

Non-Extraditability on the Ground of the Political Nature of The Offenses from the Perspective of Thailand

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Introduction

Extradition is one of the most crucial international legal mechanisms without which international cooperation in criminal matters that aims at joint suppression of local and transboundary Common Law crimes, and more particularly transboundary organized crimes, will never be comprehensive and efficient. Thailand has long been involved with this type of international cooperation¹. This has almost become a routine matter for the Thai Administration and the public at large in Thailand up to the point that an extradition of criminals or accomplices to crimes committed in foreign countries no longer attracts the attention of the public, unless it concerns or involves persons who are public figures like the recent scandalous case of a prominent Thai politician who was alleged to have been involved in narcotic drugs trafficking. We will later briefly look at this case. Extradition was designed to be an instrument that allows a country to cope with an embarrassing situation where a crime can be committed in impunity if the criminal succeeds in escaping from the country where the crime was committed into the territory of another country.

Present day means of communication are so developed that a journey which would have required months of travel in the past can now be achieved in one day or even half a day. The natural consequence

of such a development is foreseeably and inevitably ever-increasing international contacts and activities, both at governmental and non-governmental levels. Distance barriers and legal obstacles separating peoples of different countries from each other have been gradually reduced in such a manner that transboundary travels have become a common daily phenomenon. Each day millions of people travel from country to country. Modern day telecommunications have rendered the distance barrier completely insignificant. The daily circulation of a multitude of people across borders from country to country makes it extremely difficult, if not impossible, to efficiently screen in-coming and out-going people in order to prevent undesirable elements and criminals from entering or leaving a country. Hence, the possibility for criminals to commit crimes, then escape across the border into another country to evade arrest and punishment. The sacred nature of sovereignty makes it impossible to avoid impunity of criminals without cooperation of the country into whose territory the criminals have fled. It is desirable neither for the country in whose territory the crimes were committed, nor for the country in whose territory the criminals have taken refuge, that the latter country become an asylum or haven for perpetrators of crimes. Yet such would be the case, had it not been for the international legal mechanism known as "Extradition". In principle, a crime is criminally punishable

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¹ Thailand concluded international treaties on extradition with the United States of America in 1922 which were subsequently modified by another treaty in 1988, and with the United Kingdom in 1911.

in a country only if it is or deemed to have been committed in that country. True it is that, in exercising its jurisdiction *ratione personae*, a country may provide in its penal law for the possibility to punish a criminal found in its territory for a crime that such a criminal has committed abroad when either the criminal or the victim or both are its nationals². However, this possibility alone does not suffice to provide remedies for the cases where neither the criminals nor the victims are its nationals. Even if there are provisions under the national legislation which permit punishment for certain crimes committed abroad, such provisions normally cover only a limited number of categories of crimes which directly perturb the security or public order of the country.³ The logical consequence of such a situation would be that once a criminal has quitted the country in whose territory the crime was committed he could be beyond the reach of the law for good if the country of refuge does not surrender the criminal to the country where the crime was perpetrated. A persistence of such circumstances will surely end up by encouraging all criminals to escape across the border into another country in quest of asylum, to the detriment of the country where the crimes were committed, and in the long run, to the detriment to humanity as a whole. That is the reason why extradition is an indispensable international legal instrument

for the world community in its fight against crimes that involve more than one country.

In contemporary State practice, extradition has been mostly utilized as an international legal instrument to deter and suppress drug trafficking related crimes which have of late been ravaging just about every country in the world. Thailand figures among the number of countries that often receive extradition requests for prosecution of persons alleged to have been involved in narcotic drug trafficking activities. Without cooperation on the part of Thailand in this matter, a global approach for drug trafficking suppression may never be really complete, a *fortiori*, when a portion of Thailand forming part of the notorious Golden Triangle is known to be one of the drug production grounds⁴. Through a serious joint endeavour between Thailand and international drug suppression agencies to put an end to poppy cultivation in the Golden Triangle by encouraging and persuading hilltribesmen to grow substitute plants in lieu of poppies, the volume of drug production in the Thai portion of the Golden Triangle has been reduced to only one percent of the total volume of drugs produced in the Golden Triangle⁵. Thailand, however, still remains one of the most important drug trafficking routes in Asia on account of its proximity with the southern portion of China and its long common boundaries with Myanmar

² For instance Article 8 of the Thai Penal Code, B.E. 2499, stipulates that whoever commits an offense outside the Kingdom shall be punished in the Kingdom provided that:

(a) the offender be a Thai person, and there be a request for punishment by the Government of the country where the offense has occurred or by the injured person or
(b) the offender be an alien, and the Thai Government or Thai person be the injured person and there be a request for punishment by the injured person.

and provided further that the offense committed be any of the following, namely:

(1) Offense endangering Public Safety as provided in Section 217, Section 218, Sections 221 excepting the case relating to the first paragraph of Section 220, and Section 224, Section 226, Sections 228 to 232, Section 237 and Sections 233 to 236 only when it is the case to be punished according to Section 238.

(2) Offenses relating to Documents as provided in Section 264, Section 266, Section 266(1) and (2) Section 268 excepting the case relating to Section 267 and Section 269.....

(13) Offenses of Mischief as provided in Sections 368 to 360.

³ Article 7 of the Thai Penal Code B.E.2499.

⁴ the so called "Golden Triangle" which comprises a portion of Thailand, a portion of Myanmar, former Burma and a portion of Laos now includes also a portion of China.

