewees.

Second, for individuals from the police, the participant has to be either a transnational crime investigator or a police officer with at least five years relevant experience such as legal officer or Interpol officer whose works are involved with transnational crime investigations. Thus, participants were selected from two sources of police organizations: investigating agency (*Co Quan Dieu Tra*); and other relevant police

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<sup>121</sup> Law on Organization of the National Assembly; Law on People's Public Security Forces; Law on Organization of People's Procuracies; The Government Decree No.93/2008/ND-CP on Defining the Functions, Tasks, Powers and Organizational Structure of Ministry of Justice; Criminal Procedure Code; Ordinance on Organization of Criminal Investigations; Law on Legal Assistance.

<sup>122</sup> VCPC 2003, No. 19/2003/QH11 of November 26, chapter 3 and chapter 4

<sup>123</sup> Official Website of the National Assembly,  
<<http://quochoi.vn/gioithieu/caccoquanquochoi/hoidongdantocvacacuyban/uybanquocphongvaanninh/Pages/thanh-vien.aspx>>



departments such as International Cooperation Department and Legal Department. (see Table 2.2 below).

**Table 2.2. Agencies and Individuals of Ministry of Public Security in the interviews**

<b>Ministry of Public Security</b>				
<b>Name of Institution</b>		<b>Interviewees</b>		<b>Total</b>
		<i>Leaders</i>	<i>Investigators</i>	
Criminal Investigation Agencies	Central level	04		04
	Provincial level	05	02	07
Other Relevant Organizations	International Cooperation Department	02		02
	Legal Department	01		01
Total		12	02	14

In Vietnam, the crime investigation system is organized on three levels: central, province and district. According to the distribution of investigation authority, transnational crime cases can be handled by crime investigation agencies mainly either by the central crime investigation agency (*Co Quan Dieu Tra o Bo*) or provincial level ones (*Co Quan Dieu Tra o Tinh*). At the central level, there are two crime investigation agencies: one belongs to the police force whereas the other is a part of the security agencies. Both these two agencies have competence to deal with serious crime cases, including transnational crime. At the provincial level, 63 crime investigation agencies are deployed nationwide with one agency per each province. However, interviews were only carried out with representatives from agencies which usually handle major transnational crime investigations. Thus, only three agencies out of total 63 provincial level-investigating agencies were a source agency where interviewees were recruited. The reason is that the majority of transnational crime cases that took place in Vietnam happened in those three provinces. The police investigating agencies at these three provinces have more experienced transnational crime investigators than that of any other province. Besides, the researcher did not have enough time to conduct interviews with all 63 investigating agencies. As a result, representatives from five criminal investigation agencies (two central level agencies and three provincial level agencies) were offered

opportunities to participate in the interviews. In other words, this choice was to assure enough perspectives and diverse representations of investigative work for the evaluation of the investigation of different types of transnational crimes such as transnational drug trafficking crime or cybercrime. Usually, each investigating agency that comprises several departments or divisions that specialize in different types of offences has an estimated population of hundreds of officers.<sup>124</sup> However, after consideration of the criteria for selection of interviewee, each investigating agency only produced a list of 20 individuals suitable for this thesis. Therefore, a list of 100 potential interviewees from five investigating agencies was established.

With regard to police organizations other than investigating agencies, individuals from the International Cooperation Department<sup>125</sup> and Legal Department were invited to take part in the interviews in order to seek their evaluations about the process of preparation and supervision of laws and regulations regarding to international cooperation during the course of transnational crime investigation. For example, individuals who are from the International Cooperation Department undertake tasks to liaise with overseas counterparts to send and receive requests via official channels in relation to transnational crime investigations. Moreover, these individuals may have a broad picture and enough hands-on experiences to deal with the interview questions. In addition, this type of individual sometimes plays a role as a decision maker in police cooperation between Vietnam and other countries for the investigation of transnational crime. Thus, to be included in the sample, a participant from these two relevant police departments has to be an officer with direct responsibility with transnational policing. The 5 years-length of service, according to the researcher allows interviewees to obtain enough experience to answer questions of the thesis. Specifically, the International Cooperation Department in which an estimation of 70 individuals, around half of its population, were identified for a short-list of potential interviewees. In the Legal Department, only about 25 officers, which account for one tenth of the Legal Department's whole population, were identified to have a responsibility usually involving transnational policing, and to have sufficient experience suitable for this research.

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<sup>124</sup> The precise figure is not publicised due to the category of confidentiality

<sup>125</sup> When the fieldwork was conducted, Interpol Department were merged into International Cooperation Department, though investigative regulations and procedures via these two previously separated agencies are still valid in transnational crime investigation operation.

Third, for participants from the Ministry of Justice, a participant had to work with transnational policing issues. Specifically, the participant had to perform the functions of participating and negotiating with international partners or foreign counterparts about international conventions or bilateral agreements. This participant must have the ability to contribute his or her own perceptions and evaluations obtained from his or her work regarding to the issue of handling transnational crime, and to explain about both current issues in practice and other issue written in laws and policy. Based on the website of the Ministry of Justice, the researcher identified which departments within the Ministry could contain individuals suitable for this research.<sup>126</sup> Thus, a short-list of ten potential interviewees from the Ministry of Justice was established.

Fourth, for participants from the Supreme People's Procuracy, a participant had to be a procurator who has responsibility to supervise the police's transnational crime investigative work and prosecute transnational criminals before the courts. Moreover, these individuals must have sufficient experience in legal assistance and international cooperation in dealing with transnational crime. The researcher decided that, to identify someone as having sufficient experience individual, a length of 5 year service with regard to transnational crime issues should be applied. This produced a list of only 15 potential interviewees, though the Supreme People's Procuracy is a big agency in terms of its whole population.<sup>127</sup>

Fifth, the Vietnamese Bar Federation is a professional organization which plays an important role in the interpretation of laws and regulations.<sup>128</sup> Moreover, it also provides legal services including defense attorneys at the courts to different kinds of people such as victims and suspects in the course of legal proceedings in Vietnam. Therefore, participants from the Vietnam Bar Federation were also offered opportunities to give comment and opinion on how investigative activities into transnational crime were performed, specifically how due process was respected. For lawyers from this Federation, the criteria for selecting participants related to their working experiences on transnational crime. They had to work in the major transnational crime investigations, and have worked

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<sup>126</sup> Website of Ministry of Justice, < <http://moj.gov.vn/Pages/home.aspx>>

<sup>127</sup> Precise figure on population of the Supreme People's Procuracy is not available

<sup>128</sup> The Website of the Vietnam Bar Federation, <<http://liendoanluatsu.org.vn/>>

more than five years as a lawyer. Thus, out of 8,928 lawyers across the country,<sup>129</sup> a list of 35 potential lawyers suitable for this research was established.

To identify in practice all of the interviewees, the researcher met leaders of their agencies to discuss the research and its requirements including the need to interview any appropriate individuals for the thesis. Written details explaining the research and interview process was provided to these leaders in order to identify appropriate participants in accordance with the research sampling strategy. Then, the researcher was provided by these leaders with a short-list of individuals whose work involves transnational crime issues. Based on given selection criteria, the researcher identified those most suitable. In addition, some individuals were also identified via their experience profile posted in the media, especially lawyers. All this information helped identify a list of potential interviewees. After this list was established, the researcher personally invited these potential interviewees to attend the interviews. To secure enough numbers of interviewees, the researcher contacted and invited more individuals than a number of interviews that he planned to conduct. The Information Sheet (see Appendix 1) which is about the research and interview process was sent to these individuals.

As a result, 26 Vietnamese individuals recruited from the potential interviewees were interviewed. Among them, there were two legislators, 14 police officers, two judicial officials, two procurators and six lawyers (see Table 2.1 above).

Apart from Vietnamese interviewees, six interviews with international and foreign experts who engage in transnational policing in Vietnam were conducted (see Table 2.3 below). These experts are from the UK National Crime Agency, the London Metropolitan Police, the Australian Federal Police, and the UNODC-Vietnam Office in which one interviewee from each agency (except the UNODC with two interviewees) was recruited. Based on the researcher's experience, it was not difficult for the researcher to identify those individuals from these agencies who have responsibility for Vietnam in terms of transnational policing. Some interviewees were known by the researcher through their leaders' introduction, whereas others were identified via their profiles published in public domains. Then, the researcher emailed them directly to invite them to participate in the interview. Six individuals responded to the researcher's email and agreed to be interviewed. However, half the interviews were phone interviews. Specifically, the phone

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<sup>129</sup> This figure was announced at the Second National Congress of the Vietnam Bar Federation in April, 2015, <<http://www.tienphong.vn/Phap-Luat/viet-nam-co-bao-nhieu-luat-su-849781.tpo>>

interviews were conducted with an individual of London Metropolitan Police, a former UNODC officer, and an officer of ASEAN Political and Security Community Department. The reason for this alternative approach to the interview was because it was impossible to fix an appointment to meet them in person. Those interviewees had busy schedules. By using a telephone interview, the researcher was able to engage with the maximum number of interviewees who were necessary for the thesis and prepared to take part in some way. The researcher was aware that a telephone interview could cause some challenges, for example, telephone signal and transmission quality could impact on the interaction between researcher and interviewee, but this use of telephone interview was the best the researcher could do for the thesis. The researcher prepared well for these interviews. In this sense, these interviews were conducted via Skype and so still allowed interviewer and interviewee to see face to face. To some extent, this alternative approach helped the researcher not only save costs such as travel costs, but also to more easily agree on the time of interview which facilitated the fieldwork to be finished as planned.

**Table 2.3. Interviews with International and Foreign Counterparts**

<b>Agencies</b>		<b>Number of interviewees</b>
The United Kingdom	National Crime Agency	1
	London Metropolitan Police Service	1
Australian Federal Police		1
United Nations Office on Drugs and Crime – Vietnam Office		2
ASEAN Political & Security Community Department		1
<b>Total</b>		<b>6</b>

Individuals from the National Crime Agency and London Metropolitan Police Service in the United Kingdom provided further evidence to clarify the interaction between the legal system for the investigation of transnational crime in Vietnam and laws of correspondent foreign countries. The National Crime Agency, which is a successor to

the Serious Organized Crime Agency, is the NCB for Interpol in the United Kingdom,<sup>130</sup> and is also a focal point in the implementation of Memorandum of Understanding on Cooperation in Combating Serious Crimes between Ministry of Public Security of Vietnam and Association of Chief Police Officers of England and Wales and Northern Ireland.<sup>131</sup> The London Metropolitan Police Service conduct at any one time several operations with Vietnamese criminals operating in the United Kingdom, and with the involvement of activities in Vietnam. These interviewees were the persons who are either an investigator or a person in charge of liaison with Vietnamese counterparts in dealing with transnational crime cases that happen and involve two countries. As outsiders with different background knowledge, the views and evaluations of these individuals' own experience with Vietnam are significant for any assumption and ideas about possible problems that may happen in Vietnamese legislation, and about the investigation system of Vietnam.

In addition, an interviewee from the Australian Federal Police gave his personal observations and assessments on the Vietnamese policing system for the investigation of transnational crime for which he drew upon his experience as a consultant for the Vietnam-Australian Joint Transnational Crime Center.<sup>132</sup> The Vietnam-Australian Joint Transnational Crime Center is responsible for coordination with relevant Vietnamese agencies in dealing with transnational crime affecting Vietnam and Australia.<sup>133</sup> The interviewee had worked in the Vietnamese policing environment, and even sometimes had a chance to participate with Vietnamese police officers in handling criminal intelligence. This interviewee produced comments and observations from both a point of view of a foreign consultant, and international investigators who understood Vietnam well in terms of transnational policing.

Next, the view from a respondent of the Vietnam Office of the United Nations Office on Drugs and Crime was collected. The reason for this is that Vietnam Office of UNODC has been active in Vietnam since early 1990s to assist Vietnam government, in

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<sup>130</sup> Crime and Courts Act 2013 (Chapter 22) Part 1, May 2013

<sup>131</sup> Memorandum of Understanding between Ministry of Public Security and Association of Chief Police Officers of England, Wales & North Ireland, signed on 26 September 2006

<sup>132</sup> Vietnam-Australia Joint Transnational Crime Center, which is organised in accordance with similar model, sponsored by AFP in a number of Asia and Pacific Region, has been established within the Vietnam Police General Department on Crime Prevention and Suppression since 30 March 2010.

<sup>133</sup> JTCC Website, < [http://www.jtcc.vn/index\\_e.html](http://www.jtcc.vn/index_e.html)>

term of policy advice and technical assistance, to fight against transnational crime.<sup>134</sup> For example, some of its projects focus on strengthening of capacity of justice and police responses to transnational crime in Vietnam that may have some assessment through their own surveys when undertaking projects with Vietnam government. Moreover, some evaluations may also draw conclusions after comparison with regional situation and projects. So, a representative of the Vietnam Office of UNODC was interviewed to gather their evaluation to develop comparative picture of effectiveness and legitimacy of Vietnamese policing system for the investigation of transnational crime with other countries in the region or in the world.

Next, a representative from ASEAN's Political & Security Community Department within the ASEAN Secretariat whose Headquarters is located in Indonesia was interviewed in order to assess the level of participation and integration of Vietnam in the field of policing response to the issues of transnational crime in the region. The reason for gathering this view is as follows. First, Vietnam became a member of ASEAN in 1995,<sup>135</sup> and it has been actively integrating and participating in regional activities. Second, the ASEAN Political & Security Community Department within the ASEAN Secretariat has been coordinating to produce several guidance materials, such as the ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases,<sup>136</sup> and to run a wide range of projects for its member countries including Vietnam, with a view to promoting ASEAN's cooperation on matters of politics and security. There are many relevant mechanisms, for example, the ASEAN Ministerial Meeting on Transnational Crimes (AMMTC), to interact between the ASEAN Secretariat and its member countries. The evaluation of the representative of ASEAN Secretariat provided regional views as to the laws, policy and practices of Vietnam's responses to transnational crime.

In summary, there were in total 32 interviews conducted in this fieldwork. These interviews underpinned the analysis in chapters five, six and seven which describe accountability, professionalism and public trust of the police work. The contents of interviews focused on evaluations of strategies, methods, and laws on power and

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<sup>134</sup> UNODC Website, Vietnam Office,

<<https://www.unodc.org/southeastasiaandpacific/en/vietnam/overview.html>>

<sup>135</sup> ASEAN Official Website, <<http://www.asean.org/asean/about-asean>>

<sup>136</sup> ASEAN Official Website, <[http://www.asean.org/resources/publications/asean-publications/item/asean-handbook-on-international-legal-cooperation-in-trafficking-in-persons-cases-3?category\\_id=382](http://www.asean.org/resources/publications/asean-publications/item/asean-handbook-on-international-legal-cooperation-in-trafficking-in-persons-cases-3?category_id=382)>

structures of police in relation to solving of transnational crime cases. The obstacles and gaps in law enforcement of police agencies in dealing with some transnational crime cases were examined.

Finally, some reflections will be given here on the sampling strategy.

First, with regard to the background knowledge of interviewees, most interviewees were qualified for the purpose of the research. These participants have worked in transnational crime issues for several years. Three quarters of them are older than 50 years old, and had at least ten years' experience in dealing with transnational crime. All interviewees had graduated from university, mostly with a first degree only. The police interviewees became specialists on the job rather than through academic degrees about transnational crime. This characteristic had some consequences for the quality of the interviews. The interviewees may have had a lot of practical experience, but it was more difficult for them to generalise or theorise. Some of them liked to talk about their personal successes rather than to answer questions about more general processes or rules. This made some interviews last long but without producing much information relevant to the thesis. Moreover, the interviewer had to repeat questions sometimes to remind them to answer the questions. So, on average, the interviews were about 1 hour long, but there were some that lasted up to 2 hours. By contrast, some interviewees, for example lawyers, had obtained postgraduate degrees, and understood questions more easily and immediately, and gave a direct answer to the question if they had relevant knowledge. However, there were also police interviewees who were knowledgeable. For example, one interviewee,<sup>137</sup> who had worked in different posts relating to transnational crime investigations, with experience from both the Investigating Police Agency and the Investigating Security Agency, had a wider view, in comparison with other police officers, about the transnational crime investigation.

Next, as can be seen from Table 2.2 above, more police leaders than investigators attended the interviews. This is because of several reasons. First, several investigators refused to attend the interview because they considered themselves to have insufficient experience of transnational crime. Their roles in transnational crime investigations were usually subject to their leaders' instructions. Moreover, most investigators normally specialised in a certain type of transnational crime in which they were assigned to investigate a crime. By contrast, most leaders had experienced several transnational

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<sup>137</sup> Interviewee IA5



crime investigations. They had participated in investigating different types of transnational crime. In addition, before becoming a leader, they used to be crime investigators. These leaders had not only investigative experience, but also experience in directing and leading a transnational crime investigation. This facilitated these police interviewees to provide more valuable assessments on the policing system.

Third, this sampling strategy and selection was not unduly skewed, though this choice of sampling was purposive by choice. There were many officials recruited, and the number of interviewees from the police outweighed the number of representatives of other institutions. (see Table 2.1 above). The main reason is that the researcher consciously designed his research more in the way the officials looked at the issues of effectiveness and fairness of the investigation of transnational crime rather than victims or suspects did, because this choice reflected expertise of the researcher where he wanted to build on his knowledge. The researcher has worked in the field of policing for many years, and he will work for the government of Vietnam once his study is finished. He understands and has knowledge about the structure and process of the investigation of transnational crime from the perspective of a police officer. Moreover, this choice also reflected the availability of the sampling. Based on the researcher's expertise, he knew where to find policing related experts and interviewees for the research. However, to some extent, this sampling strategy was still a selection of the combination of various views. Apart from observation and assessments made by different types of officials or law enforcers, views of victims, suspects, who were subject to legal enforcement, were also collected. The researcher consciously decided not to interview victims of crime or suspects, but did interview their lawyers in some cases. Whilst the lawyers who were interviewed talked about their own experience, for example how their work as lawyers was conducted in terms of the right to collect evidence, they could present opinions and views regarding their clients and how far the policing system treated suspects or victims fairly and effectively. For example, some lawyers talked about how their clients, i.e. arrested persons perceived police powers. In summary, this conscious choice of the sampling strategy is sensible. Although the researcher had a limited amount of time that only allowed to study the research field in the chosen way of looking at the phenomenon, the chosen sampling strategy and selection could guarantee and increase the validity of interview data, indicating any possible findings about the rule of law and effectiveness of legal system and its practice for the investigation of transnational crime in Vietnam.

### 2.3.3.3. Conducting the Interview

After the interview schedule was prepared, the researcher contacted potential interviewees to arrange for the interview. The researcher sent them the Information Sheet (see Appendix 1) which presents the researcher's background, aims of the research and the interview process. After receiving positive replies from potential participants concerning their willing to be interviewed, the concrete arrangements such as date and venue of the interview were made to conduct the interview. Before the start of every interview, the researcher briefed the interviewee again about the nature of the research and aims of the interview as well as its process. The consent form was also given to interviewee prior the start of the interview (see Appendix 2, the Consent Form). Interviewees were also asked for a permit of the use of audio-recording before a start of interviews. During the interview, the interview schedule was used as the main guide.

In order to ensure a successful interview, there were a number of issues that the researcher considered in relation to conducting the interview.<sup>138</sup>

First, the researcher took into consideration the place where the interview would be undertaken. According to Lesley Noaks and Emma Wincup, the location of an interview can be significant and can enhance or reduce a sense of safety and peace of mind for both the interviewee and the interviewer. This can particularly be the case when interviewing individuals from or in criminal justice institutions.<sup>139</sup> To have a favorable interview environment, the researcher and his interviewees chose interviewing venues which did not cause interference or disruption to the implementation of the interview. For example, there should not be an interruption with the telephone or unexpected guests. In practice, the researcher had to conduct interviews in different places, including the working place and private houses of interviewees, public places like restaurants, and even restricted areas such as an embassy. The majority of interviews were however conducted at the working places of interviewees where they met the researcher and attended the interviews after working hours. There are several reasons for this. First, managers or high ranking officers in different Vietnamese institutions usually have their own offices. Second, several interviewees were busy with their daily duties. They had to use their break time to attend the interview. So, they preferred the interview being conducted at their working place for convenience. Third, most interviewees said they would feel

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<sup>138</sup> Finch, E. and Fafinski, S., *Criminology Skills* (Oxford: Oxford University Press 2012) 325

<sup>139</sup> Noaks, L. and Wincup, E., *Criminological Research: Understanding Qualitative Methods* (London: Sage 2004) 78

comfortable to give answers when they were at their own places of work. Some interviews conducted at embassies did not facilitate audio-recording use, but the researcher respected the choice of interviewees, whose works were located in a diplomatic mission, with a view to putting them at ease in the interview.

There were some interviews which took place at public places such as coffee houses, or where the researcher had to rent a separate room to conduct an interview. This need was because some interviewees such as investigators did not spend most of their working hours at their offices. Moreover, some of them felt freer to talk about conflicts or any comments about disadvantages or inappropriateness of the laws and regulations that involved the investigation of transnational crime in Vietnam because no one could disturb the interviewee and there was less concern that they might be being observed by personnel in their organization when expressing their ideas. In general, all selected venues were designated to enhance the quality of the interviews.

Second, to create an appropriate atmosphere for interviewees, the relationship between interviewee and interviewer was established by providing information about the nature of the thesis, purpose of interview and any explanation in order to make interviewee understand the interviewing questions before hand. A letter of introduction was sent to each interviewee or interviewee's organization. The researcher bore in mind that in many cases the first stage of access to the interviewee had to be negotiated with the organization of the interviewee rather than the individual interviewee.<sup>140</sup> The interviewees were reminded that their right to withdraw from interview was respected. Even, at a later phase of interview, for example after the interviewee answered the questions, the interview could still be cancelled if interviewee changed his or her mind to refuse any use of the data for the research. By observing these safeguards, the researcher encouraged all interviewees to freely give their personal assessment about the current policing system for the investigation of transnational crime in Vietnam.

Third, the interview was conducted in the interviewee's first language. The researcher understands that it is important to communicate effectively with the interviewee. This means that the language which is used in the interview must be understandable. Hence, the interviews were carried out in the language of the respondent.<sup>141</sup> Therefore, the interviews with Vietnamese participants were conducted in

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<sup>140</sup> Ibid., 83

<sup>141</sup> Berg, B., *Qualitative Research Methods for the Social Sciences* (Boston: Allyn and Bacon 2001) 77

Vietnamese, because it helped the interviewee to understand well and answer the questions naturally. In contrast, for interviews with representative from the National Crime Agency, the London Metropolitan Police Service, the UNODC-Vietnam Office, and the ASEAN Political and Security Community Department, English was the language of conversation.

Fourth, to support the interview and avoid being distracted by taking notes during the interview conversation, a tape-recorder was used. The researcher only used it after the interviewee consented. In some cases, the participant did not agree to the interview being recorded, so note taking was applied by the researcher because it was necessary to keep written notes rather than rely on the interviewer's memory.<sup>142</sup> Most interviews with the police in Vietnam were conducted without audio recording. The main reason being that they did not feel comfortable to talk when their conversations were recorded. Instead, the researcher took written notes of their answers. Audio recording was also not used for several interviews of other non-police participants because interviewing venues that the interviewee selected were restricted areas, for example an embassy where audio recording devices are not allowed. Furthermore, on some occasions, audio-recording devices had a technical problem so that the interview could not be recorded in audio, though there was the consent of the interviewee. For example, two out of three of the telephone interviews were not recorded in audio, because the tape-recorder did not work well. Overall, only 16 of 32 interviews were conducted with audio recording. All of these interview recordings were loaded into the University of Leeds's network drive for use and storage.

By way of further reflection deriving from his background, the researcher was able to complete the interviews by recognizing differences and similarities between police interviews and research interviews for the thesis. The former deals with relationship between the police and criminals whereas the latter involves the relationship between researcher and other professionals. In terms of differences, the research interview is a voluntary process, not an involuntary process. So, in this process of research interview, the researcher must prepare more carefully to obtain cooperation, and be prepared to explain further or disclose further to interviewees. However, there is some similarity between police interview and research interview. They 'share common features, such as the eliciting of information by the interviewer from the interviewee and the operation of rules of varying degrees of formality or explicitness concerning the conduct of the

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<sup>142</sup> Finch, E. and Fafinski, S., *Criminology Skills* (Oxford: Oxford University Press 2012) 325

interview.’<sup>143</sup> Specifically, both types of interview required gaining some information beforehand, though the nature of this information was different, for example the information the researcher obtained is from open sources whereas information the police have may be from closed sources. Moreover, there may be some similar steps: studying about a case file and interviewees, setting out strategies for interviews, for example what are aims of interviews and what questions are important. What are tactics for asking questions to keep the interview on the right track, for example, the way to vary questions suitable individuals is a popular way that both kind of interviews should make use to engage interviewees and get as much information as possible from interviewees. In practice, the researcher understood that his selected interviewees, especially police interviewees are professional and experienced with regard to handling criminal issues. Many of them are good at interviewing criminals. Thus, the researcher prepared the interview strategy beforehand, especially his interview schedule. He made use of his interviewing skills to conduct his interviews. For example, when dealing with two types of behaviours from the respondents, as highlighted above, his interviewing skills were used to help them answer questions and remain on track.

### **2.3.4. Data Analysis**

For the translation of collected interview data into the thesis, interpretation and analysis of data is needed. This process depends on research questions, materials, and selection of analytical style.<sup>144</sup> In this research, the researcher ensured the proper management of data in accordance with the policy of safeguarding data, storage, back up and encryption. Therefore, transcribing, coding and analyzing data were carried out as follows.

#### **2.3.4.1. Transcribing Data**

The transcription process as an integral part of the analytic process gives opportunities for reflection on data and attention to emerging themes.<sup>145</sup> In this research, interviews result in words in the native language of interviewees that are Vietnamese and English. In order to use the interview data for the thesis, the researcher transcribed these

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<sup>143</sup> Bryman, A., *Social Research Methods* (Oxford: Oxford University Press, 2008) 192

<sup>144</sup> Malterud, K., ‘Qualitative Research: Standards, Challenges, and Guidelines’ (2001) 358 *The Lancet* 483, 486

<sup>145</sup> Noaks, L. and Wincup, E., *Criminological Research: Understanding Qualitative Methods* (London: Sage 2004) 129

results into text, because it would facilitate a deeper examination of what had been said in the interview. Answers, including inferred meanings of what an interviewee said were transcribed into text.

However, it was impossible to transcribe the entire digital recording of interviews because there were large quantities of recordings. It would have been a waste of valuable research time to completely transcribe all recordings of interviews. There would be huge numbers of pages of answer from the interviews. In this regard, transcribing word for word would take up far too much time and resources. Instead, the researcher used a process in which he listened to interviews and wrote notes about them after deep reflection. Thus, he summarized the content of the interview tapes, but also selected some words or statements. These representative sentences were selected and quoted to illustrate a main idea or meaning that interviewees said.

All quotations that were used in this thesis were translated into English. And the transcriptions were stored and secured in the network computer drive that is maintained by the University of Leeds. The transcriptions in the drive were encrypted by using Encryption software, Cryptainer LEE,<sup>146</sup> with access by password. The field work carried out with international experts was done in English. Then, the data were simply transcribed under the above mentioned process into text. In theory, transcripts are convenient for process of coding, and their copies could be shared with other during process of coding and analysis in order to increase validity and objectivity of the data.<sup>147</sup> It is good for a collaborative research project that is conducted by group of researchers. But, in this research, the research was alone. To maintain confidentiality, the researcher did not share any transcripts with others.

#### **2.3.4.2. Coding and Analyzing the Data**

Before data analysis, there is a need to undertake data coding that uses some ideas or concepts to identify commonality, difference and pattern to put data into order or systems with a view to being able to analyze. Lesley Noaks and Emma Wincup wrote that ‘coding entails bringing a measure of organization to the data and identifying conceptual categories.’<sup>148</sup> Furthermore, together with transcription, some preliminary

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<sup>146</sup> This software was downloaded from website of CYPHERIX Strong Encryption, <<http://www.cypherix.com/cryptainerle/>>

<sup>147</sup> Finch, E. and Fafinski, S., *Criminology Skills* (Oxford: Oxford University Press 2012) 326

<sup>148</sup> Noaks, L. and Wincup, E., *Criminological Research: Understanding Qualitative Methods* (London: Sage 2004) 130

coding was performed on an interview-by-interview basis in the early stage of data collection process so as to allow opportunities for researcher to check out emerging findings.<sup>149</sup>

Due to the nature of this thesis, the task of coding was preferred to be undertaken manually, using highlighted pens to mark different themes, such as the use of resources of the police or decision making process by the police. The researcher was aware of computer software such as NVivo to do the coding process. But, the researcher did not choose this computer software because it was not appropriate for this thesis. The reasons are as follows. First, there was small number of interviewees for thesis (only 32 interviewees). Thus, the thesis had a small data set. Second, the research did not fully transcribe all of the interviews. Moreover, some of the interviews were done in the Vietnamese language, and would therefore require some extra work such as translation from Vietnamese into English, and NVivo does not operate with the Vietnamese language.

Based on coded data and other relevant information, the researcher compared, synthesized and made judgments about research questions. This form of content analysis is an approach also used in the analysis of documentary materials.<sup>150</sup> More specifically, the researcher analyzed each interview to find insights which could develop the thesis. On some issues, it was found that most interviewees had similar answers. For example, a majority of interviewees think that human resources, budgets and training do not sufficiently meet the demands of the fight against transnational crimes. However, there were also some points in which answers of interviewees were varied. For example, some agreed with current police structures to response to transnational crimes. But some thought that they are not effective, especially in terms of responses from different institutions. In the meantime, others did not have any clear comment because they thought it is hard to judge the system. Therefore, based on such kinds of critical data, values and shortcomings, with regard to the effectiveness and legitimacy of policing system for investigating transnational crimes, are identified in order to understand the system better both in laws and practices.

In summary, by data analysis, findings were derived to supplement to this thesis, especially chapters five, six and seven.

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<sup>149</sup> Ibid., 130

<sup>150</sup> Ibid., 127

### 2.3.5. Ethical Issues

It is essential to consider ethical issues which not only make the interview results valid and reliable, but treat fairly the researcher and interviewees. According to Maurice Punch, ‘most concern revolves around issues of harm, consent, deception, privacy, and confidentiality of data.’<sup>151</sup> This section focuses on the two main ethical issues: consent and confidentiality, that are very much related to the conduct of the interview and the use of the interview results. The reasons why these ethical issues need to be considered are as follows. First, the purpose of this thesis is to assess the effectiveness and the legitimacy of the policing system for investigating transnational crime in Vietnam. It may lead to discussion on conflicts with the rule of law in legislation and strategies that are sometimes sensitive topic in terms of human rights’ implementation in Vietnam, for example, the freedom of express or access to information. Second, the interview as the main research method involves human beings. ‘Any research involving the use of human subjects either directly or indirectly, must receive ethics approval.’<sup>152</sup> Therefore, the opinions and behaviours of the interviewer as well as interviewees are taken into account. Even the relationship between interviewer and interviewees may influence the success of the interview. Both the University of Leeds’s Code of Ethics and the Code of Ethics of the British Society of Criminology were followed in this thesis. But, the researcher emphasized the Code of Ethics of the British Society of Criminology because it is more focused on criminological research. It emphasizes that researchers have

‘a responsibility to ensure that the physical, social and psychological well-being of an individual participating in research is not adversely affected by participation in the research. Researchers should strive to protect the rights of those they study, their interests, sensitivities and privacy. Researchers should consider carefully the possibility that the research experience may be a disturbing one, particularly for those who are vulnerable by virtue of factors such as age, social status, or powerlessness and should seek to minimise such disturbances. Researchers should also consider whether or not it is appropriate to offer information about support services (e.g. leaflets about relevant self-help groups).’<sup>153</sup>

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<sup>151</sup> Punch, M., *Politics and Ethics in Qualitative Research*, in Norman K. Denzin and Yvonna S. Lincoln (eds.), *Handbook of Qualitative Research* (SAGE Publications 1994) 83

<sup>152</sup> Meadows, K., ‘So You Want to Do Research ? 3. An Introduction to Qualitative Methods’ (2003) 8(10) *British Journal of Community Nursing* 467

<sup>153</sup> British Society of Criminology, Code of Ethics for Researchers in the Field of Criminology, <<http://www.britisoccrim.org/codeofethics.htm>>



### 2.3.5.1. Consent

For ethical qualitative research data collection and analysis, the researcher ensured that all respondents had given their informed consent to take part in the research study. ‘Informed consent means the knowing consent of individuals to participate as an exercise of their choice, free from any elements of fraud, deceit, duress, or similar unfair inducement or manipulation.’<sup>154</sup> This consent must be obtained because of a number of reasons. First, the selected interview method is in-depth, face to face and semi-structured interview. The interviewees need to be informed about what are the aims and context of interview, as well as how the interview is conducted. Second, it is because of sensitivity of the thesis topic that involves individual opinions and evaluations of the interviewee about the effectiveness and legitimacy of legal system for the investigation of transnational crime. According to the privacy of interviewee, the answer to question is up to their personal decision. They are not giving an answer on behalf of organizations where they are working.

To obtain informed consent, the researcher contacted and provided potential interviewees with information about the research and the nature of informed consent. All interviewees had a period of five working days to decide whether or not they wished to voluntarily take part in the project. Before they decided to participate, all interviewees were told about how their answers would be used, especially that identifiable information would not be disclosed to the third party or made to public when the thesis was completed. Moreover, before the start of each interview, the researcher explained to the interviewee again the need for informed consent, which ensured that the interviewee’s participation was completely voluntary, and that they could at any time stop the interview or withdraw their data from the study (up to 30 days after the interview takes place). Eventually, all interviewees gave informed consent, except one interviewee,<sup>155</sup> who contacted the researcher again two weeks later to withdraw his answers. Consequently, the researcher destroyed the data from this withdrawn interview.

Consent was obtained in the form of a signed paper. In this research, the majority of interviewees consented to sign the Consent Form (see Appendix 2, the Consent Form), except for three interviewees.<sup>156</sup> However, three individuals gave the answer that they did

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<sup>154</sup> Berg, B., *Qualitative Research Methods for the Social Sciences* (Boston: Allyn and Bacon 2001) 56

<sup>155</sup> Interviewee IA13

<sup>156</sup> IA13, IA14 and IE5

not want to give their signatures in the Consent Form, though they were still willing to participate in the interviews. The researcher respected this choice of these three interviewees. In these cases, where written consent is inappropriate or the participant would rather give verbal consent, the researcher kept a record of verbal consent in his written notes and on the audio recording device. (However, this audio recording device was used only after the interviewee consented to the recording). The segments of verbal agreement were then saved as encrypted and password protected data files in the University server, along with the digitized transcriptions and the pseudonym master list. This allowed the researcher to keep on file the verbal consents, which the researcher would maintain for the same period as the transcriptions of interview data. The use of audio recording device was only used for a whole interview session after interviewees gave separate consent for that use.

### **2.3.5.2. Confidentiality**

#### **2.3.5.2.1. Confidentiality of the Interviewees and Interview Data**

Along with the informed consent, confidentiality of the interviewees and interview data is another important issue. Confidentiality means an effort to take out of any publication elements that might indicate a subject's identity.<sup>157</sup> The confidentiality of the interviewees and the interview data will allow interviewees to speak freely about their personal observations, opinions and assessments of the system and processes for investigating transnational crime. Moreover, as Leysley Noaks and Emma Wincup argued, it is typical for criminological researcher to take account of human rights and routinely to protect the identity of research informants.<sup>158</sup> In practice, for this research, the two following issues were carried out to guarantee the confidentiality of both the interviewee and the data.

First, in the selection of interviewees, all interviewees were objectively recruited. The organisation, to which the interviewees were attached was only involved to the extent that it provided the researcher with the help which the researcher used to get introduce himself to the agencies that the researcher had pre-selected. This was merely a formality that was necessary in Vietnam, and the Information Sheet and Consent Form make clear

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<sup>157</sup> Berg, B., *Qualitative Research Methods for the Social Sciences* (Boston: Allyn and Bacon 2001) 56

<sup>158</sup> Noaks, L. and Wincup, E., *Criminological Research: Understanding Qualitative Methods* (London: Sage 2004) 43

that the Ministry of Public Security has no role in overseeing or directing the project, and will not know who the selected respondents are. Whilst it is possible that the Ministry might be aware that interviews are being conducted with a particular agency or institution, it will not know exactly who the interviewees are as the researcher circulated the Information Sheet himself as an independent researcher. Moreover, he strictly protected the identity of his respondents. Identities and records of interviewees were maintained as confidential. Specifically, a pseudonym master-list of the names of 32 interviewees was created to anonymize the interviewee's identities. Even, when a particular agency or institution had a small population, which might allow individuals to be easily identified, a short-list of potential interviewees was established by mixing between its current staff and those who used to work there in order to prevent a selected interviewee from being detected by someone other than the researcher. For example, by doing this way, a sampling frame or a short-list of potential interviewees, in which two interviewees were selected from UNODC-Vietnam Office amounted to 20 individuals. Thus, identities of two selected interviewees from these 20 individuals could not be known once the thesis is published. In addition, as indicated in the sampling strategy, leaders of a particular agency or institution might sometimes introduce or give information about their staff who could meet interviewee selection criteria, but their given information is just part of the list of potential interviewees, because the researcher also used other sources such as internet posted profiles to create the list, and they did not select directly the interviewees. Instead the researcher did it personally.

Second, with regard to obtained interview data, the researcher paid attention to two points: the transcription process; and the quotation of interview data as well as their findings for the thesis. In terms of the transcription process, all recorded interviews were analysed immediately following the interviews and through this process the data was also anonymized. While necessary content was immediately transcribed for use in the thesis, all recordings were encrypted, password protected and kept on the University network (where they remain until 2 years after the thesis is finished). No one except the researcher can access these files. In the meantime, any personal information or information which might point to the identity of the interviewee was not included in the typed transcription. Instead, each transcription was given a pseudonym which would allow the researcher – and the researcher only - to identify the interviewees. According to the researcher, the reason for this storage time is as follows. First, it helps to keep confidential all data that are collected during the research until the thesis is finished and publicized. According to

the University of Leeds, a full time PhD thesis is carried out in a maximum time period of four years.<sup>159</sup> After the thesis is awarded, it will take some time for consideration of publishing it. Second, two years after the thesis is finished, things may change. So, the information obtained from the interviews may become out of date. As a result, following this time period, the anonymized transcriptions will be destroyed.

For deployment of data in the thesis, the researcher did not use any particular data quotation or findings, which – if included in the thesis or any subsequent publications – might be linked to a specific respondent. The researcher understands well Vietnamese society and culture, as well as the elite professional culture in which potential interviewees work. As a result, the researcher used his own professional judgment in assuring confidentiality by omitting quotations from the thesis and any subsequent publications which contain material which might indicate a respondent's identity. Besides, as mentioned earlier, a part of relevant data obtained from interviews were conducted in the Vietnamese language. These data need to be translated into English language for the thesis. To protect these data, the researcher did the translation personally.

#### **2.3.5.2.2. State Confidentiality and Political Sensitive Issues**

This thesis is not at all about State secrets or politically sensitive issue. So, this thesis project did not use any information, for example operational plans of police units, that according to Vietnamese legislation is forbidden to disclose to a third party or to publicize.<sup>160</sup> This sort of information was not the target of the interviews since the purpose of the interviews is to consider general laws, institutional designs and general practices. Specifically, the interviews did not discuss any criminal behaviour or anything that might be considered a state secret or a confidential work practice/process. For example, the researcher did not ask about any unpublished criminal cases. Moreover, there was also no discussion on any sensitive issues. It would be inappropriate and irrelevant to use the interview as a forum for general criticism of the Vietnamese government. To prevent the interview from 'straying' into any unwanted areas, four layers of warning were established. The first warning was provided on the Information Sheet (provided in advance) which informs prospective participants not to divulge any confidential material,

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<sup>159</sup> University of Leeds, Research Student Handbook 2011-2012, <[www.leeds.ac.uk/rsa/handbooks.html](http://www.leeds.ac.uk/rsa/handbooks.html)>

<sup>160</sup> Ordinance on State Secrets Protections , No. 30/2000/PL-UBTVQH10, issued on Dec. 28, 2000

state secrets, or criminal behaviour. The second warning appeared in the Consent Form which all prospective participants are provided immediately in advance of the interview taking place, and which they must sign or agree verbally to prior to the start of the interview. The third warning was given verbally immediately before the interview begins, whilst the fourth is provided (again verbally) during an interview if the conversation strays into a sensitive area. In practice, the researcher did not have to use the fourth warning, because all interviewees were experienced and careful to answer the interview so that they avoid straying into unwanted sensitive issues. But the first three warnings were most used by the researcher to help the potential interviewees understand the interview process and consent to participate in the interview.

Most of the fieldwork was undertaken in Vietnam. Its interview data had to be exported to the UK for further process and use for the thesis. The researcher reviewed interview data after the interview to ensure that the obtained data was appropriate and can be exported for the purpose of the thesis. Therefore, the researcher was able to export obtained interview data without infringement.

#### **2.4. Comparative Research Methods and Policy Transfer Approach**

Comparative legal research was also used for this thesis. This is because knowledge about transnational crimes and a policing system for investigating them elsewhere can suggest different and sometimes better ways to do things at home.<sup>161</sup> The use of comparative research commonly denotes reference to policies and laws of more than one jurisdiction, or to foreign policies and laws.<sup>162</sup> Due to the fact that transnational crime involves other countries, comparative research facilitates exploration of how the transnational crime phenomenon is tackled in different cultures and laws. The most important outcome is to put national policies and practices into cross-national contexts in order to know what differences might be made in the home nation.<sup>163</sup> Accordingly, this comparative analysis provides a better understanding of transnational crime, as well as the structure and legal powers of the police to respond to this problem in the home country.

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<sup>161</sup> Tonry, M., 'Is Cross-National and Comparative Research on Criminal Justice System Useful?' (2015) 12(4) *European Journal of Criminology* 505, 508

<sup>162</sup> Yntema, H., 'Comparative Legal Research: Some Remarks on Looking out of the Cave' (1956) 54(7) *Michigan Law Review* 899, 903

<sup>163</sup> Tonry, M., 'Is Cross-National and Comparative Research on Criminal Justice System Useful?' (2015) 12(4) *European Journal of Criminology* 505, 506

Moreover, this research method focuses on a study of similarities and differences among legal systems, attempting to identify solutions for a given social or economic situation.<sup>164</sup> Developing an appropriate law and policy on transnational crime requires a building process, and amendment and adaptation. During this building process, comparative research may help identify strengths and weakness of the law and policy of a country by borrowing ideas, practices and techniques. However, those who use comparative research can use this borrowing to make a change in their laws and policies, instead of only criticizing shortcomings and appraising their own values.

It should be emphasized that this thesis relies upon comparative research methods as a basic from which to propose potential policy transfer, rather than comparative analysis *per se*. In this thesis, the comparative analysis was undertaken mainly between the laws and practice in Vietnam and the UK (England and Wales) with a view to applying policy transfer. The UK was chosen as a country source from which to draw lessons to propose policy transfer because it provides a rich environment in which to undertake the study. In the context of combating transnational crime, the UK has had substantial experience and significant success. It is also an open, developed country with a well-documented and transparent policing system. The countries share some common problems in regard to transnational crime. Therefore, a better understanding of the experience in the UK may be of assistance to Vietnam.<sup>165</sup>

The concept of policy transfer is defined as a process in which ‘knowledge about policies, administrative arrangement, institutions etc. in one time and/or place is used in the development of policies, administrative arrangements and institutions in another time and/or place.’<sup>166</sup> Policy transfer can be conducted in different ways. It may be ‘lesson drawing’ as a voluntary process for some form of dissatisfaction, or it may be more structurally influenced by notions such as ‘convergence’.<sup>167</sup> Some forms of policy transfer could arise from a mix of coercive and voluntary pressures.<sup>168</sup> For example, as a

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<sup>164</sup> Hyland, R., ‘Comparative Law’ in D. Patterson (eds), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing, 1999) 184, 185

<sup>165</sup> See chapter 1 for explanation of why the UK was chosen as a country source to do policy transfer.

<sup>166</sup> Dolowitz, D. and Marsh, D., ‘Who Learns What from Whom: a Review of the Policy Transfer Literature’ (1996) XLIV *Political Studies* 343, 344

<sup>167</sup> Newburn, T. and Sparks, R., *Criminal Justice and Political Cultures: National and International Dimension of Criminal Control* (Devon: Willian Publishing 2004) 4.

<sup>168</sup> Dolowitz, D. and Marsh, D., ‘Learning from Abroad: the Role of Policy Transfer in Contemporary Policy-Making’ (2000) 13(1) *Governance* 5, 24

member of the United Nations Convention against Transnational Organized Crime, while Vietnam chose a concept of human trafficking to incorporate into the Vietnamese Penal Code, Vietnam also has to review its laws in order to fulfil its obligation to the Convention. In this sense, policy transfer becomes part of the policy process. A Policy transfer approach engages more specifically than comparative research. In this regard, according to Trevor Jones and Tim Newburn, policy transfer approach should be viewed as an ‘analogical model’ that is helpful in furthering our understanding of a particular field, allowing for novel hypotheses to be developed and suggesting new lines of enquiry.<sup>169</sup> Specifically, there are differences between comparative research and policy transfer. Comparative research is a process in which differences and similarities for example in transnational policing between the UK and Vietnam are indicated. The researcher is able to locate relevant and corresponding points to conclude what are differences and similarities between the UK and Vietnam. By contrast, policy transfer is a consequence of comparative research, and is drawn from comparison for selective policy development purposes rather than to analyse comparisons as such. While it is possible to draw lessons from comparisons in order to propose possible policy transfer from comparison between the UK and Vietnam, it is not necessary for both countries to be similar or have congruence in terms of systems. Equally, there is no need to consider an equal and corresponding amount of comparison. Rather, the purpose is to look for key points from the UK which are relevant to Vietnam, by which Vietnam could draw a lesson to apply. For example, this thesis has focused on effectiveness and legitimacy of police structure, criminal law and criminal process with regard to transnational crime in both countries, with a view to finding out what applications arising from these values from the UK should be rationally applied in Vietnam.

There is an advantage in lesson-drawing with a view to engaging in a process of policy transfer in this research, which involves issues of transnational crime and transnational policing. In this particular issue, to some extent there are policy congruencies and consolidations between Vietnam and the UK, because of the impact of international treaties that both countries have ratified. Moreover, the two countries have

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<sup>169</sup> Jones, T. and Newburn, T., *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy* (Berkshire: Open University Press, 2007) 33

signed mutual legal assistance treaty in criminal matters.<sup>170</sup> So, both countries rely on each other in terms of policing. However, despite this advantage, the researcher recognized some challenges when undertaking policy transfer between the UK and Vietnam. There may be a case in which something looks good in England and Wales, but does not fit to Vietnam's context. The reasons are as follows. First, there is a systemic difference between the UK, which is based on an adversarial system, and Vietnam, that follows the inquisitorial system. Second, there is a difference in terms of the nature of policing. While the UK adopts a more localized system, Vietnam is a more centralized one.<sup>171</sup> Moreover, because of constraints of economic resources, Vietnam cannot afford to apply some things that might work in the UK. Furthermore, there are major differences in political and social settings between the UK and Vietnam. These differences challenge the drawing of any lesson from the UK to the Vietnamese context.

## 2.5. Conclusion

This chapter has analyzed the methodologies used for the thesis. Specifically, it has indicated a socio-legal study as the best way to approach this thesis, which aims to assess the effectiveness and the legitimacy of the policing system for the investigation of transnational crime. In this sense, to achieve aims and objectives of the thesis, a combination of documentary sources, qualitative research interview and comparative research methods were the most effective strategy.

As shown in the chapter, library based research, such as documentary sources, was used as a main tool to study this thesis because this method is not only useful for the start of the research, for example the literature review, but is also cost effective. However, to better understand legitimacy and effectiveness of the policing system for investigating transnational crime, and to avoid limitations of this library based research, such as insufficient availability of personal views and assessment on structures and legal powers of the police in both current laws and practices, the qualitative research strategy was developed to use a face to face, in-depth, semi-structure interview for the study of this thesis.

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<sup>170</sup> Treaty between the Government of the United Kingdom of Great Britain and North Ireland and the Socialist Republic of Vietnam on Mutual Legal Assistance in Criminal Matters, signed on 13 January 2009, Cm 7587

<sup>171</sup> See more at chapter 5, Policing Structure and Organisations against Transnational Crime



The interview strategy gave new data to the thesis. These data play an important part in the quality and originality of the thesis. In addition, the comparative research method was also used. This was an appropriate way to mainly reflect on the experiences of England and Wales's which could facilitate to better understand the Vietnam's system and increase the quality of this thesis by identifying potential policy transfer where appropriate.

In summary, by using the three methods described in this chapter, the researcher could complete his study with these new findings and data, which can be found throughout the thesis, especially in Chapters Five, Six and Seven.

## **Chapter 3. The Phenomenon of Transnational Crime and the Challenges for Policing**

Nowadays, transnational crime is perceived as a vital issue of policing activities. Each type of crime has its own nature, and so each threat must be tackled in specific ways and by appropriate laws and policies. The growth of transnational crime poses a challenge, demanding the policing system provide an effective and legitimate response. Thus, understanding the transnational crime phenomenon will facilitate the objective to explore the policing of transnational crime. This chapter is to investigate transnational crime as a phenomenon and its impacts on policing in Vietnam. Specifically, the chapter aims to answer how transnational crime is identified. This chapter also address the questions of whether and why transnational crime has become a concern in Vietnam. As a result, this chapter has three sections. The first section will investigate the nature of transnational crime. In doing so, the section will answer why transnational crime has flourished, and to what extent transnational crime is defined. The second section will discuss possible harms caused by transnational crime. Finally, the chapter will identify the threats and challenges posed by transnational crime for policing in Vietnam.

### **3.1. Overview of Transnational Crime**

‘Transnational crime’ is a commonly used term in our daily lives. It can be found in government reports or heard in the public media. According to David Felsen and Akis Kalaitzidis, it entered the discourse of criminology in the 1970s at roughly the same time when transnationalism appeared in the vocabulary of social sciences,<sup>172</sup> although some forms of transnational crime such as the slave trade, piracy and opium smuggling had appeared a century or more before.

Literally, the term 'transnational crime' refers to criminals who transcend national boundaries, or to criminal activities which transfer from country to country. But the precise meaning of this term is still controversial. Transnational crime remains an elusive phenomenon for many people and indeed many governments and there is a need to

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<sup>172</sup> Felsen, D. and Kalaitzidis, A., ‘A Historical Overview of Transnational Crime’ in Reichel, P. (eds), *Handbook of Transnational Crime and Justice* (Thousand Oaks, London, New Delhi: Sage, 2005) 4

develop more coherent understanding of it.<sup>173</sup> There are also sometimes distortions about transnational crime. Some underestimate it, while others exaggerate it. Moreover, the use of this term sometimes overlaps or is confused with other similar terms, such as international crime and global crime. CarrieLyn Donigan Guymon said that to appreciate the need for an integrated approach to the problem of transnational crime, it is important to understand the nature of the criminals and their crimes.<sup>174</sup> Thus, this section will examine the main characteristics and opportunities of transnational crime.

### **3.1.1. Investigating the Conditions for, and Facilitation of, Transnational Crime**

Occurrences of transnational crime cases are increasingly common now across the globe and for some people are part of their every-day lives. In order to understand transnational crime, it is essential to study opportunities and facilitation that foster the growth of transnational crime as a social phenomenon. Changes in society with regard to 'routine activities' may have knock-on effects on opportunities for crimes to be committed. According to Marcus Felson and Ronald Clarke, while individual behaviour is the product of an interaction between the person and the setting, the important features of each setting help translate criminal inclination into action.<sup>175</sup> Thus, this analysis should be examined from both cross-border transnational aspects, such as globalisation, and local aspects, for example the political, economic, and social contexts within which the criminal activity might be better understood or explained.<sup>176</sup> This approach is consistent with the thesis objectives raised in Chapter One, which, overall, aim to examine and enhance the effectiveness and legitimacy of the Vietnamese transnational policing system for the investigation of transnational crime, while taking due account of the Vietnamese setting and values.

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<sup>173</sup> Fijnaut, C., 'Transnational Crime and the Role of the United Nations in its Containment through International Cooperation: A Challenge for the 21st Century' (2000) 8(2) Eur.J.CrimeCrim.L & Crim Just. 119, 124

<sup>174</sup> Guymon, C., 'International Legal Mechanisms for Combating Transnational Organised Crime: The Need for a Multilateral Convention' (2000) 18(53) Berkeley Journal of International Law 53, 54

<sup>175</sup> Felson, M. and Clarke, R., *Opportunity Makes the Thief: Practical Theory for Crime Prevention*, Police Research Series Paper 98, London: Home Office, page 1, <<http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/prgpdfs/fprs98.pdf>>

<sup>176</sup> Beare, M., *Critical Reflections on Transnational Organized crime, Money Laundering, and Corruption* (Toronto, Buffalo and London: University of Toronto Press, 2003) xxi

To begin with, globalisation is defined as a force that opens opportunities to the growth of transnational crime, which, according to Michael Wodiwiss, is the world's fastest growing business, with profits estimated at \$1 trillion.<sup>177</sup> This perspective on transnational crime has become increasingly associated with accounts of globalisation.<sup>178</sup> There are varied definitions of globalisation. According to Anthony Giddens, globalisation is defined as 'the intensification of worldwide social relations which link distant localities in such a way those local happenings are shaped by events occurring many miles away and vice versa.'<sup>179</sup> Giddens has also stressed that 'globalisation is about the transformation of our basic institutions. It is not just dominated by economic forces. It is much more closely connected with communication. It affects the state. It affects nations. It affects our personal lives.'<sup>180</sup> As such, globalisation is a process that brings changes to the understandings of geography and experience of localness. There are undoubtedly positive impacts from globalisation, but there are also significant negative impacts on society, and one such consequence is the creation of conditions and opportunities for transnational crime. For example, changes in the ways business and finance are being conducted have affected transnational crime.<sup>181</sup> These are described below.

First, with the advent of globalisation, free markets and easy movement of capital, commodities and even movement of people have increased. Commodities exchanges and financial flows are expanding from one country to another. The transportation industry has developed to facilitate closer connections in the world. There is an expansion and increasing mobility of the labour market as well. As a consequence, the global market may be exploited by criminals who expand their activities and targets beyond the national border.<sup>182</sup> Take international fraud as an example. Due to the international volume of

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<sup>177</sup> Wodiwiss, M., 'Transnational Organised Crime: the Global Reach of an American Concept' in Edwards, A. and Gill, P. (eds), *Transnational Organised Crime: Perspectives on Global Security* (London and New York: Routledge, 2003) 20

<sup>178</sup> Serrano, M., 'Transnational Organised Crime and International Security: Business as Usual?' in Berdal, M. and Serrano, M. (eds), *Transnational Organized Crime and International Security: Business as Usual?* (Boulder and London: Lynne Rienner Publishers 2002) 24

<sup>179</sup> Giddens, A., *The Consequences of Modernity* (Tyne & Wear: Polity Press, 1991) 64

<sup>180</sup> Giddens, A., Runaway world: The Reith Lectures Revisited, *The Director's Lectures*, Lecture 1:10 November 1999

<sup>181</sup> Bear, M., *Critical Reflection on Transnational Organized Crime, Money Laundering, and Corruption* (Toronto, Buffalo and London: University of Toronto Press, 2003) XXiii

<sup>182</sup> Sheptycki, J., 'Global Law Enforcement as a Protection Racket: Some Sceptical Notes on Transnational Organised Crime as an Object of Global Governance' in Edwards, A. and Gill, P.

financial markets, more people are becoming victims of fraudulent activities because of criminal involvement in foreign investment projects. Moreover, increasing connections between national economies may expand and establish new economic rules governing economic actors' activities, even beyond the conventional border of one national economy, which in turn may cause a decline in the capacity of individual states to assert independent jurisdiction over such markets.<sup>183</sup> For example, there is an application of 'no double customs inspection' against commodities that are transported between two countries. This change may challenge law enforcement's ability to detect illicit activities because law enforcement agencies' capacity becomes more limited within their own territory.

Second, advances in technology and communications have accelerated the process of globalisation to create and develop more and new businesses through internet development. Changes brought by the fast growth of technology and its world-wide application have caused a transformation of business activities and people's daily lives. On the one hand, technological development is beneficial to society, but on the other hand, it is problematic. Beside advantages, such as saving of cost of production or connecting people across distances, development in technology and communication become harder to control and therefore increase peoples' risk. Internet crime is a good example, where victims can be targeted from other countries, often invisibly, with huge losses. Furthermore, technology and communication may be exploited as facilitators for transnational crime, and they may equally become targets of transnational crime. The advanced and fast developing technologies have created a parallel and virtual landscape that is not only more and more important to our daily lives, but also facilitate criminals with a new opportunity to attack across borders with unprecedented speeds and behind the clout of anonymity.<sup>184</sup> Adam Edwards and Peter Gill have said that there is an increasing threat posed by criminal organisation, whose global reach and capacity to threaten legitimate political economies is enabled by rapid development in

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(eds), *Transnational Organised Crime: Perspectives on Global Security* (London and New York: Routledge, 2003) 42

<sup>183</sup> Broadhurst, R. and Grabosky, P., *Cyber-crime: The Challenge in Asia* (Hong Kong University Press, 2005) 10

<sup>184</sup> Interpol Official Website, Media release of 22 August 2013, <<http://www.interpol.int/News-and-media/News-media-releases/2013/PR096>>

communication, information and transport technologies and the abolition of internal borders within continental trading blocs.<sup>185</sup>

Next, the establishment of transnational entities has grown following the trend of globalisation. The process of globalisation makes individuals and markets more interconnected and interdependent as transnational organisations and global markets have emerged. On the one hand, the establishment of transnational entities, to some extent is a reaction to transnational crime, for example the establishment of the United Nations Office on Drugs and Crime (UNODC) and The Financial Actions Task Force (FATF). The UNODC as a transnational entity was established in 1997 through a merger between the United Nations Drugs Control Program and the Centre for International Crime Prevention.<sup>186</sup> While the UNODC provides expertise and assistance to nation states, it is a global leader that not only supervises the obligation of nation states in implementing international treaties on tackling crimes, for example the United Nations Conventions against Transnational Crime,<sup>187</sup> but also sets out internationally accepted standards and norms, for example a model law on extradition,<sup>188</sup> that the nation states should observe to enhance effectiveness and legitimacy of the fight against transnational crime. FATF<sup>189</sup> is another example in the powerful network of transnational entities, in terms of producing guidelines and enforcement. The FATF has issued 40 + 9 Recommendations,<sup>190</sup> which are internationally recognised standards that define criminal justice and regulatory measures which require countries to implement to combat money laundering and the financing of terrorism. In the meantime, the international community and other agencies such as the International Monetary Fund use those FATF Recommendations as a framework to evaluate and promote the effectiveness and legitimacy of a national system for responding to money laundering and the financing of terrorism.

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<sup>185</sup> Edwards, A. and Gill, P., *Transnational organised crime: Perspective on Global Security* (London and New York: Routledge, 2003) 1

<sup>186</sup> See the website of UNODC

<sup>187</sup> United Nations Convention against Transnational Organised Crime (2000), General Assembly Resolution No. 55/25, Nov., 2000

<sup>188</sup> UNODC, *the Model Law on Extradition (2004)*,

<[https://www.unodc.org/pdf/model\\_law\\_extradition.pdf](https://www.unodc.org/pdf/model_law_extradition.pdf)>

<sup>189</sup> FATF as an independent inter-governmental body was established in 1989 by a Group of Seven (G7) Summit

<sup>190</sup> FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, <[http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf)>

On the other hand, the establishment of transnational entities, to some degree also reflects the weakness of powers of states in protecting from external forces. In terms of the global market, more transnational companies, such as British Petrol and Citigroup are established to exploit the global market. In this context, national government or their regulations become incapacitated. This can undermine the power of a state to protect itself and its citizens from external forces. Criminals can make use of convergent global management to avoid the control of government to commit their crime. Take the case of international financial fraud as an example. Criminals use transnational corporations to receive money from one country and transfer them to another country via the transnational finance system. International financial systems have their own rules and networks to limit intervention from national law enforcement. Moreover, it seems that there are no border barriers to their criminal activities, whilst it is difficult for law enforcement agencies of a country to monitor transnational criminal acts often without help from other countries. In this regard, to describe the impacts of globalisation of transnational crime, Mats Berdal and Monica Serrano have described how globalisation, especially economic globalisation and integration, facilitates transnational crime as follows:

‘nowhere is this more evident than in the relation of transnational (organized) crime to economic globalisation: the degree to which a more integrated world economy - characterized by the steady reduction of regulatory and other obstacles to cross-border flows of goods, capital, and people - has facilitated the growth of transnational organised crime.’<sup>191</sup>

Yet transnational crime existed before current globalisation developed. This means that transnational crime is growing not only from globalisation but also many other factors. As a consequence, on the one hand, globalisation is one opportunity for the growth of transnational economic growth; on the other hand, globalisation is a catalyst and facilitator for the growth of transnational crime, when global markets and multi-national companies are established while global governance requirements diminish the powers of countries. But, it seems that the opportunities provided by globalisation for transnational crime outweigh its resistance to such exploitation.

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<sup>191</sup> Berdal, M. and Serrano, M., ‘Transnational Organized Crime and International Security: The New Topography’ in Mats Berdal and Monica Serrano (eds), *Transnational Organized Crime and International Security: Business as Usual?* (Boulder and London: Lynne Rienner Publishers 2002) 197

Along with globalisation, other aspects of modernity have changed social practices. Whilst they bring achievements such as the building of essential infrastructure and the supply of new products, they also cause negative consequences. The same industry advances that have allowed legitimate businesses to increase their international operations have similarly affected the activities of transnational crime.<sup>192</sup> In a broad view, there is an inequality occurring between countries and regions in terms of issues such as unemployment, resources exploration. The gap between poor and rich countries may be extending.<sup>193</sup> This gap, for example, may affect changes in drug demand and supply between these countries that may facilitate the growth of transnational crime. People lacking jobs in poor countries may engage in transnational drug trafficking to supply drugs to those who live in rich countries and thus have an increasing demand for drugs. Moreover, tendencies to pursue modernity at all costs limit the ability to control and prevent the negative impacts of the speed of modernity and create more chances for transnational crime. For example, the mobile telephone is a convenient device for people's daily use. Its use is spreading very fast in businesses and people's modern lives. But its availability may be exploited to distribute illicit images such as child pornography. Therefore, to some extent, modernity is also an enabler to the rise and expansion of transnational crime. In one or several ways, it generates asymmetry between countries and social classes in society as well, which may generate crime opportunities. The gap between rich and poor, relative poverty and inequality is a negative and unintended impact of modernity. David Felsen and Akis Kalaizidis has argued that the widening of the gap between rich and poor countries, in recent years, has made the illegal trafficking in humans a central issue in transnational crime.<sup>194</sup> Monica Serrano affirmed the role of globalisation and modernity as shaping and partially explaining the rise and expansion of transnational (organised) crime.<sup>195</sup>

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<sup>192</sup> Rodrigo Paris-Steffens, 'The Role of the United Nations in Combating Organised Crime' in Jane Rae Buck Walter (eds), *International Perspectives on Organised Crime* (Office of International Criminal Justice, University of Illinois, 1990) 15

<sup>193</sup> Piketty, T., *Capital in the Twenty – First Century* (Cambridge, MA: Harvard University Press, 2014) 188

<sup>194</sup> Felsen, D., and Kalaizidis, A., 'A Historical Overview of Transnational Crime' in Reichel, P. (eds), *Handbook of Transnational Crime & Justice* (Thousand Oaks, London, New Delhi: Sage, 2005) 16

<sup>195</sup> Serrano, M., 'Transnational Organised Crime and International Security: Business as Usual?' in Mats Berdal and Monica Serrano (eds), *Transnational Organized Crime and International Security: Business as Usual?* (Boulder and London: Lynne Rienner Publishers 2002) 23



Networks are a prime feature of late modernity, shaping increasingly global and ‘new social structures’<sup>196</sup> that may be perceived as computerized, virtual, interactive and more flexible communities, with profound implications for human communication and relationships. A network society that is perceived as a new society, based upon knowledge, organised around network and partly made up of flows is established.<sup>197</sup> Spaces of flow and networks play more important roles than ones of geography. It seems that the networks and flows are becoming more borderless, whereas the nation states are more open. As a result, this shift may make the society more vulnerable in that the concentration of power resides in transnational networks, instead of nation states. Take the internet as an example. The internet can connect people from many locations without barriers of nation states’ land borders. A strength of the internet is its ability to transmit of real-time information, but at the same time it also presents the possibility of excluding any individuals or organisation, even states, whose development does not keep pace with the evolution of the internet. In this sense, transnational crime may make use of the development of networks as a significant feature of our present world in order to carry out their transnational operations. An illicit world for transnational criminal activities may be established in order to neutralise the control of nation states. In this regard, Manuel Castells has stated that there appears now ‘the development of a global criminal economy that is having significant impacts in international economy, national politics, and local everyday life.’<sup>198</sup>

The impact of other recent world developments also plays a role to make transnational crime a more prevalent and complex phenomenon. The success or failure in management of regional and transnational problems may be related to the emergence or development of transnational crime, at least of certain types such as money laundering, human trafficking, and international environment crime. It is not difficult to see that our contemporary world is facing many challenges regarding global climate change and the shortage of natural resources. As a result, these problems cause a number of non-traditional security issues such as natural disasters, infectious disease, and transnational crime, to name a few. These matters have a causal nexus. For example, experts predicted

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<sup>196</sup> Castells, M., ‘An introduction to the Information Age’ (1997) 2(7) *City: Analysis of Urban trends, Culture, Theory, Policy, Action* 7

<sup>197</sup> Aas, K., *Globalisation and Crime* (London: Sage 2007) 9

<sup>198</sup> Castells, M., ‘An introduction to the Information Age’ (1997) 2(7) *City: Analysis of Urban trends, Culture, Theory, Policy, Action* 7

the rise in trafficking in women and children when the tsunami took place in the South Asia few years ago where there were more occasions for the abduction or trafficking of missing children and women due to the chaos caused by the tsunami.<sup>199</sup> Therefore, it can be said that transnational crime becomes worse during the emergence and development of global problems that are not resolved in suitable ways.

However, it is necessary to say that the responsibilities for the current phenomenon of transnational crime are not entirely derived from impacts of transnational factors. Facilitation of transnational crime may combine the impacts of local elements, such as the conditions and ability of a country to govern its society. Factors such as policy and its implementation by an individual nation state also impact on the emergence and growth of transnational crime. For example, in Vietnam, before the *'Doi Moi'* period, it seems that transnational crime was not common.<sup>200</sup> Moreover, although the world seems to have become smaller as a result of interconnectedness, policies of prohibition 'that are attributable to the economic and security interests of dominant power, as well as to powerful moral considerations'<sup>201</sup> still exist. In addition, there may be loopholes in a country's laws and policies. As a result, forms of illicit activities, such as smuggling, have an environment in which to grow to meet demand of prohibited products and commodities. Furthermore, there may be illicit economies existing alongside legitimate ones. These settings, to some extent, provide an origin for crimes between countries such as smuggling, because transnational criminals engage in arbitrage by seeking to exploit jurisdictional weakness. For instance, criminals make the purchase of currencies, securities or commodities in one market for resale in another in order to profit from unequal prices. These opportunities will provide stimulation for the emergence and growth of cross-border crimes. In this regard, Vincenzo Ruggiero has said that transnational crime, in sum, appears to be a specific variant of illicit business that mirrors the current, specific forms of social control.<sup>202</sup>

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<sup>199</sup> U.S. Department of State, Trafficking in persons report (June, 2005), <<http://www.state.gov/documents/organization/47255.pdf> >

<sup>200</sup> See more discussion on transnational crime situation in Vietnam at the later sub-section 3.3.3., Transnational Crime Impacts in Vietnam

<sup>201</sup> Serrano, M., 'Transnational Organized Crime and International Security: Business as Usual?' in Berdal, M., and Serrano, M. (eds), *Transnational Organized Crime and International Security: Business as Usual?* (Boulder and London: Lynne Rienner Publishers 2002) 16

<sup>202</sup> Ruggiero, V., 'Global Markets and Crime' in Bear, M. (eds), *Critical Reflections on Transnational Organised Crime, Money Laundering, and Corruption* (Toronto, Buffalo and London: University of Toronto Press 2003) 173

A country, such as a 'failed' or fragile state where national and local authorities are incapable of delivering crucial public goods such as safety, security and other basic services, or where state functioning is compromised by, for example, corruption, provides many favourable conditions for transnational crime.<sup>203</sup> In such a country, a transnational regulatory system may not be established or work well. Specifically, the amount of crime can be determined not solely by the activities of criminals themselves but also by the ability of law enforcement agencies to respond. The failure of law enforcement may facilitate transnational crime. A country where there is a shortage of human resources as well as inappropriate mechanisms for tackling crime may face more challenges in crime control and reduction. Moreover, a country which lacks capacity to respond to these issues may be attacked by criminals via its weaknesses. In other words, weak governance and corruption have helped to cultivate transnational crime. Insufficient legislation or misconduct of government officials, or even the discrepancy in governance between countries, create ideal conditions that can be made use of by transnational crime. In the case of one country, insufficient resources, including lack of finance, and incompetent authorities are also a facilitating environment where transnational crime can avoid justice easily. For example, the communities where police and customs have responsibility to tackle smuggling but are involved in the illegal activities of smugglers will trigger the rise of transnational crime. Transnational crime could even affect the policies that are made by a weak government. Adam Edwards and Peter Gill have argued that the opportunities for organised crime are generated by poor corporate governance and the connivance of respectable society.<sup>204</sup> In this regard, despite the scarcity of specific official data between corruption and transnational crime, there are consistent indications that corruption does play a role in facilitating and fostering transnational crime, especially in developing countries.<sup>205</sup> Richard Ward and Daniel Mabrey have said that in most developing Asian economies, crime in the past two decades has become a growing concern, characterized by corruption, unstable or weak governments, and in many cases,

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<sup>203</sup> Miraglia, P., Ochoa, R., and Briscoe, I., *Transnational Organised Crime and Fragile States*, (OECD, 2012) 8

<sup>204</sup> Edwards, A., and Gill, P., *Transnational Organised Crime: Perspective on Global Security* (London and New York: Routledge, 2003)7

<sup>205</sup> *Transnational Organised Crime: A Growing Threat to National and International Security* (National Security Council), <<https://www.whitehouse.gov/administration/eop/nsc/transnational-crime/threat>>

criminal justice systems that have neither the funding nor the technology necessary to cope with increasingly sophisticated criminal activity.<sup>206</sup>

In addition, the problem of a fragile state may affect the growth of transnational crime in other country, especially neighbouring countries or countries in the same region. In this sense, criminals in one country may find characteristics, such as corruption, of the fragile state in other country as opportunities to extend their criminal activities to that fragile state or at least as a hiding place. Take the case of Cambodia, a neighbour of Vietnam as an example. According to the Fund for Peace's Fragile States Index (2015), Cambodia is in a 'high warning' tier.<sup>207</sup> Although Cambodia has recently made positive progress, it is still characterized as a weak national integrity system.<sup>208</sup> 'Rival political parties dominate the justice system, and the lack of clear legal system and procedures contributes largely to corruption, political influence and arbitrary criminal justice policy.'<sup>209</sup> In other words, there are concerns about a high rate of unpunished criminal cases, a weak legal regime generally, and a judiciary that lacks independence. As a result, these conditions make Cambodia not only an ideal place of origin but also an attractive transiting point for transnational crime, such as transnational drugs trafficking and trafficking in human beings in the region. Criminals may escape from Vietnam and be able to hide in Cambodia. In the meantime, there are increasing transnational criminal activities that involve both Vietnam and Cambodia. For example, the illicit trade of timber allegedly carried out by Vietnamese companies has links with high-state officials and even military officers in Cambodia.<sup>210</sup>

In summary, criminals always look for the conditions in which there are high opportunities and low risks in order to flourish. The literature reveals that the growth of transnational crime is related to the conditions in a society. 'Crime can neither exist nor

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<sup>206</sup> Ward, R., and Mabrey, D., Organized crime in Asia, in Reichel, P. (eds.), *Handbook of Transnational Crime and Justice* (Thousand Oaks, London, New Delhi: Sage, 2005) 387

<sup>207</sup> The Fund for Peace's Fragile States Index, <<http://fsi.fundforpeace.org/rankings-2015>>

<sup>208</sup> Transparency International Cambodia, 'Corruption and Cambodia's Governance System: The Need for Reform', page 199, accessed at: <http://www.ticambodia.org/files/2014EN-NISA-WEB.pdf>

<sup>209</sup> Ward, R. and Mabrey, D., 'Organised Crime in Asia and the Middle East' in Reichel, P. and Albanese, J (eds), *Handbook of Transnational Crime and Justice* (Thousand Oaks: Sage, 2014) 447

<sup>210</sup> UNODC, *Transnational Organised Crime in East Asia and the Pacific: A Threat Assessment* (2013), page 94, <[https://www.unodc.org/documents/data-and-analysis/Studies/TOCTA\\_EAP\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf)>

make sense without its particular social context.’<sup>211</sup> The factors mentioned above that result from the negative consequences of globalisation and the inability of the state and other institutions to effect sufficient societal control are classed as factors for the acceleration of transnational crime. In post-modernity period and globalization, countries are more connected each other. There are certain global governance systems. A number of fragile states however, create a problem for global governance and an inability in global society to control where transnational crime, with its entrepreneurial nature, seeks to exploit those problems for growth. Take Afghanistan as the example, which is nowadays the world biggest opium and heroin producing area.<sup>212</sup> So, alongside its many positive effects, globalisation has transformed the world in ways that provide new crime opportunities for crime and can actually facilitate crime. As Phil Williams has said, transnational crime is the dark side of globalization.<sup>213</sup> Thus, it is necessary to prevent criminals from making use of these factors to conduct illegal transnational activities. As a result, there is an implication that, in the conditions of post-modernity, the growth of transnational crime may come from opportunities of globalization and a nature of transnational crime that allows transnational criminals to make use of globalization conditions. In this sense, the next subsection will investigate and understand the main characteristics of transnational crime.

### **3.1.2. Understanding the Main Characteristics of Transnational Crime**

The previous section has indicated key factors that foster the growth of transnational crime. To further investigate the transnational crime phenomenon, this section will examine the nature of transnational crime by identifying the main constitutive elements of transnational crime. There may be a problem of a state’s organisation of/ involvement in transnational crime and a problem of a state’s facilitation of transnational crime. Corruption is the most obvious example which can amount to transnational corruption. As a result, there are state transnational crimes. But they are not a focus of this thesis, because the issue of state transnational crime may involve a further category of crimes from military activities which requires consideration of the sources of

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<sup>211</sup> Findlay, M., *The Globalisation of Crime: Understanding Transitional Relationships in Context* (Cambridge: Cambridge University Press 2000) 6

<sup>212</sup> UNODC, *The Global Afghan Opium Trade: Threat Assessment 2011*, issued on July 2011, page 89

<sup>213</sup> Williams, P., ‘Organising Transnational Crime: Networks, Markets, and Hierarchy’ in Williams, P. and Vlassis, D. (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (London: Frank Cass, 2001) 66, 67

international humanitarian laws. In contrast, for the purpose of this thesis, this section will focus on those forms of transnational crime that are primarily non-state crimes which are deemed to be the most prevalent in Vietnam. Moreover, the issue of non-state transnational crime is more related to domestic policing laws. In this sense, it is asserted that two interrelated characteristics discussed below should exist for the existence of transnational crime. The first feature is boundary-crossing. The second feature is a legal violation codified in national legislation of at least two countries. This thesis will now give explanations to these claims as follows.

### **3.1.2.1. A Boundary Crossing Action**

Transnational crime involves a border-crossing action. It means that criminal activities which can be called transnational are not limited by the borders of single countries. In general, transnational crime is perceived as any illicit activity or activity produced by illicit means that involves the penetration of a national border.<sup>214</sup> In other words, transnational crime can be defined as any type of criminal act and/or a criminal act that occurs across national boundaries. Some crimes such as drug trafficking, trafficking in persons and cybercrimes are transnational in nature, whereas others such as counterfeit currency may be regarded transnational crime when part of their operation or its consequences are formed in another jurisdiction. The criminal action may be planned in one country, and implemented in another country. To explain this point further, Andrea Bossard also indicated one of two constitutive elements of transnational crime as follows.

‘The crossing of a border either by people (criminals; fugitives or on the way to commit a crime; or victims - such as in the case of traffic in human beings); or by things (firearm, such as when terrorists put arms on a plane before takeoff; money techniques of money-laundering; objects used in the commission of a crime, such as drugs on carriers or in containers); or even by criminal will (computer fraud, when an order given from Country A is transmitted to Country B).’<sup>215</sup>

In support of this view, Ralf Emmers also specified that transnational crime must involve the crossing of borders or jurisdiction.<sup>216</sup> Therefore, the crossing of borders can

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<sup>214</sup> Joyce, E., ‘Transnational Criminal Enterprise: The European Perspective’ in Fare, T. (eds), *Transnational Crime in the Americas* (New York: Routledge 1999) 99

<sup>215</sup> Bossard, A., *Transnational Crime and Criminal Law* (Office of International Criminal Justice-The University of Illinois, 1990) 5

<sup>216</sup> Emmers, R., ‘ASEAN and the Securitization of Transnational Crime in Southeast Asia’ (2003) 16(3) *The Pacific Review* 419, 438

be achieved via people (perpetrators or victims), objects, or intent. The important point is to make clear that a local person or a foreigner can be a perpetrator or a victim of transnational crime as long as they perform their movement or activities across national border in order to involve crime. For example, if a foreigner arrives in one country, and he or she simply commits a crime in that country, which has no involvement with another country to commit crime, then, that crime is not a transnational crime. In contrast, a local person, who, for instance, tries to send his or her email to defraud other people in other country, will be a perpetrator of transnational crime, although this person has never been abroad. In this case, what crosses borders is information. This is a basic feature to distinguish transnational crime from domestic crime, the latter of which tended to occur within a national boundary in terms of the nature of crime and crime geography. Indeed, a violation of international criminal law does not necessarily involve more than one country; and if not, that violation is not considered as transnational crime. For example, a genocide crime can be committed in one country. It may be an international crime, but it happened in only one country. Therefore it cannot be a transnational crime.<sup>217</sup>

Apart from these academic views, the United Nations has also affirmed in the context of transnational crime operations that transnational crime covers not only offences committed in more than one state, but also those that take place in one state but are planned or controlled in another. Also included are crimes in one state committed by groups that operate in more than one state, and crimes committed in one state that impact on other states.<sup>218</sup> Therefore, with this elaboration, it is clearly indicated that perpetrators of transnational crime can be individuals or criminal groups, as far as their activities across the national borders are concerned. Their significances are either their movement through national borders to commit a crime or their organising activities across the national borders to violate criminal laws. Thus, another aspect of the border crossing feature of transnational crime is cross-border mobility that takes different forms such as operational mobility and networking.<sup>219</sup>

In this sense, transnational organised crime is one part of transnational crime, because the transnational characteristics of crime may result from their organized crime

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<sup>217</sup> Madsen, F., *Transnational Organised Crime* (Oxon: Routledge 2009) 9

<sup>218</sup> UNODC, *The Globalisation of Crime: A Transnational Organised Crime threat Assessment* (United Nations Publication 2010) 25

<sup>219</sup> Lampe, K., 'Re-Conceptualizing Transnational Organized Crime: Offenders as Problem Solvers' (2011) 2(1) *International Journal of Security and Terrorism* 1

activities. But even if an organised crime group's criminal activity may be committed completely in one country; only if this group has its operational network transcending national borders can this criminal activity be regarded as transnational crime. Frank Madsen has given an example of highly professional pickpocket gangs to explain the geography of transnational crime, in which each of the offenses is national but the criminal goes from one country to another in order to commit the crimes.<sup>220</sup>

Presently, there is a common misunderstanding about the nature of transnational crime, by which transnational crime is regarded as synonymous with transnational organised crime. These 'two terms are used as near-synonym.'<sup>221</sup> But they are not the same, because transnational organised crime is defined as being a process rather than just a type of crime. Transnational organised crime is a type of criminal which involves a criminal gang. Transnational organised crime does involve particular forms of organisation, which generally impact on sources of crime but do not impact on the type of criminal involved. Although many types of transnational crimes, such as money laundering, are usually well organized and carried out in a professional way, in fact, transnational organised crime is just one aspect of the transnational crime concept. Transnational crime can be carried out by any number of individuals along a continuum. In other words, it can be committed by either one person, two persons...or complex organisations. In this sense, transnational crime can be conducted by individuals in certain circumstances. One significant example is smuggling in commodities that can be committed by a tourist as 'an opportunist' who carries contraband such as cigarettes across a national border to make illegal profits, although he or she did not plan to commit a crime before or again. In summary, Gerhard Mueller noted, almost invariably, transnational criminality is organised criminality, although it is entirely imaginable that a single person can engage in transnational crime.<sup>222</sup>

In addition, the boundary-crossing feature can also be manifested through the profit motive that drives most transnational criminals. Economic differences between countries motivate criminals to commit crime across national borders. Proceeds of crime

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<sup>220</sup> Madsen, F., *Transnational Organized Crime* (Oxon: Routledge 2009) 10

<sup>221</sup> Bear, M., *Structure, Strategies and Tactics of Transnational Criminal Organisations: Critical Issues for Enforcement* (paper presented at the transnational crime conference in Canberra, 9-10 March 2000)

<sup>222</sup> Mueller, G., 'Transnational Crime: Definitions and Concepts' in Williams, P. and Vlassis, D. (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (London: Frank Cass, 2001) 13



can be more easily concealed or multiplied when crime transcends national borders. Therefore, the profit motive of transnational criminals is often used as a defining factor to determine transnational crime different from other illegal activities, for example certain international crimes, which are not characterized by motives of personal gain or profit. In this regard, international terrorism as a form of international crime may conduct transnational criminal activities to generate funds for its organisation. International terrorism and transnational crime may use the same method, for example drug trafficking activity. Steven Hutchinson and Pat O'Malley acknowledged the increasing trend of reliance by terrorist groups on criminal activities to sustain their activities as well as improve their capabilities, and they also argued that types of crimes that the terrorist groups would engage in are subject to the degree of a terrorist group's organisation and need.<sup>223</sup> But terrorism is not ordinary transnational crime because its motivation is not financial but primarily political,<sup>224</sup> whereas transnational drug trafficking crime has a profit motive. Admittedly, terrorists and transnational criminals often use the same methods, most often for divergent motives – but not always.<sup>225</sup> When the meaning of the term 'profit motive' of transnational crime is broad enough to cover such a transnational activity for terrorist financing, in terms of the commission of a specific transnational crime, a terrorist can be considered a transnational criminal. Commenting on this point, Tamara Makarenko said that the rise of transnational crime and changing nature of terrorism have produced two traditionally separate phenomena that have begun to reveal many operational and organisational similarities.<sup>226</sup> However, this aspect of terrorism is not covered by this thesis, because terrorism is not a significant problem in Vietnam. In comparison with transnational crime, terrorism is a different phenomenon. It requires different cooperation and intelligence exchange. Indeed, terrorism is monitored by a separate law, for example in Vietnam it is the Terrorism Prevention Act 2013.<sup>227</sup>

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<sup>223</sup> Hutchinson, S., and O'Malley, P., 'A Crime-Terror Nexus? Thinking on Some of the Links between Terrorism and Criminality' (2007) 30(12) *Studies in Conflicts & Terrorism*, 1095, 1107

<sup>224</sup> Madsen, F., *Transnational Organized Crime* (Oxon: Routledge, 2009)78

<sup>225</sup> Shelly, L., Picarely, J., Irby, A., Hart, D., Caraig-Hart, P., Williams, P., Simon, S., Abdullaev, N., Stanislowski, B., and Covill, L., 'Methods and Motives: Exploring Links between Transnational Organised Crime and International Terrorism', <<https://www.ncjrs.gov/pdffiles1/nij/grants/211207.pdf>>

<sup>226</sup> Makarenko, T., 'The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism' (2004) 6(1) *Global Crime* 129, 145

<sup>227</sup> Terrorism Prevention Act 2013, No. 28/2013/QH13, issued on 12 June 2013

### 3.1.2.2. A Legal Violation Codified by National Legislation of At Least Two Countries

Turning to the second feature of transnational crime, it is specified that transnational crime involves criminal acts codified by the laws of at least two countries or more. There are two parts to this claim's meaning. First, this means that when justifying a transnational crime, national legislation is used to determine and adjudicate on that offence. It is not based on international law. Admittedly, the concept of some kinds of transnational crime can be found in international conventions (for instance, drug crime<sup>228</sup> and trafficking in persons<sup>229</sup>), and the process of bringing these crimes to justice requires international cooperation under the international agreements and conventions. However, this international code 'promotes indirect suppression of a crime through domestic criminal law by imposing obligations on states to enact legislation.'<sup>230</sup> A national law that is used to define transnational crime is still a crucial factor that helps determine transnational crime as different from other crimes that may describe the same criminal activities globally as international crime. To further prove this feature of transnational crime, according to Frank Madsen, in spite of the fact that transnational crime involves at least two jurisdictions, the crime is still codified in the national legislations of these jurisdictions.<sup>231</sup>

Thus, it is important to distinguish between transnational crime and international crime. The reason for their difference results from the nature of these two kinds of crimes. Transnational crime affects the interests of individual countries whereas international crime includes acts that threaten world order and security (i.e. crime against humanity, war crime, genocide).<sup>232</sup> Even when international crimes only occur in one country, their impact 'threatens the peace, security and well-being of the world.'<sup>233</sup> In contrast, transnational crime emerges from the concerns of individual countries regarding their 'political, social and economic interests' and 'assertion about the harm caused to these

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<sup>228</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotic Substance 1988, Article 3

<sup>229</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, Article 3

<sup>230</sup> Obokata, T., *Transnational Organised Crime in International Law* (Oregon: Hart, 2010) 29

<sup>231</sup> Madsen, F., *Transnational Organised Crime* (Oxon: Routledge 2009) 9

<sup>232</sup> Reichel, P., *Handbook of Transnational Crime and Justice* (Thousand Oaks, London, New Delhi: Sage, 2005) xiv

<sup>233</sup> Preamble of The Rome Statute of ICC

interests.’<sup>234</sup> In this connection, David Felsen and Akis Kalaitzidis stressed that international crime are crimes prohibited by international laws, norms, treaties, and customs, while transnational crimes are specifically concerned with acts criminalised by the municipal laws of more than one country.<sup>235</sup> Furthermore, examples of international crimes include for example genocide as well as violations of human rights, often without a profit motive, whereas a profit purpose is a central objective of virtually all transnational crimes.<sup>236</sup>

The second part of the meaning in this claim is that transnational criminal acts must be codified in at least two countries' national laws. Transnational crime targets not only its immediate subject, such as the interest of individuals, institutions, or the laws of one country, but it also damages interests within the other country involved. The legal factor to define transnational crime should be considered to reside in the national laws of at least two countries, or, in other words, more than one country. In practice, if a transnational activity that involves two countries which is not criminalized by both countries, that transnational activity cannot be considered as transnational crime. For example, if tax evasion activity is codified in one country, while in the other country involved in that activity it is not considered a crime, in this case, tax evasion activity between those two countries is not a transnational crime. To prove this view, Andre Bossard has also argued that transnational crime should be prescribed by the laws of at least two countries when indicating the compulsory legal codification requirement for transnational crime. He said that ‘at national level, according to the principle "*nullum crimen, nulla poena sine lege*" (no offense, no sanction without law), an anti-social conduct can be considered as a crime only if there is a legal text providing for it; at international level, if the fact is considered a criminal offense by at least two states.’<sup>237</sup>

To deal with crimes between countries, double criminality is often applied as a legal principle in mutual legal assistance in criminal matters, including extradition, although ‘requirements around double criminality vary between States and mutual legal

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<sup>234</sup> Boilster, N., ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law* 953, 957

<sup>235</sup> Felsen, D. and Kalaitzidis, A., ‘A Historical Overview of Transnational Crime’ in Reichel, P. (eds), *Handbook of Transnational Crime and Justice* (Thousand Oaks, London, New Delhi: Sage, 2005) 6

<sup>236</sup> Albanese, J. S., ‘Deciphering the Linkage between Organized Crime and Transnational Crime’ (2012) 66(1) *Journal of International Affairs* 3

<sup>237</sup> Bossard, A., *Transnational Crime and Criminal Law* (Office of International Criminal Justice -The University of Illinois, 1990) 5

assistance regimes.’<sup>238</sup> This principle’s application reflects the interests of individual States in international cooperation between countries, and the protection of human rights in criminal justice process. In general, double criminality means that the conduct of person who, for example, is the subject of a mutual legal assistance request, is defined as a criminal offence in both the requesting and the requested country.<sup>239</sup> Furthermore, according to United Nations Convention against Corruption, the double criminality requirement is deemed fulfilled as long as the conduct constitutes a criminal offence in the laws of both countries irrespective of whenever the laws of the requested state party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting state party.<sup>240</sup> Therefore, the double criminality principle plays an important role to define the application of transnational crime in relation to claimed jurisdiction over transnational crime.

By contrast, some experts such as Peter Andreas and Ethan Nadelmann take a different view. They say transnational crime can be a violation of one country’s criminal law alone rather than of at least two countries. They wrote that transnational crime consists of those activities involving the crossing of national borders and violation of at least one country’s criminal law.<sup>241</sup> This view may help explain an exceptional situation in which crime involves failed or broken states where there is no law on transnational crime. Take the case of Somalia as an example. For many years, Somalia has been a country without rules, regulations or even a functioning government.<sup>242</sup> As a consequence the country has become an attractive place for transnational crime. Moreover, to some extent, the view that regards transnational crime as a violation of one country’s national law may provide an interpretation for influence that is given from one rich country to a poor country in the context of the internationalization of law enforcement. In this sense, the rich country may offer some physical assistance, but demand cooperation with some conditions that sometimes may contradict the requested country’s laws.

