

DRUGS PROSECUTIONS IN VIETNAM: THE MODERN PROPAGANDA TRIAL

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Drug trials in Indonesia and Singapore involving Australians have received a lot of media attention since the arrest of Schapelle Corby in Bali in 2004 and the execution of Van Nguyen in Singapore in 2005. By contrast, the plight of Australians prosecuted for drug offences in Vietnam has been relatively unexplored, despite the fact that 16 Australians were tried for drug-related offences in the period from 1999 to early 2008. This article seeks to redress this gap by analysing the nature of the Vietnamese criminal courts and the extent to which Vietnamese drug laws, in particular the recently reformed Criminal Code 1999 and the Criminal Procedure Code 2003, have changed the prosecution and defence of drug-related offences. The authors argue that drug-related trials remain propaganda trials rather than spaces in which the guilt or innocence of the accused is established. Understanding that the Vietnamese criminal court operates to confirm guilt, rather than establish it, reinforces the importance of extra-legal strategies, such as the use of the media and clemency applications, when acting as defence counsel in Vietnam.

I INTRODUCTION

In recent years, there has been much writing, most of it by journalists, on Asian drug trials. In the Australian context, there have been three major news stories since early 2004 featuring drug prosecutions in Asia: Schapelle Corby's prosecution for importing (trafficking) cannabis in Bali; Van Nguyen's execution by the Singaporean authorities for possession of a trafficable quantity of heroin; and the detention, prosecution and sentencing of the 'Bali Nine' for heroin trafficking. The Australian press has covered these stories extensively using print, radio, television and the web.

Many of those writing about Schapelle Corby have argued her innocence, in part because of a perception that she faced a biased and technically ill-equipped court.¹ There were few voices reminding Australians that the very same court which was condemned as biased for finding Schapelle Corby guilty was also the

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** Associate, Baker & McKenzie. The authors would like to thank Chi Ha and Quan Nguyen for their research assistance. The authors are also indebted to various Vietnamese lawyers for their frank discussions with Nicholson, affording an insight into Vietnamese drug trafficking trials.

1 'Corby Breaks Down in Court', *The Age* (Melbourne), 7 April 2005; Editorial, 'Corby Verdict the Inevitable', *Sydney Morning Herald* (Sydney), 28 May 2005, 38. For an example of the widespread faith in Schapelle Corby's innocence, see 'I Want to Save Schapelle', *Fraser Coast Chronicle* (Queensland), 13 April 2004.

court that found Amrozi guilty of terrorist offences in 2004,² a verdict that was widely reported and celebrated in the Australian press.³ On the basis that the Australian public and media are now taking great interest in the prosecution of Australians in Southeast Asia for drug offences, it appears timely to turn the lens on to those trials involving Australian citizens that take place in Vietnam, away from the spotlight of the Australian media. Like Indonesia and Singapore, Vietnam retains the death penalty for ‘extremely serious’ drug offences. More specifically, in Vietnam, cases involving 100 grams or more of heroin or cocaine attract penalties from 20 years to life imprisonment or death.⁴ Not insignificant numbers of Australian citizens have faced or will face Vietnamese drug trafficking prosecutions.⁵

This paper argues that Vietnamese drug prosecutions (including those involving foreigners, in this case Australians), operate as ‘propaganda trials’, managed and produced by the party-state for local Vietnamese consumption. Ironically, these particular trials are not highlighted to the foreign media and in most cases pass with relatively little comment in the Australian and international press.⁶ This article will not spend time speculating on why less media time is dedicated to those facing the death penalty in Vietnam than on those on death row in Indonesia or, more recently, Singapore. Rather, it considers the nature and role of Vietnamese courts, Vietnamese drug laws, prosecution practices, judgments and enforcement mechanisms, arguing that Vietnamese drug trials operate not so much to determine guilt, but to deter others from trafficking.

Part II briefly introduces the Vietnamese legal system and its courts, noting the propagandist function of Vietnamese courts. It also introduces the role and function of the Vietnamese procuracy and police in drug investigations. Part III sets out the relevant laws relating to drugs in Vietnam, noting that drug-related laws in Vietnam have greatly expanded in the recent past. In discussing criminal procedure laws and pre-court processes, it is argued that newly introduced reforms do not appear to have radically changed prosecution practices. Part IV

2 Tim Lindsey, ‘Fact and Fiction in the Corby Case’, *Sydney Morning Herald* (Sydney), 27 May 2005, 15; ‘Sunk by Defence Team that Didn’t Rise to the Challenge’, *Sydney Morning Herald* (Sydney), 28 May 2005, 5. See also Tim Lindsey, ‘Fear, Loathing and Judgment: Australia, Law, Indonesia and Islam’ (Speech delivered at the Inaugural Professorial Lecture, University of Melbourne, 26 October 2005).

3 Joanne Collins and Karima Anjani, ‘It’s Death for Amrozi’, *The Age* (Melbourne), 18 August 2003; Catharine Munro, ‘Amrozi: A Killer Who Did Not Repent, A Clown Who Kept Smiling’, *The Age* (Melbourne), 8 August 2003.

4 *Criminal Code 1999*, 15/1999/QH10, art 194(4)(b) (‘*Criminal Code*’). See also *Resolution 01/2001/NQ-HDTP of the Judicial Council of the Supreme People’s Court, which provides guidelines for the application of a number of regulations set forth in the Criminal Code*. See especially art 3 of the *Resolution*, which provides details on the interpretation of art 194 of the *Criminal Code*.

5 See Part V below.

6 The exception here is the case of a Canadian, Nguyen Thi Hiep, who was executed in Vietnam on 24 April 2000 for allegedly trafficking heroin from Hanoi to Canada. See the various press releases issued by the Canadian Department of Foreign Affairs and International Trade. See especially Office of the Minister of Foreign Affairs (Canada), *Canada Condemns Execution of Nguyen Van Hiep* (2000) Foreign Affairs and International Trade Canada <http://w01.international.gc.ca/minpub/Publication.asp?publication_id=377662&Language=> at 26 March 2006.

discusses the difficulties faced by Vietnamese defence counsel in attempting to engage in legal argument and invoke rights on behalf of their clients, particularly within an emerging inquisitorial-adversarial hybrid trial system. Part V deals with penalties, noting the harsh conditions within Vietnamese jails and the Vietnamese party-state's attitude to the death penalty. The final part of the article discusses the implications of this analysis for those seeking to assist defendants facing drug trials in Vietnam.

In short, this article argues that the party-state in Vietnam determines guilt largely before trial.⁷ As such, drug trials in Vietnam operate more as propaganda trials than as a space in which legal arguments are tested or sought. Trials are the public face of a party-state system closely managed to '[protect] the socialist system'.⁸ The idea that drug trials operate as propaganda trials is also supported by Vietnamese appeals processes and reporting, which suggest that judgments are widely circulated and serve a very significant propagandist function.

II VIETNAMESE COURTS AND PROCURACY: INSTITUTIONS INTRODUCED

A Vietnamese Legal History Summarised

The Vietnamese legal system has been radically re-shaped at least three times under the influence of different powers: China, France and the Soviet Union.⁹ For many years, Vietnam was under the influence, if not control, of China. After achieving independence from China in 939 AD, the country developed an indigenous feudal administration informed by Chinese legal developments.¹⁰ In the late 18th century, the French claimed sovereignty over southern Vietnam and administered the central and northern parts of the country, introducing French civil law.¹¹ French law was variously applied throughout the country. From 1945, when Vietnam declared its independence from France, Soviet influence began to escalate north of the 17th parallel, where the country was divided pending the 1956 national elections to determine which government would lead Vietnam. Those elections were never held. The American-led allies shaped legal developments and training in the southern Republic of Vietnam between 1945 and 1975, whilst the legal system in the northern Democratic Republic of Vietnam developed along socialist lines, greatly influenced by Soviet legal developments.¹² With the

7 It is not possible to conceive of the Vietnamese State as separate from the Communist Party of Vietnam, hence the use of the term party-state. See Penelope (Pip) Nicholson, 'Vietnamese Courts: Contemporary Interactions Between Party-State and Law' in Stephanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (2007) 178.

8 *Criminal Procedure Code 2003*, 19/2003/QH11, art 1 ('*Criminal Procedure Code*').