⁵ Information officially given jointly by Police General Chavalit Yodmanee, Head of the Narcotic Drug Suppression Committee and the representative of the UN Drug Suppression Agency in a televised program of Channel 9, July 15, 1994.

and Laos, where, according to the UN statistics, the biggest portion of drugs originating in Asia is produced. The question of extradition for prosecution of drug trafficking related activities has recently become a thorny issue in Thailand when there was a widespread scandal generated by a rumour and a subsequent declaration of the US Embassy in Thailand through USIS that an indictment was filed by a Federal Grand Jury in California, U.S.A., against Mr. Thanong Siripreechapong, a prominent MP belonging to the Chart Thai Party, the largest of the five opposition political parties at that time. The indictment alleged that he was involved in the smuggling of approximately 49 tonnes of marijuana to the United States between 1973 and 1987. His Beverly Hills residence and luxury car in the United States were seized by the US authorities because there were well-founded grounds to believe that they were purchased by the proceeds from such drug trafficking. Subsequently there was a widespread rumour that the United States might request an extradition of MP Thanong Siripreechapong for the purpose of his eventual prosecution in a United States court. The media and the academic circles in Thailand began then to ask themselves how the Thai authorities should react if ever the United States really decided to make such a request. Obviously there must have been informal consultations between the US and the Thai authorities in this regard, because it was reconfirmed by reliable sources that ultimately the United States seemed to have decided then not to request the extradition of MP Thanong and merely express a hope that Thailand would prosecute MP Thanong in a Thai court in compliance with the *aut dedere, aut judicare* principle. According to the US authorities, he would surely be declared guilty by the US court had he been extradited to the United States, given that the eleven accomplices of MP Thanong were already convicted and sentenced to be imprisoned on the very same grounds. No official reaction on the Thai side has ever been explicitly announced, thus leaving the public in Thailand in the dark, not knowing what the Thai authorities would do if the United States authorities really requested the extradition

of MP Thanong, and not knowing why no legal action has been taken by the Thai authorities against MP Thanong in this regard. Even though this issue is not directly related to the non-extraditability on the ground of the political nature of the offense, in the absence of any in-depth study of this matter it should be of great interest to the public from an academic standpoint to look into this matter before entering into the heart of this study. After all, this matter does constitute one or even two exceptions to the issues on non-extraditability.

It is highly probable that the US authorities could have decided then not to request the extradition of MP Thanong because they were aware, perhaps after an unofficial consultation with the Thai authorities, that it was impossible for Thailand to extradite MP Thanong to the United States for an eventual prosecution in the US court because of his Thai nationality. Though the US authorities could, according to the spokesperson of the US embassy as reported in the Thai media, argue that nothing in the Thai-US Extradition Treaty prevents its Contracting Parties from extraditing their respective nationals to each other, the treaty in question does stipulate as a proviso that "if not prevented from doing so...."⁶ which connotes that if such an extradition is prevented by anything or in any way, e.g. by legislation or by the competent authorities of that Contracting Party, the permissive stipulation that a national can be extradited shall not be applicable. According to a well-informed source of information in the Ministry of Justice who took part in the negotiations of the current Thai-US extradition treaty, it was clearly stated in the agreed minutes of the negotiation of this treaty that the Thai side already officially informed the American side that the Thai extradition Act B.E.2534 did not allow such extradition. The American delegation nonetheless insisted upon the inclusion of such a proviso in the treaty in view of the fact that the American law did not systematically prohibit extradition of American nationals if the authorities deemed it appropriate, even though it was probable that in certain cases the American authorities might deem it inappropriate to do so. Thus the

⁶ Article 8 of Treaty between the Government of the Kingdom of Thailand and the Government of the United States of America relating to Extradition, 1988.

inclusion of such a proviso would accommodate the concerns and difficulties of both Contracting Parties.

As to the question why the Thai authorities have so far abstained from taking any legal action against Mr.Thanong, in spite of the urging of the American side that the Thai government prosecute MP Thanong in the case where it decided not to extradite him to the United States in compliance with the “aut dedere, aut judicare”⁷ principle, one can easily understand this seemingly strange phenomenon by simply referring to the proviso relating to the requirement to prosecute the alleged offender as stipulated in the Thai-US Extradition Treaty. According to the Thai-US Extradition Treaty, in the case where a Contracting Party declines to extradite its national to the requesting Contracting Party, that Contracting Party is obliged to prosecute the alleged offender whose extradition is requested, provided however that the court of law of that Contracting Party has the competence to adjudicate in such a case. In the light of such a proviso, one can easily understand the inactivity of the Thai authorities with respect to the requested prosecution of MP Thanong. The reasons for the inaction of the Thai authorities in this regard is very likely motivated by the fact that, primo, drug trafficking does not figure among the offenses which are punishable in Thailand, even though they are committed in another country as listed in article 8 and 9 of the Thai Penal Code.⁸ Secundo, even though under the Prevention and Suppression of Narcotics Act B.E.2534,⁹ an offense related to narcotic drug trafficking committed abroad is punishable in Thailand, MP Thanong cannot be prosecuted before a Thai tribunal because the stipulation in article 5 of the Prevention and Suppression of Narcotics Act is not applicable retroactively to the alleged drug trafficking in question

which was committed before the entry into force of the said Prevention and Suppression Act. Consequently MP Thanong will be punishable under Thai law in Thailand only if it can be established beyond any possible doubt that part of the commission of such an offense occurred in Thailand, Evidently the American authorities must have failed to be able to provide the Thai authorities with a concrete proof to that effect.¹⁰

As stated in the footnote, this portion of the introductory part is designed merely to present a general background involving the complexity of the problems related to extradition.

From a logical standpoint the four issues stipulated in article 13 of the 2472 Extradition Act obviously constitute arguments in the defense against the extradition. Therefore if the defense counsel succeeds in establishing that the case falls under any one of the four criteria, the requested extradition should legally be prohibited. *A fortiori* when article 16 stipulates clearly and explicitly that whenever the Court is convinced that the accused is a Thai national or there are any doubts or complications with regard to the regulations relating to the legalization of documents or the filing of the request for extradition, it shall consult the Minister of Justice before issuing a warrant for the release of the accused. It is probable that the requirement for the Court to consult the Minister of Justice could lead the Court to a presumption that even in such a case, the fate of the accused is still dependent on the discretion of the Minister of Justice which *in extenso* could also connote the Thai government. If that were the motive which prompted the Court to decide that MP Thanong could be extradited, the interpretation could have been regarded as an interpretation *in absurdum* which is

⁷ Meaning “Either extradite, or prosecute”

⁸ infra footnote (1), p...

⁹ Royal Thai Government Gazette, vol.45, No.28-33, p.194.