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<sup>238</sup> The ASEAN Secretariat, ‘ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases’, page 42, <<http://www.scribd.com/doc/111875099/ASEAN-Handbook-on-International-Legal-Cooperation-in-Trafficking-in-Persons-Cases>>

<sup>239</sup> UNODC, *Manual on Mutual Legal Assistance and Extradition* (United Nations, 2012) 69

<sup>240</sup> United Nations Conventions against Corruption, Article 43(2)

<sup>241</sup> Andreas, P. and Nadelmann, A. E., *Policing the Globe: Criminalisation and Crime Control in International Relations* (Oxford and New York: Oxford University Press, 2006) 255

<sup>242</sup> Chasing the Somalia money piracy trail (BBC News), <<http://news.bbc.co.uk/1/hi/world/africa/8061535.stm>>

In such circumstances, an extra-jurisdictional crime is usually applied by one nation state to cope with criminal activities that involve other nation states. In other words, a nation state may design its criminal law with extra-territorial impact extending jurisdiction beyond the sovereign and territorial limits of that nation state in order to deal with a transnational criminal act in environment in which it involves a failed state where there is no law on that crime, or a country where its government does not want to cooperate to investigate the crime because of its national interests. In this regard, Dan Stigall has said that, where other sovereigns fail or refuse to act, states can attempt to fill the void of this action by taking positive action to prevent further criminal conduct.<sup>243</sup> The use of extra-jurisdictional crime is usually premised on a link with the asserting state, notably nationality (the active and passive personality principles), or political independence (protective or security principle).<sup>244</sup> In a relatively uncontroversial example, a country may issue law to criminalise and handle dangerous violations which are committed abroad by their nationals. For example, in England and Wales, ss. 4 and 9 of the Offences against the Person Act 1861 empowers its courts to try a British citizen for murder or manslaughter committed against an individual in a foreign country;<sup>245</sup> and s.72 of the Sexual Offence Act 2003 allows prosecution of a British citizen or United Kingdom resident for certain sexual offences committed in a territory or country outside the United Kingdom.<sup>246</sup> Moreover, extra-territorial jurisdiction also facilitates the application of inchoate offences, such as conspiracy for a case that involves different jurisdictions. ‘It is not uncommon, for example, to encounter conspiracies formed in whole or in part in one country, where parties intend to import drugs, firearm and people into another country.’<sup>247</sup> In addition, extra-territorial provisions may provide a legal basis to bring to trial those who have trained or prepared for offences abroad, though there may be a difficulty of evidence-gathering abroad. For example, the offence of participating in activities of

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<sup>243</sup> Stigall, D., ‘Ungoverned Spaced, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law’ (2013) *Notre Dame Journal of International and Comparative Law* 6, <<http://www3.nd.edu/~ndjicl/V3I1/Stigall.pdf>>

<sup>244</sup> Ryngaert, C., ‘The Concept of Jurisdiction in International Law’, <<https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf>>

<sup>245</sup> The Offences against the Person Act, 1861 c. 100 (Regnal.24\_ and\_ 25\_ Vict), section 9, issued on 6 August 1861

<sup>246</sup> The Sexual Offences Act 2003, c.42, section 72, issued on 20 November 2003

<sup>247</sup> Law Commission, *Conspiracy and Attempt*, (Law Com No. 318), page 107, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/248029/0041.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248029/0041.pdf)>

organised groups<sup>248</sup> could be used to bring in trial those who has been abroad to join transnational criminal groups and receive training to commit an offence.<sup>249</sup>

The view that regards transnational crime as a violation of more than one country's national law seems to be more sensible and common than the alternative which defines transnational crime as a violation of only one country's national law. There are several reasons for this. First, in general, the former shows the possibility of transnational cooperation between countries in the fight against crime when there is a shared view about transnational crime in the countries concerned. Furthermore, when mutual legal assistance is requested, legal principles such as double criminality are easily satisfied in order to render assistance to each other. Second, in terms of the definition of transnational crime, a feature that indicates transnational crime as a violation of more than one country's national law facilitates the creation of some boundaries or criteria to transnational crime, otherwise it will have insufficient focus and then it will be difficult to allocate or apply resources such as training, expertise or even legal powers.

In summary, despite many different terms such as 'global crime', 'cross-border crime', international crime and 'transnational crime', the above two common characteristics are the main foundations to identify transnational crime as a phenomenon, and to distinguish it from other crimes. These traits are key factors which define signs of transnational crime rather than as legal factors that are used to determine what specific offences they are. These traits seem to combine a social aspect in order to perceive transnational crime as a social phenomenon rather than considering it only in the context of 'crime and punishment'. And, for practical purposes, this perception of transnational crime will help to offer further insights into some issues such as: the location where the crime is committed; the nationality that perpetrators have; and whether these crimes threaten a country's national interest. These issues require further clarification in order then to exercise national policing, legal jurisdiction or authority to punish transnational crimes under domestic law.<sup>250</sup>

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<sup>248</sup> Serious Crime Act 2015, s.45

<sup>249</sup> See further in discussion on the UK's experience in design of criminalisation to respond transnational crime in chapter 6 (section 6..2.3.3)

<sup>250</sup> Nagle, L., 'Terrorism and Universal Jurisdiction: Opening a Pandora's Box?' (2011) 27(2) Georgia State University Law Review 339, 345

### 3.1.3. Attempted Definitions in Current Use

Having explored as a phenomenon what is meant by transnational crime with the proposed two main characteristics. It is now worth examining the extent to which existing definitions of transnational crime reflect these proposed characteristics. There are as many perceptions of transnational crime as there are analytical perspectives and political backgrounds. By studying different approaches to perceiving transnational crime, this section will help understand further the nature of transnational crime. Thus, the section analyses two common ways of defining transnational crime nowadays. One considers transnational crime as a general criminological term, the other defines transnational crime as a specific legal offence.

#### 3.1.3.1. Transnational Crime as a General Criminological Concept

Transnational crime is defined as a general concept representing a group of crimes or a social phenomenon. Dimitri Vlassis has said that transnational crime is a phenomenon with multi-facets.<sup>251</sup> It can cover a wide range of transnational criminal activities, from normal crime to sophisticated crime such as organised crime, which expand in degree and grow into new types of crime such as cybercrime. In this connection, Neil Boister said that transnational crime covers a multiplicity of different kinds of criminal activity.<sup>252</sup> This type of definition focuses on the use of significant characteristics, such as boundary-crossing, to describe transnational crime in a broad sense, instead of as a specific offence.

In the same vein, the United Nations conceptualizes transnational crime on the grounds of its common nature. Specifically, the United Nations defines transnational crime as ‘offences whose inception, prevention and/or direct or indirect effects involved more than one country.’<sup>253</sup> To illustrate this view, the United Nations Convention against Transnational Organised Crimes indicates four possibilities of boundary-crossing in which an offence is transnational in nature:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

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<sup>251</sup> Vlassis, D., ‘Current Problems in the Combat of Transnational Organized Crime’ in Annual Report for and Resource Material Series No.54 (UNAFEI 2000) 69

<sup>252</sup> Boister, N., ‘Transnational Criminal Law’ (2003) 14(5) European Journal of International Law 953, 954

<sup>253</sup> A.COF.169/15/add.1, 4 April 1995

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another.<sup>254</sup>

Thus, the Convention ‘offers a broad, but exclusive definition of a transnational offence, deploying four alternation factors. Within each is the notion of an offence being committed in a particular State, or in several States.’<sup>255</sup> Moreover, the definition expands the notion of ‘boundary-crossing’ as it applies not only to criminal activities, but also to perpetrators,<sup>256</sup> which is reflected in (c) above. Further to this view, Cyrill Fijnaut wrote that transnational crime is in fact a general-purpose, ‘container’- type concept. It covers many different types of crimes, the main ones being organized crime, corporate crime, professional crime and political crime.<sup>257</sup>

The advantage of the perception of transnational crime on the basis of its main characteristics is that it describes transnational crime as a social phenomenon, and gives a wide picture of transnational crime. It also takes account of the global complexity of the issue and allows a wide range of cooperation in handling transnational crime between different national jurisdictions. Particularly, this style of definition allows law enforcement agencies to be more flexible in detecting and suppressing transnational crime and its related activities without the need to amend national legislation because the broad meaning of the definition enables them to address different forms of transnational crime as well as to cope with the changing nature of transnational crime in practice which facilitates a timely response to transnational crime. According to CarrieLyn Donigan Guymon, using the common attributes to define transnational crime could be the best method for scholars, lawyers, and social scientists.<sup>258</sup> The essence of the phenomenon of transnational crime is captured so as to construct a common understanding of

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<sup>254</sup> United Nations Convention against Transnational Organized Crime (2000), Art. 3

<sup>255</sup> McClean, D., *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford: Oxford University Press, 2007) 52

<sup>256</sup> Obokata, T., *Transnational Organised Crime in International Law* (Oregon: Hart, 2010) 29

<sup>257</sup> Fijnaut, C., ‘Transnational Crime and the Role of the United Nations in its Containment through International Cooperation: A Challenge for the 21<sup>st</sup> Century’ (2000) 8(2) *Eur. J. Crime Crim. L. & Crim. Just.* 119,120

<sup>258</sup> Guymon, C., ‘International Legal Mechanisms for Combating Transnational Organised Crime: The Need for a Multilateral Convention’ (2000) 18(53) *Berkeley Journal of International Law*, 53, 55



transnational crime that can apply across the jurisdictions regardless of the type of criminal activity in question.<sup>259</sup>

However, this way of perceiving transnational crime involves some disadvantages. For example, Gerhard Mueller has stated that it lacks precise judicial meaning and does not produce a legal term.<sup>260</sup> It only tends to be a sociological and political term to understand criminal groups and their networks and markets. Thus, it lacks legality which requires an offence to be clearly defined. Moreover, this style of defining transnational crime makes it difficult to facilitate cooperation between different agencies within a country because of discrepancies in interpretation of the definition that may occur when each agency adopts its own working definitions or interprets the definition itself.

An alternative view indicates that it is possible to define transnational crime in a more abstract and principled way whilst also taking into account legal norms. For example, Nikos Passas wrote:

Cross border-crime is conduct which jeopardize the legally protected interests in more than one national jurisdiction and which is criminalized in at least one the states/jurisdictions concerned.<sup>261</sup>

However, this approach still suffers from a lack of specificity in the definition of concepts, for example in the United States, the Trafficking Victims Protection Act 2000 states that ‘trafficking in persons is a transnational crime with national implications.’<sup>262</sup> But in fact the act does not define what transnational crime means. Therefore, though the term of transnational crime is invented in the legislation which tries to put the meaning of transnational crime into legal norms, the term still remains as a criminological term which lacks a precise definition.

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<sup>259</sup> Morrison, S., ‘Approaching Organised Crime: Where Are We Now and Where Are We Going?’ (2002) July No. 231 Trends and Issues in Crime and Criminal Justice (Refereed paper of Australian Institute of Criminology)

<sup>260</sup> Mueller, G., ‘Transnational Crime: Definitions and Concepts’ in Williams, P. and Vlassis, D. (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (London: Frank Cass, 2001) 13

<sup>261</sup> Passas, N., ‘Cross Border Crime and the Interface between Legal and Illegal actors’ in Petrus C. van Duyne, Claus Von Lamp and Nikos Passas (eds), *Upper World and Underworld in Cross Border Crimes* (Wolf Legal Publishers, 2002)13

<sup>262</sup> United States Trafficking Victims Protection Act, (Pub L 106-386 October 28, 2000, Sec.102b (24))

### 3.1.3.2. Transnational Crime as a Specific Legal Term

In contrast to the perspective described above, legal definitions involving specific transnational criminal activity are next considered. This style of definition is usually given in the national legislation of a country locally, and it tends to reflect how criminalisation of transnational activities is actually carried out locally. The core forms of crime that are viewed as potential transnational crimes are defined, for example, as trafficking in persons or drugs. This method looks at specific forms of transnational criminal activity and gives more precise description of one type of crime regarding a specific defined threat, in terms of criminalisation. However, the legislative approach to the definition of transnational crime has some advantages and disadvantages in practice.

With regard to the advantages, by this method, types of transnational criminal activities are ‘clearly’ spelt out in national legislation. This provides clear and consistent definition of specific transnational crimes. Moreover, by considering this type of concept, it is possible to understand the precise constituent elements of transnational offense that is criminalised in the national legislation of a country. This point facilitates effectiveness in investigating and prosecuting transnational criminal activities. Specifically, each legal description of transnational crime may facilitate law enforcement more easily. Because of the style of legal definition, the description of transnational crime may answer detailed questions: what action is committed; how this action is carried out; and for what the action is conducted. In addition, to a certain extent, relations between transnational crime and domestic crime can be revealed, because the concept of transnational crime is usually perceived as a development of domestic offences with a transnational dimension.<sup>263</sup>

However, there are some disadvantages with regard to the use of the legal definition of transnational crime. First, it is not flexible enough to address the wide variety of transnational crimes that occur in a society. Exhaustive lists of specific transnational offences hinder applying legal proscription to emerging and new forms of transnational crime.<sup>264</sup> Besides, it is still difficult to reflect the overarching volumes and size of transnational crime as a phenomenon by approaching transnational crime via the legislative concept of crime. This shortcoming can lead to exclude a strategy that mobilises resources and expertise of all different agencies and the whole society to address transnational crime while the transnational crime phenomenon is not only a law

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<sup>263</sup> Further discussion on this point will be in chapter 6, Criminal Law with relevant to Policing of Transnational Crime

<sup>264</sup> Obokata, T., *Transnational Organised Crime in International Law* (Oregon: Hart, 2010) 34

enforcement problem, but an issue for the whole society. Second, this style of perception of transnational crime may create different perceptions between countries over the same type of criminal activity, because of the influence of differences in legal traditions and legislative styles of countries, which can hamper transnational investigative cooperation in regions and internationally. Instead of common features of transnational crime, the same transnational criminal activity may be differently explained in different jurisdictions. It is hard to have consensus between countries when going into detailed issues, particularly legal-related factors when there still exist different degrees of development of legislation. Third, international standards with regard to transnational crimes, which are given in international documents such as ‘the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,’<sup>265</sup> may not be reflected in national law in general and legislative definitions of transnational crime in particular. For example, several countries including Vietnam do not incorporate fully all international requirements on ‘trafficking in persons’ in their national law,<sup>266</sup> though this Protocol defines ‘Trafficking in Persons’ as follows:

‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’<sup>267</sup>

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<sup>265</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by Resolution No. A/RES/55/25 of 15 November 2000 at the 55<sup>th</sup> session of General Assembly of the United Nations, Article 3(a)

<sup>266</sup> See further this point at discussion on chapter 6, Criminal Law relevant to Policing of Transnational Crime

<sup>267</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by Resolution No. A/RES/55/25 of 15 November 2000 at the 55<sup>th</sup> session of General Assembly of the United Nations, Article 3(a)

### 3.1.3.3. Summary and Application to this Thesis's Proposed Definition of Transnational Crime

To find the essence of transnational crime, this thesis studies what is transnational crime by using an epistemological approach adopted from what is called the 'ordinary language school'. The ordinary language school, sometimes referred to as the 'Oxford philosophy', is a philosophical tradition that is associated with philosophers such as John Langshaw J. L. Austin and Ludwig Wittgenstein.<sup>268</sup> According to 'ordinary language school', 'it propounds a conception of language according to which its fundamental function is to communicate thought by giving expressions in perceptible form.'<sup>269</sup> In order to understand a word (or concept), it is necessary to look at the role that that word plays in our 'language-game'.<sup>270</sup> In other words, 'coming to understand a concept is a matter of looking at the various ways in which that concept is employed or made manifest in our language-game.'<sup>271</sup> As a result, 'ordinary language school' tries to give an overall view point or overall impression of varied aspects of the ways in which the idea of transnational crime is used in a variety of contexts such as criminological context, not just law. The ordinary language approach helps locate the concept of 'transnational crime' in a specific context. For example, the term 'transnational crime' is found sometimes in legislation, sometimes in academic texts or policy documents. On this view, this analysis does not merely look at words in definitions, but also at the realities in which the definitions are used to talk about.<sup>272</sup> And, this analysis of transnational crime can be offered as an elucidation of the concept in the context of everyday usage rather than a definition. By the usage of this theory, the correct meaning of transnational crime will be distilled, which is practical and useful for policy makers and legislators in Vietnam, because ordinary language puts the meaning of transnational crime in a setting or grounding which helps keep it practical in orientation.

As indicated above, the definition of transnational crime is a highly debated topic, and it develops in line with the changes of society and the struggle against transnational crime. As described by Valsamis Mitsilegas, it is a concept that, while widely discussed,

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<sup>268</sup> Parker-Ryan, S., 'Ordinary Language Philosophy' (*The Internet Encyclopaedia of Philosophy*), <<http://www.iep.utm.edu/ord-lang/>>

<sup>269</sup> Hacker, P., *Wittgenstein's Place in Twentieth-century Analytic Philosophy* (Oxford: Blackwell, 1996) 29

<sup>270</sup> Wittgenstein, L., *Philosophical Investigations* (Oxford: Basil Blackwell, 1963) 5

<sup>271</sup> Zeybekoglu, I., 'On Appeals to "Ordinary Language"', *Pharmakon Journal of Philosophy*: 2<sup>nd</sup> Issue, 36, 37, <<https://www.american.edu/cas/philrel/pdf/upload/Zeybekoglu.pdf>>

<sup>272</sup> Hart, H., *The Concept of Law* (New York: Oxford University Press, 1961) 14

has remained largely undefined by law, at least until recently.<sup>273</sup> Transnational crime may be known by many different names such as cross-border crime, global crime, transnational organised crime and even, to some extent, as international crime. Perhaps, these terms are sometimes synonyms, but each term may have denotative and connotative meaning, and can be defined on the basis of a given context and view. There may be several definitions. Each serves a different purpose. Some are created to task the law enforcement or mobilise more resources. But it would build an incomplete picture of transnational crime when looking at just a legal definition of specific types of transnational crime. Moreover, it may not indicate that transnational crime is a social problem. Instead it only explain it as a law enforcement problem.

The above analysis about how to define transnational crime to some extent indicates that there is a broad distinction between a criminological definition of transnational crime and a legalistic definition of transnational crime. The former has a broader meaning and political focus, whereas the latter is more specific. Each term has its own purpose. Neither however fits with the proposed definition of transnational crime used in this thesis, which combines two characteristics. While transnational crime as a general criminological term tends to reflect the first characteristic of ‘border-crossing’, the definition of transnational crime as a legal term focuses on the second characteristic, which emphasises defining transnational crime as a criminal offence in national legislation. However, between these two definitions of transnational crime, in practice, transnational crime is necessarily perceived as a general criminological term rather than a specific legal offence. The reason for this is that term ‘transnational crime’ is open to interpret when it is considered as a criminological term. In this sense, for example the United Nations Convention against Transnational organised Crime achieves generalizing a concept of transnational crime by its ‘transnational’ characteristic, although it has a limitation regarding its main focus on the criminal group. Nor does it list the kind of crimes that may constitute transnational crime. Instead, the Convention then imposes an obligation on its state parties to further establish criminalisation in their national legislation based on the generalizing concept of transnational crime.<sup>274</sup> Moreover, using

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<sup>273</sup> Mitsilegas, V., ‘From National to Global, from Empirical to Legal: The Ambivalent Concept of Transnational Organized Crime’ in Beare, B. (eds), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption* (Toronto, Buffalo and London: University of Toronto Press, 2003) 58

<sup>274</sup> United Nations Convention against Transnational Organized Crime (2000), Articles 4, 5(3)

a general definition of transnational crime will allow the opportunity to study not only activities and operational processes of transnational crime, but also the markets and environment in which transnational crime evolves. In this connection, countering transnational crime is not only a responsibility of the police but also other sectors in the society. Thus, it is necessary to use different approaches other than law enforcement to tackle transnational crime, for instance social and economic initiatives. Furthermore, it is impossible to obtain a single accepted legal definition of transnational crime because transnational crime is not only a national concern, but also a transnational concern, while legal tradition varies between countries. In contrast, transnational crime that is put into a context of criminology can be easily captured with the typical features of transnational crime as proposed in this thesis.

For Vietnam, during the past nearly 30 years, the country has been in transition from a centralised and planned economy system to a socialist oriented market economy. The country also employs out an open-door policy. That is to say that, the country will not avoid facing the increase in transnational crime due to the impacts of globalisation, modernity and modern technology development as well as international integration. In practice, transnational crime has emerged in Vietnam. In spite of the fact that many efforts are made by the country to tackle transnational crime, until now, a definition of transnational crime has been neither created in Vietnamese legislation nor is there a plausible definition of transnational crime as a concept.<sup>275</sup> For example, the Penal Code 1999 (VPC 1999) that prescribes crime and punishment in Vietnam introduces at article 8 a definition of crime that makes no reference to either transnational crime or organised crime.<sup>276</sup> Moreover, with the review of the Penal Code in 2009 with the aim of tackling the emergence of some common transnational crime cases, Vietnamese legislators still did not directly define any generalist transnational crime in the Penal Code, although there were the changes in some offences making the law harmonise with international convention about transnational crime. For example, the offence of "trading in women" in article 119 is now changed into the offence of "trafficking in persons".<sup>277</sup> However, to handle transnational crime cases, regulations with regard to criminal jurisdictions, defined in articles 5 and 6 of the Vietnam Penal Code 1999, are applied to acts of criminal

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<sup>275</sup> Further discussion on this point will be in chapter 6, Criminal Law relevant to Policing of Transnational Crime

<sup>276</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 8

<sup>277</sup> *Ibid.*, article 119

offences committed in and outside of territory of Vietnam, and to perpetrators who are stateless persons or foreigners.<sup>278</sup> Furthermore, in some offences, such elements as purpose, serious harm and methods of committing crimes, including the involvement of foreign territory can be considered to determine whether to extenuate penal liability or aggravate penal liability.

In practice, a misleading picture of the transnational crime situation is, to some extent, described because of insufficient understanding of transnational crime in Vietnam. A crime that involves a foreigner is usually understood as a transnational crime, though in fact it does not involve any border-crossing. For example, according to the national crime statistics of Vietnam, a crime committed by a foreigner who is staying in Vietnam is always regarded as a transnational crime, even if this crime has no major impact on or connection to any other country outside of Vietnam.<sup>279</sup> Similarly, a criminal case in which the victim, who is a foreigner living in Vietnam, who is targeted by domestic traditional crime, is automatically labelled as a transnational crime case. This is because of several reasons. First, as explained above, there is no existing generalist definition of transnational crime which includes both the proposed main characteristics of transnational crime in order to properly understand a nature of transnational crime. Second, definitions of transnational crime from international and regional conventions that Vietnam ratifies or accedes to may be helpful for law enforcement or judicial agencies to raise their awareness and to use as a working definition in cooperation with overseas counterparts. But not all transnational crime investigators are familiar with those definitions.<sup>280</sup>

In the meantime, in the United Kingdom, since there is no generalist definition of a transnational crime in its legislation, transnational crime is perceived and contextualised in the practice of academic and practitioners. They define transnational crime based on their understanding of the both endogenous and external dimensions of traditional crimes in both types of crime and geography outside the national boundary. Sometimes, the definition of transnational crime needs to be interpreted through other concepts such as organised crime. Taking the definition of organised crime as an example, there are two

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<sup>278</sup> Ibid., articles 5 and 6

<sup>279</sup> General Department of Crime Prevention and Suppression, Annual Report 2011, page 6.

<sup>280</sup> See further at discussion on human resources for transnational crime investigations in chapter 5

levels of meaning in the definition of organised crime used in the United Kingdom. Frank Gregory said as follows:

At the denotative level, organised crime has been constructed so as to point to a crime associated with illicit economy and drug market is the sine qua none of this. At the connotative level, organised crime has come to be associated with foreign contagion.<sup>281</sup>

In some cases, defining transnational crime in terms of specific threat, such as the threat from outside of the country, is a practical way of understanding and tackling it. For example, trafficking in persons, in which victims who were found to be from Eastern Europe were detected in the United Kingdom. In this case, transnational crime took place because the crime involved other jurisdictions where the victims came from. Moreover, in the report of the Secretary of State for Home Department regarding the plan for the National Crime Agency, the aspect of transnational element of crime is again revealed through organised crime groups being depicted as one of the national threats which often operate across boundaries – both in terms of crime types and geography.<sup>282</sup> The way of defining transnational crime in the United Kingdom reveals flexibility in relation to the perception of transnational crime in order to mobilise different resources to combat transnational crime. The Security Service Act 1996<sup>283</sup> is a significant example that indicates serious crimes may include transnational crime when the threat of those crimes is from outside of the country, and/or as far as this serious crime involves cross-border activities. In that case, the Security Service is tasked to support police forces and other law enforcement agencies to tackle those types of transnational serious crime. Therefore, the implication of transnational crime is understood via tasking of those who have responsibility to combat it, although a concrete statement about definition of transnational crime is not given. In this sense, a working definition of transnational crime is developed.

Comparing the British current perceptions of transnational crime with the two features of transnational crime discussed earlier, it can be seen that a full definition of transnational crime has not been indicated. There seems to be no definition of certain forms of transnational crime which can help describe what cross-border movement is.

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<sup>281</sup> Gregory, F., ‘Classify, Report and Measure: The UK Organised Crime Notification Scheme’ in Edwards, A. and Gill, P (eds), *Transnational Organised Crime: Perspectives on Global Security* (London and New York: Routledge, 2003) 80

<sup>282</sup> National Crime Agency Program – Home Office, *The National Crime Agency: A Plan for Creation of a National Crime–Fighting Capability*, 2011

<sup>283</sup> The United Kingdom’s Security Service Act 1996



Moreover, there is not any clear indication regarding the feature of a violation of more than one country's national law which is used to define transnational crime. Instead, most efforts to perceive transnational crime have focused on highlighting the transnational dimensions of domestic crime, especially serious crimes. In this sense, working definition of transnational crime is developed.<sup>284</sup>

In summary, with respect to the different national, regional and global frameworks, the perception of transnational crime varies. They are for instance legal definitions, academic definitions, and administrative definitions, and these vary according to the aim of the proponents. Most existing definitions are more or less functional rather than normative descriptors, and as such embody definitional problems.<sup>285</sup> In fact, these definitions have all been developed to fulfil the aim of promoting cooperation between parties or countries in the fight against transnational crime, and to help decision makers, legislators, practitioners and academics build up effective strategic plans against transnational crime, for example, using them as a working definition to task law enforcements agencies or allocate resources. However, they suffer from a lack of accurate definition and not all core attributes of transnational crime are included in any definition. In order to fully understand transnational crime, it is necessary to construct a definition with careful consideration of both evolution and core characteristics of transnational crime, as are analyzed in section 3.1.1 and section 3.1.2. Especially, for the purpose of this thesis, the proposed two main features of transnational crime will offer some boundaries to study transnational crime controls in Vietnam, as outlined below.

First, the two features of transnational crime as proposed raise awareness by which policy makers and practitioners can better discuss and analyse transnational crime activities. These two proposed features could also be employed as a means of constructing a proper definition of transnational crime, at least as a guidance or working definition for policy makers and practitioners, for example with regard to differences between transnational crime and domestic crimes. At the same time, the two proposed features of transnational crime indicate that to some degree the existing perception of transnational crime is incorrect in Vietnam, which could impede policy and practice aimed at tackling transnational crime. For example, without understanding the cross-border feature of

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<sup>284</sup> Further discussion on this point will be shown in chapter 6, Criminal Law relevant to Policing of Transnational Crime

<sup>285</sup> Boister, N., 'Transnational Criminal Law' (2003) 14(5) *European Journal of International Law* 953, 954

transnational crime, this important international aspect be underestimated and insufficient policy may be developed.

Second, a significant implication of the two proposed features of transnational crime is that transnational crime is both a national and transnational phenomenon. Any research on transnational crime control should be considered in a wider context, not just domestic policing, thus directing attention to transnational policing arrangements and activities by which transnational crime could be responded to. In this sense, several questions about the effectiveness and legitimacy of police powers, institutions and policy as well as police practices, with regard to transnational crime, may be raised. These questions are: whether laws in terms of crime design are sufficient to cope with transnational crimes, which are described as a boundary-crossing action; whether the present existing institutions, in terms of effectiveness and legitimacy, are capable of tackling transnational crime; and whether the police have sufficient powers to investigate transnational crime. These issues are considered further in Chapters Five, Six and Seven which focus on analysis of the Vietnamese policing system for investigating transnational crime.

### **3.2. Identification and Measurement of Threats posed by Transnational Crime**

To further understand transnational crime, there is a need to measure the threat of transnational crime. The perceived threat of transnational crime offers a basis to develop appropriate responses. However, like the definition and categorisation of transnational crime, there is no single way to identify and assess transnational crime's threat. The following section is a general discussion on how transnational crime's threat can be identified and measured. It has three subsections. The first subsection discusses differences between measuring threats and evaluating impacts of transnational crime. The second subsection focuses on ways of measuring threats posed by transnational crime. Finally, the third subsection identifies key threats of transnational crime.

#### **3.2.1. Distinction between Measuring Threats and Evaluating Impacts posed by Transnational Crime**

Before measuring threats of transnational crime, it is necessary to differentiate measuring threats from evaluating impacts posed by transnational crime, though both are related each other. The details are as follows.

Evaluating impacts of transnational crime is usually to measure transnational crimes that have already happened in terms of financial costs, number of victims and social impacts. According to Keith Bristow, its impact can be felt throughout the public and private sectors, undermining communities and destroying lives.<sup>286</sup> This evaluative approach will focus on statistics that show: how many cases have happened; who has been affected; how much they cost the economy; and what other social impacts they have. The government might want to evaluate impacts, for example they make statistics about victims of transnational crime, but academics and researchers often look at its economic and social costs. Measuring impacts of transnational crime is important for measuring its threats and helps to predict emerging patterns and trends of transnational crime.

Admittedly, statistics that are related to the cost, victims or number of transnational crime cases, to some extent may describe a consequence of transnational crime activities, for example, damage and harm to individuals or institutions and even places. Crime statistics give some visible understanding of transnational crime activities. However, it is insufficient to use crime statistics to measure the social impacts that transnational criminal activities pose to societies because transnational crimes as a social phenomenon have negative impacts beyond their immediate target. For example drug trafficking activities may generate a social problem such as a drug addiction in the youth generation of destination countries. Moreover, transnational crime involves more than one nation state. As analysed earlier in section 3.1.2, the commission of transnational crime may only take place in one country whilst its consequences and harm happen in another country where transnational crime may not be visibly seen or counted. In addition, as with crime more generally, the true scale of transnational crime is likely to be substantially larger, but obscured, owing to the 'dark figure' of recorded crime<sup>287</sup> and the likely number of transnational crimes which are not reported to or recorded by the police. Therefore, measuring social impacts of transnational crime sometimes involves an estimation which is done by the researcher.

Turning to measuring the threats of transnational crime, this requires a comprehensive understanding of the risk that transnational crime poses. Thus, measuring

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<sup>286</sup> National Crime Agency, National Strategic Assessment of Serious and Organised Crime 2015, <<http://www.nationalcrimeagency.gov.uk/publications/560-national-strategic-assessment-of-serious-and-organised-crime-2015/file>>

<sup>287</sup> Coleman, C. and Moynihan, J., *Understanding Crime Data: Haunted by the Dark Figure* (London: Open University Press, 1996)

threats of transnational crime is to draw a picture of future threats posed by transnational crime. In other words, measuring threats of transnational crime looks ahead to see what trends and key areas of crime will look like in the future. A comprehensive understanding of the risk will inform effective government responses to transnational crime. This measuring work can be carried out every year in order to build business plan and allocation of resources. It is usually done by the police, security and intelligence agencies and governments who will propose strategies, plans of resources and deployment to tackle transnational crime.

In practice, different transnational crime threat assessments have been carried out nationally, regionally and globally. Significant examples include the work of organisations such as UNODC, Interpol, and Europol where they have enough resources and standards to deal with the issue of assessing the threats posed by transnational crime. In this regard, varied levels of threat of transnational crime have been drawn out to help respond to transnational crime effectively. A national threat assessment may focus on the main dangers of transnational crime and vulnerable areas in order to propose a proper anti-transnational crime strategy, including mobilisation and deployment of resources to tackle transnational crime in that country. International organisations such as the United Nations usually produce threat assessments of one type of transnational crime such as organised crime threat assessment; global reports on trafficking in persons; and the threat of narcotic-trafficking in Americas.<sup>288</sup> These assessments may show a wider picture of the threat of transnational crime that involves more countries than the national assessment does, but is a more fragmented way in terms of understanding the nature and extent of threats.

In summary, the evaluation of impacts and the measurement of threats are two different things, though both are linked and important. The former looks back to transnational crime that happened and measures its impacts on economy, people and society. The latter is performed by national police forces and international organisation such as Interpol, ASEANAPOL and looks proactively ahead rather than simply waiting to react to things as they happen and dealing with them afterwards. This means trying to predict threats and dangers posed by transnational crime in the future in order to issue policies and resources to empower the police and other agencies to work effectively.

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<sup>288</sup> UNODC website.

### 3.2.2. Measuring the Threats of Transnational Crime

Being a social phenomenon and a cross-border issue, the measurement of the threat posed by transnational crime is complex. The way to assess transnational crime's threats can be based on issues, such as its social impacts; its economic cost; and levels of organisation and sophistication of transnational criminal activities.<sup>289</sup> There are several other factors, such as political views, national legislation, and available statistics about transnational crime that also affect the measurement of its threats. In practice, transnational crime's threat is mainly measured by two approaches: one is through quantitative study; the other is by qualitative analysis. Thus, Bill Burnham<sup>290</sup> has argued that there are two different views regarding the measurement of transnational crime. First, some experts think that it is feasible to measure transnational crime when some sort of quantitative measure of transnational crime has been developed. Second, others argue that it will never be possible to measure transnational crime accurately enough on the basis of using orthodox evaluation methods. It needs an alternative approach: qualitative analysis. But are qualitative and quantitative methods both necessary? Is one more useful than the other?

To begin with, the threat posed by transnational crime can be quantified via figures, for example in crime reports or victimization surveys. These data not only present specific figures, for example financial losses or the number of victims, but also to some extent describe something about trends in transnational crime generally. In other words, to predict threats posed by transnational crime, a threat assessment may require understanding of the impacts of transnational crime using specific statistics about crimes that have already been committed.<sup>291</sup> For example, an increase in reported rates of crime may provide a picture about the growing threat of crime. However, the threat cannot be easily measured in quantitative terms. There are several reasons for this. First, it is not easy to collect transnational crime statistics. There is no unified definition of transnational crime, making it difficult to generate statistics. Unreliable or unavailable quantitative data

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<sup>289</sup> Boer, M., 'Law Enforcement Cooperation and Transnational Organized Crime in Europe' in Berdal, M. and Serrano, M. (eds), *Transnational Organized Crime and International Security: Business as Usual?* (Boulder and London: Lynne Rienner Publishers 2002) 108

<sup>290</sup> Burnham, B., 'Measuring Transnational Organised Crime' in Edwards, A. and Gill, P. (eds), *Transnational Organised Crime: Perspectives on Global Security* (London and New York: Routledge, 2003) 65

<sup>291</sup> For example, the National Strategic Assessment of Serious and Organised Crime 2015 indicates that 'the cost of serious and organised crime to the UK was assess in the past at 324 billion and is now likely to be higher'.

make it impossible to assess the true scale of transnational crime. In addition, the evidence of statistics does not represent the true situation because hidden crimes are not detected or reported. For example, in practice, there are many cases of trafficking in persons in which victims do not want to report to the police because they are ashamed or scared about being exploited by criminals. Moreover, existing statistics of transnational crime sometimes do not reflect all transnational crimes, not only in an individual country but also in the whole world. Statistical systems for transnational crime vary between countries due to differences in perception of transnational crime as well as efforts to tackle it. To explain a lack of comparable crime analysis, Bruggeman has stated that transnational crime has increased but it is difficult to find to what extent, because criminal statistics kept by each country make no distinction between cases which are purely national in character and those which have transnational aspects.<sup>292</sup>

In addition, as mentioned in the previous paragraph, there are national, regional and global threat assessments that are carried out to meet different aims. But each has its own obstacles to overcome. There are some obstacles to the measurement of transnational crime.<sup>293</sup> In terms of crime statistics, national assessment has its advantage. For example, the national assessment may be consistent in terms of national standard. It may have precise statistics. But it may embody or highlight national significance to find resources or for political purpose. In the meantime, for comparative regional assessment, there is a problem with different systems, definition used in terms of data collection. The same juridical system is applied to all sub-regions and agencies within the country, whereas regional or international threat assessment are collected from several countries or organisations which may not be structured in a similar way. Indeed, the capacity of each country may be different. But, the regional comparative assessment may have advantage indicating where and how a nation fits into national table. The country may learn and change based on the finding of comparative regional assessment.

Furthermore, a threat of transnational crime sometimes can become exaggerated due to public media or political interest. Transnational crime can be prioritised as an issue for one country, but not in another country due to its own policy and political aims. Images of transnational crime can be better perceived in the country where its government

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<sup>292</sup> Bruggeman, W., 'Cross-Border Observation' in Fijnaut, C. and Hermans, R. (eds), *Police Cooperation in Europe* (Van den Brink –Lochem, 1987)71

<sup>293</sup> Hill, C., 'Measuring Transnational Crime' in Reichel, P. (eds), *Handbook of Transnational Crime and Justice* (Thousand Oaks, London, New Delhi: Sage 2005) 52

itself has more interest and carries out an ongoing assessment. For example, when law enforcement wants to get more resources and funding, in anticipation of transnational crime, the threat might be exaggerated. In contrast, in a country where there is less support to study transnational crime, it is harder to estimate the size and scale of transnational crime.

Apart from quantitative methods, qualitative methods can generalize images and impacts of transnational crime from the evaluation of certain evidences. The qualitative method should not be a measurement in terms of percentage or number. Instead, it is about in-depth understanding and observation. This can give more depth and insight from selected samples into harms and threats of transnational crime. By looking at the relationship between crime and society, especially the causes of crime cases, a more precise picture of transnational crime and its impacts are developed. Assumptions or estimations of transnational crime's harms can resolve the problem of quantitative methods, such as lack of available statistics in order to assess transnational crime. Moreover, measuring transnational crime in qualitative terms will allow us to combine evaluations of both law enforcement and non-law enforcement (such as social research findings) in order to further understand transnational crime in general, and its threat in particular. Thus the threat of transnational crime can be drawn from the evaluation of criminal activities, but also inferred from the ability to control those criminal activities. These threats can be identified from the examination of transnational criminal behaviours as well as of the relationship between these criminal behaviours and people and society. There may be several ways to identify threats of transnational crime by qualitative methods. These range from data collection to analysis methodologies which can be conducted via workshops or by experts or liaison officials of one country, or by international organisations.

However, qualitative methods also have weak points in measuring transnational crime. There may be less reliability about the evaluation of crime threat. For example, for the purpose of getting more resources or funding to tackle a specific type of crime such as cybercrime, the police may over-state threats to the government and citizens while the extent of threat may be less in reality. Moreover, over-generalisation about threat of specific types of transnational crime may result from insufficiently selected samples of those transnational crime cases.

In summary, both quantitative and qualitative methods are necessary for identifying transnational crime's threat and costs/impacts. Each method serves a different

purpose. The idea is combination between qualitative and quantitative methods to measure transnational crime.

### 3.2.3. Identification of Threats of Transnational Crime

From the previous discussion, it is possible to assess transnational crime's threats, though it is not always easy. Not only does the measurement of the threat facilitate further understanding of transnational crime, but also it addresses the issue effectively and legitimately by consideration of different levels of responses. This subsection will investigate how to measure to what extent transnational crime may pose threats.

According to the United Nations, there are six clusters of threats that the world is facing in the 21<sup>st</sup> Century. These threats are: (1) Economic and social threats, including poverty, infectious diseases and environmental degradation; (2) Inter-State conflict; (3) Internal conflict, including civil war, genocide and other large-scale atrocities; (4) Nuclear, radiological, chemical and biological weapons; (5) Terrorism; and (6) Transnational (organized) crime.<sup>294</sup> In this sense, like other threats, transnational crime poses a borderless threat that is a menace to States and societies, eroding human security and the fundamental obligation of States to provide for law and order.<sup>295</sup> In other words, transnational crime is a threat to both human security and state security. In general, human security is a human-oriented concept of security that addresses all people regardless of state, region and community.<sup>296</sup> This concept of human security refers to the aim to 'protect the vital core of all human lives in ways that enhance human freedoms and fulfilment...It means protecting people from critical (severe) and pervasive (widespread) threats and situations.'<sup>297</sup> Although there is a difference between human security and state security that largely concerns territorial integrity and state sovereignty, human security is a system that is based on the existence of states and seen as a complementary to state

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<sup>294</sup> United Nations, 'A More Security World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, 2004, 2),

<<http://www.un.org/secureworld/report2.pdf>>

<sup>295</sup> United Nations, General Assembly's document No. A59/665, Dec. 2004,

<[http://www2.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.565\\_En.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.565_En.pdf)>

<sup>296</sup> Okubo, S., 'Globalisation, Human Security, and the Right to Live in Peace' in Okubo, S. and Shelly, L. (eds), *Human Security, Transnational Crime and Human Trafficking: Asian and Western Perspective* (Oxon: Routledge, 2011) 16

<sup>297</sup> Commission on Human Security, 'Human Security Now' (New York, 2003),

<[http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs\\_final\\_report\\_-\\_english.pdf](http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs_final_report_-_english.pdf)>



security.<sup>298</sup> Human security means a framework that requires States to maintain not only security of their territories, but also security of the individuals who live in those territories. People should be protected from transnational threats such as transnational crime. And these people must be safeguarded and have enjoyment in their living places, because ‘all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want.’<sup>299</sup> Human security and State security are interlinked one another in the fight against transnational crime. ‘Without human security, State security cannot be attained and vice versa.’<sup>300</sup>

In order to further illustrate the threat of transnational crime, it is useful to look at the ways of resolving it. To some extent, the effort to respond to transnational crime can demonstrate how its threat is perceived and recognized. According to Raft Emmers, the transnational crime threat can be addressed in the discourse of crime and/or security.<sup>301</sup> More details about this claim are as follows.

First, transnational crime may bring about serious consequences to individuals, economy, and society. As indicated above, transnational crime flourishes in the world as well as varies in each country. According to Louis Shelly, transnational crime, particularly the drug trade, was estimated in the late 1990s to represent two per cent of the world’s economy.<sup>302</sup> In terms of victims of transnational crime, there is an estimated 600,000 to 800,000 people who are trafficked across global borders each year.<sup>303</sup> ‘Victims of 136 different nationalities were detected in 118 countries worldwide between 2007 and 2010.’<sup>304</sup> Hence, once transnational crime happens, it will firstly violate the laws and cause disorder in markets. For example, perpetrators of smuggling in commodities make use of difference in prices of commodities between two countries which occur due to prohibition laws of the countries regarding the commodities flow of the two countries.

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<sup>298</sup> Zwitter, A., *Human Security, Laws, and the Prevention of Terrorism* (Oxon: Routledge, 2011) 8

<sup>299</sup> United Nations, ‘2005 World Summit Outcome’, paragraph 143, September 15, 2005, A/60/L.1

<sup>300</sup> United Nations, ‘Report of the Secretary General: Follow-up to General Assembly Resolution 64/291 on Human Security’, paragraph 19, April 5, 2012, A/66/763

<sup>301</sup> Emmers, R., ‘ASEAN and the Securitization of Transnational Crime in Southeast Asia’ 2003 16(3) *The Pacific Review* 419

<sup>302</sup> Louis Shelley, ‘The Unholy Trinity: Transnational crime, Corruption, and Terrorism’ in Gori, U. and Paparella, I. (eds.), *Invisible Threats: Financial and Information Technology Crime and National Security* (IOS Press 2006) 104

<sup>303</sup> US Department of State, *Trafficking in Persons*, June 2010

<sup>304</sup> UNODC, *Global Report on Trafficking in Persons 2012*

Second, transnational crime as a security issue threatens national interests and even regional or international stability. Transnational crime is referred to as a security issue by a wide range of academics and policymakers, such as McFarlane and McLennan or Galeotti. For example, McFarlane and McLennan claimed that transnational crime is now emerging as a serious threat to national and international security and stability.<sup>305</sup> The reason why transnational crime is preferably regarded as a security threat is to reflect its serious and immediate threat that may be responded to by mobilisation of efforts from all actors in society, not only law enforcement or government. Although transnational crime's prime aims are to obtain financial benefit, transnational criminal activities can be threatening to the authority and legitimacy of nation-state and its economy, because of damages caused by transnational crime to legitimate economies and societies. Moreover, when transnational crime is perceived as a security concern, it means that transnational crime is seemingly defined as complex and external threat to the nation state. For example, the UK has recognized that it faces new and unforeseen threats to security in which one of those is transnational crime included organised criminals, illegal immigrants and illicit goods trying to cross the British border to enter the United Kingdom.<sup>306</sup>

There are different concepts of security. Buzan<sup>307</sup> defines security with five categories: military, environmental, economic, societal and political security, whereas the Copenhagen school<sup>308</sup> regards security as a socially-constructed concept and process of securitization. Transnational crime can be seen as a danger to the sovereign state.<sup>309</sup> That is to say, transnational crime may pose an existential threat to the nation-state in terms of the stability of its politics, economics and social system. Therefore, the transnational crime issue can be accorded more attention by calling it a security threat. More priority and special measures such as intelligence exchange can be applied to tackle transnational crime. But there is a need to emphasise that although the military may participate with the police and other law enforcement agencies to deal with transnational crime,

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<sup>305</sup> McFarlane, J. and McLennan, K., 'Transnational crime: The New Security Paradigm', Working Paper No.294, Canberra: Strategic and Defence Studies Centre, (Australian National University, 1996) 2

<sup>306</sup> HM Government, *National Security Strategy and Strategic Defence and Security Review: A Secure and Prosperous United Kingdom*, November 2015, Cm 9161

<sup>307</sup> Buzan, B., Weaver, O. and Wilde, J., *Security: A New Framework for Analysis* (Lynne Rienner Publishers Inc. , 1998) 21, 23

<sup>308</sup> Collins, A., *Contemporary Security Studies* (Oxford and New York: Oxford University Press, 2007) 113

<sup>309</sup> Emmers, R., 'ASEAN and the Securitization of Transnational Crime in Southeast Asia' (2003) 16(3) *The Pacific Review* 419, 423

transnational crime as a security issue should not be totally perceived as a military threat because there are other categories of security as mentioned above. Moreover, sometimes the securitization of transnational crime is just confined within the construction of rhetoric against transnational crime, for example as a political determination or declaration by political leaders, rather than in the practical implementation of law enforcement. In this regard, like the European Union and Council of Europe, ASEAN has also sought to coordinate the response to transnational crime and terrorism as a non-traditional security concern.<sup>310</sup> In the meantime, in the United States, to respond to transnational crime, a role of international law enforcement is emphasised while there will take a coordinated effort using diplomatic, economy, and possibly even military force.<sup>311</sup>

To demonstrate the danger of transnational crime, it is asserted that transnational crime will be damaging to the political, economic and society values of a country where transnational crime is operating and targeting. In its political aspect, transnational crime causes damage to the sovereignty of the country by violating the laws that are promulgated by that country. A national operating system can be targeted by transnational crime via corrupting government officials who are in charge of directing and operating the system. As Jan Van Dijk has emphasized, one of the most dangerous threats of transnational (organised) crime on a state is the harm it does to the quality of the state's governance.<sup>312</sup> In terms of economy, there are also the same challenges to the economy when transnational crime is trying to enter licit economic markets. For example, money laundering activities by transnational organised crime use offshore companies to conceal the criminal or 'dirty' origins of money which may be used for investment in any industry of the country. Government imposes a crime control policy to prohibit some kinds of commodities in order to protect their own market and for the government's own interests. There appears a demand for those prohibited products. So, crime has developed to supply the market. As a result, this becomes a motivation of illicit business. Vincenzo Ruggiero argued that transnational crime appears to be a specific variant of illicit business that

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<sup>310</sup> Broadhurst, R., and Le, K. V., 'Transnational Organised Crime in East and Southeast Asia' in Andrew T H Tan (eds), *East and Southeast Asia: International relations and Security Perspectives* (London: Routledge 2013); Joint Communique of the Second ASEAN Ministerial Meeting on Transnational Crime (AMMTC), Yangon, Myanmar, 23 June 1999.

<sup>311</sup> Katkow, M., 'Transnational Crime: Legal and Policy Implications of Direct U.S. Military Action Against Non-State Actors' (Strategy Research Project of U.S. Army War College, 2002) 2

<sup>312</sup> Dijk, van J., 'Mafia Markers: Assessing Organised Crime and its Impacts Upon Societies' (2007) 10(4), *Trends in Organised Crime* 39, 56

reflects current, specific forms of social control.<sup>313</sup> According to Peter B. Martin, transnational crime is a multi-billion dollar business with a gross estimation of \$190-250 billion a year.<sup>314</sup> A recent survey reported that ‘money laundering and/or financial turnover from transnational crime has increased from USD 273 billion (1 % of the total official GDP) in 2005 to USD 603 billion (or 2% of the official GDP) in 2006 for 20 OECD countries.’<sup>315</sup> Transnational crime then can have a destabilizing effect on sovereign states. It can also distort ‘legitimate markets’. In addition to these significant effects, transnational crime may also ‘undermine civil society’ in a way which damage human rights and individual liberty.<sup>316</sup> An example of this is human trafficking which can threaten substantial sections of a national population.

It cannot be denied that the securitization of transnational crime plays an important role in transforming responses to transnational crime as an issue of national security protection in the context of late modernity. For example, special measures such as intelligence exchange including legislation may be used to empower the police to prevent or suppress the threat of transnational crime. However, there is an issue emerging from this strategy that will be able to influence not only in theory, but also the outcomes of the fight against transnational crime. A contradiction may appear between two aspects. On one side, to effectively respond to transnational crime requires enhanced international cooperation. As a consequence, to some extent, there is a ceding of sovereignty from government or nation-state to other actors including actors outside of the country. On the other side, to protect national security, there is a priority to assert national powers to deal with transnational crime. For example, the USA PATRIOT Act<sup>317</sup> raises a lot of concern about data privacy and security for businesses or individuals.<sup>318</sup> This poses an obstacle for international cooperation over anti-transnational crime. Therefore, there appears a

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<sup>313</sup> Ruggiero, V., ‘Global Markets and Crime’ in Beare, M. (eds), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption* (Toronto, Buffalo and London: University of Toronto Press, 2003) 173

<sup>314</sup> Martin, P., ‘Confronting Transnational Crime’ in Viano, E. (eds), *Global Organised Crime and International Security* (Aldershot: Ashgate, 1999) 25

<sup>315</sup> Schneider, F., ‘The Financial Flows of Transnational Crime and Tax Fraud in OECD Countries: What Do We Do (Not) Know?’, <[http://www.econ.jku.at/members/Schneider/files/publications/2012/FinancialFlows\\_TaxFraud.pdf](http://www.econ.jku.at/members/Schneider/files/publications/2012/FinancialFlows_TaxFraud.pdf)>

<sup>316</sup> ASEAN, Manila Declaration on the Prevention and Control of Transnational Crime (Manila, Philippine, 25 March 1998)

<sup>317</sup> USA PATRIOT Act, Public Law 107 – 56 – Oct. 26, 2001 [H.R. 3162]

<sup>318</sup> Kashan, S., ‘The USA Patriot Act: Impact on Freedoms and Civil Liberties’, ESSAI: Volume 7 (2009), Article 28, <<http://dc.cod.edu/cgi/viewcontent.cgi?article=1123&context=essai>>

gap between security declarations by political leaders over transnational crime, and outcomes of the fight against transnational crime in practice.

Recently, it can be seen that many countries and even international organisations such as ASEAN prefer to regard transnational crime threats as security concerns.<sup>319</sup> This strategy, to some extent, has facilitated achievements in the fight against transnational crime. For example, transnational crime has been prioritised, as in the case of the United Kingdom. However, the practice also shows evidence of a political failure of this strategy which has labelled the fight against transnational crime as national security protection. Taking ASEAN as an example, the securitization of transnational crime has grown since 1990s. Several documents such as joint communiques of ASEAN meetings<sup>320</sup> and speeches made by political leaders<sup>321</sup> over anti-transnational crime have been produced as a result of the rhetoric about security of the ASEAN region and countries. But there has not been much impact on national policy-making and implementation in each country with respect to the fight against transnational crime. The reason for this unsuccessful approach is that transnational crime needs to be tackled at both national and international levels. On the one hand, there are several factors, including corruption, vested interest, and lack of resources as well as identity of each country's system that may create opportunities for the growth of transnational crime in the region. These may require more efforts at national level to be made in order to combat transnational crime. On the other hand, when transnational crime is perceived as security issue, there may appear some barriers between countries in the field of international cooperation, because the problem of transnational crime can be used to intervene in the national interests of other nations. Dealing with transnational crime may include consideration of matters of national security that require discretion in, for example information exchange. This might impede full international cooperation in the fight against transnational crime. To further this conclusion, Ralf Emmers argued that the growing phenomenon of transnational crime in

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<sup>319</sup> The 6<sup>th</sup> ASEAN Summit, Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues, adopted on 4 November 2002 in Phnom Penh

<sup>320</sup> For example, Joint Communique of the second ASEAN Ministerial Meeting on Transnational Crime (AMMTC), Yangon, June 1999. It says transnational crime become 'more organised, diversified, pervasive and thus posed a serious threat to the political, economic and social well-being of all nations including ASEAN member countries.

<sup>321</sup> For example, a speech of Philippine President at the Meeting of ASEAN Ministers of Interior/Home Affairs (AMIHA) and the First Conference to address Transnational Crime, Manila, Philippine, 20 December 1997

Southeast Asia could be dealt with more effectively at regional level if it was approached primarily as a criminal matter rather as a security issue.<sup>322</sup>

To further assess the threat of transnational crime, it is essential to look at some forms of transnational crime below which are now dominant in international community discourse in order to examine how these types of transnational crime are responded to nowadays in terms of their threats. These examples may indicate which view between a criminal perspective and a security perspective should be preferred to tackle specified transnational crimes.

The first threat that almost all countries in the world are facing nowadays is transnational drugs trafficking. Drugs trafficking continues to grow in most parts of the world. Its activities involve growers, producers, couriers and dealers affect people in several countries. According to the Drugs World Report 2012 of UNODC, drugs trafficking flows have global dimensions which have regional and continental connections, and sometimes with dramatic consequences to the countries they affect.<sup>323</sup> Negative social impacts emerge from these activities, including significant harm to the health of individuals and communities. To deal with this problem, there are three major United Nations treaties on narcotic drug control: the (1961) Single Convention on Narcotic Drugs,<sup>324</sup> the (1971) Convention on Psychotropic Substances,<sup>325</sup> and the (1988) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>326</sup> Whilst the use of these United Nations Conventions is emphasised to counter drug problem, several countries consider the struggle against drug crime, especially international drug traffickers, as not only involving domestic strategy but also foreign policy. For example, the United States launched its 'War on Drugs'<sup>327</sup> in 1980s, especially during the period of the Clinton Administration when this policy was confirmed in its foreign policy. The main reason for this originates from the threat transnational drug trafficking poses to people and communities and even the national

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<sup>322</sup> Emmers, R., 'ASEAN and the Securitization of Transnational Crime in Southeast Asia' (2003) 16(3) *The Pacific Review* 419, 420

<sup>323</sup> UNODC, *Drugs World Report 2012*, page iii, <[http://www.unodc.org/documents/data-and-analysis/WDR2012/WDR\\_2012\\_web\\_small.pdf](http://www.unodc.org/documents/data-and-analysis/WDR2012/WDR_2012_web_small.pdf)>

<sup>324</sup> United Nations Convention on Narcotic Drugs 1961

<sup>325</sup> United Nations Convention on Psychotropic Substances 1971

<sup>326</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

<sup>327</sup> The term 'War on Drugs' was first used by the American President Richard Nixon on 17 July 1971

security of countries. ‘Illicit drug continues to jeopardize the health and welfare of people throughout the world. This represents a clear threat to the stability and security of entire regions and social and economic development.’<sup>328</sup> Moreover, by considering drug trafficking as the threat to national security, it is reasonable for nation state to justify its cost and actions against transnational drug trafficking. Some counter measures such as surveillance on drug traffickers may be accepted in order to detect the heads of drug supply groups, although these measures may not be considered in full application of human rights standards in certain contexts of use. This trend even appears to assist reform of legislation to facilitate the struggle against transnational drug traffickers.

Another form of transnational crime threat is trafficking in persons. According to the definition of trafficking in persons in the Protocol to Prevent, Suppress and Punish Trafficking in Persons,<sup>329</sup> this crime can be a transnational crime, affecting nearly all countries in every region of the world. Trafficking in persons has been one of the most rapidly growing forms of transnational crime.<sup>330</sup> With this type of crime, many victims are reported to cross the borders of countries. As a result, the human rights of several individuals in many countries are violated by this crime. It affects not only developing countries but also developed countries that are assumed as destinations for victims. There have been a lot of national, regional and global initiatives and approaches to deal with crime of trafficking in persons. In spite of the fact that the impact of these approaches to combat trafficking in persons has not been measured sufficiently, some have indicated that trafficking in person has been effectively dealt by criminal justice responses of many countries.<sup>331</sup> Countries tend to combat trafficking in persons as a serious crime. Some countries and regions such as ASEAN regard transnational crime in general as a non-traditional security concern, but trafficking in persons is still preferred to be practically resolved via anti-crime strategies. The reasons for this choice are as follows. First, trafficking in persons is directly against human beings, not systems, or property. To deal with it, it is required to protect and respect human rights standards. Moreover, efforts of

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<sup>328</sup> UNODC, *The World Drug Report 2013* (United Nations Publication, Sale No. E.13. XI.6) IV

<sup>329</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, adopted by Resolution No. A/RES/55/25 of 15 November 2000 at the 55<sup>th</sup> session of General Assembly of the United Nations, Article 3

<sup>330</sup> Shelly, L., ‘International Trafficking: An Important Component of Transnational Crime’ in Okubo, S. and Shelly, L. (eds), *Human Security, Transnational Crime and Human Trafficking: Asian and Western Perspective* (Oxon: Routledge, 2011) 135

<sup>331</sup> UNODC, *Global Report on Trafficking in Persons 2012* (United Nations Publication, Sales No. E.13.IV.1.)

anti-trafficking in persons is not only about tackling criminals, but also about protecting victims. The importance of a victim-centred, right-based approach to combating trafficking in persons is often adopted.<sup>332</sup> Several countries such as the United States have implemented the ‘3P’ paradigm, by which their governments investigate and *prosecute* trafficking cases, provide *protection* and services to victims, and put improved measures in place to *prevent* crime from happening in the first place.<sup>333</sup> In addition, in practice, a number of countries or territories that criminalize all or most forms of trafficking in persons doubled between 2003 and 2008 to include 155 countries and territories concerned.<sup>334</sup>

Cybercrime is another contemporary threat.<sup>335</sup> With the fast development of the internet and other modern technologies, cybercrime has emerged as new type of transnational crime. This include: attacks against computer data and systems, identity theft, the distribution of child sexual abuse images, internet auction fraud, the penetration of online financial services, as well as the deployment of viruses, ‘Botnets’, and various email scams such as phishing. Cybercrime poses a serious threat to national and international security. For example, cybercrime can affect security vulnerabilities related to information technology infrastructure such as power plants, electrical grids, information systems and the computer systems of governments and major companies. According to Interpol, in 2007 and 2008, the cost of cybercrime worldwide was estimated at approximately USD 8 billion. As for corporate cybercrime, cyber criminals have stolen intellectual property from businesses worldwide worth up to USD 1 trillion.<sup>336</sup> Risks posed by cybercrime vary from governments to business. But it can be easily seen that cybercrime may become a threat to national security when it targets governance systems of a country in which computers and information an play increasingly important role in world affairs. As a consequence, police and security agencies have in some cases been granted additional powers and permissions, such as to intercept data being transmitted from, to or within a computer system, in order to collect evidences against cybercriminals.

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<sup>332</sup> United Nations, Global Plan of Action to Combat Trafficking in Persons, Resolution adopted by General Assembly, August 12, 2010 (A/64/L.64)

<sup>333</sup> US Department of State, *Trafficking in Person Report 2015*, page 13, <<http://www.state.gov/documents/organization/243557.pdf>>

<sup>334</sup> UNODC, *Global Report on Trafficking in Persons 2012* (United Nations Publication, Sales No. E.13.IV.1.) 82

<sup>335</sup> Wall, D., *Crime and Deviance in Cyberspace* (Surrey: Ashgate, 2009) xvi

<sup>336</sup> INTERPOL <<http://interpol.int/Crime-areas/Cybercrime/Cybercrime>>, accessed 15 March 2013



In summary, the threat posed by transnational crime is evident. It not only damages people's rights and society's common interests, but also harms the state's capacity for delivering public goods. To respond to these threats of transnational crime, there are two popular views about transnational crime, which involve either considering transnational crime as a crime issue or as a security issue. Each view has its own value. However, the discussion of both views indicates that threats of transnational crime not only originate from their concrete harms and consequences which damage individuals, economy and society. The threats of transnational crime, to some extent, are abstract and a product of transnational crime control policies which consider transnational crime as an external threat to the proper governance of a state. Thus, the threats of transnational crime allow 'emergency measures and justifying actions outside the normal bounds of political procedures' to respond to transnational crime in terms of a security issue.<sup>337</sup> In this regard, Andre Bossard has said that transnational crime is as much a political as a legal problem.<sup>338</sup> In this sense, measurement of transnational crime's threats is relevant to the consideration of the effectiveness and legitimacy of the fight against transnational crime. Further discussion of the effectiveness and legitimacy of transnational crime investigation will be presented in the later chapters of this thesis.

### **3.3. Transnational Crime Impacts on Vietnam**

This subsection will answer the following questions: whether or not transnational crime is recognised as a major concern in Vietnam; why there has been a growth in transnational crime in Vietnam; and how far the government of Vietnam has responded to the threat of transnational crime. In the subsection, there is no comparison with the impacts of transnational crime to the UK because the thesis looks at solutions and ideas of the UK in responding of transnational crime rather than looking at the problem per se in the UK. Chapters Five, Six and Seven will later discuss comparisons with the UK.

Firstly, transnational crime and its impacts are increasingly being recognized as a major concern that can impede the construction and development of Vietnam, for example, in its realization of the 'United Nations Millennium Development Goals.'<sup>339</sup> There are several illustrations to prove this assertion. First, no legal term of transnational crime has

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<sup>337</sup> Edwards, A., and Gill, P., 'After Transnational Organised Crime? The Politics of Public Safety' in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge, 2003) 269

<sup>338</sup> Bossard, A., *Transnational Crime and Criminal law*, (University of Illinois 1990) 5

<sup>339</sup> United Nations Website, < <http://www.un.org/millenniumgoals/>>

been created in Vietnamese legislation, but in policies and official documents of government, the term ‘transnational crime’ has appeared increasingly often, which indicates the seriousness of the problem. Second, in the guidelines for achievement and performance of crime prevention and combat in new contexts, it is highlighted that transnational crime is increasing in Vietnam.<sup>340</sup> The most visible forms of transnational crime threat that Vietnam is facing nowadays are perceived to be from drug trafficking, followed by human trafficking and the smuggling of wildlife.<sup>341</sup> Transnational crime is considered to bring great harm to people and society of Vietnam directly and indirectly. For example, approximately 95 per cent of illicit drugs that are transported inside Vietnam, for either transit or domestic use have a source of origin from outside of Vietnam.<sup>342</sup> Heroin remains the most popular illicit drug, creating a large problem to human and social order in Vietnam.<sup>343</sup> In 2010, around 155,000 of people were reported as heroin users in Vietnam.<sup>344</sup> Moreover, although there are no precise statistics available at present regarding to the total number of transnational crime cases and their damage to Vietnam, the threat of transnational crime is always described as having a widely dangerous social and economic consequences to Vietnam via specific examples of some crime cases such as transnational trafficking in narcotic drugs, which involve more people and takes place in several places as well as in different areas of the country’s economy.

In Vietnam, the threat of transnational crime is also considered as a security issue. Seemingly, transnational crime that visibly shows direct damage to the interests of individuals and institutions has increased in occurrence and scale. But, a more important factor is its impact rather than its amount, because the threat of transnational crime should be measured by not only damage in quantitative data but also the implication of its dangers that reflects a threat of transnational crime other than its direct harm to specific targets in term of criminal issue.<sup>345</sup> Furthermore, some types of transnational crime such as cybercrime are operating invisibly. In addition, the content of defining transnational crime in security terms rooted from idea of ensuring state and regime security. Thus,

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<sup>340</sup> Vietnam Government, Prime Minister’s Decision N. 282/QĐ-TTg on 24 February 2011

<sup>341</sup> UNODC, Baseline survey and training needs assessment in Vietnam (Survey of Project Number : XAP/U59: Partnership against Transnational crime through regional organized law enforcement (PATROL), August 2010) page 1

<sup>342</sup> UNODC, Vietnam Country Programme 2012 – 2017, page 6

<sup>343</sup> UNODC website, *ATS second-most popular illicit drug in Vietnam, heroine still No.1*, <<https://www.unodc.org/southeastasiaandpacific/en/vietnam/2013/07/wdd/story.html>>

<sup>344</sup> UNODC, Vietnam Country Programme 2012 – 2017, page iv

<sup>345</sup> See further in subsection 3.3.1

Vietnam has identified transnational crime, such as drug trafficking, human trafficking, to name but a few, as a non-traditional security issue that can pose potential threats to sovereignty, political stability, economic development as well as societal values.<sup>346</sup> In this sense, for Vietnam, to some extent, the security view on transnational crime threat includes two levels. One is about state security that focuses on maintaining sovereignty and regime survival; the other is human security that ensures a civil society and public order in which people's rights and economy's interests are protected.

There are some assumptions explaining the emergence and growth of transnational crime in Vietnam. Most attention is paid to the issues of negative effects of globalisation on governance and the criminal justice system. Following globalisation, factors such as Vietnam's proximity to the Golden Triangle (one of the main centres for narcotics production), its long land border and long coastline become more challenging to the country when its open door policy is carried out in order to integrate into the international community. In this context, there is rapid social-economic growth and international integration in Vietnam. In the meantime, a large number of Vietnamese who live outside of Vietnam and mainly in the Western countries have connections with their families in Vietnam. Consequently, transnational crime that originates from other countries in the region or in the world will have more effect. Take a recent increase of trafficking in persons in Vietnam as an example. During the period of 2005 to 2011, the number of human trafficking cases has doubled and the number of victims has trebled in comparison with the figure of six years before Vietnam joined the World Trade Organization.<sup>347</sup> Moreover, changes made by the application of free market principles, rapid urbanisation and modernisation more or less impact on the lifestyle of Vietnamese people negatively that may facilitate a growth of transnational crime. For example, because disposable incomes grow, so does the demand for drugs and commercial sex, which is often linked to human trafficking and may facilitate the growth of transnational crime.<sup>348</sup>

Transnational crime growth in Vietnam is also to some extent due to the ineffectiveness, in terms of organisational structure, training and resources, of state forces, such as the police, that are responsible for tackling transnational crime. In recent years,

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<sup>346</sup> Ministry of Defence of Vietnam, *Defence White Paper* (Hanoi: Nha Xuat Ban The Gioi - World Publishing House, 2009)17,18

<sup>347</sup> UNODC, *Vietnam Country Programme 2012 – 2017*, page 7

<sup>348</sup> *Ibid.*, page 6

to respond to some significant forms of transnational crime, more attention has been paid to strengthening the ability and capacity of police forces and relevant agencies.<sup>349</sup> Certain professional and specialized units have been established in Vietnam. For example, a counter-narcotic drugs crime unit was incorporated in 1997. Then, a cybercrime unit was established in 2009. However, there are still several difficulties facing the State in addressing the issues because of shortage of resources, such as finance, equipment and personnel.<sup>350</sup> For example, financial limitations together with legal obstacles prevent law enforcement of Vietnam from implementing operations outside the national borders. Moreover, investigators who are in charge of the investigation of transnational crime have little experience, because transnational crime is new.<sup>351</sup> According to findings of survey conducted by UNODC recently regarding to the training needs assessment for those who works in law enforcement agencies in Vietnam, 69.7% of respondents said they would require more training on transnational crime investigation techniques.<sup>352</sup>

Next, some defects regarding the criminal justice system are sometimes indicated as opportunities for the emergence and growth of transnational crime in Vietnam.<sup>353</sup> Compared with international standards, these issues may emerge as loopholes in legislation or shortcomings in cooperative mechanisms between agencies that transnational crime may make use of in order to commit transnational crime. According to Ralf Emmers, ‘Vietnam’s legal system is incomplete, particularly vis-à-vis criminal activities.’<sup>354</sup> Moreover, there are some problems with the bureaucratic mechanisms that are used to handle transnational crime investigation.<sup>355</sup> For example, it will take time to exchange transnational crime information between Vietnam and other countries, for

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<sup>349</sup> Further discussion on this point will be discussed in chapter 5, Policing Structure and Organisations against Transnational Crime in Vietnam

<sup>350</sup> Vuving, A., ‘Vietnamese Perspectives on Transnational Security Challenges’ in Fouse, D. (eds), *Issues for Engagement: Asian Perspectives on Transnational Security Challenges* (Asia-Pacific Center For Security Studies, 2010) 176

<sup>351</sup> Further discussion on this point will be shown in chapters 5 and 6

<sup>352</sup> UNODC, ‘Baseline Survey and Training Needs Assessment in Vietnam’ (Survey of Project Number : XAP/U59: Partnership against Transnational crime through regional organized law enforcement (PATROL), August 2010) page 10

<sup>353</sup> Further discussion on this point will be presented in chapter 7, Criminal Process with regard to Transnational Crime in Vietnam

<sup>354</sup> Emmers, R., ‘The Threat of Transnational Crime in South East Asia: Drug Trafficking, Human Smuggling, and Trafficking, and Sea Piracy’ (UNISCI Discussion Paper, 2003), <<http://dspace.cigilibrary.org/jspui/bitstream/123456789/23754/1/The%20Threat%20of%20Transnational%20Crime%20in%20Southeast%20Asia%20Drug%20Trafficking%20human%20Smuggling%20and%20Trafficking%20and%20Sea%20Piracy.pdf?1>>

<sup>355</sup> See further in chapter 5, Policing Structure and Organisations against Transnational Crime in Vietnam

example via Supreme People's Procuracy, whereas the nature of transnational crime investigation requires fast intelligence exchange. In this regard, Hoang The Lien<sup>356</sup> has said that there is a need to create a favourable legal basis for preventing and combating crimes, especially transnational crime such as drug trafficking, human trafficking, and money laundering.<sup>357</sup>

Having understood the threat posed by transnational crime to the political, economic and social stability of Vietnam, Vietnam has attached great importance to preventing and combating it. The efforts to deal with transnational crime threat are not only reflected via the results of law enforcement, but recorded through Vietnam's policies and its political determination. The details of this are as follows.

First, the government of Vietnam recognizes the necessity to tackle transnational crime by issuing a 'National Program on Crime Prevention' that includes 'Project No. 3' which focuses specifically on organised crime and international crime.<sup>358</sup> This National Program on Crime Prevention mobilises all government branches and the whole Vietnamese society to tackle crimes including transnational crime. As a policy guidance, the National Program on Crime Prevention aims at 'strengthening the leadership of the Party at all levels, heightening the management effectiveness of the People's Committees from the central to local level, the key role instruction of the public security force and the participation of different branches, social organizations and people, creating a mechanism in mobilizing the comprehensive strength of the whole political system, implementing strategies, enhancing the social participation in crime prevention and suppression of which prevention is the basis, especially social prevention and active suppression.'<sup>359</sup> The Project No.3 is to deal with organized crimes, dangerous criminal offences and international-related crimes. Before this important turning point, the government of Vietnam agreed that the Ministry of Public Security, which is the driving force in the fight

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<sup>356</sup> Deputy Minister of Justice of Vietnam

<sup>357</sup> First Legal Policy Dialogue in 2013: Criminal law of Vietnam in the Context of Integration (UNDP website), <http://www.vn.undp.org/content/vietnam/en/home/presscenter/pressreleases/2013/08/29/first-legal-policy-dialogue-in-2013-criminal-laws-of-viet-nam-in-the-context-of-international-integration-.html>

<sup>358</sup> Government of Vietnam, Resolution 09/1998/NQ-CP On Strengthening the Fight against Crime in the New Situation, issued on 31<sup>st</sup> July 1998

<sup>359</sup> Vietnam Steering Committee 138/CP, 'Report on Overview of Current Implementation of Decision No. 09/CP of the Government on Crime prevention and Suppression within the development of National Target Program on Crime Prevention and Suppression for the Period of 2012-2015' (Hanoi, 27 April 2012)

against crimes in Vietnam, should apply and become a member of Interpol in 1991 in order to deal with new emerging transnational crime.<sup>360</sup> This development was followed by the joining of ASEANAPOL in 1996,<sup>361</sup> which gives Vietnam more strength to tackle transnational crime. For example, the country may have more technical assistance and support from other countries or international organisation in term of fighting against transnational crime.<sup>362</sup>

Second, Vietnam has joined with other country members and other international organisations to discuss transnational crime threats in the region and engage in countermeasures, in which all participants accept that transnational crime has posed threats to the security of each country member and the whole region. Moreover, as a result of open-door policy, Vietnam has actively integrated into the international community. In the field of preventing and suppressing transnational crime, Vietnam has acceded or signed a number of international conventions against transnational crime such as United Nations Convention against Transnational Crime that was ratified in 2012 recently. And in terms of national legislation, some efforts have been implemented such as: criminal law and criminal procedure law that were revised in 1999 and 2003 respectively; and law on legal assistance that was issued in 2007.<sup>363</sup>

In practice, the Vietnam Government has developed several policies and strategies to deal with transnational crime in Vietnam. These policies and standpoints on transnational crime threats have advantages and disadvantages. Firstly, their advantage is to facilitate consideration of revision and reform of legislation in order to harmonise with international law in the long term, and to resolve obstacles occurring during the course of fighting against transnational crime in the short term. Nevertheless, more and more transnational crime cases are handled by security agencies rather than the police, because the cases require consideration of the protection of national interest from external factors such as foreign espionage, especially in transnational economic crime cases. In this context, more resources have been mobilised to respond to transnational crime. Secondly, a disadvantage is that although achievements have been gained through the successful detection and prosecution of transnational crime cases, there has no decisive attempt to

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<sup>360</sup> General Department of Crime Prevention and Suppression, Progress Report at the Meeting on 20<sup>th</sup> Anniversary of Vietnam's Participation in Interpol Organization on 4 November 2001.

<sup>361</sup> ASEANAPOL Official Website, Introduction, accessed at <http://www.aseanapol.org/about-aseanapol/permanent-secretariat>

<sup>362</sup> See further in chapter 5, Policing Structure and Organisation against Transnational Crime

<sup>363</sup> See more at chapters 6 and 7

strengthen the effectiveness of the fight against transnational crime. For example, the legislation has not been completed to criminalise emerging types of transnational crime.<sup>364</sup> A specialized unit to assess transnational crime has not been established, and there is no annual or periodical transnational crime threat assessment that will facilitate both policy maker as well as front officers to deal with transnational crime threats more effectively.

In brief, efforts that have been carried out to fight against transnational crime in Vietnam indicate that Vietnam is clearly aware of the potential challenges posed by transnational crime. In Vietnam, transnational crime may sometimes be referred to as a security issue which is not just a domestic challenge but presents complex and external threats to the nation state. The gravity of this threat, and the recognition of this in Vietnam, have generated intense political will to combat transnational crime and to work with the international community to do this. In order to respond transnational crime successfully in Vietnam, there may need to further study of the nature and extent of such crime, as well as an evaluation of existing responses, especially Vietnamese laws and policy, powers and institutions for the investigation of transnational crime. These issues will be further discussed in Chapters Five, Six and Seven.

### **3.4. Conclusion**

This chapter has studied the transnational crime phenomenon and its impacts on policing, which facilitate the assessment of whether transnational crime is dealt with efficiently and appropriately by Vietnam's policing agencies in other chapters of this thesis. To attain the objectives of this thesis, this chapter has provided background knowledge which is used to analyse transnational crime. Not only has this chapter reviewed transnational crime literature, this chapter has also proposed two main features on the identification of transnational crime, and has indicated the main reasons for the growth in transnational crime. Based on this knowledge, the chapter has assessed the actual impacts of transnational crime and found it as a major concern to Vietnam, indicating the necessity of looking at police powers, laws and institutions, which are the main areas in the assessment of the effectiveness and legitimacy of the Vietnamese policing system for investigating transnational crime. In this sense, the chapter has investigated opportunities, nature and threat of transnational crime.

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<sup>364</sup> See further in chapter 6, Criminal Law with regard to Policing of Transnational Crime

First, the chapter has identified globalisation and the inability in developing societies as facilitators to the growth of transnational crime. Especially, the globalisation process which has created new contexts to the commission of transnational crime. In general, therefore, it seems that changes in society can produce and cause to flourish a variety of new forms of transnational crime.

By reviewing literature about transnational crime, the chapter has indicated that the term 'transnational crime' is not new, but definitions of the nature of transnational crime remain unsettled. Thus, the chapter has proposed two main features of transnational crime, which should be used a basis from which to understand and distinguish transnational crime from other crimes including domestic crimes and international crimes. Specifically, these proposed two features are: boundary-crossing; and a legal violation codified by the national laws of more than one country. Especially, in comparison with existing definitions of transnational crime in either criminological way or legal way, these proposed two features of transnational crime suggest boundaries to study transnational crime control in Vietnam which exclude the issues of terrorism, as well as a state transnational crime.

Next, the chapter has indicated the harms and threats of transnational crime. Its threats vary with its highly destabilising and corrupting influence on sovereignty, economic systems and the society of each nation-state, as well as its people. As the United Nations has indicated, transnational crime undermines the development process, damages quality of life, and threatens human rights and fundamental freedoms.<sup>365</sup> Especially, the chapter has explained the role of both qualitative and quantitative methods in the measurement of transnational crime. Qualitative data may give a detailed picture of a selection of situations whereas quantitative method may describe overall events. Thus, they may be combined to measure transnational crime. Furthermore, in this chapter, the study of the threat of transnational crime has also suggested that threats of transnational crime should be approached by both views (crime and security discourses) in order to respond appropriately to transnational crime and the threats posed by transnational crime.

Finally, the chapter has also extended knowledge about transnational crime situations and the response efforts of the government of Vietnam. For Vietnam, like other countries, transnational crime has been high on the agenda of the country. This highlights

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<sup>365</sup> The United Nations, Naples political declaration and global action plan against organised transnational crime, 1994, A/RES/49/159.



Vietnam's commitment to reduce the threats of transnational crime, especially at the national level, because effective responses to transnational crime will help to protect the country's sovereignty as well as facilitate the effective implementation and realization of the national objectives on socio-economic development. Overall, the chapter has identified the transnational crime problems in Vietnam which are essential to undertaking further analysis into the effectiveness and legitimacy of the policing system for the investigation of transnational crime that will be presented in Chapters Five, Six and Seven.

## Chapter 4: Ethical Values and Transnational Policing

The previous chapter discussed transnational crime and provided us with an understanding of that phenomenon and its many challenges. To tackle this problem, 'transnational policing' has emerged and has become an increasingly important police activity in many nations and regions of the world. According to Ben Bowling, transnational policing is the most frequently cited solution to transnational crime.<sup>366</sup> However, questions remain about how transnational policing should be developed, and this differs by jurisdiction. Not only does transnational crime create difficulties for domestic criminal justice systems, but also the fight against transnational crime demands that while national identity and sovereignty are maintained, individuals' human rights and liberty are assured. However, there is a question about common standards which are used for the assessment of the fairness and legitimacy of any particular transnational policing system.

This chapter will focus on the investigation of a conceptual framework for assessing an 'appropriate' transnational policing system. In this sense, the chapter will explore some ways of evaluating the transnational policing arrangements in Vietnam by examining the ethical values, effectiveness and legitimacy of that system, which are necessary for appropriate and sustainable policy, law and transnational policing practices. Thus, the chapter will answer whether the Vietnam's policing system needs to build its own values of effectiveness and legitimacy or borrow them from outside of the country. To attain these aims, the chapter consists of three sections. The first section will address why there is a need to look at ethics in our assessments of transnational policing. To answer this question, a relationship between ethics and the main characteristics of transnational policing will be set out and analysed. The second section will investigate the appropriate values of an ethical framework for transnational policing. Finally, the third section will explore the extent to which policing is monitored or judged by ethical values in Vietnam. Obstacles and dilemmas in Vietnam, which are caused by the existing ethical values in relation to the policing in general, and the transnational policing in particular, will be also indicated.

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<sup>366</sup> Ben Bowling, 'Transnational Policing: The Global Thesis, a Typology and a Research Agenda' (2009) 3(2) Policing 149

## 4.1. The Ethical Basis of Transnational Policing

Ethics are a branch of philosophy that involves making moral judgements about what is right or wrong, good or bad in any given action.<sup>367</sup> Ethics play an important role in the achievement of transnational policing. There are a number of reasons for this claim. First, ethics are an instrument of cooperation. Second, ethics represent a value as a public good of transnational policing. Third, ethics can be an instrument which is used to prevent the state or the police from taking unacceptable actions against individuals when their police powers are given and applied. The three reasons are explained in detail as follows.

### 4.1.1. An Instrument of Cooperation

While policing is an expression of government powers that are very much related to national sovereignty, transnational policing is generally understood as those processes and practices that take place across national boundaries. Despite the fact that determining precisely transnational policing is not easy,<sup>368</sup> cooperation is clearly a central issue for transnational policing. This means that transnational policing is always going to involve cooperation, or working with other states. Les Johnston, for instance, defines transnational policing as ‘the provision of security across national boundaries,’<sup>369</sup> whereas Neil Walker has argued that transnational policing ‘involves networks which are relatively autonomous of these states of origin or which owe authority and allegiance to other non-state polities such as European Union.’<sup>370</sup> Due to this emphasis on police cooperation beyond national borders, transnational policing activity always confronts the desire for the sovereignty of nation-states and the primacy of national interests. In order to secure effective transnational policing, questions of sovereignty must be addressed or mitigated by cooperation, which requires common understandings and shared interests.

To deal with this challenge, ethics provide a point of common understanding. They provide points where the police forces are more or less forced to agree on parameters to what they are doing, or to certain ways forward. In other words, while police forces vary quite substantially in different countries, and there are many different policing styles,

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<sup>367</sup> Banks, C., *Criminal Justice Ethics: Theory and Practice* (London: Sage, 2013) 2

<sup>368</sup> Sheptycki, J., *Issues in Transnational Policing* (London and New York: Routledge, 2000) 1

<sup>369</sup> Johnston, L., ‘Transnational Private Policing: The Impact of Global Commercial Security’, in Sheptycki, J. (eds), *Issues in Transnational Policing* (London and New York: Routledge, 2000) 21

<sup>370</sup> Walker, N., ‘The Pattern of Transnational Policing’, in Newburn, T. (eds), *Handbook of Policing* (London and New York: Willan Publishing, 2008) 119

shared ethics can provide a framework for common understanding and cooperation. Indeed, police forces who already work together across national boundaries function largely in societies where state regimes may be not the same. As Saskia Hufnagel points out, these distinct legal jurisdictions do not have uniform or common laws governing criminal procedure, substantive offences and police laws.<sup>371</sup> Moreover, they may have different structures of governance, different histories, and different cultures. And yet, ethics can help to narrow such differences and provide common ground. For example, when the ‘US War on Drugs’ was launched, threats related to transnational drug trafficking and other crimes were presented as a key issue around which to bring countries together, even though some of them had not directly been threatened by transnational drug crimes, and had different anti-drug crime policies. In this context, Cyndi Banks has indicated that there were advantages related to shared normative and applied ethics which concerned ways of behaving, standards of conduct, and ways of solving practical moral problems in law enforcement and policing.<sup>372</sup>

The reason that ethics can enable cooperation between different, culturally and legally dissimilar states is that ethics are in a sense universal and can apply evenly to different people and different national cultures. Once an action is perceived as being an ethical one, countries may more easily agree with each other about that particular action.

Historically, different ethical theories of universal philosophy have been applied to policing. Two of the typical theories are ‘deontological ethics’ and ‘consequentialist ethics’. These theories emphasize ‘either the importance of fundamental principles or the consequences of actions’ in ethical approaches in policing.<sup>373</sup>

For deontological ethics, there is presumed to exist a universal law of right and wrong, and morality is a product of man’s rationality.<sup>374</sup> Decisions are based mainly on an individual and the rights of others. ‘This means that an individual’s behaviour or decisions can be considered wrong even if a quite acceptable outcome is eventuated.’<sup>375</sup> According to Immanuel Kant, ethics concern the fundamental principles of the moral

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<sup>371</sup> Hufnagel, S., ‘The Fear of Insignificance: New Perspectives on Harmonising Police Cooperation in European and Australia’ (2010) 6(2) *Journal of Contemporary European Research*, 165

<sup>372</sup> Banks, C., *Criminal Justice Ethics: Theory and Practice* (London: Sage, 2013) 2

<sup>373</sup> MacVean, A. and Neyroud, P., *Police Ethics and Values* (London: Sage, 2012) 6

<sup>374</sup> Neyroud, P. and Beckley, A., *Policing, Ethics and Human Rights* (London and New York: Willan Publishing, 2001) 41

<sup>375</sup> Wodak, A., ‘Ethics and Drug Policy’,  
<[http://hanskoehler.com/Wodak-Ethics\\_Drug\\_Policy.pdf](http://hanskoehler.com/Wodak-Ethics_Drug_Policy.pdf)>

decisions where a person should make decisions in a sense of duty and accordance with agreed principles.<sup>376</sup> Kant's idea, known as the 'categorical imperative', can be summarized as 'treating people as you want to be treated; treating those equally as people with the same values as you have. Do not treat them as your instruments.'<sup>377</sup> This idea is consistent with human rights, though Immanuel Kant did not support human rights and emphasized the importance of duty over rights. For example, crime control or order maintenance is understood as a central duty of a state and something that the police in every country should do.

In practice, there are several sources of principles and standards related to ethical aspects of policing at the global and regional level, which police forces may adopt and use as grounds to cooperate with each other. With regard to ethical values of transnational policing action, it could be examined based on two primary categories: one is 'hard' international law such as the United Nations International Covenant on Civil and Political Rights (ICCPR)<sup>378</sup> which is a treaty instrument which creates binding obligation in international law. Policing activity is shaped by this international code, and there is a duty to comply. For example, every police force must observe the principle of 'the right to not to be tortured'<sup>379</sup> during an investigation. This is because human rights are values that do not depend on consequences. Even some rights, such as this right not to be tortured, are non-degradable could be said to be purely deontological.

The other is 'soft' international law such as the United Nations Code of Conduct for Law Enforcement Officials<sup>380</sup> that is a non-treaty instrument, but provides guidance for police in their behaviour and their judgements. Police actions are addressed by these norms. For example, Article 4 of the United Nations Code of Conduct for Law

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<sup>376</sup> Macvean, A. and Neyroud, P., *Police Ethics and Values* (London: Sage, 2012) 8

<sup>377</sup> Kant, I., *Grounding for the Metaphysics of Morals*, translated by James W. Ellington (Indianapolis: Hackett Publishing Co., 1993) 36; While the thesis is confined to applying rather than analysing Immanuel Kant's ideas, for some leading commentaries see: Allison, H., *Essays on Kant's Theoretical and Practical Philosophy* (Cambridge, 1996); Atwell, J., *Ends and Principles in Kant's Moral Thought* (Nijhoff, 1986); Engstrom, S., *The Form of Practical Knowledge: A Study of the Categorical Imperative* (Harvard, 2009).

<sup>378</sup> ICCPR, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Vietnam's accession to ICCPR was in 1982. Thus, ICCPR is recognised as a part of the Vietnamese legislation. If there is a contradiction in provisions between the Vietnamese domestic laws and ICCPR, provisions in ICCPR will be prioritized to be applied. See further explanation at section 6.1 in chapter 6.

<sup>379</sup> *Ibid.*, article 7

<sup>380</sup> United Nations, Code of Conduct for Law Enforcement Officials; adopted by General Assembly resolution 34/169 of 17 December 1979

Enforcement Officials emphasizes the need for care in safeguarding and using law enforcement information because it may relate to private lives or be potentially harmful to the interests, and especially the reputation, of others. It states that ‘matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.’<sup>381</sup> Moreover, other international documents such as the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials<sup>382</sup> focus on specific aspects of policing including ethical issues associated with the use of force and firearms.

Thus, in terms of deontological ethics, there are ethical implications for transnational policing. Ethical transnational policing activities should be carried out according to a duty to the international community. Moreover, transnational policing should respect and ensure requirements related to international standards. In other words, *how* the goals of transnational policing are accomplished is more important than what is actually achieved. For example, it is unethical for the police to obtain a statement from an arrested person by the use of torture (in order to share, for instance, with other overseas law enforcement to investigate a transnational organised crime organisation). Doing so leads to a violation of international human rights standards and norms. Therefore, to meet requirements of international standards, ethical transnational policing activities should be implemented fairly, and according to the rule of law.

By contrast, consequentialists, such as Jeremy Bentham,<sup>383</sup> regard ethics in the light of the outcome of an action, such that the *results* of a certain action or decision are considered as the basis for proper moral evaluation of that action. ‘The rightness and goodness of any action or organisation depends solely on the goodness of results.’<sup>384</sup> Basically, this kind of ethics focuses on a utility calculus of the various available options, such as a consideration of short-term and long-term results in making choices about how

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<sup>381</sup> *Ibid.*, article 45

<sup>382</sup> United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Official, adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

<sup>383</sup> See: Bentham, J., *An Introduction to the Principles of Morals and Legislation* (Kitchener, 2000). While the thesis is confined to applying rather than analysing Jeremy Bentham’s ethical ideas, for some leading commentaries see: Harrison, R., *Bentham* (London: Routledge and Kegan Paul, 1983); Plamenatz, J., *The English Utilitarians* (Oxford, 1949).

<sup>384</sup> Neyroud, P., and Beckley, A., *Policing, Ethics and Human Rights* (London and New York: Willan Publishing, 2001) 43

to obtain the best results (in which the benefits outweigh the cost). In this calculus, there are two kinds of utilitarianism: act-utilitarianism, in which the rightness or wrongness of an action is to be judged by the consequences of good or bad, of the action itself; and rule-utilitarianism, the view that the rightness or wrongness of an action is to be judged by the goodness or wrongness of the consequences of a rule that everyone should perform the action in similar situations.<sup>385</sup> Although there are concerns about consequentialism in that it may apply an ‘ends justify means’ approach to policing, the distinction between act-utilitarianism and rule-utilitarianism offers an interpretation of the relationship between utilitarianism and justice in which, as McClockey has pointed out, ‘an unjust system of punishment might be more useful than a just one.’<sup>386</sup> In other words, to obtain the best general outcome, sometimes a person may find himself or herself in a circumstance where he or she ought to act in an unjust manner. The implication of this is that a justification of outcomes in policing should be placed in their particular contexts. The results of police activities that are judged on the satisfaction of individuals will be a measurement of how satisfied countries feel to cooperate.

A good example is a change in anti-drugs policy from the ‘War on Drugs’ (which dominated for many years) to a ‘harm reduction’ approach (which has appeared more recently in some parts of the world).<sup>387</sup> In this policy shift, drugs use can be increasingly legalised instead of criminalised. Although injecting drugs is still regarded as highly problematic, such behaviours can be resolved, it is said, through a harm reduction approach with a direct goal for instance of preventing the spread of HIV/ADS.