9 Mark Sidel, 'Vietnam' in Poh-Ling Tan (ed), *Asian Legal Systems* (1997) 356.

10 M B Hooker, *A Concise Legal History of South-East Asia* (1978).

11 *Ibid.*

12 In relation to court development, see Penelope (Pip) Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (2007).

advent of *doi moi* or renovation in 1986, the party-state officially embarked on a radical legal reform process to enable the development of a socialist-oriented market economy.¹³

B Courts in Context

There is an emerging literature exploring and debating the Vietnamese court system, which goes beyond the parameters of this article.¹⁴ At its most basic, the Vietnamese court system is led by the Communist Party of Vietnam ('*The Party*')¹⁵ and is accountable to the National Assembly.¹⁶ While rapidly becoming a more self-managed institution, Vietnamese courts are not independent of government or the Party in the sense in which that term is understood in Western legal systems.¹⁷

In addition, the three tiers of the Vietnamese court system (district, provincial and central) each have particular tasks, which distinguish them from their Western counterparts.¹⁸

After setting out the court hierarchy and jurisdiction, art 1 of the *Law on the Organization of People's Courts 2002* provides that:

Within the scope of their functions, the courts have the task to protect socialist legislation; to protect the socialist regime and the people's

- 13 John Gillespie, 'Concept of Law in Vietnam: Transforming Statist Socialism' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law* (2004) 146. See also John Gillespie and Penelope (Pip) Nicholson (eds), *Asian Socialism and Legal Change* (2005).
- 14 See Nicholson, *Borrowing Court Systems*, above n 12; Penelope (Pip) Nicholson, 'Economic Rights and Land in the Socialist Republic of Vietnam: Rhetoric or Reality?' (Paper presented at the Legitimacy and Western and Non-Western Views of Human Rights, Barnes Symposium, University of South Carolina, 3-4 February 2006); Penelope (Pip) Nicholson, 'Vietnamese Jurisprudence: Informing Court Reform' in John Gillespie and Penelope (Pip) Nicholson (eds), *Asian Socialism and Legal Change* (2005) 159; Penelope (Pip) Nicholson and Nguyen Hung Quang, 'The Vietnamese Judiciary: The Politics of Appointment and Promotion' (2005) 14(1) *Pacific Rim Law and Policy Journal* 1; John Gillespie, 'Rethinking the Role of the Judicial Independence in Socialist Transforming East Asia' (2007) 56 *Journal of International and Comparative Law* 837; Brian Quinn, 'Vietnam's Continuing Legal Reform: Gaining Control Over the Courts' (2003) 4(2) *Asian-Pacific Law & Policy Journal* 431; Brian Quinn, 'Legal Reform and its Context in Vietnam' (2002) 15(2) *Columbia Journal of Asian Law* 219; Penelope (Pip) Nicholson, 'The Vietnamese Court and Corruption' in Tim Lindsey and Howard Dick (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (2002) 201.
- 15 Nicholson and Nguyen, above n 14. The authors argue that all candidates for judicial office are vetted by central and local members of the Communist Party of Vietnam and over 90 per cent of the judiciary is made up of Party members. Further, the Party has a tight hold on the interpretation and application of law.
- 16 *Constitution of the Socialist Republic of Vietnam 1992* art 135. See also *Resolution 49/NQ/TW of the Central Committee of the Communist Party of Vietnam on the Judicial Reform Strategy to 2020* (2 June 2005), which restates the Party's leadership role ('*Resolution 49*').
- 17 Nicholson, 'Economic Rights and Land in the Socialist Republic of Vietnam: Rhetoric or Reality?', above n 14; Nicholson and Nguyen, above n 14.
- 18 One of the most far-reaching reforms, suggested in s 2.2 of *Resolution 49*, proposes severing the geographical ties of local courts to local government and creating a new court at the regional (roughly equivalent to the district) level. The radicalism of this reform lies in instituting courts at a distance from the influence of grassroots political organisations, particularly the relevant People's Committees.

mastery; to protect the property of the State and collectives; to protect the lives, property, freedom, honour and dignity of citizens.

Through their activities, the courts shall contribute to educating citizens in the loyalty to the fatherland, the strict observance of law, respect for social conduct and the sense of struggle to prevent and combat crimes and other law offences.¹⁹

It is a measure of its connectedness to the Party that the court system is charged with shaping and informing community understandings of law and protecting the socialist legal tradition. This phenomenon was recently termed the ‘socialist law-based state’ (*nha nuoc phap quyen xa hoi chu nghia*). In particular, a public duty rests with the courts generally to educate citizens about the role of law and social order.

This article does not suggest that Vietnamese drug trials are ‘show trials’, a term invoking the excesses of the infamous Moscow purges of the Stalinist era.²⁰ Rather, we use the term ‘propaganda trial’ to highlight that these trials are the public face of a party-state legal system expressly designed to promote and protect socialist values by educating the public about the evils of drug use and trafficking.²¹ Drug trials, highly visible through the media and mobile courts,²² provide an example to the public of the party-state’s disciplining of behaviour that undermines a socialist understanding of law and order.²³ As the discussion in Parts IV and V details, the modern propaganda trial involves a measure of complexity in the party-state’s responses to individual accused persons. The party-state’s alertness to the management of its own legitimacy in the eyes of Vietnamese citizens is reflected in the different punishments it hands down; punishments that must necessarily reflect the narratives already disseminated before the trial occurs.²⁴

The Criminal Court of the Supreme People’s Court (‘SPC’), Vietnam’s highest court, exists as a division or chamber of the SPC. The *Criminal Code 1999* sets out the propagandist and educational role for the criminal courts:

The Penal Code has the tasks of protecting the socialist regime, the people’s mastery, equality among people of various nationalities, the interests of the State, the legitimate rights and interests of citizens and organizations, protecting the socialist legal order, opposing all acts of a criminal nature;

19 *Law on the Organization of Peoples Courts*, 06/20002/L/CTN (‘*Law on the Organization of People’s Courts 2002*’), art 1.

20 See, eg, Marc Jansen, *A Show Trial Under Lenin: The Trial of the Socialist Revolutionaries, Moscow 1922* (1982).

21 *Criminal Procedure Code* art 1; *Criminal Code*.

22 See the discussion below in this Part.

23 In needing to ‘constrain the arbitrary and random use of [hegemonic] power’ so as to ‘contribute to ... social peace and the legitimation of the political order’, socialist legal systems have much in common with legal systems in all other political orders: Raymond Michalowski, ‘Between Citizens and the Socialist State: The Negotiation of Legal Practice in Socialist Cuba’ (1995) 29 *Law & Society Review* 65, 67.

24 See the closing discussion at Part IV below.

at the same time educating people in observing the law and struggling to prevent and combat crime.²⁵

For many years, the Court's propagandist ('*truyen truyen*') function has been given effect via the extensive use of mobile courts.²⁶ For example, in 1964, the Court journal reported the use of over 600 mobile court hearings before more than 20 000 people.²⁷ At this time, court hearings were held in factories and in housing estates before workers and neighbours so that these groups would learn about law and the effects of breaking it.

The propagandist function is still taken very seriously. The SPC in its annual report to the National Assembly reported that 1 700 mobile court hearings had been conducted in 2003.²⁸ There were 2 500 mobile court hearings in each of 2004 and 2005.²⁹ These numbers are mentioned in the text of the report and it is not clear how they are collated. All mobile court hearings reportedly involved criminal matters.

In more recent times, the court has increased its use of court reporting to publicise its work and how the law operates. For example, court work is now regularly reported in newspapers such as *Nhan Dan* (the 'People', the Party's official daily newspaper); the *Saigon Daily Times*; *Lao Dong* ('Labour'); *Cong An Nhan Dan* ('People's Police'); *Quan Doi Nhan Dan* ('People's Army'); and *Saigon Giai Phong* ('Community Saigon').³⁰ In addition, there is now regular reporting of court cases on the television and radio.

In short, the propagandist role of the court continues to be taken seriously and can only be understood in the context of the argument that Vietnamese drug trials operate as propaganda trials. A key element of a Vietnamese drug trial is to educate the people about the evil of drugs and the harsh penalties that the state will mete out to those who break the law.³¹ Public trials and widespread reporting of them is a key responsibility of the criminal courts.

25 *Criminal Code* art 1.

26 Nicholson, above n 12, 129.

27 *Toa an Nhan dan Toi Cao* (1964) 8.

28 *Toa an Nhan dan Toi Cao* (2003) 4 reported 1 300 hearings for the first eight months of 2003. *Toa an Nhan dan Toi Cao* (2004) Report No 1, 3, reported 754 mobile court hearings for Quarter IV 2003 and Quarter I 2004.

29 *Toa an Nhan dan Toi Cao* (2004) Report No 2, 2, reported 2 000 mobile court hearings for the first eight months of 2004; *Toa an Nhan dan Toi Cao* (2005) Report No 2, 3.

30 Reporting has also increased to cover the work in other court jurisdictions. For example, in 1996 the *Saigon Daily Times* created its first page dedicated to reporting law and business and appointed a legally qualified reporter, Nguyen Hien Quan, to work part-time on relevant stories: Interview with Nguyen Hien Quan (October 2006).

31 Vietnam has a 10-year national plan (2001-2010) to fight drugs, which are cast as a 'social evil'. See, eg, the policy enunciated for Tieng Giang province: Hong Ha, *Aims of drug action plan for Tien Giang province during 2006-2010* [trans of: *Mục tiêu chương trình hành động phòng chống ma túy của tỉnh Tiền Giang giai đoạn 2006-2010*] <<http://www.tiengiang.gov.vn/xemtin.asp?cap=3&id=1653&idcha=999>> at 27 March 2006.

C The Procuracy: Its Reach and Role

The Procuracy (*'kiem sat'*), or People's Office for Supervision and Control, has had a long history in Vietnam, having been first introduced shortly after the Democratic Republic of Vietnam's Declaration of Independence in 1945.³² Between 1992 and 2001, the Procuracy had a broad brief, which included the oversight of all criminal prosecutions and the supervision and control of government activities on a national, provincial and district level.³³ However, in the recent past, the Procuracy has been the target of substantial reforms. Most recently, the Procuracy's energies have been focused upon criminal prosecutions, with its more general oversight of government activities having been radically curtailed.³⁴ The constitutional reforms of 2001 pared back the Procuracy's power.³⁵ The Procuracy is now responsible for public prosecutions and the supervision of 'judicial activities'.

In large part, the supervisory role of the Procuracy with respect to courts is given practical effect through pre-trial conferences (*'tham van'* or *'thinh thi an'*).³⁶ This practice involves meetings of staff from the SPC, the Procuracy, the police and the Party to determine the result of high profile trials.³⁷ As Quinn points out, the party not represented at a pre-trial conference is the defendant.³⁸ This procedure was reportedly used during the high profile corruption case of Nam Cam and in a case where a judge was tried for corruption.³⁹ While it has not been possible to confirm whether drug trials involving foreigners usually involve a pre-trial conference of this type, it is suggested that this is most likely to be the case.⁴⁰ There is nothing to suggest or require any different procedure, and the trial of a foreigner is a sensitive issue.

