The United Nations Convention against Transnational Organized Crime 2000: The Case of Thailand

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ABSTRACT

When the author started writing this thesis in 2011, there was no law covering transnational organized crime in Thailand. Two years later, in November 2013, Thailand enacted implementing legislation to ensure effective compliance and cooperation under the United Nations Convention against Transnational Organized Crime (UNTOC), namely, the Anti-Transnational Organized Crime Act B.E. 2556 (2013). However, key problems in Thailand corruption and miscarriage of justice still remain. These flow from a lack of truly independent investigative powers in Thailand's criminal law which opens the door to political intervention. Conduct concerning the obstruction of justice is routine in Thailand. Politicians or influential officials or police often intervene at the investigation stage. This results in witnesses feeling reluctant to cooperate with government agencies as they are afraid of intimidation or coercion from influential persons. Thus, the relocation of witnesses to foreign countries is needed to protect witnesses from the threat of influential persons, politicians or organized criminal groups in Thailand. In the same way, Thailand must reform its law to include foreign nationals or residents of other countries under the witness protection program in Thailand.

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CHAPTER 1 INTRODUCTION

1.1 Introduction

No country can evade the threat of transnational organized crime.[1] Purely national criminal legislation is inadequate[2] since, by definition, transnational organized crime spans jurisdictions.[3] To ensure an efficient and effective global effort to combat and

[1] The term "organized crime" is used to describe the unlawful activities of highly organized, disciplined associations (gangs, mafias, triads, cartels, syndicates, tongs, etc.) engaged in illegal ventures for profit. Such ventures include, but are not limited to, gambling, prostitution, money laundering and loan sharking, narcotics trafficking, alien smuggling and labor racketeering. See the Omnibus Crime Control and Safe Streets Act of 1968, tit. I, pt.F(b), Pub. L. No.90-351, 82 Stat. 197 (1968). The attributes of "organized crime" can be described (as drawn from the literature) as follows:
1) Traditionally, an organized crime group is motivated by money or power, not by ideology; the nonideological nature of such groups means that any political activity (generally corrupt) is an instrument for achieving their criminal aims or shielding them from law enforcement, not a goal in itself. Emmanouela Mylonki, 'The Manipulation of Organised Crime by Terrorists: Legal and Factual Perspectives' (2002) 2 *International Criminal Law Review* 228; See also Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff Publishers, 2003), 99.
2) An organized criminal group is ongoing in nature and is designed to continue over time and beyond the participation (or even lifetimes) of current members.
3) An organized crime syndicate typically has a limited membership which is bound by understood rules. The selection criteria may vary with qualifications being based, *inter alia*, on ethnicity, family, race, criminal record, or other factors. Members may require sponsorship and may be tested or serve an apprenticeship during which the candidates demonstrate a commitment to the goals and rules of the organization, as well as a willingness to follow orders and maintain secrecy.
4) The power structure within an organized criminal organization is hierarchical. Some generalize that this hierarchy is characterized by three enduring ranks. Those who occupy these positions may change with time, but the organizational structure remains, as does the authority inherent in the positions.
5) Orgainzed criminal groups attempt to promote specialization in their functioning. Thus, for example, these groups may have enforcers, charged with using violence to achieve group ends, as well as fixers (dispensing bribes) and money launders. The efficiencies and economies of scale such specialization permits increase profits; the compartmentalization of knowledge that flows from specialization limits all participants exposure to discovery or prosecution.
6) In an organized criminal organization, violence and bribery are routinely used as a means to achieve the organization's ends.
7) One of the goals of an organized criminal group is a monopolistic position either within its spheres of business or in the geographical areas in which it operates. Such a monopoly position, often achieved through violence and corrupt relations with law enforcement, is a means to increase profits and power. See Howard Abadinsky, George W. Kiefer eds, *Organized Crime* (Taylor Francis Ltd., 2nd, 1987), 334, David Luban, Julie R. O'Sullivan and David P.Stewart, *International and Transnational Criminal Law* (Aspen Publishers, 2010) , 505.

[2] Respect for state sovereignty and the legal constraints that flow from it mean that law enforcement cannot operate as effectively across borders as criminal gangs do. Criminal groups have exploited the difficulties domestic authorities have encountered in pursuing transnational crimes. They have benefited, for example, from cumbersome extradition procedures and legal constraints on evidence gathering abroad. Ibid, 507.

[3] The kinds of crime which are committed by these groups are dynamic and changing over time, and the perpetrators adapt their skill bases, resources and techniques depending on opportunity and profitability.

prevent transnational organized crime, the United Nations Convention against Transnational Organized Crime introduced provisions for state parties to adopt in order to create comprehensive countermeasures and provide guidelines for adaption and incorporation in their domestic legal systems.[4]

The United Nations Convention against Transnational Organized Crime made provision for states parties to adopt mandatory offences in their domestic laws as follows: participation in an organized criminal group;[5] money laundering;[6] corruption;[7] the obstruction of justice[8] and serious crime.[9] The Convention applies when the offence is transnational in nature and involves an organized criminal group.[10] However, at the

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See Michael Levi, *The organization of Serious Crime, The Oxford Handbook of Criminology* (Oxford University Press, Oxford, 2002).

[4] The United Nations Convention against Transnational Crime drafted provisions in such a way as to give policing authorities the kind of flexibility needed to adapt similarly, and focus on the nature of the actors and the seriousness and transnational nature of the criminal activity. More specific prescriptive regimes on particular crimes are solidified by the Protocols. For detailed commentary on the *UNTOC* and the three *Protocols*, see John D. McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, (Oxford University Press, Oxford, 2007).

[5] *United Nations Convention against Transnational Crime*, opened for signature 12-15 December 2000, *UNTOC*, art 5, (entered into force 29 September 2003). In the discussion on the definition of "organized criminal group", the Ad Hoc Committee agreed that the term " financial or other material benefit" should be understood broadly to include, for example, personal or sexual gratification. It can be seen that organizations trafficking in human beings or child pornography for sexual and not monetary reasons are not excluded. *UNTOC*, art 2, para (a). *Travaux préparatoires* Article 2, Use of terms, *United Nations Convention against Transnational Organize Crime*, 7st sess, UN DOC A/AC.254/4/Rev.7 (17-28 January 2000).

[6] *UNTOC*, art 6.

[7] *UNTOC*, art 8

[8] *UNTOC*, art 23.

[9] *UNTOC*, art 2, para (b). Serious crime is defined as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or more serious penalty". As Clark Comments: This specific- content- free definition of serious crime is fundamental to the way the Convention itself operates. The scope of the Convention's application turns ultimately on the seriousness of the particular activities (judged in a rough and ready way by the penalty) rather than on substantive content. It is left to its Protocols to spell out some particular substantive areas (obviously not all to which the basic obligations of the Convention are to be applied. Roger Clark, 'The United Nations Convention against Transnational Organized Crime' (2004) 50 *Wayne Law Review* 169, 171.

[10] *UNTOC* art 3(1).

domestic level, all offences must apply equally, regardless of whether the case involves a transnational element or is purely domestic.[11]

Witness protection is one of the significant measures under the Convention.[12] This provision appears in Article 24 of the Convention. The provision focuses on the protection of witnesses and victims from intimidation, coercion, corruption or bodily injury. The measures of non-disclosure or change of identity of witnesses, use of communications technology such as video conferencing[13] or other adequate means and relocation of witness[14] are recognized as key elements of an effective witness protection program.[15] In February 2008, the United Nations Office on Drugs and Crime (UNODC)

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[11] Indeed, the overall point of *UNTOC* and Protocols scheme is to ensure states are able to prosecute these crimes when they are transnational and have involved organized criminal groups, but also to maintain the ability to prosecute them purely as domestic offences, and in such cases not to require the prosecution to prove either transnationality or organized crime involvement. Of course, this varies with the crime approached; the organized crime offences themselves naturally will have a requirement to prove organized a transnational aspect. United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, New York, 2004) 333-334.

[12] United Nations, *Intergovernmental Negotiations and Decision Making at the United Nations: Guide 2*nd ed, (New York and Geneva, United Nations, 2007) [19] <http://www.un-ngls.org/site/IMG/pdf/DMUN_Book_PAO_WEB.pdf> at 4 January 2012.

[13] Video conferencing technology has advanced to allow for transmission with no interruption or delay and with excellent visual displays. It is deemed reliable and once up and running, relatively easy and cost effective to use. Moreover, the transmissions can be encrypted so as to prevent the identification of both locations of the videoconference. See United Nations Office on Drugs and Crime (UNODC), *Expert group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, Report of the Secretariat* [2]<http://www.unodc.org/unodc/en/treaties/stoc-cop-session5-conferencepapers,CTOC/COP/2010/CRP.2> at 4 January 2012.

[14] Pursuant to art 24 para 3 of *UNTOC*, state parties are authorized to enter into agreements or arrangements with other states for the international relocation of protected witnesses. In practice, cooperation is based on the following types of agreements:
(a) Regional or bilateral agreements on cooperation in witness protection or in combating specific crimes such as organized crime, drug trafficking and terrorism: such agreements establish a formal mechanism for cooperation between state parties and usually require ratification by the national legislature;
(b) Special agreements or memorandums of understanding concluded directly between police forces, prosecutors' offices or other judicial and law enforcement authorities of the respective countries: such agreements provide the basis for direct assistance and do not require ratification by the national legislature. *Good practices for the protection of witnesses in criminal proceeding involving organized crime* (2008) [82] <http://www.unodc.org/documents/organized-crime/witness-protection-manual-feb08.pdf>at 4 January 2012.

[15] "A Witness protection program" is a formally established covert program subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a

launched "Good Practices in the Protection of Witnesses in Criminal Proceedings Involving Organized Crime". The good practices provide a comprehensive picture of available witness protection measures and offer practical options for state parties to use as guidelines for adaption and incorporation in their legal system.[16]

In addition, mutual legal assistance between states parties is crucial to initiate investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. Article 18 of the Convention uses the term "the widest measure" as regards mutual legal assistance.[17] This is intended to provide the highest degree of mutual assistance.[18] The Convention also contains a form of assistance that was not present in earlier international instruments. It provides for the hearing of witnesses or experts by means of videoconference [19] which is known as the spontaneous transmission of information. [20] Furthermore, the convention allows authorities, even without a prior request, to pass on information to the competent authorities of another state if such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings.

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criminal group because of their cooperation with law enforcement authorities. Ibid, 4; Moreover, a witness protection program has been defined by the Council of Europe as "A standard or tailor- made set of individual protection measures which are, for example, described in a memorandum of understanding, signed by the responsible authorities and the protected witness or collaborator of justice." Council of Europe, Recommendation Rec (2005) 9, of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice.

[16] Ibid,1.

[17] *UNTOC* , art 18 (1).

[18] For example art 18(9) is a somewhat innovative provision which makes the absence of double criminality only an optional ground for refusing a request for mutual legal assistance, rather than a mandatory one. The idea is to free up the possibilities of obtaining assistance. Currently, in respect of both extradition and mutual legal assistance, there are problems with double criminality in bilateral relations where one party does not have legislation dealing with group criminality. For parties to the Convention, compliance with the criminalization obligations will narrow the range of difficulties that remain. Clark, above n 9, 95.

[19] Travaux préparatoires: article 18(8), Protection of witnesses and victims United Nations Convention against Transnational Organize Crime, 1st sess, UN DOC A/AC.254/4/Rev.1 (19-29 January 1999).

[20] *UNTOC* , art 18 (4).

To obtain substantial evidence, special investigative techniques[21] must be used in cases involving transnational organized crime. This is because transnational criminal groups use advanced technology for their activities. It is important for law enforcement authorities to keep ahead of the increasing sophistication of organized criminal activities. The use of the special investigative techniques would provide a number of benefits for investigating crime: for example, the use of controlled delivery can provide the opportunity to arrest the head of an organized criminal group; the conduct of undercover operations[22] can produce evidence that is often incontrovertible[23] and the interception of communication and electronic surveillance can produce evidence that provides an incontrovertible and contemporaneous record of criminal activity.[24] However, the use of special investigative techniques can also involve significant intrusions into people's private lives.[25] Thus, the accountability and monitoring regimes must be used for protecting the misuse power. This tension is discussed in this thesis.

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[21] *UNTOC*, art 20.

[22] Moreover, an operative can go beyond what was authorized not only for investigative purposes but also in order to protect the safety of any person or identity of an operative. See Eric Colvin, 'Controlled Operations, Controlled Activities and Entrapment' (2002) 2 *Bond Law Review* 14, 9.

[23] The product of covert investigation is very often incontrovertible evidence which the defence would undoubtedly regard as prejudicial to any protestations of innocence. See Sybil Sharpe, 'Covert Surveillance and the Use of Informants' in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 59, 64.

[24] New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) <http://www.parliament.nsw.gov.au> at 28 September 2013.

[25] In the 1990s, the High Court of Australia reviewed the legality of actions of police and informers during undercover operations in *Ridgeway v The* Queen. While recognizing that covert policing is now an indispensable tool in the fight against crime, the court decision affirmed the fundamental value of the Rule of Law, particularly its tenet that those engaged in law enforcement should themselves be bound by the law. The court outcome looks like a triumph of due process over crime control. However, closer critical scrutiny reveals that this decision does not significantly impede covert investigation. Not only are existing remedies for entrapment hedged with significant qualifications, but they are also based upon a judicial discretion that requires the balancing of competing interests, a calculus which empirically seems to favor crime control over due process. See Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968) chapter 8; see also Hans-Jorg Albrecht, *Security, Crime Prevention and Secret Surveillance: How Criminal Law Adjusts to the Challenge of a Global Risk Society* (2012) Asian Criminological Society 4th Annual Conference, 147.

By ratifying the Convention, Thailand has recently enacted implementing legislation to adopt mandatory offences in its domestic laws, namely, the Anti-Transnational Organized Crime Act B.E. 2556 (2013). The Act aims to prosecute criminal offences of participation in an organized criminal group, money laundering, corruption and obstruction of justice, as well as serious crimes constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty where the offence is transnational in nature and involves an organized criminal group. Moreover, the Act provides other necessary measures to combat organized criminal groups such as controlled delivery, using interception communication or electronic surveillance for tracking criminals and undercover operations.

However, the key problems which are corruption and miscarriage of justice are still remain. Although, there are many laws addressing corruption in Thailand, they remain "paper tigers" because of the lack of truly independent investigative powers. In some cases, corruption is linked to obstruction of justice. For instance, politicians abuse their power in the process of investigation in cases where they have interests at stake. Conduct concerning the obstruction of justice is routine in Thailand. Politicians or influential officials[26] or police often intervene at the investigation stage. This results in witnesses feeling reluctant to cooperate with government agencies as they are afraid of intimidation

[26] In 2003, the government of Thaksin Shinawatra announced a policy to prevent and combat persons of influence who were involved in organized criminal groups acting in Thailand both domestically and transnationally. The Order of the Prime Minister's office No.139/2546 on the Suppression of Persons of Influence, dated 8 July 2003 provides the definition of " person of influence". " Person of influence signifies a person, acting independently or in a group, who either commits offences themselves, or orders other people to commit offences or things above the law; and when such behavior is a criminal offence, with virulent results affecting all sectors of society and inciting annoyance, loss or fear. They also construct networks to spread these effects, which are economically, socially and politically destructive in addition to eroding the peace, order and morality of the people."
A person of influence may have a network consisting of other persons of influence, a workforce or agents (hired assassins, underlings) and supporters (civil servants, government officers, politicians of various ranks). Ibid, 11-12.

or coercion from influential persons. As discussed in this thesis, the witness protection laws have not succeeded in enhancing public trust in Thailand's criminal justice system and this failure has been criticized by international humanitarian organizations.[27]

Therefore, the relocation of witnesses within Thailand cannot guarantee their safety. The relocation of witnesses to another country could ensure the safety of witnesses. This is because where witnesses are called to give testimony in criminal prosecutions against influential persons or politicians, witnesses and their families may be threatened resulting in physical suffering or death. In the result, the relocation of witnesses to foreign countries is needed to protect witnesses from the threat of influential persons, politicians or organized criminal groups in Thailand. In the same way, Thailand must reform its law to include foreign nationals or residents of other countries under the witness protection program in Thailand.

1.2 Theoretical perspectives

The mandatory offences and other measures under the United Nations Convention against Transnational Organized Crime are important to the administration of justice in Thailand. The measures under the Convention may assist in bringing about a fair and democratic nation and truly accountable government. Moreover, measures to protect witnesses and victims must be considered such as relocation of witnesses to other states, videoconferencing and the use of assumed identities.

In addition, special investigative techniques must be used for investigation in cases involving transnational organized crime. However, the right and privacy of citizens must

[27] The Asian Legal Resource Centre (ALRC), Hong Kong, *Article 2 Special Report: Protecting Witnesses or Perverting Justice in Thailand* (2006) <http:www.article2.org/pdf/VOSn03.pdf> at 6 June 2012.

be observed. There are routine examples of intrusion on the right to privacy in Thailand which derive from the excessive use of interception by the police. Some examples are highlighted in this thesis.

1.3 Methodology

The methodology of this research consists of a review of primary sources including Thai statutes, United Nations Convention against Transnational Organized Crime, international documents recording frameworks and practices, official reports of government agencies and parliamentary reports. No case law was examined as Thailand is a civil law country. A review of secondary sources including books, journal articles and commentaries has been undertaken. Statutes such as the *Constitution*, the *Penal Code*, the *Anti-Transnational Organized Crime Act 2013*, the *Anti-Trafficking in Person 2008*, the *Anti-Money Laundering Act 1999*, the *Counter Terrorism Financing Act 2013*, the *Witness Protection Act 2003*, the *Criminal Procedure Code*, the *Mutual Legal Assistance Act 1992*, and the *Special Case Investigation Act 2547* were closely scrutinized. Most documents have been collected from libraries and electronic resources located mainly in Thailand and Australia.

1.4 Structure of the thesis

Broadly speaking, this thesis commences with an overview of the provisions under United Nations Convention against Transnational Organized Crime. This section reviews the process of investigation, prosecution and trial in Thailand involving transnational organized crime, focusing on an analysis of various issues and problems faced under Thailand's existing laws, such as the *Constitution*, the *Penal Code*, the *Anti-Transnational Organized Crime Act 2013*, the *Anti-Trafficking in Person 2008*, the *Anti-*

Money Laundering Act 1999, the *Counter Terrorism Financing Act 2013*, the *Witness Protection Act 2003*, the *Criminal Procedure Code*, the *Mutual Legal Assistance Act 1992*, and the *Special Case Investigation Act 2547*. The remainder of the thesis is divided into seven chapters.

Chapter Two begins with an outline of the background and history of the United Nations Convention against Transnational Organized Crime including an overview of the provisions under the Convention. This chapter also includes an overview of the background and history in Thailand involving transnational organized crime.

Chapter Three examines offences under the United Nations Convention against Transnational Organized Crime as follows: participation in an organized criminal group;[28] money laundering;[29] corruption;[30] obstruction of justice[31] and serious crime.[32] The chapter examines the concepts of conspiracy and participation in an organized criminal group and the laws dealing with obstruction of justice in the U.S. to use as a guideline for amending domestic laws. This chapter also examines existing Thai laws involving participation in an organized criminal group, money laundering, corruption and the obstruction of justice, together with a comparison of those laws with the relevant offences of the United Nations Convention against Transnational Organized Crime. Moreover, this chapter proposes suggestions for regulatory reforms, and includes draft wording for the new proposed laws.

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[28] *UNTOC*, art 5.

[29] *UNTOC*, art 6.

[30] *UNTOC*, art 8.

[31] *UNTOC*, art 23.

[32] *UNTOC*, art 2, para (b).

Chapter Four provides an overview of witness protection conventions, laws, guidelines and good practices evident in the United Nations Convention against Transnational Organized Crime and other countries. This chapter also illustrates the infrastructure, problems, functions and authority of law enforcement agencies which have the duty to protect witnesses. A number of case studies show problems and obstacles in practice. Moreover, this chapter introduces measures such as applying to have witnesses relocated to a foreign country and also discusses the possibility of implementing these measures. The last section of this chapter proposes suggestions for regulatory reforms and includes draft wording for the new proposed laws.

Chapter Five examines the background and evolution of mutual assistance laws and procedures in Thailand and Australia. The chapter then examines the processes involved in seeking assistance through diplomatic channels, the *Mutual Legal Assistance Act of Thailand* and the *Mutual Legal Assistance Act of Australia*. A number of strengths and weakness [33] are scrutinized as well as problems and obstacles confronted by law enforcement authorities, together with suggestions for regulatory reforms, and draft wording for the new proposed laws.

Chapter Six considers the special investigative techniques contained in the United Nations Convention against Transnational Organized Crime. This chapter also examines laws dealing with these special investigative techniques such as controlled delivery, undercover operations, interception of communication and electronic surveillance in

[33] Jae Sang Lee, *Establishing a Framework of Criminal Justice Cooperation against Transnational Organized* Crime (2012) Asian Criminological Society 4th Annual Conference 38. Mutual legal assistance as a traditional means of judicial cooperation mostly takes place through a diplomatic channel, which may contribute to a certain extent to the protection of human rights of criminals throughout the process of judicial cooperation, but ultimately makes a timely response to crime extremely difficult due to its complicated and drawn-out nature.

Australia together with guidelines to achieve balance between people's private lives and the public interest. The absence of accountability and a strict monitoring regime, will lead to significant intrusions into people's private lives and excessive abuse of power. Case studies in this chapter also illustrate the problems that arise as a result of intrusion into people's private lives and abuse of power. Moreover, this chapter contains recommendations for regulatory reforms, and includes draft wording for the new proposed laws.

Chapter Seven reviews problems in Thailand's administration of justice. This thesis argues that the current Thai legislation, namely the *Constitution*, the *Penal Code*, the *Anti-Transnational Organized Crime Act 2013*, the *Anti-Trafficking in Person 2008*, the *Anti-Money Laundering Act 1999*, the *Counter Terrorism Financing Act 2013*, the *Witness Protection Act 2003*, the *Criminal Procedure Code*, the *Mutual Legal Assistance Act 1992*, and the *Special Case Investigation Act 2547* do not sufficiently combat transnational organized crime offences.

1.5 Significance of Thesis

The subject matter of this thesis has not been addressed in previous scholarship in Thailand or Australia. Accordingly, this thesis provides the first comprehensive analysis of the implementation United Nations Convention against Transnational Organized Crime in Thailand.

CHAPTER 2 HISTORY OF UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROCESS OF IMPLEMENTATION OF THE CONVENTION IN THAILAND

2.1 United Nations efforts to strengthen international cooperation against organized crime: the early years

2.1.1 United Nations Congresses on the Prevention of Crime and the Treatment of Offenders

In the 1990s, organized crime became more sophisticated and increasingly international in nature. As a result, the United Nations saw a need to prevent and combat transnational organized crime. In 1992, the United Nations Commission on Crime Prevention and Criminal Justice was established in order to deal with various aspects of organized crime including the provision of comprehensive international instruments to combat transnational organized crime and associated offences.[34] The Commission now meets annually in Vienna to exchange views and information. The Commission has established periodic United Nations Congresses on the Prevention of Crime and the Treatment of Offenders and coordinates the crime prevention activities of the United Nations interregional and regional crime prevention and criminal justice institutes. These Congresses are held every five years in different locations around the world.[35]

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[34] The United Nations Commission on Crime Prevention and Criminal Justice was established in 1991/92, replacing the Committee on Crime Prevention and Control. This agency falls under the United Nations Economic and Social Council (ECOSOC). See also UN General Assembly, *Creation of an effective UN Crime Prevention and Criminal Justice Programme*, UN Doc A/Res/46/152 (18 December 1991); and UN ECOSOC, *Establishment of the Commission on Crime Prevention and Criminal Justice,* UN Doc E/Res/1/1992 (6 February 1992).

[35] The United Nations Congresses on the Prevention of Crime and the Treatment of Offenders have been held in Geneva 1955 (First Congress), London 1960 (Second Congress), Stockholm 1965 (Third Congress), Kyoto 1970 (Fourth Congress), Geneva 1975 (Fifth Congress), Caracas 1980 (Sixth Congress), Milan 1985 (Seventh Congress), Havana 27 August -7 September 1990 (Eighth Congress), Cairo 29 April -8 May 1995 (Ninth Congress) and Vienna 10-17 Apr 2000 (Tenth Congress). <http://www.odccp.org/crime_cicp_commission.html> at 19 March 2011.

2.1.2 United Nations World Ministerial Conference on Organized Transnational Crime and the Naples Declaration

The World Ministerial Conference on Organized Transnational Crime was held in Naples between 21 to 23 November 1994. At this conference there were delegations from 142 States (86 of them at the ministerial level, while others were represented by their Heads of State or Government), in addition to intergovernmental and non-governmental organizations.[36]

During the conference, the Commission supported the review and implementation of the *Naples Political Declaration and Global Action Plan against Organized Transnational Crime* and created a committee for the elaboration of an international organized crime convention.[37] The conference reviewed existing organized crime legislation around the world, including preventive and law enforcement strategies and procedural legislation.[38] It was found that the key problems with existing national legislation were various loopholes which organized criminal group would exploit for expanding their illegal activities.[39]

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[36] United Nations Economic and Social Council (UN ECOSOC), World Ministerial Conference against Organized Transnational Crime, *Problems and dangers posed by organized transnational crime in the various regions of the world*, UN Doc E/CONF.88/2 (18 August 1994).

[37] UN General Assembly, *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc A/RES/49/159 (23 December 1994) para 3.

[38] Naples Political Declaration and Global Action Plan against Organized Transnational Crime reprinted in UN General Assembly, *Crime Prevention and Criminal Justice: Report of the World Ministerial Conference on Organized Transnational Crime*, UN Doc A/RES/49/748 (2 December 1994).

[39] The Comments made by the representatives of Canada and Japan. UN Office at Vienna, World Ministerial Conference against Organized Transnational Crime (1995) 26/27 *UN Crime Prevention and Criminal Justice Newsletter* 10.

The *Naples Declaration* recommended enhanced international cooperation as follows:

> (a) Closer alignment of legislative texts concerning organized crime;
> (b) Strengthening international cooperation at the investigative, prosecutorial and judicial levels in operational matters;
> (c) Establishing modalities and basic principles for international cooperation at the regional and global levels;
> (d) Elaboration of international agreements on organized transnational crime;
> (e) Measures and strategies to prevent and combat money laundering and to control the use of the proceeds of crime.[40]

The *Naples Political Declaration and Global Action Plan against Organized Transnational Crime* opened the way for the elaboration of an international convention against transnational organized crime at the United Nations level.

On 29 April – 8 May 1995, the *Ninth UN Congress on the Prevention of Crime and Treatment of Offenders* was held in Cairo. This Congress requested Governments to support the possible elaboration of an international convention with emphasis on the following issues:

> (a) Problems and dangers posed by organized crime;
> (b) National legislation dealing with organized crime and guidelines for legislative and other measures;
> (c) International cooperation at the investigative, prosecutorial and judicial level;
> (d) Modalities and guidelines for international cooperation at the regional and international level;
> (e) Feasibility of various types of international instruments, including conventions, against organized transnational crime;
> (f) Prevention and control of money laundering and control of the proceeds of crime;
> (g) Follow-up and implementation mechanisms.[41]

[40] Naples Declarations, para 9.

[41] UN General Assembly, *Report of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/CONF.169/16 (12 May 1995) 15.

To continue the efforts for the implementation of the *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, there were a series of regional ministerial workshops on organized transnational and corruption held in Latin America, Africa and Asia as follows:

- The Latin American Regional Workshop, held in Buenos Aires, 27-30 November 1995, supported the creation of an international convention and prepared a list of elements for incorporation in a convention.[42]
- The African Regional Ministerial Workshop on Organized Transnational Crime and Corruption, held in Dakar, 21-23 July 1997, also supported the idea of a convention.[43]
- The Asian Regional Ministerial Workshop on Organized Transnational Crime and Corruption, held in Manila, 23-25 March 1998, adopted the *Manila Declaration on the Prevention and Control of Transnational Crime* to develop a comprehensive international instrument.[44]

2.1.3 Draft proposals for an organized crime convention

The meeting of the intersessional open-ended intergovernmental group of experts was held in Warsaw from 2 to 6 February 1998. The meeting agreed on an outline of options

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[42] UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime*, UN Doc E/CN.15/1996/2/Add.1 (3 April 1996).

[43] UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an international convention against* organized transnational crime and other international instruments, UN Doc E/CN.15/1998/6/Add.1 para 13 (29 August 1997).

[44] UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an international convention against* organized transnational crime and other international instruments, UN Doc E/CN.15/1998/5 (18 February 1998).

for the contents of the international convention against transnational organized crime which were summarized by the Chairman of the meeting as follows:[45]

> (a) While the contours of organized crime were generally understood, there continued to be divergences of legal nature that made it difficult to reach a comprehensive definition. Engaging in such an endeavor might require considerable time, whereas there was a general feeling of the urgency of action in the direction of elaborating the new convention. Organized crime continued to evolve and manifest itself in different ways. As there was a general understanding of criminal organizations, efforts to determine the scope of the convention should build on that understanding, focusing action under the new convention against those groups;
> (b) Certain States were of the view that attempting to list all possible criminal activities in which criminal organizations were likely to engage would be difficult and might lead to a convention that was too narrow. Such an approach entailed two major risks. Firstly, it would ab initio prejudice the applicability and effectiveness of the convention, as a list of offences could not be all-inclusive and would most probably exclude emerging forms of criminal activity. Secondly, it would present considerable difficulties with regard to other provisions of the convention, as specific crimes often demanded specific responses. The need to deal with specific offences might be accommodated by additional protocols, which could be negotiated separately, not affecting the comprehensiveness of the convention or its operability and effectiveness. Furthermore, it was observed that such an approach might prove more conducive to a more expeditious negotiating process that would make the new convention a reality in a shorter period of time;
> (c) An alternative approach that was proposed might be based on the seriousness of the offence, which might be determined on the basis of the penalty foreseen in national legislation and a requirement that the offence be committed in connection with a criminal organization, association or conspiracy. That approach was not free of difficulties, as the concept of seriousness was not as meaningful in all national systems. However, there was merit in further considering such an approach as a potential solution, especially combining it with a focus on the organized nature of the offence in question, as well as looking at elements that would necessitate international cooperation, including its transnational reach. Certain delegations expressed strong opposition to a "serious crimes convention" as opposed to an instrument focused on organized crime;
> (d) There was agreement that the convention should include practical measures of international cooperation, such as judicial cooperation, mutual assistance in criminal matters, extradition, law enforcement cooperation, witness protection and technical assistance. The convention should be a capacity-building instrument for States and the United Nations alike in connection with the collection, analysis and exchange of information, as well as the provision of assistance. Furthermore, the convention should expand the predicate offences for the purpose of action against money laundering, while it should include provisions for the purpose of action against money laundering, While it should include provisions creating the obligation of States to confiscate illicitly acquired assets and regulate bank secrecy. The convention should also include provisions to prevent organized crime, such as measures to reduce opportunities for criminal organizations or limit their ability to engage in certain activities. The convention should have provisions that required

[45] UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an international convention against* organized transnational crime and other international instruments, UN Doc E/CN.15/1998/6/Add.1 para 13

legislative action on the part of Governments, in order to facilitate meaningful and effective cooperation;
(e) Other international instruments, especially, the International Convention for the Suppression of Terrorist Bombings and the 1988 Convention, were useful sources of inspiration. They contained provisions of direct relevance to the new convention. Some of those provisions could provide solutions to similar problems, or serve as a point of departure in order to go beyond their scope, taking into account new needs and developments. In addition, the convention should empower the law enforcement authorities of States parties to employ extraordinary investigative techniques (for example: wire-tapping and undercover operations), consistent with constitutional safeguards;
(f) Finally, the convention should incorporate appropriate safeguards for the protection of human rights and to ensure compatibility with fundamental national legal principles.

2.1.4 The work of the Ad Hoc Committee on the Elaboration of an International Convention against Transnational Organized Crime

On 9 December 1998, following recommendations of the Commission on Crime Prevention and Criminal Justice and the United Nations Economic and Social Council,[46] The United Nations General Assembly decided it was time for the international community to adopt a mechanism to combat the threat of transnational organized crime. The United Nations called for the establishment of an open-ended intergovernmental ad hoc committee in charge of drafting an international convention against transnational organized crime which involved:[47]

(a) a new comprehensive international convention against transnational organized crime; and

(b) three additional international legal instruments on:

(1) trafficking in women and children;

(2) illicit manufacturing of and trafficking in firearms, their parts and components and ammunitions; and

[46] United Nations Economic and Social Council (UN ECOSOC), *Transnational organized crime*, UN Doc E/RES/1998/14 (28 July 1998) para 10.

[47] UN General Assembly, *Transnational organized crime*, UN Doc A/RES/53/111 (20 January 1999) para 10; UN General Assembly, *Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity*, UN Doc A/RES/53/114 (20 January 1999 para 13.

(3) illegal trafficking in and transporting of migrants, including by sea.

The negotiations took place over eleven sessions of the United Nations Crime Commission spread throughout between January 1999 and October 2000. The United Nations Convention against Transnational Organized Crime was approved by the UN General Assembly on 15 November 2000,[48] and was presented for governments to sign at a conference in Palermo, Italy on 12-15 December 2000. It is noteworthy that in the Asia Pacific region, Australia, Cambodia, China, Indonesia, Philippines, Singapore, Vietnam and Thailand signed the Convention.[49]

2.2 The United Nations Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime was opened for signature by Member States on 12-15 December 2000 at a High-level Political Conference in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.[50] The convention is the main instrument in the fight against transnational crime. The convention has entered into force according to Article 38 (1) of UNTOC.[51] This Article stipulates that when forty instruments of ratification, acceptance, approval or accession are deposited by a regional economic integration organization or by member States then Armenia deposited the 40th instrument of ratification on 1 July 2003. As a result, the Convention entered into force on the ninetieth day after the 40th

[48] United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 November 2000).

[49] United Nations Office for Drug Control and Crime Prevention (UNODCCP), *United Nations Convention against Transnational Organized Crime, Signatures*, <http://www.odccp.org/adhoc/crime/crime_cicp_convention_signature.pdf>.

[50] United Nations Office on Drugs and Crime (UNODC), United Nations Transnational Organized Crime (2000) <www.unodc.org/unodc/treaties/CTOC> at 20 July 2013.

[51] Article 38 (1) of *UNTOC*, "This Convention shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization."

instrument of ratification was deposited which was 29 September 2003. As for the States or the Organization which deposit the ratification instrument after the Convention enters into force, the Convention enters into force for such States or Organization on the thirtieth day after the instrument is deposited in accordance with Article 38 (2) of the UNTOC.[52]

The Convention is supplemented by three Protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children; the Protocol against the Smuggling and of Migrants by Land Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. States which ratify this instrument have an obligation to take effective measures against transnational crime, creating the relevant domestic criminal offences and promoting cooperation between States Parties. [53]

2.3 The relationship between international law and domestic law

Generally, the sources of international law could be categorized as the following: international conventions, customary international law, general principles of law and judicial decisions.[54]

In general, the substantial aspects of international law are designed to deal with international disputes, to regulate relations between states, to prevent violations and to

[52] Article 38 (2) of *UNTOC*, "For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Convention after the deposit of the fortieth instrument of such action, this Convention shall enter into force in the thirtieth day after the date of deposit by such State or organization of the relevant instrument."

[53] United Nations Office on Drugs and Crime (UNODC), *United Nations Convention against Transnational Organized Crime and the Protocols* <http://www.unode.org/unodc/en/treaties/CTOCindex.html> at 2 October 2013.

[54] Jane Stratton, 'Source of international law' (2009) 69 *Hot Topics Legal Issues in plain language* 3; Charlotte Ku and Paul F.Diehl, *International Law: Classic and Contemporary Readings (Sources of International Law)* (Lynne Rienner Publishers, the United States of America, 1998), 75. Malcolm D.Evans, *International law* (Oxford University Press, Oxford, 2010), 95.

provide solutions for violations as between states.[55] As mentioned, international law deals with the rights and duties of states. Generally, each State developed its own practices for applying international law in the context of domestic law.

The Relationship between International and Domestic Law

Needless to say international law and domestic law differ. This is because the object of the enforcement of international law is the State, while domestic law regulates the rights and the duties of citizen in the state. There are two substantial theories to deal with the relationship between international law and domestic law. These are discussed below.[56]

2.3.1 Monism[57]

Monism holds that both international law and domestic law are part of a universal legal order and control the behavior of each state. Philip Allot points out that according to the natural law doctrine that authority and legal duty are both subject to the universality of natural law:

> Every legal power in every society in the world is connected with every other legal power in every other society in the world through the international law of the international society, the society of all societies, from which all law-making power is delegated[58]

Kelsen comments that international law determines domestic law thus all law is part of the same legal order:[59]

> Since the basic norms of the national legal orders are determined by a norm of international law, they are basic norms only in a relative sense. It is the basic norm

[55] Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi, *Public International Law: An Australian Perspective* (2nd ed, Oxford University Press, Oxford, 2005), 3.