As a result, in terms of ethical transnational policing activities, consequentialists may know that the police of a state cannot deal with transnational crime alone. Effectiveness in transnational policing however should take into account both national interests and benefits to the international community. Both domestic and international goals of policing must involve some compromise and be respected. It is unacceptable for the police of one state to pursue its own national benefits such as to dismantle a transnational drug trafficking syndicate by merely displacing that syndicate to a neighbouring country (that is, policing without taking those countries’ interests into

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<sup>385</sup> Smart, C. and Williams, B., *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973) 9

<sup>386</sup> *Ibid.*, 70

<sup>387</sup> Jelsma, M., *The Development of International Drug Control: Lessons Learned and Strategic Challenges for the Future*, (Working Paper prepared for the First Meeting of the Global Commission on Drug Policies, Geneva, 2011) 8

account). The equation between direct and indirect outcomes or benefits of an individual state and the whole international community need be considered while doing transnational policing. In other words, the consequentialist approach judges actions by the value of their consequences, and may extend consideration to the interests of those outside the immediate national political community.<sup>388</sup>

In addition, in the context of transnational policing, there are different actors (including state actors and supranational actors). Transnational policing policies confront conflicting values that represent either the individual interests of a nation or the collective interests of the whole world. Conceptions of balancing between these conflicting values change and vary. Appropriate choices made in transnational policing are not simply based on the equations of ‘social contract theory’, for example, a balance between security and liberty in which consequentialists argue that there is simply a trade-off of rights of the individual for the benefits of a greater group. There may be a need to weigh deontic values that are embedded both in security and liberty. In this regard, Aniceto Masferrer and Clive Walker have pointed out that ‘The underlying assumption that security and liberty can be ‘balanced’ in a causal relationship – less of one automatically means more of the other – is not factually correct.’<sup>389</sup> Instead, these choices are also subject to boundaries between conflicting political and social values.<sup>390</sup> For example, there may be a prioritisation of one value over the others, such as national security over rights.

Moreover, ethical values related to transnational policing are increasingly complicated, because of intertwining relationships between policing and issues of foreign relations, development, human rights and international security politics.<sup>391</sup> All countries must compromise in terms of their values, where decisions are made, though the balance may differ according to what is an acceptable outcome in that society. The objectives of transnational policing should be achieved in a way that is acceptable to the society subject to the boundaries of common and individual frameworks. So, it is sensible, when there is a form of transnational policing acceptable within each society and between societies,

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<sup>388</sup> Gill, P., ‘Security Intelligence and Human Rights: Illuminating the ‘Heart of Darkness?’ (2009) 24(1) *Intelligence and National Security*, 78, 89

<sup>389</sup> Masferrer, A. and Walker, C., ‘Countering Terrorism and Crossing Legal Boundaries’, (*The World Financial Review*, 13 January 2014), < <http://www.worldfinancialreview.com/?p=4014>>

<sup>390</sup> *Ibid.*

<sup>391</sup> Aas, F. K., ‘Victimhood of the National? Denationalising Sovereignty in Crime Control’, in Crawford, A. (eds), *International and Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings* (Cambridge: Cambridge University Press, 2011) 401



where there are different viewpoints and balances that all factors of ethical values such as effectiveness, fairness and the rule of law are considered together.

In summary, ethics play an important role in transnational policing. Ethics help police forces to cooperate with each other. On the one hand, for consequentialists, a good result of police cooperation brings police forces together. For example, the same ethical goals directed towards transnational crime, such as transnational drug trafficking, make police forces share criminal intelligence with each other. On the other hand, for deontologists, universality is something that enables police cooperation, because this value is applicable to all police forces. For example, the Universal Declaration on Human Rights indicates that human rights as ‘common standards of achievement’ must be secured by every country, including its police force.<sup>392</sup> Thus, transnational policing demands an exploration of the ‘possibilities for fostering a constabulary ethic capable of guiding the practices of personnel in policing-type agencies (broadly conceived) towards social peace and good ends with just means.’<sup>393</sup>

Admittedly, principles and standards which are used to justify the ethical aspects of transnational policing are based on ideas of individualism such as fairness and human rights. These ideas however represent ‘part of the ideological patrimony of Western civilization.’<sup>394</sup> At the same time, there exist alternative ideas which appreciate for instance a collectivist approach to economic and social rights as can be seen in the ideology of socialism.<sup>395</sup> Moreover, like many nations, Vietnam is bound by membership of a number of regional and international communities. For example, Vietnam is a member of ASEAN and therefore must take into account the ASEAN collective objectives while undertaking transnational policing. At the same time, if a country wants to cooperate in policing, that country must accept these ideas of individualism. The reason is that the ideas of individualism are now predominant and powerful in the international community. They would ‘appear to be an approach particularly suited to contemporary social, political, and economic conditions, and thus of widespread contemporary

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<sup>392</sup> United Nations, Universal Declaration on Human Rights, adopted by the General Assembly resolution 217 A(III) of 10 December 1948

<sup>393</sup> Sheptycki, J., ‘The Constabulary Ethic and the Transnational Condition’, in Goldsmith, A. and Sheptycki, J. (eds), *Crafting Transnational Policing: Police capacity-Building and Global Policing Reform* (Oxford and Portland, Oregon: Hart Publishing, 2007) 32

<sup>394</sup> Cerna, C., ‘Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Context’ (1994) 16(4) Human Rights Quarterly 740

<sup>395</sup> Dean, R., ‘Beyond Helsinki: The Soviet View of Human Rights in International Law’ (1980-1981) 21(1) Virginia Journal of International Law 55, 61

relevance both in the West and the Third World.’<sup>396</sup> Moreover, because of their predominance, these ideas of individualism become a rule of engagement in any form of international cooperation which involves transnational policing. Therefore, in fact, Vietnam respects these individualist values, and seeks to apply them alongside the ideology of Marxism and Leninism which is reflected in Ho Chi Minh’s thought in Vietnam’s practical policing mechanism.<sup>397</sup>

#### 4.1.2. Values as a Public Good

In comparison with the instrumentalist approach to policing, ethics can also be seen as ‘public goods’ in themselves. Policing systems that seek to ‘make the right judgement and do the right things, for the right reasons’<sup>398</sup> are very much related to ethical issues because ethics bear features of a public good. For example, even if a transnational criminal is not caught, the fact that policing was conducted ethically is good in itself. Moreover, ethics propagate values that are thought to be good for society. For example, Western countries forefront human rights because they tend to believe that human rights are good for society, even if the precise results in a given case can be inconvenient. In these countries, human rights issues are embedded in policing activities. In addition, Jeremy Waldron described a conception of rights not as a counterpoint to the claims of security against which the latter must be ‘balanced’, but as a vital ingredient of a civilizing security practice.<sup>399</sup> In this sense, ethics are values that make policing worth having in itself. Moreover, in terms of deontological approaches in policing, ethics need be no less rational than teleological ones. The ethical and moral framework that the police embody will be an indicator of ‘good policing’.

In terms of links between ethics and policing values, the respect of ethics might be important if it increases trust in the police. Ethics produce legitimate standards of policing, and are valuable to the police. For example, the police should treat people fairly. Besides, ‘trust’ in the police is an important factor for police legitimacy,<sup>400</sup> which shapes

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<sup>396</sup> Donnelly, J., ‘Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights’ (1982) 76(2) *American Political Science Review*, 303

<sup>397</sup> See further discussions on this issue at section 4.3.4, Reflection on Ethical Policing in Vietnam

<sup>398</sup> Neyroud, P. and Beckley, A., *Policing, Ethics and Human Rights* (London and New York: Willan Publishing, 2001) 37

<sup>399</sup> Waldron, J., ‘Security and Liberty: The Image of Balance’ (2003) 11(2) *Journal of Political Philosophy* 191, 210

<sup>400</sup> Hough, M., and Jackson, J., and Bradford, B., and Myhill, A., and Quinton, P., ‘Procedural Justice, Trust and Institutional Legitimacy’ (2010) 4(3) *Policing: a Journal of Policy and Practice* 203, 206

public support of the police and policing activities. According to James Hawdon, legitimacy rests on a belief in the legality of enacted rules and the right of those in authority to issue commands.<sup>401</sup> In addition, when resident-police relations are considered, it is believed that increasing resident's perceptions of police legitimacy and trustworthiness is one means of improving resident cooperation with police.<sup>402</sup> Thus, first, ethical policing engenders trust. Engagement in ethical policing will make people trust the police and they will provide the police with useful information. They also comply with the police's order. Second, in the context of transnational policing, ethical policing will create trust between police forces. The reason for this is that ethics can apply to any police forces, for example either the Vietnamese police or other national police forces in the world, because ethics bear universal values. In this sense, following universal ethics, police forces can engender universal trust across borders. Therefore, ethics as a public good creates trust, making a wider favourable atmosphere between police forces. This trust will help police to cooperate in terms of information exchange, or reliance in other polices to do things whereas all these things are good for a police organisation. Moreover, trust will facilitate police cooperation even when there is an absence of legal arrangements between countries. In practice, it is difficult to gain fruitful results in police cooperation when trust is not built between police forces. In this regard, Tom Tyler has pointed out that trust is one of the crucial factors that that lead to favourable dispositions (attitudes, values and identities) and, through them, trust motivates cooperation.<sup>403</sup>

In sum, in transnational policing, ethics as a public good are something that not only benefits a single nation-state, but rather, ethics are worthwhile to all nation-states in working together in transnational policing arrangements.

#### **4.1.3. Ethics as an Instrument for Restraining Police Powers**

Ethics are central to contemporary policing.<sup>404</sup> Ethics help identify what good policing looks like and what is ethical behaviour for the police. It is not ethical for police forces to do whatever they want or use any means to catch criminals. At the same time,

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<sup>401</sup> Hawdon, J., 'Legitimacy, Trust, Social Capital, and Policing Styles: A Theoretical Statement' (2007) Volume XX Number X Police Quarterly 1, 4

<sup>402</sup> Hawdon, J., 'Legitimacy, Trust, Social Capital, and Policing Styles: A Theoretical Statement' (2008) 11 Police Quarterly 182

<sup>403</sup> Tyler, T., *Why do People Cooperate: The Role of Social Motivation* (Princeton and Oxford: Princeton University Press, 2011) 14

<sup>404</sup> Neyroud, P., and Beckley, A., *Policing, Ethics and Human Rights* (London and New York: Willan Publishing, 2001) xiii

ethics work as an instrument to prevent threats and harms by the state and the police against individuals. In other words, ethics are an instrument to ensure the police are effective and legitimate. The reasons for this are as follows.

Ethics are used to handle the relationship between a state and individuals in a society or between national security and the rights and liberty of the individual. In this sense, ethics provide a mechanism for governing choice. The police are the most visible part of government authority and power.<sup>405</sup> ‘The role of police is to address all sorts of human problems when and insofar as the problems’ solutions may require the use of force at the point of their occurrence.’<sup>406</sup> In this sense, the police have coercive powers and can use force that may pose danger to individuals. These possible threats are part of the evolution of theories about the state and its role in securing social order. There are different philosophical notions of the role of the state. Thomas Hobbes for example, regarded the state as a ‘friend’ to its citizens,<sup>407</sup> whereas others like John Locke sought to limit the power of the state.<sup>408</sup> Montesquieu introduced the notion of a separation of powers within a state as a further limit on the state.<sup>409</sup> While these theories, to some extent, provide justification for the emergence of police powers (particularly with regard to the use of force), there are potential dangers wrapped up in such police powers.

For example, according to Thomas Hobbes, any policing arrangement is required to provide security for its subjects from the most basic fear of a state of anarchy or a ‘war of all against all’.<sup>410</sup> In the logic of Thomas Hobbes’s, absolute power is vested in the

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<sup>405</sup> Kleinig, J., *The Ethics of Policing* (Cambridge: Cambridge University Press, 1996) 13

<sup>406</sup> Bittner, E., ‘The Capacity to Use Force as the Core of the Police Roles’, in Alliston, F. and Feldberg, M. (eds), *Moral Issues in Police Work* (Totowa, NJ: Rowman & Allanheld, 1985) 21

<sup>407</sup> Hobbes, T., *Leviathan* (Oxford: Blackwell, 1946). While the thesis is confined to applying rather than analysing Thomas Hobbes’s moral and political philosophy, for some leading commentaries see: Boonin-Vail, D., *Thomas Hobbes and the Science of Moral Virtue* (Cambridge: Cambridge University Press, 1994); May, L., *Limiting Leviathan: Hobbes on Law and International Affairs* (Oxford: Oxford University Press, 2013).

<sup>408</sup> Locke, J., *Second Treatise of Government* (BN Publishing, 2008). While the thesis is confined to applying rather than analysing John Locke’s ideas, for some leading commentaries see: Hoff, S., ‘Locke and the Nature of Political Authority’ (2015) 77 *Review of Politics* 1–22; Ashcraft, R., *Locke's Two Treatises of Government*, (London: Unwin Hymen Ltd, 1987).

<sup>409</sup> Montesquieu, *The Spirit of Law* (Berkeley and Los Angeles, California: University of California Press, 1977). While the thesis is confined to applying rather than analysing Montesquieu’s ideas, for some leading commentaries see: Pangle, T., *Montesquieu's Philosophy of Liberalism: A Commentary on The Spirit of the Laws* (Chicago: University of Chicago Press, 1973)

<sup>410</sup> Hobbes, T., *Leviathan* (Oxford: Blackwell, 1946)

state, and so there is no sense of constraint in accordance with a legacy of divine or natural law.<sup>411</sup> What is more, a moral duty of the sovereign is a basis for powers to protect its people. However, this ignores the fact that people could be harmed by police powers, because as Ian Loader and Neil Walker indicate, ‘the state’s concentration of coercive power makes it simultaneously a guarantor of, and a threat to, the security of individuals.’<sup>412</sup> In this regard, John Locke also used ‘social contract’ theory to present the moral foundations of policing as a matter of reconciling fundamental rights with the exercise of government power.<sup>413</sup> John Locke believed that ‘it would make sense to exchange certain of one’s freedoms for greater security of rights promised by some form of civil government.’<sup>414</sup> Thus, the police can be viewed as having the responsibility of maintaining peace and order, as well as enforcing the law, but for the protection of the public not the state.

This leads to the issue of what choices are made in applying such force and maintaining such order, and how those are implemented properly by considering different elements such as individual and common interest. Sometimes, these elements may conflict with one another. For example while applying coercive powers to keep society safe and well-ordered, the police must at times limit individual liberty and interests. Therefore, some balance between rights or interests and security/safety must be ensured. However, sometimes it is not easy to justify this balance in practice. In such circumstances, individuals could be in danger from the disproportionality of police powers, including the potentially excessive coercive dimensions of government. This danger is especially acute for those who follow Marxism and Leninism, which indicated an origin of police powers from the division of property, the division of labour and the creation of the police as a political instrument for the suppression of class enemies.<sup>415</sup>

In addition, ethics are a way to help the police be accountable for what they do. This is more important for transnational policing, because there are few provisions governing the use of police powers across national borders, except in terms of some

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<sup>411</sup> Loader, I. and Walker, N., *Civilizing Security* (New York: Cambridge University Press, 2007) 41

<sup>412</sup> *Ibid.*, 11

<sup>413</sup> Kleinig, J., *The Ethics of Policing* (Cambridge: Cambridge University Press, 1996) 12

<sup>414</sup> *Ibid.*, 12

<sup>415</sup> Engels, F., ‘The Origin of Family, Private Property and the State’, in *Karl Marx. and Friedrich Engels: Selected Works* (Moscow Publishing House, 1975) 326, 327; Marx, K., ‘Critique of Hegels’s Doctrine of State’, in *Karl Marx: Early Writings*, translated by Livingstone, R. and Benton, G. (New York: Vintage, 1975) 111

bilateral or multilateral agreements between countries. To further understand this point, it is necessary to look at the implementation of police powers. Although police powers are always limited by legislation, or judicial decisions in the case of common law, it does not mean that those limits to power are always effected in action.<sup>416</sup> As Jean Paul Brodeur pointed out, one feature of policing is its threatening character for the respect of due process of law and of human rights.<sup>417</sup> A main reason for this is that the uses of police powers are very much related to police discretion which originates from different factors such as ‘police culture’<sup>418</sup>, and especially ‘policing goals and specific police policies’.<sup>419</sup> These factors set out priorities as well as justify constraints of police powers. In the meantime, the relationship between a ruling party and the police may lead to threats in the uses of police powers in which there is no practical independence of police action.<sup>420</sup> An example can be found in states where police powers are a tool for the protection of the regime rather than the public. Moreover, threats from the use of police powers may also come from corruption, another danger of the politicization of the police. In contrast, for the public to accept the civil authority of the state or police powers, it is important to develop legitimate institutions which seek to protect life, liberty and the property of citizens within the rule of law.<sup>421</sup>

Furthermore, policing is complex. It is not only because of the nature of policing in which the police are more than law enforcers. Although the police are usually seen as a visible symbolic form of coercive power, they are responsible for responding other emergency situations, such as answering emergency calls from citizens. For example, David Dixon pointed out that several police duties or responsibilities are not facilitated by the provision of coercive powers.<sup>422</sup> However, the police do tend to use forcible intervention in confrontations. There is in fact a possibility for police to resolve issues by means of force and threat. Sometimes, there can be confusion between the role of police

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<sup>416</sup> Sanders, A. and Young, R., ‘Police Power’, in Newburn, T. (eds), *Handbook of Policing* (London and New York: Willan Publishing, 2011) 281

<sup>417</sup> Brodeur, J., ‘Transnational Policing and Human Rights’, in Sheptycki, J. (eds), *Issues in Transnational Policing* (London and New York: Routledge, 2000) 43

<sup>418</sup> Chan, J., ‘Changing Police Culture’ (1996) 36(1) *British Journal of Criminology* 109, 112

<sup>419</sup> Miller, J., Bland, N. and Quinton, P., *The Impact of Stops and Searches on Crime and the Community. Police Research Series Paper* (London: Home Office, 2000)

<sup>420</sup> Mawby, R., ‘Models of Policing’, in Newburn, T. (eds), *Handbook of Policing* (London and New York: Willan Publishing, 2008) 17, 27

<sup>421</sup> Wright, A., *Policing: An Introduction to Concepts and Practice* (Cornwall: Willan Publishing, 2002) 6

<sup>422</sup> Dixon, D., *Law in Policing: Legal Regulation and Police Practices* (Oxford: Oxford University Press, 1997) 66

and the means that are available to them in the performance of the police role. ‘Citizens frequently complain that their encounters with police are intimidating, that threat is used when negotiations would have been more appropriate.’<sup>423</sup>

In the context of transnational policing, the nature of policing and the ways in which it affects ‘the basic autonomies of human nature and social organisation’<sup>424</sup> needs consideration. Policing power in the context of transnational policing is not confined within and by a single nation-state because it involves the territory and populations of other nation-states. While threats from policing powers may therefore reach individuals or populations outside a state’s territory, policing powers can become fragmented, for example following the participation of non-state or transnational actors in some policing areas. In such cases, policing is not only justified by the society where it acquires its powers and legislative framework, but also must be acceptable to the international community, because transnational policing is a part of global governance for social order throughout the world, where public safety and respect of human rights must or should prevail.

However, transnational policing at present is not well regulated. There is an absence of clear laws, regulations and guidance with regard to transnational policing. In addition, there may be a lack of oversight mechanisms such as binding legislation or accountability over the exercise of police power or authority in a transnational context. Moreover, whilst, in fact, there is an absence of effective global mechanisms for the supervision of transnational policing strategies as well as their practices, there is a gap between the substance of stated national commitments and international agreements and the realities of practical implementation.<sup>425</sup> As Eugene McLaughlin has stated, transnational policing raises ethical questions about policing because of its often intrusive techniques and repressive styles of policing.<sup>426</sup>

So, what is right or wrong in transnational policing is left to the realm of ethics. In this sense, ethics will take formal policing out of national contexts, and become an important value to decide what should and should not be done in transnational policing. This kind of ethical policing, according to Peter Neyroud, is ‘no longer a matter for

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<sup>423</sup> Kleinig, J., *The Ethics of Policing* (Cambridge: Cambridge University Press, 1996) 27

<sup>424</sup> Reiner, R., *The Politics of The Police* (Oxford: Oxford University Press, 2010)

<sup>425</sup> Loader, I. and Walker, N., *Civilizing Security* (New York: Cambridge University Press, 2007) 242

<sup>426</sup> McLaughlin, E., ‘The Democratic Deficit: European Unity and the Accountability of the British Police’ (1992) 32(4) *British Journal of Criminology*, 473, 483

negotiation with reasonably homogeneous local communities defined by geography, but now has to be mediated with national governments and supra-national bodies and take account of communities that are increasingly diverse.<sup>427</sup>

#### **4.1.4. The Need for Ethical Frameworks for Transnational Policing**

This analysis indicates several needs for an ethics of transnational policing. As explained earlier, typically, there are the three advantages of ethics as applied to transnational policing, such as an instrument of cooperation; a public good; and restraint on police powers. To sum up and reflect these three usages of ethics, cosmopolitanism may be a kind of ethical umbrella which could emphasize how action from one police force in transnational policing looks like when that action is viewed from another police force's view point. Cosmopolitanism could be a prism through which transnational policing can be seen as ethical because it emphasizes the value of others rather than the self (or the national).

Specifically, the notion of cosmopolitanism is needed. It is a notion of common values in humanity being applied not only to people in one's own country, but other countries. Following Kant's idea, the categorical imperative, it is not permitted to treat other people in other countries as a 'means'. They should be treated equally. The idea of equality is not confined to one country. There should be a global view. From this point, there are implications for transnational policing. For example, when a foreigner is arrested in a country, how is that foreigner treated? There is a question of whether the foreigner is treated the same its own citizen. In this case, an idea of cosmopolitan liberty emerges. It means that there is a need for an equation of liberty for all within borders, in the meantime, that equation must satisfy international standards.<sup>428</sup> Thus, for the development of a transnational policing system, there may need to be a view, that extends and moves beyond national borders, to handle for example the relationship between national interests and rights or liberty of individual. In addition, Clive Walker concludes that the notion of cosmopolitanism with the core of the universality of human rights emphasises the idea of a common shared morality which might be applied regardless of nationality and

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<sup>427</sup> Neyroud, P., 'Policing and Ethics', in Newburn, T. (eds), *Handbook of Policing* (London and New York: Willan Publishing, 2008) 666

<sup>428</sup> Walker, C., 'Cosmopolitan Liberty in the Age of Terrorism', in Crawford, A. (eds), *International and Comparative Criminal Justice and Urbane Governance: Convergence and Divergence in Global, National and Local Settings* (Cambridge: Cambridge University Press, 2011) 414



citizenship in relation to transnational policing.<sup>429</sup> This point suggests that transnational policing should be constructed and operationalised on the basis of reciprocity and mutuality rather than only interests of a territorial or political community, which are rooted in the traditions and practices of particular state communities. By doing this, the meaning of policing as a visible form of sovereign power is secured while a shared common humanity value is achieved.

In summary, for transnational policing, it is important to compromise different national values, and even conflicting ethical values such as between national security and liberty and the rights of citizens with a view to acting ethically in terms of both effectiveness and legitimacy, which are ethical indicators of a transnational policing system or strategy. By doing so, success in transnational policing may be ensured. To comment on the role of ethics in transnational policing, Peter Andreas and Ethan Nadelmann recognized that several contemporary international crime control initiatives have been driven not just by the narrow political and economic interests of strong states but also by moral and emotional elements.<sup>430</sup>

## **4.2. Identifying and Understanding Ethical Values and their Impacts on Transnational Policing**

This section examines the ethical values that affect policing in general and transnational policing in particular. There is increasing awareness of ethical concerns regarding criminal justice.<sup>431</sup> Though some forms of internationally recognised standards of ethics have become important,<sup>432</sup> ethical values and their implications for transnational policing have not been clearly identified. Therefore, this section focuses on an examination of three key ethical values: fairness, effectiveness and the rule of law.

### **4.2.1. Effectiveness**

One important ethical value which transnational policing should meet is effectiveness. Although the meaning of effectiveness in policing is contested,<sup>433</sup> it can be

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<sup>429</sup> Ibid., 413

<sup>430</sup> Andreas, P. and Nadelmann, E., *Policing the Globe: Criminalization and Crime Control in International Relations* (New York: Oxford University Press, 2006) 224

<sup>431</sup> Pollock, J., Ethics and The Criminal Justice Curriculum (1993) 4 *Journal of Criminal Justice Education* 377, 386

<sup>432</sup> Neyroud, P., 'Policing and Ethics', in Newburn, T. (eds), *Handbook of Policing* (London and New York: Willan Publishing, 2008) 666

<sup>433</sup> Reiner, R., *The Politics of The Police* (Oxford: Oxford University Press, 2010) 5

simply understood that if transnational crime is not addressed effectively, its policing will be unacceptable to society. Police effectiveness is often judged by targets, priorities and strategies that are set for the police. In this sense, the police will be kept accountable and subject to democratic directions. The police cannot entirely decide what priorities or resources should apply. Stuart Kirby wrote that ‘it is difficult to judge the effectiveness of the police without knowing their purpose and role.’<sup>434</sup> They are subject to public discourse and democratic direction.<sup>435</sup> Thus, for transnational policing, there are two issues regarding effectiveness. First, effectiveness can be judged by what the police try to do within the ‘general duties of police officers which are to protect life and property, to preserve order.’<sup>436</sup> Second, from this point, there is the issue of empowering the police in terms of giving the police powers and resources in order to ensure effectiveness. These powers and resources allow the police to perform their tasks effectively, for example, the investigation of transnational crime. In addition, these powers must secure the conviction of those guilty of criminal offences and the acquittal of those who are innocent.<sup>437</sup> One ethical reason why the police should be given adequate powers and resources is as follows.

Article 6 of the ICCPR states that everyone’s right to life shall be protected by the law.<sup>438</sup> This point imposes a positive obligation on the state to protect life. The obligation requires the state to take steps to safeguard the lives of those within its jurisdiction.<sup>439</sup> The State has responsibility, as a minimum, to ‘secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression, and sanctioning of breaches of such provisions.’<sup>440</sup>

This form of human rights protection helps the police claim more power and resources to ensure effectiveness in policing. However, it is possible to argue that human

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<sup>434</sup> Kirby, S., *Effective Policing? Implementation in Theory and Practice* (Basingstoke: Palgrave Macmillan, 2013) 7

<sup>435</sup> Admittedly, there are limits on local democracy for transnational policing. See further discussion in subsection 4.2.1.3., considerations of priorities of policing.

<sup>436</sup> Police (Northern Ireland) Act 2000, s. 32

<sup>437</sup> Royal Commission on Criminal Justice, Report (Cm. 2263) (HMSO, 1993) page i

<sup>438</sup> ICCPR, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, article 6

<sup>439</sup> *LCB v. United Kingdom* (1998) 27 EHRR 212

<sup>440</sup> *Osman v. United Kingdom* (2000) 29 EHRR 245

rights legislation may also prevent effective policing.<sup>441</sup> For example, the above mentioned statement about ‘the right to life’ also indicates the negative obligation on the state by which the state must not do any activities causing harm to the individuals. This point can require that the police be constrained against the broad use of coercive methods such as stop and search, or other covert measures such as intrusive surveillance technology, because these are very much inimical to individual rights and freedoms. The use of these methods should be lawful only if application is compatible with the regulation of international human rights laws such as the International Covenant on Civil and Political Rights.

As a consequence, the effectiveness of policing can be judged according to the extent to which powers and resources are given to the police. Egon Bittner argued that the police ‘are nothing else than a mechanism for the distribution of situationally justified force in society.’<sup>442</sup> In the meantime, when resources are discussed with relevance to effectiveness, efficiency as a value must be considered. This effectiveness can be reflected by efficient use of available resources. In this sense, the value of effectiveness can be explored through three possible ways: (1) human rights discourse; (2) comparison between policing as a public good with other public goods; and (3) consideration of priorities in policing.

#### **4.2.1.1. Human Rights Discourse**

Rights and protections of rights could be seen as considerations against which police effectiveness is measured in terms of giving powers and resources to the police. For example, are the given powers and resources of police able to protect the rights of individuals? Is there an assurance that police powers and resources do not harm society? Therefore, effectiveness in policing is obtained when there is justification of necessary expense of rights towards pursuing aims of policing. A hierarchy of human rights is a foundation on which to decide the extent to which powers and resources are directed towards the effective performance of policing tasks. Recognition, protection, as well as implementation of a person’s rights involves a potential cost to other individuals and to society generally. In fact, human rights increasingly become central to policing, because

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<sup>441</sup> Hills, A., ‘The Possibility of Transnational Policing’ (2009) 19(3) *Policing and Society: An International Journal of Research and Policy* 300, 303

<sup>442</sup> Bittner, E., *The Functions of the Police in Modern Society* (Cambridge, MA: Oelgeschlager, 1980) 39

policing is concerned with the relationship between a state and individuals, or between government powers and freedoms of the individual. Human rights are defined not only as an integral part of knowledge of the police, but also as a means of securing good behaviour by the police.<sup>443</sup> Moreover, the perception of rights would be significant to consider choices regarding policing powers, and their use in the protection of national interests, liberty and the rights of individuals. Therefore, the effectiveness of policing can be reflected through handling different rights or between rights and other social values.

#### **4.2.1.2. Comparison between Policing as a Public Good with other Public Goods**

The public good may be used in general with regard to resources in which policing as a public good is measured against other public goods, such as education and health care. Whether the police should be given all resources available, at the expense of other areas, such as hospitals, education, and infrastructure, is doubtful. Policing is only a part of state protection. Policing is defined as ‘the set of activities directed at preserving the security of a particular social order, or social order in general’<sup>444</sup>. It may be carried out by different institutional arrangements of which the police are only one.

However, it is necessary to guarantee the provision of minimum resources in order to facilitate the police to fulfil their missions, which for example are the maintenance of public safety and social order. The reason is that policing is a primary task to a society. To some extent, it is considered as one of the pre-eminent public goods.<sup>445</sup> In this sense, policing is a guarantor for the achievement and sustainability of other public goods. But, for the implementation of policing, the police may need a priority or special resources such as coercive powers. Thus, a certain amount of police powers and resources must be given to the police, even in the case these powers may not be used in practice. Ben Bowling has said that unlike the provision of other public goods, such as health care, the delivery of the good offered by the police often requires the infringement of the interests or rights of others.<sup>446</sup> A decision over the amount of infringement is subject to the national purposes of policing, and threats to a given society.

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<sup>443</sup> Crawshaw, R., Cullen, S., and Wiliamson, T., *Human Rights and Policing* (Leiden and Boston: Martinus Nijhoff Publishers, 2007) xvii

<sup>444</sup> Reiner, R., *The Politics of the Police* (Oxford: Oxford University Press, 2010) 5

<sup>445</sup> Jones, T. and Newburn, T, *Private Security and Public Policing* (Oxford: Clarendon, 1998) 33

<sup>446</sup> Bowling, B., ‘Fair and Effective Policing Methods: Towards ‘Good Enough’ Policing’ (2007) 8(1) *Journal of Scandinavian* 17, 19

### 4.2.1.3. Consideration of Priorities of Policing

There next needs to be an equation within policing by which resources are allocated to the police. There are different prioritised aims in policing such as crime fighting, or social order maintaining or hot-spot policing, to name a few. A police strategy must deliver the most impact for resources allocation to the police which, in turn, shows how effective a policing system is. For example, when a crime control function is emphasized, annual budgets and other resources will be mobilized for the fight against crime more than for social order maintenance. Effectiveness in policing may involve an assessment of these two issues. On the one hand, the value of the police can be assessed through what the police represent, rather than their actual work, although what functions the police prioritise is decided by wider political and social forces. In this case, effectiveness is about getting powers and resources to ensure the achievement of the most prioritised functions of the police. On the other hand, the ability to use powers and resources of the police looks at operational performance of police activities. Effectiveness is justified by the results of police activities based on their use of powers and resources. A response time or a result of police activities, such as crime rates, may be good indicators for police effectiveness in this sense.

In terms of transnational policing, effectiveness may be seen through resource allocation for a duty that the international community demands from each nation state. Resources mobilisation should involve a relationship between a national demand for security and a local demand for order. How this relationship is balanced will indicate how effective a policing system is. If there are not enough powers and resources for a national demand, such as anti-transnational crime arrangements, the system may be judged as ineffective in terms of transnational policing. This issue is complicated, especially in times of limited resources. Moreover, the resources for the police may be decided by politicians and the expectations of a local population. Take the Police and Crime Commissioner Strategy in England and Wales as an example.<sup>447</sup> Section 1 of the Police Reform and Social Responsibility Act 2011 indicates that the elected Police Crime and Commissioners are responsible for holding their Chief Constables to account for the performance of the local police force; hiring and firing the Chief Constables; setting out local policing priorities and the police budgets.<sup>448</sup> Accordingly, apart from political

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<sup>447</sup> Home Office, 'Policing in the 21<sup>st</sup> Century: Reconnecting the Police and People', July 2010, Cm 7925

<sup>448</sup> Police Reform and Social Responsibility Act 2011, s. 1

influences, the allocation of resources is made subject to the ideas of each of the Police and Crime Commissioners. This deployment of resources may direct effectiveness of policing to a local community's concern rather than national threats or concerns, though every district is required by the Strategic Policing Requirement<sup>449</sup> to prepare policing capabilities and resources for national threats such as transnational crime, and balances between localism and meeting national requirements. Moreover, in this case, while a provision of resources may indicate the police's effectiveness in implementing the majority's interests in the community, there may be a neglect of a minority's interests who think that the policing system is ineffective or inappropriate. This is because the elected Police and Crime Commissioner may seek to ensure that police resources are used in populist ways that enhance their prospects of re-election.<sup>450</sup>

In fact, by the idea of directly elected Police and Crime Commissioners, there is the objective to democratize the police. The relationship between Home Secretary, Chief Constable and Police and Crime Commissioner becomes more balanced. The reason is that before Police and Crime Commissioner was elected, the tripartite system that consists of Home Office, Police Chief Constable, and Local Police Authority seems to be uneven. For example, the Chief Constable was relatively powerful, whereas the Local Police Authority, that consists of some elected local council members and not have enough voice to influence local policing. In contrast, the arrival of the Police and Crime Commissioner enhances transparency and reinvigorates democratic localism.<sup>451</sup> Increasing the local democratic element through the role of Police and Crime Commissioner makes the police more accountable to the local community. At the same time, the local community is allowed a voice, and actively participates in planning and locating the resources to local policing and local areas. However, admittedly, in this tripartite relationship, the Home Office still plays an important role in deciding the police budget and resources.<sup>452</sup> At the same time, Police and Crime Commissioners are still subject to the Home Secretary, and

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<sup>449</sup> The Strategic Policing Requirement is prepared by the Home Office to respond national threats which require national arrangements and local police forces to work together to tackle national threats effectively. See more in chapter 5 (section 5.3)

<sup>450</sup> Lister, S., 'The New Politics of the Police: Police and crime Commissioners and the "Operational Independence" of the Police' (2013) 7 Policing 239, 242

<sup>451</sup> Gilling, D., 'Reforming Police Governance in England and Wales: Managerialisation and the Politics of Organisational Regime Change' (2014) 24 Policing and Society 81, 95

<sup>452</sup> Police Act 1996, s. 46

the Chief Constables claim independence from the Police and Crime Commissioner, in terms of their operation, whilst elections of Commissioners attract very low turn-outs.<sup>453</sup>

Recently, there has been a combination of strengths of several relevant agencies in the fight against transnational crime, for example the police and intelligence services. Since 2001, trends of ‘amplification’ and ‘melding’ in terms of powers and resources have taken place in the policing and intelligence service development.<sup>454</sup> There is a need for effective organisation and usage of resources in terms of the relation between each professional, separate agency in charge of transnational crime. This arrangement focuses on the effectiveness of operational performance of transnational policing spread across the relevant agencies.

#### 4.2.2. Fairness

As explained in the previous section 4.2.1, to provide powers and resources to the police can reflect the requirement as to effectiveness of transnational policing. However, the use of those powers and resources is also important and requires fairness, because ‘the ‘goods’ offered by the police often require the imposition of ‘bads’ upon other.’<sup>455</sup> In transnational policing, ‘the use of coercive powers beyond national borders is rare but is not beyond the capacity of foreign police.’<sup>456</sup> This raise the question of how fair these powers and resources are. Article 26 of the ICCPR indicates that ‘All persons are equal before law and are entitled without any discrimination to the equal protection of the law.’<sup>457</sup> In other words, there is a prohibition of discrimination on any grounds such as race, colour, political, to name a few, whereas a nation state must have responsibility to ensure implementation of equal protection to all people. Thus, there is an implication for fairness in transnational policing in terms of discretionary decision-making and behaviour of the police.

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<sup>453</sup> Mawby, I. and Smith, K., ‘Accounting for the Police: The New Police and Crime Commissioners in England and Wales’ (2013) 86 *Police Journal* 143, 150

<sup>454</sup> Walker, C. and Staniforth, A., ‘The Amplification and Melding of Counter-Terrorism Agencies: From Security Services to Police and Back Again’, in Masferrer, A. and Walker, C. (eds), *Counter-Terrorism, Human Rights and the Rule of Law* (Cheltenham, UK and Northampton, USA: Edward Elgar, 2013) 295

<sup>455</sup> Bowling, B., ‘Fair and Effective Policing Methods: Towards ‘Good Enough’ Policing’ (2007) 8(1) *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 17, 19

<sup>456</sup> Bowling, B., *Policing the Caribbean: Transnational Security Cooperation in Practice* (Oxford: Oxford University Press, 2010) 294

<sup>457</sup> ICCPR, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, article 26

Fairness is thus an important ethical value for transnational policing. Usually, the meaning of fairness can be constructed from two approaches: philosophical concepts such as ‘equal concern and respect’<sup>458</sup> and the international law human rights perspective. In terms of philosophical concepts, fairness is an abstract idea that ‘government must act to make the lives of citizens better, and must act with equal concern for the life of each member.’<sup>459</sup> ‘No government is legitimate that does not show equal concerns for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance.’<sup>460</sup> Individuals should be treated as equals; and they are also treated equally in relation to a distribution of resources. A political community treats its members fairly by ensuring that each has access to an equal share of resources.<sup>461</sup> Thus, fairness could be understood not only as equal treatment, but also equal opportunities or equal outcomes. While the meaning of equal treatment may not address differences in the experiences and needs of countries, equal opportunities, for example could be useful in transnational policing. In this sense, fairness is justified by ‘right’ principles of justice, not the ‘good’.<sup>462</sup> To secure fairness, a nation state has a duty to arrange appropriate institutions, and to issue laws and procedures which are fair to all its members.

Nowadays, human rights based in international law are almost always discussed as a specific and applied idea of fairness. Fundamental human rights are understood as common values that entitle individuals to be treated fairly. The respect of human rights requires a policing system which includes basic standards such as impartiality, non-discrimination/equality and accessibility to those standards. For example, all people are treated equally before law. There is no prejudice to suspects or xenophobia to foreigners. Moreover, as objective and measurable indicators for the criteria of ‘fairness’, the use of human rights is in general a desirable tool to find accessible solutions and ‘justice for all’, in a sense of universality. Thus, for example the proportionality of decision-making that is justified by human rights discourses may be required for the mitigation between national interests and the rights and liberty of individuals.

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<sup>458</sup> Dworkin, R., *A Matter of Principle* (New York: Oxford University Press, 2001)

<sup>459</sup> Dworkin, R., ‘What is Equality? Part 4: Political Equality’ (1987 – 1988) 22(1) *University of San Francisco Law Review*

<sup>460</sup> Dworkin, R., *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000) 1

<sup>461</sup> Macleod, C., ‘A Review on Book titled Sovereign Virtue: The Theory and Practice of Equality’ (2002) 35(1) *Canadian Journal of Political Science*, 210, 212

<sup>462</sup> Burley, J., *Dworkin and His Critics: The Replies by Dworkin* (Blackwell, 2004) xvi



Although rights can be seen as complex and subject to considerable flexibility of interpretation,<sup>463</sup> in general, ‘rights presents a balance between potentially conflicting interests, some individual, some social.’<sup>464</sup> There are three categories of rights. First are absolute rights such as: not to be tortured and not to be subject to slavery. This kind of right cannot be compromised. For example, the ICCPR affirms prohibition of torture: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’<sup>465</sup> Thus, though transnational crime investigations may involve different jurisdictions which have different cultures and legal systems, no jurisdiction is allowed to torture suspects during interrogation, for example. The reason is that these rights that are most basic of fundamental rights are not intended to give way to ‘public interest’ considerations under the metaphor of ‘balancing’.<sup>466</sup> There are few rights in this category. According to the ICCPR,<sup>467</sup> the following rights are in this category: (1) the right to life (article 6); (2) the right not to be subjected to torture or inhuman or degrading treatment (article 7); (3) the right not to be subjected to slavery and forced labour (article 8); (4) the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (article 11); (5) the right not to be subjected to retrospective criminal laws or penalties (article 15); (6) the right to recognition everywhere as a person before the law (article 16); and (7) the right to have freedom of thought, conscience and religion (article 18).

Second are qualified rights. These rights are qualified and limited within their own formulation and their own terms but without reference to other values. The example of this kind of right is liberty. There are some statements about liberty in international law such as the ICCPR, Article 9. It says that ‘everyone has the right to liberty and security of person.’<sup>468</sup> However, within that convention, there are some statements about the limit of liberty when for example the lawful arrest is indicated in Article 9 of the ICCPR as follow.

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<sup>463</sup> Neyroud, P., ‘Policing and Ethics’, in Newburn, T. (eds), *Handbook of Policing* (London and New York: Willan Publishing, 2008) 674

<sup>464</sup> Feldman, D., *Civil Liberties and Human Rights in England and Wales* (New York: Oxford University Press, 2002) 6

<sup>465</sup> ICCPR, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, article 7

<sup>466</sup> Ashworth, A., and Redmayne, M., *The Criminal Process* (Oxford: Oxford University Press, 2010) 37

<sup>467</sup> ICCPR, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976

<sup>468</sup> *Ibid.*

‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’<sup>469</sup>

Thus, for transnational policing activities, for example one country can help other country to arrest and extradite someone, once there is evidence for that arrest which is justified by the law by both requested and requesting country.

Another example for this category of rights is the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14). However, Article 14 also indicates some exceptions where the press and the public may be excluded from all or part of a trial for reasons of morals or public order, to name a few.<sup>470</sup> These exceptions are sometimes deemed necessary to ensure a fair trial.

Finally, the largest category of rights is balanced rights. These rights may be balanced by not only other rights but also other social values such as economic issues, and national security. Article 4 of ICCPR states the possibility of derogation of these types of rights as a proportionate response to a serious public emergency.<sup>471</sup> For example, Article 19(3) of ICCPR indicates the exercise of the right to freedom of expression may be subject to certain restrictions as are necessary and established by law. They are:

‘(a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (order public), or of public health or moral.’<sup>472</sup>

In this sense, for transnational policing, there is a circumstance in which the police may be empowered by the law to use covert investigative measures such as electronic surveillance in order to investigate transnational criminals who distribute child pornography using the Internet and pose serious threats to the public.

This category also includes: the rights to respect for private life (article 17); the right to freedom of thought and religion (article 18); the right to freedom of expression (article 18); and the right to freedom of assembly and association (article 22). In some circumstances, where it is absolutely necessary, the right to life (article 6), for example ‘in defence of any person from unlawful violence’; and the right to freedom of thought and religion (article 18), for example ‘to protect public safety, order, health, or morals or fundamental rights and freedom of others’ are included in this category. ‘All these rights

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<sup>469</sup> Ibid.

<sup>470</sup> Ibid.

<sup>471</sup> Joseph, S. and Castan, M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2013) 910

<sup>472</sup> ICCPR, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, article 19(3)

are subject to interference, if it can be established that this is ‘necessary in a democratic society’ on the one of stated grounds.’<sup>473</sup>

In order to attain fairness in transnational policing, the following issues should be considered when the resources and powers of police are applied.

There should be fairness to both suspect and the police.<sup>474</sup> Fairness to the suspect means that the suspect is treated fairly. Fairness to the police means giving them enough powers to pursue their job, because if not, the police take risks and sometimes go over legal boundaries to undertake their job. The police should not be required to try to work within a framework of rules which are unclear, uncertain in their application and liable long after the event to subjective and arbitrary reinterpretation of their application in a particular case.<sup>475</sup>

At the same time, it is necessary to accept that the police must have discretion. The police have a job to do. The law should not make that job impossible, but should provide a broad framework within which the police can act in line with society’s values of fairness. But because the police must act with discretion, there is extensive scope for their actions to deviate from the law or organisational policy.<sup>476</sup> There is always a gap between ‘blue letter law’<sup>477</sup> and ‘black letter law’. In addition, much of the daily routine of police work does not involve law enforcement, but service provision and order maintenance.<sup>478</sup> Especially, in police international cooperation, there are not sufficiently comprehensive or precise legal regulations to regulate discretion. Police discretion is an unavoidable issue in policing. Police resources are limited while the police may have many different or competing priorities. ‘They could never have adequate resources for full enforcement of every law.’<sup>479</sup>

Moreover, the exercise of police powers may be affected by the circumstances that they are facing. One problem of giving the police discretion is that it creates a space for corruption. The police frequently find themselves in situations where they could extort

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<sup>473</sup> Ashworth, A and Redmayne, M., *The Criminal Process* (Oxford University Press, 2010) 38

<sup>474</sup> Royal Commission on Criminal Procedure, Report on the Investigation and Prosecution of Criminal Offences in England and Wales: the Law and Procedure (Cmnd 8092, 1981) 20

<sup>475</sup> *Ibid.*, 20

<sup>476</sup> Reiner, R., *The Politics of the Police* (Oxford: Oxford University Press 2010) 115

<sup>477</sup> This term refers to the police use of ‘law in action’ as contrast to ‘black letter law’ in the book. See: Reiner, R., *The Politics of the Police* (Oxford: Oxford University Press, 2010) 209

<sup>478</sup> Dixon, D., *Law in Policing: Legal Regulation and Police Practices* (Oxford: Clarendon Press, 1997)3

<sup>479</sup> Reiner, R., *The Politics of the Police* (Oxford: Oxford University Press, 2010) 206

money, goods, or favours in return for performing or not performing a service.<sup>480</sup> As a result, the police corruption may appear, and it then causes unfairness in police service. Corruption also greatly curtails the potential for improving the quality of police delivery.<sup>481</sup> Thus, to ensure fairness, it is necessary to avoid arbitrary use or abuse of police powers by combating police corruption.

In summary, to achieve fairness in transnational policing, while the police should be provided with enough resources and powers, it is necessary for the police to act ethically in their enforcement of their functions. Ethical standards are important in policing, not only because of the adverse impact of corruption, but also because it is known that perceptions of fairness and high standards in the way the police do their job are an intrinsic part of how they impact on criminal behaviour and come to be viewed as legitimate.<sup>482</sup>

### 4.2.3. The Rule of Law

The rule of law is considered one of the ‘fundamental principles of a democratic society.’<sup>483</sup> Specifically, for the United Nations, the rule of law is defined as a principle of governance in which all ‘person, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.’<sup>484</sup> In general, the rule of law includes both substantive and procedure aspects, such as clear law, act within law and consistent with human rights.<sup>485</sup>

Thus, all interventions by the state affecting the rights of individual must be under the rule of law, as indicated in a number of international human rights laws. According to the Preamble of the Universal Declaration of Human Rights, member states have pledged themselves to achieve the promotion of universal respect for, and observance of,

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<sup>480</sup> McCafferty, F. and McCafferty, M., ‘Corruption in Law Enforcement: A Paradigm of Occupational Stress and Deviancy’ (1998) 26(1) *Journal of the American Academy of the Psychiatry and the Law* 57, 61

<sup>481</sup> Goldstein, H., *Policing a Free Society* (Massachusetts: Ballinger Publishing House, 1990) 187

<sup>482</sup> Neyroud, P., ‘Policing and Ethics’, in Newburn, T. (eds), *Handbook of Policing* (London and New York: Willan Publishing, 2008) 669

<sup>483</sup> *Iatrides v. Greece* Judgement March 25, 1999, para. 62

<sup>484</sup> United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies* (Report No. S/2004/616, issued 23 August 2004), < <http://www.ipu.org/splz-e/unga07/law.pdf>>

<sup>485</sup> See further discussion on the rule of law at Chapter One (section 1.3.2.); See also: Bingham, T., *The Rule of Law* (London: Penguin Books, 2011).

human rights and fundamental freedoms which should be protected under the rule of law.<sup>486</sup> In addition, in the ECHR, not only is the rule of law cited at the preamble of the Convention as an integral part of the ‘common heritage’ of the contracting states, but also there are several articles such as Article 5, indicating obligation or intervention by state as actions which are ‘provided by law’, ‘in accordance with a procedure prescribed by law’ or ‘prescribed by law’,<sup>487</sup> and Article 7 of ECHR indicates that there is no punishment without law.<sup>488</sup> Furthermore, Article 38 of the European Code of Police Ethics states that ‘Police must always verify the lawfulness of their intended actions.’<sup>489</sup>

For transnational policing, there are two tiers in the rule of law: the obligation of a state to enact and provide adequate law for the police,<sup>490</sup> and a duty for the police to observe that law. With regard to a duty of a state, the rule of law means an observance of legality. What is done by the state must be within the rule of law. A state has responsibility to provide clear, appropriate and relevant law. There should be accountability and transparent in law making which is both open to public, and takes into public needs and desires. In this sense, not only law enforcement, but also people can get access to the law in order to protect their interests and combat transnational crime. The state should provide adequate provisions in law to define both criminal offences and procedures by which the police are able to enforce the law. However, there is a problem where law making focuses too much on the interests of national interests, or even the ruling party, and not enough on the liberty and rights of individuals. Issues such as freedom of speech and free movement are often the subject of this violation when combating transnational crime.

Apart from the duty of a state to act in accordance with the rule of law, the police must also ensure their own obedience to the law in their activities. The activities by their organisation and each individual officer must be governed by the rule of law following the requirement of their national laws as well as international human rights standards. In this regard, the European Code of Police Ethics suggests that police organisations should be established by law, which shall be accessible to the public and sufficiently clear and

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<sup>486</sup> United Nations, the Universal Declaration of Human Rights

<sup>487</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950

<sup>488</sup> *Ibid.*, article 7

<sup>489</sup> Council of Europe, The European Code of Police Ethics, Recommendation Rec(2001)10, adopted on 19 Sept. 2001

<sup>490</sup> Royal Commission on Criminal Procedure, Report on the Investigation and Prosecution of Criminal Offences in England and Wales: the Law and Procedure (Cmnd 8092, 1981) 21

precise, and their activities must be carried out in accordance with the law.<sup>491</sup> Next, the exercise of police activities must be independent from political interference. The reason is that ‘the role of police is centrally concerned with effecting the rule of laws.’<sup>492</sup> As a result, policing is seen as being more effective in fostering a law-abiding society.<sup>493</sup> Moreover, the nature of policing activity is itself supposed to be governed by legalistic procedures and constraint.<sup>494</sup>

However, there is, to some extent, a gap between international agreements and national enforcement. Moreover, the police seem to prefer to cooperate with each other in informal ways due to the limits of diplomatic bureaucracy and legal procedures. As mentioned earlier, there are limited accountability mechanisms to supervise transnational policing activities. So, ethical police policy and activities are needed by the way of being transparent. This means that police activities must be open to the public, and be judged by a society. Ethics become more important in order to impose accountability to the rule of law when some forms of intrusive measures or covert methods are applied. In this regard, as Goldsmith and Sheptycki have argued, the need for ethics to restrain the exercise of police powers is even more compelling in the case of transnational policing.<sup>495</sup>

#### **4.2.4. Interdependent Relations of Effectiveness, Fairness and the Rule of Law**

Taken together, the above analysis suggests that the three values of effectiveness, fairness and the rule of law are closely related to each other. It may be argued that one value seems to hinder the other, for example effectiveness in policing may conflict with democratic policing in which both fairness and the rule of law are upheld. In this regard, to some extent, ‘fair and reasonable treatment’ for individuals is categorised as something which is in conflict with the aims of justice.<sup>496</sup> However, fairness and the rule of law are conditions to achieve effectiveness, because the fair treatment of individuals will build more public trust in the police by which support from the public for the police will

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<sup>491</sup> Council of Europe, European Code of Police Ethics, adopted on 19 Sept. 2001, articles 2, 3, 4 and 5

<sup>492</sup> Kleinig, J., *The Ethics of Policing* (Cambridge: Cambridge University Press, 1996) 25

<sup>493</sup> Skogan, W., and Frydl, K., *Effectiveness and Fairness in Policing: The Evidence* (National Academy Press, 2004) 2

<sup>494</sup> Reiner, R., *The Politics of The Police* (Oxford: Oxford University Press, 2010) 72

<sup>495</sup> Goldsmith, A. and Shetycki, J., *Crafting Transnational Policing: Police Capacity Building and Global Policing Reform* (Oxford and Portland, Oregon: Hart Publishing, 2007) 3

<sup>496</sup> Choongh, S., *Policing as Social Discipline* (Oxford: Oxford University Press, 1997) 218

increase police effectiveness. Both trust in police effectiveness, and trust in the fairness of the police, will facilitate better cooperation from the public and other relevant agencies who feel confident about the legality and fairness of police activities.

In order to handle these relations, the following issues should be considered.

The first consideration is about proportionality and the relationships between rights. Specifically, when the possibility of balance in the case of balanced rights applies, further considerations apply regarding how that balance is to be applied. In other words, there is the consideration of proportionality in which the legal response to a problem must be appropriate to the nature and severity of that problem.<sup>497</sup> In addition, proportionality involves an evaluation of the importance of the legislative objectives as well as the importance of the particular human right at risk.<sup>498</sup> ‘Proportionality is assessed mainly by asking whether the interference with rights is more extensive than is justified by the legitimate aim.’<sup>499</sup> In this sense, to gain a proper balance between different rights or rights with other social values is not an easy task. The idea of proportionality can help foster correct decision-making, in which for example ‘law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.’<sup>500</sup> Although proportionality is not defined in the international conventions such as ICCPR or ECHR, the perception and meaning of proportionality could be found in case law of human rights’ courts such as the Strasbourg Court.<sup>501</sup> From this source of international law, it is indicated that the principle of proportionality is about the need to find a fair balance between the protection of individual rights and the interest of the community at large.<sup>502</sup> ‘A proper decision can only be reached when it is based on a clear understanding of what is at stake – whose rights are under consideration and what weight those rights should be assigned, so that it can be determined with clarity which is more important.’<sup>503</sup> A significant example is a case of detaining Mr David Miranda under

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<sup>497</sup> Kavanagh, A., *Constitutional Review under the UK Human Rights Act* (New York: Cambridge University Press, 2009) 233

<sup>498</sup> *Ibid.*, 234

<sup>499</sup> Feldman, D., *Civil Liberties and Human Rights in England and Wales* (Oxford University Press, 2002) 57

<sup>500</sup> United Nations Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169 of 17 December 1979, Article 3

<sup>501</sup> Strasbourg Court is the European Court of Human Rights which was set up, in accordance with European Convention on Human Rights, in 1959, with its base in Strasbourg, France.

<sup>502</sup> Starmer, K., *European Human Right Law: The Human Right Act 1998 and the European Convention on Human Rights* (London: Legal Action Group, 1999) 169

<sup>503</sup> David Hoffman and John Rowe QC, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (Dorset: Pearson, 2006) 14

Schedule 7 of the Terrorism Act 2000 on 18 August 2013 in the United Kingdom who was in possession of stolen material that could endanger a person's life. According to the High Court's decision, detention for six hours by the London Metropolitan Police to question David Miranda was a 'proportionate measure in the circumstance' because stopping Mr Miranda was 'imperative in the interests of national security'.<sup>504</sup> Therefore, human rights discourse not only provides the contexts and boundaries on ethical behaviour, but also considers decision-making processes in order to ensure 'appropriate' transnational policing which balance the right outcomes with sufficient justification of objectives.

The second consideration is about the relationship between fairness and the other interests of societies. This relationship is at some points related to the relationship between qualified rights and balanced rights that are mentioned earlier. Few rights are absolute. Thus, this relationship should be ethically handled. Boundaries between conflicting values, for example between state security and the liberties and freedoms of the individual citizens of the state, may be categorized by the prioritization of one value over another (usually of security over rights) or the reconciliation of security within the paradigm of human rights, or even an ultimate synthesis within the promotion of the so-called 'human security'.<sup>505</sup>

In addition, it is necessary to develop police professionalism to attain ethical policing. There are several reasons for this claim. First, professional police organisations are usually equipped and trained with enough skills and knowledge to attain appropriate policing activities. The choices between conflicting values in democratic policing should reflect the wishes of citizens, as well as the views of professional experts.<sup>506</sup> Second, the police can become more powerful in performance when professional policies are developed. Professionalism also allows the police to exercise their powers ethically by the application of ethical standards which are imbedded in ethical codes of conduct or working rules of the police. Morally, a good police officer has to resolve the potential contradiction of achieving just ends with coercive means in which he or she is able to use violence where necessary in a principled way, but is adept at verbal and other skills

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<sup>504</sup> *Miranda v. SofS Home Dept* (2014) EWHC 255; see more at: *Miranda v. SSHD* (2016) EWCA Vic 6

<sup>505</sup> Masferrer, A. and Walker, C., 'Countering Terrorism and Crossing Legal Boundaries' (Website of The World Financial Review), <http://www.worldfinancialreview.com/?p=4014>

<sup>506</sup> Jones, T., 'The Accountability of Policing', in Newburn, T. (eds), *The Handbook of Policing* (London and New York: Willian Publishing, 2008) 695



enabling solutions to be resolved without coercive force wherever the opportunity exists.<sup>507</sup>

### 4.3. Ethical Policing in the Context of Vietnam

#### 4.3.1. Political Framework, Legal Traditions and the Constitution

According to the Constitution 2013, Vietnam as a regime is ‘a socialist rule of law State of the people, by the people, and for the people.’<sup>508</sup> Vietnam is recognised as a law based state, which ‘promotes a procedural “rule of law” based on stable, authoritative and compulsory law; equality before law; and the use of law to constrain and supervise enforcement and administration.’<sup>509</sup> At the same time, the State is led by a single party,<sup>510</sup> the Vietnam Communist Party, which acts upon the Marxist-Leninist doctrine and Ho Chi Minh’s thought. The distribution of functioning for the Party, State and People is based on a mechanism: The Party is the leader; State is the manager; and People are the master.<sup>511</sup> The relation between the roles of Party and of State is that the Party is responsible to set out the objectives, whereas the state is obliged to institutionalise party lines and enact the laws to implement them. Furthermore, the political system of Vietnam is defined on the basis of: first, the Communist party as the leading force and the most decisive component; second, the state as centre or backbone of the system with law as the core feature; and third, the political and social organisations, associations or groups of working people.<sup>512</sup>

The contemporary Vietnamese legal system was built soon after its independence. It has passed five constitutions in 1946, 1959, 1980, 1992 and 2013 (which came into effect on 1<sup>st</sup> January 2014). There are different views as to when precisely the rule of law and socialist legality were first introduced in Vietnam. Nowadays the government seems to be willing to accept any kinds of legal regulations irrespective of their sources of legal tradition, provided these legal regulations are useful for their social objectives. But, in general, Vietnamese laws mainly follow the socialist legal tradition in which ‘the state

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<sup>507</sup> Reiner, R., *The Politics of the Police* (Oxford: Oxford University Press, 2010) 133

<sup>508</sup> Constitution 2013, adopted on 28 November 2013, article 2

<sup>509</sup> Gillespie, J., ‘Changing Concepts of Socialist Law in Vietnam’, in Gillespie, J. and Nicholson, P. (eds), *Asian Socialism and Social Change: The Dynamics of Vietnamese and Chinese Reform* (ANU E Press and Asian Pacific Press, 2005) 54

<sup>510</sup> Constitution 2013, adopted on 28 November 2013, article 4

<sup>511</sup> *Ibid.*, articles 2, 3 and 4

<sup>512</sup> The National Administration School, *On the Reform of the States Apparatus* (Hanoi: The Truth Publishing House, 1991) 10, 11

powers are unified and distributed to state bodies, which shall coordinate with and control one another in the exercise of the legislative, executive and judiciary powers.’<sup>513</sup> This principle is different from the legal doctrine of a separation of powers which is applied in most western countries. However, there is also an influence from a combination of Eastern Asian cultures and socialist legality doctrines, and even ‘Roman-German law’. The Vietnamese law system is thus said to be ‘an amalgam of Imperial Chinese, colonial French, and Soviet influences.’<sup>514</sup>

The legal system of Vietnam consists of broad codes and their interpretation before the law is applied in practice. Guidelines for the implementation of laws are the way to fill the gap where existing legal regulations have not been completed in detail. This feature of Vietnam’s legal system is recognized by the Law on the Promulgation of Legal Documents.<sup>515</sup> According to this law, ‘the content of legal documents shall be detailed and specific so that the documents may be effectively enforced as soon as they come into force; in the case that a legal document contains some articles and clauses related to matters of technical process and standards, which are not very stable, those articles and clauses may assign the relevant state agency to provide a document of detailed regulations on such matters.’<sup>516</sup> Moreover, pursuant to this Law, although the National Assembly is entitled to pass laws, for the implementation of these laws, there need to be decrees of the government which ‘provide detailed guidelines on the implementation of laws...’<sup>517</sup> Take the case of the Law on Prevention and Suppression of Human Trafficking<sup>518</sup> as an example. This law was promulgated on 29 March 2011 by the National Assembly, and came into effect on 1<sup>st</sup> January 2012. However, to implement this law, on 11 January 2013, the Decree on Detailed Regulation for Implementation of Some Articles was issued by the Government.<sup>519</sup> In this case, a further clarification focuses on support for victims of human trafficking. The reason for the subsequent detailed implementation is as follows. First, the demand for new law is high while the

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<sup>513</sup> Constitution of the Socialist Republic of Vietnam, adopted on 28 November 2013, article 2

<sup>514</sup> Nicholson, P. and Quang, N., ‘The Vietnamese Judiciary: The Politics of Appointment and Promotion’ (2005) 1(14) Pacific Rim Law & Policy Journal, 1, 5

<sup>515</sup> Law on the Promulgation of Legal Documents, No. 17/2008/QH-12, passed on 3 June 2008

<sup>516</sup> *Ibid.*, article 8

<sup>517</sup> *Ibid.*, article 14 (1)

<sup>518</sup> Law on Prevention and Suppression of Human Trafficking, issued on 29 March 2011, no. 66/2011/QH12

<sup>519</sup> Decree on Detailed Regulation for Implementation of Some Articles of Law on Prevention and Suppression of Human Trafficking, issued on 11 January 2013, No. 09/2013/ND - CP

ability to produce the law is limited. Second, enforcers' ability to understand laws is limited. They cannot implement the law without further clarification. Third, the quality of making law is not as high as required; the content of new law is left vague. There are not enough law-making specialists. Moreover, legal terms usually need further interpretation beforehand due to the way in which legal regulations are made.

The Vietnamese Criminal Code generally legalises crimes in three detailed ways: (1) prescriptive regulations; (2) regulations with quotations of other documents; (3) plain regulations.<sup>520</sup> 'Prescriptive regulations' are provisions that adequately describe the characteristic signs of legal offense, allowing the identification of a crime and its distinctive features in comparison with other crimes. For example, Article 133 of VPC 1999 regulates offense of plundering property by describing the following details. 'Those who use force or threaten to use immediate force or commit other acts thus making resistance futile for persons being attacked in order to appropriate property...'<sup>521</sup> 'Regulations with quotation of other documents' is one way to criminalise a legal offense in which a detailed description of that crime is not directly reflected in the article, but is directed to other articles or to other legal documents. For example, Article 202 of VPC 1999 that defines an offense of 'breaching regulations on operating road vehicles' directs a reference to the regulations on land road traffic, specifically, 'those who operate road vehicles and breach the regulations on land road traffic safety, causing loss of lives or serious damage to the health and/or property of other persons...'<sup>522</sup> In the meantime, crimes described under the form of 'plain regulations' need interpretations in the document, such as resolutions of the Judicial Council of the Supreme People's Court, because there is no detailed description of a crime in the plain regulations. Instead, the plain regulations usually only indicate a name of offense. For example, Article 194 of VPC 1999 does not describe in detail acts of illegally stockpiling, transporting, trading in or appropriating narcotics. Instead, Inter-Agency Circular No. 08/2015/TTLT-BCA-VKSNDTC-TANDTC-BTP defines for example an act of illegally stockpiling narcotics that 'means an illegal storage, concealing of narcotics in anywhere (such as at home, in garden, buried in the ground, hidden in the suitcase, concealed in the gas tank, in clothing or in a body...) but not for the purpose of trafficking, transporting or manufacturing of

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<sup>520</sup> Hanoi Law University, *Compilation of Lectures on the Vietnamese Criminal Law* (People's Public Security Publishing House, 2014) 44

<sup>521</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 133

<sup>522</sup> *Ibid.*, article 202

illegal drugs. A short or length of time for this illegal possession of narcotic does not affect the provisions of this offense.<sup>523</sup> As a matter of fact, law enforcement in Vietnam is normally and compulsorily subject to these guidelines or interpretations as the most detailed legislations for ‘plain regulations’ on crimes. Over time, this creates a general rule that the existence of the guidelines or their interpretation plays an important role in the actual implementation of the Criminal Code in practice, even if the guidelines as a form of legal direction are not as high status as the Criminal Code.<sup>524</sup> Therefore, this sometimes creates a gap between legislation and its implementation. In practice, there is often a lack of the requisite guidelines for newly passed laws. For example, in 2013, the government should have issued 129 guiding documents for an implementation of 38 laws, but only 110 documents were completed.<sup>525</sup> This flaw could reduce the effectiveness of laws and the legitimacy of the work of government agencies.

Marked by the Constitution 1992 and especially after the Communist Party’s Politburo’s Resolution No.08/NQ-TW on Justice Reform,<sup>526</sup> significant progress has been made in the instilling of legality in Vietnam. First, the enactment of the Constitution 2013 is good evidence of this. It continues to promote human rights protection and respect, as well as the implementation of rights. For example, basic individual rights such as right to life, to name a few are acknowledged in Chapter 2 of the Constitution 2013.<sup>527</sup> Second, in regard to the viewpoint of organizing state power, the shift from a ‘concentration of power’ to ‘assignment and coordination of state power’ has been an important new step.<sup>528</sup> Although the legal ideology that considers the law as an instrument to adjust

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<sup>523</sup> Ministry of Public Security, Supreme People’s Procuracy, Supreme People’s Court, Ministry of Justice, Inter-Agency Circular No. 08/2015/TTLT-BCA-VKSNDTC-TANDTC-BTP, issued on 14 November 2015, paragraph 3.1

<sup>524</sup> Ministry of Justice, UNICEF, UNODC, ‘Assessment of the legal System in Vietnam in comparison with the United Nations Protocols on Trafficking in Persons and Smuggling of Migrants, Supplementing the United Nations Convention against Transnational Organized Crime’, (2004) 12

<sup>525</sup> ‘Chinh Phu Co Gang Het Suc Khong De No Dong Van Ban Huong Dan Phap Luat ’, (Baomoi), <<http://www.baomoi.com/Chinh-phu-co-gang-het-suc-khong-de-no-dong-van-ban-huong-dan-thi-hanh-luat/144/12477251.epi>>

<sup>526</sup> Vietnamese Communist Party, Politburo Resolution No.08-NQ-TW on Justice Reform (January 2, 2002)

<sup>527</sup> Constitution 2013, adopted on 28 November 2013, articles 14 to 49

<sup>528</sup> Tran Ngoc Duong, ‘Achievements and Constraints in Theoretical and Practical Perception during the 20 year implementation of 1992 Constitution’, (Tap Chi Cong San - Communist Journal), <<http://english.tapchiconsan.org.vn/Home/Building-the-Law-governed-Socialist-State/2013/372/Achievements-and-constraints-in-theoretical-and-practical-perception-during-the-20-year.aspx>>

social relationships in which the relationship between state and citizens is handled by ‘collective mastery’, there appears a signal of a rights-based legal system, which constructs law on the ground of balancing social interests. In this sense, ‘laws implement political policy, but are not management tools.’<sup>529</sup> Moreover, there is a clearer distinction between the party’s function and state function, whereby the former is directed by political regulations, which is not the law, and is only issued by the party, while the latter is based on the law. The role of the National Assembly as ‘the highest representative organ of the people and the highest organ of State power of the Socialist Republic of Vietnam’<sup>530</sup> has been increased. For example, there was reform in the ‘questions and answers’ forum of the government and the representatives of its branches or agencies at the sessions of the National Assembly. In addition, it should be noted that more laws were passed during the ten year period of 2005 -2015 than any previous decade.<sup>531</sup>

However, there are still some problems that exist in the political system, legal tradition, and the Constitution as well as its implementation in reality, challenging the achievement of the desired ethics in transnational policing. Details of these are as follows.

First, there is a large gap between the laws on paper and laws in action. According Article 2 of the Constitution 2013, ‘all state powers belong to the people.’<sup>532</sup> The people will decide and exercise them through their representative in the National Assembly, State and its agencies. But it is not clear how these powers are implemented by the people. Moreover, in practice, the relationship between people and government branches and their officials is sometimes distant. There are still controversies about how the human rights which are acknowledged in the Constitution are to be implemented in practice, for example the right to access lawyers. Though this right to access lawyers is prescribed in Article 31(4) of the Constitution 2013,<sup>533</sup> lawyers in practice may be allowed to operate only in accordance with political expediency rather than legal fairness.<sup>534</sup> In the meantime, the legal consciousness of the people is limited because of vague laws and insufficient

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<sup>529</sup> Gillespie, J., ‘Changing Concepts of Socialist Law in Vietnam’, in Gillespie, J. and Nicholson, P. (eds), *Asian Socialism and Social Change: The Dynamics of Vietnamese and Chinese Reform* (ANU E Press and Asian Pacific Press, 2005) 65

<sup>530</sup> Constitution 2013, adopted on 28 November 2013, article 69

<sup>531</sup> Phuong Thao, ‘Big Progress on Legislative Work’ (*Bao Dien tu: Phap Luat va Doi Song*, 5 January 2016), <<http://phapluatxahoi.vn/xa-hoi/buoc-tien-vuot-bac-ve-cong-tac-xay-dung-phap-luat-104278>>

<sup>532</sup> Constitution 2013, adopted on 28 November 2013, article 2

<sup>533</sup> *Ibid.*, article 31(4)

<sup>534</sup> See further in discussion on fairness application with regard to the relationship between the police and defense counsel during crime investigation in chapter 7 (subsection 7.3.4)

legal education. In addition, poor management in the effectiveness and efficiency of state organs makes the content of laws rarely realised in reality. Apart from this political interference, there may have some other reasons for the gap between laws on paper and laws in action, for example material shortage, shortage of money, and shortage of expertise. For example, less than a half of total National Assembly deputies work full time at the parliament. In fact, there are only 33% of 498 deputies of National Assembly (13<sup>th</sup> Legislature) of Vietnam who are working full-time for different commissions of National Assembly and Provincial or Municipal delegations.<sup>535</sup> As a result, the content of new laws is often insufficient to create practice guides. ‘Hundreds of legal documents are inadequate. Many legal regulations are broad codes, and even lack practicality so that they are unable to be implemented in reality.’<sup>536</sup>

Second, there is no clear understanding or distinction between ‘law in intent’ and ‘law in action’. This is for three reasons. First, laws and policies may reflect the will of ruling party, but in their action they should be independently exercised. Second, the politicization of all activities of legislative, judicial and executive agencies to some extent happens and influences the effectiveness and legitimacy of policing. An example is police priorities in which most police resources are allocated for domestic policing. If there is consideration of transnational policing, the issue of national security is more important than combating transnational crime, unless transnational criminals are also considered as enemies of the state. Third, law enforcement is affected by corruption. According to Transparency International, Vietnam ranks at 116/177 countries in terms of the perceived levels of public sector corruption.<sup>537</sup> Thus, a gap between ‘law in action’ and ‘law in intent’ becomes larger, threatening the ethics of policing. Finally, the single party state may not welcome different views, because its exclusive discourse and theory is supposed to dominate the society.

Third, policing activities, organisations and agencies seem to face parallel systems of supervision. One is the political regulation of the Communist Party, the other is legal regulation from legislation. For example, a person who is a head of a police department

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<sup>535</sup> Website of Board of the Deputy Affairs of Standing Committee of The National Assembly, <<http://ttbd.gov.vn/Home/Default.aspx?portalid=52&tabid=108&catid=515&distid=3123>>

<sup>536</sup> Le Thi Nga – Vice Chairwoman of Legal Commission of National Assembly, quotation at ‘Chinh sach phai di vao cuoc song - Policy must come into practice,’ <<http://www.tapchitaichinh.vn/Nghien-cuu-dieu-tra/Chinh-sach-phai-di-vao-cuoc-song/29265.tctc>>

<sup>537</sup> Transparency International website, <<http://cpi.transparency.org/cpi2013/results/>>

always holds a position as the first person of a Party cell which exists in every police department.<sup>538</sup> These offices may create wider discretion for policing, because legal regulation is not the exclusive determinant. Therefore, there may arise some bureaucracy problems, following the influence and decision of divergent agencies involved. As a result, the independence of legal agencies cannot be secured entirely.

### 4.3.2. Fairness

Like many other countries, fairness is a central issue to the legal and criminal justice systems in Vietnam. This issue is closely related to the safeguarding of rights, and the duties performed by the institutions/actors in the Vietnamese criminal justice system. A notion of fairness focuses on the following matters.

First, fairness is understood as a guarantee of the socialist legislation in criminal procedures. According to Article 3 of VCPC 2003, ‘All criminal proceedings of procedure-conducting bodies and persons and participants in the procedure must be carried out in accordance with the provisions of this Code.’<sup>539</sup> For example, no one can be arrested without a decision of the People’s Court, a decision or approval of the People’s Procuracy, except in cases of flagrant offenses.<sup>540</sup> Furthermore, criminal cases must be handled within the time provided by the law.<sup>541</sup> Thus, to attain fairness in policing, it is essential to ensure all police observe the relevant laws. Powers of the police must be brought within the rule of law. There should be no interference from any political party. The police must be impartial while performing their duties.

Second, a number of rights related to criminal procedure are guaranteed to Vietnamese citizens in the Constitution. According to the Constitution 2013,<sup>542</sup> there is a presumption of innocence until guilt is proven. People are treated fairly, and have equal rights before law. ‘The detainees, accused and defendants shall have the rights to defend by themselves or ask other persons to defend them.’<sup>543</sup> Furthermore, while life, health, dignity and property of citizens are protected, there is a guarantee of the citizens’ right to

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<sup>538</sup> Nguyen Van Tiep, ‘Some Issues on Perfecting Party Organisation in People’s Public Security’ (2011) 8 Party Development Magazine,

<<http://www.xaydungdang.org.vn/Home/MagazineStory.aspx?mid=40&mzid=315&ID=691>>

<sup>539</sup> VCPC 2003, No. 19/2003/QH11 of November 26, 2003, article 3

<sup>540</sup> Ibid., articles 79, 80. See further discussion on this issue at chapter 7

<sup>541</sup> Ibid., article 119

<sup>542</sup> Constitution 2013, adopted on 28 November 2013, article 31

<sup>543</sup> VCPC 2013, No. 19/2003/QH11 of November 26, 2003, article 11

residence inviolability, safety and confidentiality of correspondence, telephone conversations and telegraphs.<sup>544</sup>

Third, the police must be responsible to investigate crimes by collecting both evidence of guilty and evidence of innocence. While handling criminal cases, the police must protect legitimate rights of citizens.

Fourth, fairness means a guarantee of the right to compensation, as well as of the right to complain about criminal procedure. ‘Any person who has been arrested, held in custody, prosecuted, brought to trial, and sent in jail in violation of the law shall be entitled to damages for any material harms suffered and his reputation shall be rehabilitated.’<sup>545</sup> In practice, there are regulations on compensation for persons who are victims of injustice in criminal proceedings.<sup>546</sup>

Although all the above issues of fairness are recognised in the law of Vietnam, there is a problem in the exercise of these rights. There may need to be the completion of several other procedures or conditions in order to implement these rights. For example, lawyers must obtain permits from the competent authorities before participating in criminal cases.<sup>547</sup> These lawyers may not be allowed to participate at the initial stage in criminal investigations. The reason for this is that authorities or persons such as investigators who are responsible for the exercise of these rights may lack skills. They may not be well trained in handling this issue. In the meantime, people such as victims and suspects lack awareness and knowledge about their rights in terms of fairness in order to protect themselves.

### 4.3.3. Effectiveness

In Vietnam, the police constitute the core of the people’s armed forces whose functions are to protect the regime, and to serve the society.<sup>548</sup> The police are not as a part of the army, but, like the army, the police are structured in military style, and defined as part of the Vietnamese armed forces. Article 2 of the Ordinance on Tasks and Competence of the People’s Police 1989 emphasizes that ‘The People’s Police Force is one of the Armed Forces of the Socialist Republic of Vietnam under the leadership of the

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<sup>544</sup> *Ibid.*, articles 7 and 8

<sup>545</sup> Constitution 2013, adopted on 28 November 2013, article 31

<sup>546</sup> Resolution No. 388/2003/NQ-UBTVQH, issued on March 17, 2003.

<sup>547</sup> VCPC 2013, No. 19/2003/QH11 of November 26, 2003, article 56(4)

<sup>548</sup> Law on People’s Public Security Forces, No. 54/2005/QH11, issued on November 29, 2005, article 4



Communist Party, the administration of Council of Ministers, the leadership of the People's Community at the same level, and the centralized command of the Minister of Public Security.'<sup>549</sup> The state shall be responsible for building the police as the revolutionary, regular, well-trained and gradually modernized force.<sup>550</sup> In this sense, the police that serve as a force rather than a service 'are characterized by centrally driven performance management, inspection and target setting.'<sup>551</sup> The police follow a set of objectives and obey the order of the police leaders. Moreover, the police are made more directly an instrument of the State. They are 'devoted to the preservation of a particular political regime that may consist in the hegemony of a political party.'<sup>552</sup> Their policing priority is threats to the state. Thus, in reality, policing in Vietnam tends to be more like 'high' policing or 'hard' policing,<sup>553</sup> as these have been defined though they are assigned to serve both the State and the public. Policing in Vietnam follows guidance from the State and is prioritized to protect the regime. For example, the police must in priority prevent and detect all plots and acts of force by those who oppose the state.<sup>554</sup> In the meantime, there may be a neglect of understanding the role and function of police in society.

Although people's satisfaction may be taken account in designing a set of police standards, this satisfaction from the public is not always a determinant factor for judging police effectiveness. In contrast, targets that are set by higher management are more important. Moreover, according to Article 10 of the Law on People's Public Security Forces, supervision of police activities in terms of their tasks and powers is taken by agencies such as the National Assembly or the Vietnam Fatherland Front.<sup>555</sup> Therefore, effectiveness in policing in Vietnam is largely measured by inputs and outputs (though not the outcomes) of 'hard' policing or targets of 'high' policing, which are always

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<sup>549</sup> Ordinance on Tasks and Competence of People's Police, issued on 28 January 1989, article 2; See further at Chapter 5

<sup>550</sup> Constitution 2013, adopted on 28 November 2013, article 67

<sup>551</sup> Bullock, K. and Sindall, K., 'Examining the Nature and Extent of Public Participation in Neighbourhood Policing' (2014) 24 *Policing and Society* 385, 386

<sup>552</sup> Brodeur, J-P., 'High and Low Policing in Post - 9/11 Times' (2007) 1 *Policing* 25, 28

<sup>553</sup> See more on the terms 'High' and 'Low' Policing and 'Hard' and 'Soft' Policing at: Brodeur, J-P., 'High Policing and Low Policing: remarks about the Policing of Political Activities' (1983) 30(5) *Social Problems* 507, 520

<sup>554</sup> Law on People's Public Security Forces, No. 54/2005/QH11, issued on November 29, 2005, article 10

<sup>555</sup> Law on People's Public Security Forces, No. 73/2014/QH13, issued on November 27, 2014, article 15(2)

assessed on the basis of goals and standards that are set out for different assignments in policing.

Typically, police effectiveness is examined in three areas: (1) operational performance that involves targets such as crime detection rates; (2) resource management; and (3) implementation of government policies and party guidelines. Area (3) may be difficult to measure because of their abstraction, and area (2) is usually unmeasurable because there is no clear criteria for the allocation of police resources.<sup>556</sup> The issues of police resources are defined as a matter of secrecy, which is not open to the public for justification. There are often no available statistics with regard to resources in order for the public to assess the effective and efficient use of the resources. The spending of resources is more subject to a police leader who considers and decides the use of the resource based on priorities in political policy and targets. In the meantime, area (1) involves quantitative targets that become a preference in the assessment of police effectiveness. The obtained quantitative targets will provide less controversy when assessing police effectiveness. Annually, a police department and its officers are categorized as competent in terms of assessment of these three areas. To ensure police effectiveness, there is an internal inspection system within the police force in Vietnam.<sup>557</sup> This system, the People's Police Inspector's System<sup>558</sup> together with a system of party cells will review police activities, or handle complaints from the public about the quality and behavior of police authorities and their officers. But unlike the HMIC in the UK which independently assesses the police forces and policing across activity from the neighborhood teams to serious crime, in the public interests,<sup>559</sup> the People's Police Inspector's System is a part of the police organizational system.

In practice, a problem arises in the assessment of police effectiveness when operational performance achievements are wrongly reported. Annual progress reports from police departments may contain incorrect figures of crime cases, and may not present the real policing situation. For example, a crime report may not be recorded by the police; or the crime situation may be displaced to other jurisdictions.

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<sup>556</sup> See further discussion on police resources at Chapter 5

<sup>557</sup> Decree on Regulation on Organisation and Operation of the People's Police Inspectors, No. 41/2014/ND-CP, issued on 13 May 2014

<sup>558</sup> According to Decree No. 41/2014/ND-CP, the People's Police Inspector's System is organised at 5 levels: Ministerial level, General Department-level, Command Headquarter -level, Provincial level and District level

<sup>559</sup> See website of HMIC, <<http://www.justiceinspectorates.gov.uk/hmic/about-us/>>

In summary, policing in Vietnam is accountable to the state and the regime. There appear to be major gaps in local accountability. In comparison, in the England and Wales, there are ways to address this problem. For example, this problem is addressed by the role of Police and Crime Commissioners and the deployment of the Neighborhood Policing structure, which is in part driven by the needs of the community. The police have to report to both the police Chief Constable at the local level and the local community safety partnership. The police are also scrutinized by the HMIC. Those responsible for policing in Vietnam can learn some valuable lessons from these matters. A police force that is locally accountable can be more effective and have greater legitimacy.

#### **4.3.4. Reflection on Ethical Policing in Vietnam**

The previous discussion has indicated that ethics are important to policing. Understanding further the values of ethics may be subject to concrete circumstances and conditions. This subsection will focus on ethics which are supposed to be used in policing in Vietnam.

Generally, in Vietnam, the notion of ethical values, in which the right of human beings to be treated as such is a fundamental principle, appeared very early, because it was mentioned in Vietnam's Declaration of Independence on 2<sup>nd</sup> September 1945 in which there were the quotations of the notion, for example 'All men are created equal. They are endowed by their Creator with certain inalienable rights; among these are Life, Liberty and the pursuit of Happiness' from the Declaration of Independence of the United States of America in 1776.<sup>560</sup> After 1945, the revolutionary ethics that have been developed are recognized as one of the contributions to the success of national salvation, construction and defense. In this sense, the revolutionary ethic require all the Party members, government officials, and people to be industrious, thrifty, honest, righteous, public-spirited and selfless.<sup>561</sup> Although these ethics primarily focus on personal perfection, they attach the great importance to achieving the collective interests of Party, country and people. There is no place for individualism.

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<sup>560</sup> Ho Chi Minh, The Declaration of Independence of Vietnam, (proclaimed on 2<sup>nd</sup> Sept. 1945)

<sup>561</sup> Ha Dang, 'The Great Campaign on Moral Building Ho Chi Minh Thought on Morality' (Tap Chi Cong San – Communist Journal),

<<http://english.tapchicongsan.org.vn/Home/Focus/2007/160/The-great-campaign-on-moral-building-Ho-Chi-Minh-Thought-on-morality.aspx>>

In Vietnam, policing work is, in general, understood as involving two tasks: protecting national security, which is to prevent, detect, prevent and frustrate infringements upon national security; and maintaining order, and social security, which is to prevent, detect, prevent and detect crimes and violations of law and order, and social security.<sup>562</sup> According to the 2013 Constitution<sup>563</sup>, this work is carried out by the State, the entire society and people, but the People's Public Security Force that is organized and operated in the form of the armed forces is assigned to be the driving force. Further discussion regarding the function and role of this force will be dealt with in Chapter Five, Policing Structure and Organizations against Transnational Crime. All activities of the People's Public Security Force are under the absolute leadership of the Communist Party, and they must be comply with the Constitution and laws in order to protect the interests of the State, and the legitimate rights and interests of organizations and individuals. In the spirit of the Constitution and relevant legislation, which regulates policing power in Vietnam, it is indicated that the ethics of policing that instruct the 'way of doing' policing must reflect legal regulations in making choices. They are loyal to the Party only while obeying the rule of law. They are required to balance not only the relationship between individual and the public interest or people and state, but also the relationship between the ruling party's interests and individual rights. This point will inevitably sometimes produce dilemmas for policing activities.

In addition, the features of Vietnam's existing political framework and legal tradition, as explained in earlier subsections, make ethical choices in policing subject to political missions set by the Party rather than effectiveness, fairness and the rule of law in the view of the public. The police are supervised not only by the laws or the public, but also by the Party. For example, the police find it difficult to be independent in their operational activities while they are organized as an instrument of the political regime. The gap between the law on paper and the law in action make the police more inclined to serve the government.

This inclination toward subservience to the state is made more likely because there is no clear definition of the criteria and concrete content of universal ethical values. The ethics that exist in several documents such as 'Ho Chi Minh's six teachings to People's

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<sup>562</sup> Law on People's Public Security, issued on 29 November 2005, articles 3, 4

<sup>563</sup> Constitution 2013, adopted on 28 November 2013

Public Security’;<sup>564</sup> ‘Five Honor Swears and Ten Discipline Rules of People’s Public Security’<sup>565</sup> seem mainly to focus on emphasizing objectives and goals to decide appropriateness rather than indicating procedures or process on how to guarantee fairness and legitimacy. These then provide self-training rules rather than attitudes and positions of performing policing, because it is hard to understand the necessary balancing between different values of ethics such as effectiveness, efficiency and human rights, fairness and legitimacy. In contrast, these rules become more useful in constructing and developing the police as a professional armed force.

In summary, the application of ethics in policing in Vietnam serves both the regime and the public. At the same time, the police seem to serve the regime more than the public because of local governance networks and a military style structure. This is a consequence of the Vietnamese political framework and legal tradition as explained in sections 4.3.1, 4.3.2, and 4.3.3. It is also because Vietnam follows the philosophy of socialist legality which always put the interests of collectives first.<sup>566</sup> However, this conception of ethics is vague. There is no clear indication of ethical values or necessary mechanisms by which to judge ethical policing in practice.

#### **4.3.5. ASEAN Ethical Values**

The Association of Southeast Asia Nations (ASEAN) was founded on the 8<sup>th</sup> of August 1967.<sup>567</sup> ASEAN, as an inter-governmental organization, now has ten member nations, and Vietnam is one of its members.<sup>568</sup> On its establishment, the ASEAN Declaration (Bangkok Declaration) 1967 stated that ‘the aims and purposes of the Association shall be to promote regional peace and stability through abiding respect for justice and the rule of law in relationship among countries of the region and adherence to the principles of the United Nations Charters’.<sup>569</sup> Specifically, one of its purposes is ‘to respond effectively, in accordance with the principle of comprehensive security, to all

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<sup>564</sup> Ho Chi Minh’s Six Teachings to People’s Public Security, issued on 11 March 1948

<sup>565</sup> Ministry of Public Security, Five Honor Swears and Ten Discipline Rules of the People’s Public Security

<sup>566</sup> Kline, G., ‘Socialist Legality and Communist Ethics’ (1963) *Natural Law Forum* 21, 30

<sup>567</sup> ASEAN Declaration (Bangkok Declaration), 8 August 1967, ASEAN Document Series 1967-88 (ASEAN Secretariat, Jakarta), 27, 28

<sup>568</sup> ASEAN Charter, article 3,4 (ASEAN Secretariat, 2008) 6; ASEAN Charter was signed by 10 country members on 20 November 2007 in Singapore, and entered into force on 15 December 2008.

<sup>569</sup> ASEAN Declaration (Bangkok Declaration), 8 August 1967, ASEAN Document Series 1967-88 (ASEAN Secretariat, Jakarta), 27, 28

forms of threats, transnational crime and transboundary challenges'.<sup>570</sup> Thus, the emergence of ASEAN requires that 'We must think at two levels. We must not only think of national interests, but also posit them against regional interests: that is a new way of thinking about our problems'.<sup>571</sup> In this sense, it is essential to understand the ethical ways in which ASEAN handles its affairs, including policing work. In so doing, the analysis will look at three issues: (1) the way of working; (2) fairness; and (3) effectiveness. These ASEAN features, to some extent, influence transnational policing activities of Vietnam at the regional level and so have relevance to this thesis.

#### 4.3.5.1. Working Mechanisms

In order to clarify the way of working in ASEAN, it is necessary to look at two issues: the 'ASEAN Way' and Human Security.

