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# Policing youth in Vietnam

**Using Juvenile Justice Reform as a Means of Social Control**

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## Abbreviations

AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
BCP	Bureau of Crime Prevention
CAT	Convention Against Torture
CESCR	Convention on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CoE	Council of Europe
CORC	Committee on the Rights of the Child`s Concluding Observations
GC	General Comment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
MILOSA	Ministry of Labour, Invalids and Social Affairs
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
UNDESA	United Nations Department of Economic and Social Affairs
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	The United Nations Children`s Fund
UNODC	United Nations Office on Drugs and Crime
VAPCR	Vietnam Association of Protecting Children`s Rights
VCLT	Vienna Convention on the Law of Treaties
VCP	Vietnam Communist Party

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## 1 Introduction

“Throughout its history juvenile justice has always been, and continues to be, neglectful, demeaning, frequently violent, and largely ineffective (Miller, 1998:3 cited in Goldson & Muncie, 2012:61)”.

Concerns over ineffective juvenile justice policies are not exclusive to Vietnam. The Vietnamese context may however be reasonably chosen to indicate to what extent children’s human rights are implemented in a juvenile justice system that persistently set out to regulate, control and ultimately punish youth. I will argue that in the particular context of Vietnam, the exercise of human rights may still be severely curtailed by subjugating human rights protection to the protection of the one-Party state (UNHRC, 2013:2).

Vietnam was the first country in Asia and the second in the world to ratify the Convention on the Rights of the Child (CRC) in 1990. Since the ratification of the CRC, Vietnam has made noteworthy efforts in implementing its international obligations. Vietnam’s regulations have acknowledged a number of the fundamental rights of the child in conflict with the law<sup>1</sup> as mandatory by the CRC and relevant international standards. As such, recent developments in Vietnam may reflect a change in the attitude of government in terms of human rights protection and indicate a possibility for more change in relation to the human rights framework. In this regard, previous research suggests that Vietnam’s justice model (shaped by communist legal theory and nationalism) is now moving away from a model of crime control towards a variant of a welfare model where crime is becoming less politicized (Cox, 2010:231). However, this study indicates that crime (and youth crime in particular) is still viewed not only as an offence against the community, but also, as an offence against the nation. Thus, criminal justice policies remain closely interlinked with national security.

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<sup>1</sup> The term ‘children in conflict with the law’ refers to anyone under the age of 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence (UNICEF, 2006).

Against this backdrop, this study investigates to what extent youth is seen as a threat to the social order and public security in Vietnam. It will look at the degree to which the state responds to what is commonly referred to as an alarming rise in youth crime (Cohen, 2005:3242; Cox, 2010:228). More specifically, it will be of particular interest to look closer at the Vietnamese interpretation and justification of social order in the context of limiting 'the best interest of the child'. Whilst recognizing the international standards for juvenile justice, this study critically analyses the relations between Vietnam's juvenile justice reform and the promise of international rights discourse on the one hand, and the limitations of national implementation and compliance on the other.

I will argue that the country is still in the very early stages in building an effective and comprehensive legal framework within juvenile justice. By asking the question if, or to what extent, juvenile justice reform in Vietnam is compatible with international human rights standards for juveniles, I analyse to what extent there remain significant shortcomings in mechanisms for the protection of young people in contact with the justice system.

## **1.1 Background**

The Socialist Republic of Vietnam, located on the Indochinese cape in South East Asia has recently reached a population of 90 million people (Vietnam Breaking News, 2013). In the last two decades Vietnam has been going through rapid and complex processes of social and economic change (known as *doi moi*, which can be loosely translated as renovation or reform). The reform process of *doi moi* started in 1986, based on the three key processes of transition from a centrally planned economy to a market-oriented economy with state management; strengthening of the rule of law and citizens' participation in decision-making processes and; an open door policy towards the rest of the world. This process has been regarded as an example of successful transformation, representing a 'third way' between socialism and capitalism - underlining impressive improvements in living conditions and child health and education, linked to the liberalisation of the economy (Salazar-Volkman, 2004:3; Cox, 2013:11).

The country has a young population, with a median age of 28.7 years according to the most recent census. As such, around 30 million Vietnamese are under the age of 18, comprising approximately a third of the population (UNICEF, 2010:35; Vietnam Demographics Profile, 2013).

Vietnam is a one-Party state consisting of four main structures: the Vietnam Communist Party (VCP), the people's armed forces, the state bureaucracy of central and local government, and the Vietnam Fatherland Front, an umbrella group for mass organisations (Thayer, 2009:424). In accordance with the *1992 Constitution of the Socialist Republic of Vietnam* (the Constitution), the VCP is the leading force of the state and society (The Constitution Article 4). Alongside the VCP, the country is also led by Vietnam's President, Truong Tan Sang, the National Assembly and the Government, which is led by Prime Minister Nguyen Tan Dung (Human Rights Report: Vietnam, 2012:1).

In line with the Constitution, the National Assembly is assigned with constitutional and legislative power. The duties and powers of the National Assembly include making decisions on pivotal domestic and foreign policies, as well as appointing the judiciary. The Government, through its Ministries is the highest of all decision-making organs and is tasked with the overall management of state affairs (The Constitution Articles 109-114). Vietnam as a one party state, led by the VCP, has been referred to as 'the leadership nucleus', emphasizing the Party's involvement and commitment in all political, economic, military and social organisations (Thayer, 2009:424).

Further, at each level of Government there is a People's Council, a legislative organ and a People's Committee, a section within the People's Council in charge of the administration and execution of the law at the local level. Also, each People's Council and People's Committee is responsible to its counterpart in the next highest level. Subsequently, this forms a chain of supervision from the central government straight down to the lowest level (The Constitution Chapter IX).

The government of Vietnam has, out of pragmatic necessity introduced reforms to prompt the transition from a centralised planning economy to a 'socialist-oriented economy'



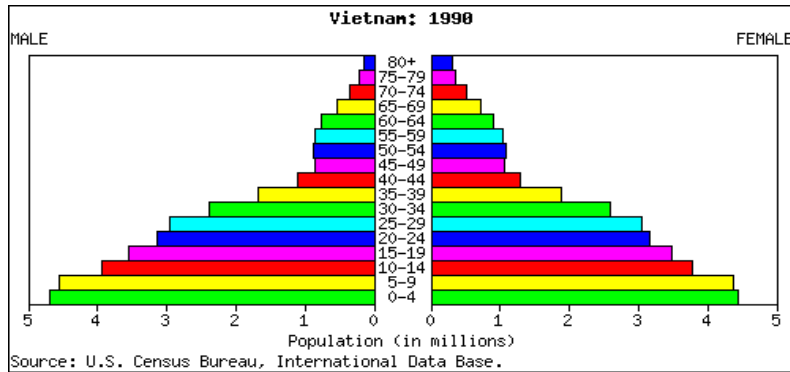
(UNICEF, 2010:17, 40). This form of market, following the Chinese model, held out the best hope for economic growth, as well as an acceptance of Western economic governance rules, which subsequently accompanied this switch in policy with the eligibility for Western aid and investment (Burr, 2006:24).

In recent years, Vietnam`s emerging and diverse voluntary sector has expanded rapidly due to the inability of the state to keep pace with social needs in the reform period. This sector includes a wide range of non-profit and non-governmental organisations (NGO`s) and, civil society organisation that are closely related to or dominated by the Party or state. In short and broadly defined by Mark Sidel (2008), the voluntary sector includes, *inter alia*, Party-related mass organisations, policy research groups, charities, private and semi-private universities, social and charitable funds, and social activist and social service groups (Sidel, 2008:141).

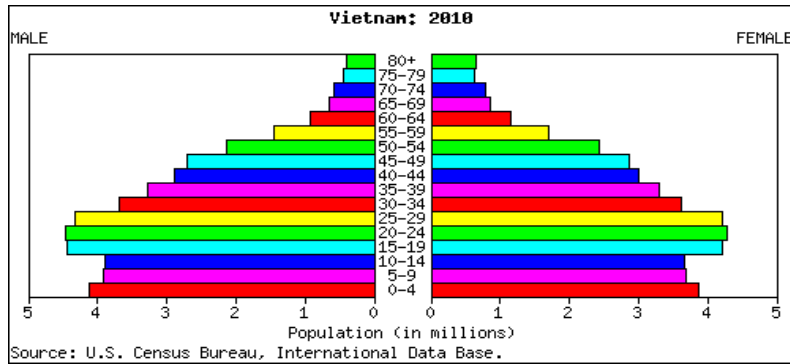
While Vietnam has without doubt achieved impressive economic growth and social progress, the country is facing a growing need to care for and protect its young population. Even though the state has sought to encourage the development of social organisations, the state conclusively retains management and control over the direction and growth of the social sector (Sidel, 2008:141).

In addition, the following graphs show the age distribution from 1990, 2010 and what the population distribution is estimated to be in 2050. As such, the graphs illustrate the current generation gap clearly underlining the very young population of the Vietnamese population. This is important to highlight in relation to the perceived threat that young people constitute to the public and social order in Vietnam. It should be noted that Vietnam, still, has relatively low recorded rates of juvenile crime regardless of its growing youth population and fast developing economy (Cox, 2010:227).

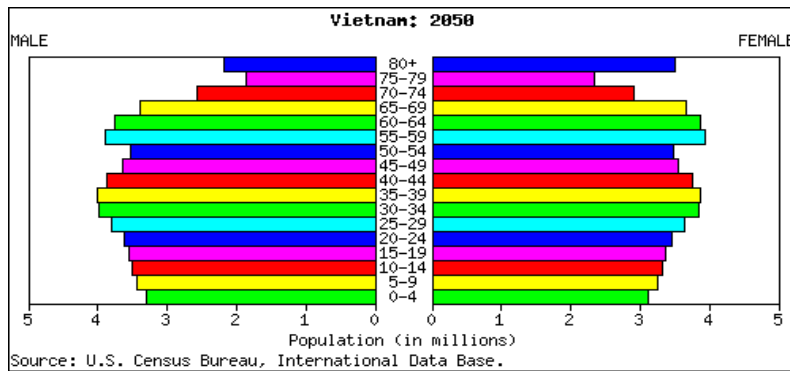
**Figure 1: Population Pyramid 1990**



**Figure 2: Population Pyramid 2010**



**Figure 3: Population Pyramid 2050**



Source: U.S Census Bureau, International Data Base

## 1.2 Aim and Purpose

Criminological research on policy making processes in Vietnam, with an emphasis on youth delinquency is scarce. Yet, it has been acknowledged that many people in Vietnam, from parents to politicians, feel that a `wave of youth crime` (as expressed by Cox 2011) may be marking the end of Vietnam`s low crime society. Therefore, I take as my point of departure what has in previous literature been referred to as concerns about a `youth crime wave` in the `new` Vietnam; the understanding that rapid economic change has allowed new youth cultures to flourish through the country`s rapid transformation financially, socially and culturally (Cox, 2011:18-19). As this topic is of international relevance, I hope to contribute to the ongoing dialogue about juvenile justice reform in Vietnam, but also to raise awareness of this issue on an international level by introducing a criminological perspective. Consequently, I have developed the following research question:

*By looking at policing youth, in relation to what is perceived as an increase in youth crime, to what extent is juvenile justice reform in breach of the CRC?*

The basic units of analysis for this thesis will be Article 3 of the CRC on the topic of `the best interest of the child`. This analysis will be in conjunction with a particular focus on Vietnam`s firm stand on the utilization of punitive policies and incarceration of youth; and the intended and unintended human rights consequences of such a policy. In order to reach the aim of this thesis, the main research question is supported by the following sub-questions:

- i. How is the official concept of social and cultural change linked to the understanding of youths and youth crime in Vietnam?
- ii. To what extent do public worries/concern around youth culture play a part in juvenile justice reform in Vietnam?
- iii. What is driving juvenile justice policy change in Vietnam, and how (if at all) are ideas from outside Vietnam shaping local practices?

### 1.3 Definitions

When speaking of *policing youth*, I refer to the systematic regulation of young people in public spaces as a key aspect of the maintenance of public and social order as conveyed by authority figures. In short, how the police intervene in young people's lives is contingent upon a wide range of factors, which include the local political context, particularly relating to the overall law and order debate (Cunneen & White, 2007:225).

*Youth*, as a category, is more fluid than other fixed age groups and is best understood as "a period of transition from the dependence of childhood to adulthood's independence" (UN Department of Economic and Social Affairs (UNDESA)). As such, the UN, for statistical purposes, defines those persons between the ages of 15 and 24 as youth. Yet, the meaning of the term youth varies in different societies depending on changes in demographic, financial, economic and socio-cultural settings (UNDESA).