In hearing drug cases, the court works closely with the Procuracy. As explained below, it is the Procuracy that lodges the case with the court and manages the file, while the investigation and amassing of evidence is undertaken by the investigating police (*'cong sat'*).⁴¹

32 See *Constitution of the Democratic Republic of Vietnam 1959* arts 105–108 (*'DRVN Constitution'*).

33 For a detailed discussion of the role of the Procuracy between 1992 and 2001, see Quinn, 'Vietnam's Continuing Legal Reform', above n 14, 443–7.

34 *Ibid* 458–66.

35 *Constitution of the Socialist Republic of Vietnam 1992* (*'SRVN Constitution'*), as amended in 2001. Article 137 provides that the Procuracy 'shall exercise the right to initiate public prosecutions and control of the judicial activities, ensuring that laws are strictly and uniformly enforced'. The earlier equivalent provision listed numerous government organisations over which the Procuracy had supervisory responsibilities including ministries and 'people's armed units'.

36 See Brian Quinn, 'Soccer, Glitter and Corruption: Vietnam's Reform Effort – Twenty Years On' (Paper presented to the The Winston Lord Roundtable on Asia, the Rule of Law and US Foreign Policy, New York, 20 March 2006) 11–12 [copy on file with author]; Nicholson, 'The Vietnamese Court and Corruption', above n 14, 209–210.

37 *Ibid*.

38 Quinn, 'Soccer, Glitter and Corruption', above n 36, 12.

39 *Ibid*; Nicholson, 'The Vietnamese Court and Corruption', above n 14, 209–10.

40 Pip Nicholson, Interview with a Criminal Barrister (Hanoi, 31 May 2005).

41 *Criminal Procedure Code*; Pip Nicholson, Interview with a Vietnamese solicitor (31 May 2005).

III VIETNAMESE DRUG LAWS

The Vietnamese penal code has undergone extensive reform. Whereas the *Criminal Code 1986* had only one article prohibiting drug offences,⁴² there are now four main sources of law governing drug prosecutions in Vietnam: the *Criminal Code 1999*, the *Criminal Procedure Code 2003*, *Resolution 01/2001/NQ-HDTP* dated 4 August 2000 (*Resolution 01/2001*) – an internal resolution of the Justice Council of the SPC – and resolutions guiding the application of the *Criminal Code* more generally that also relate to drug-related trials.⁴³

Chapter XVIII of the *Criminal Code* introduces 25 new articles dealing with drug-related crimes and makes clear that those involved in trafficking drugs will be strictly and harshly punished. In this article, the focus is on those drug offences most often alleged against foreigners, rather than those offences that are more likely to apply to local defendants.⁴⁴ Article 194 deals with ‘possession, transporting, trade in or appropriation of narcotics’.⁴⁵ Offences are classified into levels of seriousness depending on the quantity of drugs involved.⁴⁶ The less serious offenders receive 2–7 years imprisonment (where less than five grams of heroin or cocaine is involved).⁴⁷ Serious offenders receive 7–15 years imprisonment (where the amount of heroin or cocaine involved is 5–30 grams).⁴⁸ In very serious offences (involving 30–less than 100 grams of heroin or cocaine), defendants found guilty receive up to 20 years imprisonment⁴⁹ and in extremely serious cases (involving 100 grams or more of heroin or cocaine), penalties range from 20 years to life imprisonment or death.⁵⁰

Article 194 also prescribes penalties for the ‘possession, transporting, trade in or appropriation’ of other drugs including dried and fresh poppy fruit and marijuana.

42 *Penal Code 1986* art 203 (Organising the use of narcotics).

43 *Resolution 01/2006/NQ-HDTP of the Judicial Council of the Supreme People’s Court* provides guidelines for application of a number of provisions of the *Criminal Code* (*Resolution 01/2006*).

44 For example, there will be no discussion in this paper of the offence of growing opium poppies and marijuana set out at art 192 of chapter XVIII of the *Criminal Code*.

45 *Criminal Code* art 194.

46 *Criminal Procedure Code* art 8(2).

47 *Criminal Code* art 194(1).

48 *Criminal Code* art 194(2)(h).

49 *Criminal Code* art 194(3)(b).

50 *Criminal Code* art 194(4)(b). See also *Resolution 01/2001* art 3, which provides details on the interpretation of art 194 of the *Criminal Code*.

A Establishing Guilt

In Vietnam, drug offences are strict liability offences. Possession of a particular quantity of drugs is sufficient to establish guilt.⁵¹

There is no burden of proof resting on the prosecution alone in a Vietnamese drug trial. As set out above, there is a triangulated responsibility existing between the investigators, the Procuracy and the courts to establish that the crimes alleged have been made out.⁵² More particularly, the investigators are entrusted to compile the dossier, pursue evidence they assess as being relevant to the investigation and produce a recommendation for the Procuracy.⁵³ The Procuracy then determines whether or not to institute proceedings on the basis of the evidence supplied by the investigators. The Procuracy also reviews the legality of the investigation⁵⁴ and makes recommendations to the courts as to how the case ought to be handled.⁵⁵ Finally, the courts review the file and determine whether to proceed to trial or suspend the matter for additional investigation.⁵⁶ Following trial, the courts (constituted by judges or judges and assessors) proclaim publicly their decisions relating to guilt, sentencing and execution of judgment.⁵⁷ Trials do not involve a jury. Although ‘people’s assessors’ are lay representatives, they sit with powers to determine cases equal to those of judges.

The *Criminal Procedure Code* makes it clear that the Procuracy and the court cooperate in reviewing the file and that the Procuracy makes recommendations as to guilt and sentencing before the case proceeds to trial. The general procedures of the Vietnamese law enforcement system are not uncommon for civil law countries; what is less common is the pre-trial practice outlined above, which produces verdicts and sentences in advance of the defendant’s hearing.

B Presumptions

In Vietnamese criminal law, there is no presumption of innocence. Local scholars argue instead that there exists a presumption of ‘not guilty’, which reflects a literal reading of the relevant legislation. More particularly, the ‘not guilty’ approach stems from art 72 of the *Vietnamese Constitution 1992* and the current *Criminal Procedure Code*, which provides that:

51 Compare with the general principles on intention set out at art 9 of the *Criminal Procedure Code*. Article 9 establishes that a crime is intentionally committed if either ‘the offenders are aware that their acts are dangerous to society, foresee the consequences of such acts and wish such consequences to occur’ or if ‘the offenders are aware that their acts are dangerous to society, foresee the consequences that such acts may entail and do not wish, but consciously allow, such acts to occur’.

52 *Criminal Procedure Code* art 10. Time limits apply to the investigations. See *Criminal Procedure Code* art 119.

53 *Criminal Procedure Code* arts 34–5.

54 *Criminal Procedure Code* art 36.

55 *Criminal Procedure Code* art 37.

56 *Criminal Procedure Code* arts 38–9.

57 *Criminal Procedure Code* arts 9, 38, 39.

No one shall be considered guilty nor be punished until there is a final and conclusive judgment of the Court.⁵⁸

Local scholars argue that the wording of art 9 of the *Criminal Procedure Code* suggests that not only is the accused in a criminal trial ‘not guilty’, but that this also applies to people arrested or detained pending official charges.⁵⁹ In effect, anyone facing the possibility of charges, whether or not formally charged, is subject to the ‘not guilty’ principle.⁶⁰

Judges and the courts⁶¹ have an active role in asserting the ‘truth’ of the case in an objective, comprehensive and complete manner.⁶² This responsibility rests with the courts and their staff so that the legal system does not ‘wrongly convict the innocent’ or ‘let any crime go unpunished’.⁶³ This approach (‘spirit’ or ‘*y tinh*’) differs from a presumption of innocence in a number of respects. First, in the Vietnamese court system, the courts play a part in the investigation, such that their neutrality is less clear. Second, the Procuracy, which presents a criminal matter to court, also supervises the work of the court, including its determination of cases.

Consequently, Vietnamese judges (or judicial staff) do not presume or regard the accused as ‘innocent’. They are permitted to trust and follow their ‘inner beliefs’ in determining the culpability or innocence of the accused and in determining whether to stay the proceeding or bringing the accused to court.⁶⁴ All that is required by the presumption of ‘not guilty’ is that the judges (and other people involved in the proceeding, such as the prosecution and the police) do not treat the accused as a criminal until the court decides that to be the case.⁶⁵ The legal obligation on investigative bodies, the prosecution and the court to collect exculpatory evidence and clarify both aggravating and mitigating circumstances is said to act as an assurance that justice will be done

In practice, the presumption ceases to operate when there is a final and conclusive court judgment. Under Vietnamese appeal procedures, a court judgment is ‘final and conclusive’ when the right to appeal a trial judgment expires without having

58 *Criminal Procedure Code* art 9.

59 *Criminal Procedure Code* arts 239, 240. Mai Thanh Hieu ‘The Scope within which a subject is entitled to presumption of innocence in the criminal procedure law of the Vietnam’ [2004] 1 *Jurisprudence Magazine*, 27–31.

60 Mai Thanh Hieu, above n 59, 27–31

61 *Criminal Procedure Code* art 33.

62 *Criminal Procedure Code* art 10. Such objectivity is nevertheless questionable. See, eg, Pham Hong Hai, *Analytical framework for the Criminal Procedure Code of Vietnam* (1998) 180, stating that in practice, many people still consider a judge’s decision to bring a case to the court as his or her approval of the opinions expressed by the investigators and the prosecutors with respect to the case.

63 *Criminal Procedure Code* art 1.