¹⁰ This article was written before the case of MP Thanong was filed with the Thai Court for a decision on his extraditability. Consequently, in view of the fact that the Court of the First instance has ruled positively on the extraditability and that the case was pending in the Court of Appeal, it would be of interest from an academic standpoint to analyze the supporting arguments of such ruling as to how the two Courts had arrived at such a conclusion and eventually interpret the provisions of article 13 of tradition Act of B.E.2472, as an updating of this introductory part.

prohibited in an interpretation of a legislation, since it would be tantamount to saying that the nationality of the accused is irrelevant to his extraditability. In other words, it has no bearing in this case. However, it is also obvious that the Court based its ruling in this case on the provision of article 3 of the 2472 Extradition Act which incorporates the conventionsl law into this Act. Hence when read in conjunction with the permissive provision of article 8 of the Treaty between the two countries on Extradition that Thailand may extradite its nationals "if not prevented from doing so", Thailand can allow such an extradition since there is no explicit prohibition in the 2472 Extradition Act to extradite a Thai national. Whether or not such a ruling eventually become a principle of jurisprudence, which would be binding for other Courts in the future by virtue of the principle of *res judicata*, depends entirely on the outcome of the adjudication of the court of Appeal, which according to article 17 of the same Act constitutes the supreme Court both on the issue of fact and of law.

However, it is also possible for the Court of Appeal to view the case from another angle, which would permit an extradition of MP Thanong, since Article 3 of the Extradition Act clearly stipulates that the Act is applicable only insofar as it is not incompatible with an international agreement between Thailand and a foreign country. Hence the possibility to interpret such a provision as a permissive one which permits an extradition where such extradition is permissible under an international agreement with a foreign country, which in this case is the U.S.A. Consequently the proviso that a national can be extradited unless prohibited has to be interpreted to the effect that MP Thanong can be extradited by virtue of article 3 of the Extradition Act which allows a derogation from the provisions on the extraditability of a national.¹¹

(I) Exceptions to obligations to extradite

Extradition has been for several decades an international instrument for crime suppression. In spite of its obvious utility and usefulness, extradition is not without dangers. A boundless extradition without pre-conditions or reservations may easily lead to an abusive practice for an end which is foreign to the original objectives and purposes of extradition. For example, an extradition may be requested in order to bring back an alleged offender for persecution or as vengeance on account of a personal conflict which has absolutely nothing to do with the offense that constitutes the grounds of request for extradition. That is one of the reasons why State practice has been consistent in excluding systematically certain types of offenses from the coverage of extradition treaties. The most current exceptions to an extradition agreement are, *inter alia*, fiscal offenses, military offenses, political offenses, religious and trifling offenses, as well as the principle of non-extraditability of nationals etc.¹² Fiscal and military offenses, such as evasion of tax payment and desertion, are not too serious a crime to warrant international suppression.¹³ Unlike fiscal and military offenses, political offenses are excluded from extradition for political reasons and not on account of the degree of their seriousness.

A) Origin of the Principle of Non-Extraditability on the Grounds of the Political Nature of the Offense

The notion that political offenses should be excluded from extradition is a relatively recent concept. Contrary to the contemporary State practice, political offences seemed to be one of the principal concerns of heads of states in former days. For a very obvious reason, heads of states, particulary those under a monarchic or despotic regime, had all the interests in the world to

¹¹ Such an interpretation is possible only in the case of an extradition between Thailand and The U.S.A. on account of the Treaty on Extradition between the two countries. Therefore, unless there is a similar agreement between Thailand and the countries concerned, no extradition of a Thai national to other countries is conceivable under the prevailing Thai legislation.

¹² RS Chavan, *An Approach to International Law*, Stering Publisherers Private Limited, 2nd ed. 1983. pp. 164-166.

¹³ Much can be said of these two categories of offenses in regard to extradition but neither the length or the objective of this article permits a lengthy elaboration on such offenses. For more ample detail on these exceptions to an obligation to extradite see Geoff Gilbert, *Aspects of Extradition Law*, Martinus Nijhoff Publisher, London, Boston, 1991, 282 pp.

discourage and suppress or deter all political offences, like rebellions, revolutions and coups d'etat. Consequently, it was quite understandable that heads of states in the past would be more than happy to conclude among themselves a pact obliging the contracting parties to extradite to each other rebels who had fled across the border to take refuge in each other's territory. For those heads of states, political offenses like an attempted revolution or coup d'etat constituted in their eyes an undesirable factor that generated political instability and disturbance of the peace, Hence the need for their suppression through mutual cooperation.

The principle of non-extraditability on the grounds of the political nature of the offenses entered into the international scene only with the general democratization of political regimes in the world community and only after the conception of the notion of "government" in the modern sense. Once this notion of government had come into existence, the regime of succession of the heads of states through heredity was gradually eclipsed and more or less replaced by a constitutional process through general elections. Under such circumstances, a change of governments usually occurs peacefully under a normal legal process. The government is therefore identified with an institution and not with a person as it was in former times. The principle of the continuity of government and public services renders the importance of the person presiding over the government much less significant than in the past. From then on it is the institution that counts. By way of consequence even the government that comes into power through an unconstitutional process like a revolution or a coup d'etat can be internationally recognized and accepted as long as it has an effective control over the country and is generally accepted by the people of that country, provided, however, that such an entry into power is not contrary to international law.¹⁴ Therefore a politician who has failed today to take the control of a country may very well succeed in his next attempt. In such a case, that politician will become the head of the government and in

that capacity he will legally represent his country. The interdependence of every country on others requires uninterrupted relations with foreign countries, and since a good relationship between countries can also depend on a good relationship between the head of states, politicians have to be prudent and endowed with sufficient political wisdom in dealing with both politicians of other countries who are in power and those who are momentarily not in power but have a potential to regain their power in the future. Thus, it would be politically unwise to systematically extradite a group of politicians, who have failed in their attempt to overthrow the government currently in power in their country, especially when their chance to succeed or fail was fifty-fifty. All politicians are well aware that they run a constant risk of being overthrown at any time by their opposition, particularly when their political stability is precarious. Politicians in power today can become an opposition in the future, and vice versa. They could therefore envision themselves becoming one day the opposition, desperately fighting to regain their power but failing, and could be compelled to seek asylum in a neighbouring country. Under such circumstances, they too would wish that the country in which they seek asylum would refuse to extradite them to their country of origin to be persecuted or revenged on account of their unsuccessful coup d'etat attempt. This is fundamentally the core rationale behind the principle of non-extraditability on the grounds of the political nature of the offense which has been firmly established in present day State practice when concluding an international treaty on extradition.