In order to successfully assess the challenges and consequences for human rights in relation to policing youth and handling children in conflict with the law, it is necessary to consider what it means to be a young person in today's society. The notion that young people are not merely in a transitional phase of life towards adulthood has been recognized internationally and hence, the need to rethink policies that relate to young people is vital. Even though the law sees 18 as the age from which a person goes from being a child to an adult, there is strong evidence that an absolute dichotomy is in practice both unrealistic and unhelpful. For instance, recent research in neuroscience shows that a person's self-control, planning and abstract thinking only fully develops in late adolescence (SRSG on violence against children, 2013:19). More specifically, there is a need to care for the relationship between youth and society in order to facilitate a better understanding of the wider meaning of being a young person in today's society and not just as a period of transition. Seeing young people this way fails to acknowledge the needs and experiences young people have and how particular policies affect them (White & Wyn, 2008:108-115).

Therefore, I will be using the terms *youth* and *young people* interchangeable in line with the understanding that the definition that uses the 15-24 age cohort as youth best serves for

assessing the needs of young persons and provides guidelines for youth development (UNDESA). Also, in accordance with the CRC and Vietnamese law, it is important to underline that all people under the age of 18 are *de jure* children. Thus, when speaking of youth, I will also include children as defined by law from 15-18 to best discuss juvenile justice. In this regard, for the purpose of the legal discussion of this thesis, focus will be put on youth under the age of 18 when looking closer at Vietnam's implementation of the CRC.

#### **1.4 An Interdisciplinary Approach to Human Rights and Juvenile Justice**

As this thesis is concerned with a perceived increase in youth crime as a result of Vietnam's rapid development, the topic of this study is of an inherently transnational and political character. Accordingly, I find that an interdisciplinary approach is necessary. The underlying reason for utilising multiple perspectives is the assumption that some of the most important questions about human rights cannot be answered solely by legal analysis. For instance, what do the principles of 'best interest of the child' and, the right to be heard mean? Is the political justification for juvenile justice reform morally and legally justifiable? In other words, how do human rights relate to decisions governments make in order to respond to the alarming rise in juvenile delinquency?

For this reason, what I employ for this study is a combination of criminological/social and legal perspectives. In relation to legal analysis, I will be using law in context rather than what is commonly referred to as 'black-letter law'. While black-letter law is primarily concerned with analysis of court judgments and statutes, law in context also takes into consideration the broader social and political context (McConville & Chui, 2007:1-5). Further, the emergence of human rights law and the incorporation of human rights paradigms into criminological analysis is a rather new concept. Crime prevention and critical analyses of the operation of the police, courts and penal system is described as one of the most important developments within criminology and penal law (Savelsberg, 2010:1). In contrast to viewing youth offending merely from a correctional perspective located within the wider ideo-

logical context whereby social, economic and political issues are redefined as issues to be managed rather than resolved, this study attempts to investigate what is driving juvenile policy change in the so called `new` Vietnam, where cultures of control has been said to have shifted in recent years (Cox, 2010:228; Hayton, 2010).

In this regard, this thesis is primarily conducted as a desk study of legal and extra legal sources, such as secondary literature and reports from NGO`s. Yet, an integral part of the research for this thesis took place in Vietnam during three weeks in the end of February and early March 2014. Due to time constraints I decided not to conduct survey questionnaires but rather semi-structured, one to one interviews, with a focus on ethnographic research and the detailed study of the day-to-day beliefs of police officers, lawyers and social workers; this set out to discover how they make sense of the world within which they operate – the operation of the criminal process (McConville & Chui, 2007:69; Bryman, 2008:402).

In Vietnam, I was privileged to meet with UNICEF; Save the Children; Blue Dragon; Vietnam Association for Protecting Children Rights (VAPCR); and a Police Officer. Also, during a two day work shop on legal aid, the Youth Union, Public Security and Prison staff presented, in short, their views and experiences with human rights in relation to prisoners. These meetings and conversations have contributed to an enhanced understanding of the complexities around juvenile justice in Vietnam. My thesis will draw heavily on the information I was fortunate to collect during my field research.

Further, a legal methodology will be applied to establish and analyse the law, *de lege lata*, as in treaties, customary law and general principles of law as acknowledged in Article 38 (1) of the International Court of Justice (ICJ) as primary legal sources. In relation to children`s rights, the CRC will have a particularly prominent role in this thesis, as well as soft law sources such as the General Comments (GC) and Concluding Observations of the Committee on the Right of the Child (CORC). The CRC will also be viewed in the wider context of other international treaties that Vietnam is bound by, such as the two International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and

Cultural Rights (ICESCR), as well as the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment (CAT), which Vietnam has signed but not yet ratified.

Moreover, before elaborating on the requirements of the legal framework and the CRC in more detail, I will first underline the importance of looking at children`s rights in Vietnam from a criminological perspective as such a viewpoint is scarce, and also the importance of such a perspective in relation to understanding human rights more broadly in the Vietnamese context. Recognizing that Vietnam has a very young population, and the fact that there is a gap between generations, my interest lies within the government`s need (and anxiety) to control the younger generation and the perceived threat of a rapid increase in youth crime. Thus, the overall aim of this research is to specifically look at to what extent juvenile justice reform in Vietnam is compatible with international legal standards concerning juveniles.

## **2 A Criminological Contribution to Understanding Human Rights**

“Criminologists who engage actively with human rights...all see the pursuit of human wellbeing rather than the smooth functioning of state institutions as the key objective of criminological enquiry (Weber, Fishwick & Marmo, 2014:83)”

The purpose of this chapter is to in short introduce some of the classic criminological themes and theories necessary to better understand youth offending and youth justice.

The aim of the justice for children approach is to ensure that children and young persons, as defined by the CRC, are better served and protected by justice systems, including security and welfare sectors. More specifically, it aims to ensure the “full application of international norms and standards for children who come in contact with the justice systems as victims, witnesses and alleged offenders, or for other reasons where judicial, state administrative or non-state adjudicatory intervention is needed, for example regarding care, custody or protection (UNODC, 2014)”.

This thesis places juvenile justice reform by Vietnam`s judicial bodies (mainly the police) in relation to the requirements of the CRC and other international instruments in juvenile justice. In the light of the above quote, the criminological agenda is to draw attention to the potential for states to misuse their political and economic power. Currently, under the UN structure, states enjoy significant advantages in determining the substantive content of international law and practical interpretations of what constitutes human rights (Weber et al, 2014:78). Accordingly, I believe a criminological approach, in conjunction with a political and legal approach, is paramount for a successful contribution to the understanding of Vietnam`s challenge to comply with international human rights standards in relation to juvenile justice reform, and thus fills a significant gap in research, providing a new avenue for arguing for fuller rights for children and young persons.

My findings suggest that there is a lack of coherent legal and social approaches in Vietnam required for effective reception of international law and legal institutions. Therefore, the resistance, or lack of capacity, to resolve rather than manage (in the form of control) juvenile justice may also be explained by limited recognition on how to understand and think



about youth rather than solely explained by factors such as governmental fragmentation, corruption or malfunction of the political system (Bedner, 2013:253). Nevertheless, it will become evident throughout this study that one of the biggest challenges to young people lies within the governments need to legitimate its power by securing social order.

The aim here is not a comprehensive review, due to both time and space constraints, but rather to provide an illustration of classic themes and theories in relation to youth crime and youth justice. In brief, I will consider basic micro- and macro-level approaches as they address opportunities (control and disorganization), motivation (learning and culture), clashes between structure and culture (strain and anomie), and power imbalances. Additionally, in contrast to frequent concern with single cases, criminological theory is typically interested in general patterns. For example, crises that characterize post-war eras or economic hardship are often associated with the breakdown of social ties, family, work and employment and associated life. Criminological theory that focuses on social disorganization (macro-level) and social control (micro-level) addresses precisely these sorts of settings. Typically, crises are also accompanied by, on the one hand, a mismatch between desires, needs or ambitions; and social, cultural and material opportunities on the other. These resulting tensions are usually addressed by a focus on `strain` (micro-level) and `anomie` (macro-level) (Savelsberg, 2010:60).

Further, Savelsberg (2010) gives a brief deviation of both aspects of social organisation: “culture, understood here as basic goals and institutionalised means for attaining them, and structure, the distribution of access to legitimate means such as education, jobs and income (Savelsberg, 2010:60)”. Crime, then, can be explained in two ways. First, when aiming for institutionalised goals (such as material goods) clashes with a lack of availability of legitimate means, individuals experience strain and are likely to resort to illegitimate means to achieve their desired goals. Second, crimes can also be explained as an expression of alternative or oppositional cultures, developed within underprivileged groups (such as youth), and providing access to status through law-breaking behaviour. Hence, the construction of deviant cultures can be viewed as a way of adjusting to strain under conditions of crisis (Savelsberg, 2010:51).

At its most basic, it is individuals with power and authority who make laws that identify what behaviour is offensive, make perpetrators subject to punishment and define crime (Henry, 2009:298). In the Vietnamese context, what behaviour is defined as crime reflects both the Party's own values and interests and what they want to be collective norms and values of society. It is suggested that juvenile justice reform in Vietnam is in many ways a matter of 'orchestrated public display', and an ongoing policing of public perceptions regarding issues of crime and youth as constituting a threat to social and public order. It has been suggested by Ferrell (1995) that shifts like this can be seen to reflect dimensions of contemporary life, such as the emergence of a globalised economy of image and consumption and tensions between social inclusion and exclusion (Ferrell, 1995:33).

In order to make a clear distinction between youth posing an actual risk and the states belief that they are, I will make a short reference to the social construction of deviancy. The very concept of what constitutes a threat is controversial; it needs to be viewed within an expression of diverse, socially and culturally divided societies and it includes the dimension of public concern, the personification of a 'folk devil' or an 'evil', and the development of a disaster mentality – where children make excellent suitable victims. In brief, it is argued that a condition (such as the alarming rise in youth offending) that generates such widespread public concern must have a "personal agent responsible for its inception and maintenance (Goode & Ben-Yehuda, 2009:28)". What is implied here is that while all folk devils are created out of some existing and identifiable elements, the social construction of deviancy emphasises that social reactions to a new and seemingly threatening phenomena arise as a result of that phenomenon's real or supposed threat to certain positions, statuses, interests, ideologies and values (Cohen, 1972:191 cited in Goode & Ben-Yehuda, 2009:30).

The broad changes in Vietnam of economic growth and diversification have had a great impact on youth and have meant that juvenile justice reform is climbing up the national policy agenda. Yet, crime, rights and justice remain highly political matters for the VCP and thus, pose a great challenge to bringing Vietnamese practice into line with international standards.

## 2.1 Theorising Youth

On the one hand, there have been considerable efforts in recent years to shape the conditions of childhood in a particularly global way (through, *inter alia*, mobilization of the CRC and spread of international NGO's). Nonetheless, it has been previously noted that childhood has also remained in large part a local affair; meaning that the real conditions of childhood and the patterns of daily routine have remained diverse across global, regional and local levels (Bühler-Niederberger & Van Krieken, 2008:148).

To contribute to a richer understanding of youth and young people in the context of significant social change, it will be necessary to provide a more explicit theoretical introduction to the concept of youth. Thus, this section will in short give a critical assessment of the use of frameworks that currently dominate debating and thinking about social and generational change and its impact on young people's lives. More specifically, it will be necessary to consider that the CRC is in fact itself contextualized in terms of what it is to be a young person. As such, the Convention refers to "a universal, free-standing, individual child; a child who is on a particular development trajectory (Mayall, 2000:245)". It will be emphasized through this statement that we need to rethink the globalisation of socialisation and not depersonalise children. Put differently, in proposing that we (adults) know best the best interest of the child, we actually deny, rather than realise, children's rights (Mayall, 2000:245).

As it has been argued by White & Wyn (2008), the conceptualisation of youth needs to be uncoupled from deterministic frameworks of youth development. Instead, a criminological approach (interlinked with a political and legal approach) to the concept of youth offers a basis for understanding how the life stages of childhood, youth and early adulthood are simultaneously constructed and shaped by institutional processes and social structures, as well as by individuals and groups (White & Wyn, 2008:v). In other words, the aim is to locate the study of childhood/youth in the study of societies; it is to recognise interrelationships between knowledge and policy, and to study youth as a social group and childhood as a social phenomenon. If we understand children not just as individuals, but as members of a social group, we are then forced to think about that group's rights to partici-

pate in constructing the social order, social policies and practices. Put simply, a proper understanding of the social order in Vietnam (but of course not exclusively to Vietnam) requires consideration of all its members and all social groups – youth included (Mayall, 2000:243-256; Beazley, Bessell, Ennew & Waterson, 2011:166).