The 'ASEAN Way' reflects the region's values and practices and upholds a commitment to the idea of state sovereignty.<sup>572</sup> The principles that ASEAN pursues are the following: 'respect for independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states; and non-interference in the internal affairs of ASEAN member states; respect for the right of every member state to lead its national existence free from external interference, subversion and coercion.'<sup>573</sup> In terms of decision-making and implementation of ASEAN, it is recommended to use consensus and consultation processes.<sup>574</sup> In other words, all decisions reached within ASEAN must be asserted to by all members.<sup>575</sup> The reason is that the ASEAN instruments are non-legally binding. Moreover, ASEAN is not organized as a supra-national organization like the European Union that has its own Council and Committee with powers vested by its member states. In contrast, ASEAN has adopted an 'intergovernmental approach', which involves a high degree of informality, pragmatism, expedience, consensus-building, and non-confrontational bargaining styles.<sup>576</sup>

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<sup>570</sup> ASEAN Charter, article 1(8) (ASEAN Secretariat, 2008) 6

<sup>571</sup> Rajaratnam, S., 'The Founding of ASEAN' (ASEAN Website), < <http://www.asean.org/asean/about-asean/history/>

<sup>572</sup> Nshikawa, Y., 'Human Security in Southeast Asia: Viable Solution or Empty Slogan?' (2009) 40(2) Security Dialogue 213, 226

<sup>573</sup> ASEAN Charter, article 2

<sup>574</sup> *Ibid.*, article 20

<sup>575</sup> Feigenblatt, O., 'ASEAN and Human Security: Challenges and Opportunities' (RCAPS Working Paper No. 09-5, July 2009) 8

<sup>576</sup> Tripathi, M., 'European Union and ASEAN: A Comparison' (2015) 2(1) International Journal of Research of Research

The ASEAN way is mostly concerned to promote the interests of individual national states. However, the notion of human security uses a ‘people-centered approach’ to deliver security. What human security is concerned with is the protection of security to individuals or people generally, instead of emphasizing the security of nation state such as national security toward the common goals of the whole regional security stability.<sup>577</sup> Although ‘human security’<sup>578</sup> is not mentioned in the ASEAN Charter, it has become an increasing trend in dealing with issues in the region such as conflicts, and heads of government have used it since 2001.<sup>579</sup> As a consequence, to implement any issue, including transnational policing in the region, there appears the demand of balancing between human security and the ASEAN way, which may sometimes make the cooperation of the ASEAN member states difficult because of the complexity of this added consideration. Usually, informality is preferred to avoid the obstacles of individual sovereign nation states, which do not allow intervention from any other nation states even with the aim of resolving threats to human security. As a result, there is often concern about legitimacy and effectiveness of ASEAN.

In ASEAN, policing, like several other issues, remains mainly subject to the legislation and decisions of individual member states. At the regional level, transnational policing issues are dealt with by a non-legalistic, informal style in decision-making. For example, joint-communiqués or minutes of conferences on policing issues are the main sources. There is no legal enforcement. Moreover, informal bilateral networks between police forces are more prevalent. In addition, ASEANAPOL which is a kind of association for national chiefs of police forces, is not a formal part of the ASEAN institutional structure, though it plays an important role in transnational policing in the region.<sup>580</sup> In comparison, in the EU, though policing is one of the issues that remain under the purview of the EU’s inter-governmental body, the European Council, or individual member states, it is more impacted in terms of mandates by policies or measures of the institutions of the EU. While not purely supranational by any means, the EU contains

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<sup>577</sup> Zwitter, A., *Human Security, Laws, and the Prevention of Terrorism* (Oxon: Routledge, 2011) 7

<sup>578</sup> United Nations Development Program, *Human Development Report 1994* (Oxford University Press, 1994) 3,

<[http://hdr.undp.org/sites/default/files/reports/255/hdr\\_1994\\_en\\_complete\\_nostats.pdf](http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf)>; See further at the discussion on a concept of human security at section 3.3.3 of chapter 3

<sup>579</sup> Evans, P., ‘Human Security in East Asia: In the Beginning’ (2004) 4 *Journal of East Asian Study*, 263, 270

<sup>580</sup> See further discussion on ASEANAPOL cooperation in Chapter 5

many more significant supranational characteristics than ASEAN.<sup>581</sup> Take the case of the United Kingdom's opt in and out with regard to EU police and criminal justice measures as an example. The United Kingdom opted in and signed up to two key developments of policing in European Union framework: one is Europol, which was established by decision of European Council,<sup>582</sup> and the other is the European Arrest Warrant.<sup>583</sup> There is an involvement of formal bureaucratic structure and legalistic decision making procedures with regard to the UK's block opt-out and opt-in.<sup>584</sup>

In summary, the above analysis indicates that like the matter between interests of national security, and of wider community's security in ASEAN, the relation between interests of the individual, and of the public in Vietnam, should be ethically balanced in order to ensure effectiveness and fairness such as narrowing the gap between theory and practice. In the meantime, while undertaking transnational policing, Vietnam should take into account the ASEAN collective objectives.

#### **4.3.5.2. Fairness**

ASEAN attaches great importance to fairness. The ASEAN Charter points out that one of the purposes of ASEAN is to provide the people of ASEAN with equitable access to opportunities for human development, social welfare and justice.<sup>585</sup> To promote this, in 2009, ASEAN established an ASEAN human rights body which is named the ASEAN Inter-governmental Commission on Human Rights. Thus, in ASEAN, like all other areas, fairness in transnational policing adheres to human rights discourse. In other words, all ASEAN member states have a responsibility to respect individual rights in accordance with international human rights standards, in which there is a guarantee to rights such as being equal before the law in transnational policing. In general, a member country police force as an institution that ensures and promotes human rights should increasingly apply

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<sup>581</sup> Klynn, N., *Supranationalism in the Fight against Transnational Threats: A Comparative Study of ASEAN and EU Policy Responses to Human Trafficking* (2012). Dissertations and Theses. Paper 509. page 37,

<[http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1508&context=open\\_access\\_etds](http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1508&context=open_access_etds)>

<sup>582</sup> On 29 October 1993, the European Council decided that Europol should be established in Hague, Netherland. The Convention establishing Europol under article K3 of Maastricht Treaty was agreed in 1995.

<sup>583</sup> See further discussion on this issue in Chapter 7

<sup>584</sup> The UK block opt-out in police and judicial cooperation in criminal matters: recent development (Standard Note: SN/IA/6930, House of Common Library, 2014)

<sup>585</sup> ASEAN Charter, article 1(11)



human rights standards in their daily work and cooperation.<sup>586</sup> As a result, there are increasing exchanges, for example regarding criminal records of an arrested person, in terms of police work between police forces within the ASEAN region. Police cooperation demands police forces in the region act in accordance with international standards in order to prevent the abuse or violation of the rights of individuals. There are initiatives and seminars, for example the annual ASEANAPOL Police Training Cooperation Meeting,<sup>587</sup> that are used to train all police forces in the region with a view to both mutual understanding and enhancing police standards for member nations.

However, while the promotion and protection of human rights is important,<sup>588</sup> there is no enforcement mechanism such as the European Human Rights Court. Thus, fairness in transnational policing remains subject to national mechanisms for reconciling the balance between the rights of individuals and the powers of member states.

#### **4.3.5.3. Effectiveness**

To respond effectively to transnational crime is one important purpose of ASEAN.<sup>589</sup> For example, for a stable and peaceful region, ASEAN aimed at making the region drugs free community by 2015.<sup>590</sup> Moreover, since all people in ASEAN are considered equals,<sup>591</sup> they deserve to receive a similar service of transnational policing, irrespective of which member country they live in. Evidence for this assertion, for instance, is that ASEAN's Senior Officials Meeting on Transnational Crime has been active on the issue of Trafficking in Persons for some years, focusing particularly on the development of common standards and approaches within and between ASEAN member states.<sup>592</sup> To achieve this common value in the region, a powerful member country may help less powerful states in transnational policing. To recognize the effectiveness of policing in the region, the following issues need to be considered.

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<sup>586</sup> Joint Communique of the 1<sup>st</sup> Southeast Asia Human Rights Forum for Police Officials, held on April 28-29, 2015, in Antipolo city, Philippine

<sup>587</sup> This initiative was adopted at the 29<sup>th</sup> ASEAN Chiefs of Police Conference, in May, 2009 in Vietnam

<sup>588</sup> ASEAN Charter, article 1(7)

<sup>589</sup> *Ibid.*, article 1(8)

<sup>590</sup> Association of Southeast Asia Nations, Roadmap for an ASEAN Community 2009-2015 (ASEAN Secretariat, 2009) 16

<sup>591</sup> ASEAN Human Rights Declaration, 18 November 2012

<sup>592</sup> Association of Southeast Asia Nations, ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases (ASEAN Secretariat, 2010) iii

First, it is about political will and commitments to combating transnational crime. ASEAN not only recognizes transnational crime problems but also suggests regional solutions to combating transnational crime. Its ideas may be thus reflected by statements and a number of agreements or legislation which are made by member states with regard to anti-transnational crime. In past years, several ASEAN documents on anti-transnational crime have been made, for example, 'ASEAN Declaration against Trafficking in Persons, especially Women and Children'<sup>593</sup>.

Second, effectiveness in transnational policing may be examined through the results of operational assistance between countries in terms of criminal information exchange, joint investigation, and arrest of criminals. However, this area of transnational policing in ASEAN is still not as prominent as expected, because performance remains very much dependent on bilateral legal arrangements between countries, whereas few mutual legal assistance treaties have been signed between countries in the region, and ASEAN has yet to produce an effective model for development.

Third, effectiveness in transnational policing can be seen through standardization and establishment of relevant institutions in charge of combating transnational crime in ASEAN member states. There are several initiatives and programs in capacity building that are carried out in the region. These activities help to mobilize resources not only from member countries but also from different outside partners such as the European Union.

#### **4.4. Conclusions**

This chapter has proposed a conceptual framework for the assessment of transnational policing, which is shaped by ethical values of effectiveness, fairness and the rule of law. These were brought together under the notion of cosmopolitanism, with a core of the universality of human rights, which emphasises common shared morality, and that 'appropriate' transnational policing must meet international standards in which ethical transnational policing should be implemented fairly, and according to the rule of law, while it should also take into account both national interests and the benefits of membership of the international community. Both domestic and international goals of policing must compromise and be respected. In addition, the analysis of this chapter has also indicated that Vietnam may have its own conceptions of ethics in policing, which downplay individualism because of Vietnam's political framework, legal traditions and

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<sup>593</sup> Association of Southeast Asian Nations, Declaration against Trafficking in Persons, especially Women and Children ( 24 November 2004)

Constitution. However, for success in transnational policing, Vietnam should accept some key ideas of individualism, for example fairness and human rights, and should take into account the common benefits of international involvement, such as the ASEAN collective objectives, as well as the national interest of Vietnam. On the implementation of this principle, the ethical values of effectiveness, fairness and the rule of law, as are analysed in Section 4.2, should be applied more faithfully in transnational policing in Vietnam.

In addition to the above, there is a clarification of a conception of ethics and its application in policing in Vietnam. Especially, this analysis indicates difficulties of ethics that impact on the policing system of Vietnam. The main ethical drawback originates from the fact that the police in Vietnam serve dual tasks: a political function which is concerned with protection of the regime, and a social function which is concerned with the rights and liberties of individuals. In this sense, this feature of ethics in policing in Vietnam is a thread that runs within and has a significant impact on the effectiveness and fairness of a policing system for investigating transnational crime in Vietnam, which will be further considered in Chapters Five, Six and Seven.

In terms of ethics, ASEAN seems to be promoting ethics within a concept of human security, which includes resources to promote fairness, for example the ASEAN Charter is a basis for fairness in the whole region. Thus, ASEAN is a useful organisation that is consistent with the view that ethics should have influence as a regional basis for increasing transnational policing, but so far ASEAN fails to be a major player in this task because a mechanism to put transnational policing into force does not exist. Moreover, ASEANAPOL is not part of ASEAN organisational structure. At the same time, informal bilateral networks between police forces are more prevalent in ASEAN.

In conclusion, by considering powers and resources in terms of empowering the police, this chapter has identified the contents of three values of a conceptual framework, effectiveness, fairness and the rule of law, that are used to assess the transnational policing system of Vietnam in the following chapters.

## Chapter 5: Policing Structure and Organisations against Transnational Crime in Vietnam

One of the main tasks of this thesis is to investigate institutional arrangements for responding to transnational crime in Vietnam. This chapter will use the values of effectiveness, fairness and the rule of law identified in Chapter 4 in order to assess the Vietnamese transnational policing structure, and to assess strengths and weaknesses of the Vietnamese police institutions in charge of combating transnational crime. This is necessary because several policies and laws with relevance to the struggle against transnational crime have been constructed and applied recently. Moreover, there have been many changes in the policing system during the period of '*Doi Moi*' in Vietnam. However, there is very little information available about the effectiveness and fairness of the arrangements in place which enable transnational policing activities.<sup>594</sup> So, a critical analysis of the weaknesses and strengths of the policing structure and organisations against transnational crime in Vietnam, prescribed by the existing legislation, will help to explore why and how the police are tasked organisationally as the main driving force to handle transnational crime investigation. This analysis will in addition consider to what extent the fight against transnational crime has been successful in Vietnam.

The chapter is divided into two main sections. The first section will consider static arrangements which are concerned with the structures between central, province and localities. The second section will focus on dynamics which is much more about how central, province and local officials and organisations act and intervene unilaterally, bilaterally and multilaterally with other countries or international organisations. This chapter also includes data from empirical fieldwork undertaken in Vietnam and the United Kingdom, which offers critical comments and experiences from the police and other relevant individuals, such as the procurator, or international experts, about police structures for effectiveness and fairness perspective in relation to the policing of transnational crime in Vietnam.

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<sup>594</sup> Block, L., 'Combating Organised Crime in Europe: Practicalities of Police Cooperation' (2008) 2(1) Policing: a Journal of Policy and Practice 74

## 5.1. Structural Organisation

The success of any anti-transnational crime strategy will not be obtained without a competent police force.<sup>595</sup> Thus, this section first will investigate the roles and functions of the police in order to clarify who and which departments within the police are responsible for dealing with transnational crime cases. Then, there is an analysis of how these police departments are equipped or given resources to deal with transnational crime. In addition, there will need to be an explanation of whether their manpower is sufficient to tackle transnational crime. Are they specialized and trained for this transnational crime issue? Moreover, in this section, an introduction to international organisations such as Interpol, ASEANAPOL, of which Vietnam is a member, are also included in order to describe a full picture of policing structure that is responsible to respond to transnational crime in Vietnam.

### 5.1.1. Police History and the Task of Transnational Policing

The People's Police Force is a part of the People's Public Security Forces which was established after the independence of Vietnam in 1945. Article 4 of the Law on People's Public Security Forces states that the People's Public Security Forces (PPS) include the People's Security Force (PSF) and the People's Police Force (PPF).<sup>596</sup> The discussion of this chapter will focus on the latter of these, because the former deals with diplomatic rather than policing issues. Since the People's Police Force's establishment, its missions has changed over the time through different historical periods which reflect particular features of politics and development of Vietnam. But the People's Police Force has always been organised as a national police force that is structured in a military style, and at four levels (central, province, district, and commune).<sup>597</sup> The changes in positions and functions of the police can be divided into two main phases. The first phase occurred before the late 1980s and early 1990s when the police's main responsibility was targeting counter-revolutionary activities and protecting the regime. The second phase started from the early 1990s with the passing of the Ordinance on Organisation of Criminal

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<sup>595</sup> Le, V., Bell, P., and Lauchs, M., 'Elements of Best Practice in Policing Transnational Organised Crime: Critical Success Factors for International Cooperation' (2013) 2(3) *International Journal of Management and Administrative Sciences*, 24, 27

<sup>596</sup> Law on People's Public Security Force, article 4, issued on 29 November 2005, No. 54/2005/QH11

<sup>597</sup> The Official Website of Ministry of Public Security of Vietnam, <[http://www.mps.gov.vn/web/guest/ct\\_trangchu/-/vcmsviewcontent/GbkG/2101/2101/11605](http://www.mps.gov.vn/web/guest/ct_trangchu/-/vcmsviewcontent/GbkG/2101/2101/11605)>

Investigations,<sup>598</sup> and revising the first Ordinance on Tasks and Competence of People's Police<sup>599</sup> in 1989 when powers and resources for the police became increasingly open to the public.

In the first development period, the police had broad powers and resources. The police's main responsibility was as an important instrument of the state to protect the regime as well as to combat class enemies. This priority, which was said to contribute to the protection of the Socialist society in the northern part of Vietnam, and the cause of the nation's unification, was highlighted in the first Ordinance on Tasks and Competence of People's Police that was passed in 1962.<sup>600</sup> However, at this stage, like other agencies in the People's Public Security Forces, the police structure and organisation was not revealed to the public. All issues with relevance to the police work were considered secret. For example, until the late 1980s, police newspapers and magazines had been regarded as confidential, and only circulated within the police force. The name and mission of every police organ was coded in letters or digit numbers. There were no clear assignments to police organs whose powers and resources were predominantly conferred by executive orders of superiors, instead of clear provisions of written laws. In this sense, there were no concrete police organs which dealt with transnational policing. In contrast, all foreign related criminal issues were handled by the national security agencies, such as the intelligence service, that included its personnel deployment abroad.

Moreover, at this stage, real cooperation with relevance to transnational crime was not paid much attention. The reason is because not only policing was politicized for other concerns, such as the priority for the nation's unification, but also transnational crime threats were not a big phenomenon at that stage. This does not mean that transnational crime did not exist then. However, transnational crime which is enabled by globalisation, did not emerge then, because Vietnam had a regimented society and economy without the ability to engage in overseas enterprises. Vietnam was not a market economy with international trade. Furthermore, Vietnamese society had not yet integrated to the international community. Globalisation had not yet started to a significant degree, and

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<sup>598</sup> Ordinance on Organisation of Criminal Investigations (1989), issued on 4 April, 1989, No. 17-LCT/HDNN8

<sup>599</sup> Ordinance on Tasks and Competence of People's Police, issued on 28 January 1989

<sup>600</sup> Ordinance on Tasks and Competence of People's Police, issued on 16 July 1962, No. 34/LCT, articles 1, 4

there was a lot of control through border security. As a result, there were not many opportunities for transnational crime to grow.

After the early period of the 1990s, the police's responsibilities became more committed to the roles and functions of the police in society, for example the maintenance of social order and public safety, although police work still attached great importance to political matters. The Ordinance on Tasks and Competence of People's Police 1989 defines that the People's Police Force as a driving force of the state in the maintenance of social order and public safety in order to protect legitimate rights of the people, and to safeguard the state's organs and the economic development of socialism.<sup>601</sup> Specifically, the police have responsibility 'to receive and process reports and denunciations against crimes, initiate criminal lawsuits and investigate crimes, and perform other judicial tasks according to the provision of law.'<sup>602</sup> The police are thus increasingly concerned with people's needs rather than the State's needs. Some new types of crimes such as drug trafficking, a transnational crime which threatens people's interests, were dealt with by establishing new police units within the People's Police Force. For example, the Anti-Narcotic Drugs Department was set up in 1997.

In general, the structural organisation of the police is now uniform across the country. The command system is operated from central to local level, so the central level can impose targets and tasks on lower levels. Overall, the police's activities and their agenda are led by the Communist Party. Heads of the provincial police organs are always members of its local administration. As a result, the police at all levels could demand powers and resources from the government for their missions. To affirm this point, article 24 of the Ordinance on Tasks and Competence of People's Police 1989 indicates that 'Structural organisations, professional equipment and methods of the People's Police Force shall be regulated by the Ministers' Council.'<sup>603</sup>

However, the functioning as a law enforcement agency in which the police must observe and implement the law is clearly seen in this period of renovation. Although the police still have to face handling several missions and administrative orders from the political system, for example the participation as a member of local administration in

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<sup>601</sup> Ordinance on Tasks and Competence of People's Police, issued on 28 Jan. 1989

<sup>602</sup> Law on People's Public Security Force, issued on 29 Nov. 2005, No. 54/2005/QH11, article 14 (3)

<sup>603</sup> Ordinance on Tasks and Competence of People's Police, issued on 28 Jan. 1989, article 24

resolving ‘a land dispute’,<sup>604</sup> police activities are now more transparent to the public. International cooperation is officially tasked as one of the main missions of the Vietnamese police, for the first time, in 2005.<sup>605</sup> According to Article 14 (6) of the Law on People’s Public Security Force, the police are empowered ‘to apply mass mobilization, legal, *diplomatic*, economic, scientific-technical, professional and armed measures to protect national security and to maintain social order and safety.’<sup>606</sup> Among these measures is a diplomatic one which plays an important role to policing of transnational crime. Until now there is no official explanation about this diplomatic measure.<sup>607</sup> But in practice this diplomatic measure can be used for a crime investigation in a number of ways. First, the use of diplomacy for a crime problem could be about using a diplomatic process or diplomatic techniques such as technique of negotiation that the police can use that instead of police powers. Second, diplomatic measures are used by the police in the sense of a diplomatic instrument, which could include formal agreements such as an extradition treaty or mutual legal assistance treaty. Diplomats may be involved to support the police in line with foreign policy, but dealing with crimes could not be transferred entirely from policing agencies to any diplomatic agency, which has traditionally dealt with crime at the political level. In this context, diplomatic measures help the police extend their vision and reach out of their limited jurisdiction to tackle transnational crime. They provide an effective way to overcome obstacles posed by the state sovereign in order to not only investigate but also prevent transnational crime. In fact, one of the solutions to some forms of transnational organised crime is the diplomatic measure, to be pursued by the police rather than the security service. For example the diplomatic solution could be used for certain extradition cases where there is absence of legal treaty between countries. On this aspect, Ben Bowling has pointed out that seeing the growth of transnational policing simply as a functional solution to transnational crime and terrorism

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<sup>604</sup> UK Foreign & Commonwealth Office, Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report, April 2013, Cm 8593, page 251 (see the case of Mr. Doan Van Vuon)

<sup>605</sup> Law on People’s Public Security Force, issued on 29 Nov. 2005, No. 54/2005/QH11, article 14 (13)

<sup>606</sup> *Ibid.*, article 14 (6)

<sup>607</sup> Nguyen Hung, ‘Drafting a Decree on Diplomatic Measure for Protecting National Security and Public Safety’ (Vietnam Bar Association’s Newspaper, 12 September 2014) <<http://antt.vn/bo-cong-an-hop-ban-soan-thao-du-thao-nghi-dinh-quy-dinh-bien-phap-ngoai-giao-bao-ve-anqg-giu-gin-ttatxh-012531.html>>



is flawed because of the impacts to contemporary policing from globalisation.<sup>608</sup> Therefore, this regulation is important for the police to carry out their anti-transnational crime responsibility by entering international cooperation with overseas law enforcement and international organisations who are involved in the fight against transnational crime regionally and globally.

There are several reasons to recognise transnational policing as a part of the current police mission in Vietnam. Firstly, this regulation reflects the implementation of ‘*Doi Moi*’ policy in which the foreign policy of multilateralization and diversification is set out in order for Vietnam to be associated with the general development trend and the process of gradual globalization and regionalization. In this regard, in 1991, the 7<sup>th</sup> Congress of the Vietnam Communist Party promulgated the guideline that ‘Vietnam wants to be a friend to all other countries in the International Community for Peace, Independence and Development.’<sup>609</sup> Secondly, adopting the policy of multilateral and bilateral cooperation with other countries and international organisations in the fight against transnational crime is an expression of the obligation of Vietnam to the international community. Moreover, this development facilitates the PPF to standardize and to act in association with not only domestic legislation but also international laws in order to deal with transnational crime as it increases in Vietnam. In addition, this policy opens a foundation and opportunities for Vietnam to sign cooperation agreements and cooperate with overseas law enforcement. Vietnam is a member of several regional and international organisations, including organisations against transnational crime such as Interpol.<sup>610</sup> Next, in the area of crime control, police organs are more clearly and distinctly assigned. From time to time, there have been assignments to police units in order to transact transnational policing. At the central level and in ‘hotspot’ areas at the provincial level or in major cities, there are specialized police units in charge of handling transnational crime. For example, in the organisational structure of the Criminal Police Department, at the central level, there is a division dealing with transnational organised crime.<sup>611</sup> Moreover, temporary groups of persons under the auspices of different anti-

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<sup>608</sup> Bowling, B., ‘Transnational Policing: The Globalisation Thesis, a Typology and a Research Agenda’ (2009) 3(2) Policing, 149, 150

<sup>609</sup> Vietnamese Communist Party, Documents of the 7<sup>th</sup> Congress, issued in 1991.

<sup>610</sup> Vietnam joined Interpol Organisation on 4 November 1991

<sup>611</sup> Smith, G., The Criminal Justice Response to Human Trafficking: Recent Development in the Greater Mekong Sub-region, page 5, <[http://www.no-trafficking.org/reports\\_docs/siren/GMS-08\\_eng.pdf](http://www.no-trafficking.org/reports_docs/siren/GMS-08_eng.pdf)>

transnational crime projects or campaigns are set up with a view to dealing with transnational crime. Almost all individuals interviewed said that there has been a significant increase in transnational policing activities over recent years. Specifically, police leaders said in the interviews that ‘This increasingly transnational policing not only reflects a development trend of the society, but also recognises the progress of the police with more strengths and efforts in addressing newly global threats nowadays. Without cooperating with overseas partners, the Vietnamese police force could not be successful in dealing with criminal cases which originate from outside its territory or have an involvement of foreign factors.’<sup>612</sup>

In summary, nowadays, transnational policing is an important aspect of policing in Vietnam, as the country is increasingly connected to the international community. Moreover, this trend not only indicates the police’s awareness of transnational crime, but also reflects a sufficient level of relative independence of the police from political centres to create structural arrays that allows transnational policing activities to happen in line with policing values of professionalism and with ethical standards.<sup>613</sup> The next subsection will investigate in more details the organisation of transnational policing in Vietnam.

### **5.1.2. Functions and Competences**

In Vietnam, transnational crime activities, like all other criminal acts, must be detected and handled. All agencies, organisations and citizens have an obligation to actively participate in the struggle to prevent and combat crime.<sup>614</sup> However, these rights and responsibilities should be implemented in accordance with the laws. In this sense, crime investigations must be done by the investigating agencies, because only the investigating agencies are fully empowered to deal with them. According to Vietnamese legislation, ‘The investigating agencies shall conduct investigation of all offenses, apply every measure prescribed by the Criminal Procedure Code in order to identify crimes and persons who have committed criminal acts, compile files, propose case institution; find the causes, conditions of committing crimes and request the concerned agencies and organisations to apply remedial and preventive measures.’<sup>615</sup> In other words,

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<sup>612</sup> Interviewees IA1, IA3, IA4 and IA6

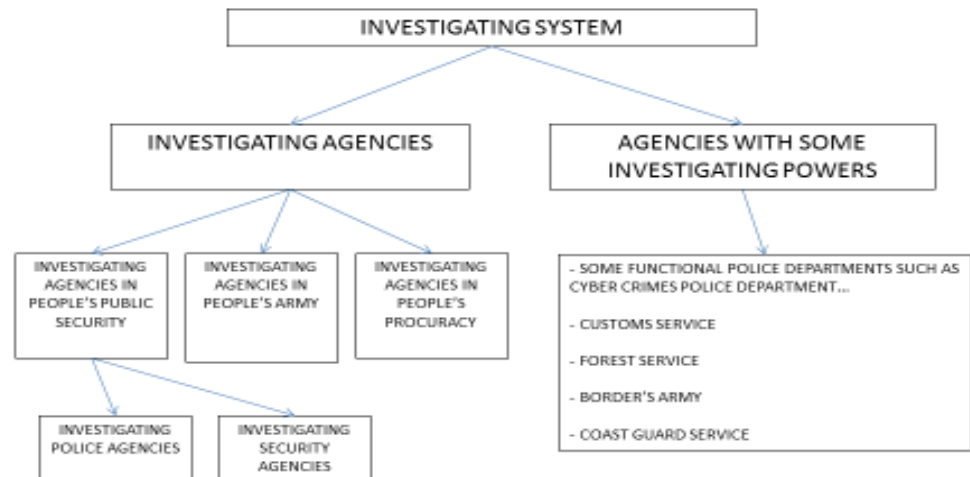
<sup>613</sup> Deflem, M., *Policing World Society: Historical Foundations of International Police Cooperation* (Oxford and New York: Oxford University Press, 2002) 215

<sup>614</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 4

<sup>615</sup> Ordinance on Organisation of Criminal Investigations (2004), issued on 20 August 2004, No. 23-2004/PL-UBTVQH11, article 3

transnational crime is an issue for which the different investigating agencies have a responsibility to investigate. To understand the Vietnamese policing system for the investigation of transnational crime, the following analysis will cover the organisation and investigating competencies of policing agencies in Vietnam.

**Table 5.1. Crime Investigating System of Vietnam**



The crime investigating system of Vietnam is divided into two main clusters of agencies.<sup>616</sup> One cluster is investigating agencies. The other is ‘agencies with some investigating powers’ (see Table 5.1.). Not only is this classification reflected in the Ordinance on Organisations of Criminal Investigation 1989, but also in the revised Ordinance on Organisations of Criminal Investigation in 2004.<sup>617</sup> Accordingly, investigating agencies consist of (1) ‘investigating agency in the Supreme People’s Procuracy’; (2) ‘investigating agencies in the People’s Army’; and (3) ‘investigating agencies in the People’s Public Security’ (inclusively the Investigating Police Agency and the Investigating Security Agency).<sup>618</sup> The apparatus and competence of investigating agencies are organised according to professional investigating agencies associated with specific offences. In addition, these agencies are a part of inquisitorial

<sup>616</sup> Criminal Procedure Code, issued on 28 June 1988, No. 7-LCT/HDNN8, Chapter VIII, articles 92, 93

<sup>617</sup> Ordinance on Organisation of Criminal Investigations (2004), issued on 20 August 2004, No.23-2004/PL-UBTVQH11

<sup>618</sup> Ibid., article 3

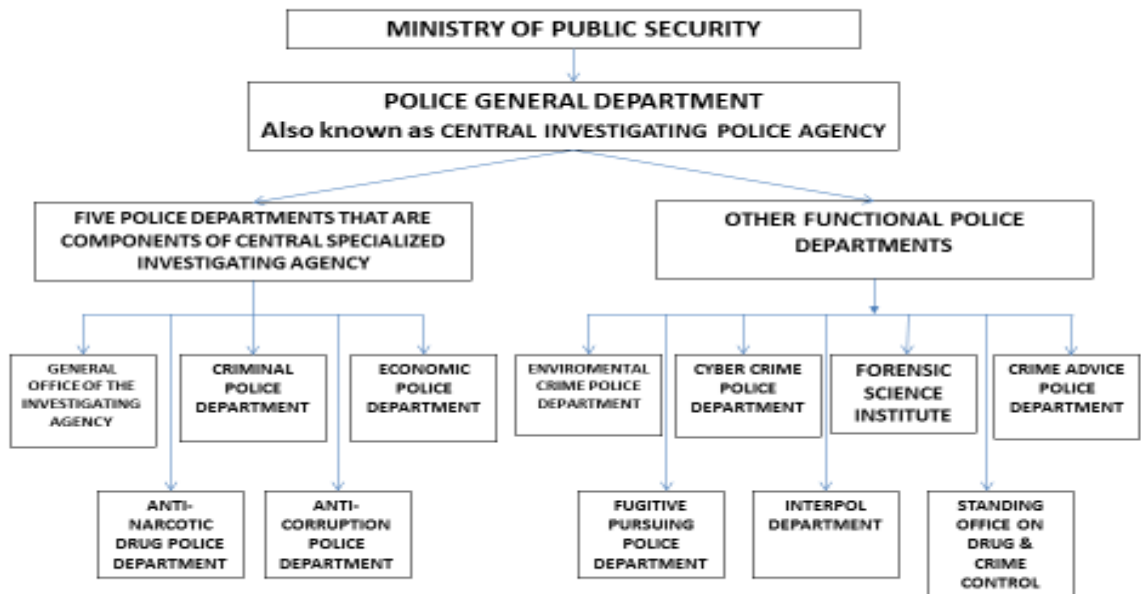
and socialist judicial system. An analysis of powers of these agencies in terms of criminal investigation will be explained in detail in Chapter Seven (Criminal Justice Process with regard to Transnational Crime). This chapter mainly focuses on structural organisations of the ‘investigating agencies in the People’s Public Security’, especially the Investigating Police Agencies, because more than 99% of detected criminal cases are handled by them.<sup>619</sup>

According to existing regulations, ‘investigating agencies in the People’s Public Security’ are categorised into two sub-systems: one is the Investigating Police Agency (*Co Quan Canh Sat Dieu Tra*); the other is the Investigating Security Agency (*Co Quan An Ninh Dieu Tra*). The Investigating Security Agency is responsible for investigating political offenses and infringements of national security, but these are not the subject of this thesis. In contrast, this chapter is more focused on the Investigating Police Agency whose tasks and structure are established to investigate and handle criminal cases, including transnational crimes, which infringe the social order and public safety of Vietnam. The Investigating Police Agencies, with the use of their investigating powers such as arrest, detention and interrogation, seek to find evidence and to prepare criminal case’s dossiers in order to bring criminals to court. In this sense, this agency has a duty to deal with transnational policing.

The Investigating Police Agency has a hierarchical and highly centralised structure in which authority emanates from the top down. The Investigating Police Agency is established in three levels: ministry (central or national level), province, and district. At central level, the Investigating Police Agency, which is called the Central Investigating Police Agency (CIPA) includes five Departments: the Criminal Police Department, Economic Crime Police Department, Anti-Narcotic Drugs Police Department, Anti-Corruption Police Department and the General Office of the Investigating Police Agency. Each of these Police Departments is responsible for specific offences, for example, transnational drugs crimes are handled by the Anti-Narcotic Drugs Police Department. The Central Investigating Police Agency is administrated as one of several General Departments, and named as the Police General Department, under the Ministry of Public Security (see Table 5.2). The head of the Central Investigating Police Agency is also a Director General.

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<sup>619</sup> Unpublished government document

**Table 5.2. Structure of the Central Investigating Police Agency**

A similar structure is also organised at provincial and district level. However, there are some differences. First, in provinces, the Provincial-level Investigating Agency (PIPA) consists of four Divisions: Criminal Police Division, Economic Crime Police Division, Anti-Narcotic Drugs Police Division, and the General Office of the Provincial-level Investigating Police Agency. There is no a separate division dealing with corruption. Instead, this function is assigned and organised in the Economic Crime Police Division. The head of the Provincial Investigating Police Agency is a Deputy Director of Provincial-level Public Security Department. Nowadays, there are total 63 provincial-level Investigating Police Agencies. In addition, there are 696 the District-level Investigating Agencies (DIPA) across the country.<sup>620</sup> The structure organisation of each District-level Investigating Police Agency varies. Some may have four components like the model of the Provincial-level Investigating Police Agency; the others may consist of only two or three components. They are all subject to the decision of the Minister of Public Security who decides based on the context of the criminal situation, available human resources and equipment in districts.<sup>621</sup> Although the Minister of Public Security

<sup>620</sup> Pham Tuan Hai, 'Some Ideas on the Solution to Perfect an Organisational Model of the District-level Investigating Police Agency', published in the Record Book of the Workshop on Theories and Practices of Criminal Investigating Activities in Vietnam, June 2014, page 143

<sup>621</sup> Ministry of Public Security, Circular on Regulations of the Criminal Investigation Work in People's Public Security, issued on 7<sup>th</sup> July 2014, No. 28/2014/TT-BCA, article 17 (2),

decides the structural organisation of investigating agencies at the district level, the Minister is not empowered with investigating competence. From this point, according to interviewees, especially procurators, there may be some political impact on policing activities in relation to the investigation of crimes including transnational crime, because the administrative leadership may not have investigating powers, but has the power to establish or dissolve an investigating unit.<sup>622</sup>

In principle, an investigating police agency must follow professional guidance from other investigating police agencies of a higher level, for example, the Provincial-level Investigating Police Agency must obey decisions of the Central Investigating Police Agency.<sup>623</sup> To further explain this point, it is useful to look at mandate structure and its implementation in combating narcotic drug crimes. The Anti-Narcotic Drug Crime Police Department's mandate that is in the name of the Central Investigating Police Agency could be implemented by the Anti-Narcotic Drugs Crime Division of the Provincial-level Investigating Police Agency. The reason is that both Anti-Narcotic Drug Crime Police Department and Anti-Narcotic Drug Crime Police Division belong to military hierarchy; whereas the Anti-Narcotic Drug Crime Police Department is higher in the rank to the Anti-Narcotic Drug Crime Police Division. Moreover, the Department holds the right to distribute financial resources and equipment to the Division annually. Tasks and competences of crime investigating agencies are constructed on the basis of two criteria. The first is concerned with the nature and dangerousness of criminal acts. The second is about the jurisdiction of courts:<sup>624</sup> 'The courts competent to adjudicate criminal cases are the courts of the places where the offenses were committed. ... For defendants committing offenses abroad, if they are to be adjudicated in Vietnam, the provincial-level people's court of their last residences in the country shall adjudicate them.'<sup>625</sup>

The investigating police agencies are responsible for investigation of a wide range of offences prescribed by Chapter XII through to Chapter XXII of the Penal Code 1999,<sup>626</sup> which cover all kinds of transnational criminality, except political offenses and offenses of infringing judicial activities. In principle, the District-level Investigating Police

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<sup>622</sup> Interviewees ID1, ID2

<sup>623</sup> Ministry of Public Security, Circular on Regulations of the Criminal Investigation Work in People's Public Security, Article 4, issued on 7<sup>th</sup> July 2014, No. 28/2014/TT-BCA. See further at section 5.2.2, domestic processes for transnational crime investigation

<sup>624</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 170

<sup>625</sup> *Ibid.*, article 171

<sup>626</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10

Agency deals with ‘less serious offences’, ‘serious offences’ and ‘very serious offences’ (except where offences are dealt by the Investigating Security Agency) belong to the adjudicating competence of district courts. Recently, to devolve more power to local level, the District-level Investigating Police Agencies became competent to investigate criminal cases which warrant very serious punishment (up to 15 years imprisonment).<sup>627</sup> The reason for this decentralisation of power to the locality is that the District-level Investigating Police Agencies are widely deployed throughout the country. Moreover, they have an advantage in responding to crime rapidly because they are close to the community. In practice, annually, the District-level Investigating Police Agencies handle 60,000 criminal cases, accounting for 80% of total criminal cases dealt by investigating agencies in the People’s Police Force.<sup>628</sup> The majority of police officers interviewed believed that it was right to decentralise power to the locality. For example, interviewee IA2 said that

‘Devolving policing powers to the District-level Investigating Agencies would bring a range of benefits which make the investigating system more effective and efficient. One of its significant benefit is to overcome a shortcoming of organisational structure which presently organises the deployment of the investigating system like ‘upside-down pyramid’ in which central agencies are large whereas locality’s investigating agencies are small with little resources. This power devolvement also facilitates the locality’s investigating agencies to have the capability to respond transnational crime more quickly, though in practice, to some extent the locality’s investigating agencies should still report the case to higher-level investigating agencies.’<sup>629</sup>

In the meantime, the Provincial-level Investigating Police Agencies can investigate offences that are particularly serious crimes and belong to the adjudicating competence of the provincial court. Even so, offences that are felt to be within the competence of a district court can be handled by the Provincial-level Investigating Police Agency, if these crimes are necessary to be investigated by the provincial level.<sup>630</sup> The

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<sup>627</sup> The National Assembly, Resolution No. 24/2003/NQ-QH11, issued on 26 November 2003

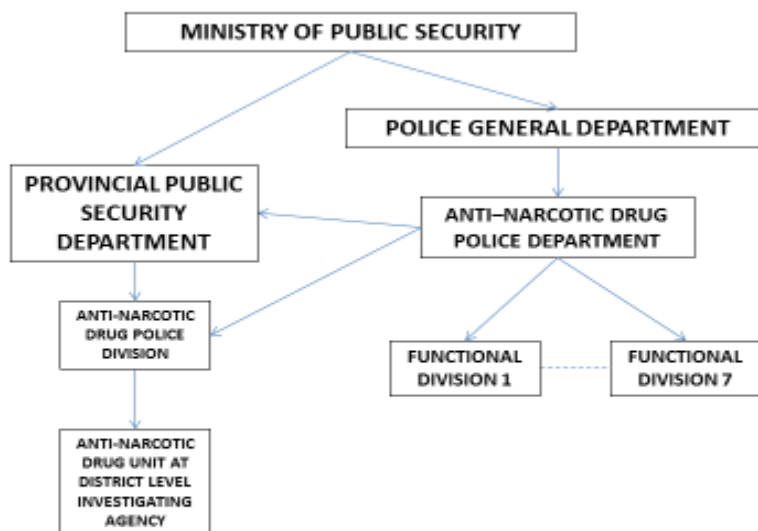
<sup>628</sup> Hoang Xuan Tu, ‘Contribution to improve quality, effectiveness of organisation and activities in the District-level Investigating Agencies’, in the Record Book of the Workshop on Theories and Practices of Criminal Investigating Activities in Vietnam, June 2014, page 122.

<sup>629</sup> Interviewee IA2

<sup>630</sup> Ordinance on Organisation of Criminal Investigations (2004), issued on 20 Aug. 2004, No.23-2004/PL-UBTVQH11, article 11; The VCPC 2003, issued on 26 Nov. 2003, No. 19/2003/QH11, article 170

statistics indicate that the Provincial-level Investigating Police Agencies investigate around 5,784 criminal cases every year that are equivalent to 8.7% of total criminal cases dealt by the investigating police agencies at all levels.<sup>631</sup> In comparison, the Central Investigating Agency only handles approximately 308 criminal cases (0.4% of total criminal cases dealt by investigating agencies in People's Police Force), despite the fact that this agency is the highest level in the investigating system of the police.<sup>632</sup> It mainly investigates complex cases that involve several provinces or different offences such as organised crime and transnational crime. In addition, the Central Investigating Police Agency and other Provincial-level Investigating Police Agencies also have the responsibility to direct and guide low level investigating agencies.

**Table 5.3. The three-level Structure to Respond to Transnational Narcotic Drugs Crimes**



In principle, transnational crime can be dealt by any investigating police agency if this crime happens in that agency's territorial jurisdiction. Especially after the policy authorised the District-level Investigating Police Agencies to investigate offences which may be punished up to 15 years' imprisonment, these agencies are competent to deal with most serious transnational crimes. Taking transnational drugs crime as an example,

<sup>631</sup> Unpublished government document

<sup>632</sup> Unpublished government document



investigations into this type of crimes can be classified according to three levels of investigating agencies (see Table 5.3).<sup>633</sup> The investigation may be handled by either the Anti-Drugs Crime Unit at the District-level Investigating Police Agency, or the Anti-Drugs Crime Division at the Provincial-level Investigating Police Agency, or the Anti-Drugs Crime Police Department at the Central Investigating Police Agency. In a complicated case, there may be a combination of representative investigators from these all three levels, but the Central Investigating Agency always takes a role to direct or lead the investigation.

In practice, most transnational crime cases are investigated by the Central Investigating Police Agency and the Provincial-level Investigating Police Agencies. The reason is that these agencies have more resources as well as experienced investigators who prefer to work at the provincial or central level rather than at the district level. Another reason is that the costs of transnational crime investigations is always high, but police resources are more constrained in local areas. This practicality, to some extent illustrates a contradiction between the accumulation of police resources at the central level and the police strategy which is to prioritise and strengthen the capacity of the police in local areas. Statistics for the allocation of police resources between investigating agencies are not available because of their sensitive nature and these statistics may be supervised only by the Defence and Security Commission of the National Assembly. But, commenting on this issue, several interviewees said that because there was no clear investigative assignment between central, provincial and district level investigating agencies, more attention and priority in the deployment of resources are given to for transnational crime investigations which are dealt by the Central Investigating Police Agency. At the same time, there are also several investigations which are investigated by district-level investigating police agencies at the locality. Interviewee IA2 from a local police agency indicated that,

‘a reality arises from the present practicality, in which only major transnational criminal cases are thoroughly investigated while a minor case that a local-level investigating agency is assumed to be responsible to investigate may be negligent due to a lack of proper investment and priority, leading to ineffective investigations.’<sup>634</sup>

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<sup>633</sup> Anti-Narcotic Drugs Crime’s General Information Pact

<sup>634</sup> Interviewee IA2

In addition, at times, police resources and personnel were provided to a wide range of investigating agencies because of so many overlapping interests, whereas the financial capacity of the state was constrained. Thus, some interviewees suggested that:

‘There should be considered an establishment of a separately specialised force which mainly concentrates on transnational crime in order to maximise the use of police resource’s available, as well as compromise a relationship mechanism and work assignment between central-level and locality, in terms of transnational crime investigation.’<sup>635</sup>

Although transnational crime is mainly dealt with by the above investigating agencies, there are some other functional police units which also may participate in the investigation of transnational crime. In terms of the structure of the investigating, these police units are shaped into agencies which, according to the Vietnamese legislation, belong to a group of ‘agencies with some investigating powers’ (see Table 5.1). They include the Environment Police Department, the Guard and Judicial Assistance Police Department, to name a few.<sup>636</sup> These agencies can apply some investigating powers, such as conducting house searches in urgent cases of preventing the destruction of evidence. The reason for the establishment of this assignment is as follows. First, these agencies help the specialized investigating agencies in terms of special expertise in order to investigate further into specific areas when it is necessary, but which the specialized investigating agencies do not have. Second, the devolution of power to these agencies allows them to react quickly to urgent circumstances when these agencies carry out their duties.

In general, the relationship between the investigating agencies and other police departments within the People’s Police Forces, and even with other government organisations, is based on the duty or responsibility of each agency/or department. Transnational crime investigating activities also follow this principle. Article 26 of the Ordinance on Organisation of Criminal Investigations specifies that ‘The relations among investigating agencies, between investigating agencies and the ‘agencies with some investigating powers’ [i.e. the Environment Police Department; the Guard and Judicial Assistance Police Department; Cyber Crime Police Department; Customs Service; Forest Service; Border Army; and Coast Guard Service] are the relations of assignment and

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<sup>635</sup> Interviewees IA9, IB1, IB2

<sup>636</sup> Ordinance on Organisation of Criminal Investigations 2004, issued on 20 Aug. 2004, No.23-2004/PL-UBTVQH11, article 23

coordination in investigating activities.<sup>637</sup> However, the investigating agencies always hold the main responsibility, and are a lead agency in transnational crime investigations. For example, if the Environmental Police Department detects signs of transnational trafficking in wild life, that Department can take action in relation to crime investigation activities, such as decisions to initiate prosecution or take testimony. Their necessary investigating activities are only aimed at responding to crimes after the signs of offenses being detected. However, within seven days, the case must be transferred to the competent investigating agencies which will be assigned on the basis of criminal nature and its danger to society, as well as territorial jurisdiction in order to continue the investigation.<sup>638</sup>

To some extent, the existing structure of policing system allows the police to respond to transnational crime like other traditional domestic crimes, with three levels of investigating agencies (see Table 5.4). For some specific crimes such as drugs crime, there is a clear system to investigate from the central to the district. In contrast, certain other crimes such as transnational environmental crime may be investigated by either the Economic Crime Police Department or the Office of Investigating Agency whose assignments are subject to the decision of the head of Central Investigating Police Agency; in that case the Environment Crime Police Department plays a supporting role. Therefore, the system is still complicated.

The competences and assignments are unclear. The Provincial-level Investigating Police Agency can conduct an investigation that belongs to the competence of the District-level Investigating Police Agency when it is deemed necessary,<sup>639</sup> based on the perception and administrative decisions of leaders. In addition, the impacts of the administrative decision can be seen through cases where there is a conflict in the investigating competences of investigating agencies when the case is involved in several types of transnational offences or different territorial jurisdictions. In these circumstances, the only solution is a request to superior management for instructions. In addition, there are cases where transnational crime investigations are taken by the Investigating Security Agencies, following decisions of Leaders of Public Security Forces, instead of the Investigating Police Agencies because the Investigating Security Agencies may be trusted

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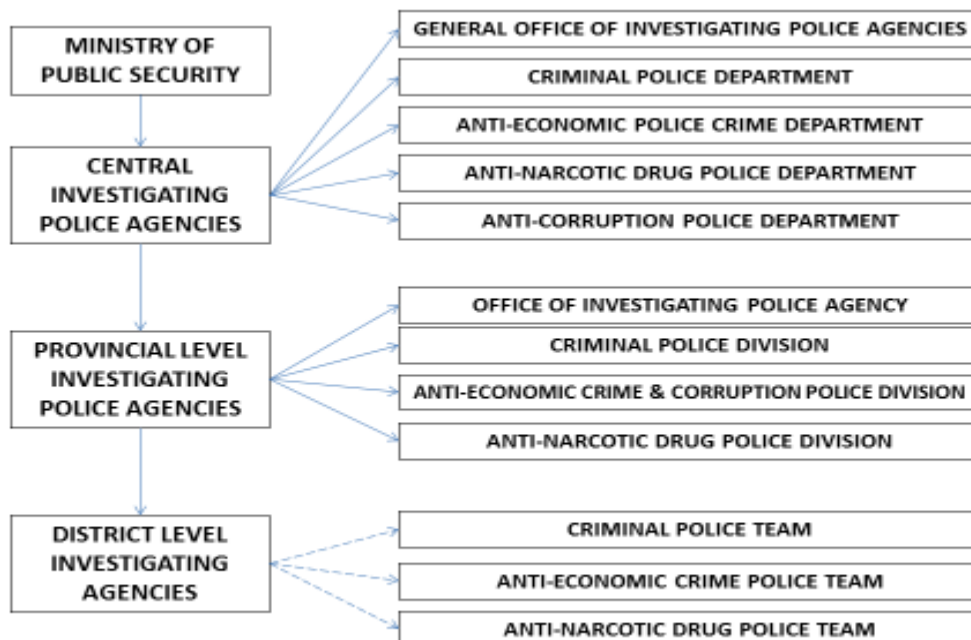
<sup>637</sup> Ibid., article 26(1)

<sup>638</sup> Ministry of Public Security, Circular on Regulations of the Criminal Investigation Work in People's Public Security, issued on 7<sup>th</sup> July 2014, No. 28/2014/TT-BCA, article 25(7)

<sup>639</sup> Ibid., article 12 (1)

more, or they have more available resources such as investigators. According to statistics, around 20% of total investigations taken on by the Investigating Security Agencies do not fall within their legal competences.<sup>640</sup> Moreover, there is not sometimes a clear distinction in competences between investigating police agencies and other functional police units. For example, the Cyber-Crime Police Department is not an investigating agency, but its mission is policing and supervising the cyber laws field. Although the Cyber-Crime Police Department is not a lead agency in cyber-crime investigations, its officers can participate or even apply some measures to detect cyber-crimes. Finally, while the Central Investigating Police Agency consists of five Police Department which specialize in different types of offences, there is not any uniform pattern to deployment of organisational structure of investigating agencies at the district level. This may lead to a paradoxical situation in which the number of investigators and organisational structures at the central level is larger than the ones at the districts which deal with the majority of investigations.

**Table 5.4. The three-level Arrangement of Crime Investigating System's Components**



<sup>640</sup> Tran Trung Dung, 'Theories and Practices, and Proposals relating to Organisation, Activities of the Investigating Security Agencies', in the Record Book of the Workshop on Theories and Practices of Criminal Investigating Activities in Vietnam, June 2014

With regard to the assessment of the existing structure of the policing system for transnational crime investigation, interviewee IA4, who has a similar view with the majority of individuals interviewed, generally agreed with this organisational structure in Vietnam, which deploys at three levels: central, province and district; and is organised associated with specific offences.<sup>641</sup> However, there was a different view, especially among those who are international respondents. For example, interviewee IG3 said that,

‘There are too many investigating agencies responsible for transnational crime investigations, which creates not only difficulty in management of these agencies, but also complication in investigative assignments between them. Moreover, to some extent, it is not sensible to organise investigating agencies associated with specific offences because transnational crimes, especially transnational organised crime, may involve different types of crimes, not simply one type of crime. For example, transnational drug trafficking may link with money laundering or corruption activities. To tackle this issue, it is necessary to define clearly the functions and responsibilities of investigating agencies, as well as to establish provisions which facilitate coordination among different components within an investigating agency, and between specialised investigating agency and other police departments. In doing so, there will be an improvement in the effectiveness of transnational investigating activities, and their legitimacy is better guaranteed.’<sup>642</sup>

### **5.1.3. Transnational Crime Investigators and Effectiveness**

Crime investigation is an important aspect of policing. To improve its quality and effectiveness, there are two critical issues relating to investigating activities: one is the investment of both human and financial resources for crime investigation; the other is the training and development of investigator’s capacity.

Recently, due to the understanding of the role of crime investigations in relation to the assurance of public safety and social order, there is special support for budget allocation and usage for crime investigation while taking into account observance of the ‘State Budget Law.’<sup>643</sup> The Government and Ministry of Public Security adjusted and invested an increased budget to meet requirements of crime investigation activities,

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<sup>641</sup> Interviewees IA4, IA5, IG2, IG6

<sup>642</sup> Interviewees IG3

<sup>643</sup> State Budget Law, issued on 16 December 2002, No.01/2002/QH11

including anti-transnational crime activities. Although the precise amount of money for crime investigation activities is not available, on average, there was annually an increase of 18.5% in allocation of investigative budgets in the period of from 2004 to 2010.<sup>644</sup> This budget covers several elements of crime investigating costs such as money for fugitive investigation and fees for judicial examination. In terms of a number of investigators, there was an increase by 52.5% in total investigators throughout the nation in comparison with the figure before 2004.<sup>645</sup> However, there was no indication about resource allocated for anti-transnational crime separately. The reason is that the government's limited budget does not allow to set aside a permanent resources for transnational crime issues. Furthermore, the specific number of investigators dedicated only to transnational crime investigation is not identified because the same investigator may handle either traditional domestic crime investigation or transnational crime investigation. Which assignment is taken will be decided by the head of the investigating agency and his own assessment of available resources. In other words, while having resources constrained, the government needs to flexibly manage the resource for prioritized missions on the basics of concrete circumstance. This point may hinder the development of professional and long term anti-transnational crime strategy. But, to some extent, there is improvement in supplying the budget and assigning investigators in international cooperation which may be reflected through an increasing number of joint international investigation activities and their results. In this regard, interviewees, including police officers, procurators and lawyers confirmed that a number of transnational crime cases, whose investigation were not expanded beyond the national border because of the lack of finance and resource, are fewer than before.<sup>646</sup> For example, according to interviewee IA8,

‘recently to complete the investigation into transnational crime cases, in many cases the Ministry of Public Security agreed to grant an additional budget for the police of Vietnam to pursue its investigation involving other countries, especially detection and arrest of criminals who fled from Vietnam to hide in those oversea countries. But the funding is still decided on the basis of each case. There is no clear spending list which is used for transnational crime investigations.’<sup>647</sup>

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<sup>644</sup> Ministry of Public Security, the drafted 7 Years-Review Report on the Implementation of Ordinance on Organisation of Criminal Investigation (2004), 29 April 2012.

<sup>645</sup> Ibid.

<sup>646</sup> Interviewees IA10, IA11, IA12, ID2, IE3

<sup>647</sup> Interviewee IA9

Crime investigation is a complex process that requires not only a funded organisation, but also capable investigators. In Vietnam, the investigators are classified into three grades: elementary investigator, intermediate investigator, and senior investigator.<sup>648</sup> In general, to be investigators, there are some criteria to be met. These criteria include a political commitment, morality, knowledge and practical experience, and good health. In this sense, the political commitment and morality require investigators that whatever they do must be prioritised for the benefits of the Party and State, because crime investigating activities play an important role in protecting the regime and public order. To ensure this implementation, any police officer who would like to be appointed as an investigator should be a member of the Communist Party. In the meantime, there are regulations strengthening the Party's leadership in crime investigation activities. An illustration of this point is the Prime Minister's Decision No. 282/QD-TTg.<sup>649</sup> In addition, Article 30(1) of the (2004) Ordinance on Organisations of Crime Investigation indicates that 'Vietnamese citizens, who are loyal to the Motherland and the Constitution of the Socialist Republic of Vietnam, have good virtues, are non-corrupted and honest, have a security university, police university or law university degree, investigating operation certificates, have the practical work experience prescribed by this Ordinance, have good health to ensure the performance of assigned tasks, can be appointed to be investigators. In cases where due to operation demands, persons having university degrees in other disciplines, satisfying the above criteria and possessing investigating operation certificates may also be appointed to be investigators.'<sup>650</sup> Presently, the People's Police Academy and the People's Security Academy, which are within the training system of the People's Public Security, are the main providers for investigators who are required to be trained for 5 years with a degree of bachelors' in law or public security. The source of investigators may even come from university graduates from other disciplines. The Resolution No. 08-NQ/TW indicates that 'it is necessary to create and develop a plan which is aimed at providing expertise trainings for judicial officials, as well as organising legal scientific researches. Ministry of Public Security's training system is responsible

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<sup>648</sup> Ordinance on Organisation of Criminal Investigations (2004), issued on 20 Aug. 2004, No.23-2004/PL-UBTVQH11, article 30(2)

<sup>649</sup> The Prime Minister promulgated the Plan on implementation of the Political Bureau's Directive No. 48/CT-TW of October 22, 2010 which is about enhancing the Party's leadership over crime prevention and combat in the new situation (Decision No. 282/QD-TTg, issued on 24 February 2011)

<sup>650</sup> Ordinance on Organisation of Criminal Investigations (2004), issued on 20 Aug. 2004, No.23-2004/PL-UBTVQH11, article 30(1)

to train crime investigators.<sup>651</sup> According to police leaders interviewed, while there is no separate training institution which provides transnational crime investigators, such investigators also mainly graduate from the training centres of the Ministry of Public Security, such as the People's Police Academy, which have sufficient experience and facilities to train investigators, but do not specialise in providing knowledge and skills for transnational crime.<sup>652</sup>

There has been some progress in the quality and the quantity of investigators. As a result, investigating operations are strengthened. However, the quality of investigators is not the same level in all investigating agencies. There is a shortage of investigators, especially those who are responsible for crime investigation at district level, where this shortage situation is especially more applicable to transnational crime investigation in terms of the number of professional investigators for transnational crime investigations. The reason is that the number of crime cases has increased more than the number of investigators. The District-level Investigating Police Agencies handle the majority of criminal cases, but there are insufficient investigators being deployed at district level because working conditions for investigators at districts are not as good as in the provinces and centre where workloads are not as high. Presently, investigators in the Investigating Police Agencies at all levels account for only 41% of total officers who carry out investigating activities.<sup>653</sup> A part of the reason for this low ratio of investigators is because of the investigating model in Vietnam where some departments are not specialized investigating bodies, but are still tasked to carry out some investigating activities, for example arrest criminals in urgent situations. Indeed, for the specialized investigating bodies, staff who have not yet been trained or appointed as crime investigators may still be assigned to conduct crime investigation due to the shortage of investigators. This situation applies also to transnational crime investigations which may be handled by untrained police officers. Several individuals interviewed admitted that there was a difference in investigators at different investigating agency levels, in terms of investigating skills and experiences. Even, investigators from one provincial-level investigating agency are not of the same quality as other provincial-level investigating

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<sup>651</sup> Politburo of The Vietnamese Communist Party, Resolution 08-NQ/TW, dated on 2 Jan. 2002.

<sup>652</sup> Interviewees IA1, IA2, IA3, IA4, IA5

<sup>653</sup> Trieu Van Dat, Theoretical Issues and Practices Relating to Organisational Model and Competence of The Investigating Police Agency in People's Public Security: Obstacles and Proposed Solutions), (2012) 3 *Ban Tin Cong Tac Dieu tra Xu Ly Toi Pham Cua Luc Luong Canh Sat Dieu Tra*, 2, 3



agencies. The requisite skills for transnational crime investigation are mainly obtained from on-job training and practical experience. For example, interviewee IG2 said that:

‘Investigators from an agency that usually deals with transnational crime are often more experienced than those who are from investigating agencies that rarely have to handle transnational crime cases. This point leads to a situation in which there is difference and inconsistency between investigating agencies, with regard to responding transnational crimes.’<sup>654</sup>

Although anti-transnational crime has become an important part of the police agenda, investigators, especially those who work at the districts and provinces, are still new to transnational crime investigations. According to a survey conducted by the Ministry of Public Security, the Investigating Police Agencies at some districts or provinces are not familiar with regulations and procedures in international legal assistance and international law enforcement cooperation.<sup>655</sup> Therefore, these agencies find it difficult, for example in requesting cooperation from other countries’ law enforcement agencies, or in handling assistance requests from overseas counterparts. Several interviewees, both police and non-police officers indicated the following main reasons.

‘Leaders and investigators are not always updated with new knowledge about the modus operandi of transnational crimes that happen in other areas or around the world. Investigators have to do more work with domestic crimes while there is no capacity for the assignment of specialised investigators for transnational crime. In the meantime, investigators prefer to investigate the domestic crimes rather than transnational crimes because transnational crime investigations may last a long time to wait for overseas responses and have no resources when they do. Moreover, investigators are sometimes transferred by the administrative decision to positions which are not involved in crime investigations, but are related to other daily prioritized police duties such as order maintenance. This transfer of investigators may also result from a characteristic of the paramilitary hierarchy of the police in Vietnam that sometimes is used to promote the officer to higher ranks or salaries.

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<sup>654</sup> Interviewee IG2

<sup>655</sup> Ministry of Public Security, the drafted 7 Years-Review Report on the Implementation of Ordinance on Organisation of Criminal Investigation (2004), drafted on 29 April 2012.

In this regard, those officers who used to be specialized in transnational crime investigation are no longer responsible for transnational crime investigation.<sup>656</sup>

To improve professional skills, training courses are organised in relation to the requirements and criteria of investigation into specific offences such as general crime (for example murder, assault); narcotic drug crimes; cyber-crime; economic crimes; environmental crimes. There are no training courses which are specifically designed for transnational crime investigators in police training systems at present. While professional skills for transnational crime investigators may largely come from practical work, some investigators in this field might have been trained in socialist countries such as the former Soviet Union, or Eastern Germany. They may be quite familiar with socialist law systems rather than international laws (including human rights legislation). Indeed, human rights which are very much related to the use of police powers have not been officially taught in police training systems, except through some experts' ideas being debated for teaching possibilities in official police training. This point, according to some interviewed lawyers, such as Interviewee IE1, may affect the appreciation of fairness in a transnational crime investigation. He said, 'it is difficult for the police to ensure fairness in their investigation when they do not understand fully about individual rights and the meaning of proportionality.'<sup>657</sup> However, since the early 1990s of the Renovation (*Doi Moi*) process, investigators for transnational crime cases have been able to obtain knowledge about international laws and other investigating techniques, for examples 'controlled delivery' in relation to the investigation of transnational crimes from training seminars, conferences or exchange programs with foreign law enforcement or under the framework of international organisations, such as ASEANAPOL and Interpol. There are a number of training courses for Vietnamese investigators which are organised through UNODC programs. Some police officers have been sent to be trained in western countries including the United States. Moreover, according to several interviewees, including policy makers as well as practitioners, Vietnam attaches great importance to technical assistance from foreign countries as well as international organisations, in terms of providing equipment and funding for the training of Vietnamese police officers, including transnational crime investigators.<sup>658</sup> This policy increases and diversifies the sources providing Vietnamese qualified investigators, though the demand is still higher than the

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<sup>656</sup> Interviewees IA9, IA10, IC1, ID2 and IE1

<sup>657</sup> Interviewee IE1

<sup>658</sup> Interviewees IA9, IA10, IB1, IB2, IC1, ID2 and IE1

supply, and the English language that is common for international police cooperation is problematic for most Vietnamese investigators.

Taking into account funding and training assistance from outside of Vietnam, Vietnam has made use of this source to supplement the scarcity of domestic resources in relation to transnational crime investigations. While Vietnam develops bilateral relationships with other countries, multilateral cooperation is increased to assist transnational policing activities. Several training packages and a large amount of finance have been provided to Vietnam from overseas partnerships. For example, Vietnam and the UNODC signed a document on the national program against crimes over the period 2012-2017. This program is worth US \$ 14,457,700 and not only positively contributes to implementing national strategies and targets for crime control in Vietnam, but also assists Vietnamese law enforcement agencies to integrate with overseas counterparts such as ASEAN member states.<sup>659</sup> In this context, besides equipment and other materials, Vietnamese investigators are provided with opportunities to engage in professional training in transnational crime investigation which is then developed as training manuals for the police training system of Vietnam. Moreover, Vietnamese investigators understand the necessity of an international police network and expand their relationship with international counterparts in order to cooperate in transnational crime investigations.

The advantages of resources and training assistance from outside Vietnam are clear, however, there are still obstacles with regard to the receipt of assistance, especially training from overseas. First, the contents of existing training programs are sometimes not suitable to needs of the investigators or investigating agencies. They may be constructed based on a political policy of decision-makers or donors who want to make an impact on Vietnam. Training is also dependent on the available resources of international organisations or countries which would like to donate to Vietnam rather than on the practical needs of the investigation of transnational crime in Vietnam. Second, there is no efficient system to coordinate all overseas assistances in order to make the best use of these. The assistance may focus only on a subset of investigators or agencies, because there is no master plan to monitor overseas assistance or to ensure that assistance is distributed evenly across the whole group of investigators and agencies. For example, interviewee IG5 indicates that 'Most training focuses on basic skills, so the same

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<sup>659</sup> UNODC, Vietnam Country Program: 2012 -2017, <[http://www.unodc.org/documents/southeastasiaandpacific/vietnam/publication/2014/CP\\_final\\_E.pdf](http://www.unodc.org/documents/southeastasiaandpacific/vietnam/publication/2014/CP_final_E.pdf)>

investigators may be provided with opportunities to receive them several times.<sup>660</sup> While the knowledge and lessons learned from the exchange of oversea training are not reviewed, there is no clear mechanism to store and apply them in practice. To some extent, it is a waste of resources and training. Investigators who attend the training may think that they are simply receiving a favour or privilege rather than what they should obtain for their careers. Commenting on this training issue, the majority of interviewees, especially from the police, pointed out that ‘the existing system for training transnational crime investigators is ineffective. The reason is that there is no standard training program. Moreover, the delivery of the training does not originate from the practical assessment of training needs. Instead, most training courses offered are subject to the sponsoring program or providers.’<sup>661</sup>

#### **5.1.4. International and Regional Institutions**

Generally, transnational policing strategies that are conceived as dimensions of the function of the police are meant to augment national tasks of policing in terms of the structure of transnational policing.<sup>662</sup> Therefore, it is important to go beyond domestic policing structures, and to investigate the roles of mainly international and regional organisations of which Vietnam is a member, because this will help to understand the interplay between these organisations and domestic policing institutions in transnational crime investigation. The following analysis focuses on Interpol and ASEANAPOL.

##### **5.1.4.1. International Criminal Police Organisation (Interpol)**

Interpol, which was established in 1923, is the world’s largest international police organisation, with 190 member countries.<sup>663</sup> According to the Constitution of Interpol, its aims are: ‘(1) to ensure and promote the widest possible mutual assistance between all criminal police authorities and within the limits of laws existing in the different countries, and in the spirit of the “Universal Declaration of Human Rights”; (2) to establish and develop all institutions likely to contribute effectively to prevention and suppression of ordinary law crimes.’<sup>664</sup> Although Interpol as an inter-government organisation has no

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<sup>660</sup> Interviewee IG5

<sup>661</sup> Interviewees IA1, IA2, IA5, IA6

<sup>662</sup> Deflem, M., *Policing World Society: Historical Foundations of International Police Cooperation* (Oxford and New York: Oxford University Press, 2002) 215

<sup>663</sup> Interpol Website, < <http://www.interpol.int/About-INTERPOL/Overview>>

<sup>664</sup> Constitution of Interpol, article 2, No. I/CONS/GA/1956 (2008)

power to investigate and arrest suspects,<sup>665</sup> it plays an important role in police cooperation in three ways. First, Interpol acts as a centre to help the police to exchange information. One of its strengths is I/24/7 which is a communication network connecting all member countries' polices. In addition, although a bilateral relationship is established between each member country and the Interpol Organisation through its National Central Bureau, member countries also use Interpol to develop multilateral relations with each other. Second, Interpol provide useful sources of global information as well as professional training to crime investigation around the world. There are ten different criminal databases such as Notices, Stolen and Lost Documents, Child Sexual Exploitation Images, DNA Profiles, in the Interpol Headquarter which can be accessed by member countries instantly and directly. For example, in 2013, more than 13,000 notices were issued to alert police to fugitives, suspected terrorists, and dangerous criminals, to name but a few; of which more than 8,000 were Red Notices for wanted persons.<sup>666</sup> Third, Interpol plays an important role in the coordination of expertise on transnational crime investigations which are involved in several countries. The Command & Coordination Centre<sup>667</sup> not only facilitates as a global response to the transnational crime phenomenon, but also supplying operational assistance for any member countries which seek urgent police information or face a crisis situation.

Despite the fact that Interpol is governed by a General Assembly and Executive Committee which issue policies and strategies for the organisation, Interpol's activities are driven by member countries.<sup>668</sup> In this framework, Interpol's daily implementation is carried out by both the General Secretariat and the National Central Bureaus of member countries. The General Secretariat is located at Interpol's Headquarters in Lyon in France, with Regional Offices in different geographic areas of the world. One of these is the Regional Office for South East Asia, located in Thailand. At the same time, each member country nominates a national police force which acts as a national point of contact between domestic policing agencies and Interpol to ensure information exchange and promotion of cooperation effectively. According to Article 4 of the Constitution of

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<sup>665</sup> Vassalo, P., 'Note: The New Ivan the Terrible: Problems in International Criminal Enforcement and the Specter of the Russian Mafia' (1996) 28 Case Western Reserve Journal of International Law 173, 186

<sup>666</sup> Interpol Website, < <http://www.interpol.int/INTERPOL-expertise/Databases>>

<sup>667</sup> The Command & Coordination Centre is managed 24 hour a day, 365 days a year by staff members of various backgrounds and nationalities who are fluent in several languages.

<sup>668</sup> Interpol Website, <<http://www.interpol.int/About-INTERPOL/Structure-and-governance>>

Interpol, to be a member of the Interpol, each country should delegate a national police body to apply as long as this national police body's function come within framework of activities of the Organisation.<sup>669</sup> Accordingly, each member country sets up a National Central Bureau which not only works as a bridge for their police forces with the organisation, but also implements strategic decisions of Interpol. There is no specific pattern to all member countries in setting up their National Central Bureau. The National Central Bureau is organised dependent upon the organisation and style of police forces of member countries. In other words, while being the part of national police force of member country, the National Centre Bureau is also responsible for the works of Interpol. But, whatever the differences in resources and the level of their participation in Interpol, a feature which all National Central Bureaus have in common is their independence vis-à-vis the Headquarters of the organisation.<sup>670</sup>

There are some obstacles in the Interpol cooperation mechanism with regard to crime investigation. First, information exchange through Interpol usually is time-consuming. While there are time-limits for crime investigation, it always takes time to get results via the Interpol channel. The reason for this is mainly because Interpol must go through the national point of contact which sometime requires completion of administrative procedures such as a review report before information is sent abroad. In addition, while the number of staff of the National Central Bureau is limited, they may face a huge quantity of requests from localities. Second, there is an issue regarding the protection of information as well as sources of information while cooperating through the Interpol channel. Interpol is open to every member. Sometimes, information about ongoing operations may be leaked to a member which is not involved in the investigation. Third, relationships between member countries and Interpol are based on the country's voluntary involvement, by which every country can apply to be a member of the organisation. Activities of the National Central Bureau must be compatible with legislation of the member country. In some ways, Interpol Organisation is considered as being 'parasitic' on national police authorities because it lacks legal and material resources.<sup>671</sup> Moreover, although one of the Interpol's operational principles is having

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<sup>669</sup> Constitution of Interpol, Article 4, No. I/CONS/GA/1956 (2008)

<sup>670</sup> Anderson, M., *Policing the World: Interpol and the Politics of International Police Cooperation* (Oxford: Clarendon Press, 1989) 83

<sup>671</sup> Walker, N., 'Patterns of Transnational Policing', in Newburn, T. (eds.), *Handbook of Policing* (London and New York: Willan Publishing, 2008 ) 119, 125

no intervention or activities of a military, political, religious or racial character within Interpol,<sup>672</sup> the organisation's cooperation channel is of course used by member countries while taking into consideration their own national interests. So, there is some indication that some countries may misuse Interpol functions for political ends or economic targets. For example amongst 7,622 published Interpol Red Notices in 2010, around 2,200 Red Notices were from countries which had poor human right records; and nearly 3,600 Red Notices were requested from countries that were ranked among the most corrupt on the annual global corruption index of Transparency International.<sup>673</sup> In the meantime, the Interpol channel is considered as an informal means of information exchange due to the legal status of the Constitution of Interpol which does not require ratification and approval from parliaments. Moreover, there is no binding responsibility on member countries to respond to investigative requests from other country members.

Vietnam joined Interpol in 1991 and became the 156<sup>th</sup> member. After that, an Interpol Department was established within the structure of the Police General Department under the Ministry of Interior (presently the Ministry of Public Security).<sup>674</sup> This Department was recently merged into the International Cooperation Department of Ministry of Public Security in 2014.<sup>675</sup> According to this establishment, the Interpol Department (now the International Cooperation Department) helps the Head of Central Investigating Police Agency to coordinate all cooperative efforts of Vietnamese law enforcements with the Interpol Organisation and other countries to prevent and investigate crimes. Since then, Vietnam has made use of the Interpol cooperation channel as a ground to extend its relations with several countries with no regard to differences in political regime or diplomatic relations. According to interviewee IA5, 'presently, Interpol cooperation is one of the most effective cooperation mechanisms for transnational crime investigation in Vietnam.'<sup>676</sup> Further analysis of police relationships between Vietnam and other countries will be explained in Section 5.2 below.

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<sup>672</sup> Constitution of Interpol, Article 3, No. I/CONS/GA/1956 (2008)

<sup>673</sup> Lewis, L., 'Are Some Countries Abusing Interpol?',  
<<http://edition.cnn.com/2011/WORLD/europe/07/18/interpol.red.notices/>>

<sup>674</sup> Ministry of Interior, Decision No. 262/QD-BNV, issued on 28 May 1993.

<sup>675</sup> Ministry of Public Security, Decision No. 2766/QD-BCA-X11, issued on 2 June 2014

<sup>676</sup> Interviewee IA5

#### 5.1.4.2. ASEAN Chiefs of National Police Forces (ASEANAPOL)

To focus on law enforcement matters and crime control in the South East Asia Region, ASEANAPOL was officially inaugurated in 1981 in Manila, following the first formal meeting of Chiefs of national police forces in the region.<sup>677</sup> ASEANAPOL now has 10 member countries which must also be members of the Association of South East Asia (ASEAN). But, ASEANAPOL is not part of ASEAN structure, though ASEANAPOL's activities can be coordinated and deliberated upon by the ASEAN's bodies, for example the ASEAN Ministerial Meeting on Transnational Crime (AMMTC).<sup>678</sup> The ASEANAPOL Secretariat, whose terms of reference were endorsed in 2009 in Vietnam, is located in Kuala Lumpur, Malaysia, and became fully operational from January, 2010.

ASEANAPOL is a mechanism for Chiefs of ASEAN Police Forces to meet annually to discuss challenges of the region, as well as to issue Joint Communiqués to promote and coordinate all law enforcements efforts in the ASEAN region. Although ASEANAPOL has no Constitution, it does requires all member countries' activities to be accountable to their own national legislations, while taking into account shared interests of peace, development and stability of the ASEAN region. This principle is reflected in Joint Communiqués of ASEAN Chiefs of Police Conference (ASEANAPOL Conference) which is to 'enhance police professionalism, forge stronger regional cooperation in police work, and promote lasting friendship amongst police officers of ASEAN countries.'<sup>679</sup> The highest governance of ASEANAPOL is provided by the ASEANAPOL Conference, which is annually organised on a rotational basis with member countries taking turns to host the ASEANAPOL conference. Accordingly, the Chief of Police Force of the host country will be a Chairman of the ASEANAPOL for a year. The Executive Committee of ASEANAPOL, which comprises Deputy Heads of member countries' delegations attending the ASEANAPOL Conference, shall provide a summary report of police

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<sup>677</sup> ASEANAPOL Website, <<http://www.aseanapol.org/about-aseanapol/permanent-secretariat>> (originally members of ASEANAPOL are Malaysia, Singapore, Indonesia, Thailand and Philippine)

<sup>678</sup> ASEAN Declaration on Transnational Crime (1997), issued 20 December 1997 in Manila, Philippine; (the AMMTC as one of ASEAN Sectorial Ministerial Meetings was formally formed by the ASEAN to respond to transnational crime in terms of policy coordination)

<sup>679</sup> Joint Communiqué of The 28<sup>th</sup> ASEAN Chiefs of Police Conference, <<http://www.asean.org/communities/asean-political-security-community/item/joint-communique-of-the-28th-asean-chiefs-of-police-conference-brunei-darussalam-25-29-may-2008>>



activities of the region to Chiefs of ASEAN police forces. In this regard, the ASEANAPOL Secretariat has a responsibility not only to provide daily operational assistance such as coordination in joint investigations to member countries' police forces but also to supervise the implementation of resolutions of the ASEANAPOL Conference in order to report to the Executive Committee.

Like Interpol, ASEANAPOL has no police power to investigate criminal offences. Its mandates are carried out based on political willingness and legislations of countries members. However, it facilitates the police forces of member countries to formulate strategies to tackle transnational crime in the region. Member countries have to prepare country reports about their crime situation and crime control activities which are shared with other member countries to decide the most effective policies for the region. Moreover, ASEANAPOL has also set up criminal database system (known as ASEANAPOL Database) that are constructed to the needs of the regions, which are more concerned with certain types of transnational crime such as drug trafficking and human trafficking. This ASEANAPOL Database is now integrated with Interpol Databases which create a common platform against both global and regional crimes.<sup>680</sup>

Vietnam joined ASEANAPOL in 1996 after becoming a member of ASEAN in 1995. ASEANAPOL provides one way to respond to transnational crime. However, concrete results of ASEANAPOL cooperation in relation to transnational crime investigation are so far modest or even unclear. The reason is that ASEANAPOL activities seem to be formal rather than operational, though its establishment is to prioritise law enforcement in the region. Whilst the highest rank officials meet once a year, there is no review mechanism for country members who fail to cooperate in investigative operations. In terms of organisational structure, the cooperative function within ASEANAPOL framework is also included in the Interpol Department in Vietnam. With regard to the role of ASEANAPOL in transnational crime investigations, most interviewees, including the police and procurators have said that 'joining as a member of ASEANAPOL mainly represents a political benefit, creates a forum for the discussion of policies and strategies by Leaders of ASEAN Police Forces, instead of investigative operational issues. In practice, unlike the Interpol framework, not many investigative requests are exchanged through the ASEANAPOL framework.'<sup>681</sup>

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<sup>680</sup> 'ASEANAPOL Partnership with Interpol Boosts Regional Security' (*Interpol Website*, 31 November 2011), <<http://www.interpol.int/en/News-and-media/News/2011/PR047/>>

<sup>681</sup> Interviewees IA8, IA9, IA13, ID1 and ID2

## **5.2. Police Cooperation in Transnational Crime Investigation**

The external policing relations are especially significant for transnational crime investigation, because the fight against transnational crime will not be successful without police cooperation between countries. Policing transnational crime must be as global as is the criminal activity.<sup>682</sup> Therefore, this section will investigate modalities and processes which different Vietnamese policing agencies experience in conducting an investigation into transnational offences. In doing so, the section is divided into three subsections. The first subsection will identify the legitimacy and impacts of different arrangements between Vietnamese policing agencies and overseas law enforcement agencies in terms of transnational crime investigation. This subsection will also conduct a study into a gap between demands of crime investigating agencies, and the existing relationships with overseas police forces. The second subsection will focus on internal regulations on the handling of an investigative inquiry with overseas counterparts that the police must follow. By doing this, the research will indicate processes of transnational police cooperation to be used in effective crime investigation. Finally, the third subsection will analyse external relationships of the police with administrative executives, indicating to what extent the police are independent of political influences.

### **5.2.1. Different Forms of Transnational Crime Investigative Cooperation**

One of the fundamental challenges for law enforcement in dealing with transnational crimes is state sovereignty, in which the effective jurisdiction of a state's law enforcement agents extends no further than the territory of that state.<sup>683</sup> To tackle transnational crimes, this obstacle should be overcome by the use of transnational police cooperation between a state's domestic law enforcement agencies and their overseas counterparts. Neil Walker has argued that states must encourage and allow some measure of liaison and cooperation between their police forces and related criminal justice agencies in order to respond to the dangers posed to their capacity to secure order within

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<sup>682</sup> Beare, M., and Martens, F., 'Policing Organised Crime: The Comparative Structure, Traditions, and Policies within the United States and Canada' (1998) 14 *Journal of Contemporary Criminal Justice*, 398, 400

<sup>683</sup> Nadelmann, A. E., *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (The Pennsylvania State University, 1993) 5

their own territories, by the planning and preparation of crime on an international level.<sup>684</sup> In the meantime, transnational police cooperation helps countries to recognise the needs of the criminal justice systems of one another. Trust can be built by different police forces in order to overcome barriers such as different legal systems or even different political positions, to better deal with transnational crime. Moreover, by understanding the limits of police power in applications beyond a state's jurisdiction, another state or international organisation can offer its assistance. International and regional police cooperation develops to overcome cross-border policing challenges.<sup>685</sup> This 'police interaction across international boundaries varies according to the police function in question and to the geographical location of the police force involved.'<sup>686</sup> In this sense, a number of modalities of transnational police cooperation have been developed, and there are several areas of transnational cooperation such as information gathering and joint investigation operation. Further analysis about investigative measures applied within this transnational cooperation will be given in Chapter Seven. This subsection only focuses on how investigating transnational crime in Vietnam, and expanding the crime investigation into other national jurisdictions by the People's Police Force is carried out. In other words, this study will look at arrangements in which the People's Police Force interacts with other countries and international organisations to 'engage in transnational operations involving foreign citizens within their own jurisdictions or through police work concerned with nationals or foreigners abroad.'<sup>687</sup> To do so, relationships for crime investigation between the People's Police and the international law enforcement community will be examined in three categories of interaction: (1) unilateral measures; (2) bilateral arrangements, and (3) multilateral arrangements.

### **5.2.1.1. Unilateral Measures**

Up to the 1990s, a unilateral approach was always considered the main approach for the People's Police of Vietnam to obtain or verify intelligence regarding foreign-

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<sup>684</sup> Walker, N., 'Patterns of Transnational Policing', in Newburn, T. (eds.), *Handbook of Policing* (London and New York: Willan Publishing, 2008 ) 119, 122

<sup>685</sup> Hufnagel, S., 'Cross-Border Police Cooperation: Traversing Domestic and International Frontiers' (2011) 35 *Criminal Law Journal* 333, 334

<sup>686</sup> Anderson, M., *Policing the World: Interpol and the Politics of International Police Cooperation* (Oxford: Clarendon Press, 1989) 9

<sup>687</sup> Deflem, M. and McDonough, S., 'International Law Enforcement Organisations', in Kethineni, S. (eds), *Comparative and International Policing, Justice, and Transnational Crime* (Durham, NC: Carolina Academic Press, 2010) 127, 148

related investigations. Information gathering or investigative operations would be secretly implemented in other states without informing their police or competent authorities. For example, this kind of investigative task would be handled by the Intelligence Service whose agents might be working abroad under diplomatic posts or in other possibly covert positions. The reason for this is that international cooperation for transnational crime investigation was not prioritized at this period.<sup>688</sup> Although international cooperation by the police of Vietnam, to some extent, was established, it mainly involved developing relationships with police forces of countries of the Socialist bloc. Police relations were constructed on the basis of friendship between these countries which shared the same ideology of Marxism and Leninism, and had ostensibly similar political objectives. By this relationship, Vietnam obtained support such as staff training and equipment supply from these countries that either were mainly for protection of national security and the struggle against class enemies, or usually took place as formal rather than real cooperation in law enforcement issues. In the meantime, Vietnam did not have investigative police cooperation with countries outside of the Socialist bloc, because of a lack of trust or conflicts in political interests with those countries.

Unilaterally interacting with other countries is usually not successful in terms of effective or ethical transnational crime investigation. It can create unnecessary tensions between nations.<sup>689</sup> According to Article 4 of the United Nations Convention against Transnational Organised Crime, no country is allowed to undertake in the territory of another country the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other country as prescribed by other domestic law, on the principles of sovereignty equality, territorial integration as well as non-intervention in the domestic affairs of another country.<sup>690</sup> In addition, Vietnamese legislation provides two sets of principles regarding international cooperation in criminal proceedings. They are indicated as follows.

‘International cooperation in criminal proceedings shall be carried out in conformity with international agreements which Vietnam has signed or acceded to and the laws of the Socialist Republic of Vietnam. Where the Socialist Republic

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<sup>688</sup> See discussions on police history and the task of transnational policing in Vietnam at section 5.1.1

<sup>689</sup> Joutsen, M., ‘International Instruments on Cooperation in Responding to Transnational Crime’, in Reichel, P. (eds.), *Handbook of Transnational Crime & Justice* (Thousand Oaks, London, New Delhi: Sage, 2005) 258

<sup>690</sup> United Nations Convention against Transnational Organised Crime, December 2000.

of Vietnam has not yet signed or acceded to relevant international agreements, international cooperation in criminal proceedings shall be effects on the principle of reciprocity, but not in contravention of the laws of the Socialist Republic of Vietnam, international laws and international practices.<sup>691</sup>

This point shows that unilateral action in transnational cooperation incurs problems in terms of legitimacy. However, in practice, unilateral law enforcement and investigation were not only used in the past, but are still on occasion used by the People's Police of Vietnam. According to police leader IA4 in the interview, this unilateral model is applied because its result may be still accepted by a court, and there is no other alternative way that the police can use to obtain that result.<sup>692</sup> The first circumstance is when cooperation in dealing with transnational crime is sometimes dominated as well as driven by the 'powerful' countries that have resources and budgets to direct the international cooperation. In this sense, the powerful countries may pressure weaker ones to conform to the former's own requests that are not conformity with the laws of the latter.<sup>693</sup> For example, when working with the police of developed countries such as the United States, Vietnam as the 'weaker' country is sometimes requested to pursue and arrest fugitives in order to hand over them back to the requested countries, even though there are no treaties between Vietnam and those countries in terms of mutual legal assistance and extradition, or any other police agreements. The principle of reciprocity is not applied when commitment for the same assistance is not rendered by the developed countries because of their existing legislation. In this circumstance, Vietnam's implementation of the developed countries' request in terms of arresting fugitives that may violate Vietnamese laws would be unilaterally carried out. Therefore, the People's Police of Vietnam must find a way round this, to meet the request, for instance by arresting fugitives under a deportation process to deliver the arrested fugitives.

The second situation in which transnational crime is unilaterally investigated by the People's Police of Vietnam takes place when the nature of the request by the People's Police of Vietnam and its implementation falls into a problematic category under the laws of Vietnam's counterparts. These categories could be either involving the death penalty or unethical policing issues/policing techniques, for example use of torture or ill-

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<sup>691</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 340

<sup>692</sup> Interviewee IA4

<sup>693</sup> Nadelmann, E., *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (The Pennsylvania State University, 1993) 7

treatment of a suspect by application of police powers such as in detention or interviewing.<sup>694</sup> For example, when Vietnam requests investigative cooperation that may lead to capital punishment<sup>695</sup> of criminals in criminal cases, the legislation of some countries does not permit investigative assistance for those criminal cases, even when the assistance is only information exchange under the framework of police to police cooperation. In practice, there have been drugs cases that involved someone residing outside of Vietnam. But the People's Police of Vietnam might not obtain verification from the police where those individuals may be hiding, because in terms of human rights, the police of that jurisdiction were unable to provide Vietnam with information that might involve the death penalty for those who were to be tried in Vietnam.<sup>696</sup> For example, this situation used to happen in exchanging criminal intelligence between the United Kingdom and Vietnam. Barriers may now arise from a consolidated guidance in the United Kingdom which requires British officers to take great care to assess whether there is a risk when sharing criminal intelligence with overseas law enforcement agencies of countries whose practices raises questions about their compliance with international legal obligations in terms of preventing torture and cruel, inhuman or degrading treatment or punishment.<sup>697</sup> In addition, full cooperation from abroad is sometimes not obtained because the grounds for the request is sometimes not evidentially sufficient for overseas police to start their investigation in order to aid Vietnam. In this case, to complete the investigation of transnational criminal offenses in Vietnam, the People's Police of Vietnam may conduct their own investigation unilaterally by using any possible opportunities and links abroad, for example through embassy staff, to obtain the required information. However, these results are sometimes unacceptable as valid information in Vietnam's courts due to the inappropriate investigation process (see more discussion on exclusionary rules for evidence at subsection 7.2.2.1.4).

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<sup>694</sup> Lillich, R.B., 'The Soering Case' (1991) 85 American Journal of International Law 128

<sup>695</sup> According to Article 28 of the VPC 1999, death penalty is one of the principle penalties that can be applied to offenders. There are still 22 offences whose maximum penalty can be up to death penalty. This issue will be further discussed at the Chapter 6 later.

<sup>696</sup> According to Article 194 of the VPC 1999, those who illegally store, stockpile, trade in, or appropriate narcotics in some circumstance, for example heroin or cocaine weighing 100 grams or more, shall be sentenced to between twenty years of imprisonment and capital punishment.

<sup>697</sup> HM Government, Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees, July, 2010, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62632/Consolidated\\_Guidance\\_November\\_2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf)>

Therefore, from the unilateral approach in the investigation of transnational crime, there are some implications regarding to resources and the professionalism of transnational policing in Vietnam. There is sometimes a lack of necessary transnational policing arrangements that can provide police cooperation from other countries. Moreover, while asking for help from sectors other than policing agencies, transnational policing work may be handled by unexperienced persons who are not trained and dedicated for transnational policing. This may impact not only legitimacy but also the quality of the results of transnational crime investigation.

### **5.2.1.2. Bilateral Arrangements**

One of the popular formats of transnational investigative cooperation that plays a central role in contemporary police activities is bilateral relations with other countries. Bilateral arrangements such as the ‘Treaty on Mutual Legal Assistance in Criminal Matters between Vietnam and the United Kingdom’<sup>698</sup> are an expression of the values of respect, recognition and mutual benefit that come from trust and confidence building between Vietnam and other countries. Bilateral arrangements will promote the effectiveness of law enforcement, and combat crime in effective ways and as a means of protecting respective democratic society and human rights. According to Ludo Block, successfully combating new dimensions of crime whose activities involve more than one jurisdiction requires law enforcement to seek partnership across borders.<sup>699</sup> Moreover, this mechanism will help the police address and overcome shortages of legitimacy that the unilateral approach always faces in transnational crime investigations. Investigative requests from Vietnam are not only assisted by overseas counterparts but are also accepted by their legislation, which gives the counterparts both the legal grounds and the resources to undertake investigations. In the meantime, bilateral arrangement will save transnational policing costs. This is because some of investigative jobs can be undertaken by overseas polices who are more experienced and trained. Moreover, under the bilateral arrangements, Vietnam and other countries can focus on concrete contents and prioritize issues in investigative cooperation. According to Matti Joutsen, the advantage of bilateral

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<sup>698</sup> Treaty between the Socialist Republic of Vietnam and the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, signed on 13 January 2009, Cm 7587

<sup>699</sup> Block, L., ‘Cross-Border Liaison and Intelligence: Practicalities and Issues’, in Harfield, C., MacVean, A., Grieve, J., Phillip, D. (eds.), *Handbook of Intelligence Policing* (Oxford: Oxford University Press, 2008) 183

agreements is being able to tailor the specific needs of the states in question and being expanded, amended, or (if necessary) terminated relatively easily.<sup>700</sup> For example, the Treaty on Mutual Legal Assistance in Criminal Matters between Vietnam and the United Kingdom indicates 10 specific areas of assistance, which are:

‘(1) taking the testimony or statements of person, including video conference or television; (2) providing documents, records, and other evidentiary materials; (3) serving documents; (4) locating or identifying persons where required as part of a wider request for evidence; (5) transferring person in custody; (6) executing requests for search or seize; (7) identifying, tracing, restraining, seizing, confiscating and disposal of proceeds of crime and assistance in related proceedings, (8) return of assets; (9) sharing of assets; and (10) such other assistance as may be agreed between Central Authorities.’<sup>701</sup>

To highlight the important role of bilateral arrangements, the United Nations Model Treaty on Mutual Assistance states that ‘the establishment of bilateral and multilateral arrangements for mutual assistance in criminal matters will greatly contribute to the development of more effective international cooperation for the control of criminality.’<sup>702</sup>

Although bilateral cooperative activities includes a variety of investigative assignments such as the apprehension of criminals, crime information exchanges and assistance in taking witness statements, these bilateral activities involving the People’s Police are mainly carried out via cooperation arrangements which are divided into three specific levels: government agreement, agency to agency agreement, and neighbouring border provinces.