64 Hoang Thi Son and Bui Kien Dien, *Fundamental Principles of the Criminal Procedure Code of Vietnam* (2003) 69–81.

65 *Ibid.*

been exercised (that is, 15 days after a judgment has been delivered),⁶⁶ the appeal judgment is issued or a decision to stay the appeal is issued.⁶⁷

Further, the presumption operates differently in Vietnam than, for example, in Australia. This is due to several related considerations. First, there is no jury in Vietnamese criminal trials. As a result – and in light of the earlier comments made about the close working relationship between judges, procurators and investigators – the presumption does not have the same significance as it does in a legal system where a jury of lay people are instructed by the judiciary to determine the facts in criminal trials. Second, there is no right to silence in Vietnam. The effect of the presumption of ‘not guilty’ is potentially undermined by the requirement to explain events.

Vietnamese scholars have argued that the ‘not guilty’ principle reflects the supreme decision-making power of the courts as the ‘sole governmental agency’⁶⁸ to hear and determine innocence or guilt. Local scholars also suggests that the ‘not guilty’ principle is more concerned with ensuring and maintaining the ‘required attitude’ of impartiality and independence of ‘judicial staff’,⁶⁹ rather than with the protection of fundamental rights.⁷⁰

In practice, the ‘not guilty’ principle carries little weight. A well-known Vietnamese barrister, Pham Hong Hai, has reported that some officials do not accept the ‘not guilty’ principle.⁷¹ It is reported that defendants and detainees are often treated as if they were already convicted.⁷²

However, it is suggested by local commentators that the presumption is particularly useful in cases where the evidence is equivocal and the investigation and assessment by the Procuracy neither eliminates suspicion nor produces sufficient evidences to convict. In such cases, the evidence should be interpreted positively in favor of the accused (*‘giai thich theo chieu huong co loi’*).⁷³

These interpretations of the ‘not guilty’ principle have to be understood in the context of a system where cases are very often determined before trial. One way of reconciling pre-trial sentencing with a ‘not guilty’ assumption is that technically no punishment can be given effect without a court order and that a court order is a public declaration of the guilt of the accused.

66 *Criminal Procedure Code* art 240.

67 *Criminal Procedure Code* arts 238, 240. Mai Thanh Hieu, above n 59, 27–31.

68 Nguyen Ngoc Anh, *Scientific comments on the 2003 Criminal Procedure Code* (2003) 23–24. See also Nguyen Quoc Viet, *Scientific comments on the 2003 Criminal Procedure Code* (2005) 23–25.

69 Hoang Thi Son and Bui Kien Dien, above n 64, 69–81.

70 See, eg, Hoang Thi Son and Bui Kien Dien, above n 64, 69–81. See also Nguyen Quoc Viet, above n 69, 23–25.

71 Pham Hong Hai, *Analytical framework for the Criminal Procedure Code of Vietnam* (2003) 125.

72 *Ibid.*

73 Interview with Unnamed Criminal Barrister (Hanoi, 12 June 2007).

C Evidence

The *Criminal Procedure Code* provides that all material evidence (defined as ‘anything which may have been used as an instrument or means for a criminal purpose’)⁷⁴ ought to be saved and formally recorded on the dossier.⁷⁵ Material evidence to be relied upon in any case must be included in the dossier. Where it cannot physically be filed, photos of the evidence must form a part of the dossier.⁷⁶

An accused is expected to provide a statement of facts with respect to the allegations made against them.⁷⁷ This wording also suggests that there is no right to silence, as the language of the *Criminal Procedure Code* states that a detainee or accused ‘shall’ make a statement. However, a confession of an accused will not determine a case unless there is other evidence to support the confession.⁷⁸ The use of torture to extract confessions has been reported.⁷⁹

The state collates the evidence and there appears to be very limited opportunity to test it. Lawyers acting as defence counsel in criminal cases have explained that they are unable to challenge drug reports,⁸⁰ or at least cannot effectively test drugs for either weight or purity.⁸¹ It is suggested that the Procuracy and investigators ensure that the ‘results remain the same’ if they do not want to see any change to the drug report.⁸² Further, the testimony of forensic experts placed on the dossier can only be questioned by the state, and only the state can seek additional expert forensic evidence.⁸³

Recent users of the Vietnamese system report that short trials of less than two hours, even for serious charges involving the death penalty, are the norm.⁸⁴ This is consistent with the practice by which crucial discussions and decisions about a case take place at the pre-trial conference.

D Forum

Where a foreign national faces a drug trafficking charge that is for ‘less serious’, ‘serious’ or ‘very serious’ criminal acts, the matter will proceed in the district court closest to the place where the alleged offence took place.⁸⁵ However, where

74 *Criminal Procedure Code* art 74.

75 *Criminal Procedure Code* art 75.

76 *Criminal Procedure Code* art 75 (1).

77 *Criminal Procedure Code* arts 71, 72.

78 *Criminal Procedure Code* art 72.

79 Paul Norris, ‘Consular Assistance – In Trouble with the Law In Asia’ (Paper presented at Asian Law Centre, Occasional Seminar Series, the University of Melbourne, Melbourne, 11 May 2005).

80 *Ibid.*

81 Interview with Unnamed Criminal Barrister (May 2008).

82 *Ibid.*

83 *Criminal Procedure Code* art 73.

84 Paul Norris, above n 79.

85 *Criminal Procedure Code* arts 170, 171.

‘particularly’ or ‘extremely’ serious charges are alleged (such as trafficking more than 100 grams of heroin), the court at first instance will be the criminal division of the relevant provincial court. Appeals go to the next highest court in the hierarchy.

E Appeals

The *Criminal Procedure Code* provides for appeals on the basis of new evidence, fact or law.⁸⁶ It is a cornerstone of the Vietnamese justice system that any accused can have ‘two instance’ adjudication.⁸⁷ In the case of district court trials, appeals lie to the relevant provincial court. In the case of provincial court trials, appeals lie to a provincial appeals court. It is open to the court hearing the appeal to dismiss the appeal, amend the first instance judgment (either increasing or decreasing the penalty), rescind the first instance judgment, suspend the case or order a re-investigation of the evidence.⁸⁸

In addition, cassational (re-opening) review (*‘giam doc tham’*) can be sought at the SPC. A cassational review can be sought where ‘a serious violation of the law has been discovered’.⁸⁹ A defendant has 15 days in which to lodge an appeal.⁹⁰ The Procuracy has seven days in which to lodge an appeal of a first instance decision, or otherwise the same 15-day limit applies.⁹¹

In all cases where the death penalty is ordered, the dossier must be sent to the President of the SPC for review.⁹² Within two months of receipt of the dossier, the SPC President and the General Procurator of the Supreme People’s Procuracy must review the file and determine whether there is a need for a cassational review.⁹³ If a review is sought, the case proceeds before the Council of the SPC. Within seven days of the decision of the Justice Council (if there is a cassational review) and within seven days of the decision of the President of the SPC and the Procurator General (if there is no cassational review ordered), the accused can seek a presidential pardon.⁹⁴

Success rates for appeals are very low. In 1999, the SPC annual report noted that only six people were acquitted on appeal (equating to 0.07 per cent of criminal decisions being overturned). Further, no drug convictions were set aside in that

86 *Criminal Procedure Code* art 246.

87 *Criminal Procedure Code* art 20.

88 *Criminal Procedure Code* arts 248, 249. See especially art 249 (on amending first instance judgments); art 250 (on re-investigation and re-hearing); and art 251 (on suspension of the case).

89 *Criminal Procedure Code* art 272.

90 *Criminal Procedure Code* art 234(1). Time is said to run from the date on which a judgment has been served on the accused.

91 *Criminal Procedure Code* art 238.

92 *Criminal Procedure Code* art 258.

93 *Criminal Procedure Code* art 258.

94 *Criminal Procedure Code* art 258.

year.⁹⁵ The 2000 report claimed that in drug-related convictions were set aside in 14 cases.⁹⁶ More recent court reports have been less specific about the nature of the criminal charges that were set aside on appeal,⁹⁷ although it was noted in 2003 that seven innocent people were acquitted and in 2004 that five innocent people were acquitted.⁹⁸

IV DEFENCE COUNSEL AND THE TRIAL

A Access to the Court File

As already mentioned, there has been a substantial review of the criminal procedure law in Vietnam culminating in the revised and newly introduced *Criminal Procedure Code 2003*. Key reforms give defence counsel a right to access the case dossier before trial and to access his or her client.⁹⁹ In the past, it was reported to be almost impossible for counsel to get access to the file in advance of the hearing, and certainly impossible to have copies made.¹⁰⁰ Today, it is reported that once access to the file has been obtained, it is possible to take extensive notes and on many occasions it has also been possible to take photos or photocopies of the contents of the file.¹⁰¹

While local lawyers have celebrated these reforms, grave concerns have also been expressed about the need for counsel to seek and obtain specific certification as counsel representing a defendant before obtaining access to the file. The *Criminal Procedure Code* provides that once a defendant has sought the services of a defence counsel (an approach in fact usually undertaken by a family member or friend not in custody), the advocate¹⁰² must apply to the investigating body, Procuracy or court ‘enclosing documents relating to the defence’.¹⁰³ Within three days, the organisation from which the certificate has been sought is required either to issue or refuse a certificate confirming representation and enabling access to the

95 *Toa an Nhan dan Toi Cao, Bao Cao Toa An Nhan Dan an Nam 1998 va Phuong Huong Nhiem vu Cong Tac Toa an Nam 1999* (Report of the Supreme People’s Court) (1999), 9.

96 *Toa an Nhan dan Toi Cao, Bao Cao Cong Tac Nghanh Toa an Nam 1999 va Phuong Huong Nhiem vu Cong Tac Toa an Nam 2000* (Report of the Supreme People’s Court) (2000) 9.