B) Problems Relating to Political Offenses

Though the principle of non-extraditability on the grounds of the political nature of the offense has nowadays been included in practically all international treaties on extradition, this principle of non-extraditability on the grounds of the political nature of the offense is far from being without complications. The problems relating to this exception to the general principles of

¹⁴ An establishment of a puppet government by the aggressor after an invasion of another country like in the case of the invasion of Kuwait by Iraq is a typical example of such an illicit entry into power of government.

extradition are at least twofold, one of which is related to the ambiguity of the concept of a “political offense”, while the other is related to the *mala fide* or at least the lack of *bona fide*. In other words, they are related to the political motivation of the countries concerned.

(1) Problems Relating to the Ambiguity of the Concept of a “Political Offense.”

The word “political offense” itself has given rise to various controversies and legal issues. The difficulties in practice with regard to the word “political offense” arise from the ambiguity of the term itself. The embarrassment for jurists when called upon to determine whether such and such offenses do or do not constitute political offenses is quite common in every country. At first glance, the definition of a political offense may seem to be rather simple, because logically any offense committed in the course of an attempted coup d’etat is considered a political offense. Thus far, there is no complication whatsoever in the determination of the offense. The problems begin to become rather complex when one starts questioning whether there was really an attempt to commit a coup d’etat or whether the attempt to commit a coup d’etat was a mere pretext or an argument *ex post facto* to camouflage the commission of a Common Law crime. A number of police and military officers involved in narcotics network may attempt to murder a president on account of a double-cross in narcotic drug trafficking activities, then flee into a neighbouring country after their failure and in order not to be extradited, plead that they intended to eliminate the corrupt president with a view to staging a coup d’etat. Under such circumstances, unless such a fact is unequivocally established, it would be very difficult to determine whether the attempted murder was committed for a political or personal purpose. It is therefore inevitable and of a crucial importance to try to define the word “political offense” before embarking upon further analysis of the problems relating to our subject matter.

By its definition, a political offense is an offense of a criminal nature that can be distinguished from a Common Law offense by the objective of its perpetration, i.e. a political offense must be committed for a political purpose, whilst a Common Law offense can

be committed for a lucrative purpose or out of malice or even merely under a passion drive. Thus far, the demarcation line between a political offense and a Common Law offense seems to be relatively clear cut. However, if we push further the hypothesis, the determination of the political nature of the offense can easily become extremely complex without any stretch of imagination. For instance, in striving to attain a political goal through a commission of an offense, the perpetrator may, as a by-product, obtain a profit or personally lucrative benefit. The complexity generated by such an event is the question as to how one can determine whether that profit or lucrative benefit was really obtained as a by-product and not by design. If the profit or lucrative benefit was obtained as a by-product, the offense can, of course, be qualified as a political offense. If on the other hand, the profit or lucrative benefit was obtained by design the political aspect of the offense could have then been a mere pretext. The complexity of the matter could be pushed even further still, where the offense was committed with two concurrent objectives : political objective and personal interests. In such a hypothesis, the political nature of the commission of the offense will not be so evident anymore. The practical problem that may arise there-from is how to determine whether the real intention of the perpetrator of the offense is oriented toward a political purpose in the interest of the collectivity or toward his personal interests. The complication of the problem resides in the fact that an intention is an intangible psychological element that is hard to prove. In the absence of a clear-cut demarcation line between the political and personal interests under such circumstances, the political nature of the offense becomes utterly ambiguous. Such an ambiguity has caused a great deal of embarrassment to governments concerned. This is especially when the public opinion of the contemporary era has a tendency to encourage and support democratization of the international community. The question deriving from such an ambiguity as to whether an offense is a Common Law offense or a political offense can become a highly politicized and crucial issue, since international public opinion often tends to sympathize with and regard any civil strife for national liberation from political, religious or racial oppression as being legi-

timate. This attitude has made a political offense a special kind of offense which is distinguished from a Common Law offense.

The practical problem in this regard is therefore the natural consequence of the lack of a non-equivocal legal definition of a political offense. After all, international law only defines it as an offense that is committed for a political purpose or motive, without providing any solution to the above-mentioned problems, leaving several grey areas unresolved, particularly in the case where personal and political benefits are concurrent and closely mingled like in the case of an attempted murder of a double-crossing president in the course of drug-trafficking operation cited above. Under such circumstances, unless that fact is unequivocally established, it would be very difficult to determine whether the attempted murder was committed for a political or personal purpose. Pushing further our hypothesis to the extreme, the complexity of these problems may be even more aggravated when members of separatist movements, such as the I.R.A.¹⁵ in Great Britain or the P.U.L.O.¹⁶ in the South of Thailand, plunder a bank for their own benefit and flee into a neighbouring foreign country. When their extradition is requested by the interested countries where they have committed the crimes they plead that they needed to plunder a bank in order to procure funds for their so-called national liberation movements. In such a hypothesis, it would be extremely difficult to determine whether that crime was committed for personal benefits or for a political purpose, and even if it cannot be proven that the perpetrators of the crime committed that offense for personal benefits, it would still be very difficult to determine whether such a political nature of the purpose can justify a hold-up of a bank. The complexity of the problems here resides in the absence of a norm or criterion whereby one may objectively determine as to how far one may go in political strife without trespassing the limit of tolerance of international law in the name of the principle of non-extraditability on the grounds of the political nature of

the offense. It would seem to be excessive to admit an application *lato sensu* of the notion of “the end justifies the means”. Logically the tolerance of the law must have a limit in this case. But where should the appropriate demarcation line be drawn in this matter? That is the heart of our problem. International law is silent in this regard, leaving the problems to be resolved by the states concerned as they deem it expedient. This *lacuna* of international law is an open door to arbitrariness and abuses. That is why state practice is very divergent and depends very much on the personal interests and the scrupulousness of the States which are directly involved, making it very difficult to effectively suppress international or transboundary crimes through international cooperation, which is the main objective of extradition.