To begin with, police cooperation for transnational crime investigation is implemented via bilateral agreements between the Vietnam government and its counterparts. The bilateral agreements include mutual legal assistance treaties and other forms such as the ‘Treaty on Combating Serious and Organised Crimes between Germany

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<sup>700</sup> Joutsen, M., ‘International Instruments on Cooperation in Responding to Transnational Crime’, in Reichel, P. (eds), *Handbook of Transnational Crime & Justice* (Thousand Oaks, London, New Delhi: Sage, 2005) 256

<sup>701</sup> Treaty between the Socialist Republic of Vietnam and the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, signed on 13 January 2009, Cm 7587

<sup>702</sup> United Nations, Model Treaty on Mutual Assistance in Criminal Matters, adopted by the General Assembly on 14 December 1990, Resolution No. A/RES/45/117.



and Vietnam.’<sup>703</sup> The scope and their implementing procedures for investigative cooperation are regulated on treaties or other agreements that both sides agree. As of August 2012, Vietnam had signed 18 bilateral treaties on mutual legal assistance in criminal matters; two bilateral treaties on extradition; and four bilateral treaties on the transfer of sentenced persons. For example, the treaty between the Republic of Korea and Vietnam on Mutual Legal Assistance in Criminal Matters was signed on September 2003, and entered into force in April 2005.<sup>704</sup> For transnational crime investigation, in general, the content of investigative cooperation from this framework varies and ranges from the supply of information, evidence collection to pursuing criminals and executing searches and seizures. These areas of cooperation conform to the Law on Mutual Legal Assistance 2007,<sup>705</sup> which regulates possibilities for criminal legal assistance between Vietnam and foreign countries. Specifically, according to Article 17, criminal legal assistance between Vietnam and foreign countries includes the following categories, which allow Vietnamese investigators to carry out a wide range of assistance as below:<sup>706</sup>

- ‘ - Service of papers, dossiers and documents related to criminal legal assistance;
- Summon of witnesses and experts;
- Collection and supply of evidence;
- Penal liability examination;
- Information sharing;
- Other requests for criminal legal assistance.’<sup>707</sup>

Legality of activities in this type of cooperation is always high, and is accepted by legislation and criminal justice system of both Vietnam and its relevant partner country. However, this type of cooperation still poses some obstacles to transnational crime investigation. First, it is not easy to produce such bilateral agreements between countries in transnational investigation cooperation. It can be seen that while transnational crime may involve any countries in the world, the Vietnamese government has signed only a

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<sup>703</sup> Treaty on Combating Serious and Organised Crimes between Germany and Vietnam, signed on 21 July 1995

<sup>704</sup> Treat between the Republic of Korea and Vietnam on Mutual Legal Assistance in Criminal Matters, signed on 2003, entered into force in 2005

<sup>705</sup> Law on Mutual Legal Assistance, issued on 21 Nov. 2007, No. 08/2007/QH12, articles 17, 20, 24, 25, 26

<sup>706</sup> UNODC, *Assessing Efficiency of Vietnam’s Mutual Legal Assistance and Extradition*, (UNODC: Vietnam Office, 2013) 4

<sup>707</sup> Law on Mutual Legal Assistance, issued on 21 November 2007, No. 08/2007/QH12, article 17

limited number of agreements on transnational investigation cooperation. Second, to request cooperation requires the completion of various procedures, as well as the supply of several legal documents and establishment of grounds before cooperation is undertaken from partners. For example, there may need to be approval from the People's Procuracies for evidential standards that may not be available at an initial stage of transnational crime investigation. Especially, the request for cooperation sometimes originates from covert operations such as wiretapping, which according to the Vietnamese legislation is not yet legalised.<sup>708</sup> Third, it usually takes time to get answers from overseas partners, because this framework usually does not set a time-limit for assistance. In addition, requests must be sent via national authorities which are focus points for the implementation of bilateral treaties while the national focal authority's human resources is limited. According to the Law on Mutual Legal Assistance 2007, and most bilateral signed treaties, Vietnam's national focal authority for implementation of mutual legal assistance treaty is the Supreme People's Procuracy, whose International Relations Department is directly responsible for operational matters.

Next, the Government of Vietnam may also allow transnational investigative cooperation that is based on considering case by case in line with the principle of reciprocity. The Law on Mutual Legal Assistance 2007 points that 'where there are no treaties on legal assistance between Vietnam and foreign countries, legal assistance activities follow the principle of reciprocity, which, however, do not contravene Vietnamese law and conform to international law and practice.'<sup>709</sup> This 'special' arrangement is also a formal and official framework at government level which requests Vietnam and foreign countries to guarantee a provision of the same assistance in future when one receives assistance from the other. For example, if Vietnam would like to request assistance to arrest Vietnamese fugitives in a country which has not signed a bilateral treaty with Vietnam, Vietnam must send the request through diplomatic channels with the promise of arresting those countries' criminals who escape to Vietnam in the future. In this circumstance, instead of the Supreme's People's Procuracy, the Ministry of Foreign Affairs plays a role as national focal authority to send or receive requests for investigative assistances.<sup>710</sup>

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<sup>708</sup> See further in Chapter 7, Criminal Justice Process with regard to Transnational Crime

<sup>709</sup> Law on Mutual Legal Assistance, issued on 21 November 2007, No. 08/2007/QH12, article 4

<sup>710</sup> *Ibid.*, article 66

Thus, transnational police cooperation via government agreement to some extent is useful for the investigation of transnational crimes. But this format makes the Vietnamese policing agencies less autonomous in terms of working with other overseas police forces in using policing powers to investigate transnational crime, because the arrangement for transnational investigative cooperation depends on the participation of agencies other than the police, who are responsible for transnational crime investigation. Commenting on this form of bilateral cooperation, all interviewees both from the police and non-police admitted that any result that is obtained from this form of bilateral cooperation is high in validity, especially for a trial, but some, for example police interviewee IA1, stressed that ‘a bilateral cooperation through government agreements such as legal assistance treaty is not usually used, and the police do not prefer using it because of its complicated and time-consuming procedures.’<sup>711</sup>

Besides government agreements, a less formal level of transnational cooperation in investigative activities is via the agency to agency cooperation framework. Transnational policing thus entails the establishment of both relationships: those between police forces of different countries and relationships between their respective governments.<sup>712</sup> According to Malcolm Anderson, an enormous increase in transnational crime has stimulated direct police-force-to-police-force contacts.<sup>713</sup> This cooperative mechanism allows a direct contact between the People’s Police and overseas law enforcement on the basis of police to police agreements. This interaction can be carried out either via a central point of contact which is usually the International Relation Department of Ministry of Public Security, or by liaison officers deployed by Vietnam in Germany, Russia and Laos, where there are big Vietnamese populations. Police to police cooperation is often the best way to investigate transnational offences, especially for proactive investigations. The reasons are follows. First, this mechanism facilitates the police to not only apply investigative measures to collect evidence about crimes, but also to exchange information between police about suspects. Police cooperation is often an appendix to legal assistance treaties which are very limited in scope.<sup>714</sup> This police relation also does not require legal procedures as strictly as the governmental agreement

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<sup>711</sup> Interviewee IA1

<sup>712</sup> Brodeur, P. J., ‘Transnational Policing and Human rights: A Case study’, in Scheptycki, J. (eds), *Issues in Transnational Policing* (London and New York: Routledge, 2000) 60

<sup>713</sup> Anderson, M., *Policing the World: Interpol and the Politics of International Police Cooperation* (Oxford: Clarendon Press, 1989) 3

<sup>714</sup> *Ibid.*, 151

framework, and is often based on trust between police forces. For example, the People's Police may only send a message to foreign police agencies to ask for information about suspicious persons without having to submit full evidence about their commission of crime. Second, it is not always easy for Vietnam to enter a government agreement such as mutual legal assistance treaty with foreign countries because of the differences in legal systems and political outlooks, which may take a time to negotiate following relevant diplomacy policies. Instead, a police to police agreement can help to overcome gaps or differences between Vietnamese and foreign interests. However, this mechanism has some disadvantages for transnational crime investigation. The level of legality of this mechanism is not as high as that of investigative cooperation via government treaties in terms of criminal proceedings, for example collecting evidence against criminals at courts. Moreover, some agreements are very broad and vague. They may work as a symbolic expression of friendship rather than for purposes of practical investigative operations.

Taking into consideration the importance of police to police cooperation in transnational crime investigation, since early 1990, international cooperation of the People's Police has changed. The police of Vietnam extend diversely their cooperation with police forces from several countries in the world. Some of these countries, such as the United Kingdom, are not the same in political nature, and do not have established relationships. In order to secure these relations, comprehensive legal frameworks on police cooperation are increasingly developed. The police of Vietnam have now established relationships with 60 organisations or organs in charge of fighting against crime from 40 countries.<sup>715</sup> For example, the Ministry of Public Security of Vietnam and the Association of Chief Police Officers of England, Wales & North Ireland signed the Memorandum of Understanding on Cooperation in Combating Serious Crime on 26 September 2006.<sup>716</sup> This Memorandum indicates 11 types of crimes such as narcotic drugs crime, human trafficking and money laundering that both Vietnam and the United Kingdom should strengthen cooperation to investigate.

Several criminal cases have been resolved via this police to police cooperation framework. For example, after the agreement between Ministries of Public Security of both Vietnam and China, on cooperation to pursue fugitives, during the period of October

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<sup>715</sup> Official Website of Ministry of Public Security,

<[http://www.mps.gov.vn/web/guest/ct\\_trangchu/-/vcmsviewcontent/GbkG/2101/2101/13601](http://www.mps.gov.vn/web/guest/ct_trangchu/-/vcmsviewcontent/GbkG/2101/2101/13601)>

<sup>716</sup> Memorandum of Understanding between Ministry of Public Security and Association of Chief Police Officers of England, Wales & North Ireland, signed on 26 September 2006

2014 – July 2015, the police of Vietnam arrested and handed over 19 Chinese wanted persons to the Chinese police; in return, the Chinese police arrested 21 Vietnamese wanted persons.<sup>717</sup> In addition, commenting on the effectiveness of the police to police cooperation, an international respondent indicates in the interview that ‘Most criminal cases that involve Vietnamese living in the UK and need investigative cooperation of the Vietnamese police are mainly conducted via either the National Crime Agency’s liaison officers in Vietnam or cooperation between Interpol Hanoi and Interpol London, though a mutual legal assistance treaty between two countries exist.’<sup>718</sup>

In practice, this mechanism nowadays has extended its dimensions to set up bilateral police cooperation at the provincial and even district level, which is used only for policing at the border provinces, and is called neighbour border province cooperation. Specifically, there is direct cooperation between some Vietnamese northern provinces such as Quang Ninh, Lang Son, Lao Cai with two Chinese provinces, Guangxi and Yunnan. This cooperation also exists between some Vietnamese North West provinces such as Dien Bien and Laos’s border provinces, or between Vietnamese South West provinces such as Tay Ninh and Cambodia’s border provinces. Through this mechanism, the police at border areas will have monthly information exchanging meetings which facilitate investigators of both Vietnam and foreign counterparts to obtain information about relevant crime situation, and sometimes about specific suspects or transnational criminal acts. This framework is increasingly recognised as an effective supporting arrangement to the ministry level,<sup>719</sup> because investigators can see in person each other during their course of investigation. Moreover, it responds timely to criminal activities at the border areas. Vietnam has long borderlines, and significant distances from the capital and other major cities to these border areas. In addition, while this local cooperation framework lays the important foundation for the development of more formal government regulation,<sup>720</sup> it helps to transcend the legal and political divisions between neighbouring

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<sup>717</sup> Hoa Thu, Vietnam and China Cooperation on Pursuing Fugitives, (Petro Times, 19 August 2015),

<<http://petrotimes.vn/phoi-hop-truy-bat-toi-pham-truy-na-viet-nam-trung-quoc-316186.html>>

<sup>718</sup> Interviewee IG6

<sup>719</sup> Quoc Trung and Truong Giang, ‘Signing the Treaty on Preventing and Suppressing Human Trafficking Crimes between Vietnam and China’, (Public Security’s Newspaper, 16 September 2010), <<http://cand.com.vn/thoi-su/Ky-Hiep-dinh-ve-phong-chong-buon-ban-nguoi-giua-Viet-Nam---Trung-Quoc-166617/>>

<sup>720</sup> Gallagher, F., ‘Cross-border Police Cooperation: the Kent Experience’, in Anderson, J., O’Dowd, L., and Wilson, T. (eds), *New Border for a Changing Europe: Cross-border Cooperation and Governance* (London and New York: Routledge, 2003) 113

countries.<sup>721</sup> However, the benefit of this mechanism is restricted to informal assistance. The main disadvantage of this type of neighbour border provincial or district cooperation is that it uses informal cross-border networks of police officers from both sides of the borders by which ‘their functioning depends very much on single persons, whereby knowledge and experiences could be easily “shielded” against scrutiny by superiors or other outside reviewers.’<sup>722</sup> The establishment of cooperative mechanisms for neighbouring provincial polices in border areas is often the result of anti-crime cooperation conferences between the Ministry of Public Security of Vietnam and its counterparts from China, Laos, and Cambodia. For example, the first Conference on Preventing and Combating Crimes between Vietnam and China decided on a cooperation mechanism for border provinces shared between Vietnam and China.<sup>723</sup>

Recently, to enhance benefits of police-police cooperation, the police of Vietnam in partnership with overseas police forces set up a bilateral joint transnational crime center within the structural organisation of the police of Vietnam, which allows overseas police officers, to work closely and in a timely fashion with Vietnamese investigators, in terms of crime intelligence gathering, as well as assistance in specific investigative operations. In addition, Vietnam can receive overseas counterparts’ immediate assistance, in terms of investigative expertise and resources. An example for this model is the Australia-Vietnam Joint Transnational Crime Center. Since the Center was established in 2010, quality of exchanged intelligence as well as concrete results of investigative cooperation between Vietnam and Australia has been increasingly strengthened so that several drug trafficking and high-tech crime cases involved both countries have been detected and investigated successfully.<sup>724</sup>

In assessing the framework of bilateral cooperation, all respondents from the interviews agreed that the current bilateral cooperation plays a major role in cooperation with foreign investigators. The state has made efforts and established various forms of

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<sup>721</sup> Walsh, W., ‘Police Cooperation across the Irish Border: Familiarity Breeding Contempt for Transparency and Accountability’ (2011) 38(2) *Journal of Law and Society*, 301, 302

<sup>722</sup> Nogala, D., ‘Policing Across a Dimorphous Border: Challenge and Innovation at the French-German Border’, (2001) 9(2) *European Journal of Crime, Criminal Law and Criminal Justice* 130,137

<sup>723</sup> Minute of the First Conference on Cooperation to Prevent and Combat Crimes between Vietnam and China, dated in December 2008

<sup>724</sup> Ai Chan, ‘Vietnam and Australia Strengthening Cooperation on Transnational Crime Prevention and Suppression’, (BaoMoi, 18 February 2014), <<http://www.baomoi.com/Viet-Nam-va-Australia-tang-cuong-hop-tac-phong-chong-toi-pham-xuyen-quoc-gia/104/13120923.epi>>

bilateral cooperation. In general these various forms reflect the increasing bilateral cooperation between Vietnam and other countries in dealing with transnational crime. Legislator IB1 interviewed said that ‘I am happy with a progress the police extend their cooperation with other country. Trust between the police forces is increasing which will help create a variety of cooperation that bring more effectiveness to transnational crime investigation. A significant piece of evidence is that nowadays there is foreign police officer working within the foreign police headquarters like a case of Australian-Vietnam Joint Transnational Crime Center, which never happened before’<sup>725</sup>

### 5.2.1.3. Multilateral Arrangements

Multilateral arrangements create a cooperation mechanism that accommodates the interests of several participating parties, instead of interests for only two countries. Peter Andreas and Ethan Nadelmann wrote that ‘Attempts to overcome frictions and facilitate greater cooperation in international crime control increasingly involve not only bilateral but also multilateral arrangements at regional and even global level.’<sup>726</sup> The police of Vietnam have strengthened international cooperation by developing relations with international organisation against crime, for example Interpol and ASEANAPOL; and participating in several multilateral anti-crime initiatives. In crime prevention and criminal justice, Vietnam signed or ratified a total of 25 international conventions or protocols, which range from global conventions, for example United Nations Convention against Transnational Organised Crime, to regional ones, such as the Mutual Legal Assistance Treaty among Like-Minded ASEAN Countries.<sup>727</sup> Moreover, combating transnational crime by the People’s Police is also carried out via cooperation amongst a group of countries, specifically ‘Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region,’<sup>728</sup> or the ‘Mechanism for Anti-Crime Cooperation among Vietnam, Laos and Cambodia’<sup>729</sup>. To coordinate all efforts, an Interpol Department has been set up at the Ministry of Public Security to facilitate the police of Vietnam to make use of multilateral and sometime bilateral arrangements in transnational crime investigation (the

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<sup>725</sup> Interviewee IB1

<sup>726</sup> Andreas, P., and Nadelmann, E., *Policing the Globe: Criminalization and Crime Control in International Relation* (Oxford and New York: Oxford University Press, 2006) 9

<sup>727</sup> UNODC, Vietnam Country Program (2012-2017)

<sup>728</sup> This cooperation mechanism involves six countries, China, Myanmar, Laos, Thailand, Cambodia and Vietnam; <[http://no-trafficking.org/reports\\_docs/commit/commit\\_eng\\_mou.pdf](http://no-trafficking.org/reports_docs/commit/commit_eng_mou.pdf)>

<sup>729</sup> The second Vietnam-Cambodia-Laos Ministerial Meeting on Crime Prevention and Suppression, held in Da Lat, Vietnam from 28 to 31 July 2014

detailed responsibility of Interpol Department in transnational investigative cooperation will be mentioned at the next subsection when discussing the handling of transnational investigative cooperation).

As a result, to tackle transnational crime, in terms of multilateral arrangements, Vietnam has made use of three main models: international and regional institutions; frameworks of international conventions; as well as frameworks of a group of countries. The reasons for this are as follows. First, the multilateral arrangement shows Vietnam's commitment to address transnational crime in wider geographic areas. Second, this mechanism offers opportunities for Vietnam to liaise with countries with which Vietnam has not established bilateral police relations, or rarely cooperated with in order to settle transnational crime cases. In fact, the People's Police cooperated via the Interpol's global communication network (I/24/7) with police forces from some countries or territories in the South America, like Venezuela, in order to investigate transnational drug trafficking routes. In terms of legal issues, multilateral mechanisms support bilateral interactions by compromising the differences which cannot be resolved by the bilateral approach in order to look for the lowest common legal basis that is used for transnational investigative cooperation. Furthermore, multilateral arrangements are used to speed up the process of investigation into transnational crime. In line with international laws, for example the United Nations Model Treaty on Extradition,<sup>730</sup> most mutual legal assistance and extradition treaties signed between Vietnam and foreign countries indicate the application of Interpol arrangements to make a provisional arrest in urgent cases while waiting for official requests via the bilateral treaties. Thus, this mechanism is a foundation to coordinate several countries to participate in transnational crime investigation. For example, in 2006, Vietnam, via Interpol organisation, coordinated with the Republic of Korea, the United States, Thailand and the Philippines to arrest one Vietnamese fugitive, Nguyen Huu Chanh in the Republic of Korea, because he was involved in several plots of bombing attacks in Vietnam, Thailand and the Philippines before fleeing to the United States.<sup>731</sup>

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<sup>730</sup> United Nations Model Treaty on Extradition, dated on 14 December 1990, No. A/RS/45/116, Article 9 states that: 'In case of urgency, the requesting state may apply for provisional arrest of the person sought pending for the presentation of request for extradition. The application shall be transmitted means of facilities of the Interpol Organisation, by post or telegraph, or by any other means affording to a record in writing.'

<sup>731</sup> Investigative record about Nguyen Huu Chanh case, held at National Criminal Records Database



However, the use of multilateral arrangements is still limited. There are several reasons. First, the multilateral arrangement usually originates from international conventions, but the domestic legal basis for implementation of these agreements is not fully available. There is a need to enact international laws within domestic laws beforehand. Sometimes, it is required to wait for guidelines to implement fully.<sup>732</sup> In addition, as with Interpol, information confidentiality is one of the challenges to multilateral cooperation when the information is spreading across several member countries which may not have direct common concerns. Moreover, the rate of responding from foreign countries to the Vietnamese requests for cooperation is low because of a lack of any compulsory mandate and accountability via multilateral relations.

In summary, transnational investigative cooperation varies through different arrangements between Vietnam and foreign countries. Each type of relationship shows strong and weak points when applied to transnational crime investigation. There are no regulations that specify which arrangement is better than the other. Choices to apply these arrangements are dependent upon the knowledge and experience of the head of investigating agency which handles the investigation. Interviews with investigators and procurators confirmed that not every investigating agencies or investigators were aware of all different modalities and processes for cooperating with oversea law enforcement agencies. For example, according to interviewee ID2, ‘there were investigators who did not know where and how to make an extradition request with foreign countries when they handled fugitive investigations.’<sup>733</sup> However, to assess different cooperative forms, interviewee ID2 said that:

‘In the long term, they expect more usage of government agreement, such as mutual legal assistance treaty, to cooperate with oversea law enforcement agencies, in terms of transnational crime investigation, because the legitimacy of its result is high, and obtained evidence could be easily used at courts. But, at the moment, Interpol or other less formal cooperation mechanism is best effective for transnational crime investigation in Vietnam. The reason for this is that many transnational crime investigations by the police of Vietnam currently involve countries where Vietnam has not signed legal assistance treaty with, whereas police to police cooperation such as Interpol cooperation could facilitate Vietnam

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<sup>732</sup> Law on Conclusion, Accession to and Implementation of Treaties, issued on 14 June 2005, No. 41/2005/QH11, chapter VII

<sup>733</sup> Interviewee ID2

to cooperate with those countries without a government agreement. Moreover, the cooperating procedures in the police to police cooperation is not complicated. In addition, in terms of the organisational structure, there is a separate department in charge of Interpol cooperation (now named as the International Cooperation Department) that helps investigators cooperate with their counterparts.<sup>734</sup>

This assessment, which was shared by the majority of individuals interviewed, to some extent reflects the Vietnamese transnational policing practices which are influenced by the ‘ASEAN culture’ in which policing issues are dealt with by non-legalistic, informal style in decision making.<sup>735</sup>

The next subsection will look at how these transnational frameworks are used for investigative cooperation by the People’s Police and their investigators.

### **5.2.2. Domestic Processes for Transnational Investigative Cooperation**

As analysed above in subsection 5.2.1., different models of transnational cooperation can be used by the People’s Police to interact with foreign police forces to investigate transnational crime. To do this, there may be the involvement of different police departments within the People’s Police, or with other domestic agencies such as the Supreme’s People’s Procuracy. It is necessary to establish a sensible working relation between these agencies. Their relationships will help to develop effective investigating activities which mobilise resources and powers from different agencies. As a result, the most efficient use of their resources will be obtained. Moreover, a conflict in competence between police agencies is avoided or resolved. Thus, this section will investigate this domestic relationship in order to verify the effectiveness of process when interacting with foreign counterparts.

The previous section 5.1 indicated that, according to the Vietnamese legislation, investigating police agencies at all levels are competent to investigate transnational offenses. Their competence empowers them to cooperate with foreign law enforcement agencies in transnational crime investigations. However, this transnational investigative cooperation should be executed in line with certain processes. The investigating police agency of each level follows different procedures. This means that the Central Investigating Police Agency and the Provincial-level Investigating Police Agency may

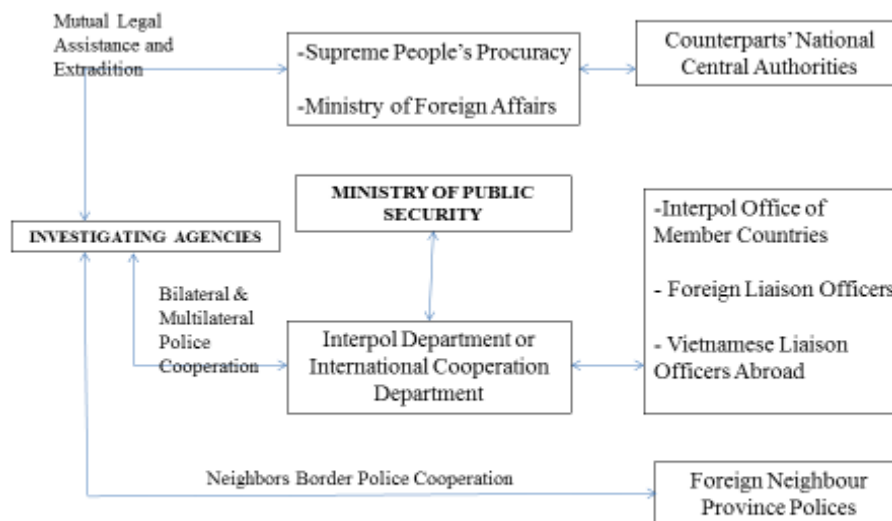
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<sup>734</sup> Interviewees ID2

<sup>735</sup> See section 4.3.5, ASEAN Ethical Issues.

complete different steps while they are required to follow the same process in order to cooperate with overseas partners. The details are as follows.

**Table 5.5. Different Handling Processes to Interact with Foreign Law Enforcement Agencies**



In general, when the investigating agency confronts an issue that may involve transnational investigative cooperation, for example the verification of witness statements about a foreign suspect who is involved in a drug trafficking ring and is residing outside of Vietnam, the common step the investigating agencies must take is to consider cooperative opportunities with overseas partners. There is a difference in handling process between one that entirely concerns formal requests via bilateral mutual legal assistance treaties or agreements, and the other that is just about police to police cooperative operation. (see Table 5.5). Once the nature of a request is determined as mutual legal assistance activities in criminal proceedings, the request is sent to the national central authorities such as the Supreme's People's Procuracy in case of a bilateral treaty's existence between Vietnam and that foreign country; or the Ministry of Foreign Affairs in case of a mutual legal treaty's absence and the application of the principle of reciprocity. These national central authorities of Vietnam will contact their partner's focal agency in line with the requirements of procedures stipulated in the Law on Mutual Legal Assistance as well as the signed bilateral treaties. This will be further analysed in Chapter Seven, Criminal Justice Process with regard to Transnational Crime.

For investigative activities via police to police cooperation mechanisms, information will be sent to the Interpol Department from the investigating agencies by written letter. In September 2014, the Interpol Department was merged into the International Cooperation Department of Ministry of Public Security following Ministerial Decision No. 2755/QD-BCA-X11 dated on 2 June 2014. However, investigative regulations and procedures via the Interpol cooperation mechanism are still valid in transnational crime investigation operations, and in practice it retains the name of the Vietnam Interpol Department. For example, Guidance No.2545/C41-C55 dated 12/07/2011 on International Fugitive Pursuing Coordination through Interpol Channel, and Guidance No. 65/C41-C55 dated 5/01/2012 on Handling of Cases with Foreign Elements via Interpol Cooperation Channel both officially assign the Vietnam Interpol Department 'to act as focal point in receiving and exchanging information between national units and international polices for effective tackling of cases involving foreign or transnational elements.'<sup>736</sup> A number of things that are reviewed by the Interpol Department include the priority of the case and its legal foundation for cooperation, even logistic conditions before information is exchanged with their counterparts who may be liaison officers or Interpol offices of foreign countries, and sometimes the Interpol Secretariat. At present, there are no specific regulations that classify information that should be sent separately to these different counterparts. It depends on the decision of the director of the Interpol Department. Furthermore, the case is also usually considered and analysed via the Case Management System of the Interpol Department that is linked with the National Criminal Records Database of the Criminal Archive Police Department. The reason for this is to identify possible links with other transnational crime related cases that may be handled by other police departments. When the case involves several crimes, Vietnam's provinces, or politically sensitive issues, the Interpol Department directly or in cooperation with the investigating agency reports the request of the investigating agency to the Minister of Public Security for further advice or formal approval before communicating with foreign partners. Especially, when investigation teams are sent abroad, the case must be approved by the Minister. In that case, the assistance request from investigating agencies, other than Central Investigating Police Agency, for example Provincial-level Investigating Police Agency, will be referred by the Head of Central

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<sup>736</sup> General Department on Crime Prevention and Suppression, Guidance No. 2545/C41-C55 dated 12/07/2011 and Guidance No. 65/C41-C55 dated on 05/01/.2012.

Investigating Police Agency. Similarly, cases handled by District-level Investigating Police Agencies may be considered by the head of a Provincial-level Investigating Police Agency which directly controls the District-level Investigating Agency in terms of administrative management. All these activities are recorded in the Case Management System of the Interpol Department.

When responses from foreign partners are received, the Interpol Department will analyse them to assess their quality, which may be later used for review of cooperation relations between Vietnam and those countries' police forces. In addition, the information is also translated into the Vietnamese language because a majority of leaders and investigators do not speak foreign languages. After doing the analysis, if there is an issue that may cause serious impacts on national interests or have political sensitivity, the information will be reported to the Minister for his advice before further progress. This advice will determine whether transnational investigative cooperation should continue or not. Apart from this situation, the reply from foreign partners is automatically sent to the agency which originally requested the assistance.

When foreign law enforcement agencies actively provide information about transnational crime, or requests assistance from the police of Vietnam in crime investigations, such as criminal record checks or clarification of suspicious issues, this information will generally follow the same process as in the case when replies of foreign partners are received. Legal grounds to start investigation activity in the Vietnamese territory are considered by the heads of investigating agencies who are assigned to handle the cases. The heads of investigating agencies also decide whether other police departments which are not investigating agencies should join in the operations. However, there is also an exception in which overseas information may not be sent to the investigating bodies such as the Criminal Police Department after the Interpol Department receives or processes the information from foreign counterparts. Instead, information may be directly forwarded from the Interpol Department to other functional police departments such as the Criminal Archive Police Department or provincial Departments of Public Security, which are not the specialised investigating agencies. For example, when an assistance request simply asks for criminal records or background checks on someone, the overseas request will be directly sent from the Interpol Department to the Criminal Archives Police Department.

In a case where the transnational investigative activities demand instant cooperation, the Interpol Department and the Central Investigating Police Agency may

give an assignment to specific officers who will join with overseas investigators to form a working team. In this case, the working team may communicate directly with overseas investigators by using Interpol Department's facilities. This type of operation rarely happens however, there is no clear process for it. These are usually linked to concrete cases in which the Director of Interpol Department will make a decision.

With regard to neighbouring border police cooperation, no concrete steps are defined. However, in general, this cooperation should be periodically summarised and reported to the Interpol Department for review such as in six monthly or annual progress reports. The reason why there is no specific procedure for this type of cooperation is because meetings between investigators of both sides are subject to the discretion of heads of both sides of the provincial police department at the border areas. There is no fixed time or place to set up the meeting. Both sides could contact each other by telephone or any other available means. Moreover, in terms of organisation, there are no officers who are professionally assigned to be in charge of doing this arrangement, although certain investigators may have personal contacts and know well the investigators of their overseas counterpart.

In summary, in Vietnam, the handling process is, to some extent, constructed to facilitate Vietnamese investigators to cooperate with their overseas partners in the investigation of transnational crime. The analysis of this process indicates that transnational investigation cooperation is heavily supervised and affected by the central government's authorities such as the Ministry of Public Security. Commenting on this handling process, the fieldwork indicated that there are still different views. Some interviewees, especially investigators, did not like the existing process because it might require those who handle transnational crime investigation to spend more time doing paperwork or completing administrative procedures, for example a preparation of a report on the investigation, rather than doing actual investigative work.<sup>737</sup> Interviewee IA11 from local police stressed that 'generally, the Ministry wants to centralise and sets the rules for transnational investigative cooperation. However, not all investigators are familiar the specific steps in the process of coordinating with foreign investigators. Moreover, I may feel I do not have enough autonomy. Instead, I depend on intermediate bodies such as the Interpol Department (now also known as the International Cooperation Department) when working with foreign partners. This feeling makes me be reluctant to

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<sup>737</sup> Interviewee IA11, IA12

request foreign cooperation for my crime investigation.’<sup>738</sup> However, a large number of individuals, who were interviewed, especially those who are police leaders and procurators, fully agree with the existing process. For example, interviewee IA8 said that:

‘I totally think that the process is suitable for both investigating agency structure and its available resources. Moreover, that process will help leaders at central level ensure their command within a uniform police force. However, I must say that to some extent it is necessary to improve the implementation of that process by investing more resources for intermediate agencies such as the International Cooperation Department, and making investigating agencies and their investigators understand well about requirements of the process. As a result, investigators can easily apply the process for their investigation while they still obey every requirement of the process.’<sup>739</sup>

### **5.2.3. Transnational Investigating Cooperation and Executive’s Control**

The success of transnational crime investigations is not only explained by the relationships between law enforcement agencies or police, but also by external relationships of the police, which are, in general, defined in two relevant relationships: one is about relationships with executives; the other concerns relationships with procurators. The latter relationship concerns the supervision by procurators that is to ensure the protection of fairness in transnational policing, as well as of rights of people. The former relationship usually focuses on political controls which are given by administrative offices who are more concerned with national interests and the stability of the State and the Party. Although both these relationships affect in different ways the autonomy and independence of the Vietnamese police’s transnational policing operations, this subsection will mainly investigate the relationship between the police and the executive with regard to investigating activities, because ‘questions about how transnational policing is held to account politically are no less important than questions about governance of the global system.’<sup>740</sup> Moreover, transnational police cooperation touches on sensitivities concerning sovereignty and the territorial principle in which government’s pressure and strong views relating to causes and the relative importance of

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<sup>738</sup> Interviewee IA11

<sup>739</sup> Interviewees IA8, ID1

<sup>740</sup> Scheptycki, J., ‘The ‘Drug War’: Learning from the Paradigm Example of Transnational Policing’, in Scheptycki, J. (eds.), *Issues in Transnational Policing* (London and New York: Routledge, 2000) 221

certain types of crime may encourage development of cooperation on certain issues whereas not on the other.<sup>741</sup> As for the relationship between procurators and police investigator, that is part of a discussion about criminal process, including criminal justice system which will be further analysed at the Chapter Seven.

Although heads of investigating agencies and their investigators play important roles in the choice of suitable models of cooperation, transnational investigative cooperation by the police of Vietnam is strictly supervised and directed by the Central Government of Vietnam which is led by the Vietnam Communist Party. Moreover, the apparatus of investigating agencies is usually established under state administrative organs. For example, the Central Investigating Police Agency is under the Ministry of Public Security. This location may result in a situation in which there is no sharp division between an administrative function with its feature of ‘mandate - obedience’<sup>742</sup>, and a judicial function with the main feature of ‘independence-only observing the laws’ in transnational investigative cooperation.<sup>743</sup> Although, according to Malcom Anderson, there is no general agreement between countries about the boundary between police and administrative functions,<sup>744</sup> it is necessary to look at some influences from executive officers on transnational policing activities. The details can be illustrated as follows.

First, there is no clear distinction as to what constitutes ‘full independence’ in relationships between the implementation of political policies and transnational police operations. Although transnational investigative cooperation is an activity within the functions of investigating agencies, politicians still exert great influence on transnational police operations. The State and Party direct transnational investigative activities by their resolutions. The Party has a strong influence in relation to the appointment of heads of investigating agencies. The Party Cell’s assessment of a nominated individual is a crucial source to decide an appointment to the assignment. To supervise police and justice work, Internal Affairs Commissions were established under the organisational structure of the

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<sup>741</sup> Anderson, M., *Policing the World: Interpol and the Politics of International Police Cooperation* (Oxford: Clarendon Press, 1989) 4

<sup>742</sup> The phrase ‘Mandate – Obedience’ indicates a relation between one who has a commanding power to order and the other who obeys that order without conditions. This ‘one way’, unequal relationship usually happens between a leader and staffs within an administrative organisation.

<sup>743</sup> Pham Thi Hoai Bac, Some Obstacles in the Implementation of Criminal Procedures Code 2003, < <http://noichinh.vn/nghien-cuu-trao-doi/201308/mot-so-kho-khan-vuong-mac-trong-qua-trinh-thi-hanh-bo-luat-to-tung-hinh-su-nam-2003-292172/>>

<sup>744</sup> Anderson, M., *Policing the World: Interpol and the Politics of International Police Cooperation* (Oxford: Clarendon Press, 1989)5



Vietnam Communist Party,<sup>745</sup> and serious or large criminal cases including transnational crime cases may be required to report to the Internal Affairs Commissions. The reason for this is that the investigation of transnational crime involves sovereignty and the national interests of Vietnam in a way that impacts not only foreign affairs with other countries, but also on the normal operations of the State's organs. The State and Party may believe that without supervision of the State and Party, these transnational activities could be abused by foreign counterparts by intervening in the internal affairs of Vietnam. Moreover, in practice, to carry out mutual legal assistance and/ or extradition activities, it is necessary for the police to take consider the foreign policy of the Party and State as a requirement, though this requirement is not in the statute.<sup>746</sup> In the meantime, the principle of reciprocity is mentioned as one of two principles to master the mutual legal assistance activities in the Vietnamese legislation.<sup>747</sup> However, there is no concrete explanation regarding the implementation of principle of reciprocity. Instead, it is interpreted in specific cases which sometimes causes unevenness in its application. In this regard, all international respondents answered in the interviews that one of the important elements that guarantee the cooperation with the Vietnamese investigating agencies is building a good relationship with heads of the investigating agencies, as well as administrative leaders of those agencies. Interviewee IG2 said that:

‘In Vietnam, the quality and result of requests for investigative cooperation may be subject to the personal relationship between leaders of the police and their partners. When trust is established, the leaders will prioritise and mobilise resources to deal with the task of partners. Secret intelligence on transnational crime may be willingly shared with each other. In the meantime, cooperative procedures could be streamlined, for example an investigative result may be informally informed to the partner via telephone before a formal answer is sent out in the note. However, admittedly, this good relationship with the leaders could negatively influence legitimacy of the investigation. For example, the leaders may

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<sup>745</sup> Vietnamese Communist Party's the Central Committee, Decision No. 158-QD/TW, issued on 28 November 2012

<sup>746</sup> UNODC, *Assessing Efficiency of Vietnam's Mutual Legal Assistance and Extradition*, (UNODC: Vietnam Office, 2013) 4

<sup>747</sup> Law on Legal Assistance, issued on 21 Nov. 2011, No. 08/2007/QH12, art. 4; See further in Chapter 7

allow to conduct an investigation immediately following crime intelligence shared by the partner, without sufficient reasons and criteria.<sup>748</sup>

Transnational crime investigating activities are important tasks. These activities shall be carried out through a national focal point at the Ministry of Public Security, especially the International Cooperation Department. Cooperating via national points of contact is a way to ensure a centralisation of the power of the State and Party in transnational police cooperation, particularly in terms of determination and management of logistics and human resources. For example, the Minister holds the right to approve officers being sent abroad to cooperate with foreign partners. The role of national points of contact helps to avoid duplication of work, for example by running the Cases Management Database for transnational crime investigations. Moreover, while implementing procedures are streamlined, coordination between different involved agencies will be easier in working with overseas partners in transnational crime investigation.

However, some problems arise from the centralisation of governance in transnational police cooperation. Responsibility for transnational police cooperation seems to belong to a small number of individuals who are assigned at national central authorities to deal with foreign counterparts. This division makes more and more Vietnamese investigators less familiar as well as offering few opportunities for working with overseas counterparts when investigating transnational crime. Transnational policing activities are thought of as complicated activities that some investigators are reluctant to carry out. The investigators may find that working with overseas partners is difficult or strange, because of insufficient knowledge of foreign languages, or a lack of experience and skills in transnational policing. As a result, several transnational crime investigations are not expanded into other countries, not only because of lack of finance to carry out international investigative cooperation, but also because investigators do not know if the international investigative expansion could help resolve the cases. Instead, these transnational crime cases are only investigated in the way in which domestic crimes are handled. Accordingly, in these cases, the nature of transnational crime may not be verified fully so that the case may not be effectively solved. Moreover, centralised governance in transnational investigative cooperation may cause unequal provision of financial resources as well as the deployment of experienced investigators in relation to

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<sup>748</sup> Interviewee IG2

transnational crime investigation to investigating agencies nationwide. In the meantime, other disadvantages regarding bureaucracy may cause transnational crime issues to not be responded to immediately. For example, the priority and necessity for information exchange with overseas counterparts depends on those who are not investigators of the case. These middle-level officers may not know the urgency of the case as well as those investigating the case.

In addition, while centralisation is emphasised in governing the transnational investigative cooperation, the existence of several national points of contact which are used separately for different cooperation arrangements makes difficulty for transnational crime investigations. The same requests may sometimes be sent to all central national authorities to request overseas assistances to investigate crimes, because Vietnamese investigators may not be able to distinguish between these modalities of cooperation mechanism. Moreover, they usually tend to focus on the results of investigation cooperation rather than the ways this cooperation should be carried out. This situation may lead to work duplication, and sometimes crime intelligence may be disclosed to unauthorized institutions. Besides, there are also divergent regulations regarding central national authorities for transnational investigation cooperation. For example, according to the Law on Mutual Legal Assistance, the People's Supremes' Procuracy is a central national authority for the implementation of mutual legal assistance in criminal matters.<sup>749</sup> However, the Ministry of Public Security is appointed as a central national authority when the Mutual Legal Assistance Treaty for ASEAN Countries of 19 November 2004 applies.<sup>750</sup> In this sense, to avoid this obstacle, personal contacts between investigators, especially in police networks, are increasingly applied in order to investigate transnational crime. According to Rutsel Silvestre J. Martha, the perceived advantages of circumventing judicial or political scrutiny at the relevant stage of investigation is one of the major driving forces behind the use of consensual informal arrangements.<sup>751</sup>

In summary, the emphasis on the relationship between the investigating agencies and the executive has serious implications in terms of the legality and morality of transnational policing. For the success of the investigation of transnational crime,

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<sup>749</sup> Law on Mutual Legal Assistance, issued on 21 November 2007, No. 08/2007/QH12, article 22

<sup>750</sup> Mutual Legal Assistance Treaty among Like-Minded ASEAN Countries, signed on 19 Nov. 2004.

<sup>751</sup> Martha, R., *The Legal Foundation of Interpol* (Portland: Hart Publishing, 2010) 15

investigating agencies should take into account this external relationship in order to both meet the interests of the central government and the objectives of transnational policing activities, one of which is protecting the rights and liberties of people. Further to this comment, Mathieu Deflem has pointed out that police-external conditions are considered to influence the degree of institutional dependence of the police, in turn affecting the form and modalities of international policing.<sup>752</sup>

### 5.3. Possible Policy Transfer from England and Wales

The police in England and Wales are localised into 43 different police forces. In general, a police force, except in London, and its priorities are directed by the ‘new quadripartite structure’<sup>753</sup> (Home Office, Chief Constable, Police and Crime Commissioner, Police and Crime Panel), in which the Police and Crime Commissioner is elected by the geographical area’s population. The Police and Crime Commissioners who represents the voice of public interest will set out policing priorities which the Chief Constable must address.<sup>754</sup> At the same time, the Police and Crime Panel is a committee of relevant local authority or a joint committee of the relevant local authorities that has a dual role to both ‘scrutinise’ and support the Police and crime Commissioner.<sup>755</sup> Next, the Chief Constable, as a professional officer, focuses on daily police work, including crime investigating activities, and directly runs the police force. In other words, the Chief Constable has independence, and uses his/her discretion and professional judgement to manage how the police force achieves its objectives.<sup>756</sup> Meanwhile, the Home Office sets out the British Government’s plan to cut crime, for example the Strategic Policing Requirement, which requires local police forces to prepare policing capabilities and resources for national threats, and to balance between localism and meeting national

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<sup>752</sup> Deflem, M., *Policing World Society: Historical Foundations of International Police Cooperation* (Oxford: Oxford University Press, 2002) 220

<sup>753</sup> Following the Police Reform and Social Responsibility Act 2011, this ‘new quadripartite structure’ replaces the tripartite mechanism (Home Office, Chief Constable and Local Police Authority) in police governance which was established in 1964

<sup>754</sup> Her Majesty’s Inspectorate of Constabulary, *The Strategic Policing Requirement: An Inspection of the Arrangements that Police Forces Have in Place to Meet the Strategic Policing Requirement*, HMIC 2014, <<http://www.justiceinspectores.gov.uk/hmic/wp-content/uploads/2014/04/an-inspection-of-the-arrangements-that-police-forces-have-in-place-to-meet-the-strategic-policing-requirement.pdf>>

<sup>755</sup> Lister, S., ‘Scrutinising the Role of the Police and Crime Panel in the New Era of Police Governance in England and Wales’ (2014) 13(1) *Safer Communities* 22, 31

<sup>756</sup> Home Office, *A New Approach to Fighting Crime*, issued on 2 March 2011

requirements.<sup>757</sup> In this sense, in comparison with Vietnam, there are some reflection points as potential lessons to be learned for Vietnam with regard to policing of transnational crime. Specifically, there may be two lessons. One is about the demarcation between central and local. The other lesson is about strategic requirements which, along with the idea of central and locality, say about central's control or independence from executive's control.

With regard to the structural organisation and assignments of central and local police forces, there are some similarities between Vietnam and England and Wales in terms of responding to transnational crime issues. In general, both central police and local police forces have responsibility for the policing of transnational crime. In areas of national concern, these are to some extent also shaped from the centre. In Britain, the Strategic Policing Requirement sets out the appropriate policing capabilities that is required to address national threats.<sup>758</sup> Some types of transnational crime such as transnational organised crime are allocated to the National Crime Agency, not to local policing forces. 'It requires a multi-agency national response.'<sup>759</sup> Although not many structures are at the regional level as in Vietnam,<sup>760</sup> it is interesting that several functions relating to transnational crime are centralised to an unusual extent for British policing. The reason is that there is concern for national security or national interests. For example, organised crime has the potential to disrupt the national economy. So, central governments are interested in taking a role to address it. Moreover, it is also a matter of efficiency which streamlines for all police agencies to easily cooperate with foreign law enforcement or international organisations such as Interpol by identifying a national police agency or point of contact that is responsible for the issue. In this way, Rob Mawby has said that the main impulse for the creation of law enforcement units at the national level was given by the need for more efficiency in order to target supra-local crimes such as organised crime and transnational crime.<sup>761</sup> Furthermore, even the establishment of the

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<sup>757</sup> HM Government, the Strategic Policing Requirement, July 2012

<sup>758</sup> Home Office, The Strategic Policing Requirements, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117445/strategic-policing-requirement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117445/strategic-policing-requirement.pdf)>

<sup>759</sup> Home Office, The National Crime Agency: A Plan for the Creation of a National Crime-Fighting Capability, Cm8097, June 2011

<sup>760</sup> Crime and Courts Act 2013, Part 1. See previously Police Act 1997; Serious Organised Crime and Police Act 2005

<sup>761</sup> Mawby, R., *Policing Across the World: Issues for the Twenty-first Century* (Oxon: Routledge, 1999) 63

specialist agency like the National Crime Agency which is overseen by the Home Office is unusual, because policing in the United Kingdom is built generally from the locality, but it is an imperative because the United Kingdom is a wealthy country with a budget for transnational crime. The National Crime Agency as a multi-agency intelligence hub, will develop a single authoritative intelligence picture of serious and organised crime, including transnational crimes in the UK, and coordinates law enforcement responses to those crimes.<sup>762</sup> This specialist agency is transparent and accounts for its activities by report. There is a clear division of functions which facilitate to establish appropriate working relationships between the specialist agency and other law enforcement organisations with a view to obtaining common goals and addressing the national threats.

However, some differences can be seen in the investigating systems for the investigation of transnational crime between Vietnam and England and Wales. The first is the size of structure for the investigation of transnational crime. In Vietnam, the size of the organisational agency at the central level is always larger than the ones at the provincial and district levels. There are more police components (with five specialized components) in the Central Investigating Police Agency than that (with less than five components) in the Provincial-level Investigating Police Agency or the District-level Investigating Police Agency. (See Table 5.4). By comparison, for England and Wales, the central agency is small, but overall it is still important. The second is about resources that are allocated to deal with transnational crime. Resources for transnational crime investigation are not permanently set out, and there is no clear policy about resources which are dedicated to policing transnational crime in Vietnam, whereas in Britain the Strategic Policing Requirement clearly asks the local policing to demonstrate commitments to address and reserve resources for, national concerns such as transnational crime, alongside local priorities. The role of the Police and Crime Commissioner contributes to politically compromising these missions by holding their Chief Constable to account for the totality of their policing – both local and national.<sup>763</sup> In addition, in Vietnam, to provide resources for policing, even for local policing's priorities, is the responsibility of the central government in consultation with local authority's needs. Annually, the local police forces such as provincial polices will submit their plans, which

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<sup>762</sup> Home Office, Serious and Organised Crime Strategy (Cm 8715, 2013) 28

<sup>763</sup> Home Office, The Strategic Policing Requirements, page 1, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117445/strategic-policing-requirement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117445/strategic-policing-requirement.pdf)>

are a foundation for the Ministry to make decisions on resource allocation. England and Wales however in contrast build policing from the bottom up. Local policing's priorities are decided locally. While they decide resource allocation for local policing's priorities, they must also set out appropriate resources to take care of national issues, including transnational crime.

Although, in the UK, the policing of transnational crime, such as transnational organised crime, is mainly taken up by a national body - the National Crime Agency, local police forces also have responsibility to respond to transnational crime. This shared responsibility is conducted under a co-ordinated effort between national bodies and local police forces. Central control is implemented through strategic policing requirements to mobilise resources and expertise from different local police forces to investigate transnational crime. In the meantime, national bodies such as the National Crime Agency provide specialist capabilities that a single local police force may not have, while coordinating with the local police force to investigate transnational crime. This national body 'has authority to undertake tasking and coordinating of the police and other law enforcement agencies to ensure'<sup>764</sup> the effective responses to transnational crime. For example, the National Crime Agency runs national crime databases, such as on human trafficking, and provides criminal intelligence to operations undertaken by the local police force. Moreover, it may assist local police forces to contact overseas police forces through its Police Liaison Officer Network worldwide.

In terms of independence from executive's control, although there will be executive involvement in setting out strategic priorities,<sup>765</sup> it seems that transnational crime investigations are still more independent in the UK than in Vietnam. This is because in Vietnam the police are more directly an instrument of the State, and they are politically influenced by the Central level, for example the Ministry of Public Security, and the political party (the Communist Party).<sup>766</sup> In contrast, in the UK the police have 'constabulary independence'.<sup>767</sup> With this so-called doctrine of 'Constabulary Independence', the British policing tradition places the services under the rule of law,

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<sup>764</sup> Home Office, *The National Crime Agency: A Plan for the Creation of a National Crime-Fighting Capability*, (Cm8097, 2011)

<sup>765</sup> Crime and Courts Act 2013, s.3

<sup>766</sup> See further discussion on this matter at section 5.2.3 (Transnational Investigating Cooperation and Executive's Control); section 4.3 (Ethical Policing in the Context of Vietnam)

<sup>767</sup> Stenning, P., 'Constabulary Independence' in Newburn, T. and Neyroud, P., *Dictionary of Policing* (London and New York: Routledge, 2013)

regardless of any partisan political or personal considerations.<sup>768</sup> In addition, the British government does not interfere or directly run operational work of the police. The Home Office may influence policy, but it cannot interfere with the police on specific operations. At the same times, there are agencies such as Her Majesty's Inspectorate of Constabulary (HMIC), National Police Chiefs' Council (NPCC), and National College of Policing which are not entirely police bodies. But these agencies provide a 'buffer' between the politic institutions and the police, and they play an important role in police operations by giving instructions, guidance and training. HMIC, which is independent of Government and the police, assesses police forces and policing across activities from neighbourhood teams to serious crime and the fight against terrorism – in the public interest.<sup>769</sup> The NPCC, which replaced ACPO on 1<sup>st</sup> April 2015, enables the independent chief constables and their forces to work together to improve policing for the public.<sup>770</sup> The College of Policing is a professional body that sets standards and develop those working for policing.<sup>771</sup>

Taking the National Crime Agency as an example, the National Crime Agency is accountable to the Home Office, and through Home Office to Parliament, but its Director General has independent operational instruction and control over NCA activities.<sup>772</sup> In the local institutional arrangement, local police forces are accountable to local priorities. Whilst these forces respond to transnational crime as a national threat, local priorities are still respected. However, 'giving Chief Constables a clear line of accountability to directly elected Police and Crime Commissioners will not cut across their operational independence and duty to act without fear and favour. In fact, Chief Constables will have greater professional freedom to take operational decisions to meet the priorities set for them by their local community-via their Crime Commissioner.'<sup>773</sup> In the meantime, the UK Government's approach to tackling crime gives far greater freedom to the police and their partners to do their jobs and use discretion.<sup>774</sup> The decisions of police officers should

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<sup>768</sup> Chakrabarti, S., 'A Thinning Blue Line? Police Independence and the Rule of Law' (2008) 2(3) Policing 367, 369

<sup>769</sup> See the Official Website of HMIC

<sup>770</sup> See the Official Website of NPCC

<sup>771</sup> See the Official Website of College of Policing

<sup>772</sup> Home Office, Revised Framework document for the National Crime Agency, presented to Parliament pursuant to paragraph 6(2)(c) of schedule 2 of the Crime and Courts Act 2013, May 2015

<sup>773</sup> Home Office, Policing in the 21<sup>st</sup> Century: Reconnecting Police and the People, Cm7925, p.2.13

<sup>774</sup> Home Office, A New Approach to Fighting Crime, issued on 2 March 2011



be answerable to the law and the law alone, and not to local or national democratic institutions.<sup>775</sup> The Police and Crime Commissioners, as indicated in The Policing Protocol Order 2011, must set the strategic direction and objectives of the force, but not must interfere in operational decisions.<sup>776</sup> Moreover, according to the Police Reform and Social Responsibility Act 2011, the Police and Crime Commissioner may influence a Chief Constable, for example to suspend from duty a Chief Constable,<sup>777</sup> but the direction and control of the police force is the Chief Constable's decision, not the Police and Crime Commissioner's.<sup>778</sup>

In summary, a good lesson that Vietnam may learn from England and Wales by way of the process of policy transfer is the need for clear lines of demarcation between central and local policing in terms of responsibility for investigating transnational crime. In addition, the police have independence from political control, which is called 'constabulary independence', in investigating transnational crime.

#### 5.4. Conclusion

This chapter has analysed the institutional policing arrangements that are responsible for transnational crime investigations. Specifically, based on extensive documentary sources, this analysis has explored the policing system for the investigation of transnational crimes in Vietnam by considering the strengths and weaknesses of policing institutional structures, resources and their inter-relationships with the administrative leadership and the international law enforcement community as well. At the same time, on the basis of the interview data, this analysis has also examined the interviewee's attitudes towards existing policing institutional systems at central, province and district levels, and their arrangements with foreign counterparts. The survey identified a gap between a demand of investigating agencies and a practical application of the existing policing institutional arrangements with regard to transnational crime. As a result, the following is indicated.

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<sup>775</sup> R v Commissioner of Police for the Metropolis, ex-parte Blackburn [1968] 2 Q.B. 118, C.A. at 136

<sup>776</sup> Lister, S., 'The New Politics of the Police: Police and Crime Commissioners and the "Operational Independence" of the Police' (2013) 7(3) Policing 1, 5

<sup>777</sup> Police Reform and Social Responsibility Act 2011, s. 38

<sup>778</sup> Winsor, T., *Operational Independence and the New Accountability of Policing*, <<https://www.justiceinspectors.gov.uk/hmic/media/hmic-tom-winsor-john-harris-memorial-lecture.pdf>>

In general, there has been a shift in policing, indicating that transnational policing is increasingly becoming an important task in Vietnam. Transnational investigative cooperation involving the Vietnamese police is a natural and inevitable response to transnational crime. Moreover, this also reflects indications of change in Vietnam's position and ways in dealing with transnational issues such as transnational crime which require transnational cooperation with foreign countries and international organisations. While transnational policing is considered as giving away some autonomy in policing, transnational policing is established by strict supervision of central government, specifically the Vietnam Communist Party and Ministry of Public Security. As well as the existence of transnational investigative cooperation in 'horizontal directions' such as between Vietnam's local police and other neighbouring countries, transnational crime investigations involve several ways of cooperation that are established via central level agencies between Vietnam and foreign countries. The external relationship of the police executive overseers plays a central part in autonomy and independence of transnational policing activities, especially transnational investigative cooperation.

The organisational agencies for the investigation of transnational crime do not only exist at national level (Central Investigating Police Agency), but also at the levels of provinces and districts (Provincial-level Investigating Police Agencies and District-level Investigating Agencies respectively). Due to the structure of the investigating police system, and the organisation of the People's Police as a national police force, transnational crime investigating activities should be directed by the central police headquarters so as to enable resources and focus on handling transnational crime to be applied quickly. This working mechanism also reflects the principles of organisation and operation of the People's Public Security forces that 'are placed under the absolute, direct and comprehensive leadership of the Communist Party of Vietnam and the supreme command of the State President, the unified management by the Government and the direct command and management by the Public Security Minister.'<sup>779</sup>

However, the investigating agency system in the People's Police of Vietnam becomes more complicated when this system specialises in specific offences. There are units that are in charge of transnational crime within the Central Investigating Police Agency or Provincial-level Investigating Police Agencies. These units mobilise and

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<sup>779</sup> Law on People's Public Security Forces, article 5(1), issued on 29 Nov. 2005, No. 54/2005/QH11

coordinate all existing resources, confronting the travel of transnational crime across different territorial jurisdictions. However, there is no clear provision of laws for the establishment of such specialized teams or units in charge of transnational crime. The establishment of these teams or units is subject to administrative decisions of the Ministry or province.

In addition, sometimes a problem arises from the distribution of investigating competence regarding to handling transnational crimes, though progress has been obtained in establishing the legality of crime investigating activities. For example, there are provisions in the law which define the investigating competence of different investigating agencies. However, there are still overlapping responsibilities of different investigating agencies in some circumstances. For example, a transnational crime case can involve several types of crime as well as territorial jurisdictions. To resolve this problem, it is usually subject to personal decisions. In the meantime, procedures and processes for transnational investigative cooperation do not give the investigating agencies enough autonomy in order to actively respond to transnational crime, because of centralisation in supervision. Moreover, there are not enough regulations in applications of different arrangements between Vietnam and foreign partners in the field of anti-transnational crime.

Another problem of organisations in the investigating system is that investigating agencies at higher levels such as the central investigating agency are organised as larger units than the lower-level investigating agencies. This leads to limitations in addressing transnational crimes quickly and effectively at the locality. On the one hand, although transnational crimes are mainly dealt with by certain investigating agencies such as the Central Investigating Police Agency or some Provincial-level Investigating Agencies like the Hanoi Metropolitan's Investigating Police Agency, these agencies usually focus on large-scale cases or very serious cases. At the same time, minor cases or less serious cases which are usually assigned to be investigated by district-level investigating agencies may be ignored due to these agencies not having resources. In terms of giving manpower and resources for policing institutions that are used to investigate transnational crime, the policing system for the investigation of transnational crime are to some extent not effective enough. There is a shortage of resources, and sometimes Vietnam is dependent on overseas assistance, for example in areas of professional investigator training, and both financial and human resources have to be distributed widely to several investigating agencies from central to local, because they are all empowered to investigate transnational

crime. In this way, the resources for the investigating agencies are fragmented. This leads to a waste of resources. It appears that while some investigating agencies have a low demand for resources for transnational crime but may be given the same amount as other areas where there is higher demand.

Next, there is no clear regulation about responsibility that deals with transnational crime in comparison with the responsibility for investigating domestic crimes. Domestic crime investigation seems to be preferred by the police which may lead to less concern about transnational crime. In addition, this vague division of responsibility between the investigation of transnational crime and that of domestic crime also negatively impacts to the deployment of resources and finance. While regulations regarding domestic crime are available, it is difficult to see specifications about resources allocation for transnational crime investigation. Indeed, investment of human resources and finance into transnational crime investigation is not paid enough attention. At the same time, the development of transnational policing is impeded by limited resources, with a blurred budgetary division between domestic and transnational policing. Resources allocated for transnational crimes may not be used for purpose of anti-transnational crime. Instead, these resources may be used for domestic crime investigation or other daily police missions such as the order maintenance in local areas. In other words, the use of resources is not efficient in terms of tackling transnational crime. There is no strategic policy in developing and using resources for transnational crime investigations.

In addition, police training for those who handle transnational crime investigation is not sufficient, so police behaviour during the course of transnational crime investigation may be unethical. In fact, there is still no master plan for training professional investigators in charge of transnational crime. Human rights issues crucial to transnational investigative cooperation have not officially been a compulsory training subject. In the meantime, as explained in earlier paragraphs, the independence of transnational investigative activities is limited by the direction of executives. Moreover, approaches to unilateral transnational investigative cooperation are still used for combating transnational crime. The less formal cooperation mechanisms, such as Interpol cooperation, remain a principle way to cooperate in investigating transnational crime with other overseas law enforcement agencies. These issues may impact not only on the legitimacy, but also on effectiveness of transnational crime investigations.

In summary, the chapter has indicated that in Vietnam, dealing with transnational crime is mainly tasked to the police. However, the analysis of this chapter has indicated

that, to some extent, the police are not independent or expert in terms of responding to transnational crime. The effectiveness of transnational crime investigation may be hampered by the interference of executive officers, and there is no clear division between investigating agencies in terms of anti-transnational crime assignment and resource deployment. Thus, clear functions between central and local in terms of shared responsibility for investigating transnational crime, as well as the independence of the police from the executive's control from the experience of England and Wales can be one possible model to enhance effectiveness and legitimacy of transnational crime investigations in Vietnam.

## Chapter 6: Criminal Law Relevant to Policing of Transnational Crime

This chapter focuses on criminal law as a reaction by the State to the phenomenon of transnational crime. The criminal law is a part of the response to transnational crime. It is important for investigating transnational crime to prove someone has committed an offence. At the same time, the criminal law not only involves interfering with the liberty of people, but also has an influence on foreign affairs when it is used to target transnational crimes. ‘In practice, criminal laws are characteristically deployed to control behaviour and events, because there is perceived to be a societal and political interest in doing so.’<sup>780</sup> However, before getting into more details on criminalisation, it is important to explore whether criminalisation is necessarily the only or the primary regulatory reaction of the State to the phenomenon. The State either effectively or legitimately needs to consider its responses beyond resort simply to criminalisation. In Vietnam, criminalisation is a part of the whole anti-transnational crime policy that includes several other measures, such as civil action, regulatory measures and protective security strategies. However, this chapter emphasises criminalisation, because it is very close to police and transnational crime investigations, as well being necessary for the successful prosecution of transnational crimes. In addition, criminalisation is an issue that needs attention for potential improvement. Moreover, the State will maximise its regulatory rule enforcement when it can escalate deterrence in a way that is responsive to the degree of uncooperativeness from regulated actors, and to the moral and political acceptability of the responses.<sup>781</sup> Therefore, this chapter aims to explore the criminal law’s potential impacts on transnational crime investigation. How effectively does the existing criminal law respond to transnational crime in Vietnam? And, how far does it ensure the fairness of transnational crime investigations? In this sense, the chapter will address the objective and fourth research question raised in Chapter One.<sup>782</sup>

To clarify to what extent and in what ways criminalisation should be deployed to counter transnational crime activities in Vietnam, this chapter consists of two main sections. The first section will investigate the necessity of criminalisation of transnational

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<sup>780</sup> Simiester, A., Spencer, R., Sullivan, R., and Virgo, J., *Simiester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 2010) 3

<sup>781</sup> Ayres, I. and Braithwaite, J., *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1995) 36

<sup>782</sup> See Chapter 1

criminal activities. To do so, the section focuses on the answer to the question of whether criminalisation is sufficient to prevent and combat transnational criminal activities, or is it put in place just to respond to international pressures. The second section will examine characteristic features of the criminalisation of transnational crime in existing Vietnamese criminal law. In this section, the design of criminalisation relating to transnational criminal activities will be analysed in comparison with international standards in order to measure to what extent these measures of criminalisation of transnational acts impact sufficiently and appropriately on the transnational crime investigations.

## **6.1. The Role of Criminalisation of Transnational Crime**

To clarify the role of criminalisation of transnational crime, this section will focus on understanding criminalisation of transnational crime and its usage in transnational crime investigations.

### **6.1.1. Understanding the Criminalisation of Transnational Crime**

Criminalisation can be understood as the transformation of behaviours into crimes and individuals into criminals.<sup>783</sup> According to David Ormerod, ‘Crimes then are wrongs which the judges have held, or Parliament has enacted, to be sufficiently injurious to the public to warrant the application of criminal procedure to deal with them.’<sup>784</sup> Criminalising transnational acts is an important concern for both law enforcers and law makers, because it not only involves the issue of defining behaviours or conducts as a criminality with a range of sanctions, but transnational crime is indicated as criminal activities that transcend national borders and violate national laws of more than one nation state. Estella Baker indicates that it is more difficult to craft adequate and effective criminal law when criminalising transnational conduct.<sup>785</sup> There may be two main reasons. One relates to the complexity of transnational crime, involving as it does a range of different crimes. It is hard to say precisely what the transnational elements are. For example, Article 6 of the VPC 1999 only indicates the principle of nationality as a foundation to identify transnational crime; it says ‘Vietnamese citizens who commit

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<sup>783</sup> Amrani, H., *The Development of Anti-Money Laundering Regime: Challenging Issues to Sovereignty, Jurisdiction, Law Enforcement and Their Implications on Effectiveness on Countering Money Laundering* (Erasmus University, 2012) 79

<sup>784</sup> Ormerod, D., *Smith and Hogan’s Criminal Law* (Oxford University Press, 2011)

<sup>785</sup> Baker, E., ‘The Legal Regulation of Transnational Organised Crime: Opportunities and Limitations’, in Adam Edwards and Peter Gill (eds.), *Transnational Organised Crime: Perspectives on Global Security* (Routledge, 2006) 188

offences outside the territory of Vietnam may be examined for penal liability in Vietnam.<sup>786</sup> So, there is a problem of technical drafting of the law that adds elements to crimes, and captures transnational aspects of crime. The second reason is the sensitive issue of international cooperation politics. When criminalising a transnational act as a transnational crime, this criminalisation may upset a foreign government because it may affect the relationship between governments. Other governments may think that it interferes in its internal affairs when a transnational act that involves that country is criminalised as transnational crime, even though that transnational ‘act’ is criminalised by its own domestic law system.

### 6.1.2. Criminalisation and Transnational Crime Investigations

In Vietnam, the criminalisation of transnational crime is increasingly becoming a central component of responding to the transnational crime phenomenon. This criminalisation has both symbolic and practical effects. The reasons are as follows.

To begin with, the serious nature of transnational crime makes criminal law relevant and appropriate. Transnational crime activity is dangerous and damaging to individuals. Some forms of transnational organized crime threaten the very security of a state and collective interests such as the legitimate economy. Like other countries, Vietnam is facing dangers and threats from transnational criminal activities.<sup>787</sup> In the meantime, all people, including the Vietnamese, have the right to live in dignity, free from hunger and from the fear of violence, oppression and injustice.<sup>788</sup> All crimes, irrespective of domestic crime or transnational crime, are harming to these values. The criminalisation of transnational crime ‘constitutes a declaration that designated conduct is, so far as the state is concerned, wrongful and should not be done.’<sup>789</sup> In other words, it is a moral statement by the society of Vietnam against transnational criminal activities. Therefore, by the criminalisation of transnational crime, on the symbolic level, the Vietnamese Government sends a message to the whole country as well as the international community that those transnational criminal acts are against the morality of society, and should be removed from society. Besides, by criminalising transnational crime, the

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<sup>786</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 6

<sup>787</sup> See more in chapter 3

<sup>788</sup> The Millennium Declaration adopted by Heads of State Meeting at the United Nations in Sept. 2000

<sup>789</sup> Simester, A. and Hirsch, A., *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart, 2011) 5



country demonstrates its political will, and a determination to prevent and control transnational crime.<sup>790</sup> This reflects the State's responsibility in which the State considers it a priority to address the transnational crime phenomenon, and to combine all its efforts in both construction of law and its enforcement to bring transnational criminals to justice. The criminalisation of transnational crime also helps to avoid unexpected criticism from other countries or international organisations over failures or weaknesses of the country in responding to transnational crime.

On the practical side, the criminalisation of transnational crime provides a legal tool to protect national interests as well as the rights of people. In other words, while criminal law sets out legal frameworks to investigate transnational offences effectively, it gives standards to ensure fairness of transnational crime. Particularly, certain benefits from the criminalisation of transnational crime are: a foundation for legitimate and fair transnational crime investigations; a useful tool for the police to investigate transnational crime; and an instrument for transnational investigative cooperation and international integration. The details are as follows.

### **6.1.2.1. Foundation to Ensure Legitimate and Fair Transnational Crime Investigation**

First and foremost, to prevent and suppress dangerous and harmful transnational activities, it is necessary to regulate them. In this regard, the Resolution No. 49/NQ-TW has indicated that while it was apposite to decriminalise some kinds of criminal offences that are no longer salient in the context of contemporary socio-economic development and international integration, it is necessary to 'criminalise dangerous acts which have newly taken place and not yet been criminalised.'<sup>791</sup> Trafficking in humans was taken as an example of the new type of transnational criminal acts that had appeared. It was supplemented in the Penal Code in 2009.<sup>792</sup> Moreover, the criminalisation of transnational crime is a part of the overall judicial reform activities in Vietnam. 'The Judicial Reform Strategy toward 2020' appreciates the Civil Rights of Citizens, which are included in Chapter Two of the Constitution 2013,<sup>793</sup> requiring the criminal justice

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<sup>790</sup> The Forewords of United Nations Convention on Transnational Organised Crime

<sup>791</sup> The Vietnamese Communist Party's Politburo, Resolution No. 49/NQ-TW on Judicial Reform Strategy toward 2020, issued on 2 June 2005.

<sup>792</sup> Law on Amending and Supplementing a Number of Articles of the Penal Code, issued on 19 June 2009, No. 37/2009/QH12, article 1

<sup>793</sup> Constitution 2013, issued on 28 November 2013, chapter 2 (articles 14 to 49)

system to ensure effective and fair operation. Therefore, revised criminalisation is to implement a strong response to existing violations of the rights of people. In the meantime, it also ensures effective and fair protection of the rights of citizens. For example, clear regulation of transnational crime activities facilitate the police, and other relevant authorities, to distinguish and to apply precisely either civil liability or criminal liability to dangerous and wrongful acts.

### **6.1.2.2. Expert Tool by the Police to Address Transnational Crimes**

In addition, the criminalisation of transnational crime is, to some extent, used as an expert tool by the police to tackle transnational crime. The reason is that there may be several ways to respond to transnational criminality. According to the theory of the ‘Pyramid of Strategies of Responsive Regulation’,<sup>794</sup> these can range from strategies, such as protective security strategies that use less severe sanction, to the other end of the pyramid such as criminal liability that applies more severe sanction. Each level may play a role as a part of responding to transnational crime, and use a certain degree of sanction to achieve its objectives. Protective security strategies, such as border control by the Border Army<sup>795</sup> may disrupt transnational criminal activities, for example to prevent people from smuggling goods across the border. Regulatory measures include promulgating regulations on customs declarations when exiting and entering Vietnam or reporting banking transactions according to the rule on suspicious banking transactions to detect for example money laundering activities. Even civil action can be used to deal with transnational activities, for example, property that is obtained from unlawful conduct can be forfeited in civil proceedings before the civil court.<sup>796</sup> The use of criminalisation is usually regarded as a last resort,<sup>797</sup> if other measures such as administrative solutions or non-criminal sanctions fail (see Table 6.1).

The criminalisation of transnational crime typically manifests state sovereignty through defining crimes and appropriate punishments, which is only open to state sovereigns or supra-national organisations in the course of international integration. These not only indicate the necessity of applying severe punishment to serious

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<sup>794</sup> Ayres, I. and Braithwaite, J., *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1995) 37

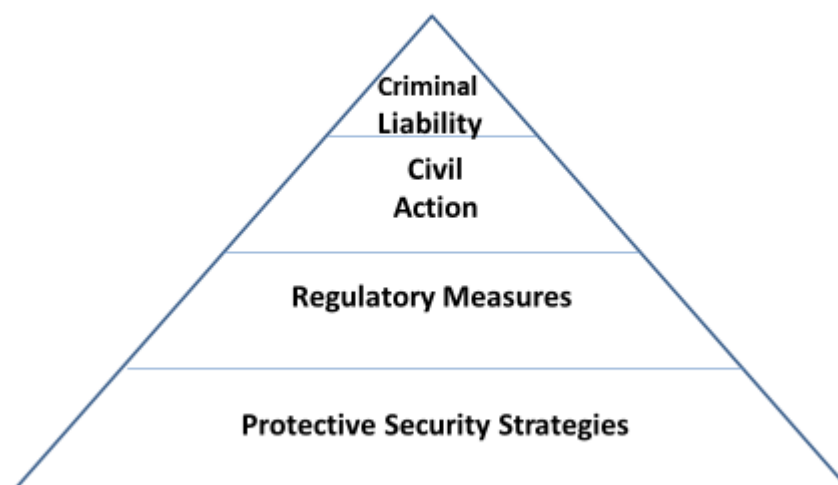
<sup>795</sup> An agency assigned with responsibility of protecting national borders in Vietnam

<sup>796</sup> Proceeds of Crime Act 2002, part 5, sec. 240

<sup>797</sup> Jareborg, N., ‘Criminalisation as a Last Resort’ (2004-2005) 2 *Ohio State Journal of Criminal Law* 521, 523

transnational criminal acts, but also provide the police with the authority to investigate these transnational acts. In this regard, Ethan E. Nadelmann pointed out that ‘the principal impetuses underlying many of the more significant developments in the history of U.S. international criminal law enforcement were provided by the federal statutes criminalising activities that had not previously been regarded as criminal.’<sup>798</sup> Moreover, although the police may be deemed to also have responsibility for other activities, such as crime prevention, formal policing is generally associated with crime in terms of investigating and prosecuting a crime. As indicated in Chapter Five, the police are the leading agency which investigates transnational crime in Vietnam. In the meantime, the rest of the regulatory pyramid, such as civil action, or protective security strategy, may be regarded as administrative measures, or related to security agencies other than the police.

**Table 6.1. Pyramid of Strategies of Responsive Regulation with Respect to Transnational Crime**



Another consideration is that, to some extent, other measures seem not to succeed as well as criminal sanctions in confronting dangerous acts including transnational criminal acts in Vietnam. Amongst the available public means of reaction to transnational

<sup>798</sup> Nadelmann, E., *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (The Pennsylvania State University Press, 1993) 1

crime, criminal law is most often employed.<sup>799</sup> For example, in Vietnam trials of money laundering help to prevent the illegal transfer of money abroad better than other measures such as an administrative fine or confiscation. The reason is that the regulatory rule system that is used to control aspects of society is not entirely completed. Few alternative choices to the use of criminal sanction are in place, because to develop these alternatives requires more time and resources. The majority of Vietnamese practitioners interviewed said that criminal law is often used to handle transnational violations, because, according to police interviewee IA1, ‘it is easy to find relevant legal provisions in the Vietnamese criminal law which are located in the unified Penal Code.’<sup>800</sup> Moreover, non-criminal sanction measures are not always effective. An example of this can be seen in a situation where breaches of a trade contract between Vietnamese and foreign businesses may be handled by the police via fraudulent crime investigations rather than international arbitration. This arbitration mechanism lacks sufficient regulations in order to ensure enforcement or deterrence. In the meantime, the use of criminal sanctions is serious enough to prevent and suppress these dangerous transnational acts. For example, for transnational violations of the environment, an administrative fine is considered to be insufficient. Instead, criminal liability is demanded to compensate and deter harms. Moreover, it is also a matter of resources. Vietnam is a developing country. To apply other regulatory measures other than criminal liability may demand more immediate process costs than the use of criminal liability.

Current comparative statistics between transnational crime prosecutions and the use of other measures to address transnational criminal activities are not available, because no agency in Vietnam is responsible for this type of survey. However, to compare the role of criminal liability with other non-criminal sanctions such as administrative fines, several police officers interviewed observed that there seems to be an increasing amount of transnational criminal prosecutions, for example for smuggling in goods.<sup>801</sup> In the meantime, several administrative regulations such as requirements of customs declaration when exiting and entering the country are applied, but they are still unable to prevent transnational smuggling activities. Moreover, when transnational smuggling cases were detected, several cases had to be delivered to the police to investigate and impose penal

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<sup>799</sup> Simiester, A.P., Spencer, J.R., Sullivan, G.R., and Virgo, G.J., *Simiester and Sullivan’s Criminal Law: Theory and Doctrine*, (Hart Publishing, 2010) 3

<sup>800</sup> Interviewee IA1

<sup>801</sup> Interviewees IA2, IA3, IA10

liability, instead of other liabilities such as administrative fines. According to interviewee IC2 who is a legal official, the reasons for this situation are mainly that:

‘The police have more powers and have better training than other non-police agencies in detecting and investigating these smuggling activities. Maybe, these administrative and customs regulations and their enforcement were not really suitable for preventing and controlling smuggling activities. However, it does not rule out overuses of criminal liability which may impose too severe punishments on the wrong doers.’<sup>802</sup>

Legislator IB2 also said in interview that, ‘in general, the level of awareness of the people in the observation of law is still low. So, there is a tendency in which the use of coercive measures of criminal law is often required to deal with dangerous acts. In other words, only these measures are deemed to be sufficient deterrent for crime as well as to prevent other people who intend to commit a crime.’<sup>803</sup>

### **6.1.2.3. Comprehensive Legal Basis for International Cooperation**

Another argument is that the criminalization of transnational crime supports the country’s integration into the international community. In other words, the gap between the ‘law in the book’ and the ‘law in action’ will be gradually overcome by the criminalisation of transnational crime through which Vietnam shows its commitment to tackle transnational crime by entering international agreements, but also brings the law into actual implementation. Vietnam has signed several bilateral agreements with other countries, and participated in many international treaties and conventions in relation to criminal laws such as the United Nations Convention against Transnational Organised Crime<sup>804</sup> which provide international regulations about transnational crime, including the criminalization of transnational crimes such as transnational drug trafficking and money laundering. Like other member countries, Vietnam not only makes use of these transnational and international laws to support its transnational crime investigations, for example enhancing criminal information exchange via established international cooperation mechanism in these international and transnational laws, but also has the responsibility to carry out the obligations under these international documents. Article 4

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<sup>802</sup> Interviewee IC2

<sup>803</sup> Interviewee IB2

<sup>804</sup> UN Convention against Transnational Organised Crime was signed and ratified by Vietnam on 13 December 2000 and on 8 June 2012 respectively.

of the United Nations Convention against Transnational Organised Crime indicates the State Parties' responsibility to carry out obligations under the Convention.<sup>805</sup> One of these obligations is to incorporate the international standards of criminalisation of transnational crime into national laws. Therefore, Vietnam has supplemented a number of articles in its Penal Code, for example by the amendment of Article 251 (money laundering) which was not criminalised before 2009.<sup>806</sup> Vietnam continues to consider the amendment of other articles in the spirit of those international agreements to which Vietnam is a party, in order to resolve shortcomings in the implementation by Vietnam of international conventions. For example, Vietnam is a member of the United Nations Convention against Corruption.<sup>807</sup> Acts of giving bribes to foreign public officials or officials of public international organisations<sup>808</sup> are not yet legally regulated in the Penal Code of Vietnam, because those kinds of persons fall beyond the scope of the term 'persons with positions' which is the term used in two articles, 279 and 289 of the VPC 1999 regarding to its corruption offence.<sup>809</sup> The amendment of these articles shall be realized with the full implementation of the Convention in Vietnam. The Prime Minister has ratified the Plan to implement the United Nation Convention against Transnational organised Crime and Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children.<sup>810</sup> The National Assembly has been carrying out the (revised) Penal Code Project.<sup>811</sup>

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<sup>805</sup> United Nations Convention against Transnational Organised Crime, December 2000, article 4

<sup>806</sup> Law on Amending and Supplementing a Number of Articles of the Penal Code, issued on 19 June 2009, No. 37/2009/QH12, , article 1(34)

<sup>807</sup> Vietnam signed United Nations Convention against Corruption against Corruption in December 2003, and ratified it in June 2009

<sup>808</sup> United Nations Convention against Corruption, General Assembly's Resolution 58/4 of 31 October 2003, article 16

<sup>809</sup> Article 279 of the VPC 1999 on Receiving Bribes offence indicates that 'Those who abuse their positions and/or power, have accepted or will accept directly or through intermediaries money, property or other material interests in any form valued between five hundred thousand dong and ten million dong, or under five hundred thousand dong but in one of the following circumstances in order to perform or not perform certain jobs for the benefits or at the request of bribe offerers, shall be sentenced to between two and seven years of imprisonment.'

Article 289 of the VPC 1999 on Offering Bribes offence indicates that 'Those who offer a bribe which has a value of between five hundred thousand dong and under ten million dong, or under five hundred thousand dong but cause serious consequences or commit it more than once, shall be sentenced to between one and six years of imprisonment.'

<sup>810</sup> Prime Minister, Decision No. 605/QD-TTg on Implementation of the United Nations Convention against Transnational Organised Crime and the Protocol to Prevent, Suppress, and Punish Trafficking in Person especially Women and Children, dated on 18 April 2013

<sup>811</sup> Standing Committee of the National Assembly, Resolution 433/NQ-UBTVQH13, 30 December 2011. In December 2015, the National Assembly passed the new Penal Code. However,

Institutionalising international standards into national laws is subject to the legal processes and cultures of every country. Criminalisation ‘rests upon assumptions about the legitimate political, social and economic interests of states, and assertions about the harm caused to these interests by the conduct criminalised.’<sup>812</sup> Beside this consideration, it is shaped by the principles of the national law. For example, with regard to criminalization of money laundering activities, Article 6 of the United Nations Convention against Transnational Organised Crime states that ‘Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences...’.<sup>813</sup> This leads to the situation in which being a member of international conventions on transnational crime does not mean that all international standards in regard to criminalisation of the type of transnational criminal acts will be automatically translated into the Vietnamese Penal Code without any adaptation. There is still sometimes a reservation in the implementation of some international legal provisions in line with the scope of the signed Conventions or Treaties.<sup>814</sup>

However, the criminalisation of transnational crime is an instrument to meet the needs of transnational law enforcement cooperation against specific types of transnational criminals, although these specific criminal problems may not be of a kind that Vietnam is immediately facing. The reason is that helping other countries to resolve their criminal issues is a way of helping and protecting Vietnam in the long term. In addition, the criminalisation of transnational crime is sometimes based on demands from outside, even pressures either from other countries, which may offer conditional financial aid, or from international organisations. Taking the case of Vietnam’s entering the WTO as an example, before becoming a member of the WTO in 2007, Vietnam had reviewed all existing laws to meet the requirements of the WTO in which, for example, the

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it was subsequently found to contain several errors and so the implementation of the Code was suspended until such time as it is revised by the National Assembly.

<sup>812</sup> Boister, N., ‘Transnational Criminal Law’ (2003) 14(5) *European Journal of International Law* 953, 957

<sup>813</sup> United Nations Convention against Transnational Organised Crime, December 2000, article 6

<sup>814</sup> When signing and ratifying the United Nations Convention against Transnational Organised Crime on 13 Dec. 2000 and 8 June 2012 respectively, Vietnam declared that it does not consider itself bound by the provision of paragraph 2 of article 35 of this Convention. The paragraph is about settlements of dispute by use of the International Court of Justice; When signing and ratifying the United Nations Convention on Corruption on 10 Dec. 2003 and 19 August 2009 respectively, Vietnam made reservation with regard to the criminalisation of illicit enrichment set forth in article 20 and the criminal liability of legal person set forth in article 26.

criminalisation of violations of intellectual property was also required.<sup>815</sup> To comment on criminalisation of transnational crime, all interview participants expressed the view that in recent years, Vietnam has made significant progress in the application of international standards of criminalisation. Interviewee IA8 from the police said ‘this application is the right way to enhance trust in law enforcement cooperation between Vietnam and the international community.’<sup>816</sup> In the meantime, interviewees IC1 and IC2 commented from the legal officer’s view that ‘this criminalisation of transnational crime is not only an instrument for transnational law enforcement cooperation, but also a way that is used to protect national interests and to implement the country’s foreign policy.’<sup>817</sup>

Next, a need for criminalisation of transnational crime also arises from the practicality of the fight against transnational crime in Vietnam that requires solving conflicts between the Vietnamese law and international law as well as other countries’ national laws. As a result, there may appear a trend of designing laws in convergence or congruity between countries nowadays which may result from the influence of international and regional conventions or treaties where all those countries are members. However, ‘what is defined as criminal varies from society to society and across time.’<sup>818</sup> Furthermore, international documents in relation to criminal law, that Vietnam has participated in and ratified, to some extent are considered as a part of legislation to support transnational crime investigations in which, according to the Vietnamese legislation, ‘in cases, where a legal document and a treaty, to which Vietnam is a party, contains different provisions on the same matter, the provision of the treaty will prevail.’<sup>819</sup> This open regulation sometimes seems insufficient, however. To some extent, some conflicts between provisions of the Vietnamese criminal law and other countries’ law or even international law signed by Vietnam still exist. This is because of a lack of implementing regulations or differences in perception of the criminal nature between those defined in the Vietnamese criminal law and those that are constructed in other countries’ criminal

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<sup>815</sup> In the VPC 1999, with regard to intellectual property crimes, there are article 131 (Infringement upon Copyright), article 156 (Manufacturing/or Trading in Fake Goods), article 168 (Making False Advertisements), and article 171 (Infringing upon Industrial Property Right). In 2009, the National Assembly added article 170a (Infringing upon Copyright and related Rights) and amended and supplemented article 171 (Infringing upon Industrial Property Rights).

<sup>816</sup> Interviewees IA8

<sup>817</sup> Interviewee IC1, IC2

<sup>818</sup> Sanders, A., Young, R., and Burton, M., *Criminal Justice* (Oxford University Press, 2010) 6

<sup>819</sup> Law on the Conclusion, Accession to and Implementation of Treaties, issued on 14 June 2005, No. 41/2005/QH11, article 6



laws. These differences may also reside in regulations about the levels of punishments applied to those crimes which may hamper the cooperation in the investigation of transnational crime between countries. In fact, according to the procurators interviewed, a large number of transnational investigative operations do not yield success because of differences in national laws, especially in criminalisation between Vietnam and foreign countries.<sup>820</sup> For example, during the past years, the police of Vietnam received several assistance requests from the Interpol National Central Bureaus of European countries, such as the Czech Republic, to assist in investigating suspects who are alleged to have refused or evaded responsibility to support their children after they married local female citizens abroad and then came back to Vietnam.<sup>821</sup> But, these requests could not be handled by the police of Vietnam under criminal proceedings because, according to the Penal Code of Vietnam, these violations are not a crime in all cases. In Vietnam, there is a provision in the Penal Code 1999 (VPC 1999) which indicates a negligent father, who fails to raise his children, as a criminal.<sup>822</sup> But a negligent father is charged as a criminal if his violation causes serious consequences or such violation has been administratively sanctioned.

Therefore, it is important to carry out the criminalisation of transnational crime in order to enhance legal assistance in criminal matters, including mutual legal assistance or extradition between Vietnam and foreign countries. It is a prerequisite for legal assistance. One further issue that is usually raised in the mutual legal assistance treaties between Vietnam and foreign countries is only to provide legal assistance in investigating a crime where the requirement of 'dual' criminality is met. This means that conduct that is an object of mutual legal assistance is not only an offence against the law of the requesting country but also against the law of the requested country.<sup>823</sup> For example, Article 4(1e) of the Treaty between Vietnam and the United Kingdom on Mutual Legal Assistance in Criminal Matters states that:

'The Central Authority of the Requested Party may refuse assistance if:

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<sup>820</sup> Interviewee ID1, ID2

<sup>821</sup> The Interpol Department's Annual Report 2009

<sup>822</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 152

<sup>823</sup> Baker, S., 'A Review of the United Kingdom's Extradition Arrangements', page 35, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117673/extradition-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf)>

(e) The conduct to which the request relates fails to satisfy the requirement of the domestic law of the Requested Party requiring the establishment of dual criminality.<sup>824</sup>

Another aspect of disparity is that of punishment. This is because the legislation of some countries, such as the United Kingdom, does not permit investigative cooperation for a criminal case which may lead to capital punishment.<sup>825</sup> One difficulty here is that Vietnam still uses capital punishment for a number of crimes including drug-related crimes or economic crimes like embezzlement of property, as in Article 278, which according to international human rights standards are considered not to be the ‘most serious crimes’.<sup>826</sup> In recent years, Vietnam has made efforts to amend criminal sanctions and to abolish capital punishment for some offences. According to Article 35 of the VPC 1999, capital punishment is a special penalty only applied to persons committing particularly serious crimes.<sup>827</sup> It is one of the principal penalties that can be applied to offenders.<sup>828</sup> Capital punishment’s application has been reduced to a small number of offences.<sup>829</sup> In the meantime, regulations regarding the criminal sanctions system were gradually reformed and applied in order to help open international cooperation opportunities to enhance the transnational crime investigation. That is, expulsion and fine as criminal sanctions are included in the list of criminal penalties.<sup>830</sup>

### 6.1.3. Summary

In summary, although the criminalisation of transnational crime is not a unique tactic, it is necessary and important in the fight against transnational crime. There are several benefits from the criminalisation of transnational crime. Specifically, the criminalisation of transnational crime reflects the political policy of the country and the morality of the Vietnamese society which condemns transnational crime. It also reflects

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<sup>824</sup> Treaty between Vietnam and the United Kingdom on Mutual Legal Assistance in Criminal Matters, signed on 13 January 2009, Cm 7587

<sup>825</sup> See further discussion on this issue in Section 5.2 in Chapter 5

<sup>826</sup> Group of Four (Canada, New Zealand, Norway and Switzerland) Position Paper, in the Second Legal Policy Policy Dialogue in 2014: ‘Amending the Penal Code: A Step forwards to the Implementation of the 2013 Constitution’,  
<<http://www.vn.undp.org/content/vietnam/en/home/presscenter/pressreleases/2014/10/22/second-legal-policy-dialogue-in-2014-amending-the-penal-code-a-step-towards-the-implementation-of-the-2013-constitution/>>

<sup>827</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 35

<sup>828</sup> *Ibid.*, article 28

<sup>829</sup> In the VPC 1999, there are still 22 offences whose maximum penalty can be up to death penalty.

