A Critique on Thailand's Law on Terrorism as a Tool to Combat International Terrorist Activities

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Abstract

International terrorism threatens human security and international community as a whole for many decades. Thailand is one of the most popular countries in Southeast Asia that has experienced terrorism in several occasions. Although a number of both legal and administrative measures have been taken by the government to combat terrorism for the prevention of violence as well as for the protection of civilians; nevertheless, terrorism acts are still being committed to shock the conscience of people not only within the country but the world community as well. This article provides some critiques on Thailand's law on terrorism which is promulgated as a prosecutorial tool to combat terrorism. However, law on terrorism of Thailand has been criticised on the ambiguity of the provisions in many aspects, in particular, a broad definition of terrorism and the exercise of universal jurisdiction over terrorism. Hence, Thailand has to take law on terrorism into consideration in the near future.

Keyword: tool, international community, Thailand's law, terrism

บทคัดย่อ

เป็นเวลากว่าหลายทศวรรษที่การก่อการร้ายระหว่างประเทศคุกคามความมั่นคงในชีวิตของคนและคุกคามความมั่นคงของประชาคมระหว่างประเทศทั้งมวล ประเทศไทยเป็นหนึ่งในประเทศเป้าหมายที่สำคัญในภูมิภาคเอเชียตะวันออกเฉียงใต้ ดังจะเห็นได้จากเหตุการณ์ก่อการร้ายที่เกิดขึ้นในหลายครั้ง แม้ว่ามาตรการทั้งด้านกฎหมาย และด้านบริหาร ได้ถูกนำมาใช้เพื่อต่อต้านการก่อการร้าย และคุ้มครองพลเรือนจากการก่อการร้าย แต่เหตุการณ์ก่อการร้ายยังคงเกิดขึ้นและยังส่งผลกระทบต่อประชาคมระหว่างประเทศ บทความนี้ได้วิเคราะห์บทบัญญัติกฎหมายเกี่ยวกับการก่อการร้ายของไทยซึ่งได้ถูกบัญญัติขึ้นเพื่อเป็นเครื่องมือในการต่อต้านการก่อการร้าย ซึ่งในตัวบทบัญญัติเองมีความไม่ชัดเจนในหลายประการ โดยเฉพาะเรื่องค่านิยมของการก่อการร้าย

และการใช้อำนาจรัฐสากลเหนือการก่อการร้ายซึ่งบทบัญญัติกฎหมายดังกล่าวควได้รับการพิจารณาทบทวนอีกครั้งในอนาคตอันใกล้นี้

คำสำคัญ: เครื่องมือ, การสื่อสารระหว่างประเทศ, กฎหมายเกี่ยวกับการก่อการร้าย

PROLOGUE

Terrorism has been one of the most significant problematic issues around the whole globe. It is accepted as international crime against the international public order, known as delicta juris gentium, (J.Y.Dautricourt, 1973) which threatens human calmness and security, injures the universal conscience, and harms human dignity. International community has been threatened by terrorist acts in every region around the world particularly in Southeast Asia. Since the late 1980s, Southeast Asia has been a target of terrorist operation particularly for Iran and Hezbollah. The Meir Amit Intelligence and Terrorism Information Center claims Thailand as one of the most popular countries in Southeast Asia for international terrorism, evidenced as Bangkok's experience regarding terrorist acts taking place since the murder of three Saudi diplomats during January to February 1988, the hijacking of Kuwaiti airliner in April 1988 and a car bombing at the Israeli embassy in March 1994. (The Meir Amit Intelligence and Terrorism Information Center, 2012) Moreover, in the middle of January 2012, the attack against an Israeli target in Bangkok was prevented; on January 12, 2012, Hussein Atris, a Shi'ite Hezbollah operator from south Lebanon, who was trying to flee the country, was arrested at the Suvarnabhumi Airport; and on February 14, 2012, a bomb exploded in a rented apartment in Bangkok near the Israeli embassy. The explosion revealed the existence of an Iranian terrorist cell of least four operatives. (Congress Research Service, 2009)

To combat terrorism, international law has been shaped by terrorist events; the alarming number of incidents regarding seizure or interference with civil aviation in the 1960s and 1970s by private individuals, proffering either financial or political demands. This led to the adoption of three distinct international treaties relating to the act of terrorism: (i) the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft; (ii) the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; and (iii) the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Till now, more than six decades of the attempt of combating, the UN and its specialised agencies have created and developed fourteen universal legal instrument and four amendments regarding the prevention and punishment of terrorist acts.