In order to do this, it is necessary to begin from the recognition that the concept of ‘children’s rights’ is not just a political and legal construct (which the CRC is) with social and societal consequences for children and childhood which sociologists and legal scholars may then explore. Rather, by situating children’s (human) rights as a social phenomenon within the broader understanding of human rights and other social scientific disciplines, it may be possible to see more clearly how children’s rights are politically, socially, culturally and practically interlinked (Alanen, 2010:7-8). Arguably, and as best put by Mayall (2000), “it is through working towards a better understanding of the social conditions of childhood that we can provide a firm basis for working towards implementation of their rights (Mayall, (2000:243)”.

## **2.2 Responding to Youth**

“Complexity of explanation and complexity of response mirror the complexity of offending itself (White & Wyn, 2008:156)”.

The above quote encapsulates the key insights for understanding why crime occurs and how to best respond to it. As pointed out by the Bureau of Crime Prevention (BCP) in Sweden, the occurrence of crime is not random, but acts according to a pattern; it is this ‘pattern’ that is of particular interest when we look closer at Vietnam’s response to youth crime. Further, three key principles are highlighted in the BCP’s study/project ‘Knowledge as a Method’ for such a basic understanding of how to best respond to crime; identify and prioritise the issue; investigate the context and; identify possible underlying causes (BCP, 2014). All of these are not, or to a very small extent, present in today’s response to youth delinquency in Vietnam (Nguyen, 2014).

Policy making in relation to youth has traditionally been studied with regard to national sovereignty and the independence of the nation state. Certainly, criminal justice remains a powerful icon of sovereign statehood (Muncie, 2005:37), and Vietnam is not an exception. In this context, policy responses to youth are interpreted as the strategic state organization of social provisions in its many forms and its use within broader public policy, such as to regulate youth transitions into adulthood. Within this approach young people are often characterised as irresponsible, irrational and thus vulnerable, by failing to evaluate risks accurately (i.e. using drugs and committing crime). As an example, it has been stated by Hayton (2010) that streets are becoming less and less places for living (Hayton, 2010:53); children who work and live on the streets are commonly referred to and labelled in Vietnam as `social evils` (Burr, 2002:53; VAPCR, Save the Children Vietnam, 2014; Nguyen, 2014). Hayton (2010) also describes the emergence of a changing youth culture played out and celebrated on the streets, and its possible clash with authorities' need for control (Hayton, 2010:53-62).

Although such distortions of youth are hardly new (for example moral panic and labelling theory), they have resulted in criminal justice and social policy responses that promote regulation and control of youth. Subsequently, there is a "blurring of social policy and crime policy in which *social* problems are reframed as *crime* problems and crime control strategies are increasingly deployed to manage intractable social ills (Kemshall, 2008:22)". Arguably, the emphasis is on fighting juvenile crime rather than securing juvenile justice (Muncie, 2005:39). The local governance of crime and insecurity is evidenced in the prolific discourses on `social order` and `public safety` in Vietnam. Given that they are directed not solely at crime but also incivilities and the antisocial (although the word antisocial is not used in Vietnam; rather, `evil` would be the word to use), it is not unexpected that the usual target is the (mis)behaviour of young people (Legal Aid Workshop, 2014; Muncie, 2005:54).

According to what scholars have previously written, the terms risk and youth have become synonymous. As a result, young people are increasingly perceived as either `at risk` or as `posing a risk`. This so called `risk discourse` has significant implications for young peo-

ple, particularly youth offenders, and its pervasiveness in contemporary social and penal policy therefore deserves enhanced focus. Specifically, the role of risk in the erosion of rights and justice for young people needs further attention. It is apparent that many systems are designed to punish young offenders, whilst simultaneously, and paradoxically, in keeping with international children's rights instruments, ensuring that their welfare is safeguarded and promoted as a primary objective (Kemshall, 2008:21; White & Wyn, 2008:155; Muncie, 2013:44).

Also, it is worth noting in this context that rights can be negative and exclusionary as well as positive and inclusionary in relation to children's rights and their experience of harms when contrasted to the rights and safety enjoyed by adults (Kemshall, 2008:25). In other words, it has been previously pointed out that human rights are expressed as universal<sup>2</sup> and unconditional but they are actually qualified by considerations by public protection, particularly to disclose information on risk, as well as to justify intrusive community interventions on the grounds of risk and prevention. As a result, community (social order) or the public good (public security) are seen to outweigh individual rights where justified by risk levels or by the need to provide protection (Kemshall, 2008:25). In the Vietnamese context this translates into the need to protect and preserve the reputation of the VCP, not the security of the individual (Nguyen, 2014).

According to earlier research, Vietnam saw the development of `youth offenders` in terms of legal categories and penal practices relating to crime control long before it had any serious levels of juvenile delinquency to deal with. This in turn has its origin in the perceived increase of youth crime and youth constituting a greater risk to the social order of Vietnam and consequently, generating a growing need for control (Cox, 2011:19-20).

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<sup>2</sup> As stated in UDHR Article 1

## 2.3 Social Control

The embedding of public policies of tough law and order as the hegemonic discourse about social control has resulted in the expansion of police powers and their role as the front line of crime control and street-level order maintenance (Reiner, 2010:110). I will for the purpose of this thesis use the idea of policing as an aspect of the more general concept of social control (Reiner, 2010:4). Yet, the conceptualisation of social control is everything but straight forward; rather, it is in itself complex and a widely debated notion. In its broadest sense, social control is seen as everything that contributes to the reproduction of social order. I will, however, use a narrower understanding of social control in order to distinguish the specificity of what is ordinarily understood to be control processes; in other words, that these processes are in essence reactive, intended to prevent or respond to threats to social order; “the organised ways in which society responds to behaviour and people it regards as deviant, problematic, worrying, threatening, troublesome or undesirable (Cohen 1985:1-2 cited in Reiner, 2010:4)”. This view is believed to be more in line with the Vietnamese context and growing concerns for youth offending.

As I have come to understand, the Vietnamese interpretation of social order means, *inter alia*, that campaigning, demonstrations or `other` public disturbances are viewed as disturbing the peace. Arguably, the constitutional structure within which Vietnamese police operates, under direct control by the authorities, is intended to preserve this (Nguyen, 2014). In a broader sense, as argued by Reiner, all relationships that have a power dimension are political, and thus policing is inherently and inescapably political; the police are at heart of the state`s functioning. Subsequently, as the goal with policing is securing social order, its effectiveness is always up for debate (Reiner, 2010:5, 33).

It is widely known that the practice of policing bears down most heavily on the most marginal and least powerful groups in society, especially at times of economic or political conflict or crisis; `the rich get rich and the poor get prison` (Reiner, 2010:33). Arguably, this statement has a significant connection to children and young people as they constitute a particularly vulnerable group in society. Therefore, the impact of laws and their enforcement can be seen in an unequal society such as Vietnam to be political – favoring some

groups at the expense of others. As such, the impact of laws, even if formulated as universal, will reproduce social divisions where young people are simultaneously labeled both as constituting a risk and being at risk and thus, become `police property` (Reiner, 2010:33). In a similar vein, the development of sociology of deviance has changed the moral evaluation of social control. From being interpreted as primarily a necessary protection against deviance, it is seen instead as producing deviance through classification and stigmatisation. In this view, social control can be seen, at least in part, as the oppressive maintenance of the privileged position of the dominant group(s) in society (Reiner, 2010:4).

In sum, models and policies of policing and provisions of security are the foremost and most visible global travelers (Karstedt, 2007:147). Put differently, it has been expressed that “the pool of knowledge on crime prevention is becoming international and transnational (Karstedt, 2007:146)”. In consequence, it is necessary to ask the question of which particular policies and practices are transferred as it becomes evident that there is a shortfall of underlying theoretical understanding for youth offending and criminal justice in Vietnam. Arguably, then it is the cultural, socio-political, and in particular local context, in contrast to mainly the universal, that needs further attention as criminal justice and youth policies differ widely between countries (Karstedt, 2007:148).

For instance, Vietnam`s firm stand on the utilisation of youth detention and reformatories can be seen as particularly challenging to the country`s compliance with human rights. Also, as will be argued later, the increased focus on youth as posing a risk presents the state with the opportunity to reject basic rights and constitutional values for preventing juvenile offending and thus creates implications for fundamental human rights norms. The significant implications for young people and youth offenders in relation to the risk discourse become apparent when we consider the state`s need to justify intrusive interventions on the grounds of risk and prevention where social order outweighs individual rights.



### **3 The Human Rights of Children**

The CRC is the universal standard of human rights for children and the benchmark for assessing state parties' responsibilities in ensuring the rights of children in their jurisdiction. The CRC contains a preamble and 54 articles with basic principles and particular rights covering all aspects of children's lives; it embraces in one instrument the "whole gamut of human rights for children: all economic, social, cultural, civil and political rights (Mower, 1997:6 and Abramson, 2009:157 cited in Pham, 2013:2)". Nation states are meant to comply, in the "best interest of the child", with the rules, principles and standards set out in the CRC. As a CRC signatory, Vietnam is obliged to develop a comprehensive policy framework for juvenile justice, with attention paid to young offenders.

In this chapter, I will review international standards in juvenile justice and then in the next chapter examine Vietnam's obligations as a signatory to the CRC and their realization of human rights. Particular focus for this thesis is to look closer at the "best interest of the child" when analysing juvenile justice reform. As stressed in Article 14 of General GC No. 10, "the preservation of public safety is a legitimate aim of the justice system. However...this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in CRC (GC No. 10 Article 14)". I will use as my point of departure the emphasis of this article as I will discuss throughout this study the Vietnamese meaning of "social order" and "public safety", *inter alia*, in relation to juvenile justice reform. It will become evident that Vietnamese legislation and practice does not fully comply with international standards and that there remains a significant gap between international law and its implementation (Pham, 2013:1).

#### **3.1 The CRC and International Law on Children's Rights**

The study of the rights of the child varies, from focusing on specific aspects of certain rights to practical implementation in different places around the world. Yet, all share the

same approach; children's rights are assumed straightforwardly to be those enshrined in the CRC (Pham, 2013:2). The CRC was adopted in 1989, and entered into force in 1990<sup>3</sup>. The CRC was accepted quickly, and to this day 193 countries have ratified the CRC, that is, all signatories except the US and Somalia<sup>4</sup> (UN Treaty Collection, 2014). The CRC may be the most ratified of all international human rights directives but it is also described as one of the most violated (Muncie, 2005:46; Rehman, 2010:555).

All states bound by the CRC have legal obligations to undertake all appropriate measures to realise children's rights as enshrined in Article 4. The CRC allocates considerable attention to the judicial sector; the specific rights of children in contact with the justice system are specified in Article 37, 39 and 40. As such, children in conflict with the law have the same basic rights as any other offender (adult offenders), including to have legal assistance; to be presumed innocent until proven guilty; not to be compelled to confess guilt and; not to be subject to torture or inhumane treatment. Special rights arising from juveniles' non-adult status include to not be sentenced to capital punishment or life imprisonment; to be treated in a manner appropriate to their age and well-being and; to have their privacy fully respected at all stages of proceedings (CRC Articles 37, 39, 40).

Further, the CRC requires the state to establish a minimum age of criminal responsibility; to hold children in detention only as a measure of last resort and for the shortest period of time; to apply all appropriate measures to promote recovery and social reintegration and to foster their health, self-respect and dignity. Although these provisions set out the central standards for the rights of juvenile offenders, they need to be understood in the wider context of both the principles and related articles of the CRC and, more importantly, in the larger context of human rights as international human rights law provides numerous

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<sup>3</sup> The two Optional Protocols on "the sale of Children, Child Prostitution and Child Pornography" and "the involvement of Children in Armed Conflict" will not be addressed separately in this thesis.

<sup>4</sup> The US and Somalia have signed but not ratified the CRC (UN Treaty Collection 2014)

guidelines, rules and principles focusing on juvenile justice (CRC; GC No. 10; Pham, 2013:4).