97 See *Toa an Nhan dan Toi Cao, Bao Cao Cong Tac Nghanh Toa an Nam 1999 va Phuong Huong Nhiem vu Cong Tac Toa an Nam 2000* (Report of the Supreme People’s Court) (2002); *Toa an Nhan dan Toi Cao, Bao Cao Cong Tac Nghanh Toa an Nam 1999 va Phuong Huong Nhiem vu Cong Tac Toa an Nam 2000* (Report of the Supreme People’s Court) (2004).

98 *Toa an Nhan dan Toi Cao* (2004), above n 98.

99 *Criminal Procedure Code* art 58(2).

100 Interview by Nicholson with Criminal Barrister (Hanoi, 31 May 2005).

101 *Ibid.*

102 It is not essential that a detainee or defendant be represented by a solicitor/barrister. The *Criminal Procedure Code* art 56(1) provides that lawyers, advocates and the defendant are all capable of being defence counsel.

103 *Criminal Procedure Code* art 56(4).

court file.¹⁰⁴ If a certificate is refused, reasons for that refusal must be supplied.¹⁰⁵ Further, if a person has been detained pending charges, the investigating police must determine whether to issue a certificate within 24 hours.¹⁰⁶

In practice, it is reported that obtaining a certificate to represent a detainee or defendant is not straightforward. It is alleged that agencies have diverse responses and attitudes to enabling access to the dossier. For example, it has been suggested that the courts, particularly in Hanoi, are more willing to issue the requisite certificate to counsel than either the Procuracy or the investigating police, particularly in the provinces in the north of the country.¹⁰⁷ As the file usually reaches the court at least 15–20 days before trial, this allows for some preparation.¹⁰⁸ It has also been suggested that in some of the smaller districts, it is easier for barristers from bigger cities (such as Hanoi or Ho Chi Minh City) to get access to the court file as a result of the awe in which practitioners from these centres are held.¹⁰⁹ Finally, it has also been noted that different institutions often seek different documentation to establish the client-counsel relationship. Some courts accept a letter confirming instructions on firm letterhead, while others seek a contract signed by the client, which can be hard to obtain if he or she is in custody

B Access to the Client

Practitioners have also reported that it is hard to get access to their clients.¹¹⁰ A lawyer can expect to see his or her client twice for a serious case and once for a simple case.¹¹¹ Commenting on the provisions dealing with access to clients, a criminal barrister practising in Hanoi stated that ‘the big changes in the criminal procedure code with respect to access to clients have, so far, changed nothing’.¹¹²

Perhaps more importantly, lawyers acting in the criminal jurisdiction report that, with the exception of death penalty cases and cases involving young offenders, the Procuracy and investigators remain ‘obstructive’ as they do not want to see lawyer involvement increase.¹¹³

104 *Criminal Procedure Code* art 56(4).

105 *Ibid.*

106 *Ibid.*

107 Interview by Nicholson with criminal barrister (Hanoi, 31 May 2005).

108 *Ibid.*

109 *Ibid.*

110 Paul Norris, above n 79.

111 Interview by Nicholson with criminal barrister (Hanoi, 31 May 2005).

112 Interview by Nicholson with criminal barrister (Hanoi, 31 May 2008).

113 *Ibid.*

C Role of Morality

Vietnamese barristers report that the morality of the accused is regarded as a crucial factor in drug trials.¹¹⁴ Counsel is required to address the court prior to sentencing on the moral fibre of the accused, providing details as to their age, whether he or she has served the government (for example, by serving in the military or being a state employee), and whether he or she has demonstrated good ethics (for example, by playing a constructive role in the local community or in the family).

However, arguing the morality of the accused is not always left to counsel in court. Several local advocates have suggested that where there is a coherent story to tell that might exculpate, or at least reduce the culpability of an accused, it is important to circulate the story in the local press. For example, if an accused was subject to abuse such that she he or she was coerced into drug trafficking against his or her will, this narrative must be publicly circulated pre-trial.¹¹⁵ Advocates have reported that it is necessary to mobilise public opinion to sympathise with the plight of the accused. It has been explained that unless the court is made aware of public sympathy (through media editorials and reports); they risk a backlash if the court appears soft on crime.¹¹⁶

V PENALTIES

A Introduction to Penalties

An analysis of recent drug trafficking cases involving Australians tried under the new Vietnamese *Criminal Code* reveals certain patterns in sentencing practices. This analysis suggests that sentencing is a critical part of the Vietnamese party-state's 'propaganda trials'. This is manifested in two ways: first, while initially harsh sentences are frequently handed down at the trial stage, these sentences are not infrequently softened on appeal.¹¹⁷ In particular, once an appeal is made to the President for clemency and the new sentence is delivered privately and with little media scrutiny, the sentence is often less harsh. Second, there are certain bases, set out below, on which the courts will exercise their discretion to reduce maximum penalties, including where a foreign party is involved.

114 Interview by Nicholson with criminal barrister (Hanoi, 31 May 2005) and communications with unnamed Vietnamese solicitor (26 September 2002).

115 Communication with unnamed Vietnamese solicitor (26 September 2002).

116 Ibid.

117 Compare this with the practice in Singapore where a convict facing the death penalty cannot expect clemency. In the case of the Australian Van Nguyen, the Victorian and federal governments raised the issue of clemency with the Singaporean authorities. In addition, a Singaporean-Australian legal team challenged the constitutionality of his death sentence. All attempts to dissuade the Singaporean government from carrying out the death penalty failed: <http://en.wikipedia.org/wiki/Nguyen_Tuong_Van> at 12 February 2008. See also 'Just Punishment', ABC TV <<http://www.abc.net.au/tv/guide/netw/200612/programs/ZY8535A001D7122006T212000.htm>> at 26 February 2008.

As indicated in Part B, the Vietnamese party-state metes out dire penalties for those involved in drug offences. A small difference in the quantity of illicit drugs trafficked alters the penalty from a fine or term of imprisonment to the death penalty under both the new *Criminal Code* and *Resolution 01/2001*.¹¹⁸

Chapter V of the *Criminal Code*, which deals with penalties, lists several groups who are exempted from the death penalty. These include juveniles, pregnant women and women nursing children under 36 months. Their death penalties are to be commuted to life imprisonment.¹¹⁹ Further, life imprisonment does not apply to juvenile offenders.¹²⁰ In effect, neither of the harshest penalties (death penalty or life imprisonment) applies to juveniles.¹²¹

Further exemptions from the primary sentencing principles exist for those who assist in the investigation and detection of other criminals and where an attempt is made to minimise the impact of the crime committed.¹²²

B Discretion and Sentencing at Trial

Both the *Criminal Code* and *Resolution 01/2001* give a trial court discretion with respect to sentencing. Articles 45 and 46 of the *Criminal Code* provide guidance on the 'bases for deciding penalties'. Article 45 states that in deciding penalties, the courts shall take into consideration:

the nature and extent of danger posed to society by the acts of offence, the personal records of the offenders, and any circumstances that *extenuate* or *aggravate* the penal liability.¹²³

Article 46(1) then provides a list of 18 specific 'extenuating' circumstances available for consideration when deciding penalties. Although art 35 already provides that pregnant women are exempt from the death penalty, art 46(1) (k) provides that pregnancy is also an extenuating circumstance. Article 46(1) (r) provides that an offender who has 'recorded outstanding achievements in production, combat, study or work' can also place these achievements before the

118 Compare the quantity of narcotics trafficked against the corresponding prescribed penalty in resolutions 3(a), 3(b) and 3(c) of *Resolution 01/2001/NQ-HDTP*. Where there are no 'aggravating circumstances' nor 'extenuating circumstances', amounts between 100 to less than 300 grams of heroine or cocaine attract a prescribed penalty under resolution 3(a), whilst amounts in excess of 600 grams of either substance attracts the death penalty under resolution 3(c).

119 *Criminal Code* art 35.

120 *Criminal Code* art 34.

121 The *Criminal Code* does not define 'juveniles' but art 2.2 of *Resolution 01/2006* defines children 'as those who are under 16 years of age'. The *Criminal Code* supplies some additional guidance on the impacts of age on liability in art 12. It provides that those aged 16 or over 'bear penal liability for all the crimes they commit'. This is consistent with *Resolution 01/2006*. But art 12 also provides that persons aged 14 or 15 remain liable for very serious crimes committed intentionally and particularly serious crimes. This is inconsistent with the exceptions outlined in art 35 and art 2.2 of *Resolution 01/2006*. Assuming that the more particular art 35 will be given more weight in sentencing practices, it appears that there is scope for flexibility when sentencing minors 16 or under.

122 *Criminal Code* art 25.

123 *Criminal Code* art 45 (emphasis added).

court. A court is also empowered to consider other extenuating circumstances not provided under art 45(1) on a case-by-case basis, but must provide a clear explanation of the extenuating circumstance in accordance with art 45(2). Finally, art 53 states that the court can take into account the ‘the nature of complicity and the nature and extent of involvement of each accomplice’.

Aggravating circumstances are dealt with in art 48 of the *Criminal Code*. For example, where crimes are perpetrated against ‘children, pregnant women, aged persons, persons unable to defend themselves or persons dependent on defenders’, the crimes are deemed more serious and those determining penalties can take these aggravating circumstances into account.¹²⁴

Resolution 01/2001 details the penalties for drug-related offences where there are no aggravating or extenuating circumstances or where they cancel each other out. *Resolution 01/2001* applies when an accused faces prosecution under either art 193 or 194 of the *Criminal Code*. Article 194 is the article most frequently alleged against Australians on trial for trafficking (transporting) cocaine and heroin.