Focusing on Thailand, in domestic level, the country promulgated laws concerning hijacking and sabotage of aircraft pursuant international obligations and amended the Penal Code to criminalise terrorist offences and amended the Protection and Suppression of Money Laundry Act to apply measures to abolish the monetary network of organisations support terrorism. Also, Thailand has taken administrative measure to repress terrorist activities such as strengthening of aviation security, maritime security, security of information communication infrastructures and international cooperation. (Asia-Pacific Economic Cooperation, 2006) Even legal and administrative measures have been applied to combat terrorism, nevertheless,

the fact shows that Thailand has been involved terrorist acts not only as a source and destination country for terrorism, but also as a transit point for terrorists.

RETHINKING OF GENERIC DEFINITION OF TERRORISM

Even the term terrorism is commonly and widely used in everyday phrasing, but its definition is still ambiguity. In general, the term terrorism is used with varying political and criminal meanings, but at the same time it remains a designation which is elusive and one that has never been defined under international law, at least under global level. (Ilias Brantekas and Susan Nash, 2003) Many occasions since the 1920s, the international community has attempted to arrive at a generic definition of terrorism for the purpose of the prohibition and/or criminalisation. (Saul, 2005)

Officially, terrorism has been put in the international agenda since 1934, when the League of Nations took a first major step for combatting the outlaw acts of terrorism was discussed during drafting a Convention for the Prevention and Punishment of Terrorism, which was adopted in 1937 but never came into force. Nevertheless, this convention is the first international attempt at codification of terrorism; Article 1(2) of the Convention defines terrorism as:

> "...[a]cts of terrorism [as] criminal acts directs against a State and intended or calculated to create a state of terror in the minds of particular person, or groups of persons or the general public"

Apart from the definition of the 1937 League of Nations Convention, the 1954 Draft Code of Offences against the Peace and Security of Mankind of the International Law Commission (ILC), terrorism was explicitly linked to the concept of aggression. The Code defines an offence against the peace and security of mankind that:

> "[u]ndertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State."

In the 21st century, there has been an attempt to draft a comprehensive convention on international terrorism of the GA's *Ad Hoc* Committee. The draft Preamble on the convention condemns 'all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed' and draft Article 2(1) proposes an offences if a person 'unlawfully and internationally' causes: (i) death or serious bodily injury to any person; or (ii) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (iii) damage to property, places, facilities, or systems … resulting or likely to result in major economic loss. And Article 14 of the treaty proposes to exclude the offences from the political offence exception to extradition. More than a decade of challenging, currently, the comprehensive convention is still under the negotiating process.

NORMATIVE MEASURES TO COMBAT TERRORIST ACTIVITIES

It is evident that norm of international law impose duty to repress terrorism, which every state shall fulfill namely: (i) the duty of abstaining from all deeds destined to encourage and incite, directly or indirectly, terrorist activities against other countries; and (ii) the duty of these countries of suppressing such activities within their own countries. This norm has been reaffirmed directly in the Convention for the Prevention and Punishment of Terrorism (Tarn-Tam, 1973) and a number of conventions concerning the

suppression of specific terrorist offences.