<sup>830</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 28

and supports criminal justice reform and the international integration of Vietnam. Moreover, it reflects how Vietnam can compromise between what the country wants and what the international community expects. As a result, it helps build up the image and trust of the police of Vietnam within the international community in the fight against transnational crime. Besides, the criminalisation of transnational crime has a deterrent benefit, and plays an essential role in the policing of transnational crime. While the criminalisation expresses a sufficient response to transnational dangerous acts, it provides the police with a legal tool to deal with transnational crime. By criminalisation, the police know what powers and what offences can be used. The criminalisation of transnational crime also indicates standards which the police must observe to ensure fairness of a transnational crime investigation and the treatment of transnational criminals, while the public easily draw on it to supervise fairness and transparency of the crime investigating activities of the police. These notions of the rule of law, fairness and effectiveness, with regard to criminalisation of transnational crime, are being pursued for a purpose of appropriately responding to crimes whether they are committed in Vietnam or other countries. This standard should be raised and required as an aspect of cosmopolitanism, as it was conceptualised in Chapter Four.

## **6.2. Designs of Criminalisation of Transnational Crime**

There are various possibilities by circumstances in which a crime involves transnational elements. A police officer would normally think of a crime in a form which treats it as a domestic crime that the Penal Code of Vietnam mainly aims at dealing with. By comparison, transnational crime creates potential difficulties in terms of resources, complex relationships and permission from senior managers, to name a few. Therefore, the police may think that domestic crime is enough and deal with the case in a domestic way. But if domestic law is in not enough, the case will move on to transnational crime, which is then categorised into designs. As indicated in the previous section, the criminalisation of transnational crime is perceived as an essential part of policing in the investigation of transnational crime. This section will investigate the criminalisation of transnational crime in Vietnam. Thus, the section will first examine the characteristics of criminalisation in Vietnamese criminal law. Then, the section will investigate the detailed designs and categories of transnational offences. Finally, the section will assess effectiveness and fairness of the designs of transnational offences.

### 6.2.1. Characteristics of Criminalisation

To better understand the criminalisation of transnational crime, this subsection will describe the ways in which categories and types of criminalisation are formed in general, and transnational crime designs are shaped in Vietnam.

#### 6.2.1.1. Ways of Criminalisation

In Vietnam, criminalisation is defined by the Penal Code,<sup>831</sup> plus the interpretations of it which are needed to clarify a vague or abstract crime, or to give guidance from relevant authorities<sup>832</sup> in order to enforce these regulations properly in practice. These interpretations may take the form of Circulars or Inter-Agency Circulars.<sup>833</sup> For example, Inter-Agency Circular No.17/2007/TTLT-BCA-VKSNDTC-TANDTC-BTP clarifies some concepts and regulations with regard to drug crimes defined in chapter XVIII of the Penal Code 1999. For instance, ‘equipment and tools to be used for illicit drug manufacture or illicit drug use’ are things ‘that have been produced specifically for illicit drug manufacture or unlawful drug use or that have been produced for everyday use but have been involved in illicit drug manufacture or illicit drug use’.<sup>834</sup> An interpretation may also be formed in the Resolutions of the Judicial Council of the Supreme People’s Court, such as Resolution No. 02/2003/NQ-HDTP.<sup>835</sup> According to the Vietnamese legal system, legal documents include: Resolutions of the Judicial Council of Supreme People’s Court, Circulars of the Chief Judge of Supreme People’s Court; Circulars of President of Supreme People’s Procuracy; Circulars of Ministers or Head of Ministerial-equivalent Agencies.<sup>836</sup> The purpose of these interpretations is to help citizens to understand and access the Penal Code in easily understandable language. Beside these

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<sup>831</sup> Since the first Penal Code was enacted in 1985, there have been 6 times of amendments and supplements to the Penal Code, including comprehensively revised version 1999.

<sup>832</sup> According to the Vietnamese law, the relevant authorities who have the power to interpret a crime are the Legislature (the Standing Committee of the National Assembly); the Judiciary (the Supreme People’s Court and its Judicial Council), and the Government Ministries (usually being Ministry of Public Security).

<sup>833</sup> Inter-Agency Circular means the Common Judicial Interpretation, which is jointly issued by Supreme People’s Court, Supreme People’s Procuracy and Ministry of Public Security.

<sup>834</sup> Inter-Agency Circular on Guidance to Application of Regulations of Chapter XVIII ‘Drug Crimes’ of the Penal Code 1999, jointly issued on 24 December 2007 by Ministry of Public Security, Supreme People’s Procuracy, Supreme People’s Court and Ministry of Justice, No. 17/2007/TTLT-BCA-VKSNDTC-TANDTC-BTP.

<sup>835</sup> Judicial Council of the Supreme People’s Court, Resolution on Guidance to Application of some Regulations of the Penal Code, No. 02/2003/NQ-HDTP, issued on 17 April 2003

<sup>836</sup> Law on Promulgation of Legal Documents, No. 17/2008/QH2, issued on 3 June 2008, article 2

written sources of criminal law, recently, the Supreme People's Court encouraged the use of precedent cases that become reference criteria during the course of adjudication.<sup>837</sup> In this regard, according to Resolution No.49-NQ/TW and Law on Organisation of People's Court, the Supreme People's Court has responsibility to develop precedent cases in Vietnam.<sup>838</sup> But, the application of precedent cases is secondary to the written regulations. Moreover, a precedent case cannot replace the law or change it. The reason for this change is to address a shortage of interpretations in criminal law. In the meantime, this use will enhance quality of adjudication. Moreover, it builds up consistency and transparency as well as fairness in handling cases.

Alongside these official sources of criminal law, in practice, non-official sources of criminal law exist which are practical directions of courts or other judicial authorities.<sup>839</sup> These documents are not legal documents, but they may contain some compulsory content and instruct legal authorities to follow them when they investigate, prosecute and adjudicate criminal cases. For example, the Letter No. 234/2014 of Appellate Court 3 of the Supreme People's Court requests forensic examination of seized drugs in all drug cases. This request is not practically implemented because not all police agencies have enough resources to do it, except the examination of quantity of drug substances.<sup>840</sup> But the request is still circulated to the police, and the police have the responsibility to execute it. This may hamper the detection and investigation of drug crime when the drug crime cases may not be adjudicated without forensic examination of drug substances. In this regard, the majority of interviewees said that the issuance of such non-official sources is less frequent nowadays, but their existence to some extent can reduce the legitimacy of investigating activities. Investigating activities may be influenced by executive officials and their administration powers. Thus, according to police interviewee IA4, 'recently, the police still largely use the Penal Code as a primary

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<sup>837</sup> Supreme People's Court, Decision No. 74/QD-TANDTC on Approving the Project on 'Development of Precedent Cases', issued on 31 October 2012, accessed at: <http://toaan.gov.vn/SPCDOC/docView.do?docid=25457&type=html>

<sup>838</sup> Vietnamese Communist Party, Resolution No.49 on Judicial Reform Strategy toward 2020; the National Assembly, Law on Organisation of People's Court, article 27(5), issued in November 2014

<sup>839</sup> Nguyen Anh Tuan, 'Written Source of Criminal Law' (2012) 28 Scientific Journal of Hanoi National University: Law 99, 100

<sup>840</sup> Phuong Diem, 'Guidance "Conflicts" with Law: Difficulty to Handle Drug Crimes' (*Phap Luat*, 4 November 2014), <<http://plo.vn/phap-luat/huong-dan-choi-luat-kho-xu-an-ma-tuy-506886.html>>

source to institute a criminal proceeding, and based on such legal criteria they collect evidence to prove a crime.’<sup>841</sup>

Criminalisation of transnational crime must equally be located in criminal law. According to the Vietnamese legislation, penal liabilities are imposed only on those persons who have committed crimes defined by the VPC 1999.<sup>842</sup> However, recently, there have appeared arguments that criminalisation of crime should not be limited to the Penal Code.<sup>843</sup> Although this argument is being debated, and not yet officially accepted, the reason for this argument is that the Penal Code is not always revised and supplemented in a timely manner. Therefore, criminalisation of activity prescribed in other specific laws, such as environmental law, that cover narrower areas of how society should respond to certain dangerous acts, especially new transnational dangerous activities in a globalised society. Moreover, this approach may help to avoid the creation of vague abstract crimes in the Penal Code. Instead of referring to crimes which are broadly and vaguely defined in the Penal Code, specific laws may introduce specific crimes in certain narrow areas of activity. The fieldwork for this thesis asked interviewees about this issue; and a large number of their answers support the existing way by which the criminalisation of transnational crime is provided by the general Penal Code, because it is easy to get access to those regulations.<sup>844</sup> For example, interviewee IC2 as a legal officer said: ‘Criminal offences defined presently in the single Penal Code are preferred because putting all criminal offences together within a law facilitates their effective implementation. It is easy to review and give guidance or educate people about offences. Besides, the use of this existing model will not jeopardise the traditional way in which the Vietnamese criminal law has been constructed and implemented so far.’<sup>845</sup>

### **6.2.1.2. Elements of a Crime with regard to Transnational Offences**

A given form of transnational conduct is deemed to be criminalised once it satisfies criteria that are set out by the Vietnamese criminal law. ‘The state criminalises certain activities by setting out, hopefully in advance and clear terms, a catalogue of specified actions or omission that are prohibited, together with ranges of sanctions for

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<sup>841</sup> Interviewee IA4

<sup>842</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 2

<sup>843</sup> Tran Van Dung, ‘Expanding the Source of Criminal Law’ (2014) 8 *Dan Chu & Phap Luat* 9

<sup>844</sup> Interviewees IA1, IA3, IA4, IC1, IC2

<sup>845</sup> Interview IC2

violations.<sup>846</sup> In this sense, the Vietnamese criminal law defines four ‘signs’ of crime that identify whether a crime has taken place.<sup>847</sup> The first sign is a dangerous act that causes harm to society. The second sign is fault on the part of a specific person in the commission of the dangerous act. The third sign is violation of the penal code in which the dangerous act is prohibited. And the fourth sign relates to the necessity of using criminal sanctions to respond to the dangerous act. However, to determine what kind of crime or which specific offence occurs, it is necessary to consider four compulsory elements, which are also the grounds to establish criminal liability for those who commit a crime.<sup>848</sup> The first element is the objective aspect (*mat khach quan*) which describes criminal activity. The second element is the subjective aspect (*mat chu quan*) or the mental element. The third element is the objective of the crime (*khach the*) which relates to the interests and relations of society or the people which are needed to be protected. The fourth element is the subject of the crime (*chu the*), that is about a natural person who has reached a certain age (14 years old) and has the capacity to bear criminal liability.<sup>849</sup> The detailed analysis of these four compulsory elements of transnational crime is as follows.

There is no single article of crime that entirely defines transnational crime in the law of Vietnam, and the term ‘transnational crime’ is not used in the Penal Code, though there is a general definition of crime which is stated in Article 8 of the Penal Code 1999.<sup>850</sup> Therefore, like many other countries, there is no definition or design of a generalist transnational crime in the Penal Code. The reason is that the meaning of the term ‘transnational crime’ contains several distinct crimes. Article 3(2) of the United Nations Convention against Transnational Organised Crime describes transnational crime as

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<sup>846</sup> Hirsh, A. and Simester, A., *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 3

<sup>847</sup> Tran Minh Huong, *Understanding the Penal Code of S.R. Vietnam and Its Implementation Guidance Documents* (Nha Xuat Ban Lao Dong, 2010) 38

<sup>848</sup> Pham Van Beo, *The Penal Code of Vietnam - General Part (Reference Book)* (Nha Xuat Ban Chinh Tri Quoc Gia, 2009) 148

<sup>849</sup> Among these four elements, the first element (*mat khach quan*) and second element (*mat chu quan*) are equivalent to Actus Reus and Mens Rea respectively in the Western language. Actus Reus describes the prohibited act, omission or state of affair. Mens Rea is about guilty mind.

<sup>850</sup> According to article 8 of Penal Code 1999, a crime is an act dangerous to the society prescribed in the Penal Code, committed intentionally or unintentionally by a person having the penal liability capacity, infringing upon the dependence, sovereignty, unity and integrity of the Fatherland, infringing upon the political regime, culture, defence, security, social order and safety, the legitimate rights and interest of organisations, infringing upon the life, health, honour, dignity, freedom, property, as well as other legitimate rights and interests of citizens, and infringing upon other socialist legislation.

either operations or part of operations of transnational acts across the national borders, or even these operations that take place within country's border but involve a criminal organisation operating in more than one country.<sup>851</sup> Therefore, it 'is too conceptually imprecise to be legally satisfactory.'<sup>852</sup> Therefore, based on the general definition of crime in Article 8 with no explicit indication regarding transnational aspects of a crime, the Penal Code seems to mainly involve criminal activities that take place locally. When asked about the design of transnational offences in criminal law of Vietnam, several interviewees, especially from the police, could not answer specifically about typical elements of transnational crime designs, because they explained that they were mainly concerned with the four 'signs' and four elements of the general crime definition, whereas regulations of transnational offences are unclear or fragmented.<sup>853</sup> For example, interviewee IA10 said 'I was never trained or given an introduction about compulsory elements of transnational crime. All I learnt was about a domestic crime generally. Transnational crime is not a legal term that is used in the investigative files.'<sup>854</sup>

In contrast, the statutory conception of transnational crime is defined via several specific offences that can be classified into two different designs. The first design of transnational crimes is reflected in ordinary crimes, such as a fraud, which is basically a domestic crime, but with an extension to cover the transnational aspect. The second design of transnational crimes is a treaty-based crime, such as drug trafficking and human trafficking, which is derived from international treaty, and is specifically designed with transnational crime in mind. The further analysis of these two designs of transnational crimes will be introduced later in order to clarify the objective aspect of transnational crime.

With regard to the subjective aspect of transnational offences, it seems that criminalisation of the subjective aspect of transnational crime in the Penal Code is generally appropriate to meet international standards which indicate that a transnational criminal act is always committed intentionally. Transnational criminals are fully aware of national frontiers and have the intention to commit their activities across the border.

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<sup>851</sup> United Nations Convention against Transnational Organised Crime, December 2000, article 3(2)

<sup>852</sup> Baker, E., 'The Legal Regulation of Transnational Organised Crime: Opportunities and Limitations', in Edwards, A and Gill, P. (eds.), *Transnational Organised Crime: Perspectives on Global Security* (Routledge, 2006) 189

<sup>853</sup> Interviewees IA9, IA10, IA11

<sup>854</sup> Interviewee IA10



Article 9 of the VPC 1999 indicates the intentional commission of crimes in following circumstances.

‘(1) The offenders are aware that their acts are dangerous to society, foresee the consequences such acts and wish such consequences to occur;

(2) The offenders are aware that their acts are dangerous to society, foresee the consequences that such acts may entail and do not wish, but consciously allow, such consequences to occur.’<sup>855</sup>

Commenting on the subjective aspect of transnational crime, a procurator indicated that ‘although there was no statistic, all transnational crime cases, which were detected in Vietnam during the last years, were the intentional commission of crimes.’<sup>856</sup>

Another element is the subject of transnational crime. Existing regulations of criminal responsibility narrow opportunities to criminalise some transnational criminal acts when these acts are committed by a legal entity such as businesses and companies. These types of transnational dangerous acts are increasingly emerging, as for example in relation to transnational environmental crimes or international corruption. The reason is that there is no regulation imposing penal liability on non-natural legal persons in Vietnam. In contrast, the Vietnam Penal Code only prosecutes individual defendants.<sup>857</sup> Vietnam law enforcement carries out individualisation of penal liability as a direction to collect evidence against criminals. However, in practice, there is sometimes difficulty in distinguishing between the liability of executive directors and that of their company because the executive directors may only be a person who implements the decision of the company’s management board or in the name of them. This leads to unfairness in dealing with such transnational criminal acts in terms of bearing penal liability as between individuals and company. Moreover, it is not an effective way to prevent recidivism of the legal entity when only individuals are punished while the company or businesses do not have to bear responsibility. In practice, Vietnam is facing challenges in handling corruption cases which involve activities of foreign company or organisations because of a lack of regulations on penal liability of non-natural legal entities. When asked about this

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<sup>855</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 9

<sup>856</sup> Interviewee ID1

<sup>857</sup> Nguyen Thi Kim Thoa, A Snapshot on the 1999 Penal Code Enforcement and Directions for Its Amendments to Meet International Integration Requirements, ( the Presentation Paper at the First Legal Policy Dialogue in 2013: ‘Criminal Laws in Vietnam in the Context of International Integration’);

<[http://www.vn.undp.org/content/dam/vietnam/docs/Article/Handout\\_Legal%20Policy%20Dialogue%208.pdf](http://www.vn.undp.org/content/dam/vietnam/docs/Article/Handout_Legal%20Policy%20Dialogue%208.pdf)>

issue, almost all interviewees affirmed this shortcoming in the Vietnamese criminal law as one of the existing obstacles to deal with transnational crime, and so they suggest that the Vietnamese criminal law should be amended soon to include non-natural legal entities such as a commercial company.<sup>858</sup> To further highlight this point, police interviewee IA10 said that:

‘this shortcoming nowadays creates a major problem in dealing with transnational environment crimes, for example several investigations into Vietnamese companies that involve illegal transportation of rhino horns from Africa to Vietnam could not result in prosecution because of a lack of evidence determining an involvement of any specific individual persons in those shipments. Hopefully, in the coming time, when the Penal Code is revised, criminal liability of corporate entity will be added so that the police can have sufficient powers to prosecute those transnational criminal activities.’<sup>859</sup>

At the same time, some legislative interviewees were more cautious. Although they have no objection to the necessity of imposing penal liability on non-natural legal entities, they suggested that ‘such provision should be confined to commercial companies only, not state administrative entities.’<sup>860</sup>

## **6.2.2. Investigating Designs of Transnational Crime**

As indicated in the above section, statutory conception of transnational crime is defined via several specific offences which are categorised into two different designs. The first design involves ordinary offences but they can be committed transnationally. The second design is about specialist transnational crime which are mainly based on international conventions or treaties. The details of these two designs are follows.

### **6.2.2.1. The First Design of Transnational Crime**

As defined in the previous paragraph, a transnational crime can be defined based on domestic crimes, with indications of transnational involvement, but generally crimes in the Penal Code do not indicate transnational elements in the description of the relevant conduct of the crimes. Taking Article 139, titled ‘Appropriating Property through Fraud’, as an example, this article is now commonly used to respond to transnational fraudulent

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<sup>858</sup> Interviewees IA13, IA14, IC1, IC2

<sup>859</sup> Interviewee IA10

<sup>860</sup> Interviewees IB1, IB2

acts though it is originally designed to deal with fraudulent activities that happen domestically. It states that,

‘Those who appropriate through fraudulent tricks other persons property valued between five hundred thousand dong and fifty million dong, or under five hundred thousand dong but causing serious consequences, or who have been administratively sanctioned for acts of appropriation or sentenced for the property appropriation, not yet entitled to criminal record remission but repeat their violations, shall be subject to non-custodial reform for up to three years or a prison term of between six months and three years.’<sup>861</sup>

This definition of fraud contains no reference to transnational elements. Instead, to apply this offence to respond transnational fraud, the law prescribes in the Penal Code and enforces regulations over particular forms of transnational fraudulent conduct by using separate articles that indicate jurisdiction of the crime and enforcement jurisdiction of this crime by which the Vietnamese authority shall perform a particular action in a particular place. This jurisdiction ‘describes the right of states to regulate conduct, and the limit on those rights.’<sup>862</sup> Specifically, Article 5, titled ‘The Effect of the Penal Code on Criminal Acts Committed in the Territory of Vietnam’, specifies that ‘The Penal Code applies to all acts of criminal offences committed in the territory of Vietnam.’<sup>863</sup> This territorial jurisdiction also extends to criminal conduct which may not operate wholly in Vietnam.<sup>864</sup> According to the Vietnamese legislation, a crime that is considered to be committed in Vietnam’s territory only requires a part of the commission of the crime to be in Vietnam.<sup>865</sup> In other words, it is a crime when transnational criminal activity is partially carried out in the Vietnamese territory. There are thus several possibilities in the transnational commission of a crime. (a) The crime can start and conclude within the Vietnamese territory (of course this circumstance is not a transnational crime); or (b) the crime’s preparation occurs in Vietnam, but its execution takes place in other country’s

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<sup>861</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, , article 139(1)

<sup>862</sup> Danielle Ireland-Piper, ‘Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine’,

<<http://www.ilsa.org/jessup/jessup14/Prosecutions%20of%20Extraterritorial%20Criminal%20Conduct%20and%20the%20Abuse%20of%20Rights%20Doctrine,%20Danielle%20Ireland-Piper.pdf>>

<sup>863</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 5(1)

<sup>864</sup> Nguyen Duc Mai, and Do Thi Ngoc Tuyet, *Scientific Comment: The Penal Code 1999; Revision and Supplement 2009 – General Part* (Nha Xuat Ban Chinh Tri Quoc Gia, 2012) 21

<sup>865</sup> Tran Minh Huong, *Understanding the Penal Code of S.R. Vietnam and Its Implementation Guidance Documents* (Nha Xuat Ban Lao Dong, 2010) 38

territory. For example, a smuggler conceals prohibited commodities in Vietnam in order to illegally take them to another country where these commodities are proscribed; or (c) preparation of the crime is carried out in foreign territory whereas its implementation occurs in Vietnam. For example, a criminal sets a time bomb in a plane at an airport outside Vietnam; this time bomb explodes when the plane descends at an airport of Vietnam. This territorial jurisdiction allows a design of criminal liability by which the Vietnamese law enforcement can have authority to investigate not only criminal activity that occurs entirely within Vietnam's borders, but also transnational criminal activity that only partially occurs in Vietnam's territory regardless of the nationality of perpetrators. These perpetrators can bear Vietnamese or foreign nationality or even be stateless persons or a mixture of any of these. According to the interviews, the majority of transnational crime cases in Vietnam are dealt by the application of this principle of territoriality.<sup>866</sup> However, interviewees also indicated a limitation in this perception of territorial jurisdiction, for example, legislative interviewee IB1 said that 'under this perception of jurisdiction, it is difficult to successfully investigate and prosecute activities such as conspiracy to commit a transnational offence, and participation in a transnational crime organisation, because the Vietnamese criminal law does not define a conspiracy offence and participation offence.'<sup>867</sup> Further explanation of this shortcoming will be explained later.

However, there are also some problems with this approach in relation to the first design of transnational crime. Although it can be flexibly used to respond to a wide range of different transnational criminal acts by being able to apply to almost all domestic crimes defined in the Penal Code, this design of transnational crime may create a contradiction in the conception of the nature of transnational crime between Vietnam and other countries which makes it difficult to conform to the feature of double criminality of transnational offences. This contradiction especially involves crimes *mala prohibita*, which are 'regulatory offences involving exchanges of goods and services which usually do not harm those involved in the exchange but where wrongfulness derives from violation of a rule laid down for policy reasons by the states.'<sup>868</sup> For example, the VPC

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<sup>866</sup> Fieldwork interview data, collected in May-August 2015

<sup>867</sup> Interviewee IB1

<sup>868</sup> Boister, N., *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012)

1999 defines some offences such as smuggling (Article 153)<sup>869</sup>, illegal cross-border transportation of goods and/or currencies (Article 154).<sup>870</sup> Furthermore, during the past years, Vietnam law enforcement could not investigate some transnational fraudulent cases that involved other countries where these activities are perceived as business disputes rather than crimes.<sup>871</sup> According to several interviewees, especially from the police and procurator, ‘double criminality of transnational crime is nowadays a big problem in several transnational crime investigations in Vietnam. A large number of suspended or unresolved transnational crime investigations are due to this problem. It hampers the police in cooperation with other foreign partners to expand their transnational crime investigations.’<sup>872</sup>

Moreover, according to the legal features of transnational crime from the United Nations Convention against Transnational Organised Crime, there may be occasions where transnational crime is a crime in one State committed by a criminal group that operates in more than one state. In the VPC 1999, it is indicated that this feature of the objective aspect<sup>873</sup> (*Mat Khach Quan*) of transnational crime has not been criminalised in the Penal Code of Vietnam. Furthermore, the interpretation of Article 5 concerning territorial jurisdiction does not include a circumstance of this type of activity. The reason is that while concepts of accomplices<sup>874</sup> as well as commission of a crime in an organised manner<sup>875</sup> are defined, there is no definition of criminal gangs or groups existing in the Penal Code of Vietnam. Even, regulation of conspiracy that is usually linked to participation or establishment of criminal gangs is not specified. So, according to police

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<sup>869</sup> According to the article 153: those who conduct illegal cross-border trading in one of the following objects shall be subject to a fine of between ten million dong and one hundred million dong or a prison term of between six months and three years...

<sup>870</sup> According to the article 154: those who illegally transport across borders any of the following objects shall be subject to a fine of between five million dong and twenty million dong, non-custodial reform for up to two years or a prison term of between three months and two years.....

<sup>871</sup> The Interpol Department, *Annual Assessment Report on Transnational Economic Crime Situation in Vietnam*, issued in 2008, page 5.

<sup>872</sup> Interviewees IA1, IA3, IA6

<sup>873</sup> This element is equivalent to *Actus Reus* in Western language

<sup>874</sup> According to article 20 of Penal Code, issued on 21 December 1999, No. 15/1999/QH10: ‘Complicity is where two or more persons intentionally commit a crime. The organisers, executors, instigators and helpers are all accomplices. The executors are those who actually carry out the crimes. The Organisers are those who mastermind, lead and direct the execution of crimes. The Instigators are those who incite, induce and encourage other persons to commit crimes. The helpers are those who create spiritual or material conditions for the commission of crimes.’

<sup>875</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 3(2)

interviewee IA1, ‘it is difficult for the police to deal with transnational crime that appears in this type of form in Vietnam nowadays.’<sup>876</sup>

Apart from the territorial jurisdiction, Article 6 of the VPC 1999 indicates the effect of the Penal Code on criminal acts committed outside the territory of Vietnam. It states that:

‘(1) Vietnamese citizens who commit offences outside the territory of Vietnam may be examined for penal liability in Vietnam according to this Code. This provision also applies to stateless persons who permanently reside in Vietnam.

(2) Foreigners who commit offences outside the territory of Vietnam may be examined for penal liability according to the Penal Code of Vietnam in circumstances provided for in the international treaties which Vietnam has signed or acceded to.’<sup>877</sup>

This regulation applies extra-territorial jurisdiction that can be used by Vietnam to identify transnational crime which is committed outside of Vietnam by either a Vietnamese or a foreigner or a stateless person. This extra-territorial jurisdiction is necessary to ensure that transnational criminals are not able to use national boundaries to avoid the law.<sup>878</sup> But, unlike the territorial jurisdiction that is mandatory, this extra-territorial jurisdiction is optional. Specifically, it can be seen from the above quotation that the wording of ‘may be examined for penal liability’ is used in Article 6 of the VPC 1999, implying only a possible application of the extra-territorial jurisdiction in Vietnam. In the meantime, by this jurisdiction, transnational crimes that involve the relevant criminal activity outside of Vietnam’s territory may be captured on the basis of the nationality principle. This means that Vietnamese citizens observe the Vietnamese law not only when they stay in the Vietnamese territory, but also when they are abroad. If Vietnamese citizens commit any crime defined in the Penal Code of Vietnam abroad, they may incur a penal liability for their crimes in accordance with the Penal Code of Vietnam. For example, a Vietnamese worker who goes to work in Germany and commits a crime, such as murder, may be prosecuted according to the Penal Code of Vietnam. Further to this point, Article 171 of the VCPC 2003 states that adjudicating jurisdiction indicates

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<sup>876</sup> Interviewee IA1

<sup>877</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 6

<sup>878</sup> Boister, N., *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012)

that ‘defendants committing offences abroad, if they are to be adjudicated in Vietnam, the provincial-level people’s courts of their last residence in the country will adjudicate them.’<sup>879</sup> This same approach also applies to stateless person who permanently reside in Vietnam.

According to this implied extra-jurisdiction, foreigners who commit a crime outside Vietnam may have penal responsibility for crimes defined in both the Penal Code of Vietnam and the treaties that Vietnam is a party to. However, this regulation is not clear enough. The reason is as follows. In terms of defining crimes in line with the first design of transnational crime, this extra-jurisdiction has no interpretation requiring compulsory links between those offences outside Vietnam and their effects inside Vietnam, but proving this link is important. According to HH Jeschek, ‘a State may not arbitrarily subject its own criminal power to acts which either occurred abroad or were committed by foreigners unless there exists a meaningful point of relation which rationally connects the factual context of the act to the legitimate interests of the prosecuting State.’<sup>880</sup> Moreover, there is also no indication regarding a crime such as murder committed by a foreigner outside of Vietnam in which its victim is Vietnamese. In fact, it is difficult for Vietnam to distinguish between a transnational crime and a domestic crime committed by foreigners that entirely takes place within a foreign country and has Vietnamese victims, except treaty-based crime. This point will be further explained in the next subsection. However, in general, with regard to the optional use of the principle of extra-territorial jurisdiction, the majority of Vietnamese interviewees indicated that ‘financial constraints are a significant obstacle for application of this principle of extra-territorial jurisdiction nowadays, and this obstacle limits the ability of the police to conduct investigations into transnational crime cases that take place outside of Vietnam and were committed by Vietnamese nationals.’<sup>881</sup>

In summary, to some extent the first design of transnational crime plays an important role in the fight against transnational crime, because it can be applied to most offences defined in the Penal Code, whereas transnational dangerous activities may take different forms of crime. The existing provisions which are already defined for domestic

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<sup>879</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 171

<sup>880</sup> Jeschek HH, ‘International Criminal Law: Its Object and Recent Development’, in Bassiouni, M. and Nanda, V. (eds), *A Treatise on International Criminal Law: Volume I Crimes and Punishment* (Springfield, IL: Charles C Thomas, 1973) 49,51

<sup>881</sup> Interviewees IA2, IA8, IA9, ID1, IE1

crimes can be used to respond to transnational dangerous acts without amendment or adding new laws. Crime investigators are familiar with the features of original crimes by which, to some extent the investigators search for evidence to prove related transnational crimes. However, the design of this category of transnational crime does not highlight or distinguish the transnational crime phenomenon compared with domestic crime problems. Moreover, since statistics of successful investigated cases relating to this first design of transnational crime are not available, the importance of this first design of transnational crime cannot easily be demonstrated. Most police officers interviewed said that this first design of transnational crime may be easy for legislators in terms of technically promulgating law on crimes, but this design does not help the police much in suggesting investigative lines and collecting evidence about transnational offences at the initial stage of investigation. Transnational criminal issues usually appear after in-depth investigation has been carried out. Thus, transnational criminals may have escaped from the country or destroyed evidence by the time the police detect them.<sup>882</sup> For example, interviewee IA11 said that ‘I did not ask overseas partners to cooperate in collecting evidence at the start of my investigation into allegations of transnational fraud. In contrast, I usually did it when I almost finished domestic investigations, because the design of these crimes does not describe in detail legal standards of proof on these transnational criminal activities. Moreover, I am more familiar with the compulsory elements of domestic crimes.’<sup>883</sup>

#### **6.2.2.2. Transnational Crime based on Treaty-Based Crime**

To understand the second design of transnational crime, this subsection will be divided into three parts. The first part will describe the detailed designs of some of the most relevant crimes. Then, the second part will assess the design of treaty-based transnational crimes in the Penal Code of Vietnam in comparison with international norms and standards from international laws. Finally, the third part will analyse challenges and advantages in the use of this treaty-based transnational crime design in practices. The details are as follows.

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<sup>882</sup> Interviewee IA1, IA2, IA3

<sup>883</sup> Interviewee IA11



### 6.2.2.2.1. General Background on Treaty-based Transnational Crime Design

Besides the first design of transnational crime that involves the majority of offences, the Penal Code defines some crimes that derive from another type of transnational crime. These crimes are derived from international treaties which are thus applied to the local conditions and circumstances of Vietnam. Therefore, in contrast to the first design of transnational crime, the design of this type of transnational crime is affected by norms of the nature of crime which are given in the international treaty or convention. This type of transnational crime may be called a treaty-based crime. Significant illustrations of this type of transnational crime can be: Trafficking in Humans (Articles 119, 120), Narcotics-Related Crimes (Articles 194, 195, and 196), Illegally Accessing Computer Networks, Telecommunications Networks, Internet or Digital Devices of other Person (Article 226), and Money Laundering (Article 251). Thus, before further assessment, hereafter is an outline of relevant certain offences in the Vietnamese Penal Code and the relevant international conventions.

**Table 6.2. Correspondence of Vietnam Law to Selected Transnational Crimes**

<b>1 - Offences against Trafficking in Human</b>	
<i>Provisions of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements to UNCTOC</i>	<i>Corresponding provision in the Penal Code of Vietnam</i>
<b>Article 3:</b> Trafficking in persons	<b>-Article 119.</b> Trafficking in humans <b>-Article 120.</b> Trading in, fraudulently exchanging or appropriating children
<b>2 - Cybercrimes</b>	
<i>Provisions of the Council of Europe Convention against Cybercrime<sup>884</sup></i>	<i>Corresponding provision in the Penal Code of Vietnam</i>

<sup>884</sup> Vietnam is not a member of this Convention, but it is used as an international document source by Vietnamese legislators to review and assess the Penal Code of Vietnam

<b>Article 2.</b> Illegal Access	<b>Article 226a.</b> Illegally accessing others' computer networks, telecommunication networks, the internet or digital devices
<b>3 – Crimes of Corruption</b>	
<i>Provisions of the United Nations Convention against Transnational Organised Crime</i>	<i>Corresponding provision in the Penal Code of Vietnam</i>
<b>Article 8.</b> Criminalisation of Corruption  ----- <i>Provisions of the United Nations Convention against Corruption</i> ----- <b>-Article 20.</b> Illicit Enrichment	<b>-Article 277.</b> Definition of position-related crime <b>-Article 278.</b> Embezzling property <b>-Article 279.</b> Receiving bribes <b>-Article 280.</b> Abusing positions and/or powers to appropriate property <b>-Article 281.</b> Abusing positions and/or power while performing official duties <b>-Article 282.</b> Abusing positions while performing official duties <b>-Article 283.</b> Abusing positions and/or powers to influence other persons for personal profits <b>-Article 284.</b> Forgery in the course of employment
<b>4 – Money Laundering</b>	
<i>Provisions of the United Nations Convention against Transnational Organised Crime</i>	<i>Corresponding provision in the Penal Code of Vietnam</i>
<b>Article 6.</b> Criminalization of the laundering of proceeds of crime	<b>Article 251.</b> Money laundering
<b>5 - Narcotic Drugs Crimes</b>	

<i>United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances</i>	<i>Corresponding provision in the Penal Code of Vietnam</i>
<b>Article. 3.</b> Offences and Sanctions.	<p>The Penal Code of Vietnam has a single chapter regulating narcotics-related crimes, which range from article 192 to article 201. For example, article 192 is about offence of ‘growing opium poppy and other kinds of plants bearing narcotic substances’. Amongst these provisions, to tackle transnational drugs trafficking, articles 194, 195, 196 are often used.</p> <p><b>-Article 194.</b> Illegally stockpiling, transporting, trading in or appropriating narcotics</p> <p><b>-Article 195.</b> Stockpiling, transporting, trading in or appropriating pre-substances for use in the illegal production of narcotics</p> <p><b>-Article 196.</b> Manufacturing, stockpiling, transporting and/or trading in means and/or tools used in the illegal production or use of narcotics</p>

It can be seen from Table 6.2 that, Vietnam has established a number of offences which originate and correspond to some international crime suppression conventions. In some cases, the wording for the transnational conduct is mentioned in the description of a crime, though it is not considered as a main feature in the objective aspect (*Mat Khach Quan*) of crime. Instead, it is mentioned as aggravating factors of the ordinary offences. For example, article 196 (1) of the VPC 1999 prescribes that ‘Those who manufacture, stockpile, transport and/or trade in means and/or tools used in the illegal production or

use of narcotics shall be sentenced to between one and five years of imprisonments.<sup>885</sup> After this description of the offence, article 196 (2,f) further indicates its aggravating circumstances by pointing out that:

‘Committing the crime in one of the following circumstances, the offenders will be sentenced to between five and ten years of imprisonments:

(f) Conducting cross-border transportation and/or trading in the same;’<sup>886</sup>

Therefore, in terms of treaty-based crimes, criminalisation of transnational crime helps Vietnam to enhance international cooperation with other overseas law enforcement agencies to tackle transnational crime. The reason is that countries easily define crimes which have the same nature of crime in their national laws when Vietnam and those countries are also parties of an international convention against those types of crime. Normally, Vietnam and other countries will criminalise crimes that conform to the norms of crimes in the treaties that both Vietnam and those countries agree. In this regard, Vietnam has signed and ratified several international conventions against crimes, for example the United Nations Convention against Transnational Organised Crime. Vietnam has also made efforts to criminalise transnational dangerous acts that are reflected in the international treaties. For example, to conform to Vietnam’s accession to the international treaties, trafficking in persons is criminalised in Vietnam, in part, Article 119 and Article 120 of the VPC 1999 that boost identification and prosecution of human-trafficking cases, especially transnational sex trafficking cases. In 2012, authorities prosecuted 232 cases of trafficking and related offences, and courts sentenced 490 defendants under Article 119 and Article 120, in which although the number of transnational investigative cooperation on human trafficking is not announced, it was reported that, for example, transnational cooperation operations with China led to the arrest of over 200 traffickers and the rescue of 216 trafficking victims.<sup>887</sup>

By way of comment about this design of treaty-based transnational crime, all the police interviewed said that, when cooperating with overseas police to investigate this type of transnational crime, they felt more advantage in seeking evidence to prove a crime, and the quality of that evidence is usually high, because, sharing similar views as to the nature of relevant transnational crime, partners easily agreed about where and what type

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<sup>885</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 196 (1)

<sup>886</sup> Ibid., article 196 (2,f)

<sup>887</sup> U.S. Department of State, *Trafficking in Persons Report 2013*, page 394, <<http://www.state.gov/documents/organization/210742.pdf>>

of evidence should be sought.<sup>888</sup> In this regard, according to Interviewee IA4's own assessment, 'There is often success in cooperating to investigate treaty-based crime transnational crime, such as transnational drug trafficking. Vietnam's standard of proof for this treaty-based transnational crime is basically similar to that in other countries, except those which follow the common law system having conspiracy offences. Vietnam tries to follow the template indicated in the United Nations' relevant conventions to construct crimes in its domestic laws.'<sup>889</sup>

#### **6.2.2.2.2. Transnational Crime Design and International Laws**

To further clarify features of the design of treaty-based crime, it is necessary to assess whether Vietnam has properly adopted provisions of relevant international laws relating to these above mentioned offences into the national laws of Vietnam. In this connection, generally, in the fight against crimes including transnational crime, the Penal Code still does not meet practical demands.<sup>890</sup> One main reason for this is a lack of sufficient criminalisation. For example, Vietnam has criminalised several aspects of the United Nations Convention against Transnational Crime, but this criminalisation is not enough.<sup>891</sup> Its insufficiency can be seen in two areas, described below.

First, provisions of international treaties with regard to criminalisation have not been incorporated in the Penal Code. For example, Vietnam ratified the United Nations Convention against Corruption in 2009,<sup>892</sup> but the 'provisions on criminalising acts of illicit enrichment'<sup>893</sup> are not translated into the Vietnamese criminal law, despite the fact that this issue is important in fighting against corruption and money laundering. Another example can be seen in the criminalisation of high-tech crimes. The Penal Code defines the offence of 'Illegally Accessing Computer Networks, Telecommunications Network, Internet or Digital Devices of Other Persons (Article 226a)',<sup>894</sup> but acts of illegal foreign

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<sup>888</sup> Fieldwork interview data, collected in May-August 2015

<sup>889</sup> Interviewee IA4

<sup>890</sup> Department of Criminal and Administrative Legislation – Ministry of Justice, 'Directions on Construction of the Penal Code Project (amendment) to Meet Requirements of Crime Prevention and Suppression in the New Situation' 2014 7(268) *Dan Chu & Phap Luat* 2, 4

<sup>891</sup> 'Illicit Enrichment Shall Be Guilty' (*VNEXPRESS*, 18 March 2013), <<http://vnexpress.net/tin-tuc/phap-luat/lam-giau-bat-chinh-se-bi-toi-2447943.html>>

<sup>892</sup> State President, Decision No. 950/2009/QĐ-CTN, issued on June 30, 2009.

<sup>893</sup> United Nations Convention against Corruption, article 20

<sup>894</sup> Law on Amending and Supplementing a Number of Articles of the Penal Code, issued on 19 June 2009, No. 37/2009/QH12, article 1

access to databases in Vietnam and *vice versa* are not yet included in the Penal Code.<sup>895</sup> In practice, Article 226a is often used for investigating domestic acts of illegal access. There is no interpretation of this article for illegal foreign access. Specifically, according to interviewee IA3,

‘the provision implies computer networks or other telecommunications system to belong to owners living inside the country. Therefore, there were cases in which suspects admitted illegal access via internet to bank accounts opened in foreign countries to steal money, but we were unable to know specific victims who did not know and claim their lost money back. The police had to release arrested suspects because, according to procurators, the suspect’s illegal access to the foreign computer network was not included in the existing legal provision of this high-tech crimes. So, they could not be charged for commission of offence of illegally accessing computer networks. However, these suspects could be prosecuted for theft if bank account owners reported their losses.’<sup>896</sup>

By contrast, unlike Vietnam, Article 3 of the Council of Europe Convention on Cybercrime does not use a concept of ownership to indicate illegal access to computers or telecommunication system. Instead, it specifies illegal access as entering the system without right. In this sense, it does not matter whether computers and communication systems are in Vietnam or foreign countries, in terms of determining crimes.

Second, regulations ‘are not clear enough and do not describe criminal activities including transnational criminal acts in enough detail.’<sup>897</sup> For example, although regulations about human trafficking for profit were supplemented in 2009,<sup>898</sup> it is difficult to distinguish between those activities and other transnational acts such as brokerage for overseas labour, marriage with foreign people, or adoption. Moreover, some transnational criminal offences are not defined sufficiently. In certain offences, typical features of offences given in international laws are not included in the

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<sup>895</sup> Tran Van Hoa, High Tech Crimes and Recommendations for Developing Provision of the Penal Code in the Context of International Integration, (Proceedings of the Conference: ‘Improving the Provisions of the Penal Code in Accordance with the International Standards’, Ministry of Justice in August 2012.)

<sup>896</sup> Interviewee IA3

<sup>897</sup> ‘New Rules on Human Trafficking A Step Forward’ (*Vietnam News*, 27 October 2014), <<http://vietnamnews.vn/opinion/in-the-spotlight/261964/new-rules-on-human-trafficking-a-step-forward.html>>

<sup>898</sup> Law on Amending and Supplementing a Number of Articles of the Penal Code, issued on 19 June 2009, No. 37/2009/QH12, article 1

corresponding provisions of the Penal Code of Vietnam. The description of criminal offences may not cover all acts or stages of those transnational criminal offences. Instead, the words used are often vague. To apply them may need explanation. For example, elements of a crime stipulated in Article 119, titled ‘Trafficking in Humans’<sup>899</sup>, may not only be vague and need further explanation in practice, but also do not reflect all steps of human trafficking which, according to ‘the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children’<sup>900</sup>, encompass other elements such as: recruitment, transportation, transfer, sheltering and receiving. As a result, the present wording of this crime may lead to an understanding of the crime which is only limited to the concept of ‘trading’ rather than the encompassment of the other stated elements such as recruitment.<sup>901</sup> Yet, these other elements may fit and become a part of the objective aspect (*Mat Khach Quan*) of transnational human trafficking that may take place across the national borders, either inside or outside the country. These shortcomings create a gap between legislation and legal enforcement when dealing with transnational crime. Moreover, these problems not only hinder the police from conducting effective transnational investigation, but also affect the legitimacy of police’s investigation, especially when the explanation for what is criminalised is inconsistent.

All interviewees from procedure-conducting agencies, such as the police, confirmed that insufficient law is a huge barrier for transnational crime investigations. Sometimes, the police detect a transnational suspect, but there is no legal basis to investigate or arrest criminals. Vietnam has achieved progress in ratifying and accessing to international conventions on transnational crime. But sufficient incorporation of provisions of those international conventions into the national laws of Vietnam has not

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<sup>899</sup> Article 119 of Penal Code defines: (1) Those who traffic in humans shall be sentenced to between two and seven years of imprisonment; (2) Committing the crime in any of the following circumstances, offenders shall be sentenced to between five and twenty years of imprisonment: (a) For prostitution purposes; (b) In an organised manner; (c) in a professional manner; (d) For taking victims ‘bodily organs’, (e) For bring abroad, (f) Trafficking in more than one person; (g) Committing the crime more than once; (3) Offenders may be imposed a fine of between five million and fifty million dong, subject to probation or residence ban for one to five years.

<sup>900</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime

<sup>901</sup> Nguyen Thi Kim Thoa, A Snapshot on the 1999 Penal Code Enforcement and Directions for Its Amendments to Meet International Integration Requirements, ( the Presentation Paper at the First Legal Policy Dialogue in 2013: ‘Criminal Laws in Vietnam in the Context of International Integration’)

been completely achieved.<sup>902</sup> Commenting on this point, interviewee IB2 indicated that ‘the coming revised penal code of Vietnam will consider this shortcoming to supplement or make a change, for example, there should establish a separate chapter that defines high-tech crimes, in which such transnational dangerous acts as illegal access to foreign databases will be criminalised clearly, in order to provide the police with sufficient powers to investigate transnational crimes.’<sup>903</sup>

There are several reasons for a delay or insufficiency with regard to creating provisions in the domestic laws from corresponding provisions of international laws. First, to sign or ratify international conventions on transnational crime is often done for political purposes, by which Vietnam shows its determination to tackle transnational crime, whilst the immediate benefits or costs of signing these conventions are not always considered sufficiently, for example how these international commitments are carried out under the social-economic conditions of Vietnam. On some occasions, Vietnam’s signing of international conventions comes from the requirements of international organisation or other countries which want the participation of international conventions on transnational crime as conditions and criteria to evaluate Vietnam. For example, the Recommendations of the Financial Action Task Force imposes these conditions when evaluating the Vietnamese legal system for tackling money laundering. But, after signing, there is no priority or plan to implement this signed commitment. In addition, sometimes, the government does not want those international regulations to be incorporated in the domestic laws because of reasons regarding for instance the protection of national security or interests. For example, before 2009, the criminalisation of money laundering was sensitive and always related to the issue of how Vietnam can attract funds from Vietnamese nationals overseas who have a need to send money to their families in Vietnam. Finally, insufficient provisions may also originate from inabilities or even errors in terms of technical issues, of national legislators when drafting laws. In this regard, the majority of interviewees also added a reason for the delay in implementation of the signed international agreements in Vietnam, which relates to the working mechanisms between government agencies.<sup>904</sup> There may be a situation in which an agency that is assigned to propose to the government the need to ratify international agreement did not discuss in

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<sup>902</sup> Fieldwork interview data, collected in May – August 2015

<sup>903</sup> Interviewee IB2

<sup>904</sup> Fieldwork interview data, collected in May – August 2015



detail the necessity of the ratification of that agreement with another affected agency such as the police which regularly applies that agreement in practice.

### **6.2.2.2.3. The Use of Treaty-based Transnational Crime Design in Practices**

In practice, there are challenges and advantages with regard to the application of this design of treaty-based transnational crime. The details are as follows.

The mixture of regulations covering transnational offences and domestic crimes in the same legal provision makes for confusion. Some legal provisions of the Penal Code, such as drug crimes, whose design contain and describes several specific offences in the same legal provision, whereas committing each act may constitute a separate crime. Some are entirely domestic while others are transnational in nature. This combination in the description of crime may cause difficulty to the proper imposition of criminal liability. The same regulations on the punishment scale are applied to all of these different acts. Taking Article 194<sup>905</sup> as example, trading in narcotics may be transnational and can involve a commission of drug trafficking separately while the same article criminalises acts of illegally storing narcotics that may only take place domestically.

Criminalising transnational conduct in a form of treaty-based crime helps to address transnational crime that is defined in international treaties in which Vietnam has a commitment to tackle. Therefore, transnational crime based on treaty-based crime, such as human trafficking, can be easily handled through agreements in the treaties. It is even applied in a case in which a commission of that transnational crime may not take place in Vietnam's territorial jurisdiction, for example Vietnam may investigate a human trafficking case that is committed by a foreigner entirely outside Vietnam where its victims are Vietnamese. However, there must be a commitment to carry this out. According to the Vietnamese legislation, if it is not a case of applying the territorial jurisdiction, a foreigner who commits a crime entirely outside Vietnam can be examined for criminal liability in circumstances provided in the international treaties that Vietnam signed or accessed.<sup>906</sup> This reflects the use of the universal principle to criminalise not only international crimes<sup>907</sup>, but also some transnational crime such as human trafficking

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<sup>905</sup> VPC 1999, issued on 21 December 1999, No. 15/1999/QH10, article 194

<sup>906</sup> *Ibid.*, article 6(2)

<sup>907</sup> Chapter XXIV, titled Crimes of Undermining Peace, Against Humanity and War Crimes, of the Penal Code defines 4 international crimes in article 341, 342, 343, and 344.

crime in the Penal Code of Vietnam. Article 56 of the Law on Human Trafficking Prevention and Combat says that,

‘Mutual legal assistance between Vietnam and an involved country complies with treaties to which Vietnam and that country are contracting parties or the reciprocity principle in accordance with the Vietnamese laws and international laws and practices. The Vietnamese government will prioritise mutual legal assistance in human trafficking prevention and combat to countries which sign bilateral agreements with Vietnam.’<sup>908</sup>

Despite this general regulation, in practice, this aspect of extra-territorial jurisdiction in criminalisation has not been applied to investigate transnational crime cases. There may be several reasons. First, there is no clear explanation of the specific circumstances which allow imposing criminal liability on a foreigner for a transnational crime outside of Vietnam. Second, the existing general provision of Article 6(2) may be made for a purpose that simply indicates the covering scopes of the law, not enforcement of it. This regulation may be only used to prevent a crime, for example to give a warning to possible criminals, rather than to prosecute the crime. Besides, this design of the law may just satisfy legislators who want to develop laws similar to other countries, but it does not take into consideration practical conditions for its application. Moreover, to impose criminal responsibility on foreigners who commit treaty-based crimes that do not take place in or involve Vietnam raises problems of ability and financial resources which are barriers to exercise this task whilst Vietnam is still a developing country.

In terms of legislative jurisdiction, the investigation of a transnational crime that is a treaty-based crime to some extent has more advantages as a design than for the first category of transnational crime, because mutual agreement on a treaty-based crime is easily obtained under the treaties. No available figure shows a comparison in successful percentages of transnational investigative operations between the first design of transnational crime and the treaty-based transnational crime. However, according to police interviewee IA5, investigators who handle the latter cases may feel more comfortable in requesting a foreign counterpart to cooperate and collect evidence because they and their foreign counterparts usually have the same perception of the nature of a common crime such as drug trafficking.<sup>909</sup> Moreover, there is no obstacle with regard to

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<sup>908</sup> Law on Human Trafficking Prevention and Combat, issued on 29 March 2011, No. 66/2011/QH12, article 56

<sup>909</sup> Interviewee IA5

the double-criminality issue. However, in terms of enforcement jurisdiction, there are still some issues with regard to the design of this treaty-based transnational crime. The police may find it difficult to deal with transnational criminal activities when the design of almost all of these crimes are ‘result’ crimes rather than ‘conduct’ crimes. Therefore, to prosecute these transnational crimes, the police need to prove harm or damage. But this proof is not easy when part of these activities or victims are abroad. For example, the police of Vietnam could not investigate and prosecute some Vietnamese individuals who illegally stole money from overseas bank accounts via the internet, because the victims of these transnational acts were not located, and therefore the damage of the case could not be determined. In the meantime, the Penal Code of Vietnam has no inchoate offences in relation to the transnational criminal acts.

In summary, treaty-based criminalising transnational acts have been carried out in Vietnam, although there remain shortcomings in the design of the offences. In this regard, Nguyen Thi Kim Thoa commented on the design of offences including transnational offences in the Vietnamese criminal law that ‘Some provisions in the Penal Code are still not clear; circumstances, constituents of a crime and determination of the penalty bracket are “qualitative” and ambiguous.’<sup>910</sup> However, in general, Vietnam has made efforts to amend and supplement its legal system including criminal law in line with international standards. There are amendments or supplements which meet the demand for tackling transnational crime, for example trafficking in humans, whereas some necessary amendments, for example illicit enrichment, have not been made. Moreover, to sign relevant international conventions is often more for political purposes rather than practical implementation. By way of comment on this issue, an international expert interviewed said that ‘honestly, there is not much concern with regard to signing the international convention on transnational crime. Almost all significant international conventions in this field have been signed or ratified by Vietnam. But, in terms of the implementation of signed conventions, Vietnam has a problem. There is a need to improve and implement them.’<sup>911</sup>

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<sup>910</sup> Nguyen Thi Kim Thoa, A Snapshot on the 1999 Penal Code Enforcement and Directions for Its Amendments to Meet International Integration Requirements, ( the Presentation Paper at the First Legal Policy Dialogue in 2013: ‘Criminal Laws in Vietnam in the Context of International Integration’)

<sup>911</sup> Interviewee IG4

### 6.2.3. Assessments of the Effectiveness and Fairness of the Two Designs of Transnational Offences

The previous section set out the designs of transnational crime. This section is going to explore these with respect to the values of effectiveness and fairness, introduced in Chapter One and Chapter Four. This is because the notion of effectiveness and fairness, with regard to criminal laws, is being pursued for the sake of standardizing criminal laws with international laws. These standards should be raised and required as aspects of cosmopolitanism as it was defined. Thus, the effectiveness and fairness of this categorisation of the two designs of transnational offences are as follows.

#### 6.2.3.1. Effectiveness

To begin with, the categorisation of these two designs of transnational crime indicates that in Vietnam transnational crime is understood as not only a phenomenon, but also as criminal offences, which are located in the Penal Code. In this sense, all types of transnational crime should be brought into justice. Criminal law should be used to prohibit conduct, but not over-prohibit.<sup>912</sup> Therefore, the two designs of transnational crime not only explain the necessity of criminalisation for specific types of transnational criminal acts, but also indicate certain and clear sources of criminalisation of transnational offences that ensure the rule of law in transnational crime investigations. It reflects the principle of legality: no crime without law or no crime or punishment can exist without a legal ground (*nullum crimen sine lege*).<sup>913</sup> In this regard, the government has responsibility and makes enough clarification about criminalisation of transnational crime. As a result, not only people and law enforcement agencies in the country but also those of foreign countries should be able to access these regulations which enable them to observe the criminal law properly in terms of transnational crime legislation. For example, the police of Vietnam could exchange and provide their overseas counterparts with specific legal provisions together with guidance on transnational crime.

Moreover, these two designs of transnational crime, to some extent, are helpful for investigating and prosecuting a transnational crime in Vietnam. They set out a catalogue of transnational crimes that exists in the Penal Code of Vietnam. Thus, they facilitate people to distinguish or recognize whether their acts are crime or not. In the

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<sup>912</sup> Simester, A., Spencer, J., Sullivan, G., and Virgo, G., *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 2010) 637

<sup>913</sup> *Ibid.*, 23

meantime, the division of designs of the transnational crime defined in the Penal Code is a foundation to differentiate specific transnational offences. Thus, the police can identify significant legal features for each type of transnational crime that ensures the successful collection of evidences to prosecute transnational crimes at courts.

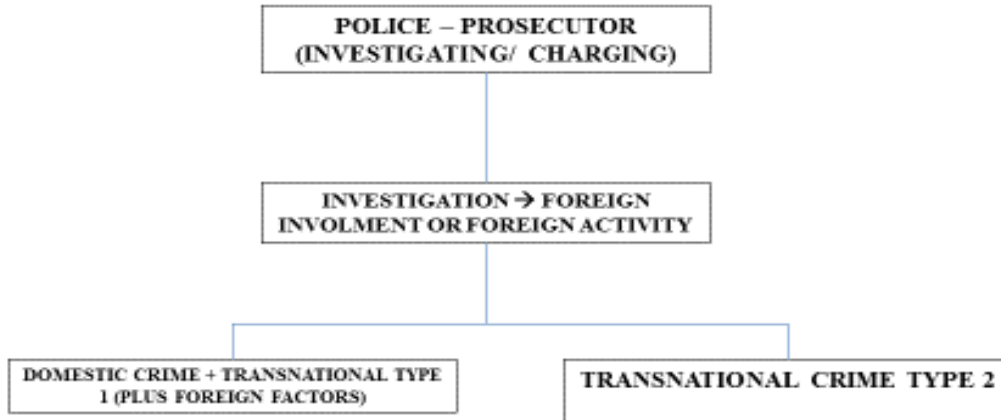
Specifically, the categorisation of the two designs of transnational crime play an important role in the way by which the police understand and investigate transnational crime. The police have responsibility to investigate crime. When an investigation starts, some things like categorisation arise in the mind of investigators (see Table 6.3). This investigation may be just a domestic crime investigation. If a crime has a foreigner's involvement or involves foreign activities, the investigators may think about the possibility of transnational crime. At this stage, there may not be any distinction yet between the first type of transnational crime and the treaty-based type of transnational crime. The crime could be either of these two types of transnational crime. However, according to interviewees from the police and procurators, there is a point when the police (and even the procurator) may think about charging the suspect. As the interviewee IA2 indicated,

‘the police may think or even discuss with procurators what kind of evidence is required to successfully charge and prosecute the suspect. There may be something in between these two types of transnational crime that the police must collect. This begins shaping the way investigators think about the right evidence to collect and prove the case. At some points during the investigation, the investigators may ask to what objective the investigation will target, and then they formulate assumptions about a happened crime in order to collect evidence. The investigators write a plan in order to set out objectives and to get more resources for the investigation on the basis of their assumptions of crime and requirements of evidence. By this process, the investigation would move on from the investigation of domestic crime to that of basically domestic crime with involvement of foreign activity (the first type of transnational crime). Furthermore, the investigation is also able to move on to the investigation of treaty-based transnational crime when signs of that treaty-based crime are appearing. As a result, an exact transnational offence will be imposed on the suspect.’<sup>914</sup>

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<sup>914</sup> Interviewee IA2

**Table 6.3. Conception Process and Its Impacts on Transnational Crime Investigation**



In addition, following training on these designs of transnational crime, the police not only distinguish different types of transnational crime, but also help raise transnational crime as a priority and as a result generate more resources including personnel and organisation to deal with specific types of transnational crime. For example, in 2009, an Anti-transnational Drug Trafficking and Money Laundering Division was established within the structure of the Anti-Narcotic Police Department that is a part of the Central Investigating Police Agency. At the same time, the designs of transnational crime also indicates a degree of existing offences in the Penal Code that can be used to respond transnational crime. Furthermore, the two designs of transnational crime also indicate that while improving and perfecting crimes under the first design of transnational crime, the country needs to think of its responsibility in signing or ratifying enough international treaties in the field of anti-transnational crime which should help define more treaty-based crimes in the Penal Code. Therefore, for improvement of these designs, the country needs to supplement and perfect the legal provisions regarding to the criminalisation of transnational crime in the Penal Code, when it is encouraged to sign and access more international treaties against transnational crime as well as mutual legal assistance treaties. In addition, the criminalisation of two designs of transnational crime

helps to identify an amount of each category of transnational crime that has taken place, though the demand for this statistic is not yet met. According to procurators and the police interviewed, there are an increasing number of transnational crime cases in the design of treaty-based transnational crimes, which reflect the necessity of continuing to perfect legal provisions of the Penal Code in line with international treaties in order to cope with transnational crimes that are also a global phenomenon, for example transnational drug trafficking.<sup>915</sup> Thus, from the distinction of these two designs of transnational crime, there may be an implication that to address transnational crime is not only an exercise of national sovereign power in criminalisation, but also an expression of the demand for the establishment of a global prohibition regime which can be reflected by growing numbers of international anti-crime treaties in the world. In the meantime, the design of each type of transnational crime helps to justify authorization of powers for the police that needs to investigate those specific transnational crimes (further discussion about the police powers will be discussed in the next chapter).

However, there are still some concerns with regard to the effectiveness of these existing designs of transnational crime. First, there are insufficient distinctions in terms of design between transnational offences and domestic crime in the Penal Code. For example, the wording in the offence of trafficking in humans is vague. As analysed in this chapter, the transnational elements are not usually given in the description of the crime design. Furthermore, according to the majority of the police and procurators interviewed, in practice, there is a misconception in which transnational offences are commonly conceived of as a crime with involvement of foreign factors, especially at the early stage of an investigation, without consideration of whether these criminal actions operate across national borders.<sup>916</sup> In this sense, every crime with involvement of a foreign factor is considered as a transnational crime, irrespective of the conditions of Articles 5 and 6 of the VPC 1999. For example, a foreigner lives in Vietnam, and his house is burgled. It is only a domestic crime. But, by misconception, this burglary case may be considered as transnational crime case because of involving a foreigner. This creates a misleading picture of transnational crime in the country.

Second, although several transnational offences, such as transnational drug trafficking, that are indicated in international conventions, have been incorporated into

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<sup>915</sup> Interviewees ID1, ID2, IA1, IA3, IA4, IA5

<sup>916</sup> Interviewee IA1

the Penal Code, there is still a shortage of necessary regulations in the design of transnational crime to address transnational criminal activities. For example, some types of transnational offence, such as bribery of foreign (public) officials, which are defined in international conventions, have not been incorporated in the Penal Code of Vietnam. Even in some cases, transnational offences are regulated in the Penal Code, but their transnational nature, indicated in the international Convention, is not reflected completely into the Penal Code. A typical example is trafficking in humans that was examined earlier in this chapter. As a result, these defects make the existing designs of transnational crime less effective in the fight against transnational crime.

### **6.2.3.2. Fairness**

Although the first design of transnational crime is founded on the broad idea by which transnational crime can be any crime defined in the Penal Code, this design does not overlap with the second design of transnational crime, a significant feature of which is to narrowly define specific crimes clearly indicated in international treaties. This facilitates fairness in transnational crime investigations so as to not prosecute or charge the same criminal act two times. For example, the difference between treaty-based transnational crime and domestic crime with extension to the transnational is recognised in order to apply appropriate punishments for each offence which guarantees fairness in addressing that crime.

Moreover, the design of two categories of transnational crime can guarantee equality and fair treatment in transnational crime investigations. On the basis of these two designs, transnational criminal acts can be investigated. Thus, it is fair when transnational offenders must be charged for their commission of crime. The reason is as follows. First, a list of transnational crimes whose design is under treaty-based crime category could be identified specifically. Once a suspected criminal act falls in this design of transnational crime, it is not a subject of the first type of transnational crime. Similarly, a suspected transnational act, which does not belong to specific transnational crimes designed under treaty-based crime, will be charged as crimes of the first category of transnational crime, because the broad design of the first category of transnational crime can be flexibly used to respond to the changing nature of transnational crime. Moreover, each design of transnational crime, irrespective either the first design of transnational crime or treaty-based transnational crime is only a concept that puts crimes with similar description of features into a group. For example, all treaty-based transnational crimes have a common



feature that originates from international treaty, showing a transnational nature of crime. In addition, to the charge each criminal act must be based on a specific crime in the Penal Code, not a group of crimes.

However, there may be concern about the fairness of these designs of transnational crime. To some extent, these designs of transnational offences may indicate that transnational crime investigations need to be extended outside national borders in order to collect enough evidence to prosecute transnational criminals. However, in practice, a transnational offence is still prosecuted on the basis of results of domestic investigations, because application of regulations with regard to designs of transnational crime are open. As analysed earlier in this chapter, they are sometimes subject to the application of regulations about jurisdictions which are mentioned in separate provisions such as Articles 5 and 6. In the meantime, during the process of the police investigation, the police may also decide not to pursue some parts of a transnational crime investigation, because they may assume it is difficult to collect evidence to prove a crime, for example where there is not enough resources to conduct investigations abroad or maybe there is no mutual legal assistance treaty between Vietnam and a foreign country with which to facilitate the collection of evidence abroad. In this circumstance, all foreign related parts of an investigation will be suspended from a domestic investigation with a view to concluding the domestic investigation only. In this regard, lawyers interviewed said that while they exercised their role as a defense counsel in several transnational crime cases, they found that only domestic investigative operations were finished by the procedure-conducting bodies such as the police. In the meantime, several factors, such as a suspect's bank account, opened at foreign banks, or their relationship between domestic suspects and their overseas partners, were not verified abroad, but trials for these cases under transnational offences were still ongoing. This raises concerns about the fairness of investigations when some transnational parts of a crime are not investigated.

Like provisions for domestic crimes, the design of the two categories of transnational crime is broad. They require more detailed interpretations to determine crimes, for example, to differentiate between brokerage for marriage with foreigners, and transnational trafficking activities in the offence of trafficking in humans. Moreover, the classification of these two designs of transnational crime is not enough to determine an individualization of offences in relation to criminal liability in which each criminal or involved person plays a different role in the commission of a crime. For example, it may face difficulty in dealing with the issue of defenses to a crime such as duress by threats

and duress of circumstance of their actions. Article 46(i) indicates that one of the circumstances extenuating penal liability is when crimes are committed due to threats and/or coercion by other persons.<sup>917</sup> But, it does not make clear how to differentiate between extenuating circumstances and defining elements of a crime. A significant example of this relates to victims of transnational trafficking in humans. These trafficked persons may have criminal liability for holding false travel documents or the acts of ‘illegal exit or entry to the country’,<sup>918</sup> though they commit those violations under deception or the coercion of traffickers.<sup>919</sup> In this regard, there have been no official guidelines on distinguishing trafficking victims who violate under fraud, deception or coercion from those who do these acts deliberately.<sup>920</sup> Therefore, this shortcoming of the design of transnational crime may negatively impact on fairness of the fight against transnational crime.

As indicated in this chapter, the design of some transnational offences is not completely compatible with international standards given in the international conventions. For example, there is still application of capital punishment to transnational drug trafficking offences. Thus, this may cause concern about the fairness of the design of transnational crime in the Penal Code.

### **6.2.3.3. Possible Policy Transfer from the UK’s Experience**

In contrast to Vietnam, in the UK, criminalisation of crimes is not in a single Penal Code, but is done through different laws. For example, money laundering offences are regulated in the Proceeds of Crime Act 2002, whereas narcotic-drug related crimes are prescribed in Misuse of Drugs Act 1971, and Drugs Trafficking Act 1994.<sup>921</sup> However, in terms of criminalisation of transnational crime, it is indicated that ‘Traditionally, with

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<sup>917</sup> Penal Code, issued on 21 December 1999, No. 15/1999/QH10, article 46(i)

<sup>918</sup> Article 274 of the Penal Code, Illegally Leaving or Entering the Country; Illegally Staying Abroad or in Vietnam: Those who illegally leave or enter the country or stay abroad or in Vietnam, have already been administratively sanctioned for such act but continue the violation, shall be subject to a fine of between five million dong or a prison term of between three months and two years.

<sup>919</sup> Ministry of Justice, UNICEF, UNODC, *Assessment of the Legal System in Vietnam in comparison with the United Nations Protocols on Trafficking in Persons and Smuggling of Migrants, Supplementing the United Nations Convention against Transnational Organised Crime*, published in 2004, page 20, 28

<sup>920</sup> Hoang Thi Tue Phuong, *Legislating to Combat Trafficking in Vietnam*, (The Record of the 17<sup>th</sup> Biennial Conference of the Asian Studies Association of Australia in Melbourne 1-3 July 2008), 17

<sup>921</sup> Misuse of Drugs Act 1971; Drugs Trafficking Act 1994

certain exceptions, English criminal law has been local in effect and not concerned with crime abroad.<sup>922</sup> In this sense, there is no legal definition of transnational crime in the UK's criminal laws. But transnational crime features are captured through specific crimes. For example, Section 72 of the Sexual Offences Act 2003 defines:

‘If a UK national does an act in a country outside the UK, and the act, if done in England and Wales..., would constitute a sexual offence to which this section applies, the UK national is guilty in England and Wales of that sexual offence.’<sup>923</sup>

These features of transnational crime are especially defined in working definitions of the police, which is daily attached to the law enforcement. The working definition of transnational crime is constructed and used to support legal terms of transnational crime in the law. For example, the definition of organised criminals by NCIS<sup>924</sup> indicates a transnational organised crime activity more clearly. Specifically, it says that organised criminals are ‘those involved, normally working together with others, in continuing serious criminal activities for substantial benefits, whether based in the UK or elsewhere.’<sup>925</sup> This means that the British legislation does not try to precisely define a generalist definition of transnational crime in legal terms. Instead, it only applies the principles of jurisdiction to view transnational crime as specific criminal activities operating across national borders, which is entirely compatible to this thesis's proposed definition of transnational crime (see Chapter Three). Therefore, key principles of criminal jurisdiction, such as territorial principle, nationality, passive personality, effect principle, and even universality jurisdiction (i.e. a case of drugs trafficking being carried out at sea)<sup>926</sup> are recognised in the UK's various statutes.<sup>927</sup>

Besides provisions of statutes with regard to specific transnational behaviours, unlike Vietnam, the UK also defines two other forms of crime: conspiracy offence and secondary participation offences. These two types of offences could be applied to respond to transnational criminal activities. First, a conspiracy offence punishes an agreement to

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<sup>922</sup> Marshall, P., ‘Part 7 of the Proceeds of Crime Act 2002: Double Criminality, Legal Certainty, Proportionality and Trouble Ahead’ (2002) 11(2) *Journal of Financial Crime* 111, 113

<sup>923</sup> Sexual Offences Act 2003, s. 72

<sup>924</sup> Predecessor of National Crime Agency

<sup>925</sup> Home Office, *One Step Ahead: A 21<sup>st</sup> Century to defeat Organised Crime*, March 2004, Cm6167

<sup>926</sup> The Criminal Justice (International Cooperation) Act 1990, Ss. 19-21

<sup>927</sup> Obokata, T., *Transnational Organised Crime in International Law* (Oxford: Hart Publishing, 2010) 159

commit a crime.<sup>928</sup> The conspiracy may ‘involve the doing of an act by one or more the parties, or the happening of an event, in a place outside the UK which constitutes an offence in that other jurisdiction.’<sup>929</sup> This type of offence allows the police to prosecute transnational offences by using evidence collected only in the UK. In addition, the Serious Crime Act 2007 creates two inchoate offences of encouraging and assisting crime.<sup>930</sup> These provisions also allow the police to handle a suspect who does an act capable of encouraging or assisting a crime which may occur wholly or partly in England and Wales, even though the act itself may be done inside or outside England and Wales.<sup>931</sup> Second is the participation offence which overcomes difficulties in proving agreement by two or more individuals with regard to the commission of transnational offence. Taking the definition of organised crime as an example. Section 45 of the Serious Crime Act 2015 defines an offence of participating in activities of organised groups in which ‘criminal activities’ are understood to contain activities inside or outside England and Wales.<sup>932</sup> The conduct element of the participation offence is satisfied if a person takes part in any activities which are criminal activities of an organised crime group, or help an organised group to carry out criminal activities.<sup>933</sup> As a result, this offence will facilitate the police to successfully respond to activities participating in transnational organised crime.

Thus, a good lesson that can be learned from the experience of the England and Wales is the incorporation of these inchoate offences in the Vietnamese criminal law, in order to proactively deal with transnational criminal offences. In this regard, several international respondents interviewed also suggested that ‘such offences should be added into the Vietnamese substantive legislation which then is to sufficiently respond to all commonly emerged forms of transnational criminal activities nowadays.’<sup>934</sup>

### 6.3. Conclusion

This chapter has focused on the criminalisation of transnational crime in Vietnamese criminal law. Based on existing Vietnamese legislation, it explores the extent

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<sup>928</sup> Criminal Law Act 1977, Section 1A

<sup>929</sup> Crown Prosecution Service’s Legal Guidance,  
<[http://www.cps.gov.uk/legal/h\\_to\\_k/inchoate\\_offences/#P16\\_311](http://www.cps.gov.uk/legal/h_to_k/inchoate_offences/#P16_311)>

<sup>930</sup> Serious Crime Act 2007, s. 44, 45, 46

<sup>931</sup> Ibid., s. 53 and schedule 4

<sup>932</sup> Serious Crime Act 2015, s.45

<sup>933</sup> Home Office, *Serious Crime Act 2015: Fact Sheet: Offence of Participating in Activities of Organised Crime Group*.

<sup>934</sup> Interviewees IG1, IG3, IG4

and the ways in which criminalisation of transnational crime is designed and applied to combat transnational crime, in terms of effectiveness and fairness. To some extent, international standards from transnational criminal laws such as features of transnational crime in the United Nations Convention against Transnational Organised Crime were used to examine the criminalisation of transnational crime. Together with the analysis of extensive interviews conducted with both international and Vietnamese experts, the chapter investigated two types of categories of transnational crime, explaining differences in their designs and usages with regard to transnational crime. In this regard, the chapter also revealed a gap between law and practice in provisions of criminal law which deals with transnational crime in Vietnam. Specifically, the following points have been identified.

Criminal law, specifically criminalisation, is determined as a primary response, and becomes an essential part of transnational crime control policy, although there are several other measures, such as security protective strategies, which can be effective against transnational crime in Vietnam. Based on socio-economic conditions and people's awareness of an observation of the law, the usage of criminal law is considered a vital element to deal with transnational crime. The criminalisation of transnational crime can bring several benefits. To some extent, it can instruct the police what to do or not to do with regard to conducting an investigation into transnational crimes. At the same time, the criminalisation of transnational crime also facilitates the implementation of foreign policy of the country as well as the assurance of legitimacy and fairness of the transnational crime investigation which are useful for transnational investigative cooperation between Vietnam and other countries.

There is no legal definition of a generalist transnational crime in Vietnamese criminal law. But the chapter has assessed and revealed that transnational crimes are conceptualised through certain specific offences, and there are two ways of structuring transnational offences. The first category of transnational crime is the one which is basically a domestic crime, but with an extension to cover the transnational aspect. The second category of transnational crime is treaty-based crime which is derived from international treaty, and are specifically designed with transnational crime in nature. As explored in Section 6.2.3, these two designs of transnational offences to some extent have advantages, in terms of effectiveness and fairness, for transnational crime investigation. They enable the police to shape their way to investigate transnational crime, for example giving directions to collect evidence. However, there are still issues that need to be

improved with regard to the designs of transnational offences in Vietnam. There is still a lack of sufficient criminalisation of transnational crime. The distinction between design of transnational offences and the design of domestic crimes is not clear enough, which to some extent shows that Vietnamese criminal law and its criminalisation seems to focus on and consider domestic crime more important than transnational crimes. In the meantime, law enforcement officials such as police investigators are not well aware of, or familiar with, the design and legal characteristics of transnational crime.

The criminalisation of transnational crime should be in line with international standards given in the international conventions and laws. Thus, to address ineffectiveness and unfairness of the existing designs of transnational crime, it is necessary to study and fully incorporate regulations of international conventions that Vietnam has ratified, into the Vietnamese Penal Code. In terms of policy transfer from the United Kingdom, some possible forms of transnational crimes, such as conspiracy offences and participation offences should be considered as supplements in the Vietnamese criminal law. Furthermore, in terms of law enforcement, a working definition on transnational crime should be provided to guide the police wherever regulations on transnational offences are not specific or available.

## Chapter 7: Criminal Justice Process With Regard to Transnational Crime in Vietnam

### 7.1. Introduction

Following on from the criminalisation of transnational crime which was examined in Chapter Six, a related response by any state to transnational crime usually involves the establishment of procedures that facilitate successful enforcement of criminal law in the fight against transnational crime. The state's responsibility must not only determine transnational crimes which are the subject of law, but also ensure the effective implementation of the law. According to Satnam Choongh, the desire of being free from crime always prompts calls for the police to be equipped with sufficient powers to apprehend and convict criminals quickly and efficiently.<sup>935</sup> In this sense, this chapter focuses on the power of the police prescribed by the law in investigative transnational crime in Vietnam. The police's investigating activity is one of the most important functions of law enforcement agencies.<sup>936</sup> At the same time, there are often questions about methods and ability of the police to undertake transnational crime investigation not only in the context of the home country's criminal justice process that applies the substantive criminal law, but also in a foreign country's jurisdiction. Moreover, although criminal process varies between jurisdictions,<sup>937</sup> the police investigation inevitably impinges on rights and interests of individuals and collectives, and so fairness is affected.

This chapter aims to consider the grounds of effectiveness and legitimacy of the legal powers of the police to investigate transnational crime in Vietnam. To address this aim, the chapter will answer the questions of whether the police are given enough powers to investigate a transnational crime, and whether these police powers for the investigation of transnational crimes are justified on the grounds of effectiveness and legitimacy by both national interest and the implementation of obligations of international standards consistent with the rule of law. In other words, analysis in this chapter seeks to understand whether or not existing Vietnamese legislation and policy balances the relationship between the demands by the police for effective transnational crime investigation, and

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<sup>935</sup> Choongh, S., *Policing As Social Discipline* (Oxford: Clarendon Press, 1997) 25

<sup>936</sup> Hess, K., and Orthmann, C., *Police Operations: Theory and Practice* (Delmar: Cengage Learning, 2011) 342

<sup>937</sup> Ashworth, A. and Redmayne, M., *The Criminal Process* (Oxford and New York: Oxford University Press, 2010) 20

the protection of national interests as well as the respect of citizens' rights. Does this relationship need to be improved and how can improvements be achieved?

Although Vietnamese legislation indicates the responsibilities of investigating bodies, procuracies<sup>938</sup> and courts in determining offences and handling offenders,<sup>939</sup> this chapter is mainly confined to the police. There is no discussion in this chapter about courts, because they mainly work as an adjudicating agency, not an investigating agency. Issues regarding procurators may arise in the discussion of the chapter in order to develop a wider picture of transnational crime investigation in Vietnam. The reason is that the crime investigation process in Vietnam is mainly conducted under an inquisitorial system in which the police and procurators work closely together to investigate crime, though the police mainly lead crime investigation operations. In addition, this chapter only focuses on the pre-trial process, especially investigative powers of the police. It does not discuss proceeds of crime issues and the power to forfeit those proceeds of crime. This is because the power to forfeit proceeds of crime contains measures both within and outside of criminal process. Moreover, 'the rationale for the implementation of this power, which may be in some circumstances be penal or even draconian, is to strip criminals of the benefits of their crimes.'<sup>940</sup> Furthermore, this chapter does not cover the modes of punishing transnational crime and other issues of the post-conviction stage of criminal process.

The chapter consists of two main sections. The first section will investigate elements of the Vietnamese criminal justice system on the investigation of transnational crime, and what powers the police wield to investigate a transnational crime. In this regard, the main investigatory powers of the police prescribed in the existing Vietnamese legislation will be introduced. The second section will study the exercises of investigatory powers in transnational crime investigations. In this sense, the section will analyse the legitimacy, effectiveness and fairness of investigatory powers that the police use to

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<sup>938</sup> Procuracy (pl. Procuracies) is a public prosecution service in Vietnam. (This official term is used in the Law on Organisation of the People's Procuracies, issued on 24 November 2014, No. 63/2014/QH13). Its staff is called procurators. The procurators exercise the rights to prosecution and supervision of criminal cases. But unlike prosecutors in England and Wales, procurators also have the duty to investigate crime. Further explanation in this issue will be shown later.

<sup>939</sup> Article 13 of the VCPC 2003 states that 'Upon detecting criminal signs, investigating bodies, procuracies, courts shall, within the scope of their respective tasks and powers, have to institute criminal cases and apply measures provided for by this Code to determine offenses and handle offenders.'

<sup>940</sup> Campbell, L., *Organised Crime and the Law: A Comparative Analysis* (Oxford and Portland, Oregon: Hart, 2013) 180



investigate transnational crime. Specifically, it will answer the thesis objective and fifth research question raised in Chapter One.<sup>941</sup>

## 7.2. Police Powers for the Investigation of Transnational Crime

To understand the police powers for the investigation of transnational crimes, this section will first examine the principles of the criminal justice process and the nature of the criminal proceedings system in Vietnam. Then, the section will explore what investigative powers the police are given to address the requirements and challenges of a successful investigation of transnational crime. In this context, two main aspects of the power - the power to investigate a person; and the power to investigate objects and places - will be examined.

### 7.2.1. Criminal Justice System

Before analysing the investigatory power of the police, this subsection outlines the investigation processes and the roles of the police (*Cong an*), procuracies (*Vien kiem sat*) and the courts (*Toa an*), which are the main part of criminal justice system of Vietnam. As a result, this subsection will clarify to what extent an inquisitorial system influences the construction of investigatory powers for the investigation of crime in general and transnational crime investigations in particular.

In Vietnam, a criminal case, including a transnational crime case, is resolved through four main different phases of criminal proceedings: investigation, prosecution, adjudication and sentencing. The phases take place in order, one after the other, and are closely related to each other, because the results of a previous phase are prerequisite for the next phase, and the outcomes of the previous phase will affect the results of the next phase. Although all these phases share the same goal of proving a crime, each phase with its own mission will be undertaken by different agencies that according to the Vietnamese legislation are classified as ‘procedure-conducting bodies’.<sup>942</sup> The police play a leading role at the investigation phase. The police decide whether a crime has taken place or not. Where the crime has definitely happened, the police have a duty to investigate the crime

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<sup>941</sup> See section 1.2 in chapter 1

<sup>942</sup> Article 33 and Articles 48 to 61 of the VCPC 2003 classifies two types of bodies/persons who are the subjects of criminal proceedings. One is called ‘procedure-conducting bodies’ such as the investigating agencies, people’s procuracies and courts; whereas the other is called ‘participants in procedure’ such as ‘persons held in custody’, the accused, defendants, victims, civil plaintiffs, civil defendants, ‘persons with interests and obligations related to criminal cases’, witness, defense counsels, experts, and interpreters.

and file a dossier of the criminal case by applying different measures such as interrogation, and the arrest of criminal suspects. To prove the facts of a crime, a duty to identify and collect sufficient evidence is placed on the police. This responsibility is revealed by Article 5 of the Ordinance on Organisation of Criminal Investigations which specifies that only investigating agencies and ‘agencies with some investigating powers’ can investigate criminal cases in which they must ‘accurately and promptly detect every criminal act, clarify evidence proving guilty and evidence proving not guilty, circumstances that aggravate and extenuate the penal liability of offenders without ignoring criminals and doing injustice to innocent people’.<sup>943</sup> In this way, the police are the main investigating agency that deals with almost all types of crime, as detailed in Chapter Five.

The procuracies have a special role in criminal proceedings. They not only prosecute criminals but also carry out supervision of legal observation in criminal proceedings to audit the handling of all criminals, as well as transact the investigation, prosecution and conviction of criminals. In this sense, the roles of procurators in Vietnam are more extensive than those of prosecutors in adversarial system like England and Wales. Besides prosecution, the procurators have an investigative role.<sup>944</sup> They can direct the police to investigate, and even have the right to directly conduct an investigation if necessary.<sup>945</sup> During the course of a crime investigation, the police and procurators have a cooperative working relationship in which the procurators control crime investigation activities by setting investigation requirements, or have the right to approve decisions of the police, for example the procurators approve arrest warrants submitted by investigating agencies. Procurators are able to participate in an investigation and to accept or reject the results of an investigation that is done by the police. When the investigation is finished, procurators have the responsibility to review a case file and decide whether to prosecute a case or not.<sup>946</sup>

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<sup>943</sup> Ordinance on Organisation of Criminal Investigations (2004), issued on 20 Aug. 2004, No. 23/2004/PL-UBTVQH11, article 5

<sup>944</sup> Law on Organisation of the People’s Procuracies, issued on 24 Nov. 2014, No. 63/2014/QH13, art. 14

<sup>945</sup> Fionda, J., *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995) 66

<sup>946</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, articles 112, 113 and chapter XV

By contrast, in England and Wales, prosecutors are not involved in the investigation of crime. The prosecutors may assist or give advice to investigators,<sup>947</sup> but they do not direct the police or investigators.<sup>948</sup> Instead of investigating, the prosecutors mainly focus on charging and then prosecuting a criminal.<sup>949</sup> The prosecutors receive dossiers of criminal cases from the police, and essentially go to courts with the dossiers and advocate on the basis of the dossier. However, it is clear that the police can more or less be forced to investigate further when the prosecutors reject evidence provided by the police until further evidence is supplied. CPS Guidance says that ‘Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies.’<sup>950</sup>

The relationship between procuracies and the police in Vietnam is a relationship of cooperation and control. Crime investigation is a part of prosecution function, and its results are to provide evidence required by the procuracies which in turn prosecute criminals in courts. According to Article 6 of the Ordinance on the Organisation of Criminal Investigations, procuracies have the responsibility to supervise the law observation in investigating activities.<sup>951</sup> In cases where the police do not have sufficient evidence for the procurator to make a prosecution, they might seek further guidance and direction from the procurator, as to how best to proceed. It seems that the relationship between the police and procurators is structured in a one-way system where the procurators can order the police to follow their instructions while they are working together. Therefore, the procuracies play an important role in investigating activities.

However, there is a problem in this relationship between the police and procuracies while investigating a crime. In practice, the police may sometimes ignore instructions from procurators. The police tend to do whatever they think is right rather than entirely being instructed by procurators. Moreover, for crime investigation, the police may use some covert powers that they do not want procurators to know about because the application of these powers has not been legalised yet. ‘Secret audio-video

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<sup>947</sup> According to CPS Director’s Guidance on Charging 2007-Third Edition, 2007: ‘Crown Prosecutor will provide guidance and advice to investigators throughout the investigating and prosecuting process. This may include lines of enquiry, evidential requirements and assistance in any pre-charge procedures.’

<sup>948</sup> Crown Prosecution Service, The Code for Crown Prosecutors, <[http://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf)>

<sup>949</sup> Crime Justice Act 2003, s. 28

<sup>950</sup> CPS Director’s Guidance on Charging 2013, Fifth Edition, 2013.

<sup>951</sup> Ordinance on Organisation of Criminal Investigations, issued on 20 August 2004, No.23/2004/PL-UBTVQH11, article 6

recording', 'secret wiretapping' and 'secret collecting electronic data' have been translated into the Criminal Procedure Code in November 2015, but delays can be expected before they take effect.<sup>952</sup> (this point will be further examined later). In practice, the police open two investigative dossiers: one is an official investigative file that will be later delivered to procuracies for prosecution; the other is called the police file and it keeps account of all applications of covert powers not shared with the procuracies. These double-criminal case files sometimes cause the police trouble. Thus, there may be cases where the police's undercover agents or informants may be tried at court due to unskilled actions of the police in removing all traces of their activities from official criminal files.

This relationship between the police and procurators, to some extent, is less structured in comparison with the relationship between the police and prosecutors in England and Wales where the relationship is a two-way system because of the clearly divided functions between the police and prosecutors.<sup>953</sup> Although there are some legal documents<sup>954</sup> guiding the implementation of cooperation between procuracies and the police, there is still a lack of detailed guidance on what the police should or should not disclose and share with procurators, and how different ideas between them with regard crime investigations can be settled. The common way for settlement of police-procuracy conflicts is by calling for a meeting between them. Furthermore, existing criminal procedure laws cannot guarantee the procuracies to control entire investigating activities of the police. Sometime, requirements or decisions from procuracies are not rigorously obeyed by the police, but the procuracies do not have sufficient measures to detect those acts as well as to ensure the police implement their requests. Normally, the usual way the procuracies act is to return criminal case dossiers back to the police when the procurators are not satisfied with investigative results. But, in practice, the procuracies do not have much investigating experience. Moreover, the procuracies are also facing a lack of staff which constrains the deployment and supervision by procurators at initial stages of crime investigations, for example during a period before detention under remand.

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<sup>952</sup> VCPC 2015, issued on 27 November 2015, No. 101/2015/QH13, article 223

<sup>953</sup> Wood, J., Relations with the police and the public, and with overseas police and judicial authorities, in J.E. Hall Williams, *The role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economics and Political Science in January 1987*, (Avebury, 1988), 17, 20; Prosecution of Offences Act 1985, section 3(2)e

<sup>954</sup> For example, Inter-Circular on Relationship of Co-ordination between Investigating Agencies and Procuracies in the Implementation of the Criminal Procedure Code (2003), issued on 7 September 2005, No. 05/2005/TTLT-VKSNDTC-BCA-BQP

Therefore, the Vietnamese criminal justice process tends to be inquisitorial<sup>955</sup>, and ‘procedure-conducting bodies’ have responsibility to find facts of crime. Procedure-conducting bodies are given full competence to prove a crime and are permitted to collect evidence in criminal cases. During the course of solving criminal cases, the police and other procedure-conducting bodies play active roles and take the initiative in a wide range of activities investigating crime, from collection, examination, assessment of evidences to any decision for application of investigative powers. To confirm this matter, Article 10 of the VCPC 2003 specifies the responsibility for determination of facts in criminal cases as follow.

‘Investigating bodies, procuracies and courts must apply every lawful measures to determine the facts of criminal cases in objective, versatile and full manner, to make clear evidence of crime and evidence of innocence, circumstances aggravating and extenuating the criminal liabilities of the accused or defendants. The responsibility to prove crime shall rest with the procedure-conducting bodies. The accused or defendants shall have the right, but not be bound, to prove their innocence.’<sup>956</sup>

However, the Vietnamese criminal process does not identify clearly three different functions of criminal proceedings: accusation, defense counsel and the trial. All criminal justice agencies are conferred with responsibilities that are in the process of finding facts about criminal cases. The way the ‘procedure-conducting bodies’ work tends to place the police, procuracies, and courts on one side, whereas ‘participants in procedure’, especially the accused, are in the opposite side during the course of solving criminal cases, particularly in the investigation phase. The ‘participants in procedure’, such as defense counsel, have no right to collect evidence, though these persons have the right to provide documents, exhibits, and to make requests.<sup>957</sup> The role of the accused is passive in the investigation process, and very much dependent on the police. In general, victims have no right to choose a way to affect the criminal case because, according to

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<sup>955</sup> In inquisitorial system, the procurators and the court also have an investigative function. The court means that a process of inquisition which is a form of investigation. In other words, the investigation goes on until the case is concluded. All parties in criminal justice process are parties to the investigation. The police are investigators, the procurators are investigators and the judges are investigators. See further at Spencer, J., ‘Adversarial vs Inquisitorial Systems: Is there Still Such a Difference?’ (2016) 20(5) *The International Journal of Human Rights* 601, 602

<sup>956</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, article 10

<sup>957</sup> *Ibid.*, articles 48, 49, 50, 51, 52, 53, 54, 58, 59, 64, 65

Vietnamese legislation,<sup>958</sup> to initiate a criminal case or not is not dependent on the victim's wish. In contrast, to initiate a criminal case is completely subject to the decisions of the police (except some circumstances provided in the criminal procedure code).<sup>959</sup> As for 'persons in custody', the accused and their lawyers do not enjoy favourable conditions to implement effective defense functions.<sup>960</sup> Regulations regarding the right to access to investigative information by the accused and their lawyers during the investigating and prosecuting process are not clear. There is legal provision to define the rights of defense counsel, for example the right to meet the persons kept in custody,<sup>961</sup> but there are few regulations regarding duty and time limit which the 'procedure-conducting bodies' in general, and the police in particular must follow to facilitate the implementation of access to defense counsel. For example, according to Article 58 of the VCPC 2003, the defense counsel shall participate at interrogations in which persons held in custody are giving statements.<sup>962</sup> But there is no legal regulation defining the duty of investigators with regard to informing defense counsel about the time and place of the relevant meeting.