The specific standards which provide practical guidance for the implementation of the CRC include international instruments relevant to juvenile justice concerning children in conflict with the law, or at social risk. These international instruments guide the prevention and deprivation of liberty of `child offenders` and include the UN Standard Minimum Rules of Juvenile Justice of 1985 (Beijing Rules), which recognize the `special needs of children` and the importance of handling young offenders flexibly, the utilisation of custody as a last resort and for minimum periods, and to protect children from stigma and labelling. It also includes the UN Guidelines for the Prevention of Juvenile Delinquency of 1990 (Riyadh Guidelines), which added that youth justice policy should avoid criminalising children for minor offences and misbehaviours; and lastly, the UN Rules for the Protection of Juveniles Deprived of their Liberty of 1990 (Havana Rules). Together, these documents are commonly referred to as the `UN Standards and Norms in Juvenile Justice`, and could be viewed as equivalent to a growing legal globalisation of juvenile justice (Guidelines for Action on Children in the Criminal Justice System, 1997, Article 3; Muncie, 2005:45).

In addition, there are further international standards which provide guidance for working with children in contact with the justice system, meaning juvenile offenders, child victims and child witnesses. These instruments consist of the Guidelines for Action in Children in the Criminal Justice System, 1997; GC No. 10 and; GC No. 12. In short, while the CRC imposes legal obligations, these instruments provide guidance, details or supplements to the legal framework. These instruments are independent and even though they differ, together they constitute as the common standards for protecting children within the justice system.

### 3.1.1 The four General Principles

I will now focus on what has been termed the four general principles (OHCHR, Fact sheet no. 10), namely the right to non-discrimination (Article 2); the best interest of the child (Article 3); life, survival and development (Article 6); and the right of being heard (Article 12). Yet, for the relevance of this thesis, the principle of `best interest of the child` will be a

primary consideration, as it is evidently one of the most important provisions of the CRC, but also the biggest challenge to Vietnamese (but not exclusively) implementation of international standards (Zermatten, 2010:27). It is important to note that this aspect of the CRC is proving to be problematic in most parts of the world (Muncie, 2005:35).

These guiding principles are crucial for defining the nature of the rights included in the Convention due to their significance in relation to the sufficient exercise of all rights. In this regard, Article 2 establishes the principle of non-discrimination, which applies regardless of cultural, ethnic or religious status. It is however, the three remaining principles that actively determine the responsibility of the state as the primary stakeholder of children's human rights. As such, Article 3 determines the best interest of the child in decision-making processes; the principle requires that active measures be undertaken at all levels of government, by parliaments and the judiciary. In other words, every legislative, administrative and judicial body or institution is required to apply the principle of best interest of the child by systematically considering how children's rights and interests are or will be affected by their actions and decisions (GC No. 14 §5(c)).

This principle is followed by Article 6, which establishes for children's right to live, as well as the government's obligation to ensure that children survive and develop healthily. The last of the principles is spelled out in Article 12, which highlights the role of the child as an active participant in the promotion, protection and monitoring of rights. It also requires that the state party put in place facilitative mechanisms that are appropriate to hearing the views of the child. What is important to note here is that the right to participation is not limited to listening, but extends to actually expressing opinions in relation to topics concerning children. As such, the view of childhood from the perspective of the CRC is not restricted to the protection of the child or young person as an object of society, but rather the protection of a child as a subject of rights (Salazar-Volkman, 2004:8). This will be discussed in more detail in the coming chapters, and the close link between Article 3 and 12 will become clear when we unpack and analyse the concept of best interest (Zermatten, 2010:22). In addition, it should be noted here that no child participated in the drafting of the CRC; this alone gives us an indication of how the international community still

implicitly regards children, which consequently can be interpreted as a double standard (Burr, 2006:14).

Moreover, the four general principles permeate all the provisions of the CRC, and could thereby be seen in conjunction with the rights to, *inter alia*, freedom of expression (Article 13) and freedom of association (Article 15). Notably, under Article 15 (2) Vietnam is also obliged not to limit children's rights in other circumstances than in the interest of national security or public order. Again, it will be of particular interest to look closer at the complexity of national interpretation of social and public order as Vietnam continues to guard its own sovereignty and control over law and order agendas. In this sense, Muncie (2005) suggests that local implementation of key reforms may also reveal a continuing adherence to some traditional values and resistance to change (Muncie, 2005:45). It is, in my opinion, the resistance to change that raise particular interest for this study and the Vietnamese context of juvenile justice reform. Hence, here, I believe it is necessary to discuss, in more detail, the principle of best interest.

### 3.1.2 The Best Interest of the Child

In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

- CRC Art 3 (1)

The different dimensions of Article 3, following the Committee's concept of the best interest of the child, are threefold. That is: it is a substantive right; a fundamental, imperative legal principle and; a rule of procedure. The first requires that when different interests are being considered in relation to a decision concerning a child, the best interest of the child should be of primary consideration. The second dimension underlines that if a legal provision is open for more than one interpretation, the interpretation which most effectively benefits the best interest of the child should be chosen. The third dimension, the committee underline, is that the decision-making process must include an evaluation of the possible impact, positive or negative, on the child or children concerned. Also, and most importantly, the justification of a decision must show that the right has been explicitly taken into

account. In that sense, the state party is required to explain how the right has been respected in the decision – that is, what has been considered to be in the best interest of the child. Nonetheless, it is vital to note that there is a lack of a proper definition of what is the best interest of the child (Freeman, 2007:27).

The fact that the CRC does not define ‘best interest’ has been subject to extensive debate in previous research. As such, it has been identified that this vagueness and unclear message of the Convention becomes commonly revealed when the Convention is applied in a specific context or setting (Zermatten, 2010:7; Invernizzi & Williams, 2011:182). It can be fairly suggested then, that shortcomings in the Vietnamese context can be addressed by the application of interpretive methods and measures that reinforce the indivisibility of the CRC’s provisions and its objective and purpose (Invernizzi & Williams, 2011:182).

During the drafting of the CRC, many delegations questioned the wording of *the* primary consideration as it was worded in the first draft, noting that there are situations in which competing interests of justice and society should be of equal, if not greater, importance than the best interest of the child. Hence, it was suggested that the wording should be what it is today, namely, that the best interest of the child is *a* primary consideration (Freeman, 2007:45). Nonetheless, the wording still implies that the child’s best interest as a main rule shall prevail over other considerations and that an exception to the rule must be justified and made visible in the decision (GC No. 14 §5(c)).

Since there have been various attempts to define best interest, I will in the following use as my point of departure the definition developed by John Eekelaar as it is beyond the scope of this thesis to compare different definitions. Eekelaar says the principle can be defined as: “basic interests, for example to physical, emotional and intellectual care, *developmental interests, to enter adulthood as far as possible without disadvantage*; autonomy interests, especially the freedom to choose a lifestyle of their own (Eekelaar, 1992:230-321 cited in Freeman, 2007:27 (emphasis added))”. In light of the UNHCR Guidelines, the term best interest broadly describes the well-being of a child, determined by a variety of individual circumstances such as age, level of maturity and the child’s environment and experience. It is further underlined that both short-term and long-term impacts must be weighed before

deciding a child's best interest, including the prospect of a durable solution (UNHCR, 2008:14, 67). In this regard, the concept of the best interest principle is aimed at ensuring both the full and effective enjoyment of all rights recognized in the CRC, and the 'holistic development' of the child. It is expected of states to interpret development as a 'holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development' (GC No. 5; GC No. 14).

In principle, it is difficult to disagree that without clarification (and inclusion) of best interest, there is a (continued) risk that very different decisions can easily, yet erroneously, be justified as being in the best interest of the child, depending on who subjectively interprets the best interest of an individual child or a group of young persons (Zermatten, 2010:27). As will be shown later, this leads to significant problems in countries like Vietnam.

### 3.1.3 The Committee on the Rights of the Child

In line with Article 43 of the CRC, a monitoring body has been set up to ensure compliance with the provisions of the CRC by state parties. In more detail, under Article 44(1) the Committee requires the state to submit a report every five years. Based on these reports, the committee addresses concerns and recommendations in the form of Concluding Observations; the last one in relation to Vietnam was in 2012. Also, the Committee publishes General Comments, which constitutes its authoritative interpretation of the provisions of the CRC. Although these sources are not legally binding, as soft law they carry significant weight as they also represent moral and political weight and, as such, can pave the way for legally binding customary law. In short, the range and depth of guidance now available in the General Comments means that they provide a rich source from which to draw in the development of standards under the Convention (Kilkelly, 2011:184). Together, they represent a very significant statement of the extent of national compliance with the CRC.

Further, for this discussion it is vital to consider the 60<sup>th</sup> session of the Committee from 2012 in the examination of Vietnam's third and fourth Periodic Reports, as it provides some interesting observations. In particular, the Committee raised concern regarding the lack of an independent organisation for monitoring human rights for children that would

not be under the supervision of the government. The response from the delegation was that human rights treaties do not impose any model for such a human rights body and indicated that countries have different mechanisms to monitor human rights (NGO Group for the CRC Committee, 2012). This statement further underlines the existence of remaining challenges and difficulties in the progress of implementation of the CRC and compliance with human rights in Vietnam.

#### 3.1.4 The Third Optional Protocol to the CRC

The Third Optional Protocol to the CRC (‘the Protocol’) on a Communications Procedure was opened for signature and ratification on the 28 February 2012. The adoption of the Protocol has been described as the greatest legal victory for children since the adoption of the CRC. Advocates of the Protocol have claimed that the individual complaint mechanism available under the Protocol will provide children with an effective remedy for violations of their rights and create a body of jurisprudence that will address the uncertainties that so often characterise children’s rights (Tobin, 2012: Abstract). In other words, this protocol recognises that children, just like adults, have access to international human rights bodies, and reinforces the international system of accountability for human rights and thus, is referred to as a major step towards the full protection of children’s rights and the participatory approach of the CRC (CRIN, 2013).

It is important to note that Vietnam has not signed or ratified the Protocol – interestingly, neither has Norway. In clarifying Norway’s reserved standpoint, the Foreign Minister expressed his concern over the lack of a margin of appreciation in the Protocol. More specifically, it was described that the provisions of the CRC are ambiguous and aspirational (Eriksen Søreide, 2010-2011). The Committee on CRC has encouraged Vietnam to ratify the Protocol, however it is noted that Vietnam has not ratified other protocols establishing similar complaints mechanisms. Thus, following Norway’s reserved attitude, I believe the Vietnamese concern over a lack of a margin of appreciation is likely to be sustained.



## **3.2 Interpreting the CRC: The Relationship to other Human Rights Conventions**

Besides child-specific documents, many other human rights treaties also contain provisions especially applicable for children that provide direction and clarification of relevant issues (Pham, 2013:3). It is clear that the CRC forms an integral part of international human rights law and that its provisions cannot be understood and interpreted outside the existing general human rights framework. As such, the CRC has not replaced, but rather supplemented general human rights instruments for children (Belser, Hanson & Hirt, 2009:IX). I will therefore give a brief outline of other provisions relevant for this study. First, it should be highlighted that in accordance with the Vienna Convention on the Law of Treaties (VCLT) Article 31(1) (c), it is clearly stated that the interpretation of treaties must be in good faith and, take account of the context the treaty is part of, including “any relevant rules of international law applicable in relations between parties (VCLT Article 31(1) (c))”. By and large, the provisions of these instruments extend to children in conflict with law and their relevance must not be overlooked (The International NGO Council on Violence against Children, 2013:53).

### **3.2.1 The Two International Covenants**

The ICCPR and ICESCR were ratified by Vietnam in 1982 and are important sources for the interpretation of the CRC. Article 24 of the ICCPR enshrines the right of the child to be free from discrimination. The enjoyment of the rights provided for in the ICCPR also stems, in the case of children, from Article 2 and their equality before the law from Article 26. In this connection, it is pointed out that the rights provided for in Article 2, 24 and 26 are not the only ones that the ICCPR recognises for children. Rather as individuals, children benefit from all of the civil and political rights enunciated in the Covenant. In enunciating a right, some provisions of the ICCPR expressly direct states to adopt measures in light of affording minors greater protection than adults (GC No.17).

Further, the enjoyment of civil and political rights is inextricably interwoven with the enjoyment of economic, social and culture rights (GC No. 5). Article 10(3) of ICESCR establishes that “special measures of protection and assistance should be taken on behalf of all

children and young persons”. Additionally, it is important to highlight that Article 9 enshrines everyone’s right to social security to be recognized by the state. This right plays an important role in preventing social exclusion and promoting social inclusion (GC No. 19) and thus becomes significant in relation to the interpretation of social order and public security in relation to juvenile justice reform. Also, in accordance with Article 2(1) of the ICESCR, state parties must take effective measures to the maximum extent of their available resources to fully realise the right of social security for all. The wording of Article 9 gives clear indication that measures that are to be used to provide social security benefits cannot be defined narrowly and must in any event, to a minimum, guarantee all people this human right – and that would include children and young people (GC No. 19).