Factually, the repression of terrorism has been a matter of legal concern to the international community since 1937, with the League of Nations' drafting of the Convention for the Prevention and Punishment of Terrorism. Subsequently, the UN has focused essentially upon individual or small group violence directed against civilians, diplomats, civilian aircrafts, commercial maritime navigation and sea-based platforms and attack involving the use of explosives and weapons of mass destruction. (Bassiouni, 2008) However, the attempt to draft a comprehensive treaty generically defining terrorist offences has been continuing through the 21st century, in particular, the General Assembly's *Ad Hoc* Committee. (General Assembly Resolution 54/110 (1999)) In 2000, there was an effort to circulate a revised draft treaty originally submitted to the sixth Committee in 1996 by India and, specially, after the shock of human conscience of September 11 atrocity in 2001. The adoption of international convention to enhance their international cooperation for the repression of certain offences could be classified as acts of terrorism. (Gaeta, 2009) As a result, after the September 11, it was clear that some acts of terrorism can be so egregious and of such a magnitude that they can serious jeopardize international peace and security. (Gaeta, 2009)

By nature, terrorism is essentially a political and social phenomenon, this means that the politic goals of the terrorist groups are and may be planned worldwide. (Gaeta, 2009) Hence, to combat terrorist acts, a number of measures shall be applied not only legal measures, but administrative measures also an important tool for preventing terrorist activities. Regarding legal approach, law is a major instrument to repress terrorist activities both by defining and criminalising terrorist offences.

Based on the expectation that terrorist activities could be seriously troubled by a comprehensive worldwide system to counter its financing, the UN enacted a Convention for the Suppression of the Financing of Terrorism in 1999, embedded in the context of its series of conventions against specific terrorist activities. Then, apart from legal approach to enact laws and regulations implementing obligations as such, administrative approach shall be promoted. Particularly, national policies on fighting the roots of terrorism such as reducing the wide support of terrorist groups or preventing individual from joining terrorist group shall be taken into account. (Quénivet, 2005)

Aside from domestic mechanism to prosecute and punish terrorist acts, in international level, there have been the efforts to categorise terrorism within the jurisdiction of the International Criminal Court (ICC) since the drafting period of the Statute of the Court. Even, at the moment, terrorism is not in the jurisdiction of the ICC, however, the Draft Rome Statute on the Establishment of the International Criminal Court included 'crimes of terrorism' comprising three distinct offences. Resulting from the debate during the Rome Statute drafting process, terrorism was not included in the 1998 Rome Statue as adopted for a variety reasons: its legal novelty and lack of prior definition; disagreement about national liberation violence; and a fear that it would politicize the ICC. (Kittichaisaree, 2001)

Even the tragedy of September 11 has sparked an intensive debate on transnational terrorism and the ICC Statute, however, the proposal of the Working Group which put forward by the Netherlands was excluded from agenda of the First Review Conference (2010) because it is not yet defined and it would be easy enough to include such a list as an interim "definition" to be supplemented

should the General Assembly ever complete its work on a "general" terrorism convention. (Clark, 2010)

THAILAND'S LAW ON TERRORISM

As abovementioned, Thailand has experienced of international terrorist activities for many decades. Experience the country faced took Thailand became a party to nine of fourteen international conventions related to repress acts of terrorism: (1) 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft; (2)1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; (3) 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (4) 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Person, including Diplomat Agents; (5) 1979 International Convention against the Taking of Hostage; (6) 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airport Serving International Civil Aviation; (7) 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; (8) 1997 International Convention for the Suppression of Terrorist Bombing; and (9) 1999 Convention for the Suppression of the Financing of Terrorism. To comply with obligations under those international instruments, Thailand has been taking approaches to implement domestic laws to combat terrorism and to apply administrative measures in combatting terrorist acts.