(2) Problems Relating to the *mala fide* of the Countries Concerned

The absence of objective criteria for the determination of the political nature of an offense is an open door for abusive interpretations which are often motivated by national interests and political considerations. The determination of the political nature of the offense depends very much therefore on whether the countries concerned view the offense in *bona fide* or *mala fide*. That is the reason why every time that the problem is highly politicized, a dead-lock is inevitable, since the country receiving a request for extradition normally exercises its sovereignty in the interpretation of the term “Political Offense”. The government which shares the political views of the offender, or the government, which supports the movement of the separatists whose extradition if requested may resort to an interpretation in *mala fide* regarding the taking of hostages for ransom or the plundering of a commercial bank by rebels or separatists as a political offense. Such a practice allows a *mala fide* nation to indirectly interfere with the internal affairs of another country or sabotage the political regime of that country by giving asylum to criminals undermining the victim country when there is even the slightest

¹⁵ Abbreviation for Irish Republican Army, an Irish separatist movement in the United Kingdom

¹⁶ Abbreviation for Pattani United Liberation Organization, a separatist movement in The Southern part of Thailand

possibility to invoke the political nature of the crime. Such an eventuality is known to have been very current during the "Cold War" epoch. At that time, terrorists and hijackers often disappeared into thin air once they arrived in the countries that notoriously gave shelter to this type of the most international criminal. Even for *bona fide* nations, this lacuna of international law makes it very difficult to determine whether all crimes committed in the course of political strife constitute political offenses in the context of an exception to extradition. Take, for example, in the aforementioned hypothetical case where a member of the I.R.A. committed a hold-up of a commercial bank or the P.U.L.O. separatist movement abducted civilians and held them as hostages for ransom, claiming to have done so in order to procure financial support for their national liberation movements. The situation can be even more complex where a group of persons, who may be just common criminals like some of those in the south of Thailand, commit Common Law crimes in the name of communist insurgents or separatists without anyone knowing for sure whether these crimes are the acts of only a handful of common criminals or a really serious and well-organized political movement. *A fortiori*, it is a commonplace nowadays for underground movements of this type to wage psychological war by inflating their numbers, for propaganda purposes, by creating phantom separate movements with similar objectives. Though in reality all such phantom movements are composed of the very same members.

It should be added at this juncture that difficulties of such an awkward and embarrassing situation are not exclusively of a juridical nature. They may also be of a political one, because even if it can be concretely established that the abduction of civilians for ransom and the plundering of a commercial bank were committed for the genuine purpose of providing funds for a revolutionary or a liberation movement, it would still be hardly conceivable that the world community would admit that separatists and insurgents can commit any Common Law crimes against civilians in the name of their political purposes. Otherwise life would be entirely chaotic, because all criminals would claim to have committed

the crimes in civil or political strife and seek asylum in another country when things go wrong.

(3) Possible Solutions

In spite of the above-mentioned apparently insurmountable complexity of the problems, in reality, the absence of a clear-cut demarcation line between a Common Law crime and a political offense does not make it entirely impossible to distinguish the former from the latter offenses, because a *bona fide* government can always make use, *mutatis mutandis*, of an analogy with the concept of the principal and accessory properties in the municipal law as the criterion for the determination of the nature of the offense. According to the principal and accessory property concept, in the case of a diamond ring, the law considers the diamond as the principal property, because the diamond is much more precious and more valuable than the ring itself, whereas the ring, which is much less expensive, is considered as an accessory property. By the same token, if in an attempt to carry out a revolution or a coup d'etat the perpetrators, who are in a great need for more weapons were obliged to plunder fire-arms shops to acquire the necessary guns and ammunition then, under such circumstances, an average sane and reasonable person can easily perceive that the principal action is the attempted revolution or coup d'etat, whilst the plundering of fire-arms shops for guns and ammunition is the accessory action. Consequently, such a plundering may be regarded as forming part of a political offense which in this case is the attempted revolution or coup d'etat. On the other hand, we have the case of the abduction of Mr. Preecha Sae Lim¹⁷ a teacher of a secondary school in the southern part of Thailand, who was abducted for ransom by a group of ordinary criminals. As a safeguard, those criminals, profiting of the well-known fact that there were separatist activities going on the south of Thailand, claimed to have committed the crime for a political purpose in the name of the notorious P.U.L.O. separatist movement. In such a case, there would be no justification whatsoever to consider that abduction as a political offense. Unfortunately, in real practice the case is not

¹⁷ Cf. Siam Almanac. 15th year No.20 May 11-17, 1990. p.563.

always that obvious, but this proposed solution may at least solve the problems in certain cases.

(II) Exceptions to the Principle of Non-Extraditability on the Ground of the Political Nature of the Offense

Even though the principle of non-extraditability on the grounds of the political nature of the offense has long been firmly established and unchallenged, the evolution of international relations and events has rendered it impossible for international law to ignore the fact of contemporary international life. The ever increasing destructive power and miniaturization of weapons in our hi-tech era have rendered modern weapons almost impossible to detect when cleverly concealed or disguised. The infamous "sweet bomb" that Libyan terrorists utilized to destroy a US civilian plane in the UK is an example of such an event.¹⁸ If modern weapons were to be employed exclusively in conventional warfare, humanity would need have no fear, provided that lethal weapons are not so freely accessible in the underworld. Unfortunately, that is very far from being the case. Sophisticated weapons of all sizes, types and appearances can easily be procured these days, if and when the purchasing power is unlimited, especially when the procurers of the weapons are unscrupulous and extremely cunning. Together with such a development of deadly modern weapons, the world has seen sabotage that, at first, both in conventional and guerrilla warfare, only aimed at military targets in conformity with the *jus in bello*, during the decolonization period. Sabotage nowadays unfortunately overspilled its original military use into the non-combatant areas. Indiscriminate sabotage against military as well as non-military and unprotected civilian targets with a view to scaring away the occupying powers, has shocked and terrified the entire world community. Hence the term "terrorism", which is currently commonly used. The supporting arguments for the use of terrorism, that weaker nations would be entirely at the mercy of imperialist powers and would remain colonized to eternity

if they were to be deprived of all possibilities of using terrorism against occupying powers, are inadequate to persuade the world to admit such a practice that international public opinion finds to be repulsive and inadmissible. That is the reason why an overwhelming majority of States, forming part of the world community, condemn the acts of terrorism as being the acts of cowardice and inhuman cruelty: the acts that mankind must jointly suppress and eliminate. That is also the reason why international instruments such as the Convention on International Terrorism required signatory States to extradite international terrorists or at least to prosecute them if those countries have a conventional obligation not to extradite them. It is noteworthy that such conventions have not provided for any exceptions to the extraditability for such heinous crimes against humanity on the grounds of their political nature. In other words, contemporary international law makes of international terrorism an "implicit exception" to the principle of non-extraditability on the grounds of the political nature of the offenses. The logical consequence of such a deduction is that even if the perpetrators of international terrorism can irrefutably establish that the acts of terrorism were perpetrated for political purposes, the requested States are not exonerated from their obligation to extradite the terrorists whose extradition is sought by other States concerned, unless they choose to prosecute the perpetrators of the crimes by themselves.