[56] Stratton above n 54, 1.

[57] Tim Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Limited, London, 1998), 34.

[58] Philip Allot, *New Order for a New World* (Oxford University Press, Oxford, 1990), 308.

[59] Blay, Piotrowicz and Tsamenyi, above n 55, 3.

> of the international order which is the ultimate reason of validity of the national legal orders too[60]

Therefore, international law could be directly transformed into domestic law.

2.3.2 Dualism[61]

According to this theory, international law and domestic law come from different sources. Moreover, the subject matter of international law and domestic law are different. As a result, the transformation of international law to domestic law is essential under this theory. International law cannot be directly enforced as domestic law.[62]

Thus, according to the monism theory discussed above, a State can enforce international law as its domestic law when the State ratifies the international law. On the other hand, a State which follows the dualism theory could not give force to the international law as its domestic law automatically. This is because the agency of the State which is responsible for treaty making would have the duty to consider the domestic law to support the international law.

2.4 The treaty-making process

This section describes the steps of the process for concluding a treaty:[63]

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[60] Kelsen, *General of Law and the State* (Harvard University Press, Cambridge, 1945), 367-8.

[61] Hillier above n 57, 35.

[62] Chen Siyuan, 'The relationship between international law and domestic law' (2011) 23 *Singapore Academy of Law Journal* 350, 356.

[63] Stratton, above n 54, 5; Blay, Piotrowicz and Tsamenyi above n 55, 109.

Adoption[64]

Adoption is the process which occurs after the authority of the State negotiates the substance of the international agreement and the final text is concluded. However, adoption is not the process which binds the State to the international agreement. Signature, ratification and accession are the processes which bind the State to the international agreement.

Signature[65]

If the State signs using the Full Signature of the authority of the State, this signifies that the State intends to bind itself according to the international agreement. The signature process is the definitive consent which is not subject to Ratification, Acceptance or Approval. The signature of the authority of the State will bind the State according to Article 12 of the Vienna Convention on the Law of Treaties.

Ratification[66]

Ratification is a substantial step for the State to consider the international agreement before binding itself to the terms of an international agreement. Ratification may be necessary where States cannot enforce the international agreement as their domestic law. Therefore, the States have to do some passing processes before binding themselves to international law such as implementing their legislation to comply with the international obligation. Where the international agreement needs ratification, the international agreement cannot bind the State until the State ratifies the international agreement.

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[64] Hillier above n 57, 131; Basak Cali, *International Law for International Relations* (Oxford University Press, Oxford, 2010), 107.

[65] Hillier above n 57, 132.

[66] Ibid.

Entry into force[67]

In general, the treaty will specify the method which will make the treaty come into force. Many multilateral treaties require a specified number of parties to consent to be bound before the treaty can enter into force and some treaties set the date on which the treaty comes into force. The treaty's entry into force makes the treaty binding between states that have expressed such consent. States that express such consent after the treaty has entered into force become bound only from the date of their consent.

2.5 Treaty ratification procedure in Thailand

Presently, many countries are threatened by the transnational organized crime which is detrimental to politics, economic and social security worldwide.[68] Thailand is one of the countries affected by the expansion and diversification of transnational crime. Thailand is exposed to threats of transnational crime such as, corruption, money laundering and obstruction of justice. These issues need to be tackled not only by Thailand but also at the regional and international levels. In order to effectively combat transnational organized crime, Thailand's government has been co-operation with other countries to solve these problems.

The Co-operation between Thailand and ASEAN

The Thai Ministry of Foreign Affairs has stated that Thailand and ASEAN strongly support the fight against Transnational Organized Crime.[69] During 20-21 March 2000, the Meeting of ASEAN Ad-Hoc High-Level Experts on the draft United Nations Convention

[67] Blay, Piotrowicz and Tsamenyi above n 55, 90: Hillier above n 57, 133; Cali above n 64, 108.

[68] United Nations Office on Drugs and Crime (UNODC), *The Globalization of crime: A Transnational Organized Crime Assessment* (2010) [ii] <http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low _res.pdf.> at 2 October 2013.

[69] The document of Ministry of Foreign Affairs, Kingdom of Thailand No. 362/2543.

against Transnational Organized Crime was held in Bangkok.[70] The ASEAN representatives who attended the Asia-Pacific Ministerial Seminar on Building Capacities for fighting Transnational Organized Crime expressed their views and discussed matters relating to the draft United Nations Convention against Transnational Organized Crime.[71]

Following the Bangkok Ministerial Seminar, ASEAN had another informal consultation in Vienna during the 10th UN Congress on the Prevention of Crime and the Treatment of Offenders in April 2000 and agreed that the Meeting of ASEAN Ad-Hoc High-Level Experts would be held in Bangkok.[72] In addition, this meeting provided an opportunity for ASEAN to make an impact in the area of transnational organized crime. As Mr. Krit Garnjana-Goonchorn, Director-General of the Department of Treaties and Legal Affairs stated:

> The increasing danger of transnational organized crime and realize that no one can evade from the threat of transnational organized crime which erode the social fabric, undermine the political system and destroy the economic structure of our countries. To effectively combat these crimes which are ever more significant especially in the age of globalization, international and regional cooperation and concerted actions are needed.

The meeting was chaired by Mr. Krit Garnjana-goonchorn, Director-General of the Department of Treaties and Legal Affairs. Mr. Jean-Paul Laborde, Officer-in-Charge, Legal and Convention Affairs of the United Nations Office for Drug Control and Crime Prevention (UNODCCP), was invited to brief the meeting on the progress of the draft convention. Mr. Laborde advised the meeting that the Ad-Hoc Committee would have to finalize the draft United Nations Convention against Transnational Organized Crime

[70] United Nations Office on Drugs and Crime (UNODC), *United Nations Convention against Transnational Organized Crime and Protocol* http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%2000> at 2 October 2013.

[71] Ibid.

[72] The document of Ministry of Foreign Affairs, Kingdom of Thailand No. 362/2543.

within its next two sessions in June and July 2000 in order to be able to submit the draft convention to United Nations Millennium Assembly for approval.[73] Another session of the Ad Hoc Committee in October was devoted to finalizing the work. Mr. Mathew Joseph and Mr. Wanchai Roujanavong, experts from Singapore and Thailand respectively, were also invited to share their views and experiences gained from active participation in the work on the Ad-Hoc Committee.[74] The meeting discussed key issues on the scope of application of the Convention and Protocols, the provisions relating to money laundering and corruption and the implementation of the Convention and Protocols.[75] Finally, at the signing ceremony for the Convention held in Palermo, Italy in December, Thailand signed the following Convention and Protocols:

1) United Nations Convention Against Transnational Organized Crime –signature 13 December 2000
2) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children- signature 18 December 2001
3) Protocol against the Smuggling of migrants by land, Sea and Air - signature 18 December 2001
4) Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition – non signature

<u>The process of implementing the Convention to the Thailand's domestic legislation</u>

Section 190 of the Constitution of the Kingdom of Thailand of B.E. 2550 (2007 A.D.), stipulates as follows:

[73] Ibid.

[74] Ibid.

[75] Ibid.

> The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations.
>
> A treaty which provides for a change in the Thai territories or extraterritorial areas over which Thailand has sovereign rights or has jurisdiction in accordance therewith or in accordance with international law or requires the enactment of an Act for the implementation thereof or has extensive impacts on national economic or social security or generates material commitments in the binding of trade, investment budget of the country significantly must be approved by National Assembly. In such case, the National Assembly must complete its consideration within sixty days as from the date of receipt of such matter.
>
> Prior to taking steps in concluding a treaty with other countries or international organizations under paragraph two, the Cabinet shall provide information and cause to be conducted public hearings shall give the national Assembly explanations on such treaty. For this purpose, the Cabinet shall submit to the National Assembly a framework for negotiations for approval.
>
> When the treaty under paragraph two has been signed, the Cabinet shall, prior to the declaration of intention to be bound thereby, make details thereof publicly accessible and, in the case where the implementation of such treaty has impacts on the public or operates of small- or medium-sized enterprises expeditious, appropriate and fair manner.
>
> There shall be the law on the determination of procedures and methods for the conclusion of treaties having extensive impacts on national economic or social security or generating material commitments in trade of investment and the ratification and remedying of impacts suffered by persons in consequence of the implementation of such treaties, having regard to justice to person benefiting from and persons aggrieved by the implementation thereof as well as to general members of the public.
>
> In the case where there arises a problematic issue under paragraph two, the power to make the determination thereon shall be vested in the Constitutional Court…

In practice, the Department of Treaties and Legal Affairs, Ministry of Foreign Affairs has full power on behalf of Thailand to ratify the international agreement with other countries. The procedure for ratifying an international agreement can be summarized as follows:[76]

The first step is to consider whether the international agreement in the procedure falls within the scope of paragraph 2 of s 190 of the Constitution. If the treaty falls outside the

[76] Kriangsak Kittichaisaree, ; 'Thailand country report for congress' CIL research Project on International Maritime Crimes), Center for International Law, 3.

scope of that provision, the authorization of the Cabinet to sign and ratify the treaty can be done after the proceeding of the treaty is concluded.

In some cases, the department may have doubts whether the treaty falls within the scope of paragraph 2 of s 190 of the Constitution. The Department of Treaties and Legal Affairs normally presumes that the treaty falls within the scope of paragraph 2 of s 190 of the Constitution. This can be seen from the Constitutional Court Judgment No. 6-7/2551[77] dated 8 July 2008. This case concerned the Thai-Cambodian Joint Communique of 18 June 2008. The Constitutional Court held that although the Joint Communique did not clearly provide for a change in the Thai territory, it nevertheless created a risk that Thailand's land boundary might be affected and this was a delicate matter which could give rise to international disputes in the future. According to the Court, the subject-matter of the Joint Communique had a long history of being socially and politically sensitive, and had to be considered against the background of the Thai-Cambodian dispute over the land boundary in the area referred to therein. Hence, the Court ruled that the Joint Communique fell within the category of treaties that required the Parliament's approval for Thailand's consent to be bound thereby. As a result, it could be said that in case of doubt, the treaty would be presumed to fall within the scope of paragraph 2 of s 190 of the Constitution.

Where a treaty falls within the scope of paragraph 2 of s 190 of the 2007 Constitution, a number of steps will be taken as follows:[78]

1. The Ministry or the Department which has responsibility for the treaty prepares the negotiation framework and submits it to the Cabinet for approval.

[77] The Constitution Court Judgement 6-7/2551.

[78] Kittichaisaree, above n 76, 4.

2. After the Cabinet approves the negotiation framework, the relevant information will be publicized and public opinion will be sought regarding the content of in the treaty.

3. After the public hearing, the negotiation framework submitted by the Cabinet will pass to the Parliament for approval and. The negotiation framework would also include the result of the public hearing as mentioned above.

4. The negotiation framework for the treaty is approved by the Parliament.

5. The negotiation of the treaty starts after the negotiation framework is affirmed.

6. The negotiation parties conclude the final text which is agreed by the parties.

7. The Ministry or the Department which is relevant to the treaty submits the final agreed text to the Cabinet for approval.

8. The treaty will be signed by the Cabinet. However, the signature is subject to the ratification of the treaty. Hence, the treaty must be submitted to Parliament for approval prior to its signing where the treaty provides that it shall enter into force on the date of its signature. Moreover, the Ministry or the Department which has responsibility for the treaty has to prepare a draft Act of Parliament to implement the treaty obligations.

9. Submission of the treaty which needs the implementing legislation. At the same time, the draft Act of Parliament must be submitted by the Cabinet to Parliament.

10. The Parliament shall approve the treaty within sixty days from the date of receipt of the submission of the treaty from the Cabinet. The Parliament gives consent to Thailand being bound by the treaty and the Parliament is bound to enact any Act of Parliament required to implement the obligations under the treaty before the treaty enters into force in Thailand.

11. Thailand proceeds to ratify to the treaty, if the Parliament approves the treaty.

In cases where there are many parties such as multilateral treaties, or conventions, the authorities of Thailand determine Thailand's position. In the case of a multilateral treaty which falls within the scope of paragraph 2 of s 190 of the Constitution, the steps for approval of the treaty as mentioned above would be apply as well.[79]

In Thailand, the treaty implementing procedure can be summarized as follows:

1. Where Thai's domestic law cannot be harmonized with international law, in general, the responsibility would lie directly with the government agency.

2. The responsibility of the government agency is to study and report on whether legislation implementing the treaty must be enacted by Parliament.

3. The draft of the implementing legislation would be drafted by the lawyer of the government agency.

4. The cabinet will submit the draft for approval. At this stage, the Council of State will advise the Cabinet on Thai Law, review the draft and improve it before returning the revised draft to the cabinet for final approval and enacting the Act by the Parliament.[80]

On 17 October 2013, Her Royal Highness Princess Bajrakitiyabha Mahidol, Thai Ambassador to the Republic of Austria and Permanent Representative of Thailand to the United Nations in Vienna deposited on behalf of Thailand the United Nations Convention against Transnational Organized Crime (UNTOC) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children with the representative of the Secretary-General of the United Nations. By its ratification, Thailand became the 179th party to the Convention and the 158th party to the Protocol to

[79] Ibid.

[80] Ibid, 6.

Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Thailand has now enacted implementing legislation to ensure effective compliance under the Convention and its Protocol, namely, the Anti-Transnational Organized Crime Act B.E. 2556 (2013) and Anti-Trafficking in Person B.E.2551 (2008) respectively. However, there are some measures under the United Nations Convention against Transnational Crime that are not currently penalized under domestic law. This thesis will argue that these measures need to be introduced into Thailand's domestic legal system.

CHAPTER 3 NEW CRIMINAL LAW PROVISIONS IN THAILAND

The United Nations office on Drugs and Crime has stated:

> Organized crime has diversified, gone global and reached macro-economic proportions: illicit goods are sourced from one continent, trafficked across another, and marketed in a third… In terms of global reach, penetration and impact, organized crime has become a threat affect all states.[81]

Moreover, in the preface to this report, former Executive Director, Antonio Maria Costa, commented that:

> Since crime has gone global, purely national responses are inadequate as they displace the problem from one country to another.[82]

Because of the increasingly globalized nature of organized crime, the investigation, prosecution and adjudication of transnational crime cannot be limited to one state. Consequently, the United Nations Convention against Transnational Organized Crime contains provisions for state parties to adopt mandatory offences in their domestic law as follows: participation in an organized criminal group,[83] money laundering,[84] corruption,[85] the obstruction of justice,[86] and the creation of measures for cooperation between states.[87]

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[81] United Nations Office on Drugs and Crime (UNODC), *The Globalization of crime: A Transnational Organized Crime Assessment* (2010) [ii] <http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low _res.pdf.> at 27 November 2012.

[82] Ibid.

[83] *UNTOC*, art 5.

[84] *UNTOC*, art 6.

[85] *UNTOC*, art 8.

[86] *UNTOC*, art 23.

[87] The United Nations Convention against Transnational Organized Crime establishes legal frameworks that enable and legal obligations that compel international cooperation as follows:

1) Acts as an autonomous legal basis for:
   - Extradition (Article 16)
   - Mutual legal assistance (Article 18)

Under the United Nations Convention against Transnational Organized Crime, "transnational organized crime"[88] (TOC) - a serious crime - is defined as any serious transnational offence undertaken by "a structured group"[89] of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.[90]

- International cooperation for the purpose of confiscation (Article 13)
- Law enforcement cooperation (Article 27)

2) Permits case-by-case cooperation for:
   - Joint investigations (Article 19)
   - Special investigative techniques (Article 20)

Karen Kramer, *The Benefits and Used of the Convention against Transnational Organized Crime* (2012) [11] <http://www.unodc.org/documents/organized-crime/FM/Karen-Kramer.pdf> at 30 September 2013.

[88] *UNTOC*, art 3 para 2 states that " The offence is transnational if:

(i) It is committed in more than one State;
(ii) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
(iii) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
(iv) It is committed in one State but has substantial effects in another State."

[89] *UNTOC*, art 2 (c) defines a "structured group" as " a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure." The Legislative Guide instructs that "structured group" be interpreted broadly "so as to include groups with a hierarchical or other elaborate structure, as well as non-hierarchical groups where the roles of the members of the group are not formally specified. Thus, a structured group is not necessarily a formal type of organization, with a structure, continuous membership and a definition of the roles and functions of its member. However, it must be more than randomly formed for the immediate commission of an offence." United Nations office on Drugs and Crime, above n 11, 14.

[90] During the preparatory working groups of United Nations Convention against Transnational Organize Crime, some delegations including Algeria, Egypt and Turkey, insist that the Convention apply also to crimes committed in order to obtain directly or indirectly moral benefit. The aim of course was to include organizations engaged in national liberation movements, but which are deemed as terrorist groups under national legislation. Other delegates were of the view that this concept was ambiguous. During the eighth session the delegation of Algeria proposed the addition of the word "or other purpose" which was supported by Egypt, Morocco and Turkey. Moreover, during this session, Turkey strongly supported the insertion of a clause recognizing the links between organized crime and terrorism, arguing that this had been earlier postulated in the 1994 Naples Political Declaration (Naples Political Declaration and Global Action Plan against Organize Transnational Crime UN Doc. A/49/748 (23 November 1994). Although, this position was supported by some delegations at the ninth session of the *ad hoc* committee, including Algeria, Egypt and Mexico, the eventual definition of organized crime contains no reference to terrorism. See *Ad Hoc* Committee on the Elaboration of United Nations Convention against Transnational Organized Crime, Eighth Session, UN General Assembly A/AC.25/4/Rev.7 (3 February 2000); see also Revised Draft United Nations Convention against Transnational Organized Crime *Ad Hoc* Committee on the Elaboration of United Nations Convention against Transnational Organized Crime, Tenth session, UN Doc. A/AC.254/5/Add. 26 (11 July 2000); See also *Ad Hoc* Committee on the Elaboration of United Nations Convention against Transnational Organized Crime, Ninth session, UN Doc. A/AC.254/4/rev.8; see also *Ad Hoc* Committee's notes on Article 3 (scope of application) emphasized with deep concern the growing links

Moreover, the Convention defines "serious crime" as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty"[91].

In general, the Convention applies when the offences are transnational in nature and involve an organized criminal group. [92] However, while offences must involve transnationality and organized criminal groups for the Convention and its international cooperation provisions to apply, neither of these must necessarily be made elements of

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between transnational organized crime and terrorist crimes, taking account the UN Charter and relevant General Assembly Resolutions. UN Doc. A/55/383/Add.1 (3 November 2000) p. 2.

[91] *UNTOC*, art 2, para (b). *Travaux préparatoires* Article 2, Use of terms, *United Nations Convention against Transnational Organize Crime*, 2nd sess, UN Doc. A/AC.254/4/Rev.7 (8-12 March 1999). In the discussion on the definition of "serious crime", some delegations noted that establishment of seriousness on the basis of the length of possible sentence might lead to difficulties in practice, owing to differences in penal systems. Some delegations noted that the issue of seriousness should be decided in accordance with the domestic legislation of the two States concerned in a case. Other delegations proposed that the seriousness of a crime should be assessed not only in terms of the level of punishment, but also in view of how the offence was categorized under national law. Croatia suggested that reference should be made to the "nature of the offence" and to the "pattern of action of the organized criminal group"
In addition, some delegations noted that reference could also be made to the list of offences that included in an annex to the convention. As can be seen that Algeria, Egypt, India, Mexico and Turkey proposed the offences list as follows (A/AC.254/5/Add.26):

(a) Illicit trafficking in narcotic drugs and psychotropic substances;
(b) Trafficking in persons, in particular women and children;
(c) Illicit trafficking in and transport of migrants;
(d) Counterfeiting of currency;
(e) Illicit trafficking in or stealing of cultural objects;
(f) Illicit trafficking in or stealing of nuclear materials, their use or threat to misuse them;
(g) Acts of terrorism as defined in the pertinent international conventions;
(h) Illicit manufacturing of and trafficking in firearms, ammunition, explosives and other related materials;
(i) Illicit trafficking in or stealing of motor vehicles, their parts and components;
(j) Illicit trafficking in human organs and body parts;
(k) All types of computer and cyber crimes and illicit access to or illicit use of computer systems and electronic equipment, including electronic transfer of funds;
(l) Kidnapping, including kidnapping for ransom;
(m) Illicit trafficking in or stealing of biological and genetic materials;
(n) Extortion;
(o) Fraud relating to financial institutions.

[92] *UNTOC*, art 34 para 2 states that "The offences established in accordance with Articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in Article 3, paragraph 1, of this Convention, except to the extent that Article 5 of this Convention would require the involvement of an organized criminal group".

domestic offences.[93] Hence, at the domestic level, offences under the United Nations Convention against Transnational Organized Crime (participation in an organized criminal group, corruption, money-laundering and obstruction of justice) must apply equally, regardless of whether the case involves transnational elements or is purely domestic.[94] This is because this transnational element may hamper law enforcement.[95] It is noteworthy that the Convention is not intended to have any impact on the interpretation of the cooperation Articles of Convention.[96] For example, when a requesting country invokes the obligations for international assistance and extradition, a requested country can extradite the offenders for one of four offences or for serious crime, even if a requesting country cannot prove the involvement of an organized criminal group and transnational nature.[97]

3.1 Article 5: Criminalization of participation in an organized criminal group

To date, no country has been able to evade the activities of organized criminal groups. Organized criminal activities are a transnational threat to global economic activity and national security issues.[98] Transnational criminal groups operate both licit and illicit

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[93] Although seemingly odd that the United Nations Convention against Transnational Organized Crime excludes the use of transnational and organized criminal group as elements of these offences, the rationale is that these elements would unnecessarily complicate prosecutions and tie the hands of law enforcement. Margaret K.Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime' (2007) 2 *Asian Criminology* 182; United Nations office on Drugs and Crime, above n 11, 45.

[94] Ibid 10.

[95] Ibid 19.

[96] *UNTOC* art 16, 18 and 27.

[97] *UNTOC*, art 16 para 1.

[98] Dimitri Vlassis, *The Global Stituation of Transnational Ogganized Crime, the Decision of the International Community to Develop an International Convention and the Negotiations Process* [475] <http://www. Unafei.or.jp/english/pdf/RS_No59_33VE_Vlassis2.pdf> at 27 November 2012.

activities.[99] Vincenzo Ruggiero, Professor of Sociology and Co-Director of the Crime and Conflict Research Centre at Middlesex University in the United Kingdom (UK) stated that:[100]

> Sophisticated organized crime groups may be forced to invest their proceeds in the licit economy because there are limits to the expansion of illicit markets, and because licit markets also provide an additional source for the growth of their power. In addition, criminal entrepreneurs are encouraged by the conditions of semi-legality which exist in parts of most economies, and which in some cases are tolerated, so that the lines between licit and illicit activity become blurred.

As mentioned above, organized criminal groups can infiltrate into legitimate businesses. To combat organized criminal groups, Article 5 of the United Nations Convention against Transnational Organized Crime requires state parties to criminalize participation in an organized criminal group.[101]

3.1.1 Provision in the United Nations Convention against Transnational Organized Crime

Article 5 of the United Nations Convention against Transnational Organized Crime requires that state parties criminalize participation in an organized criminal group to combat organized crime. Article 5 states:

> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
> "(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
> "(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where

[99] United Nations Office on Drugs and Crime (UNODC), The Globalization of crime: A Transnational Organized Crime Assessment (2010) [ii] <http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low _res.pdf.> at 27 November 2012.

[100] Ibid.

[101] *UNTOC*, art 5.

required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

"a. Criminal activities of the organized criminal group;

"b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group.

"2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this Article may be inferred from objective factual circumstances.

"3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this Article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this Article, shall so inform the Secretary- General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 5 introduces two alternative options for the criminalization of acts of participation in criminal groups as follows:

1. Under Article 5 paragraph 1 (a) (i), the offence must be committed intentionally. This provision provides the *mens rea* element of the conspiracy offence with the additional requirement that such conspiracy ("agreement") is done by one or more other persons to commit a serious crime for a purpose related directly or indirectly of obtaining a financial or other benefit.

2. Under Article 5 paragraph 1 (a) (ii), the offence must be committed with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crime in question.

Thus, the provisions penalize conspiracy and/ or membership in a criminal organization regardless of any individual crimes committed by the group or by individual members. State parties are required to implement this provision and state parties are free to criminalize either conspiracy, participation in an organized criminal group, or both activities.

3.1.2 Purpose of the Convention Provisions

During the elaboration process, Article 5 was discussed at length. The main controversy related to how the activities of criminal organizations could be criminalized most appropriately. In this regard, the draft of Poland recommended that Contracting States be required to "make punishable acts consisting of participation in or association with an organized group", [102] while the U.S. made a proposal that recommended the criminalization of transnational crime *per se*.[103] Owing to differences in legal systems, it was difficult for the *Ad Hoc* Committee to agree on a universal interpretation of the term "the criminalization of transnational organized crime".[104] In dealing with this issue, the consensus of the meeting followed the Polish Model.[105] It was not a question of choosing one model over the other, but providing two options for the criminalization of acts of participation in criminal groups.

Article 5(1)(a)(i) appears to follow the Anglo-American common law but the provision avoids the word "conspiracy".[106] The provision has elements of the conspiracy offence with the additional requirement that such conspiracy ("agreement") be done for the purpose of obtaining a financial or other benefit.[107] Moreover, this provision further narrows the type of conspiracy that must be criminalized via the requirements of an aim

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[102] UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime,* UN Doc E/RES/1997/22 (21 July 1997) Annex III, art 2(2).

[103] Ibid, Appendix, after para 26, art 1 (1).

[104] Ibid.

[105] Ibid. The proposal of Poland suggested that Contracting States be required to "make punishable acts consisting of participation in or association with an organized group".

[106] Clark, above n 9, 163.

[107] United Nations Office on Drugs and Crime above n 11, 23.

to commit "serious crime" (with potential of at least four years deprivation of liberty according to Article 2(b)) and the requirement that the group be "organized" and thus "structured" according to Article 2(a) and (c) respectively.[108]

In addition, the offence requiring involvement of an organized criminal group for the purposes of subparagraph (a) (1) must "ensure that their domestic law covers all serious crimes (as defined) involving organized criminal group".[109] Parties limiting their legislation either by the "act" requirement or that of an "organized criminal group" must notify the United Nations Secretary-General, the depositary of the Convention.[110] This provision has a degree of flexibility. State parties may add a requirement that there is "an act undertaken by one of the participants in furtherance of the agreement" This appears to be closely related to the common law requirement of an "overt act" which has been introduced in statutes across a number of common law countries.[111]

Article 5 (1)(a)(ii), on the other hand, was intended to apply to civil law countries that do not recognize conspiracy or do not allow the criminalization of a mere agreement to commit an offence. Due to subparagraph (a) (1)(ii), the required mental element is generally knowledge, intent, aim, purpose or agreement of the criminal nature of the group or of at least one of its criminal activities or objectives. Clark states:

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[108] Ibid 171.

[109] *UNTOC*, art 5, para 3.

[110] Ibid.

[111] For example, United States statute under *18U.S.C. 371* has an overt act requirement. "The conspiracy to commit a substantive offence requires proof that one of the conspirators commit an overt act in further of the conspiracy". Charles Doyle (Senior Specialist in American Public Law) *Federal Conspiracy Law: A Brief Overview* (2010) 8, *Congressional Research Service* <http://www.crs.gov> at 30 September 2013.

> This provision penalizes those who knowingly associate themselves with and take an active part in an organized criminal group. The perpetrator must either be active in the criminal activities of the group, or active in its other activities with the appropriate knowledge, namely that the participation will contribute to the achievement of the criminal aim. It is pretty clear that a perpetrator may contravene this standard without doing acts that make him or her complicit under traditional principles for a serious crime as defined in the Convention. The conduct may, in itself, be a "non-serious" crime or even lawful.[112]

The above comment is consistent with a draft of Article 5(1)(a)(ii) by a member of the United Nations Secretariat who was close to the drafting. Slawomir states:

> The provision allows the prosecution of suspects even if a single common criminal enterprise or single common agreement cannot proven. It is enough to prove that a crime has been committed on behalf or in the interest of a boss of an organized crime group without his/her knowledge of the particular crime.[113]

The aforementioned provision of Article 5 recognizes two options for the criminalization of acts of participation in criminal groups and state parties are free to choose either or both of the models contained in paragraphs (i) and (ii). However, by giving discretion to state parties to design the provisions for their own countries, the Convention cannot follow its principal purpose.[114] Some argue that the breadth of the provisions of criminalization of participation in a criminal group may lead to problems.[115] As result of the absence of a universal organized crime offence there will be differences between

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[112] As Clark points out paragraph (1)(a)(i) is meant to roughly correspond to conspiracy as the concept is known to common law states, while paragraph (1)(a)(ii) is more in line with civilian concepts. Roger S above n 9, 170- 172.

[113] Slawomir Redo, *New United Nations Provisions against economic crime* (Andrzej Adamski, 2003).

[114] Carrielyn Donigan Guymon, 'International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention' (2000) 18 *Berkeley Journal of International Law* 53, 93-4 <http://scholarship.law.berkeley.edu/bjil/vol18/iss1/2> at 30 November 2012.

[115] K.Lewis above n 93, 183; Tom Obokata, 'Transnational Organized Crime in International Criminal Law' (2010) 17 *European Journal on Criminal Policy and Research* 347.

national jurisdictions and the different concepts of organized crime embraced in domestic criminal law statues. The corollary of this is that organized criminal groups can exploit the differences, loopholes and shortcomings of national legal systems for executing crimes.[116]

3.1.3 Relevant Thai Laws

3.1.3.1 Legislation

To combat transnational criminal groups, in November 2013, Thailand enacted the Anti-Transnational Organized Crime Act B.E.2556 (2013). This Act provides a definition of "organized criminal group" [117] as "a structured group of three or more persons, notwithstanding being formed permanently or existing for a period of time, continuity of its membership or a developed structure acting in concert with the aim of committing any offence stipulated in this Act, with the aim to unlawfully obtain, directly or indirectly, property or any other benefit." [118] Moreover, this Act stipulates the meaning of "transnational organized crime" as an offence to do any of the following acts:

(1) It is committed in more than one State;

(2) It is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state.

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

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[116] Schloenhardt, above n 1, 334.

[117] *Anti-Transnational Organized Crime Act B.E. 2556 (2013)* s 3.

[118] *Anti-Transnational Organized Crime Act B.E. 2556 (2013)* s 3.

(4) It is committed in one state but has substantial effects in another state.[119]

Sections to s 5[120] and s 7[121] of the Anti-Transnational Organized Crime Act B.E.2556 (2013) penalize conspiracy or membership in criminal organization. The Act requires the mental element of knowledge, intent, aim, purpose or agreement of the criminal activities. The offender must either be active in the criminal activities of the group; however, he must know the objectives that the participation will contribute to the achievement of the criminal aim.

In addition, ss 8[122] and 9[123] of the Act provide heavier punishment for members of the House of Representative, members of Senate, members of a Local Administration Council, Local Administrators, Government Officials, employees of the Local

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[119] *Anti-Transnational Organized Crime Act B.E. 2556 (2013)* s 3.

[120] *Anti-Transnational Organized Crime Act B.E. 2556 (2013)* s 5 Whoever commits any of the following acts:
(1) being member of an organized criminal group;
(2) two persons upwards conspires to commit a serious offence which is related to transnational organized crime;
(3) participates in a criminal organization, knowing that it is a criminal organization; and
(4) demanding, assisting, aiding, supporting or giving the advise for commit a serious offence which is related to transnational organized crime by knowingly associate themselves in criminal actvities or objectives.
Is guilty of transnational organized offence.

[121] *Anti-Transnational Organized Crime Act B.E. 2556 (2013)* s 7 If any one of the offenders commit a serious offence which is related to transnational organized crime, everyone being the member of such organized criminal group at the time of the the commission of such offence, knowing and not desists from carrying it through, including the leader, director and other members in organized criminal group, shall be punished for such offence.

[122] *Anti-Transnational Organized Crime Act B.E. 2556 (2013)* s 8 Whoever, in the capacity as a member of the House of Representatives, member of the Senate, member of a Local Administration Council, Local Administration, Government Official employee of the Local Administration Organization, or employee of an organization or a public agency, member of a board, executive, or employee of state enterprise, an official, or member of a board of any organization under the Constitution, commits an offence under this Act shall be liable to twice the punishment stipulated for such offence.

[123] *Anti-Transnational Organized Crime Act B.E. 2556 (2013)* s 9 Any competent official or investigator empowered to act in accordance with this Act, committing an offence under this Act, shall be liable to thrice the punishment stipulated for such offence.

Administration Organization, or employees of an organization under the Constitution and competent officials who commit transnational organized crime offences.

The *Anti-Trafficking in Person Act*, B.E. 2551 (2008) also provides a definition of "organized criminal group" [124] as "a structured group of three or more persons, notwithstanding being formed permanently or existing for a period of time with no necessity to have formally defined roles for its members, continuity of its membership or a developed structure acting in concert with the aim of committing one or more offences punishable by a maximum imprisonment of four years upwards or committing any offence stipulated in this Act, with the aim to unlawfully obtain, directly or indirectly, property or any other benefit."

Section 9 of the Act embraces the conspiracy concept by providing a penalty for two persons upwards conspire to commit the trafficking in persons offence. Furthermore, if any one of the offenders has acted in furtherance of conspiratorial objective, each member of the conspiracy shall receive a heavier punishment. On the other hand, the court may not to impose punishment or inflict less punishment for the offender who reverses his or her position by providing a true statement in relation to the conspiracy to the competent official before the conspired offence is committed. [125]

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[124] *Anti-Trafficking in Persons Act, B.E. 2551 (2008)* s 4.

[125] *Anti-Trafficking in Persons Act, B.E. 2551 (2008)* s 9 Whoever, from two persons upwards, conspires to commit an offence as aforesaid by section 6 shall be liable to no more than one-half of the punishment stipulated for such offence.
If any one of the offenders in paragraph one has committed in further of the conspiratorial objective, each member of the conspiracy shall be liable, as an additional count, for the punishment stipulated for the committed offence.

It can be seen that the Anti-Transnational Organized Crime Act B.E.2556 (2013) and the *Anti-Trafficking in Person Act*, B.E. 2551 (2008) include a number of significant definitions which are "organized crime", "transnational" element and the concept of conspiracy that is applied in the context of the transnational organized crime offence.

3.1.3.2 Case Study

The Pattaya police made an announcement on 26 March 2012 concerning the arrest of three men from the Democratic Republic of Congo accused of embezzlement.[126] The three men, Mukola, Ntumba and Mankasi, were charged with possession of fake passports. They confessed to being agents and receiving a ten percent commission from a money laundering organization which was transferring money from overseas to their recently opened bank accounts in both Bangkok and Pattaya. On further investigation, police revealed this money transfer banking scam brought in an estimated fifty million baht of laundered money, and the three men were only just a few operating in Thailand and South East Asia.[127]

In case the commission of an offence is carried out up to the stage of commencement, but because of the intervention of any conspirator, the offence cannot be carried through, or the offence is carried through but does not achieve its end, the conspirator so intervening is liable to the punishment as stipulated in paragraph one.
If the offender, under paragraph one, reverses his position his position by providing a true statement in relation to the conspiracy to the competent official before the conspired offence is committed, the court may not inflict punishment or inflict less punishment upon such person to any extent than that prescribed by the law for such offence.

[126] Pattaya People, *Money Laundering Trio Caught in Pattaya* <http://www.pattayapeople.com/default.asp?Folder=16&IdArticle=30373> at 11January 2013.

[127] Ibid.

This case was resolved by the Kasikornthai Bank officer. The officer called the police and said there were three suspect men who held fake Portuguese Passports to open new accounts and debit cards at Lotus Southpattaya Branch and Central department store Northpattaya Branch of Kasikornthai Bank. When the Pattaya Police got the tip from the officer, they traced and finally arrested the three suspects in Pattaya.[128]

The above case is an example which indicates the presence of organized criminal groups in Thailand. This case happened in 2012. However, the *Anti-Transnational Organized Crime Act* B.E. 2556 (2013) just began enforced in November 2013. The following section examines the conspiracy concept in U.S. as a possible model for Thailand.

The U.S. Position

The following section will examine the concepts of conspiracy and participation in organized crime in the United States of America. Although Thailand is a civil law country and the United States of America a common law country, the Racketeer Influenced and Corrupt Organization (RICO) legislation has been used to prosecute those who commit crimes as part of group. Thailand can use the concept of RICO to improve its legislation relating to conspiracy.