Resolution 01/2001 states that when determining a penalty under arts 193 or 194 of the *Criminal Code*,

the Court must refer to regulations of the Criminal Code to consider the nature and degree of acts of criminal offences to the society, records of offenders, extenuating circumstances and aggravating circumstances of penal liability.¹²⁵

While discretions exist, harsh penalties are still routinely applied. That said, local barristers comment on the inconsistency of sentencing, particularly at the district and provincial court level.¹²⁶ As cases are not published, it is not possible systematically to analyse sentencing practices. However, it has been suggested anecdotally that where large amounts of drugs are involved – for example in excess of one tonne – and there are up to 10 defendants, not all will receive the death penalty. At least one criminal barrister has suggested this is not the result of applying the sentencing discretions located within the legislation, but rather the result of one judge not wishing to carry the responsibility for sentencing 10 people to death.¹²⁷

Presidential clemency, sought when the death penalty has been ordered, is granted only after all appeal processes have been exhausted. This means that the drama of the courtroom is left intact and the party-state’s policy of being ‘harsh on crime’ undisturbed.

124 *Criminal Code* art 48(1)(h).

125 *Resolution 01/2001* art 1.

126 Interview with Unnamed Criminal Barrister (31 May 2008).

127 *Ibid*.

It is also possible to seek an early release, also known as a special amnesty, from the President.¹²⁸ In 2006, details on how to judge whether to award a special amnesty were proclaimed.¹²⁹ Factors to be taken into include good jail record; active study and work in jail and successful re-education, the fact that the prisoner poses no risk to national security and completion of the minimum sentence required for a particular order.¹³⁰ For example, a prisoner must have completed half of the ordered period in custody, unless special circumstances exist.¹³¹

Media searches of drug trials involving Australians in Vietnam between 1999 and early 2008 have shown the following penalties:¹³²

- one death sentence,¹³³
- seven people sentenced to life imprisonment (including six conversions from the death penalty),¹³⁴
- six people sentenced to over 15 years imprisonment with or without fines,¹³⁵
- two sentenced to less than 15 years imprisonment.¹³⁶

The particular cases of Nguyen Thi Kim Hieu ('Nguyen') and Tran Thi Hong Loan ('Tran') illustrate the principle that mothers of young children receive different treatment from the court. In both cases, the Ho Chi Minh City Court reduced

128 Guideline 1/TVDX (25 February 2000) on the implementation of Decision 35/QD-CTN (23 February 2000) of the State Presidency on Clemency. See also the Law on Clemency, No 07/2007/QH12 (21 November 2007).

129 Decision 797/2006/QD-CTN (7 July 2006).

130 Ibid.

131 Ibid. The decision also enumerates conditions in which a prisoner is not eligible for special amnesty. For example, if a prisoner convicted of drug-related crimes concurrently commits other criminal offences while drug affected, they are precluded from seeking a special amnesty.

132 At the time of writing, a Victorian couple, Nguyen Van Huy and Hoang Le Thuy, had been arrested at Ho Chi Minh City airport in July 2006, and to date details of their circumstances have not been ascertained. Nguyen Van Huy and Hoang Le Thuy have been accused of trying to smuggle half a kilogram of heroin out of Vietnam to Australia. See Daniel Hoare, 'Australians Arrested in Vietnam on Drug Charges', *Australian Broadcasting Corporation – AM Radio* (Sydney) (2006) ABC <<http://www.abc.net.au/am/content/2006/s1681302.htm>> at 1 October 2006. In addition three further Australians are awaiting trials following arrests reported on 13 February 2007. These include Jasmine Luong: Komfie Manalo, 'Australian Woman Arrest For Drug Trafficking in Vietnam' (2007) Foreign Prisoner Support Service <<http://www.usp.com.au/fpss/news-asia/news-vietnam105.html>> at 10 May 2007. The other prisoners are Nguyen Tuan Khanh and Tran The Luan. Further, on 14 July 2008, *The Age* online reported that Nguyen Thanh Huyen had been arrested while in transit at Tan Son Nhat airport in Ho Chi Minh City for allegedly stowing 73 g of heroin in her underwear: *The Age* <<http://news.theage.com.au/world/aussie-arrested-in-vietnam-for-heroin-2--80714-3flm.html>> at 15 July 2008.

133 Tony Manh, arrested in March 2007. Manh's appeal from his death sentence failed on 22 November 2007. See, eg, 'Diplomats Monitoring Aussie on Death Row', *Sydney Morning Herald* (Sydney) 22 November 2007.

134 Le My Linh, arrested in 2001; Nguyen Thi Kim Hieu, arrested in 2002; Phan Thi Ngoc Phuong, arrested in 2002; Tran Van Thanh, arrested in 2005; Mai Cong Thanh, arrested in 2006; Nguyen Van Chinh, arrested in 2006 and Trinh Huu, arrested in 2005.

135 Quach Tieu Buu (2002); Tran Van Viet (2003); Pham Martin (2003); Tran Tony (2004); Tran Thi Hong Loan (2004) and Kant Nguyen (2008).

136 Phan Jeny was released within months because of her age (a minor under Vietnamese law) and Phan Ngoc Viet Phi was sentenced to four years jail but was released within two years.

the sentences of the two women because they were mothers of young children.¹³⁷ Nguyen was sentenced to life imprisonment and fined a nominal sum despite her offence involving over 800 grams of heroin; a quantity that would clearly attract the death penalty under the *Criminal Code* without the aforementioned exemptions.¹³⁸ Similarly, Tran was caught with half a kilogram of heroin but received the relatively light sentence of 20 years imprisonment.

Other Australians have received the benefit of the minors' exemption. For instance, leniency was shown to the young offenders Phan Jeny and Phan Ngoc Viet Phi.¹³⁹

Tran Van Viet and Pham Martin, and Nguyen Manh Cuong (in a separate case) received lesser sentences because they were found to be accomplices rather than primary offenders in the trafficking of narcotics.¹⁴⁰ There has also been media speculation that Nguyen Manh Cuong received a lesser sentence as a result of an alleged mental disability.¹⁴¹ Although there is no evidence from official sources to support this suggestion, art 46(1)(m) of the *Criminal Code* cites evidence of mental incapacity as a circumstance extenuating penal liability.

137 When captured, Nguyen was married with three young children. The youngest was only two years old at the time of her arrest. Tran was also the mother of a one-month old baby. Recall that art 35 of the *Criminal Code* provides that mothers of children up to 36 months are exempted from the death penalty. For news articles regarding the Nguyen drug bust, see 'Australian Faces 20 Years in Jail for Drug Trafficking', *ABC News Online* (Sydney) 26 March 2003 and Kirsty Needham, 'Sydney Woman Gets Life After Vietnam Drug Bust', *The Age* (Melbourne), 20 March 2003. For news articles about the Tran case, see Quan Hien, 'Vietnam Jails Australian 20 Years for Drug Traffic', *Thanh Nien Daily* (Ho Chi Minh City) 18 July 2005.

138 'Australian Faces 20 Years in Jail for Drug Trafficking', *Australian Broadcasting Corporation News Online* (Sydney) 26 March 2003. Nguyen was arrested at Tan Son Nhat International Airport in January 2002 as she boarded a flight to Sydney. She told the court that she had been paid US\$35 000 to transport the drugs to Sydney by another Vietnamese-Australian.

139 In November 2002, three sisters, Phan Thi Ngoc Phuong, Phan Jeny and Phan Ngoc Viet Phi, were caught attempting to smuggle 656 grams of heroin into Australia. Under art 194 of the *Criminal Code*, this would normally attract a death penalty. However, the eldest sister, 25-year-old Phuong (who did not actually have any drugs on her) was found guilty of instructing her younger sisters to carry the drugs and sentenced to life imprisonment. 12-year old Jeny was released within months for being a minor and 14-year-old Phi was sentenced to 4 years but officially released after 22 months. See 'Govt Providing Assistance to Sisters Charged with Drug Offences', *ABC News Online* (Sydney) 5 November 2002; 'Sisters Jiled Over Vietnam Drug Charge', *ABC News Online* (Sydney) 12 June 2003 and 'Australians serving time in Vietnamese Prisons', *ABC Law Reporter*, 24 May 2005 <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1374457.htm>> at 26 March 2006.

140 28-year old Tran Van Viet and 47-year old Pham Martin were sentenced to 16 and 20 years imprisonment respectively for being accomplices to Tran Van Thanh's attempt to traffic 700 grams of heroin in June 2003. See 'Vietnam Sentences Australian Man to Death for Drug Trafficking', *The Associated Press* (New York) 8 November 2004, circulated on *The Vietnam News* <<http://perso.wanadoo.fr/patrick.guenin/canthon/vnnews/ausman.htm>> 26 March 2006.

141 See, eg, Connie Levett, 'Bid to Save Australian from Execution', *Sydney Morning Herald* (Sydney) 11 June 2005.

C Death Penalty

The death penalty is regularly ordered in Vietnam.¹⁴² Where neither extenuating nor aggravating circumstances exist, drug trafficking involving more than 600 grams of heroin or cocaine carries the death penalty.¹⁴³ In the *Death Penalty News*,¹⁴⁴ Amnesty International suggests that in Vietnam, as many as 21 were executed in 2005 and at least 65 people were sentenced to death.¹⁴⁵

Nevertheless, as noted above, there have been many instances in which Australians' death penalties have been commuted to life imprisonment, most often on 'humanitarian grounds'.¹⁴⁶ In 2006, Mai Cong Thanh¹⁴⁷ and Nguyen Van Chinh¹⁴⁸ were granted clemency by the Vietnamese President. The decision in these two cases followed pleas for clemency reportedly made by the Australian Foreign Minister, Alexander Downer.¹⁴⁹ The Vietnamese spokesperson for the Foreign Ministry cited 'humanitarian policy' as the basis for the reversal of the

142 Amnesty International reported that at least 88 people were sentenced to death in 2004: *Amnesty International Report (2005)* Amnesty International <<http://web.amnesty.org/report2005/vnm-summary-eng>> at 26 March 2006.