The problems of international terrorism are even more acute and complex when they are perpetrated by States that would stop at nothing to attain their political objectives. Such international terrorism is commonly known as "terrorism perpetrated by States or under the instigation of States" or "State terrorism". It is very unfortunate for mankind that in our days, diabolic politicians often make use of international terrorism as a convenient means to intimidate their enemies to the detriment of innocent people in particular, defenseless civilians: children, women, aged and crippled persons

¹⁸ Evens Scotts., "The Lockerbie Incident Cases. Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine" *Maryland Journal of International Law and Trade*, 18, 1 (Spr, 1994) pp. 21-76.

alike. According to the CNN news report of May 1992, apart from Palestine which is not yet a country, many countries like Cuba, Iraq and Iran do not hesitate to utilize international terrorism as a means to attain their political objectives in international relations. It is noteworthy in regard to international terrorism that it is not only an exception to the principle of the non-extraditability on the grounds of the political nature of the offense but also to that of non-extraditability on account of the fact that the criminals are nationals of the requested State. That is the reason why the United States has legal grounds to demand that Libya extradite the Libyan terrorists who sabotaged an American commercial airliner in Scotland. It should also be noted that State terrorism is so repulsive in the eyes of the world community that even the U.N. Security Council is ready to utilize combined international troops to force Libya to comply with the demand for extradition of the two Libyan international terrorists.

We can go on and on analyzing further the problems of international terrorism utilized or instigated by States, but it would be irrelevant to the subject matter of this study. These problems should be left aside, *a fortiori* due to the fact that State terrorism does not fall within the purview of the problems of extradition, since the culprit State itself cannot be extradited.

A) Problems Relating to International Terrorism in The Context of Extradition

The problematic situations analyzed in the preceding paragraphs alone have already given rise to innumerable practical and legal complications. The eruption of the phenomenon of international terrorism in the scene of international politics in the present era has rendered the problems relating to political offenses in the domain of extradition even more complex. The complexity of the problems is hardly surmountable for political and legal reasons and on account of the considerations of national security and public order.

(1) Complexity of the Problems due to Political Factors

The political factors that render the problems very complex in matters relating to international terrorism

in the domain of extradition may be closely connected with the acts of international terrorism themselves. They may also result from the particularity of the political situations and circumstances in each specific case.

In real international life, nobody can deny that *mala fide* does exist even though it is very seldom that the world community would dare accuse *expressis verbis* any country of having acted in bad faith, unless there are obvious and adequate concrete proofs to substantiate such an accusation, and even in that case only when it is so warranted by circumstances. This fact of life is an open door to abuse and bad faith in international relations. The practical problems caused by political factors in regard to international terrorism in the domain of extradition may occur in the case where the country receiving a request for extradition of an international terrorist is in one way or another closely connected with the act of terrorism perpetrated by that terrorist. That country itself may be the one that has secretly instigated that act of terrorism. It may also have a special reason to render assistance to the terrorist, either by giving him refuge or asylum, or even helping him to get away with impunity. A country may be faced with a dilemma. For instance, the country in question is either directly or indirectly interested in the act of terrorism, either because that country itself utilized international terrorism as the means to attain its political objective but pretends to have nothing to do with that act of terrorism, or when it is an ally of the group of countries that employs international terrorism as a political means to attain their international objective. In such a case, it is quite normal and conceivable for that country to attempt to interpret relevant international law or determine the nature of such an act in the manner which will be most favorable or beneficial to the international terrorists. Taking advantage of the lucuna and the equivocal characteristics of the international norms governing this matter, and more particularly of the fact that it is a criminal act committed for a political purpose such a *mala fide* interpretation may permit the country concerned to refuse to extradite the fugitives on the grounds that their act was of a political nature. The most difficult situation that frequently occurs is the case where the country receiving a request for extradition of

the international terrorists finds itself in an extremely awkward and embarrassing situation where it is hard to decide to comply or not with the request. A very typical instance of this kind was the time when Thailand was stuck with a very difficult situation when a group of Burmese students hijacked a plane from Rangoon¹⁹ to escape to Thailand from the despotic regime in Burma.²⁰ At that time Thailand was placed in a very tight spot, not knowing what decision to take if ever Burma requested extradition of the Burmese hijackers. The dilemma in this case was that Thailand could not afford to adopt an attitude which might be regarded as being adversary neither to the Burmese Government nor to the Burmese student movement. Thailand needed to remain absolutely neutral in regard to the conflicts between the Burmese authorities and the Burmese student insurrection because Thailand has a clear and unequivocal policy to maintain an amicable relationship with Burma, regardless of the political regime of the country and no matter who are in power. If Thailand decided to extradite the students who hijacked the plane, not only Burmese students but also Thai students would surely be violently acrimonious toward the Thai government. Furthermore, Thailand might appear to the eyes of the world as lacking humanitarian conscience for having extradited the fighters for liberty and freedom from a political oppression to the tyrannical military rulers of Burma who would surely prosecute or perhaps even execute them. On the other hand, if Thailand refused to extradite the hijackers whose extradition was requested by Burma, the Burmese government might consider that refusal as a hostile or unfriendly act against the Burmese Government, since it could well be viewed as assistance to the enemies of the Burmese government. Faced with such a dilemma, it was extremely embarrassing and critical for Thailand to choose to act in one way or another, because adverse effects were inevitable no matter which one of the two alternatives the Thai government decided to choose.