> The standard recipe in comparative law for dealing with such conceptual disparities is to look for functional equivalents and to use them as a basis for comparison.[129]

[128] Pattaya News, <http://www.regist53.blogspot.com/2012/03/3_24.html> at 11January 2013.

[129] Luban, O'Sullivan and P.Stewart, above n 1, 514.

In support of this view, Wise notes that "for many civil law countries, penalization of membership in a criminal association or organization meets some of the functions of common law conspiracy and helps to illuminate the debate that must have surrounded the negotiation of these provisions. For example, French law has a concept of "association of wrongdoers" ("association de malfeiteurs")which comes close in effect to the Anglo-American [notion of] conspiracy."[130]

3.1.4 Comparative Law

United States law has implemented effective measures for fighting organized crime networks.[131] The conspiracy doctrine has been utilized by prosecutors as an effective tool against serious crime.[132] The elements of criminal conspiracy under the U.S. law under 18 U.S.C 371[133] are as follows: (1) an agreement between at least two parties, (2) to achieve

[130] Edward M.Wise, 'RICO and Its Analogues: A Comparative Perspective written for Symposium, RICO Thirty Years Later: A Comparative Perspective' (2000) 27 Syracuse Journal of International Law and Commerce 303; see also Jennifer Smith , "An International Hit Job: Prosecuting organised Crime Acts as Crimes against Humanity" (2009) 97 Georgetown Law Journal 1111, 1119.

[131] Luban, O'Sullivan and P.Stewart, above n 1, 507.

[132] Harrison v. United States, 7 F.2d 259, 263 (2d Cir.1925) (L.Hand, J.) (conspiracy is the darling of the modern prosecutor's nursery).

[133] *U.S. Code Title 18* s 371 states if two or more persons conspire either to commit any offense against the United States or to defraud the Unites States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. 18 *U.S.C.* 371 ('and one or more of such persons do any act to effect the object of conspiracy") *United States v. Wardell,* 591 F.3d 1279, 1287 (10th Cir. 2009); *United States v. Schaffer, 586* F.3d 414,422 (6th Cir. 2009); *United States V.Kingrea,* 573 F.3d 186, 195 (4th Cir. 2009).
If, however, the offense, the commission of which is the subject of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

an illegal goal, (3) the parties know the nature of the conspiracy and participate in it, and (4) an overt act[134] in furtherance of the conspiracy committed by one of the conspirators.[135]

It can be seen that the criminalization of conspiracy is crucial to suppress transnational organized crime. This is because criminals can be penalized before they complete the crime.[136] Under conspiracy law, each member of an organized criminal group who has committed an act in the furtherance of a crime and a conspiratorial objective is liable. It is unnecessary to show that the criminal had anything to do with the carrying out of the crime himself.[137] As Justice Felix Frankfurter has stated, the dynamics of the criminal group creates graver dangers for society than crimes committed by lone individuals:[138]

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[134] *S 371* has an overt act requirement. *United States v. Calderon*, 578 F.3d 78, 89 (1st Cir. 2009); see also *United States v. Franklin*, 561 F.3d 632, 402 (5th Cir. 2009); *United States v. Brown*, 587 F.3d 1082, 1089 (11th Cir. 2009)

[135] *United States v. Root*, 585 F.3d 145, 157 (3d Cir. 2009); *United States v. World Wide Moving, N.V.,* 411 F.3d 502, 516 (4th Cir. 2005).

[136] As Professor Neal Katyal summarized the U.S. conspiracy law: Imagine that Joe and Sandra agree to rob a bank. From the moment of agreement, they can be found guilty of conspiracy even if they never commit the robbery (it's called "inchoate liability"). Even if the bank goes out of business, they can still be liable for the conspiracy ("impossibility" is not a defense). Joe can be liable for other crimes that Sandra commits to further the conspiracy's objective, like hot-wiring a getaway car (that's called *Pinkerton* liability, after a 1946 Supreme Court case involving tax offences). He cannot evade liability by staying home on the day of the robbery (a conspirator has to take an affirmative act to "withdraw"). And if the bank heist takes place, both Joe and Sandra can be charged with bank robbery and with the separate crime of conspiracy, each of which carries its own punishment (the crime of conspiracy does not "merge" with the underlying crime. Neal Katyal, 'Conspiracy Theory' (2003) 112 Yale Law Journal 1307-1398.

[137] Conspiracy is a completed crime upon agreement, or upon agreement and the commission of an overt act under statutes with overt act requirement. Conviction does not require commission of the crime that is the object of the conspiracy. *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (the conspiratorial "agreement is distinct evil, which may exist and be punished whether or not the substantive offence ensues"); *United States v. Mincoff,* 574 F.3d 1186, 1198 (9th Cir. 2009); *United States v. Eppolito*, 543 F.3d 25, 47 (2d Cir. 2008). On the other hand, conspirators may be prosecuted for conspiracy, for any completed offences which is the object of the conspiracy, as well as for any foreseeable offence committed in furtherance of the conspiracy. *Pinkerton v. United States,* 328 U.S. 640, 646-47 (1946); *Callanan v. United States* 364 U.S.587, 593(1961); *United States v. Wardell*, 591 F.3d 1279, 1291 (10th Cir. 2009); *United States v. Simmons*, 581 F.3d 582, 587 (7th Cir. 2009).

[138] *Callanan v. United States* 364 U.S.587, 593(1961).

> Collective criminal agreement-partnership in crime-presents a great potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Thus, it is reasonable to penalize criminals who join a group and knowingly take part in criminal conspiracy since the criminal group activity generates a great threat to the public. Accordingly, conspiracy can be used as a legal weapon for the suppression of transnational organized crime.

The RICO can be used as a tool for organized crime control. Under the RICO (Racketeer Influenced and Corrupt Organization) statute, asset forfeiture and the criminalization of participation in the activities of a criminal organization are central. It goes beyond conspiracy. As Professor Edward Wise comments:[139]

> RICO has been characterized as "the most important substantive and procedural tool in the history of organized crime control". It is particularly important because it changed the way in which cases involving organized crime are investigated and prosecuted: it encourages investigators "to think in terms of gathering evidence and obtaining indictment against entire 'enterprises' like each organized crime family," and it allows prosecutors to present at trial "a complete picture of what the defendant was doing and why-instead of the artificially fragmented picture that traditional criminal law demands".

According to the Organized Crime Control Act of 1970 which created the RICO (Racketeer Influenced and Corrupt Organization) Law of the United States (USCA), title

[139] M.Wise, above n 130, 303.

18 section 1961-1968, was enacted as one of the key tools to be used in organized crime prosecutions. It stipulates the types of serious offences that have an impact on the state and people, and also allows for prosecution of anyone who participates or conspires to participate in a criminal enterprise/organization through two acts of "racketeering activity" within a 10-year period of time.[140] The predicate offences for racketeering include various state and federal crimes listed in the U.S. Code.[141]

The concept of criminalizing participation in the activities of a criminal organization is stated in RICO 18 U.S.C. section 1962.[142] Subsections 1962 (a) and (b) are concerned

[140] Kristin M.Finklea, *Organized Crime in United States: Trends and Issues for Congress* (Congressional Research Service, 22 December 2010) 6.

[141] See *18 U.S.C.* s 1961 for a comprehensive list of the predicate offences for racketeering. Offences include- but are not limited to- crimes such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, dealing in a controlled substance or listed chemical, counterfeiting, theft from interstate shipment, embezzlement from pension and welfare funds, embezzlement from union funds, fraud and related activity in connection with identification documents or access devices, mail fraud, wire fraud, financial institution fraud, procurement of citizenship or nationalization unlawfully, obstruction of justice or criminal investigations, tampering with or retaliating against a witness, false statements or forgery in application and use of a passport or other documents, peonage, slavery, trafficking in persons, interference with commerce, and laundering of monetary instruments.

[142] *18 U.S.C.* s 1962 Prohibited activities
(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
(b) It shall be un lawful for any person through a pattern of racketeering activity of through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

with the infiltration of legitimate businesses by organized crime. Section (a) prohibits using income derived from racketeering activity to acquire an interest in an enterprise and section (b) prohibits acquiring or maintaining control of enterprise through a pattern of racketeering activity.[143] Moreover, subsection 1962 (c) states that "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt".[144] The aim of subsection (c) is not limited to cases involving the infiltration of a legitimate business by organized crime. It has not even been limited to cases involving organized crime. It can be invoked whenever predicate crimes are committed by someone associated with an enterprise."[145]

3.1.5 Proposed Law Reform

To combat transnational organized crime effectively and comply with the obligation of the United Nations Convention against Transnational Organized Crime, Thailand should criminalize the offence for migrant smuggling relates to transnational organized crime under *the Anti-Transnational organized Crime Act B.E 2556 (2013)* as follows:

[143] *18 U.S.C*. s 1962 (a), (b).

[144] *18 U.S.C*. s 1962 (c).

[145] M.Wise, above n 130, 303.

Whoever commits one of the following;

(1) (a) arranges for an authorized migrant to enter Kingdom of Thailand;

(b) does so for the purpose of obtaining, directly or indirectly, a material benefit for himself or any other person; and

(c) knows that, or is reckless as to whether, the authorized migrant is an unauthorized migrant.

(2) (a) arrange for an unauthorized migrant to be brought into a jurisdiction;

(b) does so for the purpose of obtaining, directly or indirectly, a material benefit for himself or any other person;

(c) knows that, or is reckless as to whether, the unauthorized migrant is an unauthorized migrant; and

(d) knows that, or is reckless as to whether, the unauthorized migrant intends to try to enter the jurisdiction.

is being guilty of participating in organized criminal group.

3.2 Article 6: Criminalization of Laundering of Proceeds of Crime; Article 7: Measures to Combat Money Laundering

Money laundering is used by transnational organized crime to conceal money.[146] Generally, if money is not laundered, it is relatively easy for enforcement officials to detect and confiscate the "dirty" money.[147] This, in turn, limits the ability of transnational organized crime groups's to reinvest the proceeds into other crimes. The United Nations Convention against Transnational Crime provides a measure to weaken transnational organized crime's ability to launder its dirty money.[148]

[146] Viraphong Boonyobhas, *The Justice Process and the Anti-Money Laundering Law* (Nititham Publishing, 2003), 20.

[147] Ibid.

[148] United Nations, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges*, and Change (2004), 54.

3.2.1 Provision in the United Nations Convention against Transnational Organized Crime

Article 6 of the United Nations Convention against Transnational Organized Crime requires that state parties criminalize the Laundering of Proceeds of Crime as follows:

> 1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
>
> (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
>
> (b) Subject to the basic concepts of its legal system:
>
> (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
>
> (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this Article.
>
> 2. For purpose of implementing or applying paragraph 1 of this Article:
>
> (a) Each State Party shall seek to apply paragraph 1 of this Article to the widest range of predicate offences;
>
> (b) Each State Party shall include as predicate offences all serious crime as defined in Article 2 of this Convention and the offences established in accordance with Article 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list comprehensive range of offences associated with organized criminal group;
>
> (c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of the State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this Article had it been committed there;
>
> (d) Each State Party shall furnish copies of its laws that give effect to this Article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this Article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this Article may be inferred from objective factual circumstances.

In addition, Article 7 provides measures to combat money laundering as follows:

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money laundering, within its competence, in order to deter and detect all forms of money laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to Articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering.

2. State Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this Article, and without prejudice to any other Article of this Convention, State Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money laundering.

4. State Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering.

3.2.2 Purpose of the Convention Provisions

The first formal international instrument against money laundering dates back to 1998 and is contained in *the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances* which criminalizes the conversion of illicit cash deriving from drug trafficking.[149] International organizations such as the Basle Committee on Banking Supervision,[150] the Offshore Group of Banking Supervisors (OGBS),[151] the Commonwealth of Nations,[152] and especially the *Forty Recommendations* to Financial Action Task Force (FATF) have been recognized by the International Monetary Fund (IMF) and the World Bank as the international standards for combating money laundering and financing of terrorism.[153] However, the recommendations of these international

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[149] *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* art 3 (1) (b) <http://www.incb.org/pdf/e/conv/convention_1998_en.pdf> Originally, predicate offence included only the offence related to narcotics because the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances required state parties to enact domestic law to combat laundering of proceeds of drug trafficking. Later, the international community recognized that organized crimes such as arm and human trafficking, also were threat national security. Thus, the United Nation against Transnational Organized crime began to extend the predicate offences. Money Laundering and Terrorism Financing: Definition and Explanation <www1.worldbank.org/finance/html/amlcft/docs/Ref_Guide_EN/v2/01-Cho1_EN_v2.pdf.> at 13 January 2013.

[150] In June 1996, the International Conference of Banking Supervisors, attended by representatives from 140 countries, developed the *29 Basle Committee Recommendations* designed to strengthen the effectiveness of supervision of banks operating outside their national boundaries. Guidelines were issued for determining the effectiveness of home country supervision, for monitoring supervisory standards in host countries, and for dealing with corporate structures that create potential supervisory gaps.

[151] The OGBS was established in October 1980 at the instigation of the Basle Committee on Banking Supervision. The primary objective of OGBS is to promote the effective supervision of banks in their jurisdictions and to further international cooperation in the supervision between Offshore Banking Supervisors and between them and Basle Committee Member Nations and other banking supervisors. Furthermore, OGBS, in cooperation with FATF, evaluates the effectiveness of the money laundering laws and policies of its members.

[152] In October 1993 the Commonwealth Heads of Governments Meeting "commended" the FATF Forty Recommendations, "urged steps for their early implementation", agreed to initiate a process of self-evaluation, and mandated their Senior Officials to monitor with the assistance of the Commonwealth Secretariat the implementation of these measures and develop a model Commonwealth anti-money laundering law. Adam Graycar and Peter Grabosky, *Money Laundering: the State of Play: Money Laundering in the 21st Century: Risks and Counter-measures* (Australian Institute of Criminology, 1996), 48.

[153] The Financial Task Force on Money Laundering (The Forty and Nine Special Recommendations on The original FATF Forty Recommendations were drawn up in 1990 as initiative to combat the misuse of

organizations do not have binding legal effect. The United Nations Convention against Transnational Crime can overcome the non-enforceability of these recommendations.

The idea of placing money laundering under the United Nations Convention against Transnational Crime was first proposed in 1998.[154] The money laundering provisions of the Convention build on recommendations and best practice principles developed by other international, regional, and non-governmental organizations active in this field as stated earlier.

Articles 6 and 7 of the United Nations Convention against Transnational Crime contain provisions dealing with the laundering of proceeds deriving from organized crime activities.

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financial system by persons laundering drug money. In 1996 the Recommendations were revised for the first time to reflect evolving money laundering typologies. The 1996 Forty Recommendations have been endorsed by more than 130 countries and are the international anti-money laundering standard. In 2001 the FATF expanded it mandate to deal with the issue of the financing of terrorism, and took the important step of creating the Nine special Recommendations on Terrorist Financing. These Recommendations contain asset of measures aimed at combating the funding of terrorist acts and terrorist organizations and are complementary to the Forty Recommendations. Sudarat Rattanachotchairit, Should Thailand Enforce the Anti-Money Laundering Law to Control Designated Non-Financial Businesses and Professions? (2008), LLM thesis, the Faculty of Law Chulalongkorn University, 35.

[154] United Nations Commission on Crime Prevention and Criminal Justice, *Report of the meeting of the inter-sessional open-ended intergovernmental group of experts on the elaboration of a preliminary draft of a possible comprehensive international convention against organized transnational crime*, UN Doc E/CN.15/1998/5 (18 Feb 1998) art 4; United Nations Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4 (15 Dec 1998) art 4 bis.

Pursuant to Article 6, state parties must adopt one of two measures.[155] First, the state parties have to criminalize all of the following as predicate offences:

1. All serious crime. Article 2 (b) of the Convention.
2. Offences in respect of the participation in an organized criminal group. (Article 5)
3. Offences in respect of corruption (Article 8); and
4. Offences in respect of obstruction of justice. (Article 23)

Second, if their anti-money laundering statues set out a list of specific predicate offences, the state parties can choose to add the offences associated with organized criminal groups as the predicate offences into the list rather than include the above four categories of offences.

Article 7 is specially designed to enhance the regulation and monitoring of the financial and banking sectors in signatory nations and facilitate the apprehension and seizure of, and intelligence on, suspect assets and transactions. The provision can apply to banks as well as to other financial institutions such as stockbrokers, security dealers, bureaux de change and currency brokers.[156] It might be concluded that the offences set out under Article 6 are to be applied in domestic law by the measures listed in Article 7.

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[155] Nattawut Baibua, 'The Predicate Offences of Money Laundering: A study of the Definition of "Predicate Offences" under Thai Anti-Money Laundering Act and United Nations Convention against Transnational Organized Crime' (2011) 14 *Thailand Journal of Law and Policy* 1 <http://www.thailawforum.com/articles/Predicate-offences-under-thai-money-laundering-act-3.html> at 20 November 2012.

[156] Travaux préparatoires, para 14.

3.2.3 Relevant Thai Laws

3.2.3.1 Legislation

Before the enactment of Anti-Money Laundering Act B.E.2542 (1999), no laws in Thailand penalized criminals engaged in money laundering. Criminals tried to process money into legitimate funds so their original source could not be traced and they were able to use laundered money to expand their criminal activities. It was very hard for the authorities to detect and prosecute criminals because of the ineffectiveness of the previous law.[157] Therefore, on 19 August 1999, the Thai parliament enacted the Anti-Money Laundering Act B.E.2542 (1999). The Act criminalizes the act of money laundering and related conspiracy.[158] The Act also creates a civil forfeiture system for confiscating assets identified as having been acquired with the proceeds of specific predicate criminal offences and established the Office of Anti-Money Laundering.[159]

Money Laundering Offences

The Act criminalizes the act of money laundering by two means: Anyone who[160]

> (1) transfers, receives or changes the form of an asset involved in the commission of an offence, for the purpose of concealing or disguising the origin or source of that asset, or for the purpose of assisting another person either before, during, or after the commission of an offence to enable the offender to avoid the penalty or receive a lesser penalty for the predicate offence; or

[157] Boonyobhas, above n 146, 19.

[158] The Act applies the conspiracy principle to the money laundering offences. With this principle, although two or more persons only conspire to launder money and have not yet committed money laundering, they each will be penalized with half penalty of the money laundering offence (s 9).

[159] Kamolsak Muenpakdee, *Providing Offense of Serious Crime in United Nations Convention against Transnational Organized Crime 2000 as a predicate offence in Money Laundering Control Act B.E.2542 (1999)* (2009), LLM thesis, Faculty of Law, Chulalongkorn University, 32.

[160] *Anti-Money Laundering Act B.E.2542 (1999)* s 5.

(2) acts by any manner which is designed to conceal or disguise the true nature, location, sale, transfer, or rights of ownership, of an asset involved in the commission of an offence

shall be deemed to have committed a money laundering offence.

Extraterritorial Jurisdiction

The Act applies extraterritorially for the purpose of suppressing transnational money laundering.[161] Although the money laundering offences may be committed outside Thailand, they can be prosecuted in Thailand (1) if a Thai national or resident is an offender,[162] or (2) if an alien commits the offences with the intention of having consequence in the country, or the Government is the injured party,[163] or (3) when an alien committed an offences under the other state's law and he appears on Thai territory and is not yet extradited under the Extradition Act.[164]

Predicate Offences under Thai Anti Money Laundering Law

According to s 3 of the Anti-Money Laundering Act, there are 25 predicate offences:[165]

(1) Offences relating to narcotics under the law on narcotics control or the law on measure for the suppression of offenders in offences relating to narcotics;[166]

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[161] Peeraphan Prempoomti, *Effective Countermeasures against Money Laundering in Thailand,* UNAFEI, 83 <http:///www.unafei.or.jp/english/pdf/PDF rms/no67/13_Prempooti> at 15 January 2013.

[162] *Anti-Money Laundering Act B.E.2542 (1999)* s 6 (1).

[163] *Anti-Money Laundering Act B.E.2542 (1999)* s 6 (2).

[164] *Anti-Money Laundering Act B.E.2542 (1999)* s 6 (3).

[165] *Anti-Money Laundering Act (No.4) B.E. 2556 (2013)* s 3.

[166] Offences as stipulated in (1) *the Narcotic Act B.E. 2522 (1979), (2) Act on Measures for the Suppression of Offenders in an Offences Relating to Narcotics B.E. 2534 (1991), (3) Act on Psychotropic Substances B.E. 2518 (1975), and (4) Act on controlling the use of volatile substances B.E. 2533 (1990).*

(2) Offences relating to sexuality under the Penal Code only in respect of procuring, seducing or taking away for an indecent act a woman and child for sexual gratification of others, offences of taking away a child and a minor, offences under the law on measures for the prevention and suppression of women and children trading or offences under the law on prevention and suppression of prostitution only in respect of procuring, seducing or taking away such persons for their prostitution, or offences relating to being an owner, supervisor or manager of a prostitution business or establishment or being a controller of prostitutions in a prostitution establishment;[167]

(3) Offences relating to public fraud under the Penal Code or offences under the law on loans of a public fraud nature;[168]

(4) Offences relating to misappropriation or fraud or exertion of an act of violence against property or dishonest conduct under the law on commercial banking, the law on the operation of finance, securities and credit foncier business or the law on securities and stock exchange committed by a manager, director or any person responsible for or interested in the operation of such financial institutions;[169]

(5) Offences relating to malfeasance in office or malfeasance in judicial office under the Penal Code, offences under the law on offences of officials in State

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[167] Offences in respect of (1) procuring, seducing or taking away for an indecent act a woman and child for sexual gratification of others, taking away a child and a minor as stipulated in ss 282 and 317-319 of the Penal Code, (2) Act on Prevention and Suppression of Trafficking in Women and Children B.E.2540 (1997) and (3) Act on Prevention and Suppression of Prostitution B.E. 2539 (1995) in ss 9 and 11.

[168] Offences in respect of (1) public fraud as stipulated in ss 341 and 343 *of the Penal Code, and (2) Decree on Loans of a Public Fraud Nature B.E.2527 (1984).*

[169] Offences in respect of misappropriation or fraud or exertion of an act of violence against property or dishonest conduct as stipulated in *(1) Act on Commercial Banking B.E. 2505 (1962), (2) Act on the Operation of Finance, Securities and Credit Fonder Business B.E. 2522 (1979), and (3) Act on Securities and Stock Exchange B.E. 2535 (1992).*

organizations or agencies or offences of malfeasance in office or dishonesty in office under other laws;[170]

(6) Offences relating to extortion or blackmail committed by claiming an influence of secret society or criminal association under the Penal Code;[171]

(7) Offences relating to smuggling under the customs law;[172]

(8) Offences relating to terrorism under the Penal Code;[173]

(9) Offences relating to gambling under the law on gambling. However, these offences limited to offence relating being an organizer of gambling activity without permission and there are more than one hundred players or gamblers at one time, the total amount of money involved exceeds ten million baht;[174]

(10) Offences relating to being a member of a racketeering group under the Penal Code or participating in an organized criminal group which constitutes an offence under relevant laws;

(11) Offences relating to receiving stolen property under the Penal Code only as it constitutes assisting in selling, buying, pawning or receiving in any way property obtained from the commission of an offence with a nature of business conduct;

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[170] Offences in respect of (*1) malfeasance in office and judicial office in* ss 147-166 and 200-204 *of the Penal Code and offences as stipulated in (2) Act on Offences of Officials in State Organization or Agencies B.E. 2502 (1959), and (3) Organic Act on Counter Corruption B.E.2542 (1999).*

[171] Offences in respect of extortion committed by claiming an influence of secret society or criminal association and blackmail committed by claiming an influence of secret society or criminal association as stipulated in ss 337 and 338 of the Penal Code.

[172] Offences in respect of custom evasion under *the Customs Act B.E. 2476 (1923).*

[173] Offences in respect of terrorism as stipulated in ss 135/1-135/4 of *the Penal Code*. This offence announced in the Royal Gazette which effective from 11 August 2003 onwards.

[174] Offences in respect of illegal gambling under the Gambling Act B.E. 2478 (1925). This offence was enacted in *the Anti-Money Laundering Act , (No.2), B.E. 2551 (2008), which came into force on 2 March 2008, amended the Money Laundering Act B.E. 2542 (1999).*

(12) Offences relating to counterfeiting or alteration of currencies, seal, stamp and ticket under the Penal Code with a nature of business conduct;

(13) Offences relating to trading under the Penal Code only where it is associated with the counterfeiting or violating the intellectual property rights to goods or the commission of an offence under the laws on the protection of intellectual property rights with a nature of business conduct;

(14) Offences relating to forging a document of right, electronic cards or passports under the Penal Code with a nature of regular or business conduct;

(15) Offences relating to the unlawful use, holding, or possessing of natural resources or a process for illegal exploitation of natural resources with a nature of business conduct;

(16) Offences relating to murder or grievous bodily injury under the Penal Code which leads to the acquisition of assets;

(17) Offences relating to restraining or confining a person under the Penal Code only where it is to demand or obtain benefits or to negotiate for any benefits;

(18) Offences relating to theft, extortion, blackmailing, robbery, gang-robbery, fraud or misappropriation under the Penal Code with a nature of regular conduct;

(19) Offences relating to piracy under the anti-piracy law;

(20) Offences relating to unfair securities trading practice under the law on securities and stock exchange;

(21) Offences relating to arms or arms equipment which is or may be used in the combat or war under the laws on arms control.

(22) Offences relating to election fraud in section 53 subsections (1), (2) of the Senate and House Election Act of B.E. 2550 (2007);[175]

(23) Offences relating to Human Trafficking under the Anti-Trafficking in Persons Act B.E. 2551 (2008) section 14;

(24) Offences relating to the Counter Terrorism Act B.E.2556 (2013) section 16;

The Counter Terrorism Act B.E.2556 (2013) came into force in February 2013. This Act is related to the current the Anti-Money Laundering Act B.E.2542 (1999) in terms of preventing and detecting money laundering and terrorism financing. The financial institution has duty to submit the name of any person is in connection with terrorism or the financing of terrorism to the Anti-laundering Office (AMLO).[176] Then, if there is a reasonable suspicion that any person is connected with terrorism or the financing of terrorism, the AMLO upon approval of the Transaction Commission shall submit the name of the person in question to a public prosecutor. The court may order a suspension of the use of property in the financing of terrorism.[177] Moreover, this Act aims to bring

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[175] Section 53 prohibits a candidate or any action to induce any voter to vote for myself. Or other candidates Or any political party. Or to refrain from voting for any candidate or political party. The following way:
(1) prepare to offer promise. Or arrange to have the property or any other benefits that may be paid to any calculation.
(2) the offer or promise of money, property or other benefits, whether directly or indirectly, to fund the Community Association Institute. Hospital or any other institution.
(3) …….....
(4) ……
An offence under subsection (1) or (2) shall be treated as an offence under the law of the fundamental and anti-money laundering. The Election Commission has the power to refer the matter to the Ant-Money Laundering Authority's implementation.

[176] *Counter Terrorism Financing Act B.E.2556(2013)* s 4 Where any person, group of persons, legal person or organ has been listed as terrorist by a United Security Council resolution or announcement, the Office shall without delay submit the name of such person or organ to the Minister of Justice to further be entered in the list of designate persons, subject to the criteria and procedure set forth in a ministerial regulation.

[177] *Counter Terrorism Financing Act B.E.2556(2013)* s 5 In cases there is a reasonable suspicion according to the circumstances that any person is in connection with terrorism or the financing of terrorism, or that any person acts on behalf of , upon instructions of or under control of such person, the Office, upon approval of the Transactional Commission, shall submit the name of the person in question to a public prosecutor to further ex parte seek a judicial order adjudging the person as a designate person. The court shall rule in favour of the request when reasonable evidence supports the following believes:

Thailand into line with international standards, including standards set by the Financial Action Task Force (FATF).[178]

(25) Offences relating to the Anti-Transnational Organized Crime Act B.E.2556 (2013) section 22

Investigation, Prosecution and Trial of Criminal Offences

Normally, the police are responsible for investigating the criminal offence of money laundering. However, the Department of Special Investigation (DSI) was established in 2004 to investigate complicated and sophisticated criminal cases including investigating the criminal offence of money laundering (as distinct from civil asset forfeiture actions carried out by the Anti-Money Laundering Office).[179] Thus, both the police and the DSI have power to detect, identify, investigate, interrogate and collect evidence related to the criminal offence of money laundering. Where there is probable cause to believe that a person committed such an offence, the police or the DSI will forward the case to the public prosecutor. If the public prosecutor considers that the evidence is insufficient, the public prosecutor may drop the case or instruct the police or the DSI to collect more evidence.

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(1) the person being in connection with terrorism or the financing of terrorism;
(2) the person acting on behalf of, upon instructions of or under control of a designate person under (1) or under s 4.

[178] The Financial Action Task Force Plenary and Working Group Meeting in Paris announced the ranking the countries according to the action they have taken against money laundering and financing terrorism. At that time Thailand was categorized in the Second Public Document group which means that the delay in legislating anti-money laundering and anti-terrorist-financing laws. Therefore, Thailand has enforced the *Counter Terrorism Financing Act B.E.2556(2013)* to confirm Thailand's position that the country does not support those activities. The Nation, *Private sector worries about downgrade*, The Nation, *Private Sector Worries about Downgrade*, <http:///nationmultimedia.com> 24 May 2014.

[179] Sutthi Sookying, 'The Department of Special Investigation (DSI): Countermeasures in Regard to the Investigation of Economic Crimes and Special Crimes in Thailand' (2004), *Annual Report for 2004 and Resource Material Series No.66*, 171-178.

Conversely, if the public prosecutor considers there is probable cause to believe that an offence has been committed, the public prosecutor will file a criminal lawsuit against the offender. The burden of proof will be on the public prosecutor to prove beyond reasonable doubt that the defendant is guilty as charged.[180] If the public prosecutor is unable to prove beyond reasonable doubt that the defendant committed a criminal offence of money laundering, the court will acquit the defendant.[181]

Investigation, Prosecution and Trial of Civil Forfeiture

If there is evidence to suggest that assets are related to predicate offences, the Anti-Money Laundering Office[182] Secretary-General[183] will forward the case to the public

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[180] *The Criminal Procedure Amendment Act B.E.2542 (1999)* s 143 " Upon receipt of the opinion and file from the inquiry official as mentioned in the foregoing section, the Public Prosecutor shall act as follows:
(1) In case of the opinion submitted is for a non-prosecution order; issue a non-prosecution order; if he disagrees, issue a prosecution order and direct the inquiry official to send him the alleged offender to be prosecuted;
(2) In case of the opinion submitted is for a prosecution order: issue a prosecution order and prefer a charge against the alleged offender in Court; if he disagrees: issue a non-prosecution order.

In either case mentioned above, the Public Prosecutor has the power:

(a) To direct the inquiry official to make additional inquiry or to send him for examination any witness as is deemed expedient for the purpose of making further order;

(b) To decide whether the alleged offender should be set at liberty, granted provisional release, kept in custody or detained by the Court, as the case may be, and to take measures or make an order to that effect.

[181] *The Criminal Procedure Amendment Act B.E.2542 (1999)* s 227 " The Court shall exercise its discretion in considering and weighing all the evidence taken. No judgment of conviction shall be delivered unless and until the Court is fully satisfied that an offence has actually been perpetrated and that the accused has committed that offence.

Where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of doubt shall be given to him.

[182] The Anti-Money Laundering Office (AMLO) serves as (1) the Financial Intelligence Unit for law enforcement agencies in Thailand. As such, a primary function is to collect and analyze the various reports submitted to AMLO by financial institutions and other sources of information in order to identify subjects for investigation. (2) AMLO is responsible for conducting investigations leading to the seizure and forfeiture of assets acquired with the proceeds from the commission of a predicate offence. (3) AMLO has an asset management program which includes the custody, maintenance and disposal of seized and forfeited property. (4) AMLO represents Thailand at international forums concerning money laundering. (5) AMLO has duty to educate the public and private sectors concerning the Anti-Money Laundering Act. Anti-Money Laundering Office (AMLO), *Anti-Money Laundering Office Thailand*, 14.

prosecutor for consideration to file a petition to the court to order the forfeiture of those assets to the State. When the prosecutor has filed a petition to a court, the judge will order a notice to be posted at the court and publish it in a local newspaper for two consecutive days so that individuals who may claim ownership or have a vested interest in the assets may file an objection petition to the court before an order is issued. After the public prosecutor has filed a petition with a court, if there is probable cause to believe that there may be a transfer, distribution, or placement of any asset related to the predicate offences, the Anti-Money Laundering Office Secretary-General may submit the facts to the public prosecutor to file a petition to the court to order a temporary seizure or restraint of the asset before the judge issues the order. The judge must consider such a petition immediately. If the petition is supported by probable cause, the judge must issue the order for temporary seizure or restraint without any delay.[184] Before the judge issues an order to forfeit the assets related to the predicate offences to the State, an individual who claims ownership of the asset may file a petition to the court and prove to the court that he or she is the true owner and the assets are not related to any predicate offences, or that he or she has received the transfer of ownership honestly and with compensation, or that he or she has received the assets honestly and morally, or by charity.[185] Once the judge investigates the petition of the public prosecutor and the petition of the claimant, if the judge is of belief that the assets named in the petition are related to the predicate offences and the petition of the claimant has no merit, the judge will order the forfeiture of the assets to the State. If the claimant is related or used to be related to any person who committed the

[183] AMLO is headed by a Secretary General who has the duty to oversee the performance and public employees of AMLO.

[184] *Anti-Money laundering Act B.E.2542 (1999)* s 49.

[185] *Anti-Money laundering Act B.E.2542 (1999)* s 50.

predicate offence or money laundering offence, the assets are presumably related to a predicate offence or the assets are transferred dishonestly.[186]

It can be seen that the Act incorporates the civil forfeiture principle to deal with assets related to money laundering.[187] Unlike criminal forfeiture, civil forfeiture is not bound by the outcome of criminal judgment.[188] This means that if a judge acquitted the defendant in the criminal offence of money laundering case, or even if the public prosecutor did not prosecute a defendant in the criminal offence of money laundering case, the judge presiding in the civil forfeiture case is not bound by those facts or judgment. The court must investigate only the evidence presented in the civil forfeiture case. If it is believed that the assets are related to the predicate offences, the judge must order forfeiture of the assets to the State. On the other hand, if it is not believed that the assets are related to the predicate offences, the case must be dismissed.[189]

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[186] *Anti-Money laundering Act B.E.2542 (1999)* s 51.

[187] Chairatt Sakkosol, *Money Laundering: A case study comparing Thai law and United Nations Convention against Transnational Organized crime* (2001), LLM thesis, Faculty of Law, Chulalongkorn University, 87.

[188] Krirkkiat Budhasathit, *Legal Approach Illicit Drug Trafficking and Money Laundering in Thailand*, UNAFEI, 152 <www.unafei. or.jp7english/pdf/PDF_rms/no65/RESOURCEEDivisionNo10.pdf> at 15 January 2013.

[189] Netipoom Maysakun, *Money Laundering in Thailand*, UNAFEI, 89 <www.unafei.or.jp/english/...No73_13 PA_Netipoom.pdf> at 15 January 2013.

3.2.3.2 Case Study:

The Golden Triangle on the borders of Thailand - Myanmar and Laos is widely known as area of opium and methamphetamine production.[190] Thailand is a regional transportation hub used to transfer narcotics from the Golden Triangle to other countries. Thus, narcotics trafficking is a main source of money laundering in Thailand.

One case involved the Anti-Money Laundering Office (AMLO) receiving a tip-off from the Narcotics Prevention and Suppression Center that Mr. X, a former provincial mayor, might be involved with narcotics trafficking and organized crime.[191] After receiving a tip-off, the AMLO ran a background check on Mr. X and found that he was unusually rich, owned a big house, many cars, and possessed ten plots of land. The AMLO started investigating and found that Mr. X frequently went on trips to northern Thailand, where part of the Golden Triangle is located. On his return, he would hide methamphetamine tablets that he bought from a major drug trafficker, who had connections with organized crime, in his car. When he returned to his province, he would hand the methamphetamine tablets to his close aides. These aides then sold the methamphetamine tablets to the customers. When the AMLO had probable cause to believe that Mr. X's assets were related to narcotics trafficking, the AMLO personnel asked for approval from a judge to issue a warrant to search Mr. X's house. While searching his house, the AMLO personnel seized many documents related to Mr. X's assets. The AMLO then asked the Transaction Committee to temporarily seize Mr. X's assets for ninety days. After due consideration,

[190] Michael J. Puniskis, 'Review of Ko-Lin Chin, The Golden Triangle: Inside Sotheast Asia Drug Trade' (2012) 10 *Asian Criminology*, 1-3.