Nonetheless, most measures to be implemented by states in national law are not specified by the general human rights treaties and, as such, it is for each state to determine measures with a view of the protection of the needs of children in its territory and within its jurisdiction (GC No. 17).

### 3.2.2 The Convention against Torture

Besides focusing on fair trial and detention as a last resort for children in conflict with the law, the international legal framework in relation to juvenile justice also incorporates important safeguards against torture and other forms of cruel, inhumane or degrading treatment. It is children suspected of criminal activity, or detained on that pretext, who are most at risk of torture and ill-treatment at the hands of the state (Amnesty International, 2000:49). Because of being particularly vulnerable, children and young people require higher standards of protection than adults and specific positive measures. In this regard, a higher degree of responsibility of the state needs to be adopted in cases of torture or cruel, inhuman or degrading treatment or punishment perpetrated against children. Within the framework of the rights of the child, in conjunction with Article 37 of the CRC, the scope of state legal responsibility for torture or ill-treatment goes beyond a strict interpretation of Articles 1 and 16 of the CAT; Article 4 obligates state parties to ensure that all acts of torture are criminal offences under domestic legislation (GC No. 8; World Organisation against Torture (OMCT), 2006:7).

In November 2013, Vietnam signed, but did not ratify the CAT. Yet, the signing of this Convention marks an important step towards ratification. It is important to underline here, that in light of Article 18(a) and (b) of the VCLT, as a signatory Vietnam is:

- a) obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;*
- b) or it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed (VCLT Article 18(a)(b)).*

Moreover, the prohibition of torture in international law is absolute, *jus cogens*, and as such, is not weakened by any reference to circumstances or statute of limitations. In other words, there can be no justification, excuse (national security, social order, public security and so on) or impunity for those who commit acts of torture (Rehman, 2010:817).

Ambassador Le Hoai Trung, who signed the treaty on behalf of the Vietnamese government, stated that the signature expresses a `strong dedication to upholding human rights in the country`, and that it will allow the `authorities of Vietnam to `continue to raise knowledge, complete and perfect the legal system, contributing...to guarantee respect for human rights in the country` (Association for the Prevention of Torture, November 2013).

Besides, the signing of the CAT by the Vietnamese government could also be seen as indicating a growing interest and commitment to be part of the global effort to prevent torture, as well as enhancing Vietnam`s interaction and cooperation in the Association of Southeast Asian Nations (ASEAN) towards creating a torture-free community.

### 3.2.3 ASEAN

Since the effort of both non-governmental and governmental agencies to institutionalise child participation at all levels continues to gain new ground in Southeast Asia, I believe it necessary to briefly highlight the specific focus and commitment to juvenile justice and

children in conflict with the law through Vietnam`s membership in ASEAN as anchored to the CRC.

ASEAN is a regional inter-governmental organisation in Southeast Asia, currently with 10 member countries<sup>5</sup> including Vietnam who joined in 1995. ASEAN was established in 1967 through the signing of the ASEAN Declaration (also known as the Bangkok Declaration), which discusses the reasons, purposes and ways to operate the organisation. In essence, member states are committed to respect fundamental freedoms, the promotion and protection of human rights, including children`s rights, and the promotion of social justice. In short, cooperation between member countries is guided primarily by the ASEAN Charter and by relevant specific agreements or treaties that are signed by heads of state (such as the President or Prime Minister). In this regard, the ASEAN Charter serves as the constitution and by-laws of this organisation (Macalalad, Silverio & Fellizar, 2011:5-6).

Amongst the ASEAN treaties that deal with children`s issues, the Declaration on the Commitments for Children in ASEAN (2001) was adopted with the aim of guaranteeing member countries commitment to create opportunities for children to express their views, advocate their rights and participate in development. In essence, this declaration requests governments to protect children from all forms of violence, abuse and neglect. As such, Article 18 establishes a commitment to establish a child-centred juvenile justice system which fully safeguards children`s rights and promotes children`s reintegration to society. Even though the declaration does not represent binding provisions for states, its adoption strongly brings attention to the issues faced by Southeast Asian children and youth.

Further, Vietnam has signed the Hanoi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children (2010), which, in Article 4, calls for the strengthening of institutional mechanisms and a `child-centered approach`. More specifically, Article 19 requires member states to provide restorative instead of punitive measures

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<sup>5</sup> Currently including Indonesia, Malaysia, Singapore, Thailand, Brunei Darussalam, Lao People`s Republic, Myanmar and Cambodia.

to rehabilitate the child in conflict with the law to promote his/her reintegration into society. In comparison to previous attempts to establish concrete bodies to address issues related to women and children, this declaration strengthens ASEAN's commitment to ensure that women and children fully benefit from the process of integration and community building in a local context. Notably, the Hanoi Declaration also laid ground for the establishment of the ASEAN Children's Forum, which is one of the major developments of children's rights in the region (Macalalad et al, 2011:1).

Other important developments are the establishments of the ASEAN Intergovernmental Commission on Human Rights (AICHR) (2009), and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children. Together, these two bodies constitute the most important framework of ASEAN for the promotion and protection of human rights, especially the rights of children (Macalalad et al, 2011:1).

In addition, a specific feature of the AICHR is that it encourages ASEAN member states to ratify international human rights instruments. Yet, it has been previously stated that it has been Vietnam's main strategic interest within ASEAN to foster its national and political integrity by means of regional reassurance and support (Dosch & Tuan, 2004:207). In that sense, the terms of reference of the AICHR recognises that the most important responsibility to promote and protect human rights rests with each member state. As such, "being party to international human rights instruments is not sufficient; international standards must be incorporated into domestic legislation (Carmona cited in UNHRC, 2013:3)". Hence, it remains to be seen how committed ASEAN will be to safeguarding human rights in member countries such as Vietnam (Vaagan, 2011:323).

## 4 The Implementation of the CRC into Vietnamese Law

Vietnam has acceded to most of the key UN human rights conventions as can be seen in Table 1, but they often made reservations (e.g. regarding the Convention against Torture) and refrained from signing the various optional protocols (e.g. the Third Optional Protocol to the CRC, and the Second Optional Protocol to the ICCPR regarding the death penalty).

Table 1: Key UN Conventions on Human Rights

UN Conventions	Vietnam
<b>ICERD-Elimination of All Forms of Racial Discrimination (1965)</b>	1982
<b>ICCPR-Civil and Political Rights (1966)</b>	1982
<b>ICESCR-Economic, Social and Cultural Rights (1966)</b>	1982
<b>ICSPCA-Suppression and Punishment of the Crime Apartheid (1973)</b>	1981
<b>CEDAW-Elimination of All Forms of Discrimination against Women (1979)</b>	1982
<b>CRC-Rights of the Child (1989)</b>	1990
<b>CRPD-Rights of Persons with Disabilities (2006)</b>	2007

The protection of human rights is guaranteed by the 1992 Vietnamese Constitution. Yet, the exercise of human rights is severely curtailed by provisions in the constitution and extensive domestic legislation that restricts human rights to compliance with the policies and interest of the state. United Nations Human Rights Council (UNHRC) states that the VCP as ‘the force leading the State and society’ (Article 4 of the Constitution), “is a major impediment to the exercise of human rights because it excludes pluralism of opinion and expression, and subjugates human rights protection to the protection of the one-Party state (UNHRC, 2013:2)”. While Vietnam’s economy is rapidly progressing, their political structure may prove more resilient to change in the near or medium future (Vaagan, 2011:302).

Thus, in this chapter, I will look closer at Vietnam’s obligations in relation to international standards, and their realization of human rights and children’s rights in particular. I will, as pointed out earlier, use as my point of departure the emphasis of the best interest of the child when examining the preservation of social order and public safety as a legitimate aim

of the justice system. The aim here is not to make a comprehensive list of Vietnam's failings to comply with international standards, but rather to shed light on Vietnam's interpretation of the principle of best interest of the child, in order to successfully analyse the underlying causes for juvenile justice reform.

“In every region, in contradiction to human rights obligations and children's developmental needs, violence against children is socially approved, and is frequently legal and State-authorised (Pinheiro, 2006)”. In other words, in many countries the administration of juvenile justice does not comply with relevant international standards contained in the CRC, the Riyadh Guidelines, the Beijing Rules and the UN for the Protection of Juveniles Deprived of their Liberty; this is true both for legislation and implementation (OMCT, 2006). The Vietnamese case is indicative of this. It seems abundantly clear that it is possible to claim an adherence to the principle of universal rights while simultaneously pursuing policies that exacerbate structural inequalities and punitive institutional regimes (Muncie, 2005:47).

It is interesting to observe that the Vietnamese government has stated that “care and protection of children is a national tradition and a consistent policy, and that implementing child rights is one of the focuses of human rights in Vietnam (Vietnam 1999:66 cited in Pham, 2013:3)”. Yet, a very frank statement by the Supreme People's Court about the difficulties and inadequacies of the present system of controlling child abuse confirms that “current law on prevention of child abuse is not very comprehensive, including too general and un-specific articles (Supreme people's Court of Vietnam cited in Nicholson, 2012:13)”. The Supreme People's Court further points out that there is a shortage of effective international collaboration, a lack of close collaboration among legal agencies and other relevant organisations, as well as limited legal understandings and attitude in relation to child protection. This statement could, however, be interpreted in the light of a will to address the issues at the highest level of the legal system in Vietnam as the government has acknowledged that its legal system still contains inconsistencies, overlaps and contradictions on several aspects, and that there are gaps between legislation and enforcement (Nicholson, 2013:14; Pham, 2013:4).

To view this in a positive light then, children`s rights can now be discussed (relatively) openly in Vietnam (as compared to only a few years back) and, in return, the gradual introduction of child rights has created `catalytic` effects on the promotion of human rights in general (Salazar-Volkman, 2004:5, UNICEF, 2014). In this regard, Vietnam has given indications of making an effort to implement its obligations. Several domestic laws regulating children`s rights and the responsibility for child care and protection have been adopted. This includes the Law on Child Protection, Care and Education 1991, 2004; the Law on Universal Primary Education 1991; the Penal Code 1999, amended in 2009; the Criminal Procedure Code 2003; the Law on Adoption 2010; and the Law against Human Trafficking 2011 (Salazar-Volkman, 2004:8; Pham, 2013:3). Also, various national programs for children have been conducted: the National Action Plan for Vietnamese Children 2001-2010 and 2011-2020; the Program for Children in Difficult Circumstances 1999-2002; and the National program on Child Protection 2011-2015 to name a few (Pham, 2013:3). As such, it should be noted that the life of children in Vietnam has generally improved “in every aspect (Pham, 2013:4)” since the ratification of the CRC, and that this progress and the country`s improvements have been recognized by the international community (Pham, 2013:4). Nevertheless, the dominant philosophy is still punitive.

A punitive approach appears built in to aspects of Vietnamese law which allow for, *inter alia*, prosecuting and adjudicating juvenile offenders the same way as adults. Given adjudication is almost always public in Vietnam, this also consequently allows for juvenile offenders identity to be exposed (Pham, 2013:7).

In Vietnam, it has become clear that the juvenile justice system has a strong focus on the `prosecution` aspect, and not as much on `prevention` (at least not prevention as defined in light of the human rights conventions), and many children in Vietnam still live in conditions of deprivation and exclusion. One of the most common shortcomings of Vietnam`s legal system is in relation to the fact that laws concerning children are formulated in various legal documents and remain unclear and inconsistent (UNICEF Vietnam, 2012; Blue Dragon, 2014; Nguyen, 2014). In short, the CRC Committee continuously makes recommendations for the mitigation of the negative impact of economic reforms on vulnerable



groups (such as youth) and reform of the juvenile justice system – as well as insufficient data collection and limited dissemination of the CRC. Hence, although children’s rights have improved considerably since the ratification of the CRC, Vietnam has not yet completely fulfilled its obligation of international standards with respect to the protection of young people in contact with the judicial system (Pham, 2013:4, UNICEF, 2014; Save the Children, 2014).

#### **4.1 Vietnam’s Juvenile Justice System**

A comprehensive policy for juvenile justice must deal with the following core elements: the prevention of juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings; the minimum age of criminal responsibility and the upper age limits for juvenile justice; the guarantees for a fair trial; and deprivation of liberty including pre-trial incarceration (GC No. 10, §15).

In accordance with Vietnamese legislation, a person over 18 years of age is referred to as an `adult`, which is in line with international law. `Children` however, are defined as persons under the age of 16 (Law on Child Protection, Care and Education, Article 1), which is contrary to international standards and Article 1 of the CRC. According to Vietnamese law, persons under the age of 18 are referred to as `juveniles` (Civil Code Article 18), which covers persons aged between 16 and 18. The term `juvenile(s)` is commonly used in documents indicating juvenile’s rights and duties in relation to being subject of the law; such as being in violation of the law or in breach of the peace (Pham, 2013:4).