Such a dilemma is extremely difficult to cope with, especially when in the contemporary era all coun-

tries are necessarily interdependent. No country in the nowadays can possibly remain completely isolated from the rest of the world. The interdependence is ever more accentuated when those countries are of crucial importance economically and politically for that country, like Burma for Thailand. This remark is all the more pertinent where the situation in Burma is entirely unpredictable. It is probable that the student insurgents, who are losers at the moment, may very well one day in the future become conquerors. If Thailand decides today to extradite these Burmese insurrectionists and one day the student insurgent movement succeeds in their struggle and takes over power in Burma, the Burmese will certainly become an enemy of Thailand. In that eventuality it is highly conceivable even for the least perceptive mind that the adverse impacts on the economy and security of Thailand will be tremendous. On the other hand, the Thai government could not possibly afford to take any drastic action that might appear to be hostile to the current Burmese government, because it has always been the policy of Thailand to maintain a good and amicable relationship with Burma, no matter whether Burma is governed by the present military government or eventually by the student insurgents. After all, as already stated above, as far as Thailand is concerned, it is the continuation of the State rather than the continuation of the government that counts. This factor made it impossible for the Thai government to decide with objectivity whether or not to comply with the Burmese request for extradition. As a last resort, Thailand finally decided to discretely lobby the Burmese Government not to request extradition of the hijackers and subsequently filed a law suit against the culprits in a Thai court. Since this solution was adopted at the spur of the prevailing circumstances and political considerations at the moment, the decision made by Thailand in this case could not be taken as a precedent for future actions of the country. State practice under such circumstances is likely to be rather inconsistent, since States normally make their choices in similar situations

¹⁹ Recently changed to "Yangon".

²⁰ Now officially called "The Union of Myanmar".

on a case by case basis, depending on the long term and short term interests involved.

(2) Complexity of the Problems due to the Principles of International Law.

Before proceeding to analyze the practical problems generated by the principles of international law relating to terrorism in the context of extradition, we must first study the impact of international terrorism on the principle of non-extraditability on the ground of the political nature of the offense.

Such an impact derives from the particularity of this type of offense, i.e. its terrifying and loathesome character, which its perpetrators intend to exploit with an aim to force or blackmail the public until the defenseless terrified people panics and obliges their government or the administration to yield to the demands of the terrorists. The prime target of the terrorists is therefore the public itself, not only because the public is the sole social force that is capable of compelling the government to comply with the extortion of the terrorists, but also because the public, which is the population at large, is the most vulnerable and the most helpless of all victims. This is due to the fact that civilians are unarmed and thus completely defenseless. Besides, attacking civilians is much less risky than attacking combatants who are normally well equipped and heavily armed. Furthermore, as a whole, combatants are constantly alert and prepared to fight. The degree of risk in attacking them is therefore very high. These are some of the reasons why international terrorism constitutes a horrible public danger for humanity in its entire collectivity, danger which, unless every country forming part of international society has the genuine political will to fully cooperate with each other, will never be able to be effectively prevented and eradicated. Unfortunately, for easily understandable reasons, a group of unscrupulous nations are more than reluctant to abandon and renounce this heinous and cowardly means to achieve their political designs.

Consequently, no country in the world can even be sure that it might one day be confronted with this problem and become a victim of the relentlessness of a bloodthirsty international terrorist organization. Fur-

thermore, the atrocity and inhumaneness of international terrorism is too horrible for the world community to accept and tolerate without taking any counter measures to prevent and suppress it. Examples of the boundless brutality and bestial fiendishness of international terrorism which the world is well aware of are too numerous to be exhaustively cited in this study. Suffice it therefore merely to cite some of them just to illustrate the impetus for humanity to prescribe special principles and measures for the suppression of this type of horrible crime, apart from those applicable to political offenses in general, even if the act of terrorism is committed for a political purpose.

One of the most hideous and bloodiest terrorist acts that shook the whole world was the one committed at the Olympic Games in Munich by a group of Palestinian terrorists who called themselves the "Black September Group". These Palestinian criminals forced the Israeli participants of the Munich Olympic Games, men and women, at gunpoint to board a plane, then cold-bloodedly annihilated that plane by grenades and missiles, murdering all of them before the horrified eyes of the whole world. That cowardly, inhuman and unforgivable crime was vehemently condemned and cursed by the entire world community. Resentment was so widespread partly due to the sentiment that sportsmen are normally regarded as innocent and unpoliticized goodwill ambassadors. That was why their murder was totally inadmissible in the eyes of world public opinion.

The sabotage of the World Trade Center in New York, which aimed at destroying one or even both of the twin one-hundred and eleven floor buildings, if fully achieved as designed, would have constituted the bloodiest and the most catastrophic murder ever committed in the history of mankind, because if one of the gigantic twin towers collapsed against the other tower, it would have caused it to also collapse the buildings surrounding them, burying alive thousands and thousands of people who were in those buildings. It is very fortunate that the foundation of the targeted building was so firm and solid that the World Trade Center did not collapse despite the gigantic volume of the explosive charge.

The “sweet bomb” planted in an American commercial airline that caused the targeted plane to explode when it was airborne, killing hundreds of innocent passengers who were all civilians who had nothing to do with the conflict between Libya and the United States, was another cowardly act of terrorism that will remain engraved in the memory of mankind for years to come.

Murdering innocent civilians in cold blood by setting time-bombs in public places like in the toy section of a department store during Christmas time to explode during the busiest hour, knowing full well that the victims will surely be helpless housewives and children, or in subway stations and bus stops during rush hours, hijacking airplanes and taking civilians as hostages, killing them in cold blood at point blank, etc. also rank among diabolic and bloody terrorist acts that the international community as a whole finds so absolutely repulsive and inadmissible that even the political nature of their objectives can not justify such cowardly and inhuman measures. International society consequently condemns vehemently the acts of terrorism and makes an act of terrorism an exception to the principle of non-extraditability on the ground of the political nature of the offense.

One can therefore conclude that the main impact of terrorism on the principle of non-extraditability on the grounds of the political nature of the offense is that no matter how desirable it is to maintain a good relationship with another country in the event that the loser today become the winner in the future and takes over the administration of the country, the special characteristic of this type of hideous crime makes it impossible for the world community to cling to this half-century old principle of non-extraditability on the ground of the political nature of the offense in the case of terrorism.

B) Practical Problems inherent in the Principle of International Law relating to Terrorism in the Context of Extradition.