[191] Maysakun, above n 189, 91.

the AMLO concluded that it had evidence to believe that Mr. X's assets were related to narcotics trafficking. The AMLO Secretary General forwarded the case to the public prosecutor for consideration to file a petition to the court to order the forfeiture of Mr. X's assets to the State. The public prosecutor then filed the petition to the court. Mr. X's wife and daughter also filed an objection petition to the court claiming that they were the true owners of X's assets and the assets in dispute were not related to narcotics trafficking. After due consideration and thorough investigation of both the prosecutor's petition and Mr. X's wife and daughter's petition, the judge ruled that Mr. X assets were related to narcotics trafficking, and the judge ordered the forfeiture of Mr. X's assets, worth a total of 18,000,000 baht to the State. The narcotics trafficking and criminal offence of money laundering cases against Mr. X are still under consideration of the court.[192]

The above mentioned case shows that Thailand can use *the Anti-Money Laundering Act B.E.2542 (1999)* to suppress money laundering cases. In Thailand, government officials always apply money laundering measures in cases involving drug trafficking and corruption. In addition, anti-money laundering legislation in Thailand, as in many other countries, is being used as a weapon against criminals in general.[193] Therefore, it is crucial to amend the law of money laundering in Thailand to extend to the predicate offences to cover the migrant smuggling offences under the United Nations Protocol against the Smuggling of Migrants by land, Air and Sea. This may result in an effective tool against transnational organized crime as generally a criminal who launders money will always co-operate with transnational criminal groups and always spends the laundered money to

[192] Ibid.

[193] Frank G.Madsen, *Transnational Organized Crime* (Routledge Taylor & Francis Group Publishing, 2009), 120.

support illegal activities. The government must, thus, break this vicious circle by amending the Anti-Money Laundering Act to include all types of transnational organized crime under the Convention and protocols.

Moreover, the insufficient capacity of law enforcement across the region and disparities among national criminal laws are barriers to mutual legal assistance within the Association of Southeast Asian Nations (ASEAN) in combating money laundering.[194] For example, the difference in the coverage of predicate offence between states may lead to failure of double criminality of the predicate offence which prevents cooperation from prosecuting the transnational money laundering offence. Hence, harmonization of national criminal law is necessary to improve their consistence and eliminate the failure in cooperation for combating transnational crime.[195] However, it is impossible to harmonize national criminal law as a whole but the harmonization should focus on certain partial criminal laws. Chat Le Nguyen recommended that:[196]

> In terms of substantive criminal law, the harmonization should emphasize on the general principle of criminal liability (both natural and legal persons), constituent elements of money laundering offence, and coverage of predicate offence. With regard to procedural criminal law, the following issues should be considered for harmonization: asset confiscation legislation and the mutual recognition of decisions made by the competent authorities in identifying, tracing, freezing or seizing, and confiscating instrumentalities or proceeds of transnational crime.

[194] Chat Le Nguyen, 'Towards the Effective ASEAN Mutual Legal Assistance in Combating Money Laundering' (2012) 15 *Journal of Money Laundering Control* 383.

[195] Calderoni F, *Organized Crime Legislation in the European Union: Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight against Organized Crime* (Springer, New York Publishing, 1st ed, 2010), 3.

[196] Nguyen above n 194, 390.

3.2.4 Proposed Law Reform

To combat money laundering effectively and to comply with the obligation of the United Nations Convention against Transnational Organized Crime and Protocols, the offence of migrant smuggling relates to transnational organized crime shall constitute the predicate offences under the law against money laundering. Thus, the Act should state that:

> The migrant smuggling offences relate to transnational organized crime shall be predicate offences under the Anti Money Laundering Act B.E. 2542 (1999)

3.3 Article 8 Criminalization of Corruption

3.3.1 Provision in the United Nations Convention against Transnational Organized Crime

Article 8 of the United Nations Convention against Transnational Organized Crime requires that state parties criminalize corruption as follows:

> "1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) The Promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
>
> (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.
>
> 2. Each State Party shall consider adopting such legislative and other measure as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this Article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.
>
> 3. Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this Article.

> 4. For the purpose of paragraph 1 of this Article and Article 9 of this Convention, "public official" shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.

In addition, Article 9 recognizes measures against corruption as follows:

> "1. In addition to the measures set forth in Article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.
>
> 2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions."

3.3.2 Purpose of the Convention Provisions

During the elaboration of the Convention, a majority of nations voted against the inclusion of these illustrative lists and decided to include provisions against corruption as separate provisions, which can now be found in Articles 8 and 9.[197]

Article 8 (1)(a) contains a set of legislative measures to criminalize the corrupter for "promising, offering, or giving to a public official directly or indirectly an undue advantage for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties".[198] The

[197] *UNTOC* art 8, 9.

[198] *UNTOC* art 8(1) (a).

solicitation or acceptance of that advantage is an offence for the corrupt official under paragraph (1) (b) unless that person acted under duress.[199]

In addition, Articles 8 (2) and (3) require State Parties to criminalize the corruption of foreign officials and representatives of international organizations, and criminalize any participation in corruption and bribery.[200] This is because the original definition of corruption was problematic, especially from an international criminal point of view.[201] As Van den Wyngaert comments:

> In an ever globalizing village, this seems to be an anachronism.[202]

Thus, the Convention tried to extend the definition of corruption to include the corruption to bribery to the public officials of international organization such as the United Nations to intend to penalize corruption "in the widest sense and in all its forms."[203]

The criminal offences established under Article 8 are complemented by the legislative and law enforcement measures under Article 9 which seek to enhance the prevention, detection and punishment of corruption.

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[199] Travaux préparatoires, para 18.

[200] *UNTOC* art 8(2), (3).

[201] Gerhard Kemp, 'The United Nations Convention against Transnational Organized Crime: A Milestone in International Law' (2001) 14 *South African Journal of Criminal Justice* 158.

[202] Van DenWyngaert, 'The Transformation of International Criminal Law in response to the challenge of Organized Crime' (1999) 70 *Official Journal of The European Communities* 156.

[203] Kemp, above n 201,159.

3.3.3 Relevant Thai Laws

3.3.3.1 Legislation

From 1932 to 1975, corruption and bribery provisions were enacted under the Thai Penal Code.[204] Later, Professor Sanya Dhamasakti (the Prime Minister), Pol. Maj. Gen. Atthasit Sitthisunthorn (the Minister of Interior), and some members of Parliament became aware of the need to enact special legislation to combat corruption in Thailand.[205] This was primarily due to corruption being seen as pervasive in Thai politics and among bureaucrats. As Clark Neher states:[206]

> Thai bureaucrats, at all levels, engage in unsanctioned use or manipulation of public office to assure financial or other resource benefits for themselves.

Similarly, the National Institute of Development Administration concluded that:[207]

> Corruption is a major problem of national development, especially in Thailand. The practice is prevalent at every level, whether it is political or administrative, upper or lower level officials. Moreover, corrupt practices in Thai bureaucracy occur in many minister, bureaus and department. And yet the problem of corruption in the country is more widespread with each passing day. Urgent solutions are required to ensure the survival of the existing administrative system.

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[204] The Thai Penal Code which relates to the corruption of the public official is comprised of the following six basic offences: (1) Bribery of public servants (Article 143. 144); (2) Solicitation or acceptance of gifts by public servants (Article 148, 149, 150); (3) Abuse of political positions for personal advantage (Article 151, 152, 153, 154); (4) Possession of unexplained wealth by a public servant (Article 167-199); (5) Secret commissions made by agents or employees in the case of private sector corruption (Article 200-202); (6) Cases of bribes and gifts to voters (Article 31(1)) . To apply corrupt practices pursuant to the Penal Code, it is impossible to prosecute new, innovative methods of corruption without enacting the new legislation involve in corruption. This is because the Penal Code imposes only the act of the offering, acceptance, or demand of property and/ or other benefits, bribery. It can be seen that The Penal Code cannot penalize other methods of corruption.

[205] Sanond Prabhas & Wynne Ltd, *Anti-Corruption Laws – A Summary of Thai Anti-Corruption Laws*, 2 <http://pricesanond.com/downloads/anti-corruption-laws/Anti-Corruption%20Laws.pdf> at 2 January 2013.

[206] Clark Neher, *Political Corruption in a Thai Province* (1977) 11 *Journal of Developing Areas* 482,483.

[207] Thinapan Nakata, *Corruption in the Thai bureaucracy: who gets what, how and why in its public expenditures* (1978) 18 *Thai Journal of Development Administration* 102, 128.

Therefore, the government promulgated the Counter Corruption Act and established the Office of the National Anti-Corruption Commission (ONAC) to deal with the problem in the public sector.[208] Yet, despite these progressive reforms, the ONAC remained a "paper tiger"[209] as it lacked any investigative power. In 1992, the Civil Service Act was drafted to prescribe the conduct of the government employees in office.[210]

In October 1997, Thailand promulgated its fifteenth constitution in 65 years. This charter, for the first time in Thai history, established a constitutional mechanism to attempt to secure accountability of politicians and bureaucrats.[211] Under the 1997 Constitution, Thailand sought to combat corruption through the creation of an independent counter-corruption agency.[212] Subsequently, a number of laws were enacted to give substance to the provisions in the charter.

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[208] Ibid.

[209] Indeed the idea of establishing a special organization to deal with corruption in the public sector started as early as 1975, when Thailand emerged from long years of military dictatorship to enjoy newly acquired democracy. The so-called Suppression and Prevention of Corruption and Misconduct in the Public Sector Act of 1975 had enabled the setting up of the first anti-corruption agency in Thai government. But this organization was just a department in the Prime Minister's office, not an independent agency. So its functions were subject to government supervision and control. It had only the power of recommendation, not the power of punishment. So, for almost 25 years, this anti-agency was widely known as a "paper tiger". Medhi Krongkaew, *The National Anti-Corruption Commission*, Paper presented at seminar on Fighting Corruption in Thailand organized by International Center for the Study of East Asian Development (ICSEAD) in Kokura: the Asia Pacific University in Beppu and the DOshisha University in Kyoto during 24-27 May 2010.

[210] Kras Straub, Titirat Wattanachewanopakorn, Clemence Gautier, *An overview of Thailand's anti-corruption legislation*, 2 <http://www.tilleke.com/sites/default/files/anti_corruption_updated_2009_0.pdf> 2 January 2013.

[211] Ibid, 180.

[212] Ibid, 185.

On September 19, 2006 there was a military coup and the 1997 Constitution was abrogated.[213] The military coup led the country into a period of junta rule by martial law and executive decree for several weeks. This led to the promulgation of an interim constitution on October 1, 2006. The interim constitution allowed the junta to appoint a Prime Minister, legislature, and a drafting committee for a permanent constitution. Through this period, the need for an updated and more appropriate anti-corruption policy was acknowledged by the Constitution Drafting Committee. In August 2007, Thailand finally promulgated its sixteenth constitution which was generally similar to the previous one, with the exception of certain provisions relating to corruption.[214]

An Overview and Compendium of Thai laws relating to Corruption

The Laws related to the Thai Anti- Corruption Legislation can be categorized as follows:

1. Thai Penal Code

2. Constitution of Thailand B.E. 2550 (2007)

   2.1 *The functions of the National Anti-Corruption Commission (NACC)*: The NACC is an agency independent of the government with broad powers of investigation.[215] NACC has duty of screening cases to be sent to the courts of justice via the prosecutor or the Attorney General Office. In case of the Attorney General Office disagreeing with the decision of the NACC and refusing to submit a case to the court the disagreement between the NACC and

[213] Ibid.

[214] Ibid, 4.

[215] Straub, Wattanachewanopakorn and Gautier above n 210, 6.

the Attorney General Office can be solved through a special joint working committee which is entitled to collect further evidence necessary for the Attorney General. However, if the joint committee fails to reach an agreement, the NACC can overrule the Attorney General's opinion by transferring the case to the Supreme Court's Criminal Division for Persons Holding Political Positions (in cases where the accused is politician) or to other competent courts (in cases where the accused is the state official).[216]

2.2 *The concept of "Unusual Wealth"*: The NACC can conduct investigations on its own initiative without receiving any complaints.[217] The NACC has the power to examine the assets of persons holding political positions or state officials where an individual is suspected to have accumulated wealth in an unusual manner. The law is based on the presumption that a significant expansion in assets is the result of corruption. With this shift in the burden of proof, the suspect has to show the evidence that he obtained the property legally. If the NACC reachs a conclusion that the suspect possesses unusual wealth, the Commission is obliged to forward the case to the president of the Senate to initiate impeachment and the Attorney General to institute

[216] Pinthip Leelakriangsak Srisanit, *Effective legal and practical measures for combating corruption*, 169 <www.unafei.or.jp/english/.../No83_22PA_Pinthip.pdf> at 22 January 2013.

[217] *Constitution of Thailand B.E. 2550 (2007)* s 250 (3) and (4) states " to inquire and decide whether the state official from the top administrative or a civil servant holding the position of Director of a Division or its equivalent upwards, who has become unusually wealthy or has committed the offence of corruption, malfeasance in office or malfeasance in judicial office, including taking action against state Officials of lower ranks who collaborated with the said position holder, or holder of political position, or committed the offence in the manner regarded by the National Counter Corruption Commission that an action should also be taken against and in accordance with the Organic Law on Counter Corruption; (4) to inspect the accuracy, actual existence as well as change of assets and liabilities of the persons holding positions under Article 259 and Article 264 as stated in the account and supporting documents submitted in accordance with the rules and processes proscribed by the National Counter Corruption Commission.

proceedings in the Supreme Court Criminal Division for persons Holding Political Positions[218]

2.3 *Declaration of Assets and Liabilities*: The assets and liabilities declared by persons holding political positions or state officials must include assets and liabilities in foreign countries and those which are not in possession of that person, their spouses and children who have not become *sui juris*.[219] In cases where a person holding political positions or state officials holds more than one position, that person must submit separate accounts showing assets and liabilities for every position in accordance with the time prescribed for the submission of the account in respect of such position. The account showing assets and liabilities must be accompanied by copies of supporting documents evidencing the actual existence of such assets and liabilities as well as a copy of the personal income tax return for the previous fiscal year.[220] Moreover, the Constitution mandated state officials to file a declaration of assets and liabilities within 30 days after taking and again after leaving his position.[221]

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[218] *Constitution of Thailand B.E. 2550 (2007)* s 262 para 2 states " In case where it appears that the assets of the person under paragraph one have unusually increased, the President of the National Counter Corruption Commission shall refer all documents together with the inspection report to the Supreme Public Prosecutor for proceeding against the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions so that the unusually increasing assets shall vest in the State.

[219] Ibid.

[220] Panumas Achalaboon, *Measures to Freeze, Confiscate and Recover Proceeds of Corruption, Including Prevention of Money-Laundering*, 118 <http://www.unafei.or.jp/english/pdf/PDF_ThirdGGSeminar/Third_GGSeminar_P117-127.pdf> at 22 January 2013.

[221] *Constitution of Thailand B.E. 2550 (2007)* s 260. Time for Submission:
(1) In case of taking office, such person must submit within thirty days from the date of taking office.
(2) In case of vacating office, such person must submit within thirty days from the date of vacation.
(3) In addition to the case of vacating of office, the person who vacates his or her office, must also re-submit an account showing assets and liabilities within thirty days from the date of the expiration of one year after the vacation of office.
(4) For a person holding a political position, who has already submitted the account, who dies while in office or before submitting the same after the vacation of office, an heir or an administrator of the

2.4 *Impeachment and Criminal Prosecution*: The Constitution sets out the criminal prosecution and penalties for state officials who commit malfeasance or are corrupt. The relevant chapters are Chapter 10 of the Constitution Part 3 (Removal from office) and Part 4 (Criminal Proceedings against Persons Holding Political Positions).

2.5 Other Constitutional Measures to Fight Corruption: Other constitutional measures to fight corruption are contained in Article 302 which requires that the following legislation, among others, shall continue to be in force: *the Organic Act on Ombudsmen B.E. 2542 (1999); the Organic Act on Counter Corruption B.E. 2542 (1999), as amended by No.2 B.E. 2550 (2007); and the Organic Act on Criminal Procedures for Persons Holding Political Positions B.E. 2542 (1999), as amended by No. 2 B.E. 2550 (2007).*

In addition, the current Constitution empowers the Office of the Attorney General (OAG) to suppress corruption in both the private and public sectors. Therefore, the Office of Attorney General plays an important role in deciding whether to hand over the corruption cases to the courts. Moreover, the Attorney General is acting as the central authority in international co-operation in criminal matters, mutual legal assistance and extradition.[222]

3. The Organic Act on Counter Corruption B.E. 2542 (1999), as amended by No.2 B.E. 2550 (2007)

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estate of such person must submit an account showing assets and liabilities existing on the date of such person's death within ninety days from the date of the death.

[222] Srisanit, above n 216, 169.

4. *The Organic Act on Criminal Procedures for Persons Holding Political Positions B.E. 2542 (1999)*, as amended by No. 2 B.E. 2550 (2007): The Supreme Court's Criminal Division for Persons Holding Political Positions was established on 15 September 1999 by a provision of the Constitution of Thailand B.E. 2540 (1997) and the Organic Act on Criminal Procedures for Persons Holding Political Positions B.E. 2542 (1999) was enacted for the purpose of expeditious and fair trial of corruption offences committed by politicians.

The special division of the Supreme Court has the power and duty to try and adjudicate a case against persons holding a political position if these persons have been accused of becoming unusually wealthy, committing an offence of malfeasance in office according to the Penal Code, or committing an offence of dishonesty in office, or corruption according to other laws, including a principal, an instigator or a supporter of such offence.

The quorum of the special division of the Supreme Court consists of nine justices of the Supreme Court who hold a position of not lower than justice of Supreme Court, and are elected by a plenary session of the Supreme Court Justices on a case by case basis. A majority of votes will decide the outcome of the case, and each justice included in the quorum will prepare a written opinion and make oral statements to the meeting before making a decision. Orders and decisions of the Supreme Court's Criminal Division for Holders of Political Positions will be disclosed and final. However, if there is fresh

evidence material in case that would likely lead to the acquittal of the alleged offenders, they can appeal to the plenary session of the Supreme Court.[223]

5. Management of Partnership Stakes and Shares of Ministers Act B.E. 2543 (2000)

6. Organic Act on Election of Members of the House of Representatives and the Selection of Senator B.E. 2550 (2007)

7. Civil Service Act B.E. 2551 (2008) H. Act Governing Liability for Wrongful Acts of Competent Officer B.E 2539 (1996)

8. Additional Regulations and Directives Governing the Conduct of Government Employees

    8.1 Regulations of the Office of the Civil Service Commission on Ethics of Civil Servants B.E.2537 (1994)

    8.2 Regulations of the Office of the Prime Minister on Soliciting Donations by government agency B.E. 2544 (2001) as amended by No.2 B.E. 2549 (20060

    8.3 Regulations of the Office of the Prime Minister on the Giving or Accepting of Gifts by Government Officers B.E. 2544 (2001)

    8.4 Regulations of the Office of the Prime Minister on Ethical Code of Political Officials B.E. 2551 (2008)

9. Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (1992), as amended up to No.7 B.E.2552 (2009)

10. Act on Offences Relating to the Submission of Bids to State Agencies B.E.2542 (1999)

[223] *Constitution of Thailand B.E. 2550 (2007)* s 278 para 3.

11. Official Information Act B.E. 2540 (1997) M. Whistleblower Protection Bill N. Money Laundering Act B.E 2542 (1999) as amended up to No.3 B.E.2552 (2009)

12. Act on Establishment of Administrative Court and Administrative Court Procedure B.E. 2542 (1999), as amended up to No.5 B.E.2551 (2008)

13. The 30th Announcement of the Council for National Security: Examination of Conduct Causing Damages to the State B.E. 2549 (2006) as amended by No.2 B.E.2550 (2007)

Although Thailand has enacted a number of statutes dealing with anti-corruption, the problem of corruption is always present, especially in the police and politics.

3.3.3.2 Case study

On 20 October 2008, the Supreme Court of Thailand convicted the ex-prime minister - Thaksin Shinawatra - on corruption charges related to a 2003 purchase of land by his wife Pojamarn Shinawatra from the government-controlled Financial Institutions Development Fund. Thaksin was sentenced to two years in prison for abuse of power for using his position to secure a reduced price for the land, and violating a Thai law prohibiting political leaders from engaging in business dealings with government-directed organizations. Pojamarn was also charged in this case but finally was cleared of charges because she was not a government official. The two were tried *in absentia* after failing to return from an August trip to United Kingdom. Thailand's Office of the Attorney General

said it would seek Thaksin's extradition in light of the conviction. Thaksin is now a fugitive in the U.K.[224]

The above mentioned case is one of many cases which show that corruption cases in Thailand are always linked to the political elite.[225] Although a number of anti-corruption legislation was enacted under the 1997 Constitution, Thailand has failed to prevent Thaksin Shinawatra from exploiting its loopholes and enhancing his personal wealth from policy corruption. There are other similar cases, and for Thailand to truly combat corruption, a new regulatory framework is required.

Furthermore, another factor causing corruption in Thailand is the low salaries of its state officials and politicians. Low salaries can contribute to corruption as poorly paid state officials and politicians will be tempted to resort to corruption.[226] As can be seen from the statistics of Transparency International, political parties were the most corrupt institutions in 2009.[227] Therefore, the political leaders and state official should be paid adequate salaries to prevent them from succumbing to the temptation to accept bribes if they are poorly paid.

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[224] Jurist, *Thailand ex-PM Thaksin convicted on corruption charges,* 1 <http://jurist.org/paperchase/2008/10/thailand-ex-pm-thakin-convicted-on.php> at 28 January 2013.

[225] One research found that the views correlated with public perceptions that political and administrative corruption usually is perceived as most common and most problematic. Sofia Brussels, 'Examining the links between organised crime and corruption' (2010) 13 *Trends in Organized Crime Journal* 333.

[226] Jon S.T. Quah, *Curbing Corruption in Asian Countries: An Impossible Dream?* (Emerald Group Publishing Limited, 2011), 465.

[227] Ibid, 466.

3.3.4 Proposed Law Reform

To combat corruption effectively and comply with the obligation of the United Nations Convention against Transnational Organized Crime, it is recommended that the offence and penalties for corruption relates to transnational organized crime should be implemented with respect to *the Anti-Transnational Organized Crime Act B.E.2556 (2013)*. Thus, the Act should include a provision which states:

> If anyone promises, offers, or gives, to a public official directly or indirectly of an undue advantage or bribe in order that the official act or refrain from acting in the exercise of his or her official duties; or
>
> The solicitation or acceptance by a public official directly or indirectly of an undue advantage for himself or herself or another person or entity in that the official act or refrain from acting in the exercise of his or her official duties
>
> is guilty of corruption
>
> In addition, if the foreign officials and officials of International Organizations commit corruption offence under Kingdom of Thailand, they shall be liable to punishment under This Act

3.4 Article 23: Criminalization of the obstruction of Justice

The conduct of obstruction of justice involves any attempt to impede the due administration of justice.[228] It is necessary to protect witnesses or victims from intimidation and to prevent evidence from destruction. This is because if evidence is destroyed, no influence of organized criminal group can be detected and punished.[229] To tackle the problem of the obstruction of justice, the United Nations Convention against Transnational Organized Crime provides measures for criminal sanctions against use of threats, physical force or promise, offering or giving undue advantage to induce false

[228] *United States vs. Cihak*, 137 F.3d 252, 262 (5th Cir.1998).

[229] United Nations Office on Drugs and Crime above n 11, 91.

testimony, or to interfere in giving testimony, or the production of evidence in a proceeding.[230]

3.4.1 Provision in the United Nations Convention against Transnational Organized Crime

Article 23 of the United Nations Convention against Transnational Organized Crime requires that state parties criminalize the obstruction of justice as domestic law as follows:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;
>
> (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public officials.

Article 23 subparagraph (a) exhorts the state parties to criminalize the use of force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or interfere in the giving of testimony or the production of evidence in proceedings[231] in relation to the commission of offences covered by the Convention.[232]

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[230] *UNTOC* art 23.

[231] The term "proceedings" must be interpreted broadly to cover all official governmental proceedings, including pretrial processes. However, Article 23 need not be applied to private proceedings relating to conduct covered by the Convention, such as arbitral proceedings (A/55/383/Add.1, para 46).

[232] *UNTOC*, art 23 subpara (a).

Under Article 23 subparagraph (b) state parties are required to criminalize the use of force to interfere with the actions of judicial or law enforcement officials in relation to the commission of offences covered by the Convention.

3.4.2 Purpose of the Convention Provisions

Normally, the offence of the obstruction of justice is linked with the problem of corruption, protection of witnesses and victims and international cooperation. For example, the offenders involved in a corruption case may closely associate with government officials. They may try to use their power and influence to hide, suppress or destroy relevant information or evidence. Moreover, they may seek influence in the national financial institutions and be able to count on their complicity to cover their own wrongdoings.[233]

For the above reasons, organized criminal groups cannot be detected and punished. Thus, the purpose of Article 23 is to require state parties to specifically criminalize the use of inducement, threats or use of force in exchange for interfering with witnesses and officials, whose role would be to produce evidence and testimony.

Article 23 subparagraph (a) requires state parties to criminalize the use of corrupt means, such as bribery, of coercive means and use or threat of violence[234] to induce false

[233] United Nations Office on Drugs and Crime above n 11, 91.

[234] Ibid 92.

testimony or interfere with the giving of testimony or the production of evidence in proceedings.

In addition, Article 23 subparagraph (b) requires state parties to criminalize the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by the Convention.[235]

As noted, state parties should be obliged to adopt the obstruction of justice offence as domestic law.

3.4.3 Relevant Thai laws

3.4.3.1 Legislation

A comparison of the legal provisions dealing with the offence of the obstruction of justice in Thai legislation and the requirements contained in Article 23 of the United Nations Convention against transnational organized crime reveals there is the provisions which criminalize the conduct of the obstruction of justice as following:

Section 26 of the Anti-Transnational Organized Crime Act B.E.2556 (2013) states that whoever obstructs the process of investigation, inquiry, prosecution or criminal proceedings on transnational organized crime offence so that the process is unable to be

[235] Ibid 93. The bribery element is not included in this paragraph because justice and law enforcement officials are considered to be public officials, the bribery of whom would already be covered by Article 8.

conducted in a proper manner, by doing any of following acts, shall be liable to the punishment of an imprisonment not exceeding ten years and a fine not exceeding two hundred thousand baht: 1) the giving, offering, or agreeing to give property or other benefits to a victim or other witness in order to induce the witness not to visit a competent official, inquiry official, public prosecutor or not to attend the court for giving facts, statement or testimony at all, in criminal proceedings against the offender under this Act; (2) using force or coercing, threatening, compelling or deceiving, or using any means causing a victim or other witness in a way of which causes the witness not to visit a competent official, inquiry official, public prosecutor or not to attend the court for giving facts, statement or testimony at all, in criminal proceedings against the offender under this Act; or (3) damaging, destroying, losing, rendering useless, taking away, altering, changing, concealing or hiding any document or evidence or using any document or evidence that is false in a criminal proceeding against the offender under this Act; (4) giving, offering or agreeing to give property or other benefit to the competent official or judiciary official or public prosecutor in order to induce such person to do or not to do any act or to delay the doing of any act contrary to the duty of such person under this Act; (5) using force or coercing, threatening, compelling or using other wrongful means to the competent official under this Act or to judiciary official or public prosecutor in order to induce such person to do or not to do any act or to delay the doing of any act contrary to the duty of such person under this Act.[236]

The above provision meets with the requirements of Article 23 of the United Nations Convention against transnational organized crime.

[236] *Anti-Transnational Organized Crime Act B.E. 2556 (2013)* s 26

In addition, the offence of the obstruction of justice in Thailand appears in the Anti-Trafficking in Persons Act B.E. 2551 (2008). The following provision is limited in its application to the trafficking offence. Section 54 enumerates the elements for the obstruction of justice as the following: (1) the giving, offering, or agreeing to give property or other benefits to a trafficked person or other witness in order to induce the witness not to visit a competent official or not to attend the court; (2) using force or coercing, threatening, compelling or deceiving a trafficked person or other witness in a way of which causes the witness not to visit a competent official or not to attend the court; or (3) damaging, destroying, losing, rendering useless or taking away any document or evidence or using any document or evidence that is false in a criminal proceeding; (4) giving, offering or agreeing to give property or other benefit to the competent official or judiciary official or public prosecutor in order to induce such person to do or not to do any act or to delay the doing of any act contrary to the duty of such person; (5) using force or coercing, threatening, compelling or using other wrongful means to the competent official or judiciary official or public prosecutor in order to induce such person to do or not to do any act or to delay the doing of any act contrary to the duty of such person.[237]

[237] *Anti-Trafficking in Persons Act B.E. 2551(2008)* s 54 states "Whoever obstructs the process of investigation, inquiry, prosecution or criminal proceedings on the offence of trafficking in persons so that the process is unable to be conducted in a well-manner, by doing any of following acts, shall be liable to the punishment of an imprisonment not exceeding ten years and a fine not exceeding two hundred thousand baht:
(1) giving, offering or agreeing to give property or other benefit to a trafficked person or other witness for inducing such person not to visit the competent official, inquiry official, public prosecutor or not to attend the court for giving facts, statement or testimony, or inducing such person to give facts, statement or testimony that is false, or not to give facts, statement or testimony at all, in the criminal proceedings against the offender under this Act;
(2) using of force, coercing, threatening, compelling, deceiving, or using any means causing a trafficked person or other witness not to visit the competent official, inquiry official, public prosecutor or not to attend the court to give facts, statement or testimony, or inducing such person to give facts, statement or testimony that is false, or not to give facts, statement or testimony at all, in the criminal proceedings against the offender under this Act;

It can be concluded that the provisions relating to the obstruction of justice appear in the Anti-Transnational Organized Crime Act B.E.2556 (2013) and the Anti-trafficking in Persons Act B.E. 2008.

However, offences by state officials or politicians or influential persons still occur regularly. The next case study illustrates these problems.

3.4.3.2 Case Study:

Case Study: Somchai Neelaphaijit

Somchai Neelaphaijit is a Thai lawyer and human rights defender. He is a prominent Muslim human rights lawyer who was abducted and killed in 2004. At the time of his disappearance, he was representing clients from southern Thailand's minority Muslim community who were accused of participating in an attack on an army depot. Somchai filed a complaint that his clients had been tortured while in police custody in an effort to coerce confessions. Somchai disappeared the next day and his car was later found

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(3) damaging, destroying, losing or rendering useless, taking away, altering, changing, concealing or hiding any document or evidence, or fabricating, making or using any document or evidence that is false in criminal proceeding against the offender under this Act;
(4) giving, offering or agreeing to give property or other benefit to the Committee member, the coordinating and Monitoring of Anti-Trafficking in Persons Performance Committee member (CMP Committee member), subcommittee member, any member of the working group or to the competent official under this Act, or to judiciary official, public prosecutor, or inquiry official or demanding, accepting, or agreeing to accept a property or any other benefit in order to induce such person to do or not to do any act, or to delay the doing of any act contrary to the duty of such person under this Act;
(5) using of force, coercing, threatening, compelling or using any other wrongful means to the Committee member, the CMP Committee member, sub-committee member, any member of the working group or to the competent official under this Act, or to judiciary official, public prosecutor, or inquiry official to induce such person to do or not to do any act, or to delay the doing of any act contrary to the duty of such person under this Act.

abandoned with a fresh dent in the back, suggesting it had been rammed from behind.[238] The case of Somchai Neelapaijit involved the obstruction of justice by police and state officials and still remains unsolved.[239]

3.4.4 Comparative Law

Thailand should look to the laws dealing with obstruction of justice in the U.S. as an effective example of how to deal with this type of conduct. The offence of obstruction of justice in the U.S. involves any attempt to impede the due administration of justice.[240] The law governing conduct concerning the obstruction of justice is contained in the *U.S. Code Title 18 section 1501-1508*, which aims to protect the integrity of proceedings before the federal judiciary and government agencies.[241]

Section 1503 *of the U.S. Code* covers a wide range of acts involving the obstruction of justice. This section is known as the omnibus obstruction provision. This is because the provision aims to protect those who are involved in the trial process and to ensure that criminals are unable to escape the intention of the law by using new methods to interfere with the administration of justice. To apply this section to a case, there are three elements that the state must prove, including: (a) the existence of a judicial proceeding (b) the

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[238] <http://www.humanrightsfirst.org/our_work/human-rights-defenders/thailand/somchai-neelaphaijit> at 20 May 2012.

[239] Trustlaw, *Interview: Muslim woman in southern Thailand face discrimination by civil and religious law* (<http://www.trust.org/trustlaw/news/activist-angkhana-neelapaijit-says-muslim-women-in-southern-thailand-face-discrimination-by-civil-and-religious-law> at 20 May 2012.

[240] *United Satates vs. Cihak,* 137 F.3d 252, 262 (5th Cir 1998).

[241] *U.S. Code Title 18* section 1501-1508.

offender's knowledge of the pending proceeding and (c) a corrupt intent to obstruct or endeavour to interfere with the proceeding or the due administration of justice.[242]

As stated, according to s 1503, it is illegal to attempt to influence jurors or officers in a judicial proceeding; and any conduct concerning obstruction of the due administration of justice is prohibited. Any person attempting to alter the outcome of a judicial proceeding with bribery of an official in connection with his or her duties in a federal case commits an offence under s 1503. Moreover, s 1503 prevents a miscarriage of justice in a case pending in a federal court by covering a wide range of acts involving the obstruction of justice, such as corruptly or by threats or force, or by any threatening letter or communication, influencing, obstructing or impeding, or endeavoring to influence, obstruct or impede, the due administration of justice. [243] The term "proceeding" relates to both the investigative and adjudicative functions of a governmental agency.[244]

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[242] Justin Alexander Kasprisin, 'Obstruction of Justice' (2010) 47 *American Criminal Law Review* 851.

[243] *U.S. Code Title 18* s 1503 states :
(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

[244] *United States vs. Leo*, 941 F.2d 181,199 (3d Cir.1991), holding that governmental agency proceedings frequently embrace both investigative and adjudicative proceedings.

Furthermore, s 1505 of the U.S. Code provides criminal penalties for the same conduct as that covered by s 1503. The section goes beyond s 1503 in so far as it penalizes the obstruction of justice in proceedings before departments, agencies and congressional investigations.[245]

In addition, s 1512 of the U.S. Code applies to all forms of interference with witnesses. It covers a range of conduct including: coercive conduct, attempts to kill, or the use of physical force or the threat of physical force against any person with the intent to prevent the attendance or testimony, or to influence, delay or prevent the testimony, of any person in an official proceeding. Furthermore, evidence is also protected under this section. Hence, any person preventing the production of a record, document or other object in an official proceeding, or involved in the altering, destroying, mutilating or concealing an object with the intent to impair the integrity or availability of the object for use in an official proceeding will be liable to be punished for committing the offence of obstruction of justice under the U.S. Code.[246]

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[245] *U.S. Code Title 18* s 1505 states:
"Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in s 2331), imprisoned not more than 8 years, or both".

[246] *U.S. Code Title 18* s 1512
(a)
(1) Whoever kills or attempts to kill another person, which intent to-
(A) prevent the attendance or testimony of any person in an official proceeding;
(B) prevent the production of a record, document, or other object, in an official proceeding; or

3.4.5 Proposed Law Reform

To combat transnational organized crime effectively and comply with the obligation of the United Nations Convention against Transnational Organized Crime, Thailand has to amend the Anti-Transnational Organized Crime Act B.E.2556 (2013) by adding a new provision as follows:

> The offence of obstruction of justice under the Anti-Transnational Organized Crime Act B.E.2556 (2013) shall be a predicate offence under the Anti-Money Laundering B.E. 1999 (2542).

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).
(2) Whoever uses physical force or the threat of physical force against any person or attempts to do so with intent to-
(A) influence, delay, or prevent the testimony of any person in an official proceeding;
(B) cause or induce any person to-
(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
(iv) be absent from an official proceeding to which that person has been summoned by legal process; or
(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).

CHAPTER 4 NEW LAWS TO PROTECT WITNESSES AND VICTIMS IN THAILAND

4.1 Protection of Witnesses and Assistance to and Protection of Victims

Witnesses and victims play a crucial role in criminal proceedings.[247] They provide testimony that can assist law enforcement officials with the successful investigation and prosecution of criminal cases.[248] For this reason, it is important that witnesses and victims are assured they will be safe from retaliation or intimidation by criminal groups. The shared belief amongst experts is such measures are crucial. Hence, Lacko states that, "if there were no measures to protect witnesses and their families against intimidation, many people would be reluctant to cooperate with the authorities, and that this state of affairs could cause the justice system to become paralyzed in some cases."[249]

In order to protect witnesses and victims from intimidation, coercion and retaliation, Articles 24 and 25 of the United Nations Convention against Transnational Organized Crime introduced provisions for state parties to adopt as part of their domestic laws in order to protect witnesses and victims. It is important for nations to adopt these provisions to enhance the protection available for witness and victims. This is because the rights of

[247] United Nations Office on Drugs and Crime, above n 14, 1.