Further, the minimum age of criminal responsibility in Vietnam is 14; persons 14 years or older, but younger than 16 years old, bear penal liability for very serious crimes intentionally committed or for particularly serious crimes. Persons 16 years or older bear penal liability for all crimes they commit (Penal Code Article 12). It is worth noting that Article 8(3) of the Penal Code states that `less serious crimes` are considered crimes that cause `no great harm to society` (3 years imprisonment); `serious crimes` are crimes that cause `great harm` (3-7 years imprisonment); `very serious crimes` are crimes that cause very great harm

(7-15 years imprisonment) and; `particularly serious crimes` are crimes which cause `exceptionally great harm` (15 – life imprisonment or capital punishment). Penalties imposed on young offenders are lighter than those imposed on adult offenders (Penal Code Article 69, 72-77).

Moreover, persons between 16 and 18 years old who repeatedly commit acts of petty crime, such as theft, gambling or causing social and/or public disorder, shall be educated at communes or sent to reform schools according to the Law on Handling Administrative Violations of 2012 (Pham, 2013:5). It needs to be mentioned here that two systems exist in Vietnam to handle children in conflict with the law – the criminal law system and the administrative law system. The latter is the system most commonly used by the Vietnamese authorities, which allows for the detention of children for up to two years for having committed minor violations of the law (Human Rights Watch, 2012:6).

Based on international standards in juvenile justice (Articles 37 and 40 of the CRC, and the UN Standards and Norms), Vietnam has in its legislation introduced the following measures:

- Life imprisonment or the death penalty shall not be imposed on juvenile offenders (Penal Code, Article 35, 69(5) linked to CRC Article 37(a)).
- Penalties imposed on juvenile offenders are lighter than those imposed on adult offenders for the corresponding crime (Penal Code Article 69, 72-77 linked to CRC Article 37(b)).
- It is forbidden to keep juvenile offenders together with adult offenders (Criminal Procedure Code Article 308 linked to CRC Article 37(c)).

- The composition of the jury panel hearing juvenile offenders should include a juror who is a teacher or Youth Union cadre<sup>6</sup> (Criminal Procedure Code Article 307 linked to CRC Article 40(iii)).

(Cited in Pham, 2013:5)

Regardless of these provisions in Vietnamese legislation, mechanisms for handling children and young people in conflict with the law and within the juvenile justice system still suffer from serious inadequacy and insufficiency. Most notably, there is no relation to Article 39 of the CRC. Further, the inadequacy of the current justice system becomes particularly clear when we consider that Vietnam has no separate laws, procedures or authorities specifically applicable to juveniles. It has been admitted by the Supreme Peoples` Court that there are still no professional judicial staff for handling juvenile cases, and not a single judge specializing in juvenile trials. This clearly is in contrast to Article 40 of the CRC).

It should be added also that the principle of the best interest of the child has not been enacted into criminal law; neither the Penal Code nor the Criminal Procedure Code (which are regarded as the basic laws dealing with criminal justice) mention this principle (Pham, 2013:6). In conjunction with this, the Universal Periodic Review (UPR) at the UN Human Right Council from last year confirms that Vietnam has made no progress in reforming the Criminal Code and the Penal Code to bring them in line with international standards. This is in contrast with Vietnam`s acceptance of recommendations in 2009 to ensure national legislation consistency with international human rights treaty commitments (UPR, 2013:3).

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<sup>6</sup> Teachers and Youth Union personnel are believed to have knowledge of, and experience with working with youth. According to my findings, and in conjunction with previous research, there is a substantive lack of knowledge and understanding amongst Teachers and Youth Union personnel (and in general) for how to work with young people.

## **4.2 Shortcomings in the Juvenile Justice System**

In this section, I will analyse the most notable shortcomings in Vietnam's current law. I will only focus on some of the prominent gaps of Vietnam's juvenile justice system which became particularly obvious during my research, as a detailed analysis is beyond the scope and time frame of this thesis.

### **4.2.1 Prevention of Juvenile Delinquency**

It has been noted elsewhere that the prevention of juvenile offending has not received adequate attention, and very little of the vast amount of legal documentation focuses on preventing juvenile delinquency (Cox, 2011; Pham, 2013:6). In contrast to the Riyadh Guidelines, there are no comprehensive guidelines or fundamental principles for general prevention or social policies in Vietnam. Rather, existing documents emphasize only the last stages of criminal justice; when juveniles are at social risk and likely to breach the law, or when they are already in the system. In other words, there is a strong focus on preventing potential criminal activity rather than addressing factors that can result in juveniles breaking the law. In this regard, prevention is mentioned in light of enhanced and strengthened police control keeping a close watch on youth (Ministry of Labour, Invalids and Social Affairs, Department of Child Protection and Care (MOLISA), 2012; Pham, 2013:6; Nguyen, 2014).

According to my findings, focus on the prevention of youth crime has shifted due to the governments' greater focus on economic development (since 2008 onwards). This has contributed to a decrease in training of staff and police to prevent youth offending, and overall, it has led to a diminishing interest and concern for youth justice (VAPCR, 2014). Subsequently, research shows that there is a concern for handling and applying services for juveniles, particularly of youth from lower socio-economic status, who are over-represented in arrests and detention (underlining discrimination, in contrast to requirements set out in Article 69 Penal Code and Article 2 of the CRC). Similarly, officials, particularly the police, have reported that they have difficulties applying preventative measures in relation to juveniles (UNICEF Vietnam, 2012).

These findings highlight the complexity, and contradictions, in the government's expressed concern over youth crime. On the one hand, there is the need to highlight an alarming increase in youth offending, but on the other hand there is a decrease in interest (political will) and efforts to successively (and in line with international law) prevent young people from coming into conflict with the law.

In light of the provisions of the CRC, the state should adopt measures that are taken for the full and equal implementation of the rights to, *inter alia*, an adequate standard of living (Article 27); to education (Articles 28-29); to protection from all forms of physical or mental violence (Article 19); and to appropriate services for care and protection (GC No. 10). The lack of measures taken to prevent young people from coming into contact with the law can be seen as a result of a lack of comprehensive policy for the field of juvenile justice. Subsequently, this could also clarify why the state is providing only very limited statistical data in relation to youth offending and juvenile justice (GC No. 10). It should be noted here that there is an important link between data collection and the lack of comprehensive youth justice policy. All states are urged by the CRC to systematically collect data relevant to the information on the practice of the administration of juvenile justice; this is vital for the development, implementation and evaluation of policies aiming at the prevention of and effective response to juvenile delinquency in full agreement with the principles and provisions enshrined in the CRC (GC No. 10).

#### 4.2.2 Restorative Justice

Diversion, intervention and restorative justice are all important in international juvenile justice but they are not officially mentioned in Vietnamese law; these concepts are still new or unfamiliar in Vietnam. In short, there are no corresponding terms in Vietnamese legal documentation and judicial practice, and no judicial programs focusing on intervention or restorative justice (Pham, 2013:6; VAPCR, 2014). However, this is not to say that practice in a restorative manner is completely absent in the Vietnamese context. On the contrary, there are many organisations, such as Save the Children Vietnam and Blue Dragon, who work hard and passionately with programs that are restorative in fashion in order to further justice for young people in Vietnam (Save the Children, 2014).

Nevertheless, there are only a few provisions of the current law that do contain some reference to intervention:

- The handling of juvenile offenders aims mainly to educate and help them to recognize their faults, redress their wrongs, and develop in a healthy way (Penal Code Article 69(1); Law on Child Protection, Care and Education Article 36, 56(1)).
- Juvenile criminals may be exempt from penal liability if they commit less serious crimes or serious crimes that cause no great harm and involve many mitigating circumstances, and if they are accepted for supervision and education by their families, agencies and organisations (Penal Code Article 69(2)).

(Cited in Pham, 2013:6)

Yet in practice, there is little knowledge about whom, and which agency or organisation is responsible for supervision and education, and what would constitute such supervision and education. Further, research from interviews with investigators, prosecutors and judges indicates that application of Article 69 (2) is rare, and that application is only suitable in cases where the juvenile offender `has a good personality and has committed a minor offence` (UNICEF Vietnam, 2012:58). In such cases, it is evident that judicial bodies play a decisive role, while social organisations are generally only involved passively (Pham, 2013:6). This also brings to light the mere fact that Vietnam is left with a system with very few alternatives to divert young people away from the criminal justice system. In accordance with Article 37(b) of the CRC, the arrest, detention or imprisonment of juvenile offenders may be used only as a measure of last resort. Hence, in relation to developing a comprehensive policy for juvenile justice, Vietnam is short of measures to ensure that young people are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and offence committed (GC No. 10; VAPCR, 2014; UNICEF, 2014; Nguyen, 2014).

### 4.2.3 Data Collection

I am not the first to point out that the availability of data and data collection in Vietnam is worthy of criticism. More specifically, there is a lack of even basic data on juveniles in conflict with the law, such as the number and nature of offences, the average duration of pretrial detention, and the number of children dealt with by resorting to measures other than judicial proceedings (UNICEF, 2014). Put simply, government openness and transparency is still a key issue in Vietnam. In 2012, the NGO Group for the CRC explained the need for independent data on children and asked the Vietnamese delegation whether there were any plans for establishing a comprehensive national data collection system. It was then reported by the delegation that, currently, each agency has its own data and that this was increasingly reliable. It was, however, admitted that it would be best to have a specific body for data collection on children, but that this is anything but an easy task (NGO Group for the CRC Committee, 2012).

Since 2007, the main responsibility for child protection and care has belonged to MOLISA (Pham, 2013:4; UNICEF, 2014). Currently, MOLISA is also the only agency (officially) responsible for analysing data. According to UNICEF (Mrs. Truc), having only one agency (ministry) working with data collection and analysis will generate more reliable data on juveniles charged and prosecuted, as all data will be available at the same time to compare, and consequently, give a sufficient understanding and overview of the situation. As of today, the reality is different; there is a divided understanding about youth and youth offending (Nguyen, 2014). The police, for example, collect their own data, and so do the courts. These different sources of data vary to a great extent and also cases not dealt with during one year will feed into the data of the next. This, Mrs. Truc explains, feeds into the perception that youth crime is on the rise and fuels the public concern for juvenile delinquency in Vietnam (UNICEF, Mrs. Truc, 2014).

The following tables show the only officially available data on youths in conflict with the law and should be read with caution.

Table 2: Children in Conflict with the Law by Age, 2011

	Under 14	14 to under 16	16 to under 18	
<b>Total</b>	16222	1119	4809	10292

Source: MOLISA, 2012

Table 3: Children in Conflict with the Law by Offence<sup>7</sup>, 2011

	Robbery	Theft	Disturbance of Law and Order	Drugs	Gambling	Others	
<b>Total</b>	16222	1010	5940	1946	184	394	2395

Source: MOLISA, 2012

Table 4: Number of Juvenile Offenders: 2007-2012

Year	Juvenile Offenders
<b>2007</b>	3747
<b>2008</b>	3900
<b>2009</b>	3710
<b>2010</b>	3418
<b><u>2011</u></b>	<u>3243</u>
<b>2012</b>	6180

Source: Supreme Peoples` Court Annual Statistics  
2007-2012 cited in Pham 2013:7

<sup>7</sup> Other measured offences are: homicide, extortion, violation and rape, malice, snatching and prostitution (MOLISA, 2011).



In short, it becomes very clear if we look at the total number of youth offences in 2011 that it varies greatly between MOLISA and the Supreme Peoples` Court; MOLISA has reported a total of nearly twice as many offences compared to the Supreme Peoples` Court. Also, a main concern with the gap between the two sets of data is that it indicates that most young offenders do not go to court. This will be relevant to bear in mind for the discussion later on Vietnam`s use of detention and reform schools.

In this regard, it is fair to say that currently, statistics on juveniles are not adequate and are seriously fragmented – no agency has reliable nationwide data. Hence, it is very difficult to make a plausible judgment about the application of measures against juvenile offenders and, subsequently, the construction of specific measures to improve the quality of the protection of children`s` rights becomes very challenging. It has for a long time been advised that Vietnam needs to improve the quality, reliability, accuracy and understanding of data, evidence and indicators for children`s` rights (Pham, 2013:9).