Pursuant to international conventions concerning terrorist offences, Thailand enacted a number of provisions relating to terrorist acts. The explicit legal approach to fight terrorism of Thailand was introduced in an implementing law of the Act on Certain Offences against Air Navigation, B.E.2519 (1976) and the Act on Certain Offences against Air Navigation (No.2), B.E. 2522 (1979). Thereafter, in 2003 when the country made changes to the Thai Penal Code to include new anti-terrorism provisions to comply with the UN Security Council Resolution 1373. In the same year, Thailand promulgated two Royal Decrees concerning counter-terrorism: the Royal Decree on the Amendment of Penal Code of B.E. 2546 (2003) to criminalise terrorist offences in Sections 135/1 to 135/4 of the Code and stipulates terrorist offences as universal crimes, which state is able to exercise universal jurisdiction over terrorism pursuant to Section 7 (1/1) of the Code. The Royal Decree on the Amendment of the Protection and Suppression of Money Laundry Act of B.E. 2546 (2003) was promulgated to criminalise terrorism as an offence under the Act in Section 3(8), which can be applied as measure to abolish the monetary network of organisations support terrorism.

CRITIQUE ON THAILAND'S LAW ON TERRORISM

Since 2003, terrorism has been provided as a new criminal offence pursuant to the provisions of the Penal Code. Section 135/1 of the Code provides the definition of terrorist acts and related offences are provided in Sections 135/2–135/4. Law on terrorism seems as a useful prosecutorial tool to combat terrorism for Thailand. These provisions are defined to cover all terrorist-related acts; however, in reality, these provisions still contain some controversial issues, in particular, concerning the definition of the offences and the exercising of universal jurisdiction, which will be discussed as follows:

A. Definition of the Terrorist Offences

The attempt to define a generic definition of terrorism in international community is continuing, then apart from specific offences concerning to

terrorism as defined in international convention, the definition of terrorism is still ambiguity. However, in Thailand, the attempt to define terrorist acts appears in the Royal Decree on the Amendment of Penal Code of B.E. 2546, which defined "terrorist offences" in Section 135/1 of the Penal Code as: (i) any act of violence or exercise any act to cause a danger to life or a body harm or any person's freedom harm seriously; (ii) any act to cause seriously injury to transportation-system, communication-system or structure base of public interest; and (iii) any act to cause damages to any State's property or any person's property or an envelopment to cause likely cause an important economic damages. Additionally, it recognises that any act done in a demonstration, assembly, protestation, opposition or action taken for the purpose of liberty in accordance with the Constitution is not offence of terrorism. Apart from the definition as such, the Code also criminalises other terrorist-related acts, that is, the acts at the preparatory state and conspiracy (Section 135/2), terrorism sponsors (Section 135/3), and being a member of terrorist groups (Section 135/4).

Focusing on the definition of terrorist acts in Section 135/1, the definition of the acts of terrorism is very broad; it covers acts of violence to acts cause economic damages. In the same way, it provides a wide range of penalty; it fine from sixty thousands Baht to one million Baht, imprisonment from three years to twenty years, imprisonment for life, and sentence to death. This wide range of penalty may cause the wide range of decretory of the officials, police, prosecutors and judges, where the discretion of those persons may affect rights and fundamental freedoms of the accused, in particular, the period of time of detention and the refusing of provisional release. In addition, the lack of generic definition of terrorism and differentiation of penalty may cause the effect of the fulfilment of double criminality principle through extradition treaty.

Factually, even the provision stipulates that a demonstration, assembly, protestation, opposition or action taken for the purpose of constitutional liberty is not offence of terrorism; but, in practice, this makes it very problematic to distinguish an offence of terrorism from an act exercised upon a person's liberty, especially, when a defendant has been accused for being involved in a political conflict, which is an exercise of liberty as regulated in the Constitution. (The Truth for Reconciliation Commission of Thailand, 2012)

For terrorist-related offence, in particular, being a member of terrorist group can be compare with the offence of being a member of a secret association, so called "Ang-Yee" as provided in Section 209 of the Penal Code. The provision categorises the offence of being a member of a secret association is a preventive legislation, then we have to consider and examine back to the "preparatory state." (Nanakorn, 2010) In addition, if a member of secret association commits any further offences, for instance, offence relating to explosion, arson or committing a murder, the consequences that such member would have to take into account would be receiving the penalty that has been regulated for offences relating to explosion, arson or committing a murder. Therefore, without law on terrorism, general offences, in particular, offences of Ang-Yee can be applied to prosecute terrorism activities.