[248] Karen Kramer, *Protection of Witnesses and Whistle-Blowers: How to Encourage People to come Forward to Provide Testimony and Important Information* [16] <http://www.unafei.or.jp/english/pdf/RS_No86_07VE_Kramer.pdf> 4 January 2012.

[249] Gregory Lacko, *The Protection of Witnesses, International Cooperation Group,* Department of Justice Canada (2004) <http://justice.gc.ca/en/ps/inter/protect witness/WitnessProtection-EN.pdf> last visited 4 January 2012.

witnesses and victims to have their private lives respected and protected from intimidation are key rights in a democratic society governed by the rule of law.[250]

The next section of this chapter, therefore, focuses on the protection of witnesses and victims under Articles 24 and 25 of the United Nations Convention against Transnational Organized Crime. A subsequent section examines the rights of witnesses and of victims under Thai legislation, and includes a number of case studies in order to shed light on the problems faced by witnesses and victims in Thailand. The section also highlights various issues related to the implementation of law and regulations. The last section of the chapter contains recommendations regarding law reforms which government authorities should implement in order to solve existing problems.

4.1.1 Provision in the United Nations Convention against Transnational Organized Crime

Witness protection and victim assistance and protection under Articles 24 and 25 of the United Nations Convention against Transnational Organized Crime are significant means to prevent and control transnational organized crime. Transnational organized crime involves criminal groups with significant power and illicit financial support which enables these groups to threaten witnesses and victims.[251] Thus, in order to guarantee the safety of witnesses and victims who participate in criminal proceedings and give testimony, the provisions of Articles 24 and 25 of the United Nations Convention against

[250] United Nations Office on Drugs and Crime, above n 14, 3.

[251] United Nations Asia and Far East Institute (UNAFEI), *Recommendations [UNTOC & UNCAC]* http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/GG4_Recommendations.pdf> at 4January 2012.

Transnational Organized Crime should be adopted by state parties as part of their domestic law.

Article 24 of the United Nations Convention against Transnational Organized Crime, which deals with the protection of witnesses, states as follows:

> 1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this convention and, as appropriate, for their relatives and other persons close to them.
>
> 2. The measures envisaged in paragraph 1 of this Article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
>
> (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
>
> (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.
>
> 3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this Article.
>
> 4. The provisions of this Article shall also apply to victims insofar as they are witnesses.[252]

Thus, Article 24 of the United Nations Convention against Transnational Organized Crime requires state parties to take appropriate measures to provide effective protection from retaliation or intimidation for witnesses who give testimony in cases involving transnational organized crime. These measures include: physical protection, the relocation and non-disclosure or limitations on the disclosure of the identity and whereabouts of the witness and the introduction of evidentiary rules to permit testimony to be given in a manner that ensures the witness's safety. In addition, state parties are required to consider entering into agreements or arrangements with other States for the relocation of

[252] *UNTOC*, art 24.

witnesses. Under Article 24(4), all of the witness protection provisions of Article 24(1) - (3) apply to victims as well as to witnesses.

Similarly, Article 25 of the United Nations Convention against Transnational Organized Crime provides for the assistance and protection of victims as follows:

> 1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.
>
> 2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.
>
> 3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the right of the defense.[253]

Hence, it can be seen that Article 25 obliges state parties to take appropriate measures to protect and assist victims of offences covered by the Convention, especially in cases where victims have to confront the threat of retaliation or intimidation from criminals. Moreover, state parties are required to establish proper procedures, such as the establishment of new funding programs that enable victims to access compensation and restitution. Another important measure for the protection of victims is the requirement that the victims' views be considered during criminal proceedings but in a manner that is not prejudicial to the rights of the defence.

4.1.2 Purpose of the convention provisions

On 9 December 1998, the United Nations decided it was time for the international community to adopt a mechanism to combat the threat of transnational organized crime. The United Nations called for the establishment of an open-ended intergovernmental ad hoc committee in charge of drafting an international convention against transnational

[253] *UNTOC*, art 25.

organized crime and the creation of an instrument that addressed the threat posed by transnational organized crime. This resulted in international experts from many countries participating in the drafting of United Nations Convention against Transnational Organized Crime, including the following countries: France, Germany, Colombia, Mexico, the United States of America, Canada, Turkey, Egypt, Uruguay, Slovakia, Belgium, Norway, Kuwait, Croatia, Algeria, Singapore, Oman, the Philippines, the Netherlands, China, Poland, the United Kingdom of Great Britain and Northern Ireland, Japan, the Syrian Arab Republic, Spain, India, Venezuela, South Africa, the Islamic Republic of Iran, Finland and Cameroon. However, Thailand did not participate in the drafting process.[254]

The negotiations took place over eleven sessions of the United Nations Crime Commission spread throughout 1999, and ended on 15 November 1999, when the Convention was adopted by the United Nations General Assembly.[255] Once approved, 80 governments met at the High-Level Political Signing Conference for the United Nations Convention on Transnational Organized Crime in Palermo, Italy.

The main issues discussed during the meetings for the drafting of the United Nations Convention against Transnational Organized Crime were the definitions and provisions designed to function as a model for national laws. The witness and victim protection provisions were identified as important provisions to which the state parties should give special attention in order to protect witnesses and victims from the threat of retaliation or

[254] *Travaux préparatoires:* Article 18, Protection of witnesses and victims *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4/Rev.1 (19-29 January 1999).

[255] Ibid.

intimidation when they gave testimony in cases involving transnational organized crime.[256]

The precise wording of the witness protection provision was finally agreed upon but this did not mean there were no disagreements during the drafting process. Thus, there was much debate over whether or not to include the authorities involved in the investigation and the representatives and legal counsel of the victim within the ambit of the term "witness". As indicated in *les travaux préparatoires*, the term "witness" was intended to cover persons who might be put in danger by virtue of their particularly close relationship with witnesses, but who were not relatives.[257]

Furthermore, during the drafting of this Article, several delegations proposed that the scope of the Article should be expanded to include not only all persons assisting the authorities in the investigation, prosecution and adjudication of the case, but also all criminal justice personnel including, for example, the representatives and legal counsel of the victim.[258] "It should be noted also that this obligation is extended to include the protection of persons who participate or have participated in the activities of an organized criminal group and who then cooperate with or assist law enforcement, whether or not

[256] United Nations, *Intergovernmental Negotiations and Decision Making at the United Nations: Guide* 2nd ed, (New York and Geneva, United Nations, 2007) 19 <http://www.un-ngls.org/site/IMG/pdf/DMUN_Book_PAO_WEB.pdf> at 4 January 2012.

[257] *Travauxpréparatoires* Article 18, Protection of witnesses and victims. *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4/Rev.1 (19-29 January 1999).

[258] For example: Council of Europe, Committee of Ministers Recommendation Rec (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Strasbourg: Council of Europe. See also: Council of Europe (2005) Recommendation Rec (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Strasbourg: Council of Europe. Explanatory Report, Strasbourg: Council of Europe.

they are witnesses."[259] The Article also required state parties to consider implementing measures that provide immunity[260] and mitigate sentences for persons who cooperate with the authorities by providing information that proves useful in combating organized crime.[261]

During the debate, several delegations expressed the view that protection should be provided before, during and after the criminal proceedings and one delegation noted that protection should extend to victims and witnesses involved in proceedings in other states.[262] This is because in cases where the measures taken to prevent the witness from intimidation or coercion were implemented only in the state where the crime was committed, those measures were considered less than satisfactory for that reason. Thus, for security reasons, cross-border cooperation between states on witness protection is needed in situations involving change of identity and relocation of at-risk witnesses.[263]

Moreover, in some cases where a person can provide important information which is relevant to a transnational organized crime case that involves more than one state, each

[259] Generally, the inducements and protections are needed to encourage persons who participate or who have participated in organized criminal groups to assist the authorites. As has been shown in art 24 para 4, "Protection of such persons shall be as provided for in Article 24 of this Convention." United Nations Office on Drugs and Crime above n 11, 168.

[260] Art 18 bis Measures to enhance cooperation with law enforcement authorities *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4/Rev.1 (19-29 January 1999) Several delegations noted that their legal system did not allow for the possibility of granting immunity, and some called for deletion of this subparagraph. One delegation noted the dangers to the course of justice that might arise if the authorities required clarification in respect of whether it included only the offence under investigation, or any offence committed by the person in question. In either case, according to the delegation, this might have an impact on the rights of victim.

[261] For example, in Costa Rica and the Dominican Republic, the law provides some measure of protection from conviction or punishment to an individual who has reported the activity of a criminal organization to the authorities. In Paraguay, reporting the activities of the organization to the authorities can be considered a mitigating factor at the time of sentencing. United Nations Office on Drugs and Crime above n 11, 176.

[262] *Travaux préparatoires:* art 18, Protection of witnesses and victims *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4/Rev.1 (19-29 January 1999).

[263] United Nations Office on Drugs and Crime, above n 14, 1.

state party involved should consider the possibility of reaching an agreement with the other state parties involved regarding the provision of mitigated punishment or immunity from prosecution for the offences involved.[264]

Interstate Agreements

The approved text of Article 24 of the Convention provides that state parties shall consider entering into agreements or arrangements with other states for the relocation of witnesses.[265] But this Article does not explain how to relocate witnesses between states. In practice, cooperation for the international relocation of protected witnesses is based on the following type of agreements:[266]

(a) Regional or bilateral agreements on cooperation in witness protection or in combating specific crimes such as organized crime, drug trafficking and terrorism: such agreements establish a formal mechanism for cooperation between state parties and usually require ratification by the national legislature;[267]

(b) Special agreements or memoranda of understanding [268] concluded directly between police forces, prosecutors' offices or other judicial and law enforcement

[264] *UNTOC*, art 26, para 5.

[265] *UNTOC*, art 24, para 3.

[266] United Nations Office on Drugs and Crime, above n 14, 82.

[267] Conventions and bilateral treaties have been ratified to give effect to this commitment. Article 19 of the *UNTOC* requires states parties to consider concluding bilateral or multilateral agreements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more states, the competent authorities concerned may establish joint investigative bodies. Witness protection authorities wanting to cooperate for the purpose of witness relocation will need some form of informal agreement directly between the authorities which may be modified on a case by case basis. Some protection authorities are able to operate simply one protection authority to another. However, probably more countries and some additional level of agreement which can be at the institutional level (between police agency and ministry). An agreement can be as simple as, the Ministries of X of State A and the Ministry of X of State B agree to cooperate for the protection of relocated protected witnesses. States can ratify bi-lateral or multilateral treaties. One example, an agreement on cooperation in the protection of witnesses and victims signed by the Governments of Estonia, Latvia and Lithuania in March 2000 provides for witness or victim of crime from any of these countries to be located to any of the other Baltic States for a limited period or, if the person's security can no longer be ensured by the sending state, permanently. Karen Kramer, above n 248, 13; United Nations Office on Drugs and Crime, above n 14, 82.

[268] Upon admission to a program, witnesses and other protected persons are required to conclude a memorandum of understanding (MOU), which defines the rights and obligations of both parties. The MOU usually includes:
1) a declaration by the witness that his or her admission to the protection program is entirely voluntary and that any assistance must not be construed as a reward for testifying;
2) the scope and character of the protection and assistance to be provided;

> authorities of the respective countries: such agreements provide the basis for direct assistance and do not require ratification by the national legislature.

The implementation of this type of provision was designed to solve legal impediments to the relocation of witnesses between states. This is because, normally, the procedure for relocation of witnesses depends on the relevant states and their host countries cooperating with each other in order to assure close protection for the witnesses. The procedure for the relocation of witnesses to another country will protect witnesses when the requesting state determines that a witness has reasonable grounds for being concerned about his or her safety. The requesting state is required to establish a network of countries willing to accept witnesses, via the conclusion of framework agreements. However, this procedure has its faults. This is because the final decision on whether to accept the witness rests solely with the receiving state, meaning that the receiving state may refuse to accept the witness in certain circumstances.

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3) a list of measures that could be taken by the protection unit to ensure the physical security of the witness;
4) the obligations of the witness and possible sanctions for violations;
5) the conditions governing the program's termination.
Some of the obligations of the witness include:
1) to provide truthful and complete testimony;
2) to comply with the protection authorities' instructions and not to compromise any assistance provided;
3) not commit a criminal offence;
4) to disclose all information about past criminal history as well as financial and legal obligations;
5) to fulfill their legal obligations to third parties prior to entering the program, to the extent possible. Recurring financial obligations can continue to be fulfilled following admission to the program through an intermediary, usually the protection authority.
Some of the obligation of the protection authority include:
1) Carrying out protection measures;
2) Arranging all matters related to a relocation;
3) Providing financial support for a limited duration;
4) Providing initial assistance with job training and finding employment;
5) Providing counseling and other social services, including appropriate education.

Video Conferencing [269]

Video conferencing can be used as a protective measures to decrease the threat posed to a witness's security and the danger of intimidation by the defendant in the courtroom. The use of videoconferencing measures can reduce the pressure otherwise felt by witnesses when confronting the defendant.[270]

State parties can use videoconferencing as a means of facilitating the taking of testimony from witnesses who reside in a different state party's jurisdiction. [271] During the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime, the Italian delegation submitted a guideline for implementing this provision.[272] According to this proposal, the judicial authority of the requested state would be responsible for identifying the witness and, at the conclusion of the hearing, indicating the date and place and any oath taken.[273] The hearing would be conducted without any physical or mental pressure being placed on the witness. Other safeguards provided for include the right of the requested state to interrupt the videoconference if it infringes fundamental principles of domestic law and the right of the witness to have an interpreter

[269]Videoconferencing refers to the use of interactive telecommunications technologies for witness testimony via simultaneous two-way video and audio transmissions. It allows the options of the witness testifying from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location through an audio-visual link. Videoconfering offers the benefit of enabling the witness to be absent from the place where the proceedings are being held but at the same time to see and hear- and be seen and heard by- the judge, magistrates or jury and the other parties. The testimony is broadcast to the courtroom where the prosecutor, defendant and public are present. As a protective measures, it reduces the threat to the witness's security and the danger of intimidation by the defendant in the courtroom. Where total anonymity is required, videoconferencing may be used in conjunction with screen or image distortion. Question by the prosecutor or the defense counsel are relayed by microphone to the witness, who usually answers through voice distortion. United Nations Office on Drugs and Crime, above n 14, 37.

[270] Ibid.

[271] *UNTOC*, art 18, para 18.

[272] *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nation publication, Sales No. E.06V.5, p. 199).

[273] Ibid.

or not to testify, if that is provided for by the domestic law of either the requesting or the requested state.[274] In addition, the costs of conducting the videoconference would be paid for by the requesting state.[275]

Victim Protection vs. Witness Protection

At the drafting stage, Article 24 made provision for the protection of victims, but one delegation proposed that issues relating to restitution and victim assistance should be dealt with in a separate Article. Another delegation proposed that this separate Article could deal in general terms with human rights issues. Some delegations noted that the terms "assistance", "views and concerns" and "restitution" were ambiguous.[276] Two delegations requested that specific reference should be made to specific categories of victims who are minors, migrants and refugees.[277]

Thus, there is a consensus internationally that it is preferable for victim protection to be dealt with separately from witness protection, in separate Article. Accordingly, Article 25 was adopted by General Assembly resolution 55/25 to afford protection to victims.[278] This Article concentrates on the physical protection of victims. However, the Article does not categorize victims by type and is unclear on the scope of restitution and assistance to be provided to victims.

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[274] United Nations Office on Drugs and Crime (UNODC), *Expert group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, Report of the Secretariat* [2]<http://www.unodc.org/unodc/en/treaties/stoc-cop-session5-conferencepapers,CTOC/COP/2010/CRP.2> at 4 January 2012.

[275] Ibid.

[276] United Nations Office on Drugs and Crime, above n 11, 170.

[277] Ibid.

[278] *UNTOC* art 25.

Three points arise for consideration. These are discussed in subsequent paragraphs. First, Article 25 does not categorize the victims by type, but two of the protocols that supplement the United Nations Convention against Transnational Organized Crime are especially relevant to the protection of victims.[279] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children provides for the protection of trafficked victims (Article 6)[280] and the Protocol against the Smuggling of Migrants by Land, Sea and Air seeks to protect the victims of migrant smuggling (Article 16). It might be said that the purpose of Article 25 is to focus on providing assistance and protection to victims against retaliation or intimidation in cases involving the four offences covered by the United Nations Convention against Transnational Organized Crime; however, the goal of the two protocols is to concentrate on protecting the specific categories of victims mentioned above.

Second, in order to clarify the meaning of the terms "compensation" and "restitution", the United Nations publicized a legislative guide for the implementation of the United Nations Convention against Transnational Organized Crime in 2004, which could be used as a guide for state parties when adapting and incorporating the provisions of the convention into their respective legal systems.[281] The guide does not provide definitions for the terms "compensation" and "restitution", but it does demonstrates the scope of the terms "compensation" and "restitution", which state parties can use to develop one or

[279] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children provides for the protection of trafficked victims (Article 6) and the Protocol against the Smuggling of Migrants by Land, Sea and Air seeks to protect the victims of migrant smuggling (Article 16).

[280] Art 6, para 6, of *the Trafficking in Persons Protocol*, which was drafted later than the United Nations Convention against Transnational Organized Crime, is clearer, referring to measures that offer victims of trafficking in persons the possibility of obtaining compensation. United Nations Office on Drugs and Crime, above n 11, 170.

[281] Ibid.

more of the following three possible avenues for obtaining compensation or restitution for victims:

> (a) Provisions allowing victims to sue offenders or others under statutory or common law torts for civil damages;
> (b) Provisions allowing criminal courts to award criminal damages, or to impose orders for compensation or restitution against persons convicted of offences; or
> (c) Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the state for injuries or damages suffered as the result of the commission of a criminal offence.[282]

The third point to consider is the reference to "views and concerns" under Article 25 paragraph 3, which is intended to allow concerns to be presented, by way of either a written submission or voice statements, and to require those views and concerns actually to be considered by the court. However, victims have to express their views and concerns in a manner which is not prejudicial to the rights of the defense.[283]

Definition of the term "witness"

As discussed earlier, in the course of drafting Articles 24 and 25, there were many issues that were controversial. This resulted in the convention containing effective provisions for states parties to incorporate into their domestic law. However, both Article 24 and Article 25 do not define the term "witness", in order to enable countries to develop their own jurisprudence for such a definition.[284]

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[282] Ibid.

[283] Ibid 171. Whether a person who sought to make his or her views or concerns known was a victim of such an offence would not normally be a question of fact for the court hearing the case or conducting the proceedings to decide. If a victim is to be given the opportunity to appear prior to the final determination of the court as to whether the offence actually occurred and the person accused is convicted of that offence, legislation should allow the court to permit the participation based on the claim of the victim, but without making any finding prejudicial to the eventual outcome in the case.

[284] Research and National Coordination Organized Crime Division Law Enforcement and Policy Branch Public Safety Canada, Canada, *A Review of Selected Witness Protection Programs*, (2010) [7].

The Implementation of United Nations Convention against Transnational Organized Crime in Thailand

As stated earlier, Thailand did not participate in the process of drafting the convention. However, Thailand has always expressed confidence in promoting the ratification and implementation of the United Nations Convention against Transnational Organized Crime into domestic Thai law. As stated, between 18 and 25 April 2005, Thailand hosted the Eleventh United Nations Crime Congress, which opened in Bangkok with a session focusing on the importance of giving special attention to the need to protect witnesses and victims of crime from terrorism.[285] At the conference, the Minister of Justice for Thailand, Mr. Suwat Liptapanlop, stated that [it was of]:

> the utmost importance for the international community to undertake concerted action towards building a new security consensus, requiring a combination of actions such as a better international regulatory framework, adequate compliance of the international community to such a framework, improved cooperation among states, strong coordination among all national and international agencies involved, and above all, political willingness, commitment and determination in taking appropriate measures at the national and local levels.[286]

It became apparent that the implementation of Articles 24 and 25 of the Convention into Thai law would mean that both provisions would enable the adoption of effective measures for assisting and protecting witnesses and victims from intimidation.

The following section of this thesis examines the structure and content of Thailand's witness protection program and provides suggestions which are intended to overcome obstacles to the implementation of that program.

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[285] United Nations, Crime Prevention and Criminal Justice, *Eleventh United Nations Congress on 18-25 April 2005, Bangkok* (2005), <http://www.unodc.org/unodc/crime_congress_11/documents.html> 10 March 2012.

[286] Ibid.

4.1.3 Relevant Thai laws

Witnesses and victims play an essential role in the effective investigation and prosecution of transnational organized crime. Witnesses and victims of transnational organized crime in Thailand are often confronted with the threat of intimidation and retaliation. In order to solve this problem, the Thailand government has enacted legislation to protect both witnesses and victims. The following section will examine Thai legislation that purports to offer protection to witnesses and victims.

4.1.3.1 Legislation

Many witnesses in Thailand avoid giving testimony before the criminal courts or withdraw their earlier testimony because they are afraid of being intimidated by organized criminal groups. When this happens, it invariably results in the dismissal of cases. For example:

> In case number 1093/2540, the court observed that witnesses should be able to give testimony without being subjected to threats from the accused. In this murder case, the witness did not want to identify the accused during the trial even though the witness was the only person who witnessed the murder. This was due to the accused being an influential person in the area and the fact that the murdered person lived in another province. Therefore, the eyewitness did not want to cooperate with the authorities. Even though being a witness is one of the duties of being a good citizen, nevertheless the witness was concerned for his safety and that of his family. The statistics indicate that 20 per cent of all criminal cases are thrown out of court every year because witnesses are worried about their safety and the safety of their families.[287]

Earlier judgments have also shown that witnesses have refused to cooperate with the authorities because they were concerned about their safety. Thus, to ensure witness cooperation, the government ought to provide efficient protection measures for witnesses.

[287] Sittipong Tanyapongpruch, *Transnational Organized Crime in Thailand* (2002) 59 *Resource material of UNAFEI* 601, 606.

Such protection measures are also essential in order to overcome the threat posed by organized criminal groups and realize the concept of witness and victim protection that is enshrined in the Constitution of the Kingdom of Thailand. Witnesses must be treated with decency and receive the requisite amount of compensation from the state in appropriate circumstances.[288] In this context, it is noteworthy that on 14 July 2003, the Witness Protection Act B.E. 2546/2003 was passed into law.[289] Kankaew states:

> The doctrine of witness protection in Thailand originated from an idea to support criminal case proceedings. In the judicial system, no matter what proceeding system a state uses, a judge is always the one who is capable of ruling a judgment. Evidence is the most importance source for a judge to rule a case lawfully. A state has the duty to ensure that criminals must be sentenced according to the state's law. To do so the state needs witnesses to testify in the criminal proceedings; however, the state also has a duty to ensure and provide protection to the witness. It is easy to understand that no one would want to do a thing for the state if, by doing so, it would cause harm to himself or his family. If a state cannot enforce the law by bringing criminals to justice, its citizens will not believe and trust in the state's governing power, resulting in a failure socially or even nationally.[290]

Similarly, victims must be protected in the same way as witnesses.[291] Victims play two important roles in the successful prosecution of a criminal case, namely as the complainant or informant, and as a witness who will provide testimony to the authorities.

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[288] Many new laws and institutions were established after the passing into law, in 1997, of the Constitution of the Kingdom of Thailand with the purpose of effecting rights that did not exist under earlier constitutions. As stated in Article 244, the state is responsible for ensuring the safety of the witness in a criminal case, as well as the safety of people who are closely related to the witness. Moreover, the Constitution states that appropriate compensation should be provided to the witness in order to protect the basic rights of people and to develop the justice system. Under Article 245, in a case where any person dies or suffers an injury to body or mind on account of the commission of a criminal offence by another person, in circumstances where the injured person did not participate in such commission and the injury cannot be remedied by other means, such person or his or her heir has the right to receive aid from the State, subject to certain conditions and in the manner provided by the Constitution.

[289] Witness Protection Office Department of Rights and Liberties Protection Ministry of Justice, *the Witness Protection Act B.E.2546 (2003)*, (Bangkok: Kurusapa Publication, 2006) 2.

[290] Kerati Kankaew, *Thailand's Witness Protection Programme* (2011), <www.unafei.or.jp/.../Fourth-GGSeminar_p92-97.pdf.> at27 March 2012.

[291] It is art 24 para 4 of the *UNTOC* which requires state parties to ensure that those protections will extend to all victims who are also witnesses.

"At this stage, the investigation of crime may not come to a logical conclusion without the victim's active participation. Further, if the case is brought to court, the victim's testimony in court is usually accepted as the best piece of evidence that can be used against the accused."[292] Thus, both witnesses and victims must be protected by the authorities. However, the authorities must strike the right balance between the rights of victim and those of the accused.[293]

The Witness Protection Act of Thailand

Turning to the Witness Protection Act of Thailand, this statute provides only for the protection of witnesses in criminal cases. The Act defines a "witness" as a person who comes to give testimony for the authorities and includes an expert but does not include a defendant who is a witness.[294] The exclusion of defendants from the definition means that the Act does not meet the requirements of the United Nations Convention against Transnational Organized Crime. Article 26 paragraph 4 requires each state to provide protection for persons who participate or have participated in the activities of an organized criminal group and who then cooperate with law enforcement authorities for investigative and evidentiary purposes, whether or not they are witnesses.[295] However, the Anti-Transnational Organized Crime Act B.E. 2556 (2013) s 23 provides immunity from

[292] Dr. Chatchom Akapin and Uthaiwan Jaemsuthee, *Thailand and the Protection of Victims, Particularly Women and Children against Domestic Violence, Sexual Offences and Human Trafficking* [7], <www.aseanlawassociation.org/aGAdocs/w5___Thailand.pdf> at 28 March 2012.

[293] *UNTOC* art 25 para 3 states that "Victims have to express their views and concerns in a manner not prejudicial to the rights of the defense"

[294] S 3 *Witness Protection Act B.E. 2546 (2003)* provides only for the protection of witnesses in criminal cases. The Act defines a witness as, "a person who commits himself/herself to be present at, or testify, or give evidence to a competent official for investigation, a criminal interrogation, or a court for criminal proceedings, and includes an expert but not a defendant who himself/herself is a witness.

[295] *UNTOC* art 26 para 4 states that "Protection of such persons shall be as provided for in art 24 of this Convention".

prosecution for the offences involved.[296] It can be seen that this provision meets the requirement of Article 26 paragraph 4 of the United Nations Convention against Transnational Organized Crime.

Furthermore, the Act does not clarify whether "victims" are protected under the Act. Victims may, of course, be witnesses for the prosecution. In the light of the dual status of victims as witnesses, it can be implied that under the Witness Protection Act "victims" are incorporated within the definition of "witness".

The Thai Witness Protection Office and Relevant Agencies

Under the Witness Protection Act, the Witness Protection Office[297] is responsible for the implementation of witness protection measures by coordinating and governing the operations of the relevant public agencies and the private organizations in order to obtain results.[298] However, the office does not have its own staff to perform this task, but has instead relies on other agencies to implement relevant measures. These agencies carry out their duties in accordance with laws that set out the authority and jurisdiction of the relevant agency in dealing with criminal activities. The level of witness protection may differ according to each agency's standards and witnesses may encounter different problems in terms of privacy, intimidation and threats to life, meaning that the need for

[296] The Anti-Transnational Organized Crime Act B.E.2556(2013) s 23 states during the investigation of transnational organized crime offence, if an offender provides substantial cooperation, the inquirer or the public prosecutor has to record the fact in the file of inquiry and then submit to the Attorney General for consideration.

If the Attorney General considers that the evidence under paragraph 1 is useful for the cae, the Attorney General can make discretion not to be liable offender for all charges or just some charges.

[297] The Witness Protection Office was established under Rights and Liberties Protection Department of Ministry of Justice.

[298] *The Witness Protection Act B.E. 2546 (2003)* s 13.

protection varies on a case-by-case basis. There are seven relevant agencies that perform the function of providing witness protection as follows:[299]

1. The Royal Thai police force is responsible for offering protection to witnesses, with this protection offered by police who have jurisdiction throughout the country.
2. The Royal Thai army is responsible for offering protection to witnesses, who are required to give testimony before a military court where soldiers are either the victims or the defendants.
3. The Bureau of Internal Security Affairs of Ministry of Interior is responsible for changing the name, domicile, identification and any other information that would reveal the identity of witnesses.
4. The Department of Special Investigation of Ministry of Justice is responsible for offering protection to witnesses under its legal jurisdiction and in the performance of its duties.[300]
5. The Office of the Narcotics Control Board of Ministry of Justice is responsible for offering protection to witnesses under its drug law and enforcement powers.
6. The Department of Corrections of Ministry of Justice is responsible for offering protection to witnesses who are prison inmates.

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[299] Witness Protection Office, Rights and Liberties Protection Department Ministry of Justice, Memorandum of Understanding between Witness Protection Office and relevant agencies (2005), <http://www.rlpd.moj.go.th/rlpd/WitnessProtection/mou1.html> at 29 March 2012.

[300] According to *The Special Investigation Act B.E.2547 (2004)*, the Department of Special Investigation (DSI) is responsible for crime prevention and suppression and for investigating specific crimes, such as Financial and Banking crimes, Intellectual Property Rights crimes, Taxation crimes, Consumer Protection and Environmental crimes, Technology and Cyber or Computer Crimes, Corruption in Government Procurement, and other serious crimes that have a seriously negative effect on public peace and order, the morals of the people, national security, international relations, and the economic or financial system. The DSI also has responsibility for investigations involving Transnational and Organized Crimes and also other white-collar crimes. Moreover, the DSI has a special power to request a court to issue a warrant to access the accounts, computer, communication instruments or equipment, data, electronic mail, or any electronic telecommunications of suspects for no longer than a 90 days period. The DSI can also operate a sting operation or set up a mobile unit or commando unit if necessary. Sookying, above n 179, 173.

7. The Department of Youth Observation and Protection of Ministry of Justice is responsible for offering protection to witnesses who are under 20 years of age.

General and Special Measures

The Witness Protection Act B.E. 2546 (2003) divides protective measures into two types - general measures and special measures. Both types of measures can be extended to the witness's spouse, parents, children and any person who is in a close relationship with the witness.[301] This is because, in some cases, it may insufficient to offer protection only to the witness. There may be threats made against the spouse, children or parents and persons in a close relationship with the witnesses. It is a common occurrence that the spouse or children of the witness are subjected to threats.[302]

1. General Measures

General measures are provided for witnesses in ordinary cases.[303] In general, the process starts when a witness fears for his or her security. In these circumstances, a competent official from the office running the criminal investigation, interrogation or prosecution or from the Witness Protection Office, as the case may be, applies for any witness protection measures that are deemed appropriate, or that are requested by the witness or the other concerned party, to be implemented. The said person may request a police officer or other official to provide protection for up to 30 days, as considered necessary in the particular case and the protection measures can only be implemented with the consent of the

[301] *Witness Protection Act B.E. 2546 (2003)* s 7.

[302] Siripen Tangtaweesuko, *Witness Protection in Criminal Case Act B.E. 2546: Study of The Legal Measures and the Achievement of Witness Protection (2004)*, Master of Laws Thesis, Chulalongkorn University, Bangkok, 17.

[303] Prathan Watanavanich, *The Emergence of Victims' Rights in Thailand: Twenty Years After the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, <http://www.unafei.or.jp/english/pdf/RS_No70_05VE_Watanavanich.pdf> at 10 April 2012.

witness.[304] However, in an emergency situation, the investigator or prosecutor is empowered to order the police to provide protection for their witness for up to 5 days at a time.[305]

General protection measures may include arranging (1) a safe place for witness to be housed; (2) changing the witness's first name or family name, domicile, other means of identification,[306] or other information that would reveal the identity of the witness, as appropriate; and (3) changing the personal status of the witness and the nature of the criminal case.[307]

2. Special Measures

Special protection measures are applied to protect the witness, whenever there are specific circumstances or it is suspected that a witness may lose his or her security. The witness or other concerned parties, a competent investigation official, a competent interrogation official or a competent criminal case prosecution official applies to the Minister of Justice or his appointed official to decide whether to approve the requested protection measures.

The special measures are designed to apply to cases involving:[308]

- Prosecutions under the laws relating to narcotic drugs, money laundering law, anti-corruption law, or customs law.

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[304] *Witness Protection Act B.E. 2546 (2003)* s 6 para 1.

[305] Tanyapongpruch, above n 287, 606.

[306] It should be noted that the change of identity under the Witness Protection measures does not give individuals any immunity. It means that the person's criminal history transfer over to the person's new identity.

[307] *Witness Protection Act B.E. 2546 (2003)* s 6 para 3.

[308] *Witness Protection Act B.E. 2546 (2003)* s 8.

- Cases regarding national security under the Penal Code.
- Sexual offences under the Penal Code involving the luring of a person for the sexual gratification of another.
- A criminal offence in the nature of organized crime under the Penal Code, including any crime committed by a criminal group with a well-established and complex network.
- A case punishable with at least ten years of imprisonment.
- A case in which the Witness Protection Office deems it appropriate for protection to be offered.

If the measures are not approved, the witness may appeal the decision to a court of first instance, or to a military court that has jurisdiction to try the case, or to the court in the domicile of the witness. The appeal has to be lodged within 30 days from the date of notice of the decision of the Minister of Justice. The court has to hear the case in camera within 30 days but, if necessary, the court may extend the hearing time for a reasonable further period. The decision of the court on whether or not protection should be provided to the witness is final.[309]

If the special measures are approved by the Minister of Justice, the Witness Protection Office will arrange for the following special protection measures: [310]

- Relocation of witness to appropriate accommodation.

[309] *Witness Protection Act B.E. 2546 (2003)* s 9.

[310] *Witness Protection Act B.E. 2546 (2003)* s 10.

- Daily living expenses for the witness or his or her dependents for a period not exceeding one year, with extensions as necessary for three months each time, not exceeding two years.
- Coordination with the relevant agencies in order to change the first name, family name and other information that may otherwise lead to the identity of the witness.
- Actions to help the witness to pursue his or her own career and receive training, education and other services that provide the witness with the means with which to enjoy a better quality of life.
- Assistance with enforcing or actions on behalf of the witness to enforce his or her lawful rights.
- Arrangements being made for a bodyguard service to be provided for a necessary period of time.
- Other actions being taken as appropriate to ensure the witness's safety and security.

In addition, the prosecutor can also provide both general[311] and special measures[312] protection for witnesses according to the Regulation of the Office of the Attorney General on Witness Protection.[313]

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[311] *The Regulation of the Office of the Attorney General on Witness Protection B.E.2547 (2004)* s *8* states if prosecutor finds that a witness is in danger, he can set out measures to protect the witness by suppressing the witness's name, address, and other information that might lead to identification.

[312] *The Regulation of the Office of the Attorney General on Witness Protection B.E.2547 (2004)* s 11 states during the course of proceeding, if the prosecutor, in his or her opinion, found that it is appropriate to place the witness under the special protection program, the prosecutor may ask the Minister of Justice for inclusion of the witness.

[313] However, witness protection is general mainly the responsibility of the Rights and Liberties Protection Department. Competent authorities within criminal investigation, interrogation, prosecution and trial stages may request the Rights and Liberties Protection Department to take the witnesses into the witness protection program. Further, when necessary, those authorities may request police officers or other officials to assist in implementing witness protection measures.

Re-Location of Witnesses

According to s 10 (1) of the Witness Protection Act, witnesses who are at risk or highly likely to lose their security may request relocation under special protection measures. The protected witnesses may be removed to appropriate accommodation with closed-circuit surveillance at the entrance of the accommodation. Moreover, the protected witnesses will be under protection of assigned officers from the Witness Protection Office who spend 24 hours escorting him or her. The officers will provide food and all facilities for the protected witnesses. If the protected witnesses need to contact others, they must seek approval from the authorities in order to assure witness's security. However, authorities can only relocate witnesses within the Kingdom of Thailand. Currently, there is no legislation in place authorizing officials to relocate witnesses to a foreign country. The implementation of the special protection measures is conducted under a confidential operation. All relevant information cannot be accessed unless authorized by the Minister of Justice.

Witness Compensation

Additionally, in appropriate circumstances, witnesses should receive compensation from the state.[314] The Witness Protection Act provides the right for witnesses and, in appropriate circumstances, the witness's spouse or a person in a close relationship with the witness, to claim compensation in two situations, namely situations where:[315]

- The witness, or the witness's spouse or a person in a close relationship with the witness has had any right in relation to their life, body, health, liberty, honor or property impaired; or
- The witness has already given evidence or testified to a competent official as part of an investigation or interrogation, or before a court.