In spite of such universal rejection and condemnation by world public opinion, a great number of countries which are widely known in diplomatic circles to have been either sympathetic to or in some way or

another directly or indirectly involved in terrorism, while not daring to oppose openly such a strong current of hostile attitude toward terrorism, attempt both explicitly and implicitly to either justify or find a leeway for utilization of terrorism as a means to achieve political goals. Many of them try to justify a utilization of terrorism for political purposes through an argument that an act of terrorism is the only means for the oppressed minority in their struggle against stronger oppressors. In their view, both civil strife and the fight against imperialist opponents are acts of war and that in all warfare it is inevitable that a number of innocent civilians perish. According to these partisans of terrorism, the world should consent to sacrifice the lives of some innocent people in order that the majority may survive. All of the countries which in one way or another sympathize with terrorism also attempt to neutralize the UN resolutions that condemn an act of terrorism, by pushing the United Nations under the initiative and instigation of several Middle Eastern countries, to organize a UN conference to distinguish a national liberation movement from an act of terrorism. The underlying intent and aims of these countries were obviously to permit a possibility of construing such a distinction along the line that any acts committed in a national liberation movement cannot be regarded as an act of terrorism. By way of consequence, a conclusion can be drawn therefrom to the effect that, in a national liberation movement, an act of terrorism is permissible. This question was one of the most controversial issues ever debated in the United Nations forum.

This attempt to neutralize the condemnation of terrorism and the international legal instruments which aim at suppressing such a crime against humanity has resulted in a complete failure to reach an agreement on the definition of the word “terrorism”. Up to now the project to organize such a highly politicized conference can be qualified as being a complete failure. This attempt would have been pushed all the way through, had it not been for the ingenious submission of a number of legal experts to impose a *sine qua non* condition for a qualification of an act of war as being a national liberation movement that would be entitled to special treatment in the eyes of international law that such a

national liberation movement must comply with *jus in bello* and that it does not include a separatist movement.²¹

There are number of international instruments that deal with the question of extradition in case of terrorism, but due to failure to reach an agreement on a detailed and precise principle governing this matter, the relevant provisions of such a law could be formulated only in broad terms as a compromise solution. Otherwise the international instruments in question might never see the light of day.²² According to the conventions relating to terrorism and similar activities, contrary to the general principle that a political offense is an exception to the general rules of extradition, i.e. that normally an extradition cannot be obtained if the offense motivating the request for the extradition is of a political nature, no matter whether the terrorism in question was committed for a political motive or not, the injured country can always request extradition of the perpetrators of such an act of terrorism. The conventional law on this matter goes in principle even further in making it an obligation for the country on whose territory the terrorists are found to extradite the terrorists as requested, even if those terrorists are their own nationals. This special rule or principle constitutes an additional exception to the general rules governing matters which are related to extradition, because normally a State is not required to extradite its nationals. A country that refuses to extradite terrorists whose extradition is requested, merely on the grounds that they possess its nationality, may risk being coerced to do so by force just like in the case of the Libyan terrorists who were responsible for the explosion of the American airliner over Scotland. In that case, upon the refusal of Libya to extradite the Libyan terrorists in question, the United States promptly threatened to request an authorization of the Security Council to invade Libya in order to capture and arrest the said terrorists. Hence, the precipitation of Libya to adopt a more compromising attitude and immediately commence the process of negotiations with the United States on this matter.

Notwithstanding its apparent hardline nature, the principle of the conventional law on this matter has a gigantic defect or lacuna in that if the requested State has a conventional obligation not to extradite the terrorists whose extradition is sought, that State is only obliged to refer the matter to its competent authorities with a view to having the terrorists in question prosecuted in its tribunals. In appearance such a requirement may seem to be logical and reasonable, but an in-depth analysis of the matter reveals that such a requirement is far from being adequate, since it may be consequentially construed that it suffices for the requested State to pass on the matter to its competent authorities for the purpose of an eventual prosecution, but if such a prosecution is not possible on account of its national legislation or for any other plausible reasons, the terrorists in question may get away with it in complete impunity without that State being in contravention of the international law on this matter.

This irrationality in the international law on this matter reflects clearly the highly politicized nature of the issues related to terrorism in the context of extradition. This has to a great extent diluted the apparent severity of the principles of international law in this domain. Without the genuine political will of all countries in the world to truly collaborate and cooperate with each other with the view to preventing and eradicating the commission of crimes which may have transboundary adverse consequences on the world community as a whole, the global approach of an international network of international legal mechanisms will never ever be really effective and operational.

Conclusion

Throughout the development of this study, one can deduce right away that the international law on extradition has during the past centuries undergone considerable evolution from cooperation through extradition of fugitive rebels with a view to discouraging or deterring any attempt to overthrow the head of a

²¹ for more ample details, of Pongsatorn Boonaree LLM. Thesis, Faculty of Law, Chulalongkorn University, 1987.

²² e.g. European Convention for the Suppression of Terrorism 1977, in Antonic Vercher, *Terrorism in Europe*, Clarendon Press, Oxford, 1992, pp.350-361.

country to non-extraditability by reason of the political nature of the offense and finally to restrictive practice with regard to the application of the non-extraditability principle on account of the political nature of the offense. This latest evolution is conditioned by a decisive factor in the new trend in State practice, i.e. global democratization. It is true that this new trend is a mere *de lege ferenda*, but in view of prevailing world public opinion, this *de lege ferenda* is not far from the already triggered off processus of its crystallization into a *lex lata*. It is undeniable nowadays that world public opinion is always taken into account when a State has to make a political decision in respect of certain incidents which are sensitive in nature. Take for instance the case of a failed coup d'etat attempt to overthrow a tyranical military regime in a neighbouring country, after which the rebels fled into Thailand where they sought asylum. If the Thai government extradites those rebels back to

their country upon request of such a military regime, it will risk being vehemently condemned by the entire world community as a violater of human rights and as a supporter of dictatorship. On the other hand, in a similar case where a coup d'etat attempt to overthrow a legitimate democratically elected government in a neighbouring country completely fails, compelling the rebels to flee into Thailand in order to seek political asylum, if Thailand concedes to a request for extradition by the legitimate government of the country where the coup d'etat attempt occurred, and surrenders the fugitive rebels to such a democratic government, *a fortiori* when such a government was elected under the auspices and with the full support of the world community, it would be very unlikely that Thailand will ever be condemned by the world community for having extradited the fugitive rebels to their national authorities, even though a coup d'etat attempt is obviously a political offense.