In summary, the criminal process of Vietnam has characteristic features of an inquisitorial model. Generally, the system has a good design for working relationships between the police, procurator and judge. The police, procurators and judges have responsibilities as well as powers to investigate a crime. The distinction in powers and competences between criminal justice agencies refers to different phases of criminal proceedings. During the investigation process, the police always play the important role in investigating transnational crimes, though to some extent procuracies conduct supervision over the investigating activities of the police. Almost all interviewees said that the police, in general, have the major power to investigate transnational crime in

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<sup>958</sup> Ibid., articles 100, 104. They indicate that: Criminal cases shall be instituted only when criminal signs have been identified. When deciding that criminal signs have existed, the investigating agencies must issue decisions to institute criminal cases.

<sup>959</sup> Article 105 of the VCPC 2003 indicates some certain circumstances such as 'intentionally inflicting on or causing harms to the health of other persons (article 104 of the Penal Code)' in which criminal cases are initiated at requests of victims.

<sup>960</sup> Nguyen Hoa Binh, *Some Directions on Amendment, Supplement to Criminal Procedure Code to Meet Judicial Reform Requirements*, accessed at: Website of People's Procuracy of Bac Ninh Province,

<[http://www.vksbacninh.gov.vn/index.php?option=com\\_content&view=article&id=1079:mot-so-dinh-huong-nghien-cuu-sua-doi-bo-sung-bo-luat-to-tung-hinh-su-dap-ung-yeu-cau-cai-cach-tu-phap-&catid=55:chuyen-de-nghiep-vu&Itemid=102](http://www.vksbacninh.gov.vn/index.php?option=com_content&view=article&id=1079:mot-so-dinh-huong-nghien-cuu-sua-doi-bo-sung-bo-luat-to-tung-hinh-su-dap-ung-yeu-cau-cai-cach-tu-phap-&catid=55:chuyen-de-nghiep-vu&Itemid=102)>

<sup>961</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, article 58

<sup>962</sup> Ibid., article 58(2,a)

Vietnam.<sup>963</sup> Thus, the analysis of the above model of criminal justice system has shown the relationship between criminal process and criminal law which is a foundation to assess effectiveness of the investigatory powers of the police. It shows the core role of the police to deal with transnational crime investigation.

However, the above analysis also indicates that the assignment of agencies and persons who are involved in the course of crime investigation is not clear in terms of assuring the fairness of the investigation process. Thus, it is difficult to execute and control activities of the police and other ‘procedure-conducting agencies’. Responsibilities of the police and other ‘procedure-conducting bodies’ such as procuracies, to some extent overlap. Moreover, the roles of ‘participants in procedure’ such as defense counsel have not been fully facilitated in order to ensure fairness. In this regard, Resolution No. 49 of Judicial Reform Strategy toward 2020 indicates for the future the objective of ‘defining functions, tasks, competences and perfecting judicial institutional organisations.’<sup>964</sup>

## **7.2.2. Investigatory Powers of the Police**

As indicated in the previous section, the police play a central role in criminal investigations. This subsection will investigate what investigatory powers the police have to undertake transnational crime investigations. The analysis of the subsection is divided into two parts. One is a general introduction about investigatory powers of the police in Vietnam. The second part will investigate some specific investigatory powers of the police most relevant to transnational crime.

### **7.2.2.1. Understanding Investigatory Powers of the Police**

When investigating criminal cases, including a transnational crime case, the police must prove the facts of criminal cases by finding and collecting evidence<sup>965</sup> which according to Article 64 of the VCPC 2003 is regarded as the ‘grounds to determine whether or not criminal acts have been committed, persons committing such acts as well as other circumstances necessary to for the proper settlement of the cases’.<sup>966</sup> While the police may have the support of the public to undertake investigating activities to find

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<sup>963</sup> Interviewees IA1, IB2, IC1, ID1, ID2 and IE5.

<sup>964</sup> Vietnamese Communist Party, Resolution No.49 on Judicial Reform Strategy toward 2020;

<sup>965</sup> A discussion on the standard of proof will be later provided on section 7.3.3, the Effectiveness of Investigatory Powers.

<sup>966</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 64

criminals, it is also necessary for the police to be conferred with coercive investigatory powers. Article 65 of the VCPC 2003 indicates that to collect evidence, the police ‘may summon persons who know about the cases to ask and listen to their statements on the matters pertaining to the cases, solicit expertise, conduct searches, examinations and other investigating activities according to the provisions of this Code; requested agencies, organizations and individuals must supply documents, objects and relate circumstances to clarify the cases.’<sup>967</sup> Furthermore, the police require investigatory powers not only where no suspect has been identified, but also where suspects are not willing to cooperate and where suspicion needs to be dispelled or confirmed.<sup>968</sup>

In Vietnam, studies about the investigatory powers of the police have been limited. Until now, there has been no complete definition of investigatory powers for the police defined in Vietnamese law, although investigatory powers can be found in certain regulations and laws. For example, the Law on People’s Public Security Force<sup>969</sup> indicates seven police methods: ‘public mobilisation’, ‘law’, ‘foreign affairs’, ‘economics’, ‘technology and science’, ‘professional techniques’, and ‘militant force’. In other words, these legal terms mean that the police may use different tools, such as money, and powers, such as statutory powers of arrest, to facilitate their operations in detecting and investigating transnational crime. In general, the investigatory powers of the police are classified into two categories: covert powers and overt powers, which are described as follows.

### **7.2.2.1.1. Covert Powers of the Police**

In the first category of investigatory powers of the police are intelligence gathering powers or covert powers, for example covert surveillance. These powers are used to gather information about a person who is unaware that such oversight may be taking place.<sup>970</sup> Although these police powers can be very useful for transnational crime investigation,<sup>971</sup> they have yet to be fully legalised. A new amendment to the Criminal

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<sup>967</sup> Ibid., article 65

<sup>968</sup> The Royal Commission on Criminal Procedure, *Report* (Cmnd 8092, London, 1981 page 22)

<sup>969</sup> Law on People’s Public Security Force, issued on 29 November 2005, No. 54/2005/QH11

<sup>970</sup> Serious Fraud Office, *Covert Investigative Techniques*,  
<[http://www.sfo.gov.uk/media/106970/covert\\_investigative\\_techniques-RIPA\\_sfo\\_operational\\_handbook\\_topic.pdf](http://www.sfo.gov.uk/media/106970/covert_investigative_techniques-RIPA_sfo_operational_handbook_topic.pdf)>

<sup>971</sup> Three fourth of interviewees said covert powers must be given to the police to investigate transnational crime in Vietnam while one fourth had no comments because of insufficient knowledge on the powers of the police. (Fieldwork interview data, collected in May-August 2015).



Procedure Code will come into effect in the near future and references secret audio-video recording, secret wiretapping and secret collecting of electronic data.<sup>972</sup> However, as discussed further below, the Code provides very limited scope for their use. In general, the investigative outcomes obtained from covert police powers are not considered as evidence in courts.<sup>973</sup> Alternatively, these police powers, such as covert human intelligence sources, are regulated by non-legal documents, for example decisions of the Minister of Public Security.<sup>974</sup> So, this type of investigatory power contains investigatory measures that may be indicated by certain laws, but the scope or nature of these investigatory measures depends on interpretations of the Ministry of Public Security and there are no details about the mechanisms of application of those measures. For example, the Law on the People's Public Security indicates that the police are conferred with the method of 'professional techniques'<sup>975</sup> to protect national security as well as to maintain public safety, including criminal investigations. However, the meaning of this method has not been defined. Furthermore, there is no concrete interpretation of how this police measure should be exercised and who exactly is responsible for its usage.

With regard to legislating for covert powers as special investigative techniques, there still exist two main contrasting views: supporters and opponents. One view is supporting the legalisation of covert powers whereas the other is against the legalisation of covert powers. For the former, it is necessary to legalise these covert powers because of several reasons. First, these powers are very much related to human rights and the rights of citizens. Legalising these covert powers is a way to meet requirements of the Constitution (2013) which indicates that 'Human rights and citizen's rights may not be limited unless prescribed by a law.'<sup>976</sup> Second, the legalisation of covert powers will invest transparency in crime investigations, and comply with international conventions<sup>977</sup>

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<sup>972</sup> VCPC 2015, issued on 27 November 2015, No. 101/2015/QH13, article 223; <sup>972</sup> The Criminal Procedure Code 2015 (VCPC 2015) would have come into effect on 1<sup>st</sup> of July 2016, however, the Penal Code 2015 will be revised because of technical errors, and the VCPC 2015 will now come into effect once this revision has been completed.

<sup>973</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 64

<sup>974</sup> The Ministry of Public security issued some unpublished documents that are only used within the police to define and guide how to apply the covert powers such as the employment of informants.

<sup>975</sup> Law on People's Public Security Force, issued on 29 November 2005, No. 54/2005/QH11, article 3(7) and article 14(6),

<sup>976</sup> Constitution 2013, issued on 28 November 2013, article 14(2).

<sup>977</sup> For example, article 17 of ICCPR said 'No one shall be subject to arbitrary and unlawful interference with privacy, family, home and correspondence, not to unlawful attacks on his honour and reputation.'

that Vietnam has signed and ratified. Moreover, this legalisation will facilitate investigating activities into transnational crime and other serious crimes. This perspective proposes a preference to legalise some covert powers such as wiretapping, secret video surveillance, and secret searches of property, postal parcels, and correspondences. Their applications should be only for serious crimes such as drug crimes, and transnational crimes or crimes infringing national security.

In contrast, critics argue that covert powers should be not legalised because these powers are related to sensitive issues like national security. So, if these investigative techniques are legalised, the legalisation will jeopardise the secret nature of investigating sensitive activities. According to interviewee IA4, ‘legalisation of covert powers makes its application less effective.’<sup>978</sup> Criminals may know all the investigative techniques of the police so that they can counter these methods. In addition, there is no guarantee that, after legalisation, these legalised covert powers will not be abused by the police and other ‘procedure-conducting agencies’. Furthermore, it is argued that the use of these covert powers should be considered as a matter of police skills, which concentrate on obtaining intelligence about crime rather than finding evidence to prove the crime in a public court.

Concerning this controversy, the research interviews show that the larger number of police interviewees do not agree with a proposal for the legalisation of covert powers. Interviewee IA4 said,

‘When covert powers are legalised, the police may need an approval from procurator before an exercise of covert powers. In this context, the police cannot respond transnational crime actively and timely. As a result, the police become less effective in investigating transnational crime. Also, it is difficult to protect the confidentiality of covert operations when information about covert operation are shared with agencies other than the police.’<sup>979</sup>

As for the other view, interviewees who are lawyers, legislators and procurators support legalising covert powers. For example, interviewee IB1, who has a similar view with some other interviewees, indicated that ‘if there is a law regulating police covert powers, that legislation not only aims at a guarantee of fairness of the transnational crime investigation, but the legislation will facilitate the police to easily cooperate with other overseas law enforcement agencies.’<sup>980</sup> Moreover, legislating covert police powers is a

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<sup>978</sup> Interviewee IA4

<sup>979</sup> Interviewee IA4

<sup>980</sup> Interviewees, IB1, IC1, IC2, ID1 and IE4

way to protect the police from crime. At the same time, some of those in favour of legalising the use of covert powers maintain the importance of restricting and limiting the use of such powers. Interviewee IB1 said that ‘if the law is issued, it should only give general regulations such as definition, role and aims of covert powers while specific regulations on an application procedures and process of the cover powers must be assigned to a government agency for example the Ministry of Public Security to regulate.’<sup>981</sup> However, both supporters and opponents do not make clear any distinction between legalising covert powers and the issue of using its result in court. They all think that the legalisation of covert powers inevitably means being able to use its product at court.

By contrast, legalising covert powers and using covert power products are two distinct issues in England and Wales. Covert powers have been legalised for many years, following the Interception of Communication Act 1985. The legislation about covert powers in the UK is now the Regulation of Investigatory Powers Act 2000 (more detail about this law will be given later). However, not all results of using covert powers can be used as evidence at court so as to protect sensitive methods. For example, the use of intercept material as evidence in criminal proceedings is currently prohibited in the UK.<sup>982</sup> Instead, this material is considered as vital intelligence in the UK, though it can be used as valuable evidence at trial in other jurisdictions such as USA and Australia.<sup>983</sup>

The Criminal Procedure Code 2015 (VCPC 2015), which will take effect in the near future, now regulates some special investigative measures, including ‘secret audio-video recording’, secret wiretapping and ‘secret collecting electronic data’.<sup>984</sup> According to the VCPC 2015, the results of these measures can be used at courts.<sup>985</sup> However, this addendum will not immediately change the way the police use covert powers in the near future. This is for several reasons. First, police practice on a day to day basis is not necessarily easy to change by legal edict. Police currently use covert techniques and see them as an important part of their investigative skill set. However this is frequently done without oversight and the VCPC 2015 will therefore only have a limited effect on these practices, at least in the short term. Second, the VCPC 2015 only mentions the name of

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<sup>981</sup> Interviewee IB1

<sup>982</sup> RIPA 2000, Sections 1, 17, 18

<sup>983</sup> HM Government, *Intercept as Evidence*, Cm8989, London, 2014

<sup>984</sup> VCPC 2015, issued on 27 November 2015, No. 101/2015/QH13, article 223

<sup>985</sup> *Ibid.*, article 227

three specialist investigative measures. Substantive regulation of these measures is not defined specifically. According to the Resolution No. 110/2015/QH13 of the National Assembly regarding the implementation of the VCPC 2015, it is necessary to issue specific regulations and guidance for implementing them.<sup>986</sup> However, such specific regulations and guidance have not yet been issued nor are expected to be for some time. This means that the Code might limit their actual application in ways that are not necessarily useful in combating transnational crimes. Third, according to Article 224 of the VCPC 2015, these specialist investigative measures can only be used for investigating certain offences, that include ‘crimes of infringing upon national security’, drug crime, corruption, terrorism, money laundering and very serious organised crimes. However, according to the analysis of the features of transnational crime and the designs of criminalisation of transnational crime in Chapter Three and Chapter Six, transnational crimes vary and are not confined to drugs crimes or money laundering. The existing Criminal Code of Vietnam does not specify organised crime offences. This also suggests a conflict between definition of transnational organised crime and the means to combat it. Fourth, as analysed in previous paragraphs, the fieldwork data shows that the majority of police officers are not ready to apply these three covert powers as legal measures. They need to be trained.

Thus, in terms of the rule of law, there is a failure: the covert powers are not dealt with by law. There may be some administrative processes relating to those powers. Some senior police officers may know about that process. But this does not mean that the requirements for the rule of law are met.<sup>987</sup> In addition, fairness is compromised because those powers are governed by secret regulations. People’s privacy rights need to be better protected. When exchanging covertly obtained evidence, against transnational crime, if without clear laws or legality, international partners may not accept that evidence collected by Vietnamese police is acceptable to use in their courts. At the same time, notions of fairness and the rule of law, with regard to police powers, are being pursued for the sake of standardising a treatment of people whether they are Vietnamese or foreigners. This standard should be raised and required as an aspect of cosmopolitanism. In terms of effectiveness, the majority of the police are not ready to apply this power, because the police need more training and better equipment.

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<sup>986</sup> National Assembly, Resolution No. 110/2015/QH13, article 2(2)

<sup>987</sup> *Malone v. the United Kingdom*, App No. 8691/79, Ser. A vol. 82, (1984)

### 7.2.2.1.2. Overt Powers of the Police

The second category of investigatory powers is overt statutory powers of the police in the investigation of transnational crime. These investigatory powers of the police are how the police are expressly empowered by the State to help them bring criminals to justice. Moreover, these investigatory powers enable the police to carry out their investigating activities lawfully, and with the application of reasonable force.<sup>988</sup> According to David Dixon, these investigatory powers are ‘simply exemptions from criminal or civil liability for what otherwise would be unlawful acts.’<sup>989</sup> In this sense, Articles 34, 35 of the VCPC 2003 indicate that when investigating transnational criminal cases, the police have certain main powers.<sup>990</sup> These are: (1) the power to institute criminal cases and initiate criminal proceedings against the accused, to decide not to institute criminal cases; to decide to incorporate or separate criminal cases, (2) the power to arrest, (3) the power to detain, (4) the power to search, (5) and the power to interrogate. This shows that the investigatory powers of the police may involve both a person and things (objects or places) that are believed to be related to criminal cases.

In terms of statutory powers, when the police of Vietnam undertake a crime investigation, only those investigatory powers prescribed in the Criminal Procedure Code are recognised in courts. The reason for this is that this Code ‘prescribes the orders and procedures of instituting, investigating, prosecuting’<sup>991</sup> criminal cases, including international cooperation in criminal procedures with a view to detecting accurately and quickly and handling justly and in time all criminal acts, thereby not leaving criminals unpunished and the innocent injured unjustly. Thus, Article 2 of the Criminal Procedure Code states that ‘All criminal proceedings on the territory of Vietnam must be conducted in accordance with the provisions of this Code.’<sup>992</sup>

Commenting on this issue, several interviewees indicated that statutory powers of the police play an important role in enhancing the validity as well as the use of investigative results at courts. For example, Interviewee ID1 said:

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<sup>988</sup> The Royal Commission on Criminal Procedure, Report (presented to Parliament by Command of Her Majesty 1981), cmnd 8092, page 22

<sup>989</sup> Dixon, D., *Law in Policing: Legal Regulation and Police Practices* (Oxford: Clarendon Press, 1997) 64

<sup>990</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, articles 34, 35

<sup>991</sup> *Ibid.*, article 1

<sup>992</sup> *Ibid.*, article 2

‘Regulating investigatory powers in Criminal Procedure Code helps prevent the police from an abuse of the investigatory powers because the police then are required to follow a certain orders and procedures which guarantee fairness of investigating activities. At the same time, the public can easily supervise the law observation of the police.’<sup>993</sup>

Furthermore, there are some legal documents other than the Criminal Procedure Code that also empower the police to investigate a crime. For example, the Law on Drug Prevention and Control states that the police may ‘take necessary professional measures to detect drug-related crimes.’<sup>994</sup> The Law on Legal Assistance provides legal provisions regarding to extradition matters which regulate procedures that ‘procedure-conducting bodies’ shall follow.<sup>995</sup> However, these legal documents are only to provide supplements to procedures that have not been clearly defined by the Criminal Procedure Code, for example in the case of mutual legal assistance. As a whole, there is only recognition for the implementation of investigatory powers and their results which are drawn in accordance with the processes and procedures prescribed in the Criminal Procedure Code. What is more, while some ancillary powers defined in laws other than the Criminal Procedure Code, such as the Law on Handling of Administrative Violations,<sup>996</sup> can be adapted to investigate transnational crime, those powers are not under criminal process, but are under administrative procedures. For example, when a car that is suspected of smuggling banned products violates traffic regulations such as by hitting another car in an accident, the police may search that suspected car under the Law on Handling Administrative Violations, instead of criminal process.<sup>997</sup> This search may be used to find

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<sup>993</sup> Interviewee ID1

<sup>994</sup> Law Amending and Supplementing a Number of Articles of the Law on Drug Prevention and Control, issued on 3 June 2008, No. 16/2008/QH2, article 13 (b)

<sup>995</sup> Law on Legal Assistance, issued on 21 November 2007, No.08/2007/QH12, article 42(2)

<sup>996</sup> Law on Handling of Administrative Violations, issued on 20 June 2012, No. 15/2012/QH13

<sup>997</sup> Article 119 of Law on Handling of Administrative Violations states that ‘In case of necessity to promptly deter administrative violations or to assure the handling of administrative violations, competent persons may apply the following measures according to administrative procedures: (1) Holding of persons in temporary custody; (2) Escorted transfer of violators; (3) Temporary seizure of administrative violation material evidences and means, licenses and practice certificates; (4) Search of persons; (5) Search of means of transport and objects; (6) Search of places where administrative violation material evidences and means are hidden; (7) Management of foreigners violating the Vietnamese law pending the completion of expulsion procedures; (8) Consignment of persons requested to be subject to administrative handling measures to their families or organizations for management pending the completion of procedures for application of such measures; (9) Pursuit of persons obliged to execute decisions on consignment to reformatory, compulsory education institution or compulsory detoxification establishment in case they abscond.’

evidence about the car concealing banned products. But the uses of such ancillary powers for transnational crime investigations fall in the field of police tactics, and are not core to the objects of this thesis.

### **7.2.2.2. Key Investigatory Powers of the Police**

To further understand available investigatory powers prescribed in the Vietnamese laws, the following analysis will clarify the nature and extent of some key investigatory powers that are often used in the investigation of transnational crime. The investigatory powers of the police will be examined from two approaches: the power to investigate a person; and the power to investigate objects or places. This subsection exclude the three newly regulated covert powers, since they will not be applied by the police in the near future.<sup>998</sup>

#### **7.2.2.2.1. Power to Investigate Persons**

The power to investigate a person by seeking information from that person by questioning is important in transnational crime investigations. This power allows settlement of a criminal case by verification of a suspicion about a person or identification of a person who is responsible for the commission of a crime. However, the investigation must cease if its results cannot identify a criminal after the investigation time limit.<sup>999</sup> Even so, ‘effective crime control requires that the police be equipped with extensive powers of control and surveillance over citizens.’<sup>1000</sup> In Vietnam, this important power can be examined under concrete powers such as arrest powers, custody powers, search powers, interrogation powers. The detailed analysis of these powers is as follows.

##### **7.2.2.2.1.1. Arrest Powers**

In Vietnam, the police can make an arrest either when they face urgent circumstances (more of which will come below) or when they are authorised by procuracies following an approved warrant that is defined under the term of ‘Arresting the accused or defendants for temporary detention.’<sup>1001</sup> The latter is applied to a person who was either charged by the police for a certain offence or given a decision to be tried

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<sup>998</sup> See further discussion at subsection 7.2.2.1.1

<sup>999</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 119(6)

<sup>1000</sup> Choongh, S., Police Investigative Powers, in McConville, M. and Wilson, G., *The Handbook of The Criminal Justice Process* (Oxford and New York: Oxford University Press, 2002) 56

<sup>1001</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 80

at a court. Its main purpose is to facilitate an investigation, prosecution, trial or the implementation of criminal penalties.

In the former circumstances, article 81 of the VCPC 2003 gives the police the right to arrest persons in urgent cases.<sup>1002</sup> It states that an urgent arrest can be made in the three following cases.

‘(a) when there exist grounds to believe that such persons are preparing to commit very serious or exceptionally serious offenses; (b) When victims or persons present at the scenes where the offenses occurred saw with their own eyes and confirmed that such persons are the very ones who committed the offenses and it is deemed necessary to immediately prevent such persons from escaping; (c) When traces of offences are found on the bodies or at the residences of the persons suspected of having committed the offenses and it is deemed necessary to immediately prevent such persons from escaping or destroying evidence.’<sup>1003</sup>

Therefore, arresting persons in urgent cases is a necessary power that can be applied to two kinds of person: one is a person who is preparing a crime; the other is a person who has committed a crime or is suspected of having committed a crime. Cases of (a) and (b) are exercised when according to a preliminary investigation of the police, such arrests are deemed necessary. The case of (c) usually takes place while the police are executing their tasks such as residence search or body search against someone.

In terms of competence for mandate issuance, according to the VCPC 2003, the power to order the arrest in case of urgency is only assigned to police leaders of the investigating police agencies. On this point, the article 81 (2) of the Criminal Procedure Code indicates that:

‘The following persons shall have the right to order the arrest of persons in urgent cases: Heads, deputy heads of investigating bodies at all levels.’<sup>1004</sup>

Although the police must immediately notify the urgent use of that power to the procuracies who within 12 hours must make a decision to approve or not approve such police mandate, this regulation grants the police significant investigatory power to investigate a persons without approval from the procuracies beforehand.

Apart from the two arrest powers described above, Vietnamese legislation also defines the powers of arresting offenders caught red-handed or wanted offenders that

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<sup>1002</sup> Ibid., article 81

<sup>1003</sup> Ibid., article 81(1)

<sup>1004</sup> Ibid., article 81



allow every citizen the right to arrest.<sup>1005</sup> A police officer may act as a citizen to utilise this arrest power to supplement his or her transnational crime investigation when the circumstance permits and there is no possibility to request for urgent arrest powers.

By comparison, in England and Wales, power of arrest is classified into (1) the power to arrest without a warrant by the police and (2) the power to arrest without warrant by other persons other than the police (citizen's arrest) which is confined to arrest for the more serious category of indictable crime.<sup>1006</sup> In terms of arrest powers of the police, this 'power to arrest without a warrant by the police'<sup>1007</sup> is equivalent to the urgent arrest powers by the police in Vietnam. But, unlike in Vietnam, where the urgent arrest power by the police is only resorted to for very serious or exceptionally serious offences, the arrest power without warrant by the police in England and Wales can be used for any offence.<sup>1008</sup> This point provides the English police more arrest powers than the power to arrest in urgent case by the police of Vietnam. However, the arrest without warrant as used by the English police is strictly governed. There are clear legal grounds requirements for making an arrest. Although arrest is also defined as a step in the criminal process, a lawful arrest by the police requires two elements: the first one is an involvement in the commission of an offence; and the second element is having reasonable grounds for the necessity of arresting a person.<sup>1009</sup> Therefore, the experience of England and Wales relating to powers of arrest should be considered by Vietnam in terms of legality, authorisation and oversight. In terms of legality, like in Vietnam, powers of arrest in English law are extensive. But in terms of authorization, which includes who authorizes; what grounds for authorization and oversight, these may be more specific in England and Wales particularly in the notion of necessity for the arrest. The requirements for necessity are now specified in Section 25 of PACE<sup>1010</sup> (a comparative analysis between the powers of arrest of the English police will be and the Vietnamese equivalent appears further below).

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<sup>1005</sup> Article 82 of the VCPC 2003 states that 'For persons who are detected or chased while committing offenses or immediately after having committed offenses as well as for wanted persons, any persons shall have the right to arrest and take them to the police agencies, procuracies or People's Committees at the nearest places.'

<sup>1006</sup> PACE 1984, sections 24, 24A; Serious Organised Crime and Police Act 2005, s. 110.

<sup>1007</sup> PACE 1984, s. 24

<sup>1008</sup> Serious Organised Crime and Police Act 2005, s. 110; Zander, M., *The Police and Criminal Evidence Act 1984* (London: Sweet & Maxwell, 2005) 126

<sup>1009</sup> Revised Code of Practice for the Statutory Power of Arrest by the Police Officer: PACE 1984 - Code G, May 2012

<sup>1010</sup> PACE 1984, s. 25

In summary, sufficient arrest powers are important for the police to investigate transnational crimes. The police can use different arrest powers. As indicated above, arrest powers are regulated in the Criminal Procedure Code. But there remain some concerns about their use in terms of the rule of law, fairness, and effectiveness. This is because the notion of the rule of law, fairness and effectiveness, with regard to police powers, are being sought for the sake of standardizing a treatment of people whether they are Vietnamese or foreigners. In the meantime, this standard should be raised and required as the aspect of cosmopolitanism. Specifically, in terms of the rule of law, the use of the urgent arrest powers for very serious offences or exceptionally serious offences is vague. It is not clear how the police should use it. Moreover, it raises a question of whether the police are always able to determine serious offences at the pre-arrest stage, when the police sometimes make arrest to assist in looking for evidence of a crime. Besides, in term of fairness, it is hard to ensure that the police only use the urgent arrest powers for very serious offences where it is often difficult to make a distinction between very serious offences and less serious offence at the initial investigative stage. Furthermore, in terms of effectiveness, the use of the urgent arrest powers confined to very serious offences limits the ability of the police to use it. A criminal may escape from arrest while the police are still looking for evidence to determine that the offence is a very serious offence. In the meantime, the police may feel hesitant to apply it.

#### **7.2.2.2.1.2. Detention Powers**

Custody detention is also a power that the police may use in transnational crime investigations. According to the VCPC 2003, a person held in custody can be someone arrested in urgent cases, offenders caught red-handed, offenders who confessed or surrendered themselves or persons arrested under a pursuit warrant.<sup>1011</sup>

In these circumstances, the police have the power to keep a person in custody for a maximum period of 72 hours. Specifically, like arrest powers in urgent cases, heads and deputy heads of investigating police agencies are assigned to issue this custody warrant. After this period of time, if necessary, the police can request the procuracies to extend for another three days. In special cases, the police may request a second extension of three days by submitting the documents and evidence to the procuracies who within 12 hours must decide to approve or not approve. The VCPC 2003 does not state clearly the reasons

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<sup>1011</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 86

or grounds for custody extensions. The meanings of a necessary case and a special case are not explained by specific regulation, but by perception and assessment of the police. In practice, the police usually seek to extend detention in order to have more time to investigate and verify a suspect.

Although these custody extensions can only be carried out after getting approval from the procuracies, they enable the police to detain the suspect for up to nine days. Due to the lack of clear grounds for custody extension, this nine day detention period seems to be quite long in comparison with the period afforded in other countries. For example, in England and Wales, it is possible to detain a suspected terrorist for up to a total of 14 days,<sup>1012</sup> but limits on the period of detention without charge in non-terrorism cases is up to 96 hours (or 4 days).<sup>1013</sup> The police may detain a suspect before charge usually for up to maximum of 24 hours or in serious cases for up to 36 hours.<sup>1014</sup> However, according to Section 43 of PACE, after 36 hours, the police must apply to a Magistrate for further detention.<sup>1015</sup> In addition, there is a periodic police review of such detention within specific times, such as after the first six hours detention, and then at nine hours intervals. In contrast to Vietnam, where there are no public statistics on detention, in England and Wales most prisoners are detained by the police at the pre-trial period for an average of six to nine hours and the vast majority for under 24 hours.<sup>1016</sup> While this statistic reflects the oversight of this detention power, it also shows that the system in England and Wales is effective. It balances and compromises between effectiveness of the police and the protection of liberty. The shorter limits for detention with the periodic reviews have assisted the English police not only in achieving greater professionalism in their task of investigating transnational criminals but also restricting detention to instances when it is strictly necessary.<sup>1017</sup> In this regard, Vietnam may consider this issue of oversight on detention powers as a helpful policy transfer.

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<sup>1012</sup> Criminal Justice Act 2003; Terrorism Act 2000

<sup>1013</sup> PACE 1984 (s.41, s.42, s.43 and s. 44)

<sup>1014</sup> *Ibid.*, s.42

<sup>1015</sup> *Ibid.*, s.43

<sup>1016</sup> Home Office, *Police Powers and Procedures, England and Wales, Year Ending 31 March 2015, Statistical Bulletin 07/15*, p. 29; The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO, London, 1993, p.30

<sup>1017</sup> Law Reform Commission of Mauritius, *Issue Paper on 'Criminal Investigation & Reform of Police Procedures and Practices'* (July 2010), <<http://lrc.govmu.org/English/Documents/Reports%20and%20Papers/35%20issue-pap-crim.pdf>>

During the nine day custody time limit in Vietnam, no persons held in custody shall be considered to be guilty.<sup>1018</sup> In other words, the regime of detention is required to provide that persons held in custody are treated well, and are afforded conditions to exercise their civil rights, for example the right to access legal advice. However, a custody officer, who guards over treatment during the detention, operates as the gaoler in Vietnam. This custody officer is in charge of guarding the detention, but has no decision about arrest or detention order, or how long the arrestee is in custody. In addition, the custody officer has no responsibility to review the detention of the suspect periodically. Furthermore, he cannot order immediate release of a detained person if the grounds for detention of that person no longer exist. Instead, the custody officer only has the duty to follow the order of the head of investigating agencies in detaining the suspect.

By comparison, unlike regulations in Vietnam, a custody officer in England and Wales takes an active role in the detention decision.<sup>1019</sup> While a custody officer's duty must oversee all aspects of a detainee's treatment,<sup>1020</sup> he has a duty, *inter alia*, to decide initially whether the detention of the suspect is warranted.<sup>1021</sup> In addition, there is a review officer who is not involved in the investigation. After the authorisation of detention by the custody officer, the review officer should conduct a review periodically. For example, 'the first review is supposed to be not more than six hours after the initial authorisation of the detention by the custody officer.'<sup>1022</sup> These provisions to some extent help prevent abuse of the detention period by the police and provide better safeguards for the suspect. Most detentions are under 24 hours.

After nine days' detention, three different possibilities arise. First, the person can be released without conditions if an investigation confirms that he or she did not commit a crime. Second, the person can be released, but constrained by other measures such as either 'Ban from travel outside one's residence place',<sup>1023</sup> or 'Guarantee'<sup>1024</sup>, or 'Depositing money or valuable property as bail'.<sup>1025</sup> This possibility is applied in circumstances in which a person is still being investigated, but it is not necessary to

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<sup>1018</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, article 89

<sup>1019</sup> PACE Act 1984 (s.34(2) and s.40) and Code C

<sup>1020</sup> *Ibid.*, s. 37

<sup>1021</sup> Zander, M., *The Police and Criminal Evidence Act 1984* (London: Sweet & Maxwell, 2005) 186

<sup>1022</sup> *Ibid.*, 187

<sup>1023</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, article 91

<sup>1024</sup> *Ibid.*, article 92

<sup>1025</sup> *Ibid.*, article 93

continue detaining him or her because, for example, he or she has a settled residence address. Third, the person may be detained under remand. According to Article 88 of the VCPC 2003, this detention under remand is used for accused persons who have committed serious offences or less serious offences punishable under the Penal Code by imprisonment for over two years and there are grounds to believe that they may escape or obstruct the investigation, prosecution and trial or may continue committing offences.<sup>1026</sup>

Thus, apart from being held in custody, which could amount to a total of nine days including two extensions, a person can be detained under remand by the police whilst the investigation is ongoing, but the police's orders for detention under remand must be approved by the procuracies beforehand. In this regard, there is a distinction between nine days-custody time limits and detention time limits after nine days (detention under remand). Firstly, nine days-custody powers are usually applied to a person who is not charged for any offence yet, except the case of a person being arrested under a pursuit warrant (this custody decision issued for a person arrested under pursuit warrant is a waiting time before handover of the arrested person to the investigating agencies who have issued the pursuit warrant.<sup>1027</sup>) To confirm the legal status of a person held in custody, Article 87(3) indicates that 'In the custody period, if there are insufficient grounds to initiate criminal proceedings against the accused, the persons kept in custody must be released immediately.'<sup>1028</sup> In the meantime, powers for detention under remand (detention time limits after nine days) are only used for accused or defendants who are likely to go to court. Secondly, during detention under remand, a primary investigation using the inquisitorial system is done under close direction, agreed with procurators rather than under initiative of the police as during the nine days detention time limits. The procurators participate in more depth during detention under remand, though during this time, the police are still able to question the detainee for further evidence. However, the procurators are still in charge. Thirdly, custody cells are usually located within police stations together with investigating agencies, whereas detention facilities for detention under remand are often in separated places, though they are still governed by the police.

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<sup>1026</sup> Ibid., article 88

<sup>1027</sup> Ibid., article 83(2)

<sup>1028</sup> Ibid., article 87(3)

According to Vietnamese legislation, the maximum remand period can be up to 16 months.<sup>1029</sup> With regard to crimes which affect national security, a time limit for detention under remand can be extended by up to 20 months. However, there are no provisions which are specifically used for transnational crime. Therefore, normally, under the order by procurators, the police still carry out investigation within 16 months. In general, these limits seem to be suitable for transnational crime investigations. Especially, where cases are processed through official procedures and orders of legal assistance in criminal matters. For example, it may take at least 90 days to process a request for service of a summons on witnesses or experts, who are residing in Vietnam, before the expected date of those persons' presence in those requesting country.<sup>1030</sup> Or within four months after handling a request for extradition, the court must decide to consider extradition or not.<sup>1031</sup>

Even beyond 16 months, the police still request in special circumstance procurators to continue the investigation by initiating a new investigation. There is no special criterion to prolong the detention time limits for transnational crime investigations. It is considered on a case by case basis in which difficulty of timeframe for transnational crime investigation may be claimed by the police. This raises an issue of fairness such as process and review of detaining a person in prison for a long time before trial takes place. The rules and laws are not strict enough. There are differences between the rule on paper and the rule in action. The police therefore can play with the rules to conduct lengthy investigations.

In summary, there are provisions in Vietnamese law regarding the detention powers. Suspects may be detained for nine days and thereafter on remand up to 16 months or beyond 16 months. But in terms of the rule of law, these are not always clear, nor are they sufficient: for example there are a lack of provisions which provide the requirement for custody officers to justify the detention warrant. In addition, it is necessary to have regulations which specify the role of the review officer who is not involved in the investigation but who has a duty to oversee the continued detention of suspects. Experience in the appointment of a review officer's role in England and Wales may be considered to improve the Vietnamese legislation. In terms of fairness, it is hard to ensure fairness in the use of detention powers when a custody officer just follows the orders of

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<sup>1029</sup> *Ibid.*, article 120

<sup>1030</sup> Law on Legal Assistance, issued on 21 November 2007, No. 08/2007/QH12, article 24

<sup>1031</sup> *Ibid.*, article 40

the investigating officers, and has no power to make detention decisions. A custody officer, as in England and Wales, may be a better way to prevent abuse of a long detention period by an investigating officer. In terms of effectiveness, as explained above, because there is no clear legal ground for custody extensions in Vietnam, the police sometimes do not want to seek a custody extension. They may be afraid that they will violate the liberty of suspects following their subjective assessment of the necessity for detention.

### **7.2.2.2.1.3. Search Powers Related to Persons**

In Vietnam, a search of the person can be done by the police on three occasions.

First, in general, the police can search a person when they are authorised by the procuracies under an approved search warrant. According to Article 140 of the VCPC 2003, a body search can be conducted when there are grounds to judge that on the bodies of persons there are instruments and means of offense commission, objects or, and property acquired, from offense commission or other objects or documents related to criminal cases.<sup>1032</sup> In this context, the police must request procuracies for a search warrant. Therefore, a body search can be applied to any persons whether or not they are subject to criminal proceedings.

Second, the police are given the power to search a person in urgent cases. According to the VCPC 2003, in case of urgency, the police have the right to issue a search warrant, and within 24 hours after completion of the search, they must notify procuracies of the same level thereof.<sup>1033</sup> While the execution of search warrants may be assigned to investigators, in such urgent cases, search warrants must be issued by heads or deputy heads of investigating police agencies.<sup>1034</sup> The purpose of these searches is either looking for evidence or arresting a person who may be believed to have escaped. Although a search in case of urgency is required to meet requirements of fast and just investigating activities, there is no further explanation concerning the meaning of urgency.

Third, according to Article 142(3) of the VCPC 2003, ‘a body search may be conducted without a warrant in case of arrest or when there is grounds to confirm that the person present at the searched place is hiding on his/or her body documents or objects required to be seized.’<sup>1035</sup> For example, while the police are searching Mr. A’s residence,

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<sup>1032</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 140

<sup>1033</sup> Ibid., article 141(2)

<sup>1034</sup> Ibid., article 81

<sup>1035</sup> Ibid., article 142(3)

Mr. B who is present there conceals on his body money or property that are suspected of being related to the criminal case. If a searching officer asks Mr. B to hand back concealed money and property, but he refuses to do so, a body search against Mr. B can be executed without a warrant. With regard to the body search in the case of arrest, there is no clear regulation saying that the search will be conducted before or after the arrest. Instead, the VCPC 2003 leaves this point to the police who further interpret the application of body search in case of arrest under instructions of professional investigative tactics, not under legal provisions.

Furthermore, during the investigation of transnational crime, the police, specifically investigators, may also have the right to examine the bodies of a person to detect evidence related to the offense or other traces of significance to the criminal cases, without a warrant. Article 152 of the VCPC 2003 confirm that ‘Investigators shall examine the bodies of the person arrested or taken into custody, the accused, victims or witnesses in order to detect thereon traces of offences or other trace of significance to the cases.’<sup>1036</sup> Although there are no further regulations covering ‘intimate searches, non-intimate searches and strip searches’ like those in England and Wales,<sup>1037</sup> this regulation gives the police an investigating measure that can be regularly used in their investigative work either at police stations or outside the police stations. Moreover, this power for examination of bodies, together with a regulation about the ‘solicitation of expertise’<sup>1038</sup> that requires taking samples, implies the right of the police to take fingerprints and DNA samples, even though no existing provisions for this kind of activities are set out in the Criminal Procedure Code. Specifically, except article 126(3) of the VCPC 2003 which indicates investigating agencies ‘must take photographs and compile other personal record of the accused and put them in the case file’,<sup>1039</sup> there are no further details indicating how a case of suspects other than the accused, for example a person being not yet charged with an offence, is dealt with regarding fingerprints and DNA records and examination. Instead, these issues are more likely handled under training guidance of police skills. For example, by the Instruction No. 06/CT-BNV(C11) and No.01/2008CT-

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<sup>1036</sup> Ibid., article 152

<sup>1037</sup> PACE 1984, s. 65 and Code C, Annex A

<sup>1038</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 155

<sup>1039</sup> Ibid., article 126(3)



BCA(C11), the Minister of Public Security allow the police to fingerprint a person who is held in custody and has not been charged.<sup>1040</sup>

In practice, when it is necessary to verify someone who is suspected of commission of a crime, the police will take a fingerprint and DNA sample from that person for examination: although this is technically requested by the police, the arrestee or suspect has no clear legal right to refuse. Without any written orders, the police can verbally request to be provided with the samples. Then, these fingerprint and DNA samples and their examination results are recorded in the police's Criminal Records Database, and are only used for crime prevention and investigation. But this collection of fingerprint and DNA sample is carried out under a routine job requirement of the police rather than a requirement of legal provisions. There is a no clear regulation on how these fingerprints and especially DNA are retained, used and destroyed. For example, there is no time limit for the retention of these samples, so the police can store them as long as they want.

In comparison with England and Wales, starting with the PACE 1984, a lot of work has been done with regard to regulating search powers related to a person, particularly provisions relating to bodily search. This issue is clearly and specifically regulated at Sections 61, 63A, and 64 of the PACE 1984 and Chapter 1 of the Protection of Freedoms Acts 2012 and court's decisions. In these regulations in England and Wales, criterion and conditions to collect, use, retain and destroy these samples and their information are set out as well as the specific agencies which have competence to do so. For example, the legislation clearly regulates the collection of fingerprints of those who are convicted of overseas offences.<sup>1041</sup> Further, for the fairness of the police powers, fingerprints can only be taken under authorisation of an officer of the rank at least of inspector who judges the necessity for taking of that fingerprints in terms of prevention and detection of crime.<sup>1042</sup>

The reasons for England and Wales to develop a lot of such regulations is because the UK (England and Wales) is orientated to forensic evidence, and is one of leading countries in developing forensic evidence. The UK is at the forefront for the development

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<sup>1040</sup> Ministry of Public Security, the Instructions No. 06/CT-BNV(C11), issued on 22 March 1997; and the Instructions No.01/2008CT-BCA(C11), issued on 14 March 2008

<sup>1041</sup> PACE 1984, s.61(6D)

<sup>1042</sup> *Ibid.*, s.61

of DNA evidence as an important player in the investigation of crime.<sup>1043</sup> The UK has embraced new forms of forensic evidence, but it also recognises its threats by considering the impact of this kind of evidence on personal freedom, privacy and liberty. In *S. and Marper v. UK*, with regard to the issue of retention and accessibility of biometric materials, the European Court of Human Rights argued with the British government that the retention of applicant's fingerprints and DNA records had a clear basis in the domestic law, but it condemned the English law about legal limits on powers of gathering and storage of evidence, as being too indulgent in terms of length of retention powers.<sup>1044</sup> The English law responded to that judgement with the Protection of Freedom Act 2012. Specifically, by this act, not only the legality is ensured for powers of gathering evidence, but also there is specificity for how long a sample can be retained. Moreover, in terms of oversight, there is the appointment of the Biometrics Commissioners who oversee biometrics evidence.<sup>1045</sup> Therefore, it can be seen that in terms of the rule of law, England and Wales has a law to regulate when, why and in what circumstances the police can collect, retain and destroy biometric evidence. All these help the police to respect the privacy of suspects and to ensure fairness. In terms of effectiveness, England and Wales can afford to retain and oversee biometric evidence. There is also a lot of training and discussion on how to take this kind of material and what they mean in courts. Such expenditure may not be possible on this scale in Vietnam. But in terms of legality, authorisation and oversight, Vietnam needs to learn from this experience in order to have at the least clear powers of taking bodily sample forms of forensic evidence, its retention and oversight.

In summary, some issues may arise from existing Vietnamese legislation relating to search powers related to a person. In terms of the rule of law, although there is a law regarding the powers to search a person, this law is in broad terms. It is not clear whether or not to instruct the police, for example to use the body search powers before or after arrest. There is a lack of regulation on the collection and storage of biometric evidence such as DNA evidence. Instead, these processes are conducted by police routinely, and under the training guidance of police skills. Moreover, efficiency and fairness are not secure. Without clear legal regulations, it may waste resources to take fingerprints and

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<sup>1043</sup> McCartney, C., *Forensic Identification and Criminal Justice: Forensic Science, Justice and Risk* (New York: Willan, 2006) xii

<sup>1044</sup> *S. and Marper v. the United Kingdom*, December 2008

<sup>1045</sup> Biometrics Commissioner's Annual Report 2015

DNA from every person since it may be unnecessary to do so. Moreover, the power may be abused, and become unfair when doing it without legal grounds because it invades people's privacy. Besides, there may arise an obstacle to the police when they cooperate with overseas police forces to identify someone in transnational crime investigations in a country such as England and Wales, where taking and examination of fingerprints and other biometric samples are rigorously regulated by the law, because without legal regulations, it is not fair to take, use and retain these samples and their information. Thus, the legitimacy of police activities in handling these samples is not guaranteed. In this regard, it may be good to learn from England and Wales where there is detailed legislation to provide for the body of the search powers, especially the use and oversight of biometric materials obtained from those powers. By doing so, the police powers to search a person not only have a clear legal basis, but also enhance the fairness of use of these powers. In the meantime, this standard should be raised and required as the aspect of cosmopolitanism which facilitates success in transnational crime investigation.

#### **7.2.2.2.1.4. Interrogation Powers**

Interrogating the accused is a way for police investigators to detect and collect evidence when investigating transnational crimes. Usually, the police must conduct this investigating power soon after a decision to initiate criminal proceedings is issued. Moreover, the Vietnamese legislation also requires the police to interview an arrestee within 24 hours after the arrest in order to decide whether the arrestee is to be detained or released.<sup>1046</sup> In this interrogation, the police shall ask questions. In turn, the accused or suspect may answer or acknowledge as recorded in Minutes of Interrogation (*Bien Ban Hoi Cung*). This minute must be taken by the investigators and considered as a source of evidence that will be used at the court later.

To ensure the objectivity and the quality of evidence obtained from the interrogation power, some regulations with regard to conducting the interrogation and treatment of interrogated suspects are prescribed. For example, according to Article 131 of the VCPC 2003, the police can conduct an interrogation of the accused either at police stations or at the accused's residence, but not at night except in case of urgency.<sup>1047</sup> Before conducting an interrogation, the police have the duty to explain about the rights such as the right to access to lawyers, as well as the obligation for example being present for

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<sup>1046</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 83

<sup>1047</sup> *Ibid.*, article 131

interrogation at the request of the police. The police are banned from abuse of interrogation, for example to make someone to answer under oppression. To prevent this violation, the VPC 1999 prescribes two offences: ‘Applying corporal punishment’ and ‘Forcing evidence or testimony’.<sup>1048</sup> In other words, an investigator will be charged with a crime if he or she uses any means of torture, unhuman, maltreatment or any illegal methods and tricks on persons while questioning them in order to obtain a false testimony. However, regulations for the interrogation power are still vague and even insufficient, especially for interrogating serious and complex crimes such as transnational crime. For example, there is no full explanation about what is maltreatment of the suspect. In addition, there is no detailed guidance on interrogating foreigners including the use of interpreters. Besides, there is no concrete regulation about interrogating a person who is detained in custody. The accused’s right to silence is not prescribed. In terms of the right to access lawyers, although Article 58 of the VCPC 2003 indicates that a defence counsel can attend the interrogation,<sup>1049</sup> but this regulation does not outline procedures by which the right to access to lawyers is implemented (see further discussion on this issue at section 7.3.4.2). Moreover, during interrogation, it is not compulsory to use audio or visual recording during interviewing. The Criminal Procedure Code 2015 supplemented a provision that requires the police to use audio-video recording while interrogating a ‘person held in custody’.<sup>1050</sup> But this compulsory provision will not take effect until 1 January 2019.<sup>1051</sup>

In general, criteria for the admission of a statement are not regulated specifically and fully in the law. In the legal practice of Vietnam, normally, admission of testimony is judged under two aspects: one is whether testimony is taken in accordance with the Criminal Procedure Code; and the second criterion is whether the content of this testimony is consistent with other evidence gathered by other means, for example criminal traces collected from a crime scene.<sup>1052</sup> Even, in terms of the first aspect, the procedures and processes of conducting an interrogation, which may facilitate to admission of a testimony, are insufficiently regulated. This lack of specific regulations sometimes causes a conflict in assessment of validity of testimony. According to

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<sup>1048</sup> VPC 1999, issued on 21 Dec. 1999, No. 15/1999-QH10, articles 298, 299

<sup>1049</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 58

<sup>1050</sup> VCPC 2015, issued on 27 November 2015, No. 101/2015/QH13, article 183(6)

<sup>1051</sup> National Assembly, the Resolution No.110/2015/QH13, issued on 27 November 2015, article 2(1)

<sup>1052</sup> Interviewee IE3

international expert IG6, ‘confession seems to be more highly emphasised than other type of evidence in the Vietnam criminal justice system,’<sup>1053</sup> but it is not clear by what criteria a minute of interrogation can be trusted, and under what conditions and procedures an interview is considered to be objectively conducted.

There remains controversy on recording between two main views in terms of fair interrogation processes. One side thinks that it is required to apply audio or visual recordings for all interrogations; whereas the other side states that this recording equipment should be used only when necessary, for example for serious crimes or criminal cases where there is a signal of miscarriage of justice at the early stages of the investigation.<sup>1054</sup> The reason for the latter viewpoint is a lack of resources and equipment. For example, interviewee IA12 said ‘the present budget cannot afford to do it.’<sup>1055</sup> But, the former viewpoint argues that it is necessary to be transparent and openly in investigating activities including interrogation. In this regard, the interview data indicates that more than half of all interviewees, especially lawyers and international experts, support the use of recording equipment during questioning.<sup>1056</sup> According to interviewee IC1, the main reason for this argument is that the objectivity of testimony taken is guaranteed and its quality is increased while there is a foundation to protect the police from accusations.<sup>1057</sup> This interview result, to some degree, reflects a change in perception of police powers in comparison with the past in Vietnam. Thus, while the police’s powers enable them to catch a criminal, there is an increasing demand for respect of due process in the application of police powers in order for the country to integrate with the international community in the fight against transnational crime.

It is also difficult to find a set of detailed rules for exclusion of evidence in Vietnamese legislation. According to the Vietnamese legislation, evidence should ensure three characteristic elements: ‘legality’, ‘authenticity’, and ‘relevance to the cases’.<sup>1058</sup> In this sense, legality involves procedures and processes prescribed by the Criminal Procedure Code by which evidence is collected.<sup>1059</sup> To overcome and prevent the abuse

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<sup>1053</sup> Interviewee IG6

<sup>1054</sup> ‘There Should Apply Audio, Visual Recordings When Interrogating’ (BBC News, 7 April 2015),

<[http://www.bbc.co.uk/vietnamese/vietnam/2015/04/150407\\_ghi\\_am\\_ghi\\_hinh\\_hoi\\_cung](http://www.bbc.co.uk/vietnamese/vietnam/2015/04/150407_ghi_am_ghi_hinh_hoi_cung) >

<sup>1055</sup> Interviewee IA12

<sup>1056</sup> Interviewees IC1, IE2, IE3, IG3, IG5

<sup>1057</sup> Interviewee IC1

<sup>1058</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 66

<sup>1059</sup> *Ibid.*, article 64

of powers as well as the violation of human rights during the course of crime investigation, for the first time the VCPC 2015 adds an exclusionary rule of evidence. It states ‘what is true, but is not collected according to orders and procedures prescribed in the Criminal Procedure Code, shall have no legal value, and cannot be used as a basis for resolution of the criminal cases.’<sup>1060</sup> By contrast, there are no criteria or further guidelines to define what is ‘authenticity’ and ‘relevance to the cases’. Consideration of ‘authenticity’ and ‘relevance to the case’ is thus dependent on the discretion of ‘procedure-conducting bodies’. Thus, it is unavoidable to have differences in the assessment of evidence between individuals and agencies in criminal process.<sup>1061</sup> In practice, the exclusion of evidence can be usually found in circumstances where there is violation of procedures and orders prescribed in the Criminal Procedure Code during the collection of that evidence. The exclusion of evidence usually involves police’s misconduct or violation of procedures in their practice while collecting evidence. For example, before interviewing a suspect, if the police forget to explain the suspect’s rights such as the right to access lawyers, the interview result could be excluded later by a court. If violations of the police are serious, for example an investigator makes a false testimony, evidence is excluded and that investigator can be prosecuted for the commission of a crime.

By comparison, the England and Wales’s legislation specifically regulates issues, such as recording of interrogation, legal advice at the interrogation, and admission of confession. These issues are important for effectiveness and fairness of the interrogation powers.

First, interrogation by the police in England and Wales must be appropriately recorded. Any written record must be made and completed during the interview if there is no reasonable reason which shows its interference with the conduct of interview.<sup>1062</sup> The interrogation is compulsorily required to be tape-recorded,<sup>1063</sup> although a written record, in the form of either short descriptive notes or a record of taped interview, must be made after the completion of interview.<sup>1064</sup> There is no statutory requirement on police officers to visually record interviews, but the visual recording with sound of an interview

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<sup>1060</sup> VCPC 2015, issued on 27 November 2015, No. 101/2015/QH13, article 87(2)

<sup>1061</sup> Interviewee IE2

<sup>1062</sup> PACE 1984, Code C, para. 11.7, 11.8, 1.9, 11.10

<sup>1063</sup> *Ibid.*, s.60, Code E

<sup>1064</sup> Zander, M., *The Police and Criminal Evidence Act 1984* (London: Sweet & Maxwell, 2005) 235

is regulated in England and Wales for the case where the investigating officer decides to make video recording of interviews.<sup>1065</sup> This electronic recording would ensure the liability and credibility of interrogation-related evidence in criminal cases. For example, it prevents the adding or cutting of content of interview which may happen in the case of note-taking in the interview.<sup>1066</sup> The tape or audio recording of the interview not only ensures the integrity of content of the interview, but also encourages ethical tactics by which the police ask questions. Moreover, the tape recording of interview would help the police avoid the distraction of writing minutes during the interview. The police could watch the behaviour of suspects more while the suspect answers questions.

Second, the lawyer's presence in interrogation is important. Section 58 of PACE and Code C recognises and provides detailed procedures for exercise of the right to access to lawyers.<sup>1067</sup> For example, when the interview starts, the interviewer reminds the suspect of their right to legal advice. Advice may be delayed in exceptional cases, but the maximum period for the delay is normally 36 hours. There are several reasons for England and Wales to have such specific regulations regarding the lawyer's role in interrogation. One is about the lawyer giving advice. The police may have a negative attitude toward lawyer, but the expertise of lawyers will assist the suspect in protecting himself and giving proper answers to questions by the police. The other is about the lawyers as observers in interrogation. When there is a lawyer in interrogation, the police may be on notice as to their behaviour. This secures the rights of suspects against unwanted police actions in obtaining confessions.

Third, England and Wales's legislation specifically regulates in which circumstance confessions can be admissible or excluded. For example, the confession to be admissible as evidence must not be obtained either by oppression or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made in consequences thereof.<sup>1068</sup> Moreover, in England and Wales's legislation, there is regulation with regard to exclusion of unfair evidence. This rule allows refusal of evidence if admission of that evidence would have such an adverse effect on the fairness of the proceedings.<sup>1069</sup> In England and

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<sup>1065</sup> PACE 1984, s.60A, Code F

<sup>1066</sup> See further discussion on limits of written records at section 7.3.4.2

<sup>1067</sup> PACE 1984, s. 58, and Code C, para. 6

<sup>1068</sup> *Ibid.*, s.76

<sup>1069</sup> *Ibid.*, s.78

Wales, the law permits adverse inferences to be drawn from a silence of suspects, though no one may be convicted solely on the basis of an adverse inference. For example, s. 34 of the Criminal Justice and Public Order Act 1994 provides that, in relation to pre-trial investigation, a court or jury may draw such inferences as appear proper from evidence that the accused failed, on being questioned under caution or on being charged with the offence, to mention any fact relied on his or her defence, being a fact which in circumstances existing at the time he or she could reasonably have been expected to mention.<sup>1070</sup> But the law also regulates circumstances in which adverse inference cannot be admitted, for example in police interrogation without presence of lawyers. By comparison, in Vietnam, there is no such regulations in its legislation, but in practice, it is possible to infer guilty.

In summary, interrogation powers are important in transnational crime investigations. However, in terms of the rule of law, unlike the UK, Vietnam still lacks detailed regulations regarding interrogation powers, especially provisions on safeguarding the rights of suspects in interrogation. Therefore, Vietnam needs to issue more detailed regulation, especially on the issues of access to legal advice, records of interrogation, as well as admissibility or exclusion of confessions. In terms of fairness, it is hard for the existing Vietnamese legislation to ensure a fair use of interrogation powers while there is insufficient regulations to do so. Although new regulations regarding audio and video recording interviews may eventually take effect, Vietnam still needs to study the experience of England and Wales with regard to the use of electronic recording of interviews. Equally, the issue of access to legal advice in interrogation should be considered. This is not only about specific regulation on how to enable the lawyers to be present in interrogations, but also validity of legal advice. It is necessary to train sufficient lawyers who are competent to give advice for suspects. In England and Wales, there is much guidance and regulations with regard to lawyers which Vietnam should learn to increase a quality of lawyers in terms of competence and trust for transnational crime investigations. For example, the Solicitors Regulation Authority issued the standards of competence for accreditation of solicitors and representatives advising at the police station, which sets out required knowledge and skills, such as an understanding of criminal law and procedures, for solicitors or representative adviser. In addition, there is

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<sup>1070</sup> Criminal Justice and Public Order Act 1994, s. 34; Starmer, K. and Woolf, M., 'The Right to Silent', in Walker, C. and Starmer, K., *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) 100, 104



a police station representative accreditation scheme, which is to accredit non-solicitors to advise and assist suspects being held at the police station.<sup>1071</sup>

#### **7.2.2.2.2. Power to Investigate Objects or Places**

Besides persons, transnational crime investigations may target objects such as a criminal's property that either is acquired by criminal activities or is used by a criminal as instruments or means of offense commission, for example a bank account of the criminal that is used to receive and transfer illicit money. Sometimes, to prove an offence, the police transnational crime investigation may involve things such as documents or objects that are owned by other persons so long as they relate to criminal cases or contain evidence proving a crime. For example, a person lends his car to his friend. Then, his friend uses it to smuggle prohibited products across borders. The car can be investigated by the police in order to collect information about facts of the criminal case, though the car owner is not a criminal. In this sense, the police of Vietnam have the power to investigate objects. Specifically, chapter XII of the VCPC 2003 provides legal regulations by which the police are allowed to search residence, working places, premises, objects, correspondence, telegraphs, postal parcels and matters; as well as to seize those things.<sup>1072</sup> The details of these powers are as follows.

##### **7.2.2.2.2.1. Search Powers**

Like body searches, powers to search things such as residences are considered as a way to find instruments and means of offense commission, objects and property acquired from offense commission, or other objects and documents related to the criminal cases. In addition, this kind of search power also allows the police to detect a criminal. To confirm this point, Article 140(1) of the VCPC 2003 indicates that 'Search of residences, working places or premises shall also be conducted in case of necessity to detect wanted persons.'<sup>1073</sup> In case of urgency, competence for mandate issuance for a search is also assigned to the heads or deputy heads of investigating police agencies.

However, there is a difference between the power to search a person, and the power to search a thing. For the former, as mentioned earlier, the police may search a

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<sup>1071</sup> 'Police Station Representatives Accreditation Scheme',  
<<http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page>>

<sup>1072</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, chapter XII

<sup>1073</sup> Ibid., article 140(1)

person without warrant. But, to exercise the latter powers, there must be a warrant from either the police in case of urgency, or authorisation of procuraries. Another difference is that there is a clear indication about the subject of the body search of persons who may be either the accused or not the accused, as long as relevant evidence is believed to be on these persons' bodies. However, the powers to search objects are confined to certain searches: searches of residences, working places, premises, objects, correspondence, telegraphs, postal parcels and matters. Whilst specific circumstances are listed in which to apply these search powers, there remains uncertainty in their application. For instance, the definition of 'objects' above is very vague and open to interpretation. Therefore, the powers to search objects can be interpreted by the police to search for several things that are not yet clearly defined in the Criminal Procedure Code.

For instance, there is no specific provision regarding the search of bank accounts. Thus, the police use the power to search objects in order to issue a warrant to search a bank account. In this case, the bank account is considered to be a kind of object. In practice, there is no limit on the list of materials that the police are able to search for evidence. The police can search for both non-confidential materials and confidential materials such as medical records. When necessary, the police first send a letter to a person or institution that they think is keeping those materials. If this request of the police is not responded to, the police issue a search warrant to look for that evidence, as long as the police have reasonable ground for believing that those materials, which involve a crime that the police have initiated legal proceedings to investigate, and are in the possession of that person or institution. In addition, because the VCPC 2003 does not define specifically which circumstances are an urgent case, the police always conduct this search without the procuracy's approval beforehand.

By contrast, in England and Wales, the power for the search of premises is regulated specifically. These specific regulations not only facilitate the police to have clear guidance to follow, but also prevent the abuse of the search powers. These detailed regulations are as follows. The police are empowered to use a number of statutory powers that enable them to enter and search premises without warrant. Three main statutory sources of powers to enter and search premises without warrant are found under ss. 17 (entry for purpose of arrest), 18 (entry and search after arrest), and 32 (search upon arrest)

of PACE.<sup>1074</sup> Thus, besides the powers to search premises for arresting a person,<sup>1075</sup> the police also have a power to search premises for looking for evidence other than items subject to legal privilege after owners or controllers of those premises are under arrest.<sup>1076</sup>

Apart from these powers, in searching for items, the police can apply for a search warrant from a magistrate.<sup>1077</sup> However, this search warrant excludes a search for evidence which may be classified under three categories: legal privilege materials (for example legal advice from a lawyer to his client); special procedure materials (like bank accounts); and excluded materials (for example medical records).<sup>1078</sup> To have access to special procedure materials and excluded materials, for the purpose of the investigation of crime, the police need to make an application under s. 9 together with schedule 1 of PACE to obtain a search warrant or production order from a judge in order to search or detain those materials,<sup>1079</sup> whereas items subject to legally privilege materials which is very highly protected would not be a subject of a warrant by either a magistrate or a judge.<sup>1080</sup> The legally privileged materials are not subject to a search unless lawyers are accused of involvement in crime.

In summary, in England and Wales, search powers are explicit and comprehensive. The police are allowed to use these powers, but within constraints, and sometimes the police must apply to a judge to use such tactics. This is the recognition of fairness. The judges give approval to the police to do this. Moreover, the laws avoid legitimising general searches.<sup>1081</sup> In terms of effectiveness, the police have a wide range of powers to search. In addition, the police are fully aware of what they can and cannot do. It is hard to see ineffectiveness of those police powers. By comparison, there are still some problems with search powers in Vietnam. In terms of the rule of law, the search powers are regulated in vague terms, which cause difficulties for the Vietnamese police to understand and use. At the same time, those vague regulations give the police broad discretion to interpret the powers for areas where there is no existing law to cover. In this

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<sup>1074</sup> Jason-Lloyd, L., *Introduction to Policing and Police Powers* (Cavendish Publishing Ltd, 2005) 111

<sup>1075</sup> PACE 1984, s. 17

<sup>1076</sup> *Ibid.*, s. 18, s. 32

<sup>1077</sup> *Ibid.*, s. 8a, s.9, Code B

<sup>1078</sup> *Ibid.*, s.10,11,12,13,14

<sup>1079</sup> *Ibid.*, s. 9, schedule 1, Code B

<sup>1080</sup> Code B of PACE; Ozin, P. and Norton, H. and Spirey, P., *PACE: A Practical Guide to the Police and Criminal Evidence Act 1984* (Oxford: Oxford University Press, 2013), 29

<sup>1081</sup> Zander, M., *The Police and Criminal Evidence Act 1984* (London: Sweet & Maxwell, 2005) 82

sense, the search powers have insufficient basis in Vietnamese law. In terms of fairness, although the competence for granting search powers is confined to heads or deputy heads of investigating agencies, it is hard to ensure that that search powers are fairly used by the police when there is no clear and sufficient legislation. This also impacts on the effectiveness of search powers. The police may waste resources to conduct a search for evidence, but the obtained evidence may not be admitted by overseas police forces if the transnational crime investigation involves unfair powers. In this regard, Vietnam should consider the experience of England and Wales, where there are clear and specific purposes and processes by which the police can and cannot use the search powers. The idea for categorising things as ‘legally privileged materials, special procedure materials and excluded materials’ may be helpful for considering the extent to which the police are empowered to use search powers. This will enhance the fairness of search powers in Vietnam.

#### **7.2.2.2.2. Seizure Powers**

The outcomes of searches usually require the police to decide whether it is necessary to seize some things that are helpful for their task of proving an offence. Moreover, the seizure powers may facilitate the police to preserve documents or evidence that may be destroyed either by criminals or by the impacts of the natural environment such as the weather. In addition, the police may also ask if they may seize evidence of offences other than that for which they are searching.<sup>1082</sup> In Vietnam, the VCPC 2003 allows the police to have the power to seize exhibits as well as documents which are directly related to the criminal cases when they conduct a search.<sup>1083</sup> This seizure by the police has no time limits. In other words, the police can seize things until the criminal cases are settled. Although a searching officer is empowered to decide what should be seized, the officer must have a ground to determine that these objects and documents are directly related to the criminal cases. For example, during a search of residence of Mrs. A who committed theft, the police found an amount of money. In this case, to seize that money is only implemented when there is evidence to prove that Mrs. A derived that money from the commission of the theft.

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<sup>1082</sup> Lidston, K. and Palmer, C., *Bevan and Lidston's The Investigation of Crime: A Guide to Police Powers* (London: Butterworths, 1996) 139

<sup>1083</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, article 145

Next, Article 145 of the VCPC 2003 states that ‘For objects falling into the categories banned from storage or circulation, they must be forfeited and immediately delivered to competent management bodies.’<sup>1084</sup> This point permits the police to seize banned objects which may not be directly related to the criminal cases. Therefore, to some extent, the police also have a power to seize something that is not directly relevant to the criminal case they are investigating. This situation may happen when the police investigate a crime which is committed by organised criminal gangs. For example, the police may investigate them for murder, but they may find narcotic drugs at a criminal gang member’s residence.

Apart from seizure powers of the police during a search, Vietnamese legislation does not clearly define circumstances in which the police have the right to forfeit some things outside a physical search. Specifically, Article 144 of the VCPC 2003 regulates forfeiture of correspondence, telegraphs, postal parcels and matters at post offices.<sup>1085</sup> Although, this provision is regulated to apply to search things at post offices, in practice, this regulation is also made use to seize or forfeit objects and documents which are found outside a physical search, but necessary to seize. The reason for this extended use of article 144 is that there is no other existing provision from the VCPC 2003 to cover seizures or forfeitures of those not resulting from a physical search.

Another significant example for this extended use is related to seizure powers for objects and documents of the arrestees. Article 84 of the VCPC 2003 states that ‘The seizure of articles and documents of the arrestees must comply with the provisions of this Code.’<sup>1086</sup> But there is no further relevant regulation for seizing articles and documents of the arrestees. When the police seizure articles and documents that are voluntarily handed over by the arrestees, the police usually use Article 144 as a legal basis to apply seizure powers. Even those articles and documents are not related to post offices. Thus, in terms of the rule of law, Vietnam fails to comply with it because Vietnamese legislation is insufficient. There is no specific regulation relating to what the police can and cannot do. In this sense, it is hard to ensure effectiveness in seizure powers. In terms of fairness,

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<sup>1084</sup> Ibid., article 145

<sup>1085</sup> Article 144 of the Criminal Procedure Code says that ‘In case of necessity to forfeit correspondence, telegraphs, postal parcels and matters at post offices, the investigating bodies shall issue forfeiture warrant. These warrants must be approved by the procuracies of the same level before they are executed, except for cases where the execution thereof cannot be delayed, provided that the reasons therefore must be clearly stated in the minutes and the forfeiture, once completed, be immediately notified to the procuracies of the same levels.’

<sup>1086</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, article 84

the property rights of suspects are not guaranteed when there is a lack of legal provisions governing seizure powers.

In comparison with England and Wales, as with the search powers, the seizure powers are also regulated specifically in the UK. These set out the criteria and circumstances to seize, access, copy and retain materials.<sup>1087</sup> The seizure powers have a broad scope.<sup>1088</sup> The police have powers enabling them to seize as evidence material which they reasonably suspect relates to a commission of an offence, and it is necessary to seize that material.<sup>1089</sup> But the PACE 1984 and Code B have clearly defined how these seizure powers are exercised. In addition, there is a constraint on what the police are not allowed to seize, for example legally privileged items. This shows that the law relating to the seizure powers in the UK makes clear processes and procedures the police must and must not do. Thus, the seizure powers are fairly and effectively used. This point indicates that Vietnam may need to issue more effective law on seizure powers as well as the legal provisions that specify what the police can and cannot do.

### **7.3. Investigatory Powers of the Police within Transnational Crime Investigations**

The previous section illustrated what investigatory powers are granted on paper to the police. This section explores the exercise and impact of investigatory powers in transnational crime investigations. To do this, the section will clarify four main issues. First, how these investigatory powers are applied in responding to demands for transnational crime investigation from the police of Vietnam and foreign partners. Second, to what extent the application of these investigatory powers is legitimate. Third, how sufficient these investigatory powers are for investigating transnational crime. Finally, how far these investigatory powers ensure fairness during the course of transnational crime investigations.

#### **7.3.1. Exercises of Investigative Powers between Jurisdictions**

Investigatory powers are an important tool that the police employ within a sovereign territory. In Vietnam, these powers are only used by Vietnamese ‘procedure-conducting bodies’ including the police, whose tasks and competences are regulated by

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<sup>1087</sup> PACE 1984, s. 19, 20, 21, 22

<sup>1088</sup> Zander, M., *The Police and Criminal Evidence Act 1984* (London: Sweet & Maxwell, 2005)

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<sup>1089</sup> PACE 1984, s.19,20, 21,22

the Criminal Procedure Code. However, as transnational crime operates across national borders, there are processes and procedures in order to extend the exercise of these investigatory powers and their impacts beyond the national border. Article 2 of the VCPC 2003 states that criminal proceedings against foreigners who commit offences on the territory of Vietnam and who are citizens affected by any international agreement that Vietnam concludes shall be carried out within provisions of such international agreements.<sup>1090</sup> Moreover, in some cases there may be an involvement of a foreign counterpart while the investigatory powers are executed. Specifically, besides the implementation of investigatory powers that are clearly described in Criminal Procedure Code, investigatory powers shall be employed in two special processes. One is a process in which the investigatory power is expected to be in effect outside of the country in order to enforce extra-territorial jurisdiction. Its use is always associated with making outgoing investigative requests. The other is a case of incoming investigative requests in which, for example, the police may arrest someone at the request of their foreign counterparts. In this case, the police use their jurisdiction to handle requests from foreign law enforcement agencies with regard to applications of investigatory powers.

As a whole, in a formal way, investigatory powers applied in these two circumstances will be excised through sequences and procedures of mutual legal assistance in criminal matters which are defined in the Criminal Procedure Code<sup>1091</sup> and the Law on Legal Assistance,<sup>1092</sup> because of their nature of application of coercive means.<sup>1093</sup> For example, according to the Vietnamese legislation, performance of foreign legal mandates for the investigation of foreign nationals in Vietnam must take place as follows.

‘Within five working days after the receipt of legal mandate dossiers for investigation of foreign nationals who have committed crimes in their countries and are residing in Vietnam, the Supreme People’s Procuracy shall transfer the

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<sup>1090</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 2

<sup>1091</sup> The VCPC 2003 has two relevant chapters: one is the chapter 36, namely General provisions on international cooperation in Criminal Proceedings; the other is chapter 37 that is named Extradition and Transfer of Dossiers, Documents and Exhibits of Cases.

<sup>1092</sup> The Law on Legal Assistance has chapter II and chapter IV, dealing with mutual legal assistances and extradition respectively.

<sup>1093</sup> Home Office, *Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom – 2015*, page 4, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/415038/MLA\\_Guidelines\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/MLA_Guidelines_2015.pdf)>

dossiers to competent investigating bodies of Vietnam for investigation. Investigation results will be sent to the Supreme People's Procuracy for transfer to the requesting countries.<sup>1094</sup>

The Supreme People's Procuracy is a national focal authority to effect investigatory powers in Vietnam and before transferring to foreign partners. Requests for investigatory powers with regard to extradition will be carried out through the Ministry of Public Security as a national focal authority.<sup>1095</sup>

However, there is a difference in executing investigatory powers between these two contrasting processes. For outgoing investigative requests, the police will send mandates together with necessary evidence in order to request the judiciary of foreign counterparts to consider and action.<sup>1096</sup> The Vietnamese police have no competence to execute the investigatory powers in foreign countries.<sup>1097</sup> There are two clear compulsory things the police must do to request or cooperate with foreign law enforcement to resort investigatory powers.<sup>1098</sup> Firstly, the police have to prove the legality of requests by indicating that their investigatory power requests arise from a criminal case. The police have no investigatory power prior to the institution of proceedings. Secondly, they should indicate concrete details of targets which are objects of proposed investigatory powers. For example, if the police would like to arrest a wanted person who is hiding in another country, they must submit their request together with their own warrant as well as information about the subject which is used as grounds to believe that the subject is hiding there.

Although this procedure is necessary for the legitimacy of the application of investigatory powers in another jurisdiction, in practice, the procedure is not completely followed by the police.<sup>1099</sup> The reason is that a formal approach in legal assistance may take too much time for foreign judiciaries to process Vietnamese requests before investigatory powers are actually carried out. The process requires all requests of investigatory powers to be applied through procuracies. Moreover, when investigatory powers are resorted to in these circumstances, according to several police interviewees,

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<sup>1094</sup> Law on Legal Assistance, issued on 21 Nov. 2007, No. 08/2007/QH12, article 30

<sup>1095</sup> VCPC 2015, issued on 27 November 2015, No. 101/2015/QH13, article 493

<sup>1096</sup> Law on Legal Assistance, issued on 21 Nov. 2007, No. 08/2007/QH12, articles 18, 20, 22

<sup>1097</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 340

<sup>1098</sup> General Department on Crime Prevention and Suppression, Guidance No.2545/C41-C55 dated on 12/07/2011 and Guidance No.65/C41-C55 dated on 05/01/2012

<sup>1099</sup> Supreme People's Procuracy, *Handbook on Legal Assistance in Criminal Matters* (Nha Xuat Ban Lao Dong, 2015) 42



the requested investigatory powers sometimes are not carried out effectively because the foreign law enforcement agencies carry out those powers passively and at the request of another police force, not based on their judgment about the nature of the crime.<sup>1100</sup> Alternatively, interviewee IA1 said, ‘in practice, the Vietnamese police send a police team either secretly or in cooperation with foreign law enforcement to directly carry out these powers.’<sup>1101</sup> Of course, this action only happens with some countries, such as Cambodia or Laos, which have a good friendship and relationship with Vietnam. Where legislation that bans such use of investigatory powers of foreign police forces is incomplete in such countries, the Vietnamese police focus on obtaining results of those investigatory powers more than on ways of implementing those powers. Yet, those results are still accepted by the procuracies because of an absence of clear exclusionary rules for evidence. As mentioned in subsection 7.2.2.2.1.4, there is the newly passed exclusionary rule of evidence which will take in effect in the near future. But the implementation of this rule remains uncertain in practice, because informal transnational law enforcement mechanisms, especially police to police cooperation, is still the main way to cooperate with overseas law enforcement agencies.<sup>1102</sup>

With regard to incoming investigative inquiries, it is more flexible to use ‘normal’ investigatory powers to investigate transnational crime cases. In principle, requests with relation to resorting to investigatory powers must be sent through the Supreme People’s Procuracy before the requests are delivered to the police,<sup>1103</sup> and in extradition cases, the courts will further review the requests to decide and authorize the police to enforce those powers.<sup>1104</sup> In practice, this procedural requirement seems to represent only ‘laws in the book’, not ‘laws in practice’. In contrast, the police under supervision of procuracies carry out investigatory powers such as arrest powers without examination by competent courts.<sup>1105</sup> In certain cases, the police even allow foreign law enforcement to participate in executing that power.<sup>1106</sup> For example, in 2005, the police agreed for the British police to travel to Vietnam and together with the Vietnamese police to take DNA samples from

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<sup>1100</sup> Interviewee IA1, IA3, IA5

<sup>1101</sup> Interviewee IA1

<sup>1102</sup> See more discussions on this issue at section 5.2.1 in chapter 5

<sup>1103</sup> Law on Legal Assistance, issued on 21 Nov. 2007, No. 08/2007/QH12, articles 18, 21, 23

<sup>1104</sup> Ibid., article 38

<sup>1105</sup> Interviewee IA9

<sup>1106</sup> Supreme People’s Procuracy, *Handbook on Legal Assistance in Criminal Matters* (Nha Xuat Ban Lao Dong, 2015) 46

Vietnamese victims in order to investigate a murder in the United Kingdom.<sup>1107</sup> This case was arranged directly between police forces of both countries without an approval of the Vietnamese procuracies.

There are some reasons why the use of the investigatory powers are usually arranged via informal ways through police to police cooperation. First, the uses of investigatory powers are very much subject to the discretion of the police. According to police interviewee IA8, 'to arrest foreign fugitives at the requests of foreign law enforcement, usually the police just need permission from their administrative leaders such as Minister of Public Security which allows them to execute the oversea counterpart's request.'<sup>1108</sup> In the meantime, there is no detailed guidance with regard to investigatory powers that are used at the request of foreign law enforcement. For example, there is no clear rule with regard to how to authorize the investigatory power to arrest a foreign wanted person. After accepting a request for the arrest of a wanted person, there is no indication of whether to issue a 'new' arrest warrant to arrest the foreign wanted person, or to continue using arrest warrant of foreign judicial authority to arrest someone in Vietnam. Second, the situation may arise in which a foreign law enforcement agency contacts directly different police agencies either through personal relations or through international police cooperation in order to request for use of investigatory powers in Vietnam. In the meantime, according to police interviewee IA8, the Vietnamese police's attitude toward this request is simply procedural. Instead, the police respond to their foreign counterpart's request by exercising their investigatory powers in order to 'clean dirt from the site'.<sup>1109</sup>

In summary, investigatory powers are often used in transnational crime investigations by the police of Vietnam. There are existing regulations with regard to application of these police powers in the Vietnamese legislation, but they seem to reflect vague rules. There is no specific requirement for certain types of crime or transnational crime operations. In areas such as banking or telecommunications, no special procedure is required in comparison with the requirement for application of investigatory power in domestic crime investigations. Moreover, application of investigatory powers in incoming investigatory requests is simpler than those requested for outgoing investigatory requests. Exercise of the former is based on consideration of both existing rules and

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<sup>1107</sup> Nguyen Xuan Tho case file, recorded at the Interpol Department

<sup>1108</sup> Interviewee IA8; see further discussion at section 5.2.2

<sup>1109</sup> Interviewee IA8

administrative discretion of the police while the latter is rigorously subject to the sovereign power of the requested countries. To some extent, the Vietnamese police tend to be more open in applying their investigatory powers to handle investigative requests of foreign law enforcement agencies. Instead of mutual legal assistance, informal cooperation is often preferred by the police of Vietnam to be chosen as a way to request for the exercises of investigatory powers, though this way is inconsistent with existing legislation. In this regard, most interviewees affirmed that, for Vietnam's present context, transnational crime investigation cooperation via the informal way is now more effective than that in the formal way, but in the long term, there is a need to perfect and use formal way-cooperation as a primary way in order to ensure the legitimacy and the fairness of investigating activities in crime investigation cooperation with foreign partners.<sup>1110</sup>

### **7.3.2. The Rule of Law of Investigatory Powers**

In Vietnam, investigatory powers are granted to the police on the basis of the Vietnamese Constitution. The details are as follows.

Legitimate rights and interests of citizens are respected by the State of Vietnam via laws. In addition, the State has established necessary conditions to facilitate protection of the rights of people. The Constitution 2013 reflects international standards of human rights protection from several international documents such as International Covenant on Civil and Political Rights, and recognises this principle.<sup>1111</sup> A significant right that influences the police and directs all their investigation activities is the presumption of innocence until proven guilty.<sup>1112</sup> This principle has been concretized into the Criminal Procedure Code, indicating that 'No person shall be considered guilty and be punished until a court judgement on his/or her criminality takes legal effect.'<sup>1113</sup> While investigating a crime, people are protected by the law that is enforced by the police. No one can violate, for example, people's freedoms, and the right to inviolability of their body. Article 20 of the Constitution 2013 says as follow.

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<sup>1110</sup> Interviewees IA5, IA8, IG6; See further at section 5.2.1 in chapter 5

<sup>1111</sup> Chapter 2 of the Constitution 2013 defines 36 articles with regard to human rights and citizen's fundamental rights and duties.

<sup>1112</sup> Article 31 of the Constitution 2013 states that 'A person charged with a criminal offense shall be presumed innocent until proven guilty according to a legally established procedure and the sentence of the court takes legal effect.'

<sup>1113</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, article 9

‘Everyone has the right to inviolability of his or her body and to the protection by law of his or her health, honour and dignity; no one shall be subjected to torture, violence, coercion, corporal punishment or any form of treatment harming his or her body and health or offending his or her honour and dignity.

No one may be arrested without a decision of a people’s court, or a decision or approval of a people’s procuracy, except in case of a flagrant offense. The arrest, holding in custody, or detention, of a person shall be prescribed by the law.’<sup>1114</sup>

Moreover, objects or properties that belong to people must not be violated during crime investigation unless there is a reason to do so under the law. Article 21 of the Constitution 2013 states that ‘Everyone has the right to privacy of correspondence, telephone conversations, telegrams and other forms of private communication. No one may illegally break into, control or seize another’s correspondence, telephone conversations, telegrams or other forms of private communication.’<sup>1115</sup> Similarly, the Constitution 2013 also recognises the right to legal residence, indicating that the search of a person must be prescribed by a law.<sup>1116</sup> No one may enter the home of another person without his or her consent.

From these norms, there is an implication for the need for authorizations and uses of investigatory powers when the police investigate a crime. To investigate a crime, the police may be allowed to apply coercive measures, for example arrest of person or temporary detaining a person that suspend a part of the rights of criminal suspects. However, the State not only has a duty to provide the power to the police to successfully investigate transnational crimes, but also to prevent the overuse or abuse of these powers that may illegally harm the rights and interests of people as well as political relationships between the country and foreign countries in case of transnational crime. The State issues rules and procedure to guarantee the protection of people’s rights, including rights of suspects. Therefore, the police are required to have a legal ground to use their investigatory powers against someone or his or her property. When the police exercise their powers, the exercise must be in accordance with the law. In this regard, Article 14 of the Constitution 2013 indicates that ‘Human rights and citizen’s rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national

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<sup>1114</sup> Constitution 2013, issued on 28 November 2013, article 20(1,2)

<sup>1115</sup> Ibid., article 21(2)

<sup>1116</sup> Ibid., article 22(3)

defense, national security, social order and safety, social morality and community well-being.<sup>1117</sup>

Furthermore, investigatory powers are only used after a decision to conduct an official investigation is made, except in the case of catching someone red-handed. In this sense, all crime investigation powers must be carried out by competent authorities (mainly the police). Presently, only investigating activities and their results that are carried out in accordance with the law, particularly the Criminal Procedure Code, are recognised in courts. In other words, the court only accepts evidence that is obtained from the investigatory powers prescribed in the Criminal Procedure Code. The reason for this is that while the law determines the power of the police for the investigation of crime, there are also procedure requirements of law to control police powers in order to guarantee fair investigations. If these procedures of the Criminal Procedure Code are broken, evidence can be excluded (see more discussion on exclusionary rule of evidence at subsection 7.2.2.2.1.4). This point is more important in Vietnam when a criminal case file is officially needed as a foundation for the procurators and judges to fulfil their tasks. In practice, criminal case files can be returned by procurators to the police to re-do the investigation because obtained evidence or investigating activities are not carried out in accordance with procedures provided by the Criminal Procedure Code. According to the Supreme People's Procuracy, in 2011, investigating agencies at all levels concluded and delivered procuracies a total 61,161 for requesting prosecutions, of which the procuracies later returned to the investigating agencies 1,262 cases for additional investigations, accounting for 2.055%.<sup>1118</sup> In these total returned cases files, there were 5.32% cases with serious violations of criminal procedures.<sup>1119</sup>

In terms of the rule of law, there are three main concerns with regard to the investigatory powers of the police for investigating transnational crime.

Firstly, there is no statutory framework to regulate the use by the police of covert powers. As indicated in previous sections, the VCPC 2015 recently regulated three covert measures which will be taken into effect in the future. Even now however, there is no detailed guidance for implementing those measures. Therefore, it is unclear whether these

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<sup>1117</sup> Ibid., article 14(2)

<sup>1118</sup> Supreme People's Procuracy, *One Year-Reviewing Report on Implementation of Joint Circular No1 on Guiding the Implementation of Provisions prescribed by the Procedure Criminal Code regarding to the Returning of Criminal Case Files for Further Investigations*

<sup>1119</sup> Ibid.

newly passed regulations could be implemented in the near future. In practice, to investigate a crime, including a transnational crime, the Vietnamese police use not only statutory powers, for example arrest powers, but also covert powers such as human intelligence sources. These covert powers which are not yet legalised are understood as an important part of policing which help the police to investigate a crime without applying the investigatory powers prescribed in the Criminal Procedure Code. Moreover, these covert powers are usually structured by way of ‘police skills’. To undertake these ‘police skills’, there are several internal guidance documents that are only classified for ‘police use’.<sup>1120</sup> The exercises of the covert powers and their results are governed by heads of investigating agencies and their internal standards, instead of legal procedures and constraints. In addition, the police must not disclose these uses of covert powers to any other agencies because covert operations are not recognised by the courts. Before the police deliver investigative dossiers to procuracies for prosecuting a case, the police must remove all traces of the covert operation from the dossiers. Therefore, the uses of covert powers are neither enforced under the law nor supervised by the procuracies who, as described in the previous section, have the responsibility to supervise investigating activities. In this sense, these covert powers of the Vietnamese police may be considered to be illegitimate by foreign counterparts when transnational investigative cooperation is required to handle transnational crimes, albeit that these techniques can be professionally conducted by the Vietnamese police. In this regard, police interviewees confirmed and explained the reasons as follows.

‘Until now, we have been using covert powers as police skills because we were trained to do so. Besides, we still follow internal rules within the police to undertake those covert powers. In general, we often find difficulties in applying these covert powers while cooperating with foreign counterparts. For example the foreign counterparts often refuse to cooperate doing it in terms of police skills because we cannot present to them the legal reasons of such operations.’<sup>1121</sup>

Secondly, for the use of statutory powers of the police there may be a conflict between the Criminal Procedure Code and the Constitution 2013, because there has been no further amendment to existing investigatory powers. The reason is that while the Constitution 2013 demands a decision of a court, or a decision or approval of a procuracy,

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<sup>1120</sup> This confidential guidance is not available outside the police.