[314] *The Constitution of the Kingdom of Thailand* s 244 states that " In a criminal case, a witness has the right to protection, proper treatment and necessary and appropriate remuneration from the state as provided by law".

[315] *Witness Protection Act B.E. 2546 (2003)* ss 15, 16, 17.

> In the context of the above measures, a witness who is dissatisfied with an order made under ss 6, 7, 9, 10, 11, 12, 16, 17 or 19 of the Witness Protection Act, may lodge an appeal with a Court of First Instance or with a military court.

It should be noted that the receipt by a witness of the benefit of a right granted under the Witness Protection Act does not prejudice his or her other entitlements.

Termination of Special Protection Measures

The Minister of Justice or his appointed official may order termination of the special protection measures in the following circumstances:[316]

(1) The witness requests termination of involvement the program;

(2) The witness failed to comply with a provision of Ministerial Regulation or Rule on special protection measures set for the witness;[317]

(3) Circumstances have changed and the special protection measure becomes unnecessary;

(4) The witness irrationally refuses to provide evidence or testify;

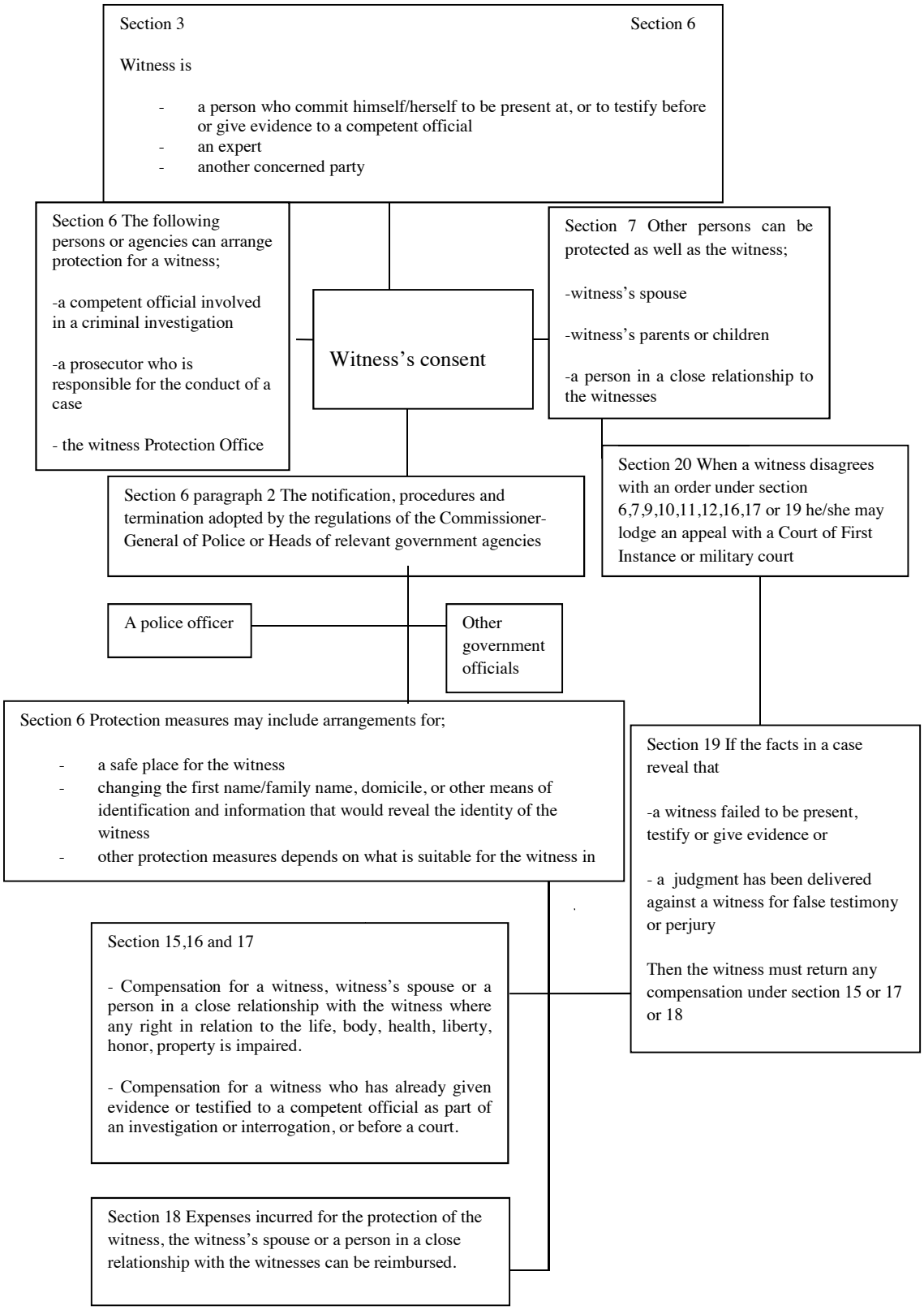
(5) A court has convicted and sentenced the witness for perjury.

Figures 1-3 below provide diagrammatic presentations of processes and organizational structures.

[316] Ibid s 12.

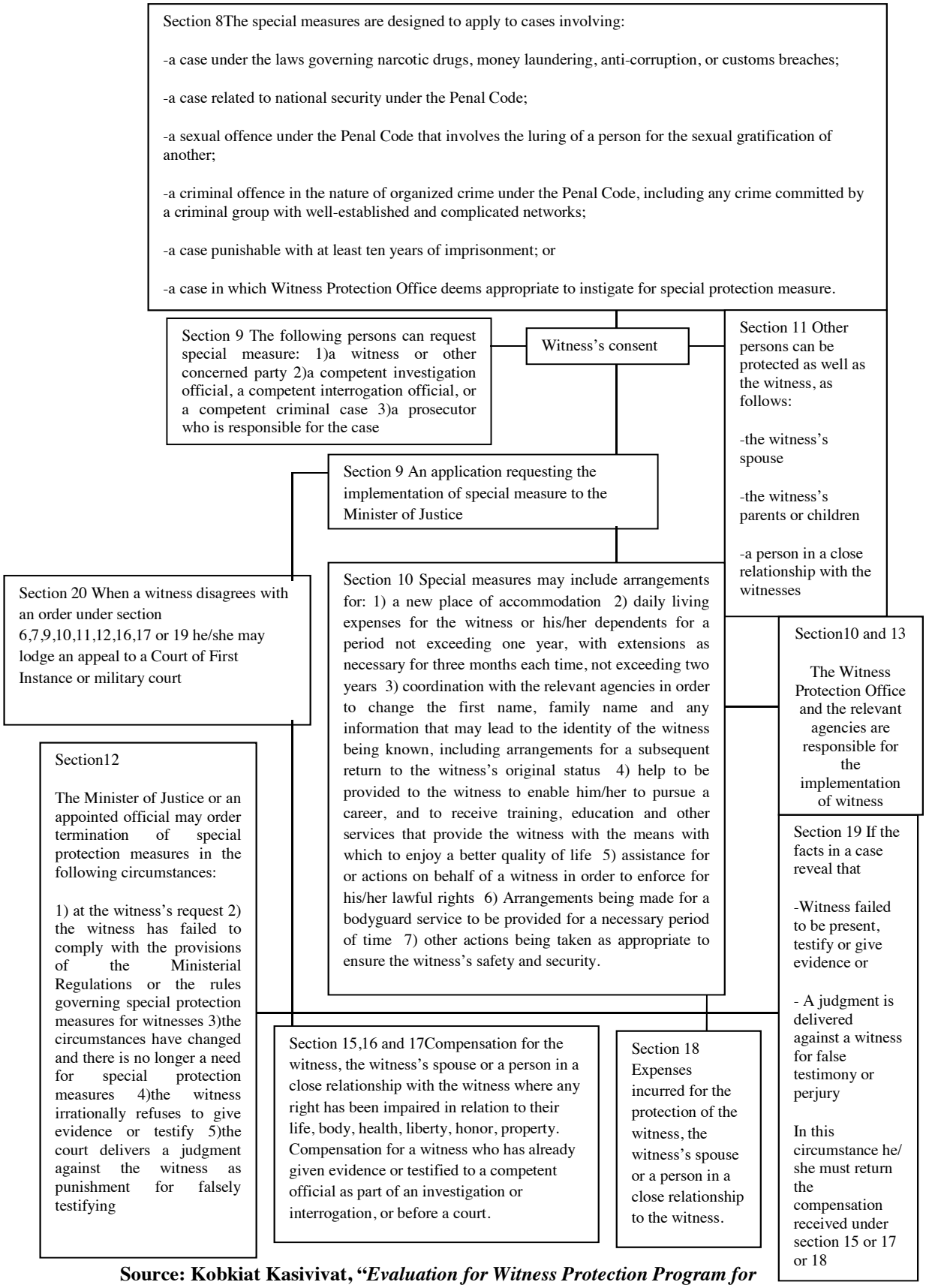
[317] *Regulation of the Ministry of Justice on Special Protection Measures B.E. 2548 (2005)* ss 5 and 6 provide that witnesses who are under the special protection measures are required to strictly comply with all conditions set by the Witness Protection Office. These include providing cooperation to the protection; avoid presenting his or her identity, communication under permission, and others. Any violation of conditions may result in termination of the special protection measures by the order of the Minister of Justice.

Figure 1: Flowchart of General Measure for Witness Protection in Thailand



Source: Kobkiat Kasivivat, "*Evaluation for Witness Protection Program for Witness Protection in Criminal Case Act, B.E.2546 (2003)*", (Bangkok: National Defence College, 2007)

Figure 2: Flowchart of Special Measure for Witness Protection in Thailand



Source: Kobkiat Kasivivat, "*Evaluation for Witness Protection Program for Witness Protection in Criminal Case Act, B.E.2546 (2003)*", (Bangkok: National Defence College, 2007)

The Role of the Department of Special Investigation

According to the Special Investigation Act BE 2547 (2004), the Department of Special Investigation (DSI) [318] is responsible for crime prevention and suppression and for investigating specific crimes, such as financial and banking crimes, intellectual property rights crimes, taxation crimes, consumer protection and environmental crimes, technology and cyber or computer crimes, corruption in government procurement, and other serious crimes that have a seriously negative effect on public peace and order, morale of the people, national security, international relations, and the economic or financial system. The Department of Special Investigation also has responsibility for investigations involving Transnational and Organized Crimes and also other white collar crimes.[319]

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[318] After the establishment of Department of Special Investigation (DSI), the power of criminal investigation in special cases was vested to the new agencies which were resulted in legal reform. Due to under the old system of investigation power was belongs exclusively to police. This is because the police are the only agency who can initiate a criminal investigation and are in a position to monopolize the state's power to invoke criminal enforcement. Such complete control of the pre-trial criminal process by the police without an adequate opportunity for supervision and control by other organizations has left the police virtually unchecked to freely perform their functions with very minimal review from the other criminal agencies. It can be seen that in the old system the prosecutor has a passive and limited role in the criminal investigation. The prosecutor's role begins only after the police have finished their investigation and submitted the file of inquiry to him/her. The prosecutor will review the file, which also includes the police recommendation on whether the case should be prosecuted. If the prosecutor gives the opinion that the file of inquiry is incomplete and more investigation is needed before a prosecution to the court, he/she can request the police to conduct additional investigation. However, since the power of investigation was belongs exclusively to the police, the prosecutor can only request the police to conduct the investigation on his/her behalf and cannot initiate it himself/herself. Sookying, above n 179, 174.

[319] *The Special Case Investigation Act B.E. 2547 (2004)* s 21 "Special Cases required to be investigated according to this Act are the following criminal cases:

(1) Criminal cases according to the laws provided in the Annex attached hereto and in the ministerial regulations as recommended by the Board of Special Case (BSC) where such criminal cases shall have any of the following natures:
    (a) It is a complex criminal case that requires special inquiry, investigation and special collection of evidence.
    (b) It is a criminal case which has or might have a serious effect upon public order and moral, national security, international relations or the country's economy or finance.
    (c) It is a criminal case which is a serious transnational crime or committed by organized criminal group; or
    (d) It is a criminal case in which influential person being a principal, instigator or supporter.

This however shall be in line with details of the offence provided by the Board of Special Case.

(2) Criminal cases other than those stated in (1) where the Board of Special Case resolves by no less than two-thirds votes of its existing Board members.

In a case of a single offence against various legal provisions and a particular provision is handled by Special Case Inquiry Official according to this Act, or in a case of several related or continuous offences and a particular offence is handled by the Special Case Inquiry Official according hereto, such

The Special Investigation Act BE 2547 (2004) was enacted to solve problems of lack of cooperation and coordination among agencies in the criminal justice system. Thus, the Act allows the Special Investigation Board to pass a resolution or adopt a Memorandum of Cooperation and Coordination among agencies.[320] The Board is headed by the Prime Minister and consists of the heads of the criminal justice agencies and scholars. If there are conflicts among agencies, the problems are solved by the board. In addition, the Department of Special Investigation can request the court to issue a warrant to access any information sent by post, telegram, telephone, facsimile, computer, communication device or equipment or any information technology media which has been used to commit a Special Case offence for a period of no more than 90 days.[321]

The concept of working in an interdisciplinary manner can be applied to an investigation. The Department of Special Investigation can invite or appoint any related persons or experts[322] to join the investigation team, including the international community staff. For example, the Department of Special Investigation can request officers from other agencies to work for a certain period. Moreover, the Department of Special Investigation will consult and work closely with prosecutors. In particular cases, such as transnational

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Special Case Inquiry Official shall have a power to investigate offences against such other provisions or other matters and such case shall be considered as Special Case".

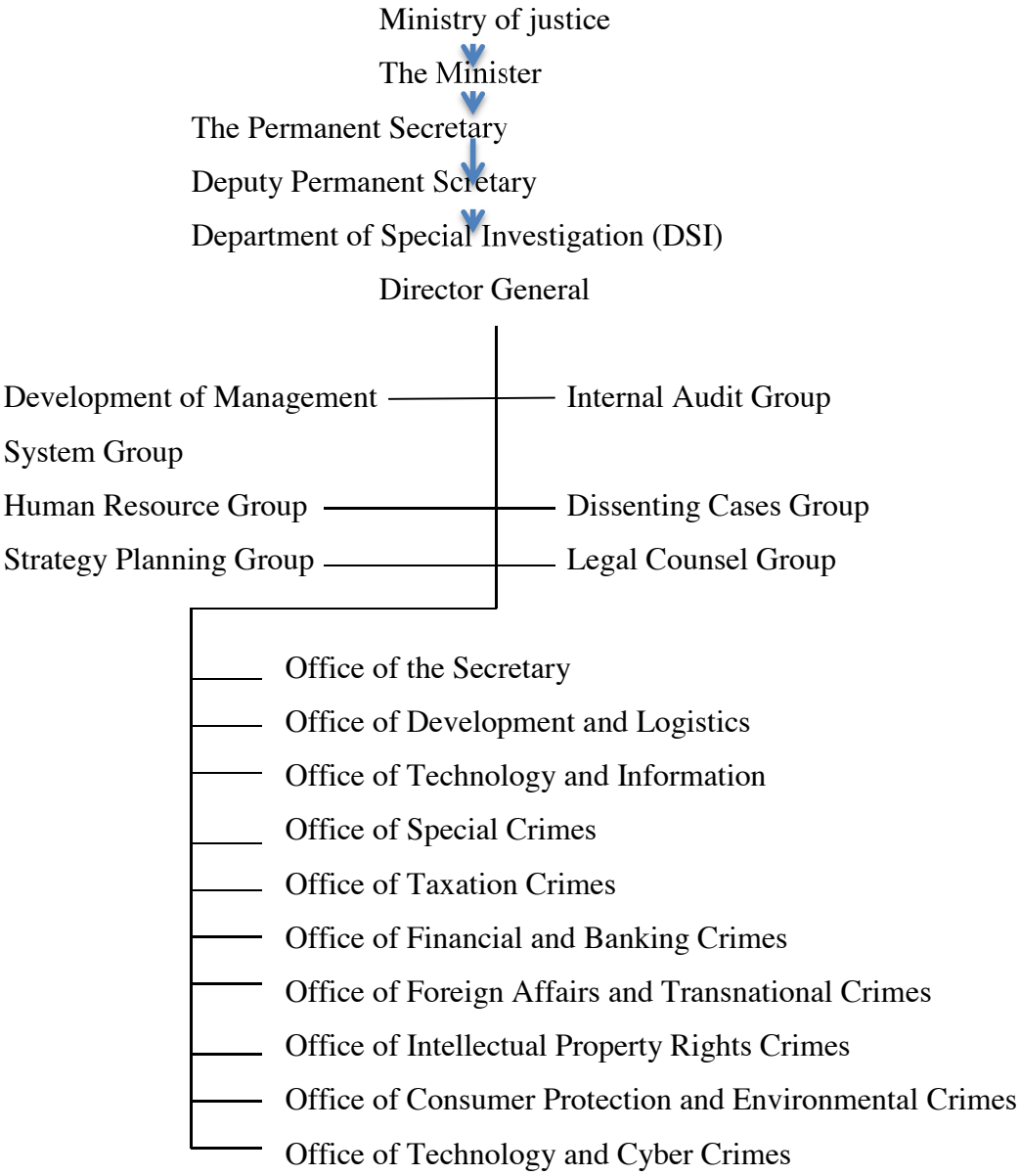
[320] *The Special Case Investigation Act B.E. 2547 (2004)* s 33 "In case of the necessity for the benefit of an investigation and inquiry of Special Case in particular, the Minister may propose to the Prime Minister, as head of the government, to issue an order according to the laws governing public administration regulations, to appoint governmental officials in other agencies to work at the Department of special Investigation to assist an investigation and inquiry of such Special Case".

[321] *The Special Case Investigation Act B.E. 2547 (2004)* s 25 para 1 "In case where there is a reasonable ground to believe that any other document or information sent by post, telegram, telephone, facsimile, computer, communication device or equipment any information technology media has been or may be used to commit a Special Case offence, the Special Case Inquiry Official approved by the Director-General in writing may submit an ex parte application to the Chief Judge of the Criminal Court asking for his/her order to permit the Special Case Inquiry Official to obtain such information".

[322] *The Special Case Investigation Act B.E. 2547 (2004)* s 30 " For an investigation and inquiry of any Special Case which needs a special specific expertise, the Director-General may appoint a person having such qualification as a Special Case consultant".

crimes and crimes committed by influential persons or politicians, the Department of Special Investigation and the prosecutors are jointly responsible for investigation.

Figure 3: The Organizational Structure of the Department of Special Investigation



Sutthi Sookying, "The Department of Special Investigation (DSI): Countermeasures in Regard to the Investigation of Economic Crimes and Special Crimes in Thailand" (2004), ***Annual Report for 2004 and Resource Material Series No.66***

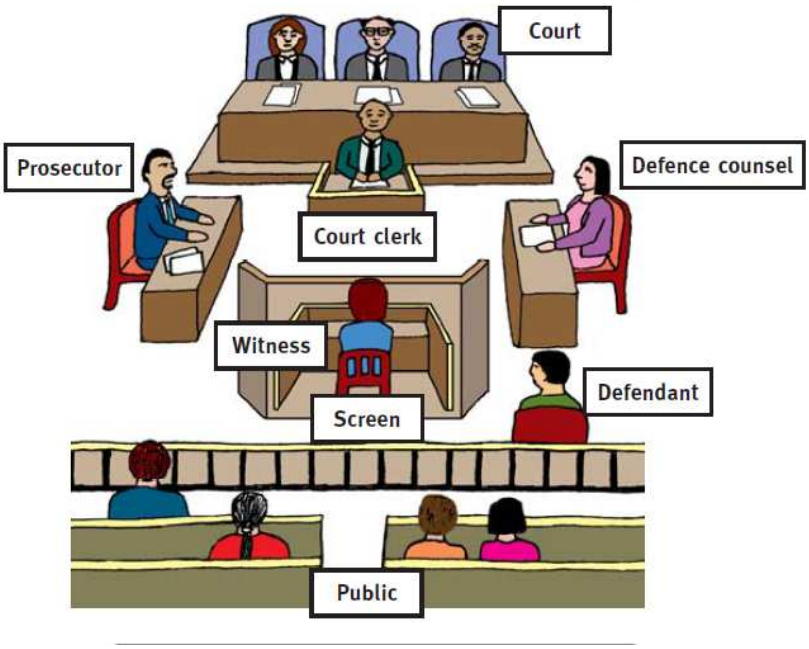
Protection Measures in Court

A witness is one of the key sources of evidence that a judge relies on when issuing his or her judgment in a case. If the witnesses do not testify against the criminal, the case must be dismissed, as the standard of proof in criminal cases requires that the prosecution proves the criminal's guilt beyond reasonable doubt.[323]

Protective measures can be used in courts to protect witnesses or victims who are put at risk because of their testimony. Some witnesses or victims might not be able to testify freely if they are required to testify in open court in accordance with the usual court procedures. The special measures used by the courts usually focus on distorting the witness's identity or concealing it from the public or the media. These measures are consistent with the standards set out in Article 24 of United Nations Convention against Transnational Organized Crime.

[323] *The Criminal Procedure Amendment Act B.E. 2542 (1999)* s 227, para 2 " Where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of the doubt shall be given to the offender" It can be seen that when the trial begins the rule on presumption of innocence is upheld. The prosecutor has a duty to prove his case to the satisfaction of the court that the accused is guilty, if not he will be acquitted".

Figure 4: Sample Courtroom Arrangement When A Screen Is Used



Source: Good practices for the protection of witnesses in criminal proceeding involving organized crime (2008) [36] <http://www.unodc.org/documents/organized-crime/witness-protection-manual-feb08.pdf>

In Thailand, there are no specialized courts with specific jurisdiction to hear cases involving organized crime. Matters arising can be heard in any court[324] of competent jurisdiction. Normally, trials are conducted in the presence of the defendants.[325] In this setting, witnesses or victims may be hesitant about giving evidence freely in the presence of the defendants. If the presiding judge is aware of the dangers posed to the witness, modern technology should be used while the trial is conducted.

[324] The Courts of Justice of Thailand are classified into three levels, consisting of (1) the Courts of First Instance; (2) the Court of Appeal; and (3) the Supreme Court.

[325] *The Criminal Procedure Amendment Act B.E. 2542 (1999)* s 172. This section is consistent with art 25 para 3 of the United Nations Convention against Transnational Organized Crime which requires that a victim be required to express his or her views and concerns in a manner not prejudicial to the rights of the defense.

Children

Under *the Criminal Procedure Amendment Act B.E. 2542 (1999)*, certain measures are adopted which serve to protect the rights of children in criminal justice cases, regardless of whether the children are involved in the investigation as offenders, victims or witnesses. These measures include the use of video to record statements and deliver testimony, and the separation of the child from the accused. The main objectives of these provisions are to reduce the pressures to which children are subjected while giving testimony in court and to protect children from intimidation. The law requires that in the investigation of offences, relating to sexuality, life and body, and offences relating to liberty, extortion, robbery and gang-robbery, as well as offences under the law of prostitution protection and suppression, the inquiry must be conducted jointly by a psychiatrist or a social welfare official, a person requested by the child, a public prosecutor, and a police investigator,[326] "instead of allowing a police investigator to handle the inquiry alone as in a general case."[327]

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[326] *The Criminal Procedure Amendment Act B.E. 2542 (1999)* s 133 bis. The first and the second paragraph of section 133 bis added by section 5 of *the Criminal Procedure Amendment Act (No.26) B.E. 2550 (2007)* "In case of the offence, relating to sexuality, life and body, which is not the offence arising from affray, the offence relating to liberty, the offence of extortion, robbery and gang-robbery according to the criminal code, the offence according to the law of prostitution protection and suppression, the offence according to the law of measurement of lady and child business protection and suppression, the offence according to the law of public place of entertainment or the case of other offence having the rate of punishment with imprisonment requested by an injured person or a witness who is a child not over eighteen years of age, an inquiring officer shall examine such an injured person or a witness who is a child not over eighteen years of age in proportion, in the place suitable for a child and a psychologist or a social welfare worker, a person requested by a child and a public prosecutor shall be together in examining such a child, and in case of a psychologist or a social welfare worker is of the opinion that examing any child or any question may have a strong mental effect on a child, an inquiring officer shall examine in particular, passing a psychologist or a social welfare worker, on the issue of inquiring officer's examination in the way which a child does not hear the inquiring officer's examination and many repeated questions shall not allowed to give to a child if it is not a reasonable cause.

It shall be the duty of the inquiry official to notify the psychologist or social welfare worker, the person requested by the child and the public prosecutor, and also inform an injured person or a witness who is a child of his right according to the first paragraph.

The psychologist or social welfare worker or the public prosecutor participating in the examination may be challenged by the child injured person or witness. If such case occurs, such person shall be replaced.

Subject to the provision of s 139, in the examination under the first paragraph, the inquiry official shall arrange to have the image and voice of such examination recorded as evidence in the manner that can be reproduced continuously.

The accused is entitled to the right to confront his or her accusers at the trial, and the taking of evidence or the making of statements by the witnesses must be conducted in the presence of an accused. Further, the trial proceedings must be open to the public. The witness should be able to give evidence without being subject to inducements or threats from the accused. Therefore, s 172 of *the Criminal Procedure Code of Thailand* provides that after taking into account the sexuality, age, status, health and mental state of the witness or his or her fearfulness of an accused, a trial may be conducted without a direct confrontation taking place between the witness and accused, by using closed circuit television or electronic media tools.[328] The aim is to allow a witness or victim to give testimony without being subjected to any trauma.

In addition, the court may order the trial venue to be transferred if any party to the proceeding or the presiding judge considers that it would be very dangerous to any party or to any of the witnesses if the trial were conducted in a court that has the jurisdiction over the case.[329] However, this provision may not be practical when the danger to the party or the witnesses is imminent, as it would take a long time for the request to have the case transferred to another court approved by the Chief Judge of the Supreme Court.

In case of extreme emergency with reasonable cause where it is unable to wait for the psychologist or social welfare worker, the person requested by the child and the public prosecutor to participate in the examination simultaneously, the inquiry official may examine the child by just having any person in the paragraph to participate with, but he has to write the cause of being unable to wait for other persons down in the file of inquiry, and it shall not be deemed that such examination of the child injured person or witness, which has already been made is unlawful.

[327] Akapin and Jaemsuthee, above n 292, 8.

[328] *The Criminal Procedure Amendment Act B.E. 2542 (1999)* s 172 (amend in 2008) states that "In the taking of evidence where the consideration of sexuality, age, status, health and the mental state of a witness or his fearfulness of an accused has been made, a trial may be conducted without a direct confrontation between a witness and the accused. This may be done by using closed circuit television, electronic media tools, or other methods as prescribed in the rules of the Chief Justice and the taking of evidence may be acquired through a psychologist, a social worker or another person whom the witness has confidence in."

[329] *The Criminal Procedure Amendment Act B.E. 2542 (1999)* s 26.

Compensation and expenses payable to the witness

Victims should be entitled to claim compensation under the Thai criminal justice system, where they have suffered as a result of being a victim of a crime. In Thailand prior to 2002, victims of crime had only two options when seeking compensation. They could either claim damages for wrongful acts under s 420 of *the Civil and Commercial Code*; or alternatively, they could file for civil proceedings seeking restitution in connection with the criminal prosecution. However, very few victims of crime have been compensated using these options.[330] Therefore, in 1997, the government approved a new statute proposed by the Judicial Affairs Office of the Ministry of Justice, which provides victims of a crime with the right to seek compensation and restitution from the accused. The National Assembly finally passed the law and it came into effect on 12 November, 2001 (B.E.2544).[331]

The Act relating to Victim Compensation, Restitution and Benefits of the Accused B.E. 2544/2001 provides a state compensation program for victims of crime, as well as restitution for accused persons who suffer personal injury as a result of the abuse of

[330] This is due to the fact that most victims of crime have not issued civil proceedings seeking compensation. This is because the cost of issuing a civil lawsuit consists of the court fee, which is set at 2.5% of the principal amount claimed plus a lawyer's service fee and other contingent expenditures. Besides, the claimant has to bear expenses during the trial proceedings, such as the cost of filing, of the service of pleadings and of preparing documents and the expenses incurred by the witnesses. The claimant has to submit evidence demonstrating the loss or damage that the claimant has suffered or incurred as a result of the wrongful act. The court will determine the damages and tangible loss at the discretion of the judge who presides over the case, subject to the relevant legal principle. As regards the filing of a civil claim in connection with an offence, it is evident that there have been a number of restitution cases filed in the court. However, only a small number of victims have received payment for damages from the offenders, due to the fact that most criminals are poor and unemployed, and may never have worked. Thus, the offenders are not able to compensate the victims. Watanavanich, above n 303, 3.

[331] Ibid.

power or miscarriage of justice.[332] The victims who qualify to receive compensation[333] under this Act are injured persons who meet the following criteria:[334]

(1) An injury is restricted to life and body, including physical or mental injury.

(2) The injury has been caused by another person in circumstances where the victim was not involved in the offence.

(3) The offences committed by the other person are included within the list of offences set out in the Act.[335]

In the above circumstances, the victims may lodge an application for compensation with the Victim Compensation and Restitution Board (VCR). The Board may appoint a sub-committee to act on behalf of the Board.[336] The VCR may award compensation at its discretion, taking into account the gravity of the offence, the circumstances surrounding the offence, the seriousness of the offence, the nature of the loss suffered by the victim and any other sources of compensation that are available to the victim. (such as social

[332] Ibid. This applies when the court decides, as part of its final judgment to reverse a previous judgment or dismiss the case because the accused is dead, or when the public prosecutor abandons the case with the court's permission and it appears from the facts that the accused is not criminally liable, or has been mistakenly charged or convicted, whether with intentionally or as a result of negligence by any competent state official in the criminal justice system.

[333] Compensation under the Act is only available for the victim of the crime, whereas restitution under the Act is only available for the accused. Each entitlement includes benefits given to the victim or to the accused respectively.

[334] *The Act relating to Victim Compensation, Restitution and Benefits of the Accused B.E. 2544 (2001)* ss 3 and 17.

[335] For example, a situation involving an offence committed by a state official in the course of performing his or her duty which results in the victim either dying or being physically or mentally injured.

[336] The Permanent Secretary of the Ministry of Justice is Chairman of the Board. Other members consist of representatives of the Royal Thai Police, the Office of Judicial Administration, the Office of the Attorney General, the Ministry of Finance, the Department of Local Administration, the Probation Department, the Judge Advocate General's Department, the Department of Correction, the Department of Welfare and Labor Protection, the Council for Lawyers and five experts from each of the fields of medicine, social welfare, and human rights to be appointed by the Council of Ministers on the recommendation of the Minister of Justice. The Chairman of the Board must appoint an official of the Ministry of Justice as secretary and may appoint an assistant secretary.

welfare programs, social security, workmen's compensation, insurance and other competing sources)

It should be noted that a victim or accused person who has been paid under other laws or insurance is entitled to claim payment from the compensation fund.

Compensation for victims under this Act is limited to offences specified in the Annex to the Act.[337] It is possible to amend this Act so that it allows compensation to be provided to victims of transnational organized crime.

The following sections of this chapter examine some case studies. These case studies have been selected for discussion because they present a wide range of the issues that commonly arise in the context of the witness protection program.

4.1.3.2 Case Studies

This section aims to evaluate the protection of witnesses under the Witness Protection Act B.E.2546 (2003) by examining the degree of satisfaction of witnesses and obstacles faced as a result of the means employed by the Witness Protection office, the Royal Thai Police, the Department of Special Investigation (DSI) and relevant agencies to protect witnesses. The data analyzed was derived from various cases studies which were sourced from the media and from human rights organizations.

[337] Victims are entitled to apply for compensation only in relation to offences listed in the Criminal Code as follows.

(1) Offences under the sexuality ss 276-287.
(2) The following offences against life and body:
    a) Causing death, ss 288-294;
    b) Bodily harm, ss 295-300;
    c) Abortion, ss 301-305; and
    d) Abandonment of children, the sick and the aged, ss 306-308.

Case Study One: Angkhana Neelaphaijit

The first case is that of Angkhana Neelaphaijit. She is the wife of human rights lawyer, Somchai Neelaphaijit, who was abducted by the police on 12 March 2004. In this case, five police officers were charged in connection with Somchai's abduction.[338] Four of them were members of the powerful Crime Suppression Division. Angkhana cooperated as a witness and was also a joint plaintiff in the case against the five accused. She was intimidated by the perpetrators.

On 18 April 2005, Angkhana received a telephone call from a man who identified himself as a government intelligence officer whom she had previously met. The caller asked her about her activities at the United Nations. Several weeks earlier, an unidentified man had approached her near her house and warned her against providing any support in her husband's case such as providing interviews on television or making other public statements.[339]

Due to these events, the Witness Protection Office sent two police officers from the Metropolitan Bureau to protect her the following day. Angkhana accepted their offer to

[338] Somchai Neelaphaijit is a Thai lawyer and human rights defender. At the time of his disappearance, he was representing clients from southern Thailand's minority Muslim community who were accused of participating in an attack on an arm depot. Somchai filed a complaint that his clients had been tortured while in a police custody in an effort to coerce confessions. Somchai disappeared the next day and his car was later found abandoned with a fresh dent in the back, suggesting it had been rammed from behind. <http://www.humanrightsfirst.org/our_work/human-rights-defenders/thailand/somchai-neelaphaijit> at 8 May 2012.

[339] Angkhana told Human Right First when she was interviewed on November 2005 that "We are always threatened for a long time. An intelligence official called me and asked if I was going to the UN. Are you planning to go to UN? Are you planning to go to UN? Are you sending a letter? Then a man came to my house, said he was working with detainees and that I wasn't safe anymore, I could be shot. I told friends, who told the newspaper. The Minister of Justice contacted me, said he wants to meet me, and has a duty to protect me. But the problem was surveillance. They were in our house, they asked for our phone numbers. I signed a two-month protection contract, but did not extend it. A Human Rights First White Paper, *Trial Monitoring Report the Disappearance of Somchai Neelaphaijit Bangkok, Thailand*, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/06221-hrd-somchai-trial-report.pdf> at 6 June 2012.

provide her with protection for two months. When the two police officers came to Angkhana's house, she and her family felt more unsafe than they did before taking part in the witness protection program, as the police were monitoring her activities. Neighbors and friends stopped visiting her. Her family also felt intimidated as the police wanted to know the phone numbers and movements of her five children, four of whom were young women at that time. Moreover, when she met the Prime Minister, she asked him whether her phone was being tapped and he did not deny it. After two months, Angkhana refused to extend her involvement in the witness protection program, as she felt she was being harassed by the police. She obtained assistance from colleagues and made her own private arrangements for security.

On 21 March 2006, Angkhana was again threatened by the same man who had approached her in 2005, at a time when she was working with the Central Institute of Forensic Science. The man warned her not to go out as; if she did, she might be involved in an accident or discover a bomb underneath her car. But on this occasion, she did not request any further protection from the Witness Protection Office. This is because she did not trust the witness protection program anymore.[340]

On 10 April 2006, two members of the European Parliament submitted written questions to the European Union asking whether or not it had "communicated its concern over the security threats to Mrs. Angkhana to the Government of Thailand."[341] The following month, the European Union accepted her case under a program for women human rights

[340]A Project of the Asian Human Rights Commission, *Lesson 2 Case Study of Thailand's Fledgling Witness Protection Programme*, the Asian Legal Resource Centre (2006) <http://www.hrschool.org/doc/mainfile.php/lesson47/184> at 27 March 2012.

[341] Ibid.

defenders. Angkhana felt that the protection received from human rights groups and international agencies was more effective than anything offered by the Government of Thailand.[342]

The case of Angkhana Neelaphaijit demonstrates that Thailand's witness protection program has failed. As has been shown, the Government of Thailand was widely criticized in the media and human rights organizations. Moreover, the European Union had to offer protection to Angkhana under a program for women human rights defenders. Even though the Witness Protection Office had sent two police officers to protect Angkhana and her family, she felt unsafe. The police wanted to know the movements of her and her five children, and because her phone was being tapped. If a witness consents to receiving protection under the witness protection program, the witness's right of privacy and safety should be respected.

It is submitted that certain minimum requirements must be met before the police can initiate any protection measures. The police officers who are assigned to provide witnesses protection should be specialized or should have experience in providing protection for witnesses. The facts of Angkhana Neelaphaijit's case show that the police officers did not have any special qualifications and lacked experience. It is not appropriate for the decision whether or not to provide protection to a witness to be left to police officers who may not be specialized in the area of witness protection. Another issue was that Angkhana's husband had been abducted by the police but she was still being protected by the police. As a result, she felt as though she was receiving protection from the perpetrators of the offence committed against her husband, or their associates.

[342] The Asian Legal Resource Centre (ALRC), above n 27, 3.

This was the main reason why she decided not to continue to receive protection from the Witness Protection Office anymore.