B. Terrorist Offences and Universal Jurisdiction

Terrorism has been recognised as *delicta juris gentium*, which violates *jus cogens* and fundamental interests of international community.

Because terrorist offences injure the "interests of the international society as a whole," therefore, they are subject to universal jurisdiction that state, under national law of international concern, may exercise universal jurisdiction over terrorist offences. (Nagle, 2011) According to Section 7(1/1) of the Penal Code, terrorist offences are criminalised as universal crimes where state can to exercise its jurisdiction over terrorist offences according to the universality principle, regardless of the place where the crimes committed or the nationality of the criminals or victims of the offences. In addition, in comply with universal principle, state has obligations to extradite or punish according to the principle of *aut dedere aut judicare*. In other word, state cannot only prosecute terrorists who presence in its territory, but it can also extradite the offenders to another state which is entitled and intends to prosecute those offenders fairly and effectively. (M. Cherif Bassiouni and Edward M. Wise, 1995)

According to Amnesty International, some 125 counties have enacted legislation to exercise universal jurisdiction over crimes against humanity, war crimes, genocide and other *jus cogens* crimes. (Amnesty International, 2001) Additionally, some cases of domestic courts prosecuting foreign nationals under universal principle and extraterritoriality include *Adolf Eichmann* in Israel, *Refik Saric* in Denmark, or *Nikola Jorgic* in Germany. (Amnesty International, 2001) However, it must be noted that exercise of universal jurisdiction under domestic legislation does not impose a duty on a State to act against the perpetrators of extraterritorial crimes. Such legislation only "authorises, rather than obliges States to prosecute and punish offenders" under international law. (Nagle, 2011)

Regarding this, the exercise of universal jurisdiction obligates state as permissive approach, where state may exercise jurisdiction, more than mandatory approach, where state must apply universal jurisdiction. As a result, universal jurisdiction manifests as a right of state than a duty of state. Hence, even Thailand enacts to authorise Thai court to exercise of universal jurisdiction over terrorist acts, but it not guarantees the proficiency of the exercise of such legislation to combat terrorism.

EPILOGUE: THE FUTURE OF LAW ON TERRORISM IN THAILAND

On the one hand, it is evident that law on terrorism plays a great role in the conflicts in the southernmost provinces of Thailand as a prosecutorial tool for security cases; however, a large numbers of cases that have undergone a trial faced difficulties in the proceeding. This may result due to lack of understanding upon the actual content of offences relating to terrorism, resulting in defendants and all related parties losing trust toward the law and the justice system.

On the other hand, a number of terrorist acts in Thailand show that the law on terrorism is not an efficient prosecutorial tool to combat international terrorism. In particular, a broad definition of terrorist and a wide range of penalty, and the permissive right to exercise universal jurisdiction over international terrorism are still controversy.

In addition, the law on terrorism has been challenged by the recommendations of the Truth for Reconciliation Commission of Thailand (TRCT), which was submitted on May 12, 2012. The TRCT submitted its proposal to abolish law on terrorism to PM, President of the House of Representatives and President of the Senate because the law relating to terrorism has not been stipulated on the "principle of democracy" and "rule of law". The

proposal claims that the Penal Code have come into force wrongfully; not compliance with the principle of democracy and have been enacted by a Royal Decree. Moreover, the royal decree of the government at that time did not imply any consideration regarding the minority vote in the Parliament and the overlapping of offences of terrorism with the offence of Ang-Yee in the Penal Code.

Hence, the law on terrorism of Thailand will be taken into consideration in the future and the learned lessons and experience in the past will help us to draw a new law relating to terrorism for being a proficient prosecutorial tool to combat terrorism. Ultimately, at the end of the day, the law of terrorism will reflect credibility of the country to international community in the near future.

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