<sup>1121</sup> Interviewee IA1

the Criminal Procedure Code gives the police powers before a procurator's approval. An example for this can be seen from the power to arrest in case of urgency. This powers of the police seem to be inappropriate to the principle of 'presumption of innocence until guilty', because their execution of investigatory powers by the police before a decision of courts or a decision or an approval of procuracies.<sup>1122</sup> In practice, the regulation has given legal loopholes when requesting foreign law enforcement agencies to cooperate in executing this urgent mandate. The mandate shall not be carried out by foreign partners because it is not entirely consistent with the existing Constitution 2013. To settle this problem, alternative solutions for this police power are obtaining approval from procuracies for the orders made by the police, though this additional step may delay investigating activities. According to the VCPC 2003, besides urgent circumstances, the police still have the right to issue arrest warrants or search warrants but these warrant must have the approval of procuracies at the same levels as beforehand, for example for 'Arresting the accused or defendants for temporary detention'.<sup>1123</sup>

Thirdly, some investigatory powers are used by the police as a matter of routine, but there is no clear legal basis to do so. The police are instructed to apply the investigatory powers as a part of police skills. On some occasions, the police find a legal basis for the application of investigatory powers from existing rules, which are applied for other investigatory powers. Take as an example the case of taking fingerprints and DNA samples to identify a person. Normally, after arresting a person, the police always take his or her fingerprints to compare in the criminal records and archive system of the police to confirm his or her identity and criminal history. However, there is no legal provision to directly regulate these police activities. Instead, according to police interviewee IA12, the police cite other legal provisions, for instance Article 152 (Examination of bodies' traces) and Article 155 (Solicitation of experts) for taking fingerprints or DNA samples from suspects.<sup>1124</sup>

In summary, the Constitution 2013 clearly requires investigatory powers to be exercised in accordance with the rule of law. However, to some extent, there is a gap between the Constitution 2013 and the exercise by the police of investigatory powers in practice, because of the absence and insufficiency of specific legal rules regarding

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<sup>1122</sup> Ngo Ngoc Trai, The Police of Vietnam and Arresting Powers (BBC News, 18 March 2015), <[http://www.bbc.co.uk/vietnamese/forum/2015/03/150318\\_quyen\\_cua\\_cong\\_an\\_viet\\_nam](http://www.bbc.co.uk/vietnamese/forum/2015/03/150318_quyen_cua_cong_an_viet_nam)>

<sup>1123</sup> VCPC 2003, issued 26 November 2003, no. 19/2003/QH11, article 80 (1,d)

<sup>1124</sup> Interviewee IA12

investigatory powers. The use of investigatory powers, in some circumstances involves more administrative decisions and less law enforcement, especially in the case of covert powers. By contrast, as illustrated previously, investigatory powers of the British police are legally regulated in England and Wales, and the police must observe the law during the investigation. In terms of the rule of law, England and Wales performs better than Vietnam. England and Wales has many rules and codes. For many years, England and Wales made prolonged efforts to make legislation clear, transparent and explicit in all investigating powers. The introduction of the Investigatory Powers Bill<sup>1125</sup> is a recent example that recognises this ongoing need. This Bill will replace parts of the RIPA 2000. Yet this Bill is controversial, because of the adoption of new powers. It is mainly controversial because of bulk powers of data collection which means everyone can be subject to surveillance and all messages can be collected. The Bill tries to achieve legality in which all data collection by bulk powers are done under the law. But there is still controversy on the sufficiency of oversight of bulk powers for data collection. For example, the exercise of bulk powers ‘will result in the acquisition of large volumes of untargeted data about a large number of people, most of whom will not be of intelligent interest.’<sup>1126</sup> Vietnam may not have enough money to undertake bulk powers like in England and Wales. But what Vietnam can learn is to consider legislation on this issue which ensure the legality, authorisation and oversight of investigatory powers. In Britain, there is law to grant powers both to collect and to survey the police, but at the same time it imposes some restrictions and oversights to those powers. By comparison, the existing law in Vietnam is not enough. Vietnam needs to pass further rules and laws on this manner. There are some examples of this law from England and Wales, in the current shape of the RIPA 2000.<sup>1127</sup> This law may not be a precise blueprint to follow, but at least Vietnam can learn from the idea of legality. In addition, there should be change and supplementation to any legislation on the investigatory powers which still have insufficiency or conflict with the Constitution in order to ensure that all investigating activities by the police is enforcing the law.

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<sup>1125</sup> Home Office, *Investigatory Power Bill: Government Response to Pre-Legislative Scrutiny*, Command Paper 9219, London, 2016

<sup>1126</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Investigatory Powers Bill (2016-17, HL16, London, 2016)* 9

<sup>1127</sup> Further details on this act will be explained at section 7.3.3.2.3



### 7.3.3. Effectiveness of Investigatory Powers

To further investigate the investigatory powers of the police, this subsection will focus on effectiveness of the existing investigatory powers, and assess whether these powers are clear and sufficient for investigating transnational crime. The assessment will be examined in two aspects: advantages and shortcomings.

#### 7.3.3.1. Advantages

In general, the police of Vietnam have broad powers to investigate a crime. Traditional investigatory powers such as arrest powers, seizure powers which to some extent are useful for transnational crime investigations are given to the police. For some investigatory powers, the police are permitted to use the powers as long as they expect those powers are still useful for the completion of the settlement of criminal cases. The significant example of this is seizure powers. This is an advantage for crime control by the police. Moreover, in terms of competences of mandate issuance, the powers are granted not only to police leaders such as heads or deputy heads of investigating police agencies, but also to police officers. While police leaders can order to use the powers in urgent cases, a police officer on some occasions is able to decide seizure or search without a warrant, for example seizure of objects and documents during a search in which that officer is assigned to implement. Commenting on this issue, the majority of interviewees agreed that the police have extensive powers. For example international respondent IG2 said:

‘I am happy with the cooperation from the police of Vietnam. All my queries are responded by them with useful information. There are many inquiries relating to complicated and sensitive issues such as telephone subscriber checks and bank account checks. But the police of Vietnam are able to investigate them quickly and effectively.’<sup>1128</sup>

Furthermore, the police of Vietnam can actively use their investigatory powers. The police can actively initiate criminal proceedings against a person, and issue a warrant to arrest and detain that person for 72 hours. What is more, with regard to the ground for application of power, Vietnamese legislation gives the police investigatory powers with wide discretion. The police can use their power against someone who is either a criminal or a suspect. In fact, the police can for example make an urgent arrest when a person is

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<sup>1128</sup> Interviewee IG2

preparing to commit a very serious crime. As a result, this broad power may facilitate the police to take the initiative in investigating a transnational crime. Police interviewee IA1 indicated that ‘the police can make use of the regulation in relation to investigatory powers to intervene transnational crime from early stage when they believe it necessity for investigation, for example, because the suspect may escape by crossing borders.’<sup>1129</sup>

### **7.3.3.2. Shortcomings**

Besides advantages, existing provisions about investigatory powers have shown some unclear and insufficient investigatory powers with regard to effective transnational crime investigations. These defects in existing legislation on investigatory powers originate from the design of a legal system where several investigatory powers are considered as performances of police skills rather than being regulated and exercised by specific legal rules. This design sometimes makes the police hesitate to use their investigatory powers because they are not so sure about whether the law allows them to act or not. Police interviewee IA11 admitted that ‘sometimes I did not want to work as an undercover agent, though that cover role might give a useful information to my enquiry. I am afraid my undercover work might lead to my violation of the law without my knowledge about that violation.’<sup>1130</sup> There are several possibilities which make the investigatory powers less effective as follows.

#### **7.3.3.2.1. Confused Aims for the Use of Investigatory Powers**

The aims of existing powers with regard to investigation of crime including transnational crime are not fully and clearly defined. Although, in practice, it is common to use existing powers for investigating transnational crime in terms of proving a crime, some of these powers, for example arrest powers are commonly considered as deterrent measures. These deterrent measures mean that the uses of the powers are to stop a crime from happening or continuing. Moreover, they are sometimes used to confront obstructions of a criminal such as destroying evidences or escaping from the justice. According to Nguyen Ngoc Chi, apart from these disruptive purposes, powers of arrest and custody as deterrent measures should not be applied.<sup>1131</sup> To illustrate this point, the

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<sup>1129</sup> Interviewee IA1

<sup>1130</sup> Interviewee IA11

<sup>1131</sup> Nguyen Ngoc Chi, ‘The 2013 Constitution and the Completion of Measures of Prevention, Arrest and Detention in Criminal Proceedings’ (2014) 30(3) Tap Chi Khoa Hoc DHQGHN: Luat hoc 15, 22

VCPC 2003 prescribes some investigatory powers such as powers of arrest and custody into a separate chapter which is named ‘Deterrent Measures’<sup>1132</sup>, and sets out circumstances in which the power is applied. Specifically, article 79 of the VCPC 2003 states that,

‘In order to stave off crimes in time or when there are grounds proving that the accused or defendants would cause difficulties to the investigation, prosecution or adjudication, or they would continue committing offenses, as well as when it is necessary to secure the judgment execution, the investigating bodies, procuracies or courts, within the scope of their procedural jurisdiction, or competent persons defined by this Code may apply one of the following deterrent measures: arrest, custody, temporary detention, ban from travel outside one’s residence, guaranty, deposit of money or valuable property as bail.’<sup>1133</sup>

This perception about powers of arrest and detention makes the police narrow the scope of the application of the investigatory powers, and hesitate to apply them in investigating and looking for information about transnational crimes. As a result, this perception causes these investigatory powers to be ineffective. In the meantime, in reality, these powers are helpful for the police to investigate a criminal, for example when arresting a criminal; the police may find traces of crimes. Moreover, these powers usually go in combination with other investigating activities to investigate about a crime. For example, immediately after arresting someone, the police will interview him or her to obtain information.

#### **7.3.3.2.2. Vague Grounds for the Application of Investigatory Powers**

The ground for the application of powers is often too vague. Apart from no specific guidelines on the legal standard of evidence as discussed at subsection 7.2.2.2.1.4, there is also concern over standard of proof for application of investigatory powers, which is ambiguous. There is no indication of what amounts to ‘sufficient evidence’ in order to apply investigatory powers. Instead of regulating criteria to consider and decide whether to apply investigatory powers on the grounds of practicality, sensibility and proportionality, existing legislation only has a general regulation, which as a result is sometimes difficult to implement. There are several indications for this problem. The first one is that one of conditions to consider whether the police should apply their investigatory powers is the quality and volume of the seriousness of criminal behaviour.

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<sup>1132</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, chapter VI

<sup>1133</sup> Ibid., article 79

For example, Article 81 of the VCPC 2003 indicates that the police have the power to issue an arrest warrant when there is ground to believe that such persons are preparing to commit very serious or exceptionally serious offenses.<sup>1134</sup> The second illustration is that the decision for application of the investigatory power is subject to discretion of the police with regard to consideration of the necessity for the application. For example, Article 81 indicates a circumstance of arresting a person in an urgent case on the basis of it being deemed necessary to immediately prevent such persons from escaping or destroying evidence.<sup>1135</sup> But the law does not set out necessary criteria. As a result, this vague regulation creates some obstacles for the police in transnational crime investigation, because it is not always easy to explain to a foreign police force that choices of applied investigatory power such as arrest is appropriate when the application of that power is subject to the police's personal judgement about criminal behaviour. Moreover, in practice, the police may be unsure about the requirements for the application of the power. The police do not have clear guidance to follow. For example, procurator ID2 said:

‘Consideration of the seriousness of the offenses may be required. But, at early stage of transnational crime investigation, it may be difficult for the police to determine which transnational offenses took place in order to apply the power of arrest. There may need to be further investigation before determining the type of transnational crime committed.’<sup>1136</sup>

By contrast, in England and Wales, the law sets out clearly and specifically grounds to apply investigatory powers. Taking arrest without warrant by a constable as an example. Section 24 of the PACE 1984 (amended by s. 110 of the Serious Organised Crime and Police Act 2005) not only indicates possibility of application of arrest powers to a person of either involvement or suspected involvement or attempted involvement in the commission of a crime, but also describes (also in Code C) a list of specified reasons by which the police decide the necessity of the arrest.<sup>1137</sup> This list of necessity criteria ranges from ascertaining of the person's identity to prevention of unlawful obstruction of the highway or such matters of public decency, child protection. In this sense, the police have clear guidance to decide the application of investigatory powers that contribute to success of crime investigation. Based on this point, Vietnam should reform its legislation

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<sup>1134</sup> Ibid., article 81(1,a)

<sup>1135</sup> Ibid., article 81(1,c)

<sup>1136</sup> Interviewee ID2

<sup>1137</sup> PACE 1984, s. 24, Code G (2.1, 2.9)

by supplementing regulation with regard to standard of proof for the application of investigatory powers, especially necessity criteria, which may help the police understand the circumstance that they can use investigatory powers effectively and fairly.

### **7.3.3.2.3 Absence of Statutory Framework for the Uses of Covert Powers**

Apart from no concrete or insufficient regulations of some ‘traditional’ investigatory powers, there is no statutory framework, which takes in effect, to regulate the use by the police of covert powers. In terms of efficiency, to some extent the police use of covert powers can waste resources because results of covert powers are not recognised at courts. Moreover, in the current Vietnamese situation, this covert power is treated as a matter for the discretion of the police, which in terms of the investigative standards and the respect of human rights is not satisfactory. The police find an unclear dividing line between illegitimate and legitimate activities when they apply investigatory powers. In addition, sometimes investigators are not familiar with internal guidance which is issued to instruct them about the uses of investigatory powers. As a result, these shortcomings reflect that not only the police of Vietnam have insufficient investigatory powers, but also they find it difficult in cooperating with foreign partners who apply such covert investigatory powers lawfully to conduct transnational investigations. The reason for this is as follows.

Policing transnational crime demands not only ‘low’ policing methods but also ‘high’ policing too.<sup>1138</sup> For transnational crime investigation, the police may need to accept the results of security forces or cooperate with them to exercise police powers. For example, effective transnational crime investigations may place a more important role on the fast exchange of intelligence or on the effective coordination of transnational investigative operations. Due to the nature of transnational crime which often involves other countries and complexity, covert powers are increasingly used for the investigation of transnational crime nowadays. According to Kingsley Hyland and Clive Walker, intelligence-led policing strategies, such as undercover policing, are becoming more prevalent, driven in the fight against serious and transnational crimes nowadays.<sup>1139</sup>

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<sup>1138</sup> Brodeur, J., ‘Transnational Policing and Human Rights: A Case Study’, in Sheptycki, J., *Issues in Transnational Policing* (London and New York: Routledge, 2000) 43

<sup>1139</sup> Hyland, K., and Walker, C., ‘Undercover Policing and Underwhelming Laws’ (2014) *Criminal Law Review* 555, 574

Several countries in the world have regulated these powers in legislation in order to empower the police with useful tool to investigate transnational crime.

For example, in England and Wales, investigatory powers of the police in relation to communications and technologies are prescribed in the RIPA 2000. This is a landmark piece of legislation regulating for example electronic surveillance and covert human intelligence sources.<sup>1140</sup> This Act provides the statutory framework under which covert powers such as covert human intelligence source activity can be authorised and conducted compatible with the rights of people such as the right to respect for private and family life, and the right to a fair trial. It categories specific types of covert techniques, conditions for use of the powers, types of public authority permitted to use, and level of authorisation required, with regard to the application of the overt human intelligence sources and covert surveillance and property interference. Specifically, RIPA 2000 and its Codes of Practice have provided regulations on the uses or conduct of: (1) interception of a communication such as wiretapping or reading post; (2) the use of communication data, for example telephone subscriber verification; (3) directed surveillance, for example following people; (4) intrusive surveillance such as bugging premises or vehicles; and (5) covert human intelligence sources, for example using informants or undercover officers.<sup>1141</sup> Further, it sets out regulations regarding to the uses of these powers with regard to overseas operations. For example, ‘authorisation under the RIPA 2000 can be given for the use or conduct of the covert human intelligence sources both inside and outside of the United Kingdom.’<sup>1142</sup> In this regard, Vietnam thus needs to learn from England and Wales to create sufficient legal framework which clearly and sufficiently provides legality, authorisation and oversight for the use of covert powers.

#### **7.3.3.2.4. Lack of Effective Transnational Investigative Powers**

Although Vietnam is now integrating with the international law enforcement community in the fight against a crime, several ‘contemporary’ investigatory powers are not or not completely regulated in the Vietnamese legislation to tackle transnational crime. These ‘contemporary’ powers are either mentioned in international laws such as the United Nations Convention against Transnational Organised Crime, or popularly applied

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<sup>1140</sup> McKay, S., *Covert Policing: Law and Practice* (Oxford and New York: Oxford University Press, 2011) 5

<sup>1141</sup> RIPA 2000

<sup>1142</sup> Home Office, *Covert Human Intelligence Source: Code of Practice, Chapter 4: Special Considerations for Authorisations*, issued in 2014, page 32

in practices of investigative operations of transnational policing organisations such as Interpol or of police forces in the world. This shortcoming can be seen in the below illustrations.

First, the United Nations Convention against Transnational Organised Crime calls for the use of ‘controlled delivery’ as a special investigative technique in international level-investigation.<sup>1143</sup> ‘Controlled delivery’ is a kind of investigatory power that facilitates the police to investigate all criminal individuals, especially instigators rather than merely to intercept their consignments of banned products. This ‘controlled delivery’ can be used to investigate several types of transnational offences such as smuggling in goods, though this term is originally defined in ‘the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’<sup>1144</sup>. According to Article 11 of this Convention, ‘Controlled delivery’ means a technique that allows illicit or suspect consignments of narcotic drugs, psychotropic substances or substances substituted of, through or into the territories of one or more countries, with the knowledge or under supervision of competent authorities, with a view of identifying persons involved in the commission of offences.<sup>1145</sup>

In this regard, Vietnam incorporated this technique of ‘Controlled delivery’ into the Law on Drug Prevention and Fights.<sup>1146</sup> However, this special technique as well as other necessary techniques, such as video conferencing, has not been regulated in the Criminal Procedure Code. Alternatively, in practice, those special investigatory powers are used on the basis of consideration by officials in the Ministry of Public Security. This means that the uses of these special investigatory powers are subject to administrative discretion rather than legal provisions. To some extent, this implementation not only impacts on the lawfulness of investigatory powers of the police when these powers are

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<sup>1143</sup> United Nations Convention against Transnational Organised Crime, article 20

<sup>1144</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, issued on 20 December 1988, article 11

<sup>1145</sup> UNODC, Training Guidelines,

<[http://www.unodc.org/pdf/india/publications/training\\_Guidelines/18\\_controlleddelivery.pdf](http://www.unodc.org/pdf/india/publications/training_Guidelines/18_controlleddelivery.pdf)>

<sup>1146</sup> Article 51 of Law on Drug Prevention and Fights prescribes ‘controlled delivery’ for drug crime investigation as follow: ‘The Vietnamese State cooperates with others in respect of requests for controlled delivery in conformity with provisions of the international treaties that Vietnam has ratified or accessed to for the purpose of identifying and prosecuting persons involved in commission of drug-related crimes. The use of this technique must conform to agreements made by Vietnamese competent authorities and authorities of concerned States.’

used, but also hinders fast response by the police to transnational criminal activities due to the delay caused by administrative procedures.

Next, in Mutual Legal Assistance Treaties<sup>1147</sup> or Extradition Treaties that Vietnam signed with its partners, there is always a provision about ‘provisional arrest’<sup>1148</sup> that indicates that the police are allowed to arrest foreign fugitives while they are awaiting for official documents regarding to criminal activities of those arrestees. However, this power is not clearly specified in the Criminal Procedure Code. There is no specific regulation with regard to the ground for the application of ‘provisional arrest’. Alternatively, in practice, the police have to make use of ‘powers to arrest in case of urgency’ to arrest these foreign fugitives, and detain them for 72 hours.

Vietnam has no kind of investigatory powers that automatically take effect in Vietnam and foreign countries at the same time, because there is no such regulation or arrangement with foreign countries, including country members of ASEAN. Therefore, the Vietnamese police must go through mutual legal assistance arrangements as an official way to apply their powers beyond the country. In the meantime, to streamline the process and legal procedures as well as improve waiting times in transnational investigation cooperation, several countries have established such arrangements to empower the police with effective powers for investigating transnational crime. Taking Britain as an example, the British police can be given investigatory powers which take effect in country members of the European Union. For example, the British police can seek the issuance of European Arrest Warrants<sup>1149</sup> to arrest fugitives in foreign countries. This use of the European Arrest Warrant was incorporated in the British Law through the Extradition Act 2003.<sup>1150</sup> Although there is still a criticism to the European Arrest

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<sup>1147</sup> Article 41 of Law on Legal Assistance indicates ‘Precautionary Measures for Extradition’: ‘Upon receipt of official extradition requests of foreign countries, competent bodies of Vietnam may apply precautionary measures under Vietnamese law and treaties to which Vietnam is a contracting party in order to ensure consideration of extradition requests.

<sup>1148</sup> For example, article 9 of Treaty on Extradition between Vietnam and India says that ‘In case of urgency, Requesting party may request the provisional arrest of the person sought pending the presentation of extradition request.’ (signed on 12 October 2011), <[http://cbi.nic.in/interpol/ext\\_treaties/Vietnam.pdf](http://cbi.nic.in/interpol/ext_treaties/Vietnam.pdf)>

<sup>1149</sup> The European Arrest Warrant was created by the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, issued on 13 June 2002, came into force on 1 January 2004

<sup>1150</sup> Article 155A of the Extradition Act 2003 indicates the effect of the European Arrest Warrant in the UK; Sections 86, 87 of the Crime (International Cooperation) Act 2003 also specifies an implementation of the European Arrest Warrant from 1<sup>st</sup> of January 2004 in the UK as a member country of European Union



Warrant in terms of fairness and protection of sovereignty, the European Arrest Warrant, to some extent is now an effective tool to fast extradition arrangement between the United Kingdom and other EU member states.<sup>1151</sup> Thus, for the application of investigatory powers, one country can, on the basis of considering its own context such as crime problem and political agenda, establish special arrangements with other country in order to respond timely and effectively to transnational crime. Vietnam should study this scheme to increase the effectiveness of transnational crime investigations, as well as to strengthen the cooperation with other countries in the fight against transnational crime, especially with neighbouring countries.

Similarly, insufficiency of investigatory powers for transnational crime investigations in Vietnamese legislation can be seen from the execution of an ‘Interpol Red Notice’, which, according to Interpol Organisation, is a tool to ‘seek the location and arrest of wanted person with a view to extradition or similar lawful action.’<sup>1152</sup> Although criticism of the Interpol Red Notice may exist,<sup>1153</sup> this Interpol Red Notice is considered as ‘a closet instrument to international arrest warrant in use today’.<sup>1154</sup> Vietnam, as a member of Interpol, annually handles several requests concerning execution of Interpol Red Notices. For example, during the period of 2004 – 2011, the police of Vietnam conducted 923 searches for wanted suspects, and arrested 49 wanted suspects on request of foreign law enforcement agencies on the basis of the Interpol Red Notice.<sup>1155</sup> However, the legal status of the Interpol Red Notice has not been officially regulated. In practice, to execute the Interpol Red Notice, the police make use of ‘arresting in case of urgency’ to arrest wanted criminals. This point not only relates a matter of legitimacy which shows that there is no clear legal rule to apply the Interpol Red Notice in Vietnam, but also indicates that existing investigatory powers in the law do not respond to practical requirements in transnational crime investigation.

In summary, to investigate crimes in general and transnational crimes in particular, the police can use extensive powers. Although the Vietnamese State regulates the

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<sup>1151</sup> House of Lords, Select Committee on Extradition Law - Second Report of Session 2014-15, Extradition: UK Law and Practice, HL Paper 216, pages 81 to 87

<sup>1152</sup> Interpol Website, <<http://www.interpol.int/INTERPOL-expertise/Notices>>

<sup>1153</sup> Lewis, L., Are Some Countries Abusing Interpol? , <<http://edition.cnn.com/2011/WORLD/europe/07/18/interpol.red.notices/>>

<sup>1154</sup> US Attorneys, Criminal Resource Manual, <[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00611.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00611.htm)>

<sup>1155</sup> Interpol Department, General Report of the Workshop on Situation of Transnational Crime, Foreign-Related Crimes and the Fight against them, the Record Book of Conference 2011

investigatory powers in a single Criminal Procedure Code, investigatory powers which are drawn from the administrative management authorities and beyond the source of Criminal Procedure Code are still used. Some covert investigatory powers which are not legalised yet may be used for transnational crime investigation, though results of those covert investigatory powers are not recognised in courts. In terms of crime control, all these practices may be necessary. But, in terms of legal standards and human rights, existing investigatory powers reveal flaws because of the absence or insufficiency of legal rules regarding investigatory powers of the police.

### **7.3.4. Fairness of Investigatory Powers**

While the previous section showed the important role of investigatory powers in the effective investigation of transnational crimes, it is also necessary to ensure the fairness of these investigatory powers because the uses of these powers interfere with individual rights. These investigatory powers may be wide, but they are not unlimited.<sup>1156</sup> There are regulations and procedures by which the exercise of investigatory powers should follow in order for the police to keep to a minimum infringements to individual rights. Although the previous section of this chapter indicated that procurators have the responsibility to supervise the police during the investigation phase, this subsection aims to clarify supervision mechanisms and legal rules that aid the fairness of existing investigatory powers for the investigation of transnational crime. To attain this purpose; this subsection consists of two parts. The first part will answer whether the uses of the covert powers yield sufficiently to fairness. The second part will analyse existing statutory powers to determine to what extent those powers are exercised in terms of assuring human rights of suspects in transnational crime investigation.

#### **7.3.4.1. The Fairness of Covert Powers**

As analysed in the previous section, covert powers that are commonly used in transnational crime investigations are actually not enforced under the current laws in Vietnam (although they will be addressed soon, but in a limited way as discussed already in subsection 7.2.2.1.1.). The exercises of these powers are outside the normal supervision of procurators and other legal controls. Although the application of covert powers does not mean that there is no infringement of individual rights, the only supervision that

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<sup>1156</sup> Leigh, H., *Police Powers in England and Wales* (London: Butterworths, 1985) 45

applies to these covert powers is based on the internal guidance issued by the Ministry of Public Security. Therefore, the fairness of these covert powers is entirely subject to decisions of officials from police investigating agencies, as well as the professionalism of investigators. In addition, there may be a participation of other police officers from the Internal Inspectorate who are also within structure of the police and have responsibility to conduct periodical supervision of all police activities as well as handle complaints lodged against police officers. However, there is no guarantee that investigators will not ‘overstep the boundaries of professionalism and fairness’<sup>1157</sup> while they apply covert powers to investigate a crime. The UNODC indicates that the use of electronic evidence gathering in those countries which have no regulation or their legislations are lacking in some respect is challenged by a balance between the effective use of electronic evidence gathering and the protection of citizens’ rights.<sup>1158</sup> In summary, it is hard to assure the fairness of covert powers when there is no legal framework to regulate the use by the police of these powers, and the uses of these powers are not open. Because of this absence of the legal regulation, the police are not sure about what they can do during the investigation phase. Moreover, the police are unable to determine the limits in order not to cause unnecessary harms to other people. In addition, several interviewees admitted that:

‘Exercises of covert powers may cause unfairness of a crime investigation if there is no legislation about those covert powers, because there is no foundation to supervise that exercise whereas the powers can be easily conducted at the discretion of a person.’<sup>1159</sup>

#### **7.3.4.2. The Fairness of Statutory Powers for Investigating Transnational Crime**

Results of statutory investigatory powers are usually contained in criminal case dossiers which are used for prosecuting a criminal in courts. In terms of ensuring fairness of these investigatory powers, a number of principles and mechanisms are established in the law of Vietnam.

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<sup>1157</sup> Hyland, K., and Walker, C., ‘Undercover Policing and Underwhelming Laws’ (2014) *Criminal Law Review* 555, 574

<sup>1158</sup> UNODC, *Current Practices in Electronic Surveillance in the Investigation of Serious and Organised Crime*,

<[http://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic\\_surveillance.pdf](http://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf)>

<sup>1159</sup> Interviewees ID1, ID2, IE3, IE5, IG1

To begin with, investigatory powers are only used for the purpose of crime investigation. In general, investigatory powers are established after an official decision of institution of criminal proceedings, except where the criminal is caught ‘red-handed’. Moreover, to safeguard the rights and interests of people, the police are only allowed to decide the application of investigatory powers in certain cases. More specifically, these investigatory powers are mainly confined to a case of urgency.<sup>1160</sup> This means that although criteria for the application of each investigatory power are variable, the police must only use these powers when they have reasonable grounds that are understood to either respond quickly to ‘very serious crimes or exceptionally serious crime’<sup>1161</sup>, or assure handling crimes including transnational crime, for example to deal with obstruction of criminals in destroy of evidence.

In addition, to ensure fairness, the law sets out supervision frameworks for the use of investigatory powers of the police in which the police have to report their use of investigatory powers to procuracies after their execution of investigatory powers. For example, 12 hours after arresting or detaining someone, the police must obtain approval or no approval from procuracies with regard to their use of the powers, or 24 hours after completions of a search, notifications by the police about the search must be sent to procuracies. Furthermore, to ensure the exact use of investigatory powers as well as to prevent their abuse of these powers, investigatory powers are usually ordered in written warrants by police leaders who have investigative knowledge and experience as well as greater accountability. Investigating officers may be able to decide the use of investigatory powers, for example that is a case of deciding to seize things during a search. But, in these circumstances, the investigating officers are authorised by their leaders, and act in the name of their leaders who issued a warrant, for example a search warrant.

However, there is still concern whether there is necessary or proportionality in using investigatory powers. There may be two main concerns: one is about a decision by the police to apply investigatory powers; the other is to ensure the quality of exercises of the investigatory powers.

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<sup>1160</sup> See more in section 7.2.2.2, Investigating Some Key Investigatory Powers of the Police

<sup>1161</sup> According to article 8 of the VPC 1999, ‘very serious crimes are crimes which cause very great harm to society and the maximum penalty bracket for such crimes is fifteen years of imprisonment; exceptionally serious crimes are crimes which cause exceptionally great harms to society and the maximum penalty bracket for such crimes shall be over fifteen years of imprisonment, life imprisonment or capital punishment.’

Firstly, the police have wide discretion when deciding to apply some investigatory powers because there is no clear regulation for the use of these powers. For example, the volume and quality of crimes are used as a foundation to consider the necessity to apply investigatory powers, but there is no different classification for each type of offence. With regard to transnational crime, there are no relevant regulations. When there is no clear ground to apply investigatory powers, it is hard to guarantee the proportionality of the exercise of the investigatory powers. For example, the law of Vietnam does not make clear the grounds for extensions of custody from 72 hours up to the 9 day-time limits. Moreover, lawyer IE3 indicated at the interview that ‘there may be an abuse of using investigatory powers when the uses of a legal provision that specifies for one investigatory power is a foundation to apply another investigatory powers which are not clearly defined in the law.’<sup>1162</sup> As examined in the previous section, several investigatory powers such as taking fingerprints and DNA samples or making a ‘provisional arrest’ on the request of foreign law enforcement are used in this way. Due to the lack of clear legal foundation, the fairness of investigatory powers tends to be subject to the qualification of investigators who use these powers. This point can easily lead to unfairness of investigatory powers when the investigators make a mistake. In this regard, a report indicates that in Vietnam corporal punishment in most criminal cases happened because of the subjective nature of investigators who were impatient, inexperience.<sup>1163</sup>

Secondly, the Vietnamese legislation does not create enough legal frameworks and conditions that supervise the exercise of investigatory powers of the police, and guarantee the quality of evidence obtained from those investigatory powers being accepted by courts. Take interrogating a suspect who is in custody as an example, the fairness of interrogating activities may be seen from the extent to which a suspect gets access to lawyers and interpreters, how the interrogation is recorded, and under what conditions the suspect is in custody. All these issues regarding the conduct of interrogation and treatment of a suspect can show how far any result of the interrogation is accurate or fair. The details are as follows.

A defense counsel plays an important role in transnational crime investigations. On the one hand, the defense counsel protects the rights of people, and supervises the

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<sup>1162</sup> Interviewee IE3

<sup>1163</sup> Linh Thu, Forcing evidence, Corporal Punishment Happens mainly in Criminal Cases (VIETNAMNET, 11 September 2014), <<http://vietnamnet.vn/vn/chinh-tri/196903/buc-cung--nhuc-hinh-chu-yeu-trong-an-hinh-su.html>>

exercises of investigatory powers of the police. According to Vietnamese legislation, defense counsel can be either lawyers, or lawful representatives of the persons in custody, the accused, defendants, or people's advocates.<sup>1164</sup> This defense counsel can present their own ideas and requests to the police to assist in an accurate and fair outcome. Although there are up to 80% of all criminal cases which have no participation of lawyers,<sup>1165</sup> the situation for transnational crime cases is different. There are no precise figure showing defense counsels participating in transnational crime cases. But, according to interviewees from the police and procuracies, 'almost all transnational crime cases have defense counsel, because of the nature of transnational crime.'<sup>1166</sup>

However, the implementation of defense counsel in practice is not as good as expected. The defense counsel may not help much in assuring the fairness of the exercise of investigatory powers. There are some reasons for this. Firstly, a relationship between the police and defense counsel does not facilitate the full performance of a defense counsel. A defense counsel's participation in transnational crime investigation, to some extent, is passive and dependent on the police. There may be no equal relationship between the police who find evidence to prove a crime, and the defense counsel who defend for the suspect. For example, although, in principle, the law allows a defense counsel to participate in transnational crime investigation at the initial stage of the investigation, the defense counsel still needs a permit from the police. In addition, during the interrogation, the defense counsel is only allowed to ask questions when the investigator agrees.<sup>1167</sup> In the meantime, while persons in custody or the accused do not have the right to access investigative case files against them, the time of each meeting between them and their defense counsel is restricted to only one hour.<sup>1168</sup> Thus, there may be some existing legal regulations for the exercise of defences counsel, but they seem to be formalistic rather than specific regulations which can guarantee implementation of defense counsel in practice. Indeed as yet a provision regarding to 'the right to silent' is

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<sup>1164</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, article 56

<sup>1165</sup> Truong Giang, National Assembly Deputy Do Van Duong: 'I will not do correction' (INFONET – Ministry of Information and Communication, 28 October 2014), <<http://infonet.vn/dbqh-do-van-duong-toi-khong-dinh-chinh-post148171.info>>

<sup>1166</sup> Interviewees IA1, IA3, IA5, ID1, ID2

<sup>1167</sup> Ministry of Public Security, Circular No.70/2011/TT-BCA on Specific Regulations on the Implementation of the Criminal Procedure Code with regard to Assurance of Defense Function, issued on 10 October 2011, article 7

<sup>1168</sup> Vietnamese Government, Degree No. 89/1998/ND-CP on Regulation on Custody Detention, issued on 7 November 1998

not regulated in the Criminal Procedure Code. Moreover, in the inquisitorial system, the defense counsel does not have the right to collect evidence, though they can provide information and ideas to the courts. In the meantime, many defense counsels have insufficient professional knowledge to protect their customers in transnational crime investigation. While they are not trained for transnational crime cases, a majority of them do not use English language well which is one of the essential skills to deal with transnational crime investigation nowadays. In this regard, the Human Rights Committee of the United Nations has said that ‘the Vietnamese judicial system remains weak owing to the scarcity of qualified lawyers.’<sup>1169</sup> By comparison, as indicated in section 7.2.2.2.1.4, Vietnam needs to learn from England and Wales with regard to having specific regulations on not only how to enable suspects to get access to lawyers, but also ensuring validity of legal advice.

As well as lawyers, interpreters are necessary for ensuring the fairness of transnational crime investigations, especially for interrogating a foreign suspect. Article 24 of the VCPC 2003 indicates Vietnamese as spoken and written language used in the criminal procedure; for those who cannot use Vietnamese language, they may use languages of their own nationalities, but in this case interpreters are required.<sup>1170</sup> The interpreter can help the police and the suspect to communicate with each other during an interrogation. On the one side, the interpreter help the police fulfil their interrogating tasks. Availability of the interpreter may help the police decide fast and precisely in applying investigatory powers. On the other hand, the interpreter is a foundation that facilitates suspects to exercise their rights.

However, some issues that are related to the use of interpreters may have a negative impact on the fairness of transnational crime investigations. Firstly, not all transnational crime investigation can find within a reasonable time available interpreters. There may be a circumstance in which the provision of interpreters is dependent on embassies of the victims or the accused whereas the police do not have available a team of professional interpreters or have enough budget for hiring interpreters. Moreover, the Criminal Procedure Code does not specify the required standards of an interpreter. There

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<sup>1169</sup> United Nations, Compilation Prepared by the Office of the High Commissioner for Human Rights, In Accordance With Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1, No. A/HRC/WG.6/5/VNM/2, 16 March 2009, page 7, <[http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A\\_HRC\\_WG6\\_5\\_VNM\\_2\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A_HRC_WG6_5_VNM_2_E.pdf)>

<sup>1170</sup> VCPC 2003, issued on 26 November 2003, No. 19/2003/QH11, articles 24 and 61

is no guidance that defines who can be an interpreter. Thus, who can be selected as an interpreter and how the interpreters can participate in the investigation process are very much dependent on the judgement of investigators, which once again is related to the subjective interpretation of the police. By contrast, England and Wales has specific regulation about interpreters. It emphasises the role of interpreters when someone has difficulty in understanding and speaking English in criminal process, and thus a qualified interpreter is required. Moreover, the law also indicates the police's responsibility to arrange an interpreter, for example for an interview, as well as ensure that the interrogation with those who cannot speak and understand English must have an interpreter's participation.<sup>1171</sup> At the same time, in England and Wales, there are guidance and regulations with regard to increasing the quality of interpreters rather than just mentioning their roles in criminal proceedings. These regulations, such as linguistic competence or professional attitude, are regulated by the association of interpreters, which is important for accurate interpretation in criminal process. For example, interpreters should be selected through the MOJ Framework Agreement or from the National Register of Public Service Interpreters.<sup>1172</sup> In this regard, Vietnam needs to learn this experience from England and Wales in order to have qualified and independent interpreters.

Another issue relates to legal regulation for interrogation powers that relates to the environment of interrogation such as timing of interrogation, a location of interview and all factors that can impact on the psychology of suspects during the course of interrogation. The regime of detention under which the suspect is in custody also influences the objectivity and fairness of an interrogation. Article 89 of the VCPC 2003 states that 'temporary detention and custody places, the regimes of daily life, receipt of gifts, contact with families and other regimes shall comply with the regulation of the Government,'<sup>1173</sup> which is called the Governmental Decree No. 13/VBHN-BCA on the Regimes of the Custody Detention.<sup>1174</sup> In this sense, the Criminal Procedure Code tries to regulate how to treat the suspect, for example an interrogation is not allowed to be

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<sup>1171</sup> PACE 1984, Code C 13

<sup>1172</sup> The Crown Prosecution Service's Legal Guidance,  
<[http://www.cps.gov.uk/legal/h\\_to\\_k/interpreters/](http://www.cps.gov.uk/legal/h_to_k/interpreters/)>

<sup>1173</sup> VCPC 2003, article 89, issued 26 November 2003, No. 19/2003/QH11

<sup>1174</sup> Vietnamese Government, Decree on the Regimes of Custody Detention, No. 13/VBHN-BCA, issued on 7 April 2014



conducted during at night, except in case of urgency.<sup>1175</sup> Furthermore, a detained suspect has the rights for example to be provided with food or to have access to medical treatment.

However, there is insufficient regulation to guarantee the exercises of these rights by the suspect. For example, a supervision role of the custody officer is not emphasised. As previously explained, the custody officer is not independent from investigators in terms of the detention of the suspect. Moreover, there is no clear ground which is used to extend detention of a person. Therefore, due to this insufficiency and unavailability, a suspect or their lawyers may usually claim that the interrogation can be conducted under oppression or its result is unfair when they are trialled at courts. To comment on this issue, an official from the Ministry of Justice said that:

‘During the investigation, there should facilitate more interactions between persons in custody and the accused with their lawyers by allowing more participation in the interrogation as well as visits to detention centres. Besides, for fairness of the crime investigation, while facilitating the accused to get access information, the State may reform detention regulations by regulating specific circumstances and criteria by which the police can extend a detention. Even, there should reduce maximum limit of detention time by the police from the 9 days period to 72 hours, because with short detention time limit, the police should have more consideration before application of the power of arrest and detention, and the police have to focus on the investigation in order to give a decision of whether the arrested is released or not.’<sup>1176</sup>

In addition, the unwieldy nature of the procedures and regulations themselves does not guarantee fairness for an interrogation. For example, it is compulsory for an interrogation to be recorded in the Minutes of Interrogation (*Bien Ban Hoi Cung*). Investigators are prohibited to add or cut or modify a content of a minute that is already acknowledged by the interrogated person. However, this existing regulation does not entirely prevent the suspect from blaming the police for changes of the content. In the meantime, until the 1<sup>st</sup> of January 2019, other equipment such as audio and visual recordings which can prove the accuracy of the interrogation record and protect the integrity of the police are not compulsorily applied as a way of keeping records of the interrogation.

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<sup>1175</sup> VCPC 2003, issued 26 November 2003, No. 19/2003/QH11, article 131

<sup>1176</sup> Interviewee IC2

In summary, so long as investigatory powers are conceived very much as a part of 'police skills', insufficient statutory frameworks to regulate investigatory powers can be considered as a major cause that leads to the unfairness of the exercise by the police of investigatory powers. Like legitimacy and effectiveness, for fairness of investigatory powers of the police, Vietnam should have clear and specific regulations on the grounds of the application of the investigatory powers, especially covert powers, as well as to develop sufficient supervision mechanisms for the exercise of those powers, for example supplementation to regulations on interrogation procedures, regimes of custody detention, and lawyers and interpreters. Thus, in terms of fairness, Vietnam may learn from Britain. For example, the right to lawyers when in police detention is much more explicit in the UK than it is in Vietnam. Britain has laws and regulations to implement fairness without any obvious diminution in effectiveness.

#### **7.4. Conclusion**

This chapter has examined investigatory powers relating to transnational crimes. This analysis was conducted based on both the existing legislation for the police powers and its practical application. Thus, the chapter sought to determine what powers are available to the police for transnational crime investigation and how effective and fair these powers are exercised for the investigation of transnational crime. The specific issues are identified as follows.

The analysis of this chapter has indicated that the police of Vietnam use widely investigatory powers which range from covert powers to overt powers, in terms of both the power to investigate a person and the power to investigate things. This is because of the leading role of the police as an investigative agency in the inquisitorial system of criminal justice in Vietnam. Moreover, the pre-trial stage of the Vietnamese criminal process in which a crime investigation is run facilitates the police investigation to continue.

In Vietnamese legislation, there are several key powers such as powers of arrest, detention, search and interrogation which are 'conventional' investigatory powers and important for transnational crime investigations. However, the police have no special investigative powers conferred by the law beyond those which are usually used for domestic crime investigations. There are a number of investigatory powers which are commonly used in worldwide transnational crime investigations which have not been given by the law to the police. For example most covert powers have not been legalised

yet. Even, some special investigative techniques which are suggested in international law are not regulated in the Criminal Procedure Code in order to provide the police with the lawful exercise of such investigative powers. There is no clear division between investigatory powers and police skills. The police regard the use of covert powers as 'police skills' rather than legal enforcement. This defect may indicate the illegitimacy of those investigatory powers, and to some extent cause their ineffectiveness when the police investigate transnational crimes.

In this chapter, there is also an analysis on the extent to which investigatory powers reflect fairness. In terms of standards and human rights, the chapter investigated three issues: the grounds for application of investigatory powers, the processes and procedures with regard to the exercise of investigatory powers, and the mechanism for the supervision of the use of powers of the police in transnational crime investigations. The chapter shows that while the police have wide discretion to use investigatory powers, there is a lack of essential legal regulations relating to investigatory powers and control of these powers. As a result, the analysis indicates that the use by the police of investigatory powers are dependent more on their subjective use by the police than on legal rules. This can harm the fairness of investigatory powers. In other words, there is a threat to the balance of the relationship between the effective use of investigatory powers, the protection of national interests and the respect of citizens' rights in transnational crime investigation.

The chapter has at some points given special consideration to experiences from England and Wales with regard to legislating investigatory powers as a way to improve effectiveness and fairness of investigatory powers in the investigation of transnational crime. Although the experience of England and Wales is not perfect, it suggests a foundation for legislating and using investigatory powers including covert powers that originates from the quality of human rights and citizen's rights. In this sense, Vietnam needs to learn from England and Wales in terms of legality, authorisation and oversight, for example, Vietnam should issue clear laws for the use of investigatory powers instead of internal guidance on police job skills. At the same time, it is necessary to provide the police with the legal training and resources to handle these powers. Some possible lessons are drawn as follows:

First, the police of Vietnam should be granted sufficient and specific investigatory powers. In addition, the police lack some of the necessary powers to investigate transnational crime, for example 'controlled delivery', which are now commonly used by

the international law enforcement community. Thus, it is necessary to study relevant international laws to incorporate necessary special investigative techniques in the Vietnamese legislation.

Second, while all investigatory powers must be regulated in the law, there should be clear and detailed legal regulations in terms of the exercise of those powers. In this regard, the police should regard the use of investigatory powers as legal enforcement rather than police skills. In this sense, in order to obtain effectiveness and fairness in transnational crime investigations, it is necessary to specifically regulate all covert powers in the law. Specific regulations with regard to oversight and supervision of the use of investigatory powers, for example standards of proof for the application of investigatory powers, should be reviewed and supplemented. Recently, there has been a positive change in the Criminal Procedure Code in terms of human rights protection and due process. The law has recently added legal provisions covering three newly investigatory powers (secret audio-video recording; secret wiretapping, and secret collecting of electronic data) or exclusionary rule of evidence. But it is still necessary to define or interpret them more specifically, otherwise it is hard for those new legal provisions to take effect in practice.

In summary, the notion of the rule of law, fairness and effectiveness, with regard to police powers, are being sought for the sake of standardizing the treatment of people whether they are Vietnamese or foreigners. This standard should be raised and required as an important aspect of cosmopolitanism. Thus, the chapter provides an analysis of the rule of law, fairness and effectiveness of investigatory powers used for investigating transnational crime in Vietnam. Specifically, the chapter indicates that the main issue that influences the effectiveness and fairness of the policing system for the investigation of transnational crime is insufficient legalisation with regard to investigatory powers of the police. Moreover, it also shows that Vietnam places more importance on the effective use of investigatory powers than the legalistic processes and procedures of carrying out those powers. Therefore, the chapter suggests that to balance this relationship and to enhance both the effectiveness and fairness of the policing system for investigating transnational crime, it is necessary to establish a sufficient statutory framework for investigatory powers. That framework needs to be detailed and comprehensive.

## **Chapter 8: Conclusion**

### **8.1. Introduction**

This chapter will outline the conclusions of the five research questions that underpinned this thesis and the main points discovered by the empirical research. Then the chapter discusses implications for the future, and reflects on the process to say something about the limits of the research and recommendations for future research. The details are as follows.

This thesis has discussed responses to transnational crime in Vietnam and potential conflicts with effectiveness and legitimacy. In this research, the aim was to assess how effective and legitimate the Vietnamese policing system is for investigating transnational crime, in compliance with international standards, such as human rights, which are now dominating and directing a trend for the development of transnational policing worldwide. Like many other countries, Vietnam is currently facing increasing transnational crime. The development of this phenomenon largely results from the negative impacts of globalisation. In the meantime, although there are differences in culture, legal tradition and political regimes between countries, each country sees demands to cooperate as a key way to handle this transnational problem. Transnational policing has been gradually developing as an important solution to cope with such increasing phenomenon of transnational crime. Features such as police institutions, powers and laws are transforming to meet the requirements of responding to transnational crime. Questions remain however about the effectiveness and legitimacy of those responses, challenging the success of the fight against transnational crime. A transnational policing activity may confront potential clashes of national interests and values. To gain insights into these issues is important for Vietnam.

In this sense, the thesis has focused on the relationship between demands for the development of transnational policing, the protection of national interests, and the requirements of legitimacy and effectiveness for the police in Vietnam. Specifically, the research has identified and followed a number of research questions which are drawn from Chapter One as follows.

- How does transnational crime develop and to what extent does it give impacts to Vietnam?

- Whether Vietnam has its own values of effectiveness and legitimacy or borrows them from outside which apply for appropriate transnational policing system.

- Whether the police are institutionally organised for effective and fair transnational crime investigations.

- How does the existing criminal law for investigating transnational crimes comply in terms of effectiveness and legitimacy?

-Whether police powers are able to ensure the success of a transnational crime investigation; and are they justified as effectiveness and legitimacy by both national interest and the obligations of international standards?

In answering these research questions, the thesis has analysed laws, policing strategies and practices of the investigation of transnational crimes. A socio-legal approach was applied as the best way to deliver this research. Documentary sources were used for doctrinal analysis of laws and policing strategies, whereas a qualitative research interview was conducted with 32 individuals who are police officers, procurators, lawyers, legislators, judicial officials, and international experts. These interviews helped the research generate data and insights on legitimacy and effectiveness of structures, and powers of the police and the process in laws and practices, in terms of investigating transnational crime. In addition, a comparative research method was used at some points in the research to draw possible policy transfers from England and Wales into Vietnam.

## **8.2. Research Findings**

### **8.2.1. How Does Transnational Crime Develop and To What Extent Does It Give Impacts to Vietnam?**

The research has explored opportunities, characteristics, categorisations and threats of transnational crime. It has identified globalisation and the limited capacity in developing societies as facilitators for the growth of transnational crime. Transnational crime is not new, but the perception of the nature of transnational crime is not yet settled. The research has proposed two main characteristics of transnational crime, which are (1) boundary crossing actions, and (2) legal violations codified by national legislation in at least two countries.<sup>1177</sup> Transnational crime is nowadays viewed as both a national and transnational phenomenon. These two proposed characteristics of transnational crime were used as a basis to understand and distinguish transnational crime from other crimes including domestic crime and international crime. Moreover, these characteristics also provided boundaries for this research to study transnational crime policing in Vietnam.

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<sup>1177</sup> See further at chapter 3

The research has also indicated that threats from transnational crime vary with its highly destabilising and corrupting influence on sovereignty, the economic system and society of each nation state. In this sense, in Vietnam, transnational crime has become a high priority for the country. Vietnam has highlighted its commitment to reduce threats of transnational crime, because the combating of transnational crime will result in the protection of the country's sovereignty as well as effective implementation and realization of socio-economic development's national objectives.

Overall, the research has analysed the transnational crime problem and the necessity for appropriate reactions by the State to transnational crime in Vietnam.

### **8.2.2. Whether Vietnam Has Its Own Values of Effectiveness and Legitimacy or Borrows Them From Outside Which Apply For Appropriate Transnational Policing System?**

The research has indicated that Vietnam has its own conception of ethics in policing, which downplays individualism because of Vietnam's political framework, legal traditions and Constitution. There are ethical difficulties that impact on the policing system of Vietnam. The main ethical problem originates from the fact that the police in Vietnam serve dual tasks: a political function which is concerned with protection of the regime, and a social function which is concerned with the rights and liberties of individuals. However, for transnational policing, Vietnam should accept more the ideas of individualism, for example fairness and human rights, and should thereby take into account the common benefits of international involvement, such as ASEAN collective objectives, as well as the national interests of Vietnam.

In assessing the policing system for investigating transnational crime, this research has adopted and clarified the ethical values of effectiveness, fairness and the rule of law, as being essential for transnational policing. Specifically, the contents of these values are indicated as follows.<sup>1178</sup>

There are two issues regarding effectiveness. Effectiveness can be judged by what the police try to do within the general duties of police officer which are to protect life and property and to preserve order. The police must act ethically in their enforcement of their functions. By considering powers and resources in terms of empowering the police, the value of effectiveness can be identified through three possible measures: (1) human right

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<sup>1178</sup> See further at chapter 4

discourses, (2) comparison between policing as a public good with other public goods, and (3) consideration of priorities of policing.

Next, based on abstract philosophical concepts, such as ‘equal concern and respect’, and more concrete international human rights documentation, the meaning of fairness not only includes basic standards such as impartiality, non-discrimination/equality, and accessibility to those standards. It also means that the state has a duty to arrange appropriate institutions, and to issue laws and procedures which are fair to all of its people including both the police and the suspect.

As for the rule of law, there are two tiers: the obligation of a state to enact and provide adequate law for the police; and a duty for the police to observe that law.

In this sense, the research has proposed a notion of cosmopolitanism as a conceptual framework for assessment of transnational policing. This is because the notion of cosmopolitanism, with a core of the universality of human rights, brings together the three ethical values of effectiveness, fairness and the rule of law. The notion of cosmopolitanism emphasises the shared morality, and that ‘appropriate’ transnational policing must meet international standards in which ethical transnational policing should be implemented fairly, and according to the rule law, while there should take into account from both national interests and benefits of international community.

### **8.2.3. Whether the Police Are Institutionally Organised For Effective And Fair Transnational Crime Investigations?**

Based on the identified conceptual framework of this thesis and its values of effectiveness, fairness and the rule of law, the research has analysed the policing institutional arrangements that are responsible for transnational crime investigations. Thus, the analysis indicated that dealing with transnational crime is mainly tasked to the police. This responsibility is organised in military style, and allocated in terms of hierarchy: central, province and district. In this regard, the analysis also identified the strengths and weaknesses of policing institutional structures, resources and their inter-relationships with the administrative leadership and the international law enforcement community as well.<sup>1179</sup> For example, in terms of the strengths, policing structures and organisations are generally similar throughout the nation through which the same standards for investigating agencies can be applied. The police can easily mobilise

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<sup>1179</sup> See further at chapter 5



resources from one investigating agency to another. Besides, there are several established cooperation mechanisms, which are used for cooperating with the international law enforcement community to investigate transnational crimes. These cooperation mechanisms vary in unilateral, bilateral and multilateral ways, or range from formal to less formal ways.

However, the following critical points with regard to the institutional arrangement for effective and fair transnational crime investigations have been indicated.

In terms of the rule of law, legality for responsibility for investigating transnational crime is insufficient. There are many investigating agencies which range from central, provincial to district, and all have responsibility to investigate transnational crime. But there is no clear division of their functions in addressing transnational crime. Indeed there are overlapping responsibilities between them. Sometimes, transnational crime cases can be investigated by the investigating security agency, not the police. This assignment can be subject to the decision of administrative leaders. Moreover, transnational crime investigations are centrally controlled by the Ministry of Public Security.

With regard to fairness, it is hard to guarantee the fairness of the policing system for investigating transnational crimes. This is because the police are not independent and expert in terms of responding to transnational crime. While there is no clear regulation about responsibility that deals with transnational crime, the independence of transnational investigative activities is still limited and subject to the directions of executive officials. Moreover, among several established cooperation mechanisms, less formal cooperation mechanisms, such as Interpol cooperation, remain a principal way to cooperate in investigating transnational crime with overseas law enforcement agencies. Nonetheless, unilateral ways in transnational investigative cooperation are still used for combating transnational crime

In terms of effectiveness, the investigating agency system in the People's Police of Vietnam is not really effective for investigating transnational crime because the investigating system is complicated. It specialises in specific offences. The competence of each investigating body in the system is organised following and under its administrative organisation system of the state. The capacity of investigating agencies is limited in terms of training and human resources.

#### **8.2.4. How Does the Existing Criminal Law For Investigating Transnational Crimes Comply In Terms of Effectiveness and Legitimacy?**

Criminalisation is determined as a primary policing response, and becomes an essential part of the transnational crime control policy. The research has focused on the criminalisation of transnational crime. The research indicated that there is no general legal definition of transnational crime in Vietnamese criminal law. But the research revealed that transnational crimes are delivered through certain specific offences, and there are two designs of criminalisation of transnational crimes. The first design of transnational crime is the one which basically relies on a domestic crime, but with an extension to cover the transnational aspect. The second design of transnational crime is a treaty-based crime which is derived from international treaty and is specifically designed with transnational crime in mind.

The analysis of the research has used the two proposed characteristics of transnational crime and international standards to identify and assess the two designs of criminalisation. Its results indicated that these two designs of transnational offences each has advantages in terms of effectiveness and fairness, for the transnational crime investigation. They enable the police to navigate their way to investigate transnational crime, for example giving directions to collect evidence. However, there are some concerns in terms of the rule of law, fairness, and effectiveness with regard to the criminalisation of transnational crime.<sup>1180</sup>

First, in terms of the rule of law, there is still a lack of sufficient criminalisation of transnational crime. Regulations regarding some transnational criminal activities which are suggested in international laws have not been created in Vietnamese criminal law. For example, organised crime including transnational organised crime is not regulated yet. Moreover, the distinction between the design of transnational offenses and the design of domestic crimes is not clear enough, which to some extent reveals that the Vietnamese criminal law seems to focus on domestic crime more than transnational crime.

Second, in terms of fairness, the existing designs of transnational crime can have a negative impact on the fairness of transnational crime investigations. First, while there is no general definition of transnational crime, there is the application of separate regulations relating to extra-territorial jurisdiction, to define a form of transnational

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<sup>1180</sup> See further at chapter 6

criminal offences. But this extra-territorial jurisdiction is vague and its application is subject to the subjectivity of investigators as well as availability of police resources.<sup>1181</sup> Thus, the police may easily decide not to pursue a transnational crime investigation. Instead, they only focus on domestic parts of a crime investigation. Another problem for fairness is that the police cannot charge someone without occurrence of any offence committed. Thus, a transnational crime investigation cannot ensure fairness if there is a lack of sufficient definition and criminalisation of transnational crime and the police cannot find any offence as a legal basis to charge. Specifically, there are legal provisions, such as penal liability of a non-natural legal entity, or offences such as illicit enrichment and organised crime that are regulated in international laws, but Vietnam has not incorporated them into its Penal Code. Indeed, even some ordinary crimes such as conspiracy have not been defined yet, though they are often used by the international law enforcement community. At the same time, some transnational criminal offences, such as human trafficking, are not defined sufficiently so that it is difficult to distinguish between transnational acts, such as brokerage for overseas labour, and the offense of human trafficking.

Third, in terms of effectiveness, the police may not know what they need to collect as evidence to prove a transnational crime. This results from the fact that law enforcement officials such as police investigators are not well aware of, or familiar with, designs and legal characteristics of transnational crimes, because unclear division in terms of design between transnational offences and domestic crimes in the Penal Code.<sup>1182</sup>

### **8.2.5. Whether Police Powers Are Able to Ensure the Success of A Transnational Crime Investigation; and Are They Justified as Effectiveness and Legitimacy by Both National Interest and Obligations of International Standards?**

Besides substantive criminal law, the research has focused on pre-trial phases of criminal justice process where it has examined the effectiveness and legitimacy of investigatory powers which are used by the police for investigating transnational crime. The analysis of the research indicated that the police of Vietnam are vested by the law with many 'conventional' investigatory powers such as powers of arrest, search, custody and interrogation. In general, the police are widely empowered with investigatory powers

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<sup>1181</sup> See subsection 6.2.3.2

<sup>1182</sup> See further at subsection 6.2.3.1

which include both key statutory powers and non-statutory powers which are understood as the inherent professional skills of the police. However, the research has indicated the following points.

In terms of the rule of law, most covert powers are not regulated by the law. Instead, they are used as police techniques which are instructed and managed by administrative decisions and internal police rules. There are no transparent legal regulations, and the police use special regulations which are not open to every normal police officers or to the public. Furthermore, legal regulations regarding controls of the use of investigatory powers are deficient. The unclear and unspecific regulations, involving vague grounds for the application of investigatory powers, may hamper the use of investigatory powers of the police.<sup>1183</sup>

In terms of fairness, the research also indicated that several investigatory powers are conducted routinely, instead of being enforced based on legal provisions. This is because, to some extent, the criminal process in Vietnam tends to focus more on crime control objectives than due process. The way in which the criminal justice process works encourages the police toward that mode of working.

In terms of effectiveness, the research revealed that for transnational crime investigations, there is no separate body of investigative powers beyond the investigatory powers used for investigating domestic crimes. The police do not have some effective transnational crime investigatory powers such as ‘controlled delivery’ which are commonly used by international law enforcement agencies.

### **8.2.6 Possible Policy Transfers**

As outlined above, the research has at key points compared Vietnam’s laws and policing with that of England and Wales to discern possible lessons. The following points were the main lessons learned.

First, there are clear lines of demarcation between central and local policing in terms of responsibility for investigating transnational crime. In addition, the police have an independence from political control, which is called ‘constabulary independence’, in investigating transnational crime.<sup>1184</sup>

Second, beside specific transnational behaviours, for example transnational drug trafficking and money laundering, there are some forms of crimes such as conspiracy

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<sup>1183</sup> See further at chapter 7

<sup>1184</sup> See further at section 5.3

offences and participation offences, which facilitate successful response to transnational crime which involves foreign jurisdictions. It is necessary to define these two forms of crime to respond to transnational crime (see more at section 6.2.3.3). In the meantime, for successful enforcement of criminal law with regard to transnational crime, there may need to be a working definition of transnational crime, which would help the police understand transnational crime and overcome the lack of a legal definition of a generalist transnational crime.

Third, for crime investigations, including a transnational crime investigation, English police are empowered with sufficient investigative powers which are clearly regulated in law, for example under PACE 1984 or RIPA 2000.<sup>1185</sup> In addition, the foundation for legislating and using those investigatory powers, including covert powers, is affected by human rights and citizen's rights. In this sense, there are three points from PACE 1984 and RIPA 2000 in terms of policy transfer. They are legality, authorization and oversight. With regard to legality, PACE 1984 and RIPA 2000 are extensive. They are long and detailed statutes which can help with legality for police powers. These statutes deal with difficult issues which Vietnam finds difficult or vague, for example, covert techniques are not easy to be placed within legal limits. Though there are criticisms, Britain is trying to deal with these and a sincere attempt has been made by the introduction of the new Investigatory Powers Bill. The next point is about authorization. It is about not just having a law on investigative techniques but also how these techniques are limited, which leads to who exercise these powers; on what authority and what grounds these powers are applied. Thus, it is important for Vietnam to learn from PACE 1984 and RIPA 2000 which give specific grounds for the application of powers of the police. In terms of authorizing bodies, authorization for investigative powers vary in PACE 1984 and RIPA 2000. Sometimes, these statutes allow the police to authorize themselves. Sometimes, these statutes allow Ministers to authorize investigative powers. Occasionally, these statutes require judges to determine investigative powers. Therefore, it is essential to know who are the authorizing bodies and in which circumstance. This is important to safeguard the rule of law, fairness and effectiveness. Vietnam may learn from this point to define authorizing bodies and circumstance by which an investigative power can be applied. Another point that Vietnam may learn from PACE 1984 and RIPA 2000 relates to oversight of investigative powers. Some sources of investigative powers

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<sup>1185</sup> See further at chapter 7

are sensitive or very intrusive powers. This is correlated to authorization. So, the police can use those powers, but must account for them to an oversight authority. Overall, there is no single blueprint for investigative powers. Vietnam could nonetheless learn all of these three points, legality, authorization and oversight in order to adjust and amend the way investigative powers are appropriately exercised in Vietnam. While the police are given powers, they should be limited and oversighted in order to protect the rights of people.

### **8.3. Implications for the Future**

The findings of this study have a number of important implications for future policy and practice which deals with transnational crime as follows.

The growth of transnational crime raises a question as to what extent the policing system for investigating transnational crime can be made more legitimate, effective, and fair. The findings of this thesis have indicated that Vietnam has made many efforts to establish national laws, policies and transnational policing practices, which allow the police to cooperate with the international and regional community in investigating transnational crime. In general however it is still necessary to improve the policing system for the investigation of transnational crime, in terms of its effectiveness and legitimacy. Responding to transnational crime relates to the 'traditional' relationship between the state's power and the protection of the rights of individuals. In addition, that response may also confront clashes of national interests and clashes of values such as human rights between Vietnam and other foreign countries. Thus, Vietnam should have a regulatory framework for investigating transnational crimes, which addresses on three levels: (1) policing structures and organisations against transnational crime; (2) criminal law; and (3) criminal process. This regulatory framework must be based on the 'cosmopolitanism' perspective in which the ethical values of effectiveness, fairness and the rule of law are brought together to apply to transnational crime investigations. By doing so, this regulatory framework will help the development of lawful transnational policing whilst its implementation ensures the protection of national interests and the requirements of the liberty and civil rights of individuals. Moreover, this regulatory framework is seen as a prerequisite for the Vietnamese police to gain the trust and confidence of its overseas counterparts, which facilitates the success of transnational policing activity.

Specifically, knowledge of the effectiveness and legitimacy of the existing policing system for investigating transnational crime, such as this research provides,

should be useful in addressing temporary and long term policies. In this sense, the following areas of improvement should be prioritised.

### **8.3.1. On Institutional Arrangements: Clear Assignment and Capacity Building**

The findings of this research point out that it is necessary to have clarity in terms of those who are responsible for transnational crime investigations. While there is no specialised investigating agency which has main responsibility for transnational crime, there is insufficient training on transnational crime. In the meantime, there are no clear financial and human resources dedicated for transnational crime investigations. Thus, the ineffectiveness and illegitimacy of the existing policing system for investigating transnational crime derives not only from institutional structure of investigating systems, but also from a lack of capacity in the police. To solve this shortcoming, there may be required a clearly defined agency with a special remit. This does not mean that transnational crime investigations are all confined to one agency. However, a defined agency could have a clear duty and identified resources as well as the main responsibility for transnational crime. The defined agency will ensure that transnational crime investigations are neither ignored nor downgraded as a low priority. In this regard, experience from England and Wales with regard to a model of the National Crime Agency may be considered. As indicated in Chapter Five, the National Crime Agency has primary responsibility for transnational crimes in the UK, which is clearly defined. It has sufficient capacity to investigate transnational crime. Moreover, in terms of legality, the agency works independently. Its investigating activities are independent from political control.

Vietnam may think that the Vietnamese police structure is different from the UK. Its police force's duty is not the same as the National Crime Agency's. The National Crime Agency does not comprise all functions the Vietnam police have. Moreover, the National Crime Agency may not be regarded as a viable choice because Vietnam has not enough resources to establish such an agency. An agency which combines investigative works and preventive efforts may be another possible choice. This is because it saves operational costs for the agency, but at least there is clearly an agency specialising in tackling transnational crime. Overall, in its present conditions and capacity, Vietnam should have a national specializing agency which deals with transnational crime at the central level. Though this specializing agency is still within the police force, its functions and duty should be defined as clearly as the National Crime Agency in the UK. Thus this

agency could be empowered with sufficient powers and resources in order to specialize on anti-transnational crime tasks.

Another implication of the findings relates to the ways in which the police of Vietnam interact with international law enforcement agencies to investigate transnational crimes. Different forms of cooperation mechanism that range from formal to informal are established, but the police usually use informal cooperative mechanisms due to a lack of knowledge about formal mechanisms. So, there is insufficient formal cooperation mechanism between Vietnam and several countries. However, as Chapter Five indicated, Vietnam has established Vietnam-Australian Joint Transnational Crime Centre, and it has been useful for investigating transnational crimes between Vietnam and Australia. This model can enhance transnational investigative cooperation in a more formal way, based on bilateral official agreements between Vietnam and Australia. Thus, Vietnam may consider continuing the development of this model with other countries. Particularly, Vietnam could establish a Joint Transnational Crime Centre as the same model between Vietnam and Australia to promote the investigative cooperation between Vietnam and a country where many transnational crime investigations involve.

In fact, transnational crime in Vietnam mainly involves certain countries such as Australia where there are many Vietnamese living there, or China which is a neighbouring country to Vietnam. To cope with this transnational crime situation, bilateral anti-crime agreements are usually signed between Vietnam and each involved country. Then, a Joint Transnational Crime Centre may be a part of solution on that agreement. It is usually a Bilateral Joint Transnational Crime Centre rather than Multilateral Joint Centre. This is because it requires a specific agreement between Vietnam and one country. At the same time, a multilateral agreement may take time to be signed between countries. In this sense, the Joint Transnational Crime Centre can be bilaterally developed between Vietnam and a country which is either a neighbouring country or ASEAN member country at some distance from Vietnam. Vietnamese criminals are one of many groups of foreign criminals in the UK,<sup>1186</sup> while there are increasing British criminals who may be involved in for example drug trafficking or child abuses in Vietnam. So, establishment of the Bilateral Joint Transnational Crime Centre between Vietnam and the UK may be necessary.

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<sup>1186</sup> Barret, D., 'Foreign Criminals Choose to Stay in Britain' (*The Telegraphs*, 23 May 2010) <<http://www.telegraph.co.uk/news/uknews/law-and-order/7753353/Foreign-criminals-choose-to-stay-in-Britain.html>>



### **8.3.2. On Criminal Law: Supplement of Essential Forms of Transnational Offences, and Enhancement of the Legal Education on Transnational Offences for the Police**

The findings of Chapter Six have indicated that transnational crime can be conceptualised through certain specific offences, but that these indirect designs of transnational crimes are not sufficient. Most investigators are familiar with designs of domestic crimes rather than transnational crimes. In other words, Vietnam is facing two issues in terms of criminal law with regard to transnational crime investigations. One is a lack of essential transnational offences in the Penal Code. The other issue is how to put regulations of transnational offences into the practices of the police. Thus, to enhance the effectiveness and legitimacy of the policing system for investigating transnational crime, there are some implications for Vietnam

First, it is necessary to put the international agreements that Vietnam signs and ratifies in terms of transnational crimes into Vietnamese criminal law. Vietnam needs to review and determine whether there are any international conventions with regard to transnational crimes that it has not signed or ratified. Moreover, the incorporation of transnational offences, which originate from the international conventions, into the Penal Code should not be merely for political purpose, but must be used for enforcement. Thus, Vietnam defines clear designs of transnational offences by providing specific acts or behaviours as transnational crimes or at least an explanation of transnational crime for tasking the police. Vietnam could add essential regulations such as the offence of illicit enrichment, which Vietnam does not at present have in its Penal Code.<sup>1187</sup> Moreover, from the experience of England and Wales, Vietnam may learn and add to its Penal Code two offences which are important to transnational crime investigations. These offences are the offence of conspiracy and the offence of participating in a criminal organisation. See further at Chapter Six.

Second, the police should be well educated about transnational offences and their characteristics which help them to think of evidence and the way to collect those evidence in order to prove transnational crime. Thus, training for the police in terms of transnational offences should be prioritised.

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<sup>1187</sup> See further at chapter 6

### **8.3.3. On Criminal Justice Process: The Change from the Police Skills to Legal Enforcement in terms of Investigatory Powers of the Police, and the Necessity of Legal Specificity for the Investigatory Powers**

Based on the findings of this research, the police are seen to face significant problems in transnational crime investigations. For example, the use of some covert powers such as informant use is not lawful in transnational crime investigations. This is because there is no clear separation between the pre-investigation or ‘intelligence’ phase and the investigative phase. Moreover, the dominant perspective for regulating and using covert investigatory powers is under the rubric of police skills, instead of legal enforcement. Even though the Criminal Procedure Code 2015, which will take effect in the near future, has added some provisions relating to special investigative techniques such as wiretapping, these provisions are still vague. Thus, it is necessary for law makers and enforcers to improve the position further. Investigatory powers should be regulated by law and used instead of simply following internal instructions within the police. Any investigatory powers, irrespective of covert powers or ‘conventional’ regulatory powers, potentially cause harm to the rights and interests of individuals. So, all covert investigatory powers must be regulated by the law. Moreover, to ensure effectiveness and legitimacy, there is the issue of enforcement of those powers. The law should concentrate on specific regulations by which there are clear foundations for applying the investigatory powers as well as safeguarding the liberty and civil rights of both suspects and the police. Experience from England and Wales with regard to regulating police powers, especially covert powers, should be considered. Vietnam could study the RIPA 2000 (and pending amendments in the Investigatory Powers Bill) to regulate and control the investigatory powers of the police. They are not only regulated by the law, but the laws provide procedures and processes for applying those powers.

Another problem relates to fairness. The criminal process tends to place more importance on finding facts to prove crimes rather than due process, which safeguards suspects and even the police during the course of transnational crime investigations. It is necessary to review and provide in detail a provisions with regard to, for example the exercise of lawyers’ functions, interpreters, admissibility of evidence, recording of evidence, and generally checks on detention and treatment.

#### **8.4. Limitations of the Current Study, and Recommendations for Further Research Work**

The police response to transnational crime is not the only way to deal with the problem. There are non-policing responses, such as taxation or customs policies, which, as alternative approaches, can be applied to combat transnational crime.<sup>1188</sup> For example, tax enforcement may be used in lieu of, or as a complement to, proceeds of crime enforcement, by using civil proceedings to deprive transnational criminals of their unreported illicit wealth. However, due to the objectives of this thesis, which aims to explore the effectiveness and legitimacy of the policing system for investigating transnational crime in Vietnam, the thesis has focused on transnational policing policies and laws. Another alternative way of dealing with transnational crime is to apply preventive solutions to transnational crime, such as technological surveillance. These other research strands are important but go beyond policing in terms of responding to transnational crimes.

As indicated in Chapter One and throughout the thesis, the research has focused on responses to transnational crime, and has assessed the effectiveness and legitimacy of the policing system for investigating transnational crime. On the whole, this is a study of the policing system. However, to improve the results of this research, future studies may be conducted in the following themes.

First, as explained in Chapter Two, a qualitative research strategy was employed for generating data for this research, instead of quantitative data gathering. Thus, on the same topic of this thesis, future research conducted by a quantitative strategy may be helpful.

Second, future research may look further at specific aspects of police tactics which are used to deal with transnational crimes. For example, there may be research about the use of force or coercive powers during responses by the police (or even the military) to transnational crimes. Moreover, there are allied issues with this research: future research on the role of procurators or lawyers or the treatment of victims during the course of transnational crime investigation may be useful. This is because this future research could provide a wider picture on the issue of policing transnational crime. Responding to transnational crime not only involves officials from those agencies, but other participants

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<sup>1188</sup> Leong, A., *The Disruption of International Organised Crime: An Analysis of Legal and Non-Legal Strategies* (Aldershot: Ashgate, 2007) 137

such as victims or suspects of transnational crime. However, as indicated in Chapter Two, this research has been conducted with attention to policing officials and their experience rather than the perspectives and experiences of suspects or victims.

Next, there are different agencies involved in addressing transnational crime in the criminal justice system such as police, procuracy and court. Prosecution and particularly punishment are distinct issues to be further studied beyond the existing research on pre-trial process and policing. Specifically, future research may focus on mutual legal assistance issues between Vietnam and other countries which facilitate prosecution of transnational crime. After the police's effective investigation, it is necessary to prosecute criminals in court. This raises the issue of criminal justice solutions to bringing those criminals into courts. In addition, another area that future research may be needed relates to prisoners in transnational crime cases. After transnational criminals are convicted, issues relating to foreign prisoners, such as the transfer of prisoners to their home countries to assist investigations abroad are always popular topics of debate.<sup>1189</sup> At the same time, foreign prisoners create challenges for a criminal justice system because they speak different languages and have different cultural expectations and are cut off from relatives and other sources of potential help and rehabilitation. For example, in the UK, there is a large number of Vietnamese prisoners in British prisons who were sentenced for activities related either to cannabis growing, sex trafficking or worker trafficking. The scale of Vietnamese prisoners in the UK is worthy of further research on the treatment and cost of those prisoners, including the implementation of the treaty between Vietnam and the UK on the transfer of sentenced prisoners.<sup>1190</sup>

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<sup>1189</sup> Crime (International Co-operation) Act 2003, s. 47

<sup>1190</sup> Treaty between the United Kingdom of Great Britain and North Ireland and the Socialist Republic of Vietnam on the Transfer of Sentenced Prisoners, Cm 7498 (Hanoi, Sept. 2008)

## **Appendix 1 – Information Sheet**

### **The Investigation of Transnational Crime in Vietnam: With Reference to England & Wales and the European Union**

You are being invited to take part in a research project. Before you decide whether to participate, it is important for you to understand why the research is being carried out and what it will involve. Please take time to read and consider the following information carefully, and discuss it with others if you wish. Please do not hesitate to ask if there is anything which is unclear, or if you would like more information. You will have a period of five working days to decide whether or not you wish to voluntarily take part in the project.

My name is Chu Van Dung. I am currently a full time PhD student in the School of Law at the University of Leeds (United Kingdom). Whilst my prior and future employment has been as a police officer in Vietnam, for the duration of my studies and this research project I am not operating in any capacity as a police officer. As an independent researcher, I am under the supervision of Professor Clive Walker and Dr Steven Hutchinson from the School of Law, University of Leeds.

My research explores responses to transnational crime in Vietnam, and the place and role of efficiency, fairness and legitimacy therein. It examines and considers the current structures for investigating transnational crime, and the nature of police powers and criminal justice processes. Its purpose is to assess the effectiveness and the legitimacy of the policing system in Vietnam for the investigation of transnational crime. To do this, it is important that I solicit the views and opinions of those who work within the current system. As a result, I am conducting interviews with key personnel involved in such investigations. There will be a total of 27 interviews with persons engaged in transnational policing in Vietnam, the United Kingdom and at the international level (including bodies such as at UNODC and the ASEAN Secretariat). Specifically, I am interviewing 2 National Assembly deputies, 11 Vietnamese Police Officers, 2 Legal Officials, 2 Prosecutors, and 6 Lawyers, as well as 2 British Police Officers and 2 International Experts. The findings from these interviews will aid in the assessment of whether the current institutions, laws and police powers for confronting transnational crime in Vietnam are sufficient, efficient, fair and legitimate. Moreover, the interview data will

provide crucial evidence of any differences between official structures and powers, and how these are implemented in practice.

You have been invited to take part in this research because of your role in responding to transnational crime. I am interested in learning about your experiences in investigating transnational crime. To do this, I would like to ask you some questions about your personal observations, opinions and assessments of the system and processes for investigating transnational crime. There may however be some questions which are not within your area of expertise, and which you may feel unable to answer fully. You may also refuse to answer any questions you like, and if you would like to skip a question, simply let me know and we will move on.

Taking part in the interview is entirely voluntary and at any time, for any reason, you can stop the interview or withdraw your responses from the study, with no consequences. You will also be given 30 days after the interview takes place in order to consider and decide whether to withdraw your consent for the use of what you said in the interview. If you decide to withdraw your consent, any information collected from you will be destroyed. To withdraw from the study after you have interviewed, please contact me directly at School of Law, (University of Leeds, on telephone number +44 7707470058, or email me at: [lwdvc@leeds.ac.uk](mailto:lwdvc@leeds.ac.uk)). Your consent to participate in the interview will be recorded on a separate written form at the interview. In cases where written consent is inappropriate or where you would rather give verbal consent, a recording of your consent will be taken. This will only be done after you have agreed to the use of a recording device.

I would like to make it absolutely clear that persons who take part in this research project will not be named in the subsequent thesis or in any publication produced therefrom. Any quotations that are used will be anonymised completely so that the source of the information is impossible to identify. Although the Vietnamese Ministry of Public Security has provided a Letter of Introduction to introduce me to your agency, this introduction is only a formality. The Ministry of Public Security has no role in this research project and is not overseeing or directing the project. It will not interfere with the interviews, oversee or monitor the interviews, or guarantee that someone will take part. Those who take part will not be known to the Ministry, only to myself. The selection process for interviewees has also been conducted by myself as an independent researcher at the University of Leeds.

The interview itself should last no more than 60 minutes. I would like to tape-record the interview so that I can make sure we correctly record your views and experiences. If you prefer that the interview not be recorded, please tell me before we begin and I will take handwritten notes instead. You may stop the interview at any time for any reason, or ask to take a break whenever you need one.

The interview will be entirely confidential, and anything you say to me will only be known to me. There is no wish or need for us to discuss any criminal behaviour or anything that might be considered a state secret or confidential work related practices/processes. Moreover, you are also reminded to not use the interview to discuss any sensitive issues, for example, please do not use the interview as a forum to blame the Vietnamese government. If you stray in this terrain, I will provide you with a warning to stay on track, and if this warning is ignored (either accidentally or intentionally), then the interview will be stopped. Further, any material that is considered to be irrelevant or overly sensitive will be deleted from the recorded interview and will not appear in any transcriptions. In addition, you should refrain from divulging any crimes you have committed whether or not these were in the course of an investigation. I will not be asking you about any unpublished criminal cases, and a case will not be used in the project until it is made public. In the unlikely event that you disclose an offence that you have committed, I will have to stop the interview and may take action which is required of all Vietnamese citizens (i.e. reporting that crime to the relevant and competent authority).

Whilst I can provide no immediate financial or other benefits to those who agree to participate in the research, this work will lead to the completion of my PhD thesis which is designed to help refine and perfect the laws, systems and processes for investigating transnational crime in Vietnam. The findings may also be published in the form of academic papers and research reports which will seek to aid the Government of Vietnam and the Ministry of Public Security in improving the effectiveness and legitimacy of the investigation of transnational crime in Vietnam.

If you require any further information please contact either myself (at the School of Law–University of Leeds, on telephone number +44 7707470058, or email: [lwsvc@leeds.ac.uk](mailto:lwsvc@leeds.ac.uk)), or my supervisors (at the School of Law, University of Leeds, LS2 9JT, UK: Professor Clive Walker ([C.P.Walker@leeds.ac.uk](mailto:C.P.Walker@leeds.ac.uk)) or Dr Steven Hutchinson ([lawsh@leeds.ac.uk](mailto:lawsh@leeds.ac.uk))). I thank you in advance for your consideration and participation in this important research project.

## **Appendix 2 – Consent Form**

### **The Investigation of Transnational Crime in Vietnam: With reference to England & Wales and the European Union**

My name is Chu Van Dung. I am currently a full time PhD student in the School of Law at the University of Leeds (United Kingdom). Whilst I was previously a police officer in Vietnam, and will be again upon completion of my degree, I am carrying out this project as an independent researcher. As such, the project is under the supervision of Professor Clive Walker and Dr Steven Hutchinson, both in the School of Law at the University of Leeds.

This project explores responses to transnational crime in Vietnam, and the role of efficiency, fairness and legitimacy therein. It examines and considers the current structures for investigating transnational crime, the nature of police powers and the relevant criminal justice processes. Its purpose is to assess the effectiveness and legitimacy of the system(s) for policing transnational crime in Vietnam. To do this, it is important that I solicit the views and opinions of those who work within the current system. As a result, I am conducting interviews with key personnel involved in such investigations. The findings from interviews will help me to assess whether the current institutions, laws and police powers are sufficient, efficient, fair and legitimate for confronting transnational crime in Vietnam. Moreover, the interview data will provide evidence of any differences between the official structures and powers and how these are implemented in practice.

You have been selected as a potential interviewee because of your place and role in responding to transnational crime. I would like to learn about your experiences with investigating transnational crime. To do this, I would like to ask you some questions about your personal experiences, observations, opinions and assessments of the current system for investigating transnational crime. There may however be some questions which are not within your area of expertise, and which you may feel unable to answer fully. You may also refuse to answer any questions you like, and if you would like to skip a question, simply let me know and we will move on.

Taking part in the interview is entirely voluntary. You can at any time stop the interview or withdraw your data from the study, for any reason, without any negative



consequences. You will also be given 30 days after the interview takes place to withdraw your consent and your data. If you decide to withdraw your consent, any information collected from you will be destroyed. To withdraw, please contact me at the School of Law – University of Leeds, on telephone number +44 7707470058, or by email at: [lwdvc@leeds.ac.uk](mailto:lwdvc@leeds.ac.uk).

Those who take part in the research will not be named in the thesis or in any publication produced therefrom. Any quotations I use will be anonymised so that the source of the information cannot be identified. Although the Ministry of Public Security has provided me with a Letter of Introduction in order to introduce me to your agency, this is only a formality. No further action will be taken by the Ministry, which is not overseeing the research, monitoring the interviews, or guaranteeing that someone will take part. The selection process for interviewees has been conducted by myself as an independent researcher, and the Ministry will not be made aware of who ends up being interviewed.

The interview should last no more than 1 hour. I would like to tape-record the interview so that I can make sure to correctly record your views and experiences. If you prefer that the interview is not tape recorded please tell me and I will take hand written notes instead. You can stop or withdraw from the interview at any time, or ask to take a break whenever you desire one.

The interview results will be confidential such that anything you say will only be known to me. There is no wish or need for us to discuss any criminal behaviour or anything that might be considered a state secret or a confidential work practice/process. Moreover, you are also reminded to not use the interview to discuss any sensitive issues; for example, please do not use the interview as a forum to blame the Vietnamese government. If you stray in this terrain, I will provide you with a warning to stay on track, and if this warning is ignored (either accidentally or intentionally), then the interview will be stopped. This is done in order to comply with Vietnamese legislation. Further, any material that is considered to be irrelevant or overly sensitive will be deleted from the recorded interview and will not appear in any transcriptions. In addition, you should refrain from divulging any crimes you have committed, whether or not these were in the course of an investigation. I will not be asking you about any unpublished criminal cases, and a case will not be used in the project until it is made public. In the unlikely event that you disclose an offence that you have committed, I will have to stop the interview and

may take the action that is required of all Vietnamese citizens (i.e. reporting that crime to the relevant and competent authority).

Whilst I can provide no immediate financial or other benefits to those who agree to participate in the research, this work will lead to the completion of my PhD thesis which is designed to help refine and perfect the laws, systems and processes for investigating transnational crime in Vietnam. The findings may also be published in the form of academic papers and research reports which will seek to aid the Government of Vietnam and the Ministry of Public Security in improving the effectiveness and legitimacy of the investigation of transnational crime in Vietnam. In order to comply with the ethics code of the University of Leeds, I would be grateful if you would sign this consent form confirming that I have explained the purpose of the project and the interview to you, and that you understand this process and provide me with your consent to participate.

*Participant's consent*

I agree to participate in this research project on the investigation of transnational crime in Vietnam, which is being undertaken by independent researcher Chu Van Dung from the School of Law – University of Leeds. The researcher is also granted my consent to use my responses for the production of his PhD thesis.

Signature .....

Name .....

Date .....

## Appendix 3 - Interview Schedules

Before interviewing, interviewer reads informed consent form and have signature of interviewee.

*Note: The interview will follow this list of questions. The italicised notes will be mentioned to the interviewees as an introduction to each section and to help guide the conversation. The interviews will be conducted in a flexible way, according to the conditions of the interview and the conversational flow.*

### **Interview with police officers /legislators / legal officials /procurators / defense lawyers/ International Respondent**

#### *1-Section One: Demographics and Background*

At the beginning, I would like to start by asking you some personal questions about your background and your duties; the purpose is to set your answer in the context of your professional profile.

Please tell me:

Q1. Could you specify your age band? Is it (20-29/30-39/40-49/50+)?

Q2. How long have you been a police officer /legislator /legal official /procurator/ defense lawyer? (should select an appropriate one for each interview)

Q3. What is your main duty?

Q4. How long have you been in this current job?

There may have further sub-questions below for those who are not a police officer.

Q4.1. What qualifications and experience do you have with regard to transnational crime as a legislator/legal official/ procurator/defense lawyer?)

Q4.2. How have you been involved with the police and their transnational policing activities?

Q4.3. What do you think about your relationship with the police?

#### *2-Section Two: Policing Structure and Institutions against Transnational Crime in Vietnam*

This section is to identify and measure gaps and inappropriateness in policing institutions such as their assignments and relationships both domestically and

transnationally with regard to the investigation of transnational crime. Therefore, I would like to ask you questions about the following issues.

Q5. What do you think about the organisation and tasking of investigating agencies with regard to the investigation of transnational crime?

Q5.1. What do think about the current system in which transnational crime investigations are allocated to different policing structures or various agencies?

Is it effective in terms of resources? Is it effective in terms of working mechanism?

Q6. Think about your organisation in which you work, what do you think about the following with regard to the task of investigating transnational crime:

Q6.1. Are there enough staff?

Q6.2. Are there enough financial resources?

Q6.3. With present personnel, are they the right staff with sufficient training?

Q6.4. With your involvement of transnational crime, what do think about the training you received?

Q6.5. Do you think your unit in which you work is well managed?

Q7. What do you think about cooperative relationships between investigating agencies and executives during the investigation of transnational crime?

Q8. What do you think about processes by which the police cooperate with other overseas law enforcement community to investigate transnational crime?

Q9. What do you think about existing cooperation mechanisms by which the police interact with overseas countries and international organisations to conduct transnational crime? Are they effective? Are they enough?

Q9.1. Is there anything specific you would like to say about existing mechanisms at central, province and local levels within Vietnam by which the police cooperate with foreign law enforcement agencies?

Q9.2. Is there anything specific you would like to say about existing cooperation mechanisms with Interpol or ASEANAPOL when conducting transnational crime investigations?

Q9.3. If you had an opportunity, what cooperation mechanism would you prefer using to investigate transnational crime? Why? Is there any not 'barriers'?

### *3-Section Three: Criminal Law relevant to Policing of Transnational Crime*

This section focuses on the assessment of the Vietnamese transnational criminal law and its impacts on transnational crime investigation in Vietnam. Therefore, the

following questions will investigate to what extent the nature and requirements of transnational crime investigations are well addressed in the Vietnamese transnational criminal law.

Q10. What do you think about the criminal law of Vietnam and its impacts on transnational crime investigation?

Q10.1. What do you think about the defining and regulating transnational criminal acts in the existing criminal law of Vietnam in terms of the offences and punishment framework? Are they appropriate? Effective?

Q10.2. Do you think designs of transnational offences in the present Penal Code influence transnational crime investigations and investigators? How so?

Q11. What do you think about the implementation of treaties and agreements that Vietnam concludes with regard to the investigation of transnational crime? Are they useful /effective?

Q11.1. What do you think about the Vietnamese criminal law incorporating transnational offences which originate from international conventions? Is this effective and fair?

Q11.2. What do you think about a role that the police play in implementing these treaties, conventions or agreements? (this sub-question is used for those who are not a police officer.)

#### *4-Section Four: Criminal Justice Process with regard to Transnational Crime*

This section will focus on the execution of investigative powers that are used for transnational crime investigations. Therefore, I would like to ask you questions about limits on investigative powers, and the relationships between the effectiveness of policing powers and the protection of national interests and the respect of human rights, during the investigation of transnational crime.

Q12. What do you think about the criminal justice system of Vietnam in terms of assignments and powers for the investigation of transnational crime? Are they appropriate and effective?

Q13. What do you think about current legal mechanisms for international law enforcement cooperation? Are they enough? Effective? Fair?

Q14. What do you think about investigative powers that the police use to investigate transnational crime?

Q14.1. Do you think that the investigative powers prescribed in the Vietnamese existing legislation that includes arrest, search and detention are sufficient for transnational crime investigation?

Q14.2. What do you think about roles and competences of investigators and heads of investigating agencies in determining applications of these investigative powers in transnational crime investigations?

Q14.3. What do you think about the laws on investigative methods which are used in transnational crime investigation, or need to be used?

Q14.4. What do you think about intelligence gathering powers/or covert powers with regard to the investigation of transnational crime? What is your opinion about the present use of these powers when there is no statutory framework to regulate them? Should they be regulated? Why or why not?

Q15. What do you think about investigation process which is followed in transnational criminal cases?

Q15.1. What do you think about special process which may be needed to investigate transnational crime cases, for example notify a foreign country about an arrest of its citizens? Do you think that is fair? What do you think about efficacy of that process?

Q15.2. What do you think about two separate legal processes by which incoming investigative requests and outgoing investigative requests are handled? What do you think they are fair and effective? (There may need to explain about these two processes before asking this question.)

Q15.3. What help do you think you may expect to receive from your foreign partners when cooperating with them to investigate transnational crimes? Does it depend on the partner? How so?

Q16. What do you think about the protection of suspects, victims and witnesses in regulations and applications of investigation methods in terms of respecting human rights and liberties during the course of the investigation of transnational crime?

Q16.1. What do you think about discretion that the police have in applying investigative powers during the course of the investigation of transnational crime? Is it enough? Too much?

Q16.2. What do you think about the police training that is provided to the police in order to ensure fair treatment of all people in transnational crime investigation? Is it sufficient?

Q17. What do you think about the administration of justice, and judicial supervision that is applied to the police while their investigating transnational crime?

Q17.1. What do you think about the roles of procurators, defense counsels, interpreters, and their relationships with investigators in transnational crime investigation in Vietnam? Are they clear? Do they work well?

Q17.2. What do you think about legal regulations that safeguard a balance between the effective use of investigatory powers and the protection of national interest and the respect of human rights and citizens' rights of people? What should the balance be?

Q17.3. What do you think about the role of procurators /defence lawyers in ensuring observance by the police to the laws? (Could you evaluate how the defense lawyers get access to clients; and how do they disclose information? What about legal payment aids, interpreters?)

*5-Section Five:*

Q18. Is there any way that you feel the structure, powers and process for transnational crime investigation should change in Vietnam?

Q19. Do you have any documents or guides published by your organisation or authority which do you think might be helpful for my research? Could you give me them, if any?

Q20. Is there anything you would like to add?

Thank you.

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