143 *Resolution 01/2001* art 3. Article 3 provides details on the interpretation of art 194 of the *Criminal Code*.

144 *Death Penalty News* (January 2006) is a news bulletin published by Amnesty International which provides regular updates on the death penalty and related statistical information. It was retrieved from the Amnesty International website: <<http://web.amnesty.org/library/Index/ENGACT530012006?open&of=ENG-392>> at 10 April 2006.

145 *Ibid.*

146 For example, the official statement by Le Dzung, the Spokesman of the Vietnamese Ministry of Foreign Affairs, cites 'humanitarian tradition' as one of the reasons for commuting Tran Van Thanh's death sentence to life imprisonment. See Vietnamese Ministry of Foreign Affairs, 'President of the SRV Tran Duc Luong has Decided to Commute Tran Van Thanh's Death Sentence to Life Imprisonment' (Spokesman's statement, 23 August 2005) <http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns050824085221> at 26 March 2006.

147 Mai Cong Thanh was allegedly caught in 2003 attempting to smuggle 1.7 kilograms of heroin into Australia for distribution. Arrested in May 2003, he was sentenced to death by the Ho Chi Minh City's People's Court in the country's standard one-day trial on 9 June 2005. He lost his appeal in 2005 and faced death by a firing squad but was granted presidential clemency in early February 2006.

Thanh Nien Daily (Ho Chi Minh City) 9 June 2005, at <<http://thanhniennews.com/society/?catid=3&newsid=7175>> at 26 March 2006.

148 Nguyen Van Chinh was sentenced to death by the HCMC People's Court following an arrest in December 2000 when a drug raid on his hotel room revealed possession of a substantial amount of heroin. He was sentenced to death on 22 April 2005 and this was upheld by the HCMC Supreme People's Court in July 2005. According to foreign press, Nguyen was linked to Sydney gangs and had already successfully smuggled heroin from Vietnam to Australia earlier that year, purchasing heroin from several local Vietnamese drug dealers. His appeal was quashed in 2005 but he eventually received presidential clemency along with Mai Cong Thanh in February 2006. See Le Nga, 'Vietnam Upholds Death Penalty for Australian Pusher', *Thanh Nien News* (HCMC) 23 April 2005 at <<http://thanhniennews.com/overseas/?catid=12&newsid=7790>> at 26 March 2006; 'Australian Faces Firing Squad Over Trafficking', *Sydney Morning Herald* (Sydney) 23 April 2005 at <<http://www.smh.com.au/news/World/Australian-faces-firing-squad-over-trafficking/2005/04/23/1114152356093.html?oneclick=true#>> at 26 March 2006; 'Australian Given Death Penalty in Vietnam for Drug Trafficking', *Thanh Nien News* (Ho Chi Minh City) 23 April 2005 at <<http://thanhniennews.com/overseas/?catid=12&newsid=6303>> at 26 March 2006.

149 Associated Press Online, 'Vietnam Commutes Aussie's Death Sentence' (2006).

original death penalty.¹⁵⁰ Clemency was also granted to Le My Linh in 2001,¹⁵¹ Tran Van Thanh in 2005 and Nguyen Van Chinh and Trinh Huu in 2006.¹⁵²

The emerging pattern is that, unless defendants fall into one of the legally recognised exemptions, initial penalties are invariably harsh with clemency or leniency being granted only on appeal to the President.¹⁵³ More particularly, where Australians have received the death penalty, there is evidence of party-state leniency. Since 1999, no Australian national has been executed, although one currently remains on death row.¹⁵⁴

It is suggested that one reason for the relative leniency toward Australian nationals is that whilst the Vietnamese party-state emphasises its sovereignty, the country is vulnerable to diplomatic pressure, particularly on human rights issues. Since the adoption of the *doi moi* ('renovation') policy in 1986, Vietnam is no longer hidden from the world and openly courts international relationships to foster investment and economic development.¹⁵⁵ Vietnam is acutely aware of the adverse reporting on its continuing use of the death penalty. The 2006 *Ministry of Foreign Affairs Report on Human Rights* includes the following:

150 Ibid.

151 Le My Linh was caught with almost a kilogram of heroin at Tan Son Nhat International Airport in November 2001 whilst attempting to board a plane to Sydney. She was sentenced to death but following a successful clemency plea by Foreign Minister Alexander Downer, her sentence was reduced to life imprisonment. See Alexander Downer, 'Death Sentence Upheld on Le My Linh' (Press Release, 23 December 2002) at <http://www.foreignminister.gov.au/releases/2002/fa198_02.html> at 26 March 2006; Mr Jull, Interview with Alexander Downer, Minister for Foreign Affairs (Questions without notice in the Senate, 29 August 2002) at <http://www.dfat.gov.au/qwon/2002/qwn_020829a.html> at 26 March 2006.

152 Tran Van Thanh was sentenced to death on 5 November 2004 for drug trafficking, aged 34 years old. He was convicted of attempting to smuggle 700 grams of heroin in a tube welded into a ship container. He was arrested in 2003 in the southern city of Dalat named as part of a drug syndicate smuggling heroin from Cambodia to Australia via Vietnam. The syndicate was exposed in June 2003 when police arrested a corrupt local Vietnamese official (*can bo*), Pham Dai Nhon. Tran's appeal was quashed in March 2005 but clemency was granted to him in August 2005, commuting his death sentence to life imprisonment. See 'Australian Arrested in Vietnamese Drug Trafficking Crackdown', *ABC News Online* (Sydney) 5 July 2003, at <<http://www.abc.net.au/news/newsitems/200307/s895599.htm>> at 26 March 2006.

153 The only exceptions are where the law itself allows a sentencing court to be lenient as in the case of Nguyen Thi Kim Hieu; in the case of minors, as in the case of the Phan sisters; and for mentally disabled defendants, as is suggested in the case of Nguyen Manh Cuong. See discussion above.

154 Research suggests that four Australian nationals have been executed in Southeast Asia for drug trafficking in Malaysia and Singapore. Australians Brian Chambers and Kevin Barlow were executed in Malaysia on 7 July 1986 for heroin trafficking. Michael McAuliffe was hanged in Malaysia on 19 June 1993 also for heroin charges and Nguyen Van Tuong was executed also for trafficking charges in Singapore in 2005. The execution of these individuals was widely published by media sources. See, eg, Peter Hiatt, 'Brian Chambers and Kevin Barlow Executed in Malaysia', *The Guardian* (United Kingdom) 7 July 1986 at <<http://www.guardian.co.uk/fromthearchive/story/0,,1255112,00.html>> at 1 October 2006; Alexander Downer, Minister for Foreign Affairs, 'Singapore Death Penalty Case' (Transcript of Interview with Alexander Downer available on Minister of Foreign Affairs website at <http://www.foreignminister.gov.au/transcripts/2005/051021_ds.html> at 1 October 2006.

155 See also Vo Van Ai 'Human Rights and Asian Values in Vietnam' in Michael Jacobsen and Ole Bruun (eds), *Human Rights and Asian Values Contesting National Identities and Cultural Representations in Asia* (2000) on Vietnamese attitudes to human rights.

The Vietnamese State has pursued the policy of narrowing the scope of capital punishment, gearing towards its abolition in the future. Along this line, in the 1999 *Penal Code*, the number of offences subject to capital punishment is reduced from 44 to 29.¹⁵⁶

Domestic statements about the need to revisit the role of the death penalty have also been made in *Resolution 8* and *Resolution 49* of the Vietnam Communist Party.¹⁵⁷ However, while it may be the case that review of the death penalty is on the policy agenda, it is also publicly defended:

To meet the needs of the fight against crimes, particularly drug-related ones, Vietnam now maintains capital punishment.¹⁵⁸

By granting clemency through political avenues, rather than through the court system, the Vietnamese party-state is able to maintain a divide between the theatre of legally sanctioned harsh penalties and a political policy of avoiding the death penalty where Australian citizens are involved. In all cases since 1999 where Australians were sentenced to death for drug trafficking, those sentences were confirmed on appeal. They were only successfully reduced to life imprisonment on application to the President for clemency, which is not a public hearing.

Each appeal process saw statements being made about the severity of punishments handed out to Australians. For example, the Vietnamese spokesperson for the Foreign Ministry, Le Dzung, commented publicly on Nguyen Van Chinh's plea for clemency before it was finally granted in February 2006:

The Vietnamese court tried these cases in accordance with Vietnam's legal procedures ... The mitigation of the punishment is within the jurisdiction of the State President and relevant agencies such as the Court and the Procuracy. The Vietnamese side will convey the proposal for mitigation of the punishment for the two cases to the President and authorised agencies of Vietnam.¹⁵⁹

It is suggested that whereas the reporting of criminal drug trials is widespread, including where foreigners are involved, the fact of the President acceding to a request for clemency is not widely reported. Certainly, in the two most recent cases where death penalties meted out to Australians were commuted to life imprisonment, the reporting in Vietnam was scant.¹⁶⁰

156 Ministry of Foreign Affairs, *Achievements in Protecting and Promoting Human Rights in Vietnam* (2005) 23 (the 'White Book').

157 *Resolution 8 on Forthcoming Principal Judiciary Tasks*, CPV/2002, analysed in more depth in Pip Nicholson, 'Vietnamese jurisprudence informing court reform' in John Gillespie and Pip Nicholson (eds), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (2005) 159–190. See also *Resolution 49* s 2.1.