For example, in the CRC Committee`s concluding observations it was noted that the state Party`s efforts to improve its data collection is a concern and that the data available is not comprehensive. This was repeated and emphasised again in 2012 - that there is an urgent need to establish regulations on data collection on children with a view to monitoring the implementation of all the rights of children (CORC, 2003: §16; CORC, 2012: §20). In a statement made by Mrs Truc, her estimation for a change regarding data collection was “five more years and the situation will have improved (Mrs Truc UNICEF 2014)”. Hence, it is difficult to believe that there will be any changes regarding the lack of data in the near future after such a statement. Overall, there seems to be a lack of commitment as well as a lack of capacity to provide official data and improve transparency. Overall, regular evaluations of the state`s practice of juvenile justice, in particular regarding effectiveness of the measures taken, do not seem to be high up the political agenda.

In addition, following from the forgoing analysis in this chapter, when examining the Committee on the rights of the Child`s concluding observations on Vietnams implementation of the CRC, it becomes apparent that recommendations in relation to juvenile justice

have been repeated and emphasised over the years – with little or no improvement. For instance, it was recommended in 2003 that Vietnam should, *inter alia*:

- Ensure the full implementation of juvenile justice standards, in particular Articles 37, 40 and 39 of the Convention, as well as the Beijing Rules and the Riyadh Guidelines
- Consider adopting a separate legal code for juvenile justice and establishing a system of juvenile courts
- Improve conditions in juvenile detention centres and ensure deprivation of liberty is used only as a measure of last resort
- Expedite the development of a system for the provision of appropriate rehabilitation and reintegration services and increase the number of professional social workers providing such service to young offenders
- Ensure that all children accused of having violated the law have legal counsel or other appropriate assistance (CORC, 2003: §54).

Almost ten years later, the report from 2012 states that these recommendations have not been fully addressed by the state party and express particular concern in relation to the lack of a comprehensive juvenile system, including the absence of a juvenile court, and current measures cover children under the age of 16 only; the rising number of young offenders in the state Party's punitive system dealing with young offenders and; the limited alternatives to detention, and the absence of rehabilitation and reintegration programs (CORC, 2012: §73).

## **5 Policing Youth in Vietnam: A Breach of the CRC?**

For the remaining part of this thesis, it will be of particular interest to take a closer look at Vietnam's justifications for the decision-making processes regarding youth offenders. Since it has been acknowledged that the preservation of public safety is a legitimate aim of the justice system, it will become clear that in the Vietnamese context, full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in the CRC is not the first priority of the state. Rather, it will be argued that the preservation of social order and public safety, as understood from the Vietnamese interpretation, is a much higher aim for the one-Party state than compliance with the best of the child.

### **5.1 Do Best Interest of the Child `Trump` Social Order and Public Security?**

Article 3 of the CRC has three sections, all of which are highly relevant to the assessment of whether juvenile justice reform in Vietnam is compatible with international human rights standards. I will first and foremost focus my attention on Article 3(1), which is to date, as previously pointed out, not enacted into criminal law, nor is it mentioned within Vietnam's domestic legal framework. Yet, as Vietnam is party to the CRC and other fundamental human rights conventions, this section will ask whether it is justifiable, in the name of social control and public security as interpreted in the Vietnamese context, to limit the best interest of the child.

As highlighted when determining the best interest of the child, it is necessary to consider all the rights of the child. In accordance with Article 41 of the CRC, the higher standard must always apply in relation to other relevant legal bases, both at the international and the national level (UNHCR Guidelines). Thus, we need also to consider the political dimension of this principle; do laws, ordinances or rules exist that do not have a potential impact on youth (Zermatten, 20110:27)?

According to Ronald Dworkin, there is an important element in distinguishing a *human right* from a *high-priority goal*. In the words of Dworkin, the difference is that rights have a special normative force which `trumps` non-rights objectives, such as protecting or pre-

serving a state-party's reputation (Nickel, 2007:24-26). At heart of this debate is the vital question whether the principle of best interest is a guideline or a right, and whether it is to be regarded as *a* primary or *the* primary consideration. Put simply, the best interest of the child is a fundamental legal principle of interpretation to limit the extent of adult authority over children and young people (Zermatten, 2010:6). The protection of the best interest of the child means, for instance, that the traditional objectives of criminal justice, meaning repression/retribution, must give way to rehabilitation and restorative justice objectives when handling juvenile offenders. Arguably this can be done alongside attention to effective social order and public safety (GC No. 10) – depending, of course, on the underlying reasons for reform.

In limiting the best interest of the child, there are two main arguments I would like to put forward in relation to Vietnam's expressed concern over an increase in youth crime and the need for juvenile justice reform. But first, it is important to point out that human rights law recognizes a number of legitimate limitations to certain rights (for instance, Article 4 of ICCPR and Article 5 of ICESCR). It is stated that the protection of national interest and security, public order and public safety may justify restrictions of the full enjoyment of certain human rights, as for instance, within the context of best interest of the child. It needs to be underlined here that the provisions for derogation contained in ICCPR and ICESCR, *inter alia*, all have the same purpose and are drafted in a similar manner.

In brief, these provisions provide that state measures that would usually be a violation of a human rights treaty would not breach the treaty if these measures are taken in exceptional circumstances and to the degree absolutely necessary. In essence, limiting rights means, amongst other, that certain rights of those who have committed, or are suspected of having committed or are about to commit acts against state security or public safety, may be restricted to protect the rights of others and the population as a whole. The bottom line to limiting rights is however, that the right(s) or freedom(s) subject to limitation may not be curtailed in their essence – which arguably, highlights the complexity of striking a balance between security and rights.

Further, any restrictions or derogation from human rights must be `prescribed by law`, which requires their regulation in transparent and accessible legal provisions (CoE, Opinion No. 359, 2005). However, no clear cut definition of `provided by law`, or of exactly what restrictions are necessary, is provided by the legal texts. Hence, limitations to human rights can be legitimate but also open to abuse.

*The first argument* I would like to make is that Vietnams focus on juvenile justice reform can be paralleled to some extent with the discourse on the threat of terrorism. From this perspective, the perceived increased risk that youth poses to society presents the state with the opportunity to reject basic rights, legal norms and constitutional values to prevent juvenile offending; youth has become the new `folk devil`<sup>8</sup> and the `enemy within`. The moral concern encouraged by reform policy is driven by the exclusionist rhetoric of youth constituting a risk, where youth has become stereotyped and social control measures aim at explanations of new cultural differences and hostility towards the nation state and national prosperity. Thus, youth, public disturbances and international influences (such as the internet, online gaming and new youth cultures) becomes identifiers of risk requiring state intervention. In other words, the government may believe that the nation`s survival is at stake and hence, “the prevailing political culture that facilitates the unraveling of law is reinforced by a wider public culture that sees those socio-legal transformations as contingent on safeguarding national security in what is nowadays viewed as `dangerous` (Welch, 2007:148 cited in Palmer, 2012:523)”. The emphasis here is embedded within the view that under this construction, policy is directed at those (in this case youth) regarded as dangerous and constituting a threat and, as a result, youth is singled out as a `sub-group` of the population that is problematic. More specifically, they are singled out for state attention particularly in relation to policing and pre-crime measures allowing greater control and surveillance, arrest and detention and the identification of `interrupting the peace` (Palmer, 2012:522; Nguyen, 2014; VAPCR, 2014).

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<sup>8</sup> `Folk devils` are explained as deviants; they are engaged in wrongdoing; their actions undermine the moral order and harm the society and; they are evil and they must be stopped (Goode & Ben-Yehuda, 2009:27).

The concept of socially constructed deviancy becomes very important here as it expands our understanding of social structure, social processes and social change. More accurately, it integrates concepts from a variety of areas, such as crime, collective behaviour, social issues and social movements. As such, the concept successfully explains and demonstrates that there are margins to how much diversity is tolerated in a society (Goode & Ben-Yehuda, 2009:22) – which seems in the Vietnamese context to be very limited.

In essence, many acts are labeled by the government as breaking social order, or categorised as `disturbances of law and order`, or as `others`<sup>9</sup> - these `crimes`, according to my findings, include campaigning, demonstrations and forming or participating in social movements - even though they are not really criminal acts as usually understood by the term (Nguyen, 2014, VAPCR, 2014). Also, as reported by Human Rights Watch (HRW), Vietnamese authorities require official approval of all public gatherings, and refuse to grant permission for meetings, marches or protests they deem politically or otherwise unacceptable. This same report highlights the issue of corruption (HRW, 2014) and thus the term breaking social order is, as it seems, all too often applied to any form of objection to government policy (Doswald-Beck, 2011:127). Such a description of meaning can be seen to make `available` an `escape route` from the constraints of law in that it creates domestic implications for criminal justice and legal systems in the name of national security and, as a consequence, extends criminalisation through increased police powers (Palmer, 2012).

Embedded in this view is the perspective that juvenile justice measures for reform are not being developed with a view to ensure protection to *all* persons involved, but rather to prevent what could be described as political instability<sup>10</sup> (Nguyen, 2014). It is this pre-crime and pre-emptive logic that is found in the discourse of counter-terrorism, which represents the pursuit of security as opposed to the pursuit of justice (Lomell, 2012:91); and what seems to be Vietnam's response to preventing youth crime (Nguyen, 2014).

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<sup>9</sup> See Table 3.

<sup>10</sup> The primary focus in Vietnam is on maintaining political stability; meaning social security is the security of the state party and not of the individual.

Without a doubt, the security of the state and its institutions and, the safety of its officials and population, are important public and private interests that deserve protection. It is claimed that, if necessary, it should be protected at a high cost. But the question is, in relation to limiting best interest of the child and overall challenges to human rights, to what cost exactly?

In conjunction with the first argument, *the second argument* I would like to bring forward is how extensive and all-inclusive the rhetorical notion of human security has become. In short, as expressed in Article 143 of the UN 2005 World Summit Outcome, human security now encompasses a right to dignity, equality in the broadest sense (equal opportunity to enjoy all rights), and liberty in the broadest sense (to be free from fear and want, and poverty and despair)(UN World Summit Outcome, 2005). As best expressed by Lazarus (2007), the risk with this notion of rights, which are most commonly understood as fundamental and self-standing rights, is to displace dignity, liberty and equality with the conception of human security to become the underlying foundation of all other human rights. Put differently, it is vital to resist the temptation and growing tendency to consider traditionally established rights within an umbrella right on the basis of a right to security. In a political climate such as Vietnam's, security can be seen to trump fundamental human rights; "there is a danger that when the right to security slips into becoming the meta-principle grounding other rights it can also displace the non-instrumental values upon which it properly ought to rest (Lazarus, 2007:328)". At the core of this argument is the fear that the rhetorical and political demand for security and rights has within it a potentially volatile combination, not only to undermine the protection of competing rights, such as dignity and liberty, but also to erode conventional understandings of the foundations of fundamental rights reasoning (Lazarus, 2007:331-344).

What can be seen in Vietnam today is that this `tradeoff` of rights (the sacrifice of rights' in the name of security interest for the party) (Chesney, 2003:1414) legitimises security measures that infringe upon the best interest of the child. More specifically, preventing future crime increasingly takes precedence over recognising and bringing to justice perpetrators of crimes already committed (Lomell, 2012; Nguyen, 2014).

It can be fairly argued, then, that there seems to be resistance to resolving rather than managing, in the form of enhanced control and pre-emptive measures, the perceived increase in youth crime. This resistance can to some extent be explained by limited recognition on how to understand and think about youth, and in turn, how to develop a comprehensive juvenile justice policy as enshrined in the CRC. Consequently, it becomes evident that one of the biggest challenges to Vietnamese youth today lies within the governments need to legitimate its power by securing `social order`. Bedner (2013) expresses this as `inherent problems in transplanting law into a badly integrated legal environment`. What is meant here is that a country like Vietnam may be currently unable (lack of capacity or political will) to produce coherent legal (and interdisciplinary) approaches necessary for effective reception of international law and legal institutions (a situation not exclusive to Vietnam). However, partial transfers may still be effective in the sense that they contribute to reconstructing new rules and institutions. Most importantly, the transfer of foreign and international ideas has an influence beyond mere law making and thus, leads to wider public debates and reasoning. Nevertheless, given the structural factors underpinning the Vietnamese context, change may be very difficult and the rule of law may remain an ideal still far away (Bedner, 2013:253; Nguyen, 2014).

In sum, the force of these two arguments is that it allows us to see that there is a clear indication to what elements of international law Vietnam is adhering to, and where there is continued resistance, all of which have severe consequences for juvenile justice reform, which in turn, can be seen as a means of social control as the focus on sovereignty becomes apparent in the state`s need to limit international influences to local practice (Nguyen, 2014). As such, an enhanced international consensus of international legal standards and CRC-based language of children`s rights is essential; even more so in a time of globalisation that will ensure greater protection of human rights of all children (Kilkelly, 2011:195). Arguably, then, state sovereignty must also then be subject to further limitations, as clearly there is a too wide margin of appreciation for states to interpret and define both national security and `best interest`. If not, the law can continue to be used against the individual and hence, consequently result in the denial of fundamental human rights.