At present, there are only five staff members who are specialists in witness protection; however, all of them have to perform other missions.[343] The Witness Protection Office has to coordinate with the Royal Thai Police or the Department of Special Investigation office to provide protection for the witness. The statistics show that ninety percent of witnesses were protected from police except for the cases are relevant to state officers' abuse. The witnesses have to state to the Witness Protection Office that they were intimidated.[344] For instance, in 2006-2008 the Witness Protection Office provided protection for witnesses under the general measure in cooperation with the Department of Special Investigation (DSI). Most witnesses are protected by police that have jurisdiction throughout the country.[345] The number of witnesses who were protected by the Witness Protection Office and the relevant agencies is shown in Figure Four below.

[343] Kobkiat Kasivivat, *Evaluation for Witness Protection Program for Witness Protection in Criminal Case Act, B.E.2546 (2003)*, (Bangkok: National Defence College, 2007), 46. The background of five staff that have responsible for providing witness protection is the following: 1) Witness protection staff are 4 males and 1 female. 2) Their age is 31, 32, 34, 38 and 42 respectively. 3) Three of them graduated with bachelor degree and the others graduated with masters degree. 4) Only four staff ever had experience for giving protection for the witnesses and one staff never had experience for witness protection but his duty is coordination with relevant agencies.

[344] Ibid 50.

[345] Watanavanich above n 303, 2.

Figure 5: The numbers of witnesses who were protected by the Witness Protection Office and the relevant agencies in 2004 – 2008

Year	The Witness Protection Office	The Royal Thai Police	The Department of Special Investigation
2004	11	4	-
2005	93	59	-
2006	208	101	22
2007	164	24	8
2008	228	2	3
Include 927	704	190	33

Source: Witness Protection Office, Rights and Liberties Protection Department Ministry of Justice

In addition, according to the report entitled "Thailand's Witness Protection Programme",[346] the Witness Protection Office and other relevant agencies that perform the function of providing witness protection (the Royal Thai Police, the Royal Thai army, the Bureau of Internal Security Affair, the Department of Special Investigation, the Office of the Narcotics Control Board, the Department of Corrections, the Department of Youth Observation) are hampered by a lack of the coordination between agencies. This may result in different standards for providing witness protection.[347]

The law is unclear as to how the coordination role should play out in the practice. Thus, a new provision about the Witness Protection Office and other relevant agencies for

[346] Kankaew, above n 290, 3.

[347] Ibid.

coordination should be included in the Witness Protection Act B.E. 2546 (2003), providing that coordination in practice should be clear and effective.

Training of Witness Protection Program Officials

The Witness Protection Office has never established programs for training officials how to provide an effective witness protection. Witness protection officials have to perform their duties by reference to their own experiences. This has resulted in a lack of standards for providing protection to witnesses and has aggravated various poor witness protection practices.

As can be seen in the Figure 6, the Witness Protection Office cannot complete the task of providing protection to witnesses.

Figure 6: Data of Witness Protection shows the number of under protection

Year	Number of Witness Under Protection	Completed	Remaining
2004	1	1	0
2005	15	4	11
2006	4	0	4
2007	2	1	1
2008	11	4	7
2009	11	4	7
2010	25	0	25
Total	69	14	55

Source: Mr. Kerati Kankaew, Thailand's Witness Protection Programme (2011), <www.unafei.or.jp/.../Fourth- GGSeminar_p92-97.pdf>

Case Study Two: Thai Buddhist monk -Phra Kittisak Kitisophon

Phra Kittisak Kitisophon is a member of the Sekhiyadhamma Group of development monks working to preserve the environment and local forests. Phra Kittisak and Phra Supoj Suwagano were supporting villagers involved in land disputes and were trying to protect the community and the religious centre in the Chiang Mai province. This land was sought by a group of local influential businessmen who had previously threatened the monks living there.[348]

[348] Human Right Correspondence School, *Lesson 2: Case Study of Thailand's fledgling witness protection programme* (2006) <http://www.hrschool.org/doc/mainfile.php/lesson47/184/> at 6 June 2012.

On 17 June 2005, Phra Supoj was murdered. His corpse was found in the forest 300 metres away from the temple. Consequently, Phra Kittisak also began receiving death threats. As a result, he requested protection from the Minister of Justice, who appointed the Witness Protection Office to be responsible for this case. However, the Witness Protection Office lacked any personnel who could provide protection for the witnesses; the agency, accordingly, had to rely on police officers to provide protection for witnesses. Phra Kittisak asked to be provided with protection by the Crime Suppression Division (CSD) instead of being protected by the local officers of Police Region 5. He did this as he was afraid local police were involved in the murder of Phra Supoj Suwagano.

The Crime Suppression Division assigned four police officers to provide protection for Phra Kittisak from June 25 to October 18. The four police officers were young and did not seem to understand what they should do, as they always waited to receive advice from their superiors. They never received special training in witness protection. Moreover, they were suspicious about whether the witnesses really needed protection.

In October 2005, the protection being offered to Phra Kittisak was suspended on the grounds that the Witness Protection Office had no further budget resources allocated for this case and also believed that Phra Kittisak was no longer in danger. In spite of this, he continued to receive threats. He again asked for protection on 1 December. Both the Witness Protection Office and the Department of Special Investigation approved his request for further protection but the police refused to provide any protection.[349]

[349] The Asian Legal Resource Centre (ALRC), above n 27, 5.

The main issue in this case was that, even though the police were alleged to have been involved, the Witness Protection Office still arranged for police officers from different regions or departments to provide protection for the witness. This made the situation worse, as the defendants were from the Suppression Division which is under a duty to control crime throughout the country. The witness felt more unsafe when receiving protection from the police since the police were alleged to be involved.

Moreover, the Witness Protection Office has no power to order the Royal Thai Police to provide further protection for a witness who is endangered. As can be seen from the Phra Kittisak case, the police declined his request for further protection and the Witness Protection Office was unable to do anything. Another issue is that, normally, the witness should be protected for as long as the threat against him or her persists. However, the Witness Protection Office refused to extend protection for Phra Kittisak on the grounds that it had no budget to continue to do so. Thus, it can be concluded that the Witness Protection Office lacks sufficient staff, financial resources and powers.

Case Study Three: Ekkawat Srimanta

On 2 November 2004, Ekkawat Srimanta was arrested by police officers in the Ayuthaya province on suspicion of having committed the offence of robbery. The police officers at PhraNakhon Si Ayutthaya Police Station tortured him by covering his head with a hood and beating him all over his body in order to force him to confess.[350] They then transferred him to the Uthai Police Station where he was again the victim of mistreatment. The police officers electrocuted Ekkawat on his penis and testicles. He was released shortly

[350] The Asian Human Right Commission (AHRC), *Update (Thailand); Alleged tortured victim withdraws his complaint against the police* (2005) <http://www.humanrights.asia/news/urgent-appeals/UP-157-2005> at 6 June 2012.

afterwards and taken to hospital by a friend. Media reports and photos showed that Ekkawat had injuries all over his body. When he was at hospital, he was visited by senior police and government officials. Then two police officers were assigned to protect him for 30 days.

The 23 police officers who were recorded as having been involved in his case were transferred to Bangkok while investigations were carried out. The regional commander stated on 9 November 2004 that criminal proceedings would continue, and the case was transferred to the Department of Special Investigation on 29 November 2004. To date, no police officers have been convicted of any criminal offences in connection with the case, despite the overwhelming circumstantial evidence pointing to the fact that Ekkawat had been tortured by the police.

A number of human rights organizations and legal groups were involved in this case.[351] Ekkawat spoke at a seminar on torture organized by the National Human Rights Commission. He was represented by lawyers from the Law Council of Thailand.

Despite this case receiving enormous publicity and being designated as a special case, Ekkawat did not receive any long-term special protection measures. In the end, he withdrew his lawsuit against the police on 11 November 2005, prior to the case opening in the Ayutthaya Provincial Court, without informing his lawyer. He subsequently ceased all contact with human rights defenders and his lawyer, and it is rumored that the police

[351] For example, Asian Human Right Commission and Asian Legal Resource Centre wrote the letter to Pol. Gen. Chidchai Wanasatidya (Minister of Justice) for request the proper witness protection to be afforded to the victim (Ekkawat Srimanta) in order that he felt able to give a true account of what allegedly happened to him. The Asian Human Rights Commission (AHRC), *Thailand: Two cases of extremely serious and cruel and inhuman treatment* (2005) <http://www.humanrights.asia/news/urgent-appeals/UA-153-2004> at 6 June 2012.

coerced him into accepting money in return for withdrawing his case prior to giving evidence in court.[352]

What is most interesting about this case is the fact that the police were the defendants. The rights of witnesses and victims were violated by police officers, as the police were accused of torturing and inflicting physical abuse against Ekkawat. Moreover, Ekkawat was a victim of the police exceeding their powers. As has been noted, the police tried to intervene in the case by coercing and threatening Ekkawat to withdraw his case.

This case is consistent with the findings of a study undertaken by researchers Chulalongkorn University on behalf of the Thai Justice Ministry which found that 63 percent of 1,531 crime victims surveyed in Bangkok did not file reports with the police.[353] It is stated in the study:

> This is because, in most case against law enforcement officers, witnesses are afraid to appear in court. Where they do appear, they deny earlier testimonies or lie blatantly in a desperate attempt to escape retribution.[354]

Moreover, the above case shows that the Witness Protection Office has limited capacity and resources. The Witness Protection Office has to depend on other agencies in order to provide protection. While, in theory, the Witness Protection Office is responsible for implementing witness protection measures, but, in practice, witnesses can only receive

[352] The Asian Legal Resource Centre (ALRC), above n 27, 5.

[353] Refworld (The Leader in Refugee Decision Support), *Thailand: Crime Situation, including Organized Crime; Efforts to Corruption; State Protection for Witnesses of Crime* (2010), <http://www.unhcr.org/refworld/topic,4565c225b,4565c25fl49,4b7cee8ale,0.html> at 6 June 2012.

[354] Asian Legal Resource Centre, *Thailand: End Police Control of Witness Protection, New Report Urges* (2006), <http://www.alrc.net/pr/mainfile.php/2006pr/121/> at 19 June 2012.

protection by the police. When a case has been approved for witness protection, the police have complete discretion to decide how to offer the protection. The police can decide when the protection should start, how the witnesses should be protected and when the protection should cease.

Moreover, as shown earlier, the police in Thailand have been routinely associated with acts of physical violation and humiliation. Basil Fernado also made a similar observation. He states:

> As the police in Thailand are the main perpetrators of human rights abuses, giving them effective control of witness protection totally defeats its purpose.[355]

Recommendations for reform

To address the above problems, a number of reforms are recommended. First, investigative processes which run independently of police officers are required especially in cases where police officers are alleged to have been involved in the commission of the offence.[356] The concept of working in an interdisciplinary manner should be put into practice. The Witness Protection Office should allow any related persons or experts to be appointed to the investigation team, including appropriate people from the international community. Moreover, the Attorney General should establish a central authority. With regard to the investigation of organized crimes or crimes relating to influential persons, the public prosecutor should jointly investigate with investigators to provide a check and balance mechanism to counter the police abuse power. Also, the Witness Protection

[355] Basil Fernando, Executive Director, Asian Human Rights Commission and Asian Legal Resource Centre Hong Kong.

[356] As can be seen Witness protection best practice calls for a unit independent from the police and state prosecuting authorities in order to maintain objectivity, confidentiality, operational readiness and accountability. United Nations Office on Drugs and Crime, above n 11, 25.

Office should consult and work closely with prosecutors especially in cases involving transnational crimes and crimes committed by influential persons.

Case Study Four: the disappearance of Mr. Abduloh Abukaree

Mr. Abduloh Abukareewas was a key witness in a case involving a gun robbery at NarathiwatRajanagarind (Pileng) Army camp in Narathiwat Province on 4 January 2004. A case was initiated by the Department of Special Investigation (DSI) of the Ministry of Justice against 10 high ranking police officials. Later, this case was submitted to the National Counter Corruption Commission (NCCC) for further investigation. According to this case, ten high ranking police officials were accused of torturing and inflicting physical abuse against the clients of Mr. Somchai Neelapaijit in order to force them to confess to various crimes.

Mr. Abduloh Abukaree was supposed to testify as a witness in court against the 10 high ranking police officers. As a result, for several years, Mr.Abduloh and his family were subjected to threats and acts of intimidation. Hence, he was protected as a witness by the Department of Special Investigation (DSI).

In November 2009, Mr. Abdulah Abukaree returned to his hometown during the Muslim New Year and did not come back to the safehouse that had been provided for him by the Department of Special Investigation (DSI). It was reported that on the night of 11 December 2009, Abdulah disappeared while returning from a teashop, not far from his home in the Ra-ngae district, Narathiwat Province. His disappearance was reported by his relatives to the Ra-ngae Police Station.

However, under the regulations governing the witness protection program, if Mr. Abdulah wanted to go to other places in the south or to his hometown for any reasons, he could not be protected under the witness protection program.[357] After the disappearance of Mr. Abdulah, his family was subjected to various acts of intimidation and lived without hope. To this day, the cause of the disappearance of Mr. Abdulah is still unknown.

At 4.45 pm on 29 August 2011, two years after Mr.Abdulah's disappearance, Jerawhanee, the wife of Mr. Abdulah, was murdered. According to eye-witness reports, Jerawhanee was returning home from the Dusongyor market. While she was riding her motorcycle, she was shot in Maosava-Bangborgnor, Narathiwat Province. Although Jerawhanee was murdered in a market and there were many eye-witnesses, no one came forward to act as witnesses in this case, due to concerns about their safety. As a result, this case has never been solved.[358]

The case above shows that the administration responsible for enforcing the witness protection program was ineffective. Mr.Abuduloh Abukaree was an important witness in a criminal case against high ranking officials who were accused of torturing and inflicting physical abuse against the clients of Mr.Somchai Neelapaijit but he disappeared while receiving protection under the witness protection program of Department from the Special Investigation (DSI).

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[357] Cross Culture Foundation, *Thailand: The disappearance of Mr.AbdulohAbukaree, a grave jeopardy to a key criminal case* (2010), <http://facthai.wordpress.com/2010/01/07/witness-to-police-torture-disappeared-ahrc/> at 19 June 2012.

[358] http://partykita.igetweb.com/index.php?lite=article&qid=41916484 at19 June 2012.

The media criticized those responsible for the administration of the witness protection program, claiming the program was deficient and that the Witness Protection Office could not guarantee the safety of witnesses.[359] The Witness Protection Office claimed that the death of Mr. Abdulah Abukaree was not due to any failure on the part of the office, but rather was caused by the witness violating the regulation governing the witness protection program by going to the southern province. Two years later, Mr. Abdulah's wife was murdered which only serves to reinforce the failure of the Witness Protection Office.

Moreover, the disappearance of Abdulah Abulakaree occurred on 11 December 2009 but it was not until 12 June 2012 that his mother received compensation from the government. It can be seen that there are shortcomings involving the implementation of the Act relating to Victim Compensation, Restitution and Benefits of the Accused B.E. 2544/2001 which remain such as delays in processing compensation claims and lack of public understanding of the right to receive compensation.

4.1.4 Comparative Law

The Australian legal framework

In Australia, the witness protection concept was established after the Parliamentary Joint Committee on the National Crime Authority inquired into the issue of witness protection in 1988 and its report led to the introduction at the Commonwealth level of the Witness Protection Act 1994. Later on 18 October 1994, the Act received royal assent and became effective on 18 April 1995.[360] The National Witness Protection Program (NWPP) is run by

[359] Asian Legal Resource Centre (ALRC), *ASIA: Council failing to address situations of widespread forced disappearance* (2009) <http://www.alrc.net/doc/mainfile.php/alrc_st2010/594> at 4January 2012.

[360] Australia Federal Police, *Witness Protection Annual Report 2010-2011* (2011) <http://www.afp.gov.au/media-centre/publications/~/media/afp/pdf/a/AFP_Witness_Protection_2010-2011.ashx> at 4 January 2012.

the Australian Federal Police (AFP) and gives the Commissioner of the AFP responsibility for the maintenance of the program.[361]

According to s 3 of the Witness Protection Act 1994, a "witness" is defined as a person who has given, or who has agreed to give, evidence on behalf of Crown in right of Commonwealth or of a State or Territory in proceedings for an offence and hearings or proceedings before an authority including a person who has made a statement to Australian Federal Police or an approved authority in relation to an offence against a law of the Commonwealth or of a State or Territory. In addition, the term "witness" also means a person who, for any other reason, may require protection or other assistance under the NWPP and persons who are related to or associated with the protected witness.[362]

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[361] *Witness Protection Act 1994* (Cth) s 4 Establishment of the National Witness Protection Program
(1) The Commissioner is to maintain a program, to be known as the National Witness Protection Program, under which the Commissioner and persons who hold or occupy designated positions, arrange or provide protection and other assistance for witnesses.
(2) That protection and assistance may include things done as a result of powers and functions conferred on the Commissioner under a complementary witness protection law.

[362] *Witness Protection Act 1994*(Cth) s 7(1), (2) state that "(1) The Commissioner is not to include a witness in the NWPP unless the Commissioner is satisfied that the witness has provided the Commissioner with all information necessary for the Commissioner to decide whether the witness should be included.
(2) Without limiting the generality of subsection (1), a witness must:
(a) disclose to the Commissioner details of all outstanding legal obligations of the witness; and
(b) disclose to the Commissioner details of any outstanding debts of the witness, including amounts outstanding for any tax, including a tax under a law of a State or Territory; and
(c) disclose to the Commissioner details of the witness's criminal history; and
(d) disclose to the Commissioner details of any civil proceedings that have been instituted by or against the witness; and
(e) disclose to the Commissioner details of any bankruptcy proceedings that have been inistituted against the witness; and
(f) inform the Commissioner whether the witness is an undischarged bankrupt under the *Bankrupt Act 1966* and, if the witness is, give to the Commissioner copies of all documents relating to the bankruptcy; and
(g) inform the Commissioner whether the witness has entered into or intends to enter into a personal insolvency agreement under Part X of the *Bankruptcy Act 1966* and, if the witness has done or intends to do such a thing, give to the Commissioner copies of all documents relating to that thing; and
(h) inform the Commissioner whether there are any restrictions on the witness's holding positions in companies, whether public or private and, if there are, give to the Commissioner copies of all documents relating to those restrictions; and
(i) disclose to the Commissioner details of the witness's immigration status; and

The process for the inclusion of a witness in the NWPP is that the witness must disclose all personal information necessary for the Commissioner to decide whether the witness should be included in NWPP. Moreover, the Commissioner may require the witness to undergo some medical tests or psychological or psychiatric examinations.[363] The Commissioner has to consider whether the witness has a criminal record, especially in respect of crimes of violence, and whether that record indicates a risk to the public, the seriousness of the offence to which any relevant evidence or statement relates, the nature and importance of any relevant evidence or statement, whether there are viable alternative methods of protecting the witness, and the nature of the perceived danger to the witness before making a final decision. The Commissioner has the sole responsibility of deciding

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(j) disclose to the Commissioner details of financial liabilities and assets (whether real or personal) of the witness in relation to which:

(i) a record is kept under a law of a State or Territory; or

(ii) the witness has entered into a contractual arrangement;

and

(k) disclose to the Commissioner details of any cash held by the witness, whether in accounts or otherwise; and

(l) disclose to the Commissioner details of any reparation order that is in force against the witness; and

(m) inform the Commissioner whether any of the witness's property (whether real or personal) is liable to forfeiture or confiscation or is subject to restraint under a law of the Commonwealth or of a State or Territory; and

(n) inform the Commissioner of the witness's general medical condition; and

(o) disclose to the Commissioner details of any relevant court orders or arrangements relating to custody or access to children; and

(p) disclose to the Commissioner details of any business dealings in which the witness is involved; and

(q) disclose to the Commissioner details of court orders relating to sentences imposed on the witness to which the witness is subject in relation to criminal prosecutions; and

(r) disclose to the Commissioner details of any parole or licence to which the witness is subject; and

(s) give to the Commissioner copies of any documents relating to any such orders, parole or licence; and

(t) disclose to the Commissioner details of any arrangements that the witness has made for:

(i) the service of documents on the witness; or

(ii) representation in proceedings in a court; or

(iii) enforcement of judgments in the witness's favour: or

(v) compliance with the enforcement of judgments against the witness.

[363] *Witness Protection Act 1994*(Cth) s 7 (3).

whether to include a witness in the NWPP, including in cases where an approved authority has requested that a witness be included in the NWPP.[364]

To be included in the NWPP, the witness and a parent or guardian (if witness is under 18 years) must sign a memorandum of understanding setting out the basis on which a witness is included in the NWPP and details of the protection and assistance that is to be provided. The memorandum of understanding also contains a provision setting out protection and assistance provided under the NWPP. The witness must comply with all reasonable directions of the Commissioner in relation to the protection and assistance provided to the witness. The NWPP may be terminated if the witness breaches a term of the memorandum of understanding. The protection and assistance may be withdrawn if the witness commits an offence against a law of the Commonwealth or of a State or Territory, engages in activities of a kind specified in the memorandum of understanding, or compromises the integrity of the NWPP.[365]

Sections 10 and 10A of the Witness Protection Act 1994 provide that foreign nationals or residents can be considered for inclusion into the National Witness Protection Program (NWPP) by the request of an appropriate authority of a foreign country or the International Criminal Court (ICC) to the Minister of Home Affairs.

According to s 10, if the Minister receives a request from an appropriate authority of a foreign country or agency to protect a citizen or a resident of that foreign country, and the Minister is satisfied that the authority of a foreign country has provided all material that is necessary to support and it is appropriate, then, the Minister will refer the request to the

[364] *Witness Protection Act 1994* (Cth) s 8 (1).

[365] *Witness Protection Act 1994* (Cth) s 9 (1) (a) (b).

Commissioner of the Australian Federal Police (AFP). The Commissioner will consider four conditions as follows:[366]

1) The Commissioner must decide if the nominated person is suitable for inclusion in the NWPP; and
2) The Minister, after considering a report from the Commissioner recommending the inclusion of the person in the NWPP, has decided that it is appropriate in all the circumstances that the person be included in the NWPP; and
3) The Commissioner has entered into an arrangement with the agency for the purpose of making services under the NWPP available to the agency; and
4) The nominated person witness has been granted an entrance visa for Australia and the foreign authority referring the witness has agreed to pay for the costs of protection and assistance to be provided by the Australian Federal Police (AFP).

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[366] *Witness Protection Act 1994* (Cth) s 10 states that " Inclusion of foreign nationals or residents in NWPP at the request of foreign law enforcement agencies

(1) If:

(a) the Minister receives a request from an appropriate authority of a foreign country (the agency) for the inclusion of a person (the nominated person) who is a citizen or a resident of that country in the NWPP; and

(b) the Minister is satisfied that:

(i) the agency has provided all material that is necessary to support the request; and

(ii) it is appropriate to do so in all the circumstances;

the Minister is to refer the request to the Commissioner.

(2) The Commissioner is to consider including the nominated person in the NWPP in the same way as the Commissioner would consider including another person in the NWPP.

(3) The Commissioner may, if he or she thinks it appropriate to do so, seek further information about the nominated person from the agency.

(4) If:

(a) the Commissioner decides that the nominated person is suitable for inclusion in the NWPP; and

(b) the Minister, after considering a report from the Commissioner recommending the inclusion of the person in the NWPP, has decided that it is appropriate in all the circumstances that the person be included in the NWPP; and

(c) the Commissioner has entered into an arrangement with the agency for the purpose of making services the NWPP available to the agency; and

(d) the nominated person has been granted a visa for entry to Australia;

the Commissioner is to include the nominated person in the NWPP.

(5) An arrangement referred to in paragraph (4) (c) must include procedures under which the agency pays the costs associated with providing protection for the nominated person and any associated persons, including:

(a) the costs of travel by those persons and the costs of associated travel by members; and

(b) any costs that will be incurred if protection and assistance under the NWPP to the nominated person is terminated; and

(c) such other costs as the Commissioner determines."

In addition, the International Criminal Court may also request inclusion of a person in the NWPP. Accordingly s 10A provides for the inclusion of persons in the NWPP at the request of the International Criminal Court. If the Minister receives a request from the International Criminal Court and is satisfied that the Court has provided all material that is necessary to support the request, and it is appropriate to do so in all the circumstances, the Minister is to refer the request to the Commissioner. If the above conditions (1-4) are met, the Commissioner is to include the nominated person in the NWPP.[367]

It can be seen that both provisions seek to remove differences in the law that impede the prosecution when a case requires international cooperation. For example, in some cases where witnesses must be relocated to another country, international cooperation is particularly important. This process is beneficial for solving legal impediments to the relocation of witnesses. This is because in some cases, the receiving state may refuse to accept the witness. Thus, s 10 of the Witness Protection is a useful model for Thailand to use when drafting a new section for the inclusion of foreign nationals or residents in the special protection measures in the Witness Protection Act B.E. 2546 (2003).

In addition, another type of interagency collaboration is the regional or bilateral agreement on witness protection. In Europe, the Committee of Ministers of the Council of Europe adopted Recommendations to deal with witness protection and the rights of witnesses as follows:[368]

- Cooperation in evaluating the threat against a witness or victim;
- Prompt communication of information concerning potential threats and risks;

[367] *Witness Protection Act 1994* (Cth) s 10A.

[368] The relevant requirements under United Nations Convention, see Working Paper II paragraph 60-64.

- *Mutual assistance in relocating witnesses and ensuring their ongoing protection;*[369]
- Protection of witnesses who are returning to a foreign country in order to testify, and collaboration in the safe repatriation of these witnesses;
- Use of modern means of telecommunications to facilitate simultaneous examination of protected witnesses while safeguarding the rights of defence;
- Establishing regular communication channels between witness protection program manager;
- Providing technical assistance and encouraging the exchange of trainers and training programs for victim protection officials;
- Developing cost-sharing agreements for joint victim protection initiatives; and
- Developing agreements for the exchange of witnesses who are prisoners.

The above recommendations could be considered effective examples of concerted action at the regional level towards promoting inter-state cooperation and coordination in witness protection. Thus, the ASEAN region should adopt the above recommendations, in order to strengthen regional capacities to deal with the sophisticated nature of transnational crime.

However, research conducted on organized crime in Asia concluded that the mutual legal assistance in ASEAN has yet to develop into the cross-border institutional frameworks that can be found in Europe, and there is a need for the level of effective co-operation to

[369] International cooperation in this area, as noted by a best practice survey conducted by the Council of Europe, "is highly important, since many member states are too small to guarantee safety for witnesses at risk who are relocated within their borders". Council of Europe, *"Witness Protection", in Combating Organised Crime, Best Practice Surveys of the Council of Europe* (Strasbourg, Council of Europe Publishing, 2004), 15.

improve.[370] This is because countering organized crime in Asia also raises additional difficulties arising from the cultural diversity, and the relative weakness of law enforcement in some states.[371]

4.1.5 Proposed Law Reform

In spite of Thailand enacting the Witness Protection Act B.E. 2546 (2003) and related regulations for providing protection to witnesses and victims protection, the weaknesses of law enforcement and some ambiguous legislation remain. These weaknesses have been explored above in this chapter. This section attempts to propose law reform governing witness relocation as follows:

Relocation of Witnesses to Other Countries

Article 24 paragraph 3 of United Nations Convention against Transnational Organized Crime, state parties have to consider entering into agreements or arrangements with other states for the relocation of witness but the Article does not indicate how to relocate witnesses between states. In Thailand, there is no specific provision to relocate witnesses to another country.

However, *the Act on Mutual Assistance in Criminal Matters, B.E. 2535 (1992)* can be applied to this case. *The Act on Mutual Assistance in Criminal Matters, B.E. 2535 (1992)* is the main statute applied to all processes of requesting and rendering assistance to facilitate the prosecution criminal proceedings such as tracing of clues and evidence,

[370] Narayanan Ganapathy and Roderic Broadhurst, Organized Crime in Asia: A Review of Problems and Progress (2008) 12 *Asian Crminology* 1.

[371] Oh Jung-han, *Clash of Jurisdictions in Transnational Organized Crime* (2012) Asian Criminological Society 4th Annual Conference [257] <www.acs2012.kr> at 30 August 2012.

investigation, inquiry of witnesses and so on.[372] The Act provides measures to grant assistance to foreign requesting states and to seek assistance from foreign states. Even where there exists no treaty between Thailand and the requesting state, Thailand may be granted assistance via the reciprocal clause.[373] The request for assistance must be submitted through diplomatic channels.[374] However, if the mutual assistance treaty between Thailand and the requesting state applies, the commitment for reciprocity and connection through diplomatic channel will be waived. The request for assistance in such a case might be made directly to the Attorney General who is the Central Authority for mutual legal assistance.[375]

The relocation of witnesses within Thailand only is not sufficient to protect witness from threats. For example, where witnesses are called to give testimony in criminal prosecution in cases against powerful officials or politicians, witnesses and their families may be threatened resulting in physical suffering or death. In the result, the relocation of witnesses to foreign countries is crucial to protect witnesses from the threat of influential officials, politicians or organized criminal group in Thailand. In the same way, Thailand must reform law to include foreign nationals or residents of other countries in the special protection measures of the Witness Protection Act B.E. 2546 (2003) as follows:

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[372] *The Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992)* s 12 categorized of the forms of assistance as following: 1) Taking statement of persons, providing documents, articles, and evidence out of court, serving documents, searches, seizure of documents or articles, locating persons; 2) Taking the testimony of persons and witnesses, adducing document and evidence in the court, forfeiture or seizure of properties; (3) Transferring persons in custody for testimonial purposes; (4) Initiating criminal proceedings."

[373] *The Act on Mutual Assistance in Criminal Matters B.E. 2535(1992)* s 9 states that "The providing of assistance to a foreign state shall be subject to the following conditions: (1) Assistance may be provided even there existed no mutual assistance treaty between Thailand and the Requesting State provided that such state commits to assist Thailand under the similar manner when requested (2) The Act which is the cause of a request must be an offence punishable under when Thailand and The Requesting State have a mutual assistance treaty between them and the treaty otherwise specifies…"

[374] *The Act on Mutual Assistance in Criminal Matters B.E. 2535(1992)* s 10

[375] *The Act on Mutual Assistance in Criminal Matters B.E. 2535(1992)* s 6

Section 10: The Witness Protection Office shall arrange for one or more of the following special protection measures:
(1) Arrange for new accommodation within Thailand territory or in case of necessity relocation of a witness to a foreign country.

Section 10 bis: Inclusion of foreign nationals or residents in the special protection measure at the request of foreign law enforcement agencies. If:
(a) the Minister of justice receives a request from an appropriate authority of a foreign country (the *agency*) for the inclusion of a person (the *nominated person*), who is a citizen or a resident of that country, in the special protection measure; and
(b) the Minister is satisfied that:
(i) the agency has provided all material that is necessary to support the request; and
(ii) it is appropriate to do so in all the circumstances,
the Minister is to include the nominated person in the special protection measure.

Conclusion

In general, Thai domestic laws relating to witness protection are substantially in compliance with Articles 24 and 25 of the United Nations Convention against Transnational Organized Crime. However, Thai domestic laws are required to criminalize and amend some provisions to meet the standards set out in United Nations Convention against Transnational Organized Crime which would criminalize certain conduct. A number of recommendations for reform have been made in this chapter. In a nutshell, it has been recommended that the definition of witness should be revised and its scope expanded: furthermore relocation of witnesses to other countries.

CHAPTER 5 MUTUAL LEGAL ASSISTANCE

Organized criminal groups often take advantage of international borders; for example, they may plan their offences in one state but carry it out in other states. As Kofi Annan, the former Secretary-General of the United Nations, has stated "we can only thwart international criminals through international cooperation".[376] This chapter examines the provisions of the United Nations Convention against Transnational Organized Crime with regard to mutual legal assistance and special investigative techniques.

5.1 Article 18: Mutual legal assistance

This section examines the provision of mutual legal assistance under Article 18 of the United Nations Convention against Transnational Organized Crime.

5.1.1 Provision in the United Nations Convention against Transnational Organized Crime

Article 18 of the United Nations Convention against Transnational Organized Crime requires state parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. However, by virtue of Article 18(6), the Convention does not affect obligations between states parties under "any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance."[377] This means that obligations under other agreements remain in force and the Convention does not in any

[376] Matti Joutsen, *International Cooperation against Transnational Organized Crime: Extradition and Mutual Legal Assistance in Criminal Matters*, <http:// www. Unafei.or.jp/english/pdf/RS_No59_28VE_Joutsen2.pdf>at 12March 2013.

[377] *Travauxpréparatoires* Article 18, Mutual Legal Assistance. *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4/Rev.1 (19-29 January 1999).

way diminish these obligations. State Parties should examine the conventions side by side and identify which provisions of the different conventions result in the highest degree of mutual assistance.

State parties must ensure their mutual legal assistance treaties and laws provide for assistance to be provided for cooperation with respect to investigations, prosecutions and judicial proceedings.[378] Moreover, state parties must reciprocally extend to one another similar assistance where the requesting state has reasonable grounds to suspect that one or some of these offences are transnational in nature such as where victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested state party and involve an organized criminal group.[379]

Article 18(9) allows state parties to decline to render assistance because of a lack of dual criminality. By contrast, a state party may not decline to render mutual legal assistance on the basis of bank secrecy[380] or because the request is considered to involve a fiscal matter.[381] However, it may refuse such assistance if "execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests".[382]

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[378] The term "judicial proceedings" is separate from investigations and prosecutions and connotes a different type of proceeding. Since it is not defined in the Convention, state parties have a discretion in determining the extent to which they will provide assistance for such proceedings, but assistance should at least be available with respect to portions of the criminal process that in some states may not be part of the actual trial, such as pre-trial, sentencing and bail proceedings. United Nations Office on Drugs and Crime above n 11, 220, para 465.

[379] *UNTOC* art 18(1).

[380] *UNTOC* art 18(8).

[381] *UNTOC* art 18(22).

[382] *UNTOC* art 18(21)(b).

5.1.2 Purpose of the Convention Provisions

In 1998, an informal preparatory meeting was held in Buenos Aires. During the negotiations, some delegations expressed the concern that the Convention should not create detailed obligations to provide for specific forms of mutual assistance. It was thought that such an approach might limit the obligations under Article 18.[383]

Article 18 was amended in the second session of the Ad Hoc Committee at the request of several delegations who proposed that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the 1990 United Nations Model Treaty on Mutual Assistance in Criminal Matters[384] and the Commonwealth Scheme paragraph 1 should be used as the basis for the drafting of this Article. Thus, most of the items in the final text of Article 18 were drawn from Article 7(2) of the 1988 Convention, Article 1(2) of the United Nations Model Treaty and paragraph 1 of the Commonwealth Scheme as well as from several bilateral Conventions. These items included the following:

a) Taking evidence or statements from persons;

b) Effecting service of judicial documents;

c) Executing searches and seizures, and freezing;

d) Examining objects and sites;

e) Providing information, evidentiary items and expert evaluations;

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[383] *Travauxpréparatoires* Article 18, Mutual Legal Assistance. *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4/Rev.1 (19-29 January 1999).

[384] The United Nations Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117 of 14 December 1990). The purpose of the Model Treaty is to provide a suitable basis for negotiations between states that do not have such a treaty. The Model Treaty is by no means a binding template. States can freely decide on any changes, deletions and additions. However, the Model Treaty does represent a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between states representing different legal systems. <www.un.org/documents/ga/res/45a45r117.htm> at 3 May 2013.

f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

h) Facilitating the voluntary appearance of persons in the requesting state party; and

i) Any other type of assistance that is not contrary to the domestic law of the requested state party.[385]

However, there are four aspects of the United Nations Convention against Transnational Crime which differ from the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the 1990 United Nations Model Treaty on Mutual Assistance in Criminal Matters. These are as follows:

1) According to c) as mentioned above, the measure of freezing assets is a new mechanism for the prevention and suppression of organized crime under United Nations Convention against Transnational Organized Crime.

2) According to e) as mentioned above, expert evaluations are a new mechanism used to combat organized crime under United Nations Convention against Transnational Organized Crime. Earlier multilateral treaties did not provided for this form of assistance.

3) According to f) as mentioned above, the provision of the United Nations Convention against Transnational Organized Crime states that originals or certified copies can be obtained as well as governments records or documents. This was not stated in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

[385] Mutual legal assistance is distinct from the transfer of proceedings and the transfer of persons in custody to serve sentences, which would not be covered by point (i). The provisions of the United Nations against Transnational Organized Crime deals with these subjects separately in art 17 and 21. Joutsen, above n 401, 5.

of 1988 and the 1990 United Nations Model Treaty on Mutual Assistance in Criminal Matters.