158 Ministry of Foreign Affairs, above n 156.

159 'On the capital punishment of two Australians for illegal drug trafficking', *Nhan Dan* (Hanoi) 5 August 2005 at <<http://www.nhandan.com.vn/english/life/050805/2tin.htm>> at 11 September 2006.

160 The only record of the pardon located electronically was on the Ministry of Foreign Affairs website: <http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns05082408221> at 11 September 2006. This suggests that its publication targeted an international audience rather than a domestic one. Online sources for major Vietnamese dailies did not record this fact.

It is also possible that the granting of presidential clemency after an Australian national has failed on appeal may form part of an implicit understanding between the Vietnamese government and the Australian Federal Police.¹⁶¹ It is possible that in extremely serious drug trafficking cases, defendants will receive the death penalty in accordance with the party-state's strict anti-drug policy, but the execution will not actually take place as a *quid pro quo* for Australian assistance in drug investigations. There is no evidence to support this suggestion, but it is a possible policy. Alternatively, the rationale may have nothing to do with Vietnamese-Australian cooperation, but may be the result of a Vietnamese policy not to implement the death penalty where the death penalty does not apply to a Vietnamese citizen and where the defendant's government is prepared to seek presidential clemency.¹⁶² The Vietnamese spokesperson from the Ministry of Foreign Affairs, Le Dzung, explains the granting of clemency in opaque terms:

It's a proper punishment for drug trafficking and trading crime ... [but] prompted by the humanitarian tradition, by the good relationship between Australia and Vietnam and based on the appeal for pardon from Tran Van Thanh, President of the Socialist Republic of Vietnam Tran Duc Luong has decided to commute Tran Van Thanh's death sentence to life imprisonment.¹⁶³

Whatever the reason, it appears that the Vietnamese have an 'unspoken' policy not to execute Australian citizens convicted of drug trafficking where an appeal for clemency has been made by the Australian government.¹⁶⁴

D Prison Conditions

Given that in 2008 at least 14 Australians were serving lengthy jail sentences in Vietnam, it is relevant to examine their prison conditions. Vietnamese jails are reportedly harsh with very poor facilities. An Australian lawyer reported the on jail conditions he encountered when visiting his client in the Chi Hoa Detention prison in Ho Chi Minh City:

There's the use of tiger cages, which are essentially holes in the ground with a roof entry, 3 x 3 metre size during the investigation stage, and the light being left on 24 hours a day.¹⁶⁵

161 On 4 March 2004, the Vietnamese National Police Force and the Australian Federal Police, in a *Memorandum of Understanding*, committed openly to cooperate and collaborate in investigating international crimes such as 'terrorism, human trafficking, illicit drugs, money laundering and other major crime types': AFP Manager Marketing and Communication, 'AFP Strengthens Relations with Off-shore Law Enforcement Agencies' (Press Release, 4 March 2006) at <http://www.afp.gov.au/__data/assets/pdf_file/7947/nat_060304_offshorerelations.pdf> at 1 October 2006.

162 Ibid.

163 Vietnamese Ministry of Foreign Affairs, 'President of the SRV Tran Duc Luong has Decided to Commute Tran Van Thanh's Death Sentence to Life Imprisonment' (Spokesman's statement, 23 August 2005) at <http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns050824085221> at 26 March 2006.

164 Interview with unnamed bureaucrat (12 June 2007).

165 'Australians serving time in Vietnamese Prisons', *ABC Law Reporter*, 24 May 2005, at <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1374457.htm>> at 26 March 2006.

A similar description was contained in a letter from a Canadian national to his family while serving time in the same prison. Randy Sachs of Ontario, Canada, was jailed in 2003 for drug trafficking offences, aged 26. The *Ottawa Citizen* quoted Sachs describing the ‘four-by-seven-metre cell’ which he shared with seven other inmates:

We slept on a straw mat on the floor, which is rough cement ... Urine dripped from the cracked ceiling above my aching head.¹⁶⁶

According to Sachs, severe malnutrition and dehydration are common amongst inmates.¹⁶⁷

Sachs’ letter was smuggled out of the country and eventually circulated to newspaper sources such as the *Ottawa Citizen*. It contains accounts of extortion practices by prison guards and other detainees in the prison, particularly targeting foreign prisoners who are likely to receive money from their families during their jail term. In his letter, Sachs recounted how money received by fellow inmates from their families was often used to bribe guards to obtain necessities such as water and medical attention, which were rationed in low levels or withheld altogether. In particular, Sachs’ letter reported a lack of dental care for prisoners, stating that he had lost at least 10 teeth since his arrival at the prison.

An Australian lawyer has confirmed the claim that prisoners largely have to buy nourishment and services:

The worst thing is that the prison is self-funded by the prisoners. Prisoners have to pay for everything, including their daily water allowance, and it’s particularly difficult during the investigation phase.¹⁶⁸

The challenge of buying water is made more difficult by the inability of family and friends to have access to the accused:

After someone is arrested, they’re not allowed any access with the outside world in terms of relatives, and in most cases lawyers, while the police investigate with the prosecutors and prepare the case. That phase lasts for four to six months.¹⁶⁹

The Vietnamese embassy in Ottawa has denied Sachs’ account of prison conditions in Vietnam, adding that detainees serving time in Vietnamese prisons are treated humanely.¹⁷⁰ However, bodies like Human Rights Watch have similarly described ‘extremely harsh’ prison conditions:

¹⁶⁶ Glen McGregor, ‘Desperate Canadian Inmate Pleads for Mercy in Vietnam: Malnutrition, Illness Run Wild in Corrupt Prison Letter Claims’, *The Ottawa Citizen*, 6 June 2005.

¹⁶⁷ *Ibid.*

¹⁶⁸ ‘Australians serving time in Vietnamese Prisons’, above n 165.

¹⁶⁹ *Ibid.*

¹⁷⁰ Glen McGregor, above n 166.

cramped, dark, unsanitary cells; lack of access to medical care; and of police beating, kicking, and using electric shock batons on detainees.¹⁷¹

E Prisoner Exchange Agreements

Australia currently has prisoner exchange agreements with Thailand¹⁷² and the Council of Europe¹⁷³ as part of its International Transfer of Prisoners scheme. The legislative framework for Australian participation in this scheme is provided under the *International Transfer of Prisoners Act 1997* (Cth).¹⁷⁴ These agreements operate largely in the same way. They allow Australian nationals who are imprisoned in participating countries to apply to serve the remainder of their sentences in an Australian prison and vice versa.¹⁷⁵ A prisoner's eligibility is subject to satisfaction of specified criteria.¹⁷⁶

As yet, Australia does not have a prisoner exchange agreement with Vietnam. However, in 2005, the Minister for Justice, Senator Chris Ellison, reportedly stated that Australia was in the process of negotiating prisoner transfer agreements with Vietnam and Cambodia.¹⁷⁷

VI 'PROPAGANDA TRIALS' INTACT

This article argues that there has been much reform of Vietnamese criminal law since 1998. The result is a much clearer statement of the applicable law. There is nothing covert about the Vietnamese party-state's tough stance on drugs. However, focussing on the relevant codes alone obscures the way Vietnamese drug cases are investigated and tried and the vital social-educational role played by the courts.

Vietnamese criminal drug trials do not necessarily test evidence or enable the negotiation of a plea bargain. Instead, the trial operates as a short public statement

171 Human Rights Watch, *World Report 2005 – Vietnam* (2005) Human Rights Watch <<http://hrw.org/english/docs/2005/01/13/vietna9828.htm>> at 26 March 2006.

172 *Agreement between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences*, opened for signature 26 July 2001 (entered into force 26 September 2002).

173 *Council of Europe Convention on the Transfer of Sentenced Persons*, opened for signature 21 March 1983 (entered into force 1 January 2003).

174 *International Transfer of Prisoners Act 1997* (Cth).

175 *Agreement between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences*, opened for signature 26 July 2001 (entered into force 26 September 2002) art 2; *Council of Europe Convention on the Transfer of Sentenced Persons*, opened for signature 21 March 1983 (entered into force 1 January 2003) art 2.

176 The Australian Government, Attorney-General's Department provides a *Frequently Asked Questions Factsheet* which lists the criteria for the transfer of prisoners through the Transfer of Prisoners scheme and can be accessed at <<http://www.ag.gov.au/agd/WWW/criminaljusticeHome.nsf/AllDocs/8E2F9C2015142030CA2570A40008D86F?OpenDocument>> at 26 March 2006.

177 'Scramble to Prevent Aussie's Execution', *The Sunday Times* (Sydney) 11 June 2005.

of verdict and sentence, often widely reported by the local media. A Vietnamese 'propaganda trial' involves a party-state that is confident of its result.

Counsel wishing to assist Australians facing drug prosecutions in Vietnam must understand that Vietnamese trials operate domestically as a 'propaganda trial'. To be effective, advocates must intervene well in advance of a trial date. Further, campaigns aimed at reducing sentences or indeed pleading innocence should be waged publicly and through the media to have a real impact on the courts. A propaganda trial becomes a piece in a public drama about the eradication of the social evil of drug trafficking. To persuade the court to exercise its discretion it is best to have a public informed and supportive of the legitimacy of leniency in a particular case. In such cases, the court is justified in the eyes of the public when it is relatively less harsh. The great irony is that the 'drama' involved in the propaganda trial is limited, short and sharp. The theatre needed to reduce a sentence needs to take place before the court date, in order to set the stage for a less harsh sentence.¹⁷⁸

178 *Criminal Procedure Code* art 10.