## **5.2 Attitudes to Juvenile Justice and Challenges to Human Rights**

As stated earlier, too often children are seen as objects to be dealt with as there is still a strong hostility towards recognising that children are legitimate human rights subjects. The foundational element of international youth justice is that children in conflict with the law deserve to be treated with respect and dignity that recognises their vulnerability. Studying both the international and Vietnamese commentary on juvenile justice reveals the extent to which international obligations are being ignored or used to counter the 'punitive turn' (Muncie, 2008:110). As such, it has been previously concluded that the obligations of the CRC are received by many states as 'unwanted'; it is noted that disproportionate sentences, insufficient respect for the rule of law, excessive use of custody and improper use of the juvenile justice system to tackle other social problems is widespread (Abrahamson, 2006 cited in Muncie, 2008:111). Arguably, this furthers the argument that Vietnamese youth has been made the 'enemy within', and as such, juvenile justice reform in Vietnam can be seen to be used for the benefit of protecting the state, rather than protecting the rights of its young population. Thus, this section will look at the close link between public opinion and the administration of juvenile justice.

### **5.2.1 Public Concern for Increased Youth Crime**

The pervasiveness of negative political, public and media attitudes to children's and young people's behaviour has been well documented in criminological and juvenile justice literature. These attitudes and public perceptions are being used to justify the development of laws, policies and practices that would not be tolerated if they were proposed and applied in relation to adult offenders. Thus, it is clear that youth is being much more heavily policed in contrast to adults (Muncie, 2008; Weber, Fishwick & Marmo, 2013:194).

In Vietnam, there is a clear degree of unity on what are regarded as the most common youth offences, and, what constitutes as the moral concern for increased juvenile crime; which interestingly differs from the statistics presented earlier. According to VAPCR, the biggest and leading organisation in Vietnam for protecting children's rights, breaking social order is the most common crime committed by youth. It was further stated by VAPCR

that it is middle class children who most often commit offences constituting as breaking security (VAPCR, 2014; UNICEF, 2014; Nguyen, 2014; Save the Children, 2014).

Further, VAPCR states that the second most common crime is theft. The explanation given to me was the increased gap between rich and poor, and the increased pursuit of material gain amongst people from lower socio-economic status. In other words, there is great concern over a very unfair society, which is in line with `the rich get rich and the poor get prison` (Reiner, 2010:33). VAPCR holds the view that the practice of policing bears down most heavily on Vietnam`s most vulnerable youth. In relation to this, unemployment was considered to be a key factor to the increase in theft amongst young people, as more young people are feeling the social pressure `to belong` (for instance, in terms of clothes, mobile phones and TV`s); this was mentioned in terms of international influences, mainly through the internet and movies (UNICEF, 2014). Interestingly though, no one could answer the question of what is the current unemployment rate in Vietnam – this is considered state information and thus publically unofficial. In addition, the information given by VAPCR is contrary to the statistics available from MOLISA (2011)<sup>11</sup>, which shows that theft is the most common offence and that social order and public safety offences are the second most common crime amongst youth. Also, my impression is that crimes considered as `others` are closely linked to social order and public safety offences. This contrast is interesting as it again highlights the very serious deficiency of available data in Vietnam.

Moreover, despite these criminal offences, there is a great concern for the increase of violent crimes (armed robbery, gang violence and murder). Everyone I spoke with during my time in Vietnam mentioned one particular case as having great influence on public perception and moral concern for increased youth crime - the case of `teen murderer Le Van Luyen`. This case is interesting to mention here for two main reasons; first because the case has been, and continues to be, subject to great media attention, and second, because the case is described as being influential for similar crimes that have been committed after-

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<sup>11</sup> See Table 3.

wards. As such, this case will successfully illustrate Vietnam's continued resistance to international juvenile justice standards.

My aim here is not to discuss this case at length, but rather to draw attention to what could be seen as a systematic denial of children's rights by considering the relationship between the media's representation of crime and justice and the public perceptions of and reaction to these issues; following the "community sensation (Cohen, 1967:280 cited in Goode & Ben-Yehuda, 2009:22)" of crime in line with the social construction of deviance.

In short, in 2011, a 17 year old boy (2 months from turning 18) killed 3 people at a local gold shop in Bac Giang Province: the owner of the shop, his wife and their 18 month old daughter. Another daughter, nine years old, had her arm chopped off by Luyen. After confessing the crime, Luyen was sentenced to 18 years imprisonment, although the request for death penalty was substantial as this case produced a great stir in the public. Also, the trial was held open both to the public and the media (contrary to protecting young offenders' identity, CRC Article 8); the first day of trial was attended by over a thousand people (Saigon GP Daily, 2012; Tuoitrenews, 2013).

As a response to this case, it has been widely held that this and similar cases are "the evidence for law-making agencies to amend the law" as clearly expressed by Dr. Thaou, the director of the Legislative Institute of the National Assembly Standing Committee (Ha, 2012). Dr. Thao made further statements that are worth quoting: "as teen crime is on the rise, people may worry that if the law is not tough enough, teen crime will keep increasing; to prevent teen crime, it is necessary to reduce the age of juveniles in not only criminal but also civilian law; it is very difficult to change the law towards imposing death sentences on murders [for minors], because the international trend is abolishing the death sentence (Dr. Thao cited in Ha, 2012)". In line with Dr. Thao's honest views, a statement from the Ho Chi Minh City People's Procuracy says in a similar manner: "teen crime is alarming now. In the current situation...internet is everywhere and youth crime is at [an] alarming rate, the current law is inappropriate (Ha, 2012)".

This could be compared to what is in theory referred to as `fear of crime`, which has become a widely discussed and important notion within criminology. This idea that the media creates levels of fear of crime is by no means new. It is apparent however, that the public view of the extent of crime is strongly influenced by the picture painted by much of the news media, especially in relation to spiralling crime rates and the view that the criminal justice system is too lenient. According to a study looking at crime news in 2001, it was found that 76% of the public forms their opinions about crime from what they see or read in the news; this was three times the number of those who said they got their primary information on crime from personal experience (22%) (Marsh & Melville, 2009:1).

In that sense, public opinion plays an important role in the administration of criminal justice, and information about public attitudes is without doubt central to politicians and criminal justice professionals. Additionally, it should be pointed out that the media coverage of serious crimes, such as murder and armed robbery (which are the least common, as well as the more solvable crimes), can give the wider public the impression that the work by the police in general is effective in detecting and solving crime – enhancing the firm political stance on control and surveillance. In relation to punishment, then, it would seem that there is a divergence between what the actual situation is and what the public believes it to be (Marsh & Melville, 2009:129,181-182).

What becomes clear from the above discussion, following these statements and the analysis of the Le Van Luyen case, is that the state seems to have an evident willingness to maintain punitive measures in contrast to its international obligations in relation to juvenile justice.

### 5.2.2 Education and Rehabilitation: The use of Reform Schools

Depending on the nature of the crime, a child may be subject to non-custodial sanction (such as a warning, a fine or commune-level education). Yet, more serious sanctions include placement in a rehabilitation centre or in a reform school. While a detailed analysis of Vietnam's punitive measures falls outside the scope of this study, this section will only in short emphasis the interpretation (justification) of education and rehabilitation since the

Vietnamese utilisation of these concepts are found to vary to a great extent from the international interpretation.

As pointed out in previous chapters, there is a strong focus on education within the legal framework (Penal Code, Article 69(1) (2); Law on Child Protection, Care and Education Article 36, 56(1)). On face value, the nature and manner of detention in a reform school (which is a closed centre) reflects its rehabilitative purpose. On paper, reform schools in Vietnam offer a regime of education, counselling and vocational training to juveniles. The emphasis on these activities may distinguish a reform school from a regular prison setting or confinement in Vietnam. However, it is necessary to point out, without detailed discussion, the reality of the situation. First, it is important to highlight that in terms of the nature and manner of implementation in general, the administration, management and organization of the reform schools is notably under the control of the Ministry of Public Security, who are also responsible for the administration of the police force and prison system. In addition, it is the police who are the educators in the reformatories (UNICEF Vietnam, 2010; Hue Law University. 2014). Statements from Public Security and Youth Union representatives, as well as prison staff, agree that offenders are educated `to become lawful citizens who can live in compliance with state policy`. It was further stated that how much time and resources are spent on offenders should be limited since most of them are `social evils` with no ability to change (HCM City Legal Aid Conference & Hue Law University, 2014). Arguably, such statements underline Vietnamese leaders' interest to identify reforms that `works` defined in terms of what strengthens party legitimacy (Cox, 2011:25).

Most importantly, it has been found that reform schools house only a small number of youth sentenced by courts, referring to sentencing under the Penal Code (Lorens, 2013:44; Save the Children, 2014). In this regard, according to my findings, there is a state interest in keeping a high number of youths in reform schools due to the component of forced labour and thus, a clear indication that detention is used beyond simply a means of last resort. It has been previously documented that Vietnamese authorities deny the existence of child labour and forced labour in reform schools, claiming youths are involved in `training` or `vocational training` (Cox, 2011:26; Professor G, 2014; HRW, 2014).

It can be fairly argued then, that concerns about risk, including the risk of re-offending, the desire of the government to appear to be tough on crime and, the impact of the focus on policing targets can be seen to lead to a situation where young people are too readily placed in detention and reformatories (Weber et al, 2014:200). I was told by the VACPR, when asking about their view on the use of reform schools, that “the purpose is good, they are just not effective enough (VACPR, 2014)”. Arguably, the Vietnamese interpretation of education and rehabilitation can be seen to go hand in hand with public concern for youth crime. Once certain types of behaviour, and a category of deviants (youth) is identified, very small deviations from the norm become noticed, commented on, judged and reacted to (Goode & Ben-Yehuda, 2009:22). In that sense, minor offences (which most youth offences are), or even assemblies, might become offensive and immediately the focus of press and police attention due to constituting a threat and thus fuel the view that what today’s youth need is to be educated to become lawful citizens who can live in compliance with state policy. This confirms that there is an underlying interest within Vietnam’s system for dealing with juvenile offenders to remain mainly punitive (UNICEF Vietnam, 2010).

## 6 Conclusion

In contrast to viewing youth offending merely from a correctional perspective, this thesis has explored what is driving juvenile justice policy change in Vietnam. By looking closer at the Vietnamese context of juvenile justice, and the implementation of children's human rights, it has become clear that the current focus on penal policy have dominated the human rights discussion for far too long. It has also become clear that one of the greatest obstacles for Vietnamese youth today, especially for young people in conflict with the law, is the government's position that securing social order should have priority. As a result, this study has shown that children's human rights are still neglected to a great extent as the focus of the juvenile justice system remains highly punitive.

While my visit to Vietnam confirms that it is possible to speak more freely about children's human rights today, the sensitivity around the issue of juvenile justice remain obvious. It appears that youth crime, rights and justice continue to be regarded as highly political matters for the VCP and thus, pose a great challenge to bringing Vietnamese practice into line with international standards.

It has been further argued throughout this study that there are strong links between Vietnam's youth policies and the 'risk discourse'. The described alarming rise in youth crime seems deeply rooted in the perception that youth constitute a great risk to the social order of Vietnam. However, as this study has shown, there is an important distinction to be made between perceived risk and actual risk. By drawing a parallel to the social construction of deviance, the Vietnamese concern for a rise in youth crime should be viewed with caution as there are strong links to the Party's need and anxiety to justify limitations to the principle of best interest in the name of national security.

Finally, while Vietnam has given indications of making an effort to implement its obligations, juvenile justice in Vietnam is only in its early stages to be in full compliance with the CRC. Clearly, there is still a too wide margin of appreciation for the state to interpret and define both national security and best interest of the child. It is therefore believed important, particularly in a country like Vietnam that state sovereignty should be subject to

further limitations. If not, the law can continue to be used against the individual and hence, consequently result in the denial of fundamental human rights.

By looking at policing youth, and to what extent Vietnamese juvenile justice reform is in compliance with the CRC, it is most likely, given the structural factors underpinning the Vietnamese context, that the rule of law may still be an ideal far away. However, “whilst it is important to acknowledge some of the limitations of rights discourses, it is equally important to appreciate their continuing potential as the only existing benchmark for a common global language (Goldson & Muncie, 2012:61)”.



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