4) According to i) as mentioned above, the United Nations Convention against Transnational Organized Crime includes the words "any other type of assistance that is not contrary to the domestic law of the requested state party".[386] This results in a degree of flexibility for the requested state party to render mutual legal assistance.

It can be seen that Article 18 provides for specific forms of mutual assistance and the manner of execution of requests for mutual assistance in paragraphs 3 and 15. In order to solve the problem of the narrow extent of mutual assistance provided, the final text of Article 18 of the Convention added a sentence which states, inter alia, that "the widest range of mutual legal assistance in investigation, prosecutions and judicial proceedings in relation to the offences covered by this Convention".[387]

The Convention also contains a form of assistance that was not present in earlier international instruments. For example, Article 18(18) of the Convention provides for the hearing of witnesses or experts by means of video conference[388] which is known as the "spontaneous transmission of information". Article 18(4) of the Convention allows the authorities, even without a prior request, to pass on information to the competent authorities of another state if such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings. Clearly, video conference

[386] *UNTOC*, art 18(6)

[387] *UNTOC*, art 18(1)

[388] Video conference (Article 18 (18)) of UNTOC is a new provision that does not contained in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988 (The 1988 Convention) and the United Nations Model Treaty on Mutual Assistance in Criminal Matters (The 1990 UN Model Treaty).

technology can facilitate the hearing of witnesses and experts who cannot travel from one country to another.[389] It is also useful for protecting witnesses or experts who are afraid of being intimidated or threatened by organized criminal groups if they reveal their location. However, when an attorney or judge located in the requesting state uses a video link to hear a witness located in the requested state, there may be an issue regarding sovereignty or concern about due process in the requested state. In order to address this situation, Article 18(18) specifies that a state may agree that a judicial authority of the requested state may attend the hearing.[390]

Moreover, the Convention requires state parties to render mutual legal assistance with effective, speedy and prompt execution. This is because the main problem in mutual legal assistance worldwide is that the requested state is often slow in replying and suspects may escape due to lack of evidence.[391] The main reason for delay in the process of rendering mutual assistance in criminal matters is the means by which states seek and provide assistance in gathering evidence for use in criminal cases, and its transmittal through diplomatic channels upon receipt of letters rogatory.[392] The request for evidence, usually originating from the prosecutor, is a certified by the court in the requesting state and then passed on by that state's foreign ministry to the embassy of the requested state. The embassy then sends it onto the competent judicial authorities of the requested state,

[389] United Nations Office on Drugs and Crime, above n 11, 82.

[390] Joutsen, above n 376, 5.

[391] Asian Development Bank Organization for Economic Co-operation and Development Anti-Corruption Initiative for Asia and the Pacific, *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and Pacific*, Framework and Practices in 27 Asian and Pacific Jurisdiction (2007) 23 <http://www.oec.org/site/adboecdanti-corruptioninitiative/37900503.pdf>at 12March 2013.

[392] Currie Robert, 'Human rights and international mutual legal assistance: resolving the tension' (2000) 11 *Criminal Law Forum* 143-6.

generally through the foreign ministry of the requested state. Once the request has been fulfilled, the chain is reversed.[393]

In the second half of the twentieth century, with the expansion of transnational crime and the growing demand of legal assistance, mutual legal assistance in criminal matters is the process whereby one state provides assistance to another in the investigation and prosecution of criminal offence.[394] The main forms of mutual legal assistance are letters rogatory, mutual legal assistance treaties and interstate police-to-police assistance or interstate agency-to-agency assistance.[395]

The forms of mutual legal assistance that can be undertaken are formal or informal. A formal request for mutual legal assistance is received by the central authority of requested state (the Ministry of Justice). It is forwarded to the competent agency for execution (police) and returned to the central authority for transmission to its counterpart in the requesting state. In less formal forms of mutual legal assistance, governmental law enforcement agencies including police and other competent agencies can seek assistance directly from their foreign counterparts through their own channels.[396]

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[393] Legal scholars have already indicated that one of the major disadvantages of letters rogatory is their efficient, costly and time consuming transmission. See M. Cherif Bassiouni and David S. Gualtieri, *International and national responses to the globalization of money laundering* (Ardsley: New York, Transnational Publisher, 2nd edition, 1999), 682.

[394] William C Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge University Press, 1995), xii. Gilimore provides a definition of " mutual legal assistance in criminal matters" as "the process whereby one State provides assistance to another in investigation and prosecution of criminal offences". This definition includes what Gilmore describes as "such unglamorous but highly practical matters" as the provision of evidence, documentary or *viva voce*, for use abroad; the search and seizure of evidence for use in foreign proceedings; the transfer of witnesses for interview; and the serving of documents originating in another jurisdiction.

[395] Nguyen, above n 194, 383.

[396] Ibid.

The United Nations Convention against Transnational Organized Crime Article 18 paragraph 13, requires state parties to establish "a central authority" that has the responsibility and power to receive requests for mutual legal assistance and either execute them or transmit them to the competent authorities for execution. In addition, Article 18 paragraph 24, provides that the request is to be executed as soon as possible and that the requested state, in so far as possible, is to take as full account of any deadlines suggested by the requesting state party for which reasons are given. For example, if the central authority itself responds to the request, it should ensure speedy and prompt execution. If the central authority transmits the request to the court, the central authority is required to encourage speedy and proper execution of the request. However, at the informal preparatory meeting, it was noted that the provisions dealing with central authorities (Article 18 paragraph 13) might cause difficulties in respect of territories that did not have full sovereignty.[397]

5.1.3 Relevant Thai Laws

5.1.3.1 Legislation

The Evolution of Mutual Assistance in Thailand

Before the Mutual Assistance in Criminal Matters Act B.E. 2535 (1992) came into force, there were no laws in Thailand which were directly aimed at such international assistance. The means for rendering assistance between law enforcement agencies of Thailand and other states was via diplomatic channels. According to s 15 of the Criminal Procedure Code where there is no provision of the Criminal Procedure Code specially applicable to any procedural acts, provisions of the Civil Procedure Code apply to the extent possible. The law dealing with mutual assistance before 1992 was Article 34 of the Civil Procedure

[397] *Travauxpréparatoires* Article 18, Mutual legal assistance, *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4 (19-29 January 1999).

Code.[398] In the absence of a mutual legal assistance treaty, there is no legal obligation between a requesting state and a requested state to force requested states to execute the request. Obtaining assistance between two countries is subject to the diplomatic relationship between the countries.

According to Article 38(1)(c) of the Statute of the International Court of Justice, the general principles of international law must be the general principles of law recognized by civilized nations[399] such as the principle of *pacta sunt servanda*,[400] equity, good faith, prohibition on abuse of rights, and others.[401] With regard to international assistance, the general principle of international law includes the principle of reciprocity, comity and rules of due process as generally recognized between and among the sovereign states.[402]

In Thailand, the diplomatic channel process begins with the relevant court of the judicial branch submitting a request to the Ministry of Justice as the executive branch. Then the Ministry of Justice refers the request to the Ministry of Foreign Affairs which is

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[398] *Civil Procedure Code B.E.2478 (1935)* s 34 states that, " Where any proceeding is to be carried out wholly or in part through the resort of or by requesting to the authorities in any foreign country, in the absence of any international agreement or provision of law governing the proceeding, the court shall comply with the general principle of International Law".

[399] *Statute of the International Court of Justice* Article 38
1.The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of art 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

[400] *Black's Law Dictionary* (8th ed.2004): Pacta sunt servanda (Latin for "agreements must be kept").

[401] Jumpot Saisuntorn, *International Law Book I* (Winyuchon Publication House Ltd., Bangkok, 2011) 76.

[402] Sirisak Tiyapan, *Extradition and Mutual Legal Assistance in Thailand* UNAFEI <http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-10.pdf> at 29 April 2013.

responsible for international affairs. After receiving the request from the Ministry of Justice, the Ministry of Foreign Affairs will transfer the request of the court to the Ministry of Foreign Affairs of the requested state through the Thai Embassy located in the requested state. The Ministry of Foreign Affairs of the requested state would refer the request to the court which has jurisdiction over the request. After the request is executed or refused by the court of the requested state, the matter would be sent back to the requesting state by repeating the same process. It can be seen that the process for request and receipt of legal assistance through diplomatic channels is time-consuming.

As a result of the constraints noted above, Thailand has sought to find other means of international cooperation in criminal matters. For example, in 1951 Thailand became a member of the international police organization (INTERPOL), for the purpose of facilitating police-to-police assistance and cooperation with other members for information exchange, database assistance, and technical exchange. [403] However, cooperation with INTERPOL is limited only to information and technical exchange not law enforcement. Moreover, information obtained by the exercise of coercive power or the improper process cannot be admissible.[404]

Agreements with other countries

Thailand and Indonesia concluded a first agreement on judicial cooperation in civil matters in 1978. Thailand concluded a similar agreement with France in 1983.

[403] Interpol, *Interpol Expertise* <http://www.interpol.int/INTERPOL-expertise/Overview> at 30 April 2013.

[404] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 41 states that "All evidence and documents derived under this Act shall be deemed as admissible for hearing.

In 1986, Thailand concluded a mutual legal assistance treaty with the United States of America which entered into force on 10 June 1993. Later, Thailand signed mutual legal assistance treaties with various countries as follows:

- United Kingdom signed on 12 September 1994;
- Canada signed on 3 October 1994;
- France signed on 11 September 1997;
- Norway signed on 20 May 1999;
- China signed on 21 June 2003;
- South Korea signed on 25 August 2003;
- India signed on 8 February 2004;
- Poland signed on 26 February 2004;
- Sri Lanka signed on 30 July 2004;
- Peru signed on 3 October 2005;
- Belgium signed on 12 November 2005; and
- Australia signed on 26 July 2006.[405]

In 1992, the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) (MACM) was introduced to implement the Treaty signed with the U.S. The MACM provides a direct channel for assistance between law enforcement agencies of Thailand and other states via the central authority replacing traditional diplomatic channels or Letters Rogatory.

[405] Office of the Attorney General, *Laws and Treaties Relating to International Cooperation in Criminal Matters* (Bangkok Blog 6th ed, 2008).

The Scope of the Mutual Assistance

Section 4 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) (MACM) defines the term "assistance" as covering investigation, inquiry, prosecution, forfeiture of property, and other proceedings[406] relating to criminal matters.

Section 12 of MACM categorizes the forms of assistance as follows:

(i) Taking statement of persons, providing documents, Articles and evidence out of Court, serving documents, searches, seizure of documents or Articles, locating person;

(ii) Taking the testimony of persons and witnesses, adducing document and evidence in the Court, forfeiture or seizure of properties;

(iii) Transferring persons in custody for testimonial purposes;

(iv) Initiating criminal proceedings.

There is no provision for the assistance on witness protection in MACM. This is considered to be a crucial omission.

Central Authority

The "Central Authority" is the administrative center for sending and receiving requests as well as taking direct responsibility for mutual legal assistance matters. The advantage of proceeding via a central authority is avoidance of delays and the minimization of unnecessary formalities in granting and requesting assistance between countries.

[406] The term "other proceedings" stipulated in s 4 can be interpreted to cover forfeiture or seizure of properties, transferring persons in custody for testimonial purposes, as well as initiating of criminal proceedings.Tiyapan, above n 370, 9.

According to MACM, the "Central Authority" means the person having authority to be the coordinator in providing assistance to a foreign state or in seeking assistance from a foreign state.[407] The Attorney General or a person designated by him or her, is the Central Authority in relation to mutual assistance in criminal matters and is responsible for the conduct of granting and requesting assistance.[408] The functions of the Central Authority are as follows: to receive the request for assistance from the requesting state and transmit it to the competent authorities; to receive the request seeking assistance presented by the agency of the Royal Thai Government and deliver it to the requested state; to consider and determine whether to provide or seek assistance; to follow and expedite the performance of the competent authorities in providing assistance; to issue regulations or announcement for the implementation of this Act and to carry out other acts necessary for the success of providing or seeking assistance under the Act.[409]

States that have signed a Mutual Legal Assistance Treaty with Thailand can submit a request directly to the Central Authority. The requests can be conducted in various stages: for example, investigation, prosecution, sentencing and appeal.

Thailand can grant assistance to states that have not signed a Mutual Legal Assistance Treaty with Thailand through diplomatic channels[410] but requests in the absence of a

[407] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 4.

[408] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 6.

[409] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 7.

[410] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 10.

treaty are sent to the Office of the Attorney General for transmission. In this regard, a commitment of reciprocity from those states is required prior to providing assistance.[411]

The Attorney General has a duty of considering an incoming request and an outgoing request. The International Affairs Department in the Office of Attorney General is responsible for processing requests for cooperation. The main role of the International Affairs Department includes executing and monitoring outgoing and incoming requests. Outgoing requests are drafts by prosecutors in the International Affairs Department.[412] If necessary, the prosecutor may seek assistance from the investigating agency or the Ministry of Foreign Affairs.

For an incoming request, the Attorney General considers whether or not to execute the request. If the request is consistent with the requirements under *the Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)*, the Attorney General will refer it to the competent authorities for further steps. For an outgoing request, the Thai agency seeking assistance from a foreign state presents its requests to the Central Authority of Thailand. The Attorney General has a duty to determine whether it is appropriate to seek assistance from a foreign state by considering regulations, relevant details, facts, supporting documents, and then notify his determination to the requesting agency. [413] The

[411] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 9(1) states that "Assistance may be provided even where there exists no mutual assistance treaty between Thailand and the Requesting State provided that such state commits to assist Thailand under the similar manner when requested."

[412] Somjai Kesornsiricharoen, *The Role and Function of Public Prosecutors in Thailand* [290] (1997) <http://www.unafei.or.jp/english/pages/Part107.htm> at 29 April 2013.

[413] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 38.

determination of the Attorney General in all manners relating to granting and seeking assistance is final unless otherwise instructed by the Prime Minister.[414]

However, s 8 of the MACM limits the Attorney General's discretion. It stipulates that in providing assistance for or seeking assistance from foreign states which may affect national sovereignty or security, crucial public interests, international relations, or in relation to a political or military offence, the Attorney General must be advised by the Advisory Board.[415] The latter Board is to consist of delegates from the Ministry of Defence, the Ministry of Foreign Affairs, the Ministry of Interior, the Ministry of Justice, the Office of the Attorney General, as well as other distinguished persons (not more than four) as board members nominated by the Prime Minister, and one public prosecutor designated by the Board as Board Secretary.[416] The aim of the Advisory Board is to advise the Central Authority in the consideration and determination of the granting of assistance to, or seeking assistance from, a foreign state. Disagreement between the determination of the Central Authority and the Board is referred to the Prime Minister for final determination.[417]

Double Criminality

The principle of double criminality requires that the conduct underlying the assistance requested must be a criminal offence punishable under the laws of the requested state otherwise such request may be refused. According to s 9 of *the Mutual Assistance in Criminal Matters Act B.E.2535 (1992)*, the criminal activity which is the cause or subject

[414] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* ss 11, 38.

[415] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 8.

[416] Ibid.

[417] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 8.

matter of a request made by a foreign country must be an offence punishable under Thai law unless a mutual assistance treaty between Thailand and the Requesting State specifies otherwise. This means that lack of dual criminality can be a ground for refusal of assistance. Assistance can be granted when the conduct at issue constitutes a criminal act in both the requesting state and Thailand. However, the offence concerned does not need to be placed in the same category as between the requesting state and Thailand. This is because Thailand permits a more flexible procedure to fulfill the double criminality requirement.

Grounds for refusal

In Thailand, the grounds for refusal of assistance are stipulated in the Act on Mutual Assistance in Criminal Matters B.E.2535 (1992) and other treaties concluded with foreign states as follows:[418]

1) The offence is related to a political offence;[419]

2) The offence is related to a military offence;[420]

3) A request may be refused if it shall affect national sovereignty or security, or other crucial public interests of Thailand.

[418] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 9 (3), (4).

[419] *The Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* does not give the definition of " a political offence". The absence of precise definition of political offence raises questions and lead to controversy when the request relates to a political offence.

[420] *The Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* does not give the definition of " a military offence". However, in practice, the Attorney General considers a military offence as alleged conduct violating the military laws and not constituting offences under ordinary criminal law. *Extradition Act, B.E.2551 (2008)* s 9 military offence means specific military criminal offence and not ordinary criminal offence.

Process and Execution

1. Request by Thailand

Section 36 of the Mutual Assistance in Criminal Matters B.E. 2535 (1992) does not categorize the forms of assistance that can be requested from a foreign country; therefore, Thai authorities can request various forms of assistance.

The process begins when the Attorney General determines it is appropriate to request assistance from a foreign state by considering regulations, details, facts and supporting documents and notifying the requesting agencies on the determination.[421] If the determination is not in favor of the agency, the agency may present their new request along with new justifications seeking permission or turn to the Prime Minister to overrule the determination of the Attorney General.

If the Attorney General is satisfied that all necessary conditions are consistent with the Mutual Assistance in Criminal Matters B.E. 2535 (1992), he will send the request to the relevant foreign state requesting the assistance applying an existing treaty between Thailand and the foreign state or by seeking other forms of cooperation through diplomatic channels depending on the situation.

Moreover, the Thai Attorney General may request a foreign country to transfer a person in custody in that country to testify in Thailand. Persons who enter Thailand to testify or give statements involving this Act will be granted immunity.[422] They will not be subject to

[421] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 38.

[422] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 40 states that no person entering to testify or give statement in Thailand in accordance with this Act shall be subject to service of process or be detained or subject to any other restriction of personal liberty by reason of any acts which preceded his departure from the Requested State.

any prosecution or be detained or subject to any other restriction of personal liberty by reason of any acts which constitute offences preceding their departure from the requested state. This immunity ceases when such a person, having had the opportunity to leave Thailand within fifteen consecutive days after notification that his presence was no longer required by the appropriate authorities, has nonetheless stayed or voluntarily returned after having left Thailand.[423]

2. Requests by foreign countries

When a foreign country seeks mutual legal assistance from Thailand, the state which has signed a Mutual Legal Assistance Treaty with Thailand may render a request via the Central Authority of that state. A request in the absence of a treaty is also sent to the Office of the Attorney General through diplomatic channels for transmission.[424] The Attorney General then considers whether the request is compliant with the relevant requirements and if there are no grounds for postponement, he will refer a request to the competent authority[425] for further execution. The Office of the Attorney General has to keep incoming requests confidential. The prosecutor and the competent authority are the only persons who know about the details of a request. The Attorney General will proceed with further steps with no delay unless the execution of a request interferes with an ongoing investigation, inquiry, prosecution or other criminal proceedings. The Attorney

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The safeguard in paragraph one shall cease when the person, having had the opportunity to leave Thailand with fifteen consecutive days after notification that his presence was no longer required by the appropriate authorities, shall have nonetheless stayed in or voluntarily returned after having left Thailand.

[423] Ibid.

[424] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 10 states that the state having a mutual assistance treaty with Thailand shall submit its request for assistance directly to Central Authority. The state which has no such treaty shall submit its request through diplomatic channel.

[425] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 4 gives the definition of "competent authorities" that means the official having authority and function to execute the request for assistance from a foreign state referred from the Central Authority under *the Mutual Assistance in Criminal Matters Act B.E. 2535 (1992).*

General can postpone the execution or may place certain conditions to the requesting state before executing the request.[426]

During the investigative process, the competent authority works as a Police Commissioner. The competent authority has power to order the inquiry official as follows: take statements from persons; serve documents; search and seize documents and other items, and locate persons in accordance with rules, means and conditions stipulated in the Criminal Procedure Code.[427]

According to the provisions of the Criminal Procedure Code relevant to the inquiry, the filing of motion, the trial, the adjudication and the making of an order relating to

[426] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 11 states that upon receipt a request for assistance from a foreign state, the Central Authority shall consider and determine whether such request is eligible for the providing of assistance under this Act and has followed the process correctly as well as accompanied by all appropriate supporting documents.

If such request is eligible for the providing of assistance, and in line with the process, as well as accompanied by all appropriate supporting documents, the Central Authority shall transmits the said request to the Competent Authorities for further execution.

If such request is not eligible for the providing of assistance, or must be subject to some essential conditions before the assistance is provided, or if it is not in line with the process or has not been accompanied by all appropriate supporting documents required, the Central Authority shall refuse to provide assistance and notify the Requesting State the reasons thereof, or indicate the required conditions, or the causes of impossibility to execute the request.

If the Central Authority is of the view that the execution of a request may interfere with the investigation, inquiry, prosecution, or other criminal proceeding pending its handling in Thailand, he may postpone the execution of the said request or may execute it under certain condition set by him and notify the Requesting State about that.

A determination of the Central Authority with regard to the providing of assistance shall be final, unless otherwise altered by the Prime Minister.

[427] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 15 states that upon receipt the request for assistance from a foreign state to take statement of persons or gathering evidence located in Thailand at the stage of inquiry, the Competent Authorities shall direct an inquiry official to execute such request.

The Inquiry Official shall have authority to take statement of persons or gathering evidence as requested under paragraph one and, if necessary, to search and seize any document or Article in accordance with rules, means, and conditions set forth in the Criminal Procedure Code.

When the taking statement of persons or gathering evidence has been finished, the Inquiry Official shall report and deliver all evidence derived therefrom to the Competent Authorities.

forfeiture or seizure of property will be applied as necessary depending on the subject matter of the request.[428]

The Chief Public Prosecutor is in charge of criminal litigation including requests for forfeiture of property and requests to obtain witness testimonies or evidence. When there is a request for forfeiture of property, the Chief Public Prosecutor will make an application to the court which has jurisdiction over the location of the property for the forfeiture or seizure of property.[429]

Moreover, a foreign order can be enforced only by applying to the Thai judiciary for a domestic order.[430] The assets forfeited on the request of the requesting state will become

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[428] Criminal Procedure Code of Thailand s 132 " For the purpose of collecting evidence, the inquirer shall be invested with:
(1) The power to conduct a search on the person of the victim with his prior consent or on the person of the accused, and inspect all articles or places likely to bear witnesses, as well as take photographs, create maps or sketches, or take fingerprints, handprints or footprints, and record all particulars which may throw the light upon the case.
With respect to the search on the person of the victim or accused pursuant to paragraph 1, if such victim or accused is female, the search shall be conducted by female official or another female and, where reasonable, in presence of the person applied for by such victim or accused.
(2) The power to search for any article whose possession constitutes an offence, or which has been obtained through, or used or suspected of having been used in, the commission of an offence, or which is likely to be used as evidence; prescribed that the provisions of the present Code governing search must be abided by.
(3) The power to, by summons, require for a personal appearance of a possessor of an article likely to be used as evidence; prescribed that the summonsed needs not to make his presence but he shall be deemed to have conformed to the summons after having furnished the inquirer with the article required.
(4) The power to seize all articles discovered or delivered pursuant to subsections (2) and (3).

[429] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 17 states that upon receipt the request for assistance from a foreign state to take the testimony of witness in Thai Court, the Central Authority shall direct the public prosecutor to execute such request.

The Public Prosecutor shall have the power to apply to the Court having jurisdiction over the domicile or residence of the person who will be the witness or who has in possession or keep the documents or other evidence, and request for the testimony or adducing of the evidence, and the Court shall have the power to try the case conforming to the provisions enshrined in the Criminal Procedure Code.

After the completion of testimony, the Public Prosecutor shall apply to the court requesting for the record of testimony as well as other evidence and deliver all to the Central Authority for further operation.

[430] The confiscation of property under Thai Penal Code is linked to a conviction – based system, whereby states may not be able to confiscate property without a court judgment, even though there may be clear evidence that such property is involved in criminal activities. The exception to this is the Money Laundering Control Act, which does not rely on the court judgment, although this is limited to only eight predicate offences. Wanchai Roujanavong, *Organized Crime in Thailand* (Rumthai Press Co.Ltd., 2006), 156.

the property of the public treasury of Thailand.[431] In some cases, the court may order the forfeited property to be destroyed. An asset sharing instrument between Thailand and requesting state does not exist under Thai legislation; however, some of Thailand's Mutual Assistance in Criminal Matters treaties provide that forfeited proceeds may be transferred to the requesting state. Examples are the treaties between Thailand and China and Korea.[432]

5.1.3.2 Case Study

Masoud Sedaghatzadeh was an Iranian suspect involved in three explosions in Bangkok's Sukhumvit 71 area on 14 February 2013. On 8 April, Thai prosecutors filed lawsuits against him for conspiring to make and possess explosive devices intended to cause harm to others. The explosive devices found were especially powerful and destructive, posing a threat to the public.[433]

On 21 February 2013, Thailand sent a request to Malaysia for the extradition of Masoud Sedaghatzadeh and a request for a mutual legal assistance in criminal matters. At the time Masoud was a suspect arrested by Malaysian authorities in Kuala Lumpur International Airport one day after the three explosions in the Sukhumvit area while he was preparing to board a plane to Iran. The French news agency - Agence France-Presse (AFP) - quoted the Malaysian police chief, Ismail Omar, as saying in a statement on 22 February 2013 that "the Iranian was arrested under the Immigration Act of Malaysia using intelligence

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[431] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 35.

[432] Asian Development Bank Organization for Economic Co-operation and Development Anti-Corruption Initiative for Asia and the Pacific, *Mutual Legal Assistance*, above n 391, 101.

[433] Thailand Times, *Security 'stepped-up' after bungled Bangkok bombings* <http://www.thailandtimes.asia> at 1 July 2013.

provided by Thai counterparts. He is being investigated for terrorism activities in relation to bombings in Thailand".[434]

The Thai police spokeman - Pol Maj Gen Piya Uthayo - stated that Malaysia's public prosecutor had already received an extradition request and relevant documents from Thailand, and that the Malaysian public prosecutor would forward the letter to the Malaysian court to decide whether the detainee be would extradited to Thailand or not.[435]

On 25 June 2013, a Malaysian court ruled there was sufficient evidence to indicate that the accused had taken part in the making and possessing of an explosive device as well as causing an explosion that led to human injuries and property damage. Therefore, the court decided that the accused would be extradited to Thailand.[436]

The above mentioned case demonstrates two types of cooperation between Thailand and Malaysia. The first is the less formal form of mutual legal assistance by Malaysian authorities and Thai counterparts (interstate police-to-police). The other type is extradition. As these case examples demonstrate mutual legal assistance and extradition are core mechanisms to bring criminals to prosecution in trans-border criminal case.

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[434] Agence France-Presse (AFP), "3rd suspect of Bangkok blasts detained in Malaysia" <http://www.afp.com> at 1 July 2013.

[435] <http://www.pattayamail.com/tags/masoud-sedaghatzaden> at 1 July 2013.

[436] <http://www.huffingtonpost.com/2012/06/25masoud> at 1July 2013.

5.1.4 Comparative Law

5.1.4.1 Mutual Assistance in Criminal Matters in Australia: The Australia Regulatory Framework

Because of the threat of trans-border criminality such as transnational organized crime, trafficking in persons, and similar crimes, the Attorney-General's Department (AGD) has realized that it is important to have a responsive and streamlined mutual legal assistance law for eradicating transnational crime.[437]

In Australia, the cognate legislation is the Mutual Assistance in Criminal Matters Act 1987 (Cth) (MACM). The MACM is governed by the federal Attorney General's Department and the Attorney General has responsibility to proceed with "mutual assistance".[438] The objects of the Act are to regulate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country and to facilitate the obtaining by Australia of international assistance in criminal matters.[439]

In addition, MACM can be used to provide mutual legal assistance to any country irrespective of the existence of treaty or arrangement, but assistance would normally not

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[437] Asian Development Bank Organization for Economic Co-operation and Development Anti-Corruption Initiative for Asia and the Pacific, *Mutual Legal Assistance,* above n 391, 103.

[438] Attorney-General's Department give the definition of "mutual assistance means that " is an important tool in obtaining evidence for investigation and prosecution of transnational crime, particularly drug trafficking, fraud, money laundering, child pornography and other child exploitation offences and terrorism offences and is the process countries use to obtain government to government assistance in criminal investigations and prosecutions. Moreover, mutual assistance is also used to recover the proceeds of crime. Assistant Secretary, International Crime Cooperation Central Authority, Attorney-General's Department of Australia Government, *Mutual assistance overview* (2013) <http://www.ag.gov.au/Internationalrelations/Internationalcrime> at 30 May 2013.

[439] *Mutual Assistance in Criminal Matters Act 1987 (Cth)* s 5.

be provided to a country that does not provide reciprocity.[440] However, to request or receive extradition from Australia, a country must promise to render similar assistance upon receiving a request from Australia. Thus, "the requirements for providing mutual assistance in criminal matters are more flexible than extradition because mutual assistance in criminal matters does not intrude upon an individual's liberty."[441]

MACM may provide mutual assistance by way of formal and informal arrangements. For informal arrangements, MACM can provide mutual assistance through bilateral cooperation and sharing of information between competent authorities in different countries such as police to police assistance and the exchange of information between intelligence agencies.

Under MACM, Australia can grant and request various types of assistance to and from foreign countries. Examples of mutual assistance include:

- Executing *search warrants* to obtain evidence such as bank records from financial institutions;
- *Taking evidence* from a witness in Australia for foreign criminal proceedings;
- Arranging for *witnesses to travel* with their consent to a foreign country to give evidence in foreign criminal proceedings, and

[440] The organization for Economic Co-operation and Development (OECD), *Review of Implementation of te Convention and 1997 Recommendation*, <http://www.oecd.org/dataoecd/0/29/2378916.pdf> at 30 May 2013.

[441] Preliminary draft issues paper on Frameworks for Extradition and Mutual Legal Assistance in Corruption matters Technical Meeting on Co-operation in Bribery Investigations and Prosecutions on 28 September 2006 Santiago de Chile, Chile, OECD Secretariat <http://www.oecd.org/dataoecd/28/11/39200781.pdf> at 4 June 2013.

- *Registering and enforcing orders*[442] restraining and forfeiting the proceeds of crime.

The Function of the Central Authority under Australia Law

Under the Treaty between Australia and Thailand on Mutual Assistance in Criminal Matters, the Attorney General of Australia or a person authorized in writing by the Attorney General is the Central Authority.[443] A request by a foreign country for international assistance in a criminal matter may be made by a foreign country, the

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[442] *Mutual Assistance in Criminal Matters Act 1987 (Cth)* s 34 " Requests for enforcement of foreign orders
(1) If:
(a) a foreign country requests the Attorney-General to make arrangements for the enforcement of:
(i) a foreign forfeiture order, made in respect of a foreign serious offence, against property that is reasonably suspected of being located in Australia; or
(ii) a foreign pecuniary penalty order, made in respect of a foreign serious offence, where some or all of the property available to satisfy the order is reasonably suspected of being located in Australia; and
(b) the Attorney-General is satisfied that:
(i) a person has been convicted of the offence; and
(ii) the conviction and the order are not subject to further appeal in the foreign country;
the Attorney-General may authorize a proceeds of crime authority, in writing, to apply for the registration of the order.
(2) If a foreign country requests the Attorney-General to make arrangements for the enforcement of:
(a) a foreign forfeiture order that:
(i) has the effect of forfeiting a person's property on the basis that the property is, or is alleged to be, the proceeds or an instrument of a foreign serious offence (whether or not a person has been convicted of that offence); and
(ii) is made against property that is reasonably suspected of being located in Australia; or
(b) a foreign pecuniary penalty order in respect of which both of the following apply:
(i) the order has the effect of requiring a person to pay an amount of money on the basis that the money is, or is alleged to be, the benefit derived from a foreign serious offence (whether or not the person has been convicted of that offence);
(ii) some or all of the property available to satisfy the order is reasonably suspected of being located in Australia;
the Attorney-General may authorize a proceed of crime authority, in writing, to apply for the registration of the order.
(3) If a foreign country requests the Attorney-General to make arrangements for the enforcement of a foreign restraining order, against property that is reasonably suspected of being located in Australia, that is:
(a) made in respect of a foreign serious offence for which a person has been convicted or charged; or
(b) made in respect of the alleged commission of a foreign serious offence (whether or not the identify of the person who committed the offence is known);
the Attorney-General may authorize a proceeds of crime authority, in writing, to apply for the registration of the order.

[443] Treaty on Mutual Assistance in Criminal Matters, Australia – Thailand, signed on 27 July 2006 (entered into force 18 June 2009) Article 3 (3) For Australia, The Central Authority shall be the Attorney General's Department, Canberra.

Attorney General or a person authorized by the Attorney-General.[444] Furthermore, the Attorney General's office is the agency for providing assistance to domestic competent authorities and foreign agencies.[445] Because granting assistance to a foreign country is a matter for the discretion of the Attorney General who may direct or authorize relevant officers in writing to execute the request, assistance may also be provided subject to such conditions as the Attorney General determines. In this process, the Attorney General has a broad discretion and his determination in relation to the Act is final but may be subject to judicial review.

Double Criminality

Dual criminality for mutual assistance in criminal matters is generally a discretionary ground upon which the Attorney General may provide assistance requested by foreign country.[446] MACM provides that a request by a foreign country for assistance may be refused if an alleged act or omission would not have constituted an offence against Australian law or an alleged act or omission has occurred outside the foreign country or if a similar act or omission occurring outside Australia in similar circumstances would not have constituted an offence against Australian law.[447]

Grounds for Refusal

Section 8(1) of the MACM sets out the various grounds on the basis of which the Attorney General may refuse the request if he or she gives an opinion as follows:

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[444] *Mutual Assistance in Criminal Matters Act 1987 (Cth)* ss 10, 11.

[445] Asian Development Bank and Organization for Economic Co-operation and Development, Anti-Corruption Initiative for Asia and the Pacific, *Mutual Legal Assistance,* above n 391, 103.

[446] Otto Lagodny, *Expert Opinion for the Council of Europe on Questions Concerning Double Criminality* (18 May 2004) <http://www.coe,int/t/dghl/standardsetting/pc-oc/OC-WP(2004)02E.pdf> at 31 May 2013.

[447] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 8(2).

- There are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex sexual orientation, religion, nationality or political opinions;[448]
- The request relates to an act or omission that would have constituted an offence under the military law of Australia but not under Australia's ordinary criminal law;[449]
- The request may prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory;[450]
- The person has been acquitted or pardoned or has undergone the punishment provided by the law of foreign country.[451]
- The request has been made for the purpose of prosecuting or punishing a person for a political offence. "Political offence" in this regard has the same meaning as in the Extradition Act 1988 (Cth).[452] The term may encompass elements of a common crime motivated by political purposes.

According to s 8(1A) of the MACM, a request by a foreign country must be refused if the request relates to the investigation, prosecution or punishment of a person arrested or detained on suspicion of having committed an offence or a person charged with, or

[448] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 8(1)(b).

[449] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 8(1)(d).

[450] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 8(1)(e).

[451] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 8(2)(c).

[452] *Extradition Act 1988(Cth)* s 5 "Political Offence, in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country)…".

convicted of, an offence.[453] Furthermore, the request by a foreign country must be refused if the offence may result in the imposition of the death penalty unless the Attorney General is of the opinion, having regard to any special circumstances[454] that the assistance requested should be granted.

Pursuant to s 8(2) of the MACM, the Attorney General has discretion to refuse to provide assistance as follows:

- The request relates to the prosecution or punishment of a person for an act or omission for which the person could no longer be prosecuted in Australia because of lapse of time;
- The assistance could prejudice a criminal investigation or proceeding;
- The assistance would be likely to prejudice the safety of any person regardless of whether such person is in or outside Australia;
- The assistance would impose an excessive burden on the resources of the Commonwealth or of a State or Territory; and
- After considering if the case meets the above conditions, it is appropriate that the assistance requested should not be granted.

[453] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 8(1A).

[454] "Special circumstances" is not defined in the MACM. The example of a special circumstance are when the foreign country provides an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out or the assistance provided would assist a defendant to prove their innocence. Australian Government Attorney General's Department, *Mutual assistance in death penalty matters* (2012), International Crime Cooperation Division <http://www.ag.gov.au/Legalaid/Pages/Specialcircumstancesscheme.aspx> at 31 May 2013.

Process and Execution

1. Mutual assistance requests made by Australia to foreign countries

Most Australian mutual assistance requests to foreign countries are made by the First Assistant Secretary of the International Crime Cooperation Division under a delegation from the Attorney General (especially requests dealing with sensitive national security matters). Moreover, mutual assistance requests can be made on behalf of the Australian Federal Police (AFP), the Commonwealth Director of Public Prosecutions (CDPP) and other Commonwealth investigative agencies and State and Territory investigative and prosecution agencies.[455]

The Attorney General on behalf of Australia can make requests for the execution of search warrants, production of documents, taking evidence by video link, enforcement of proceeds of crime orders and so on. The Attorney General may request international assistance in criminal matters other than assistance of a kind that may be requested under MACM[456]

In addition, the Attorney General's Department liaises with the central authority of the foreign country as to the progress of the requests. The requests can be sent through diplomatic channels although, according to the treaty, the request may be sent directly to the Central Authority.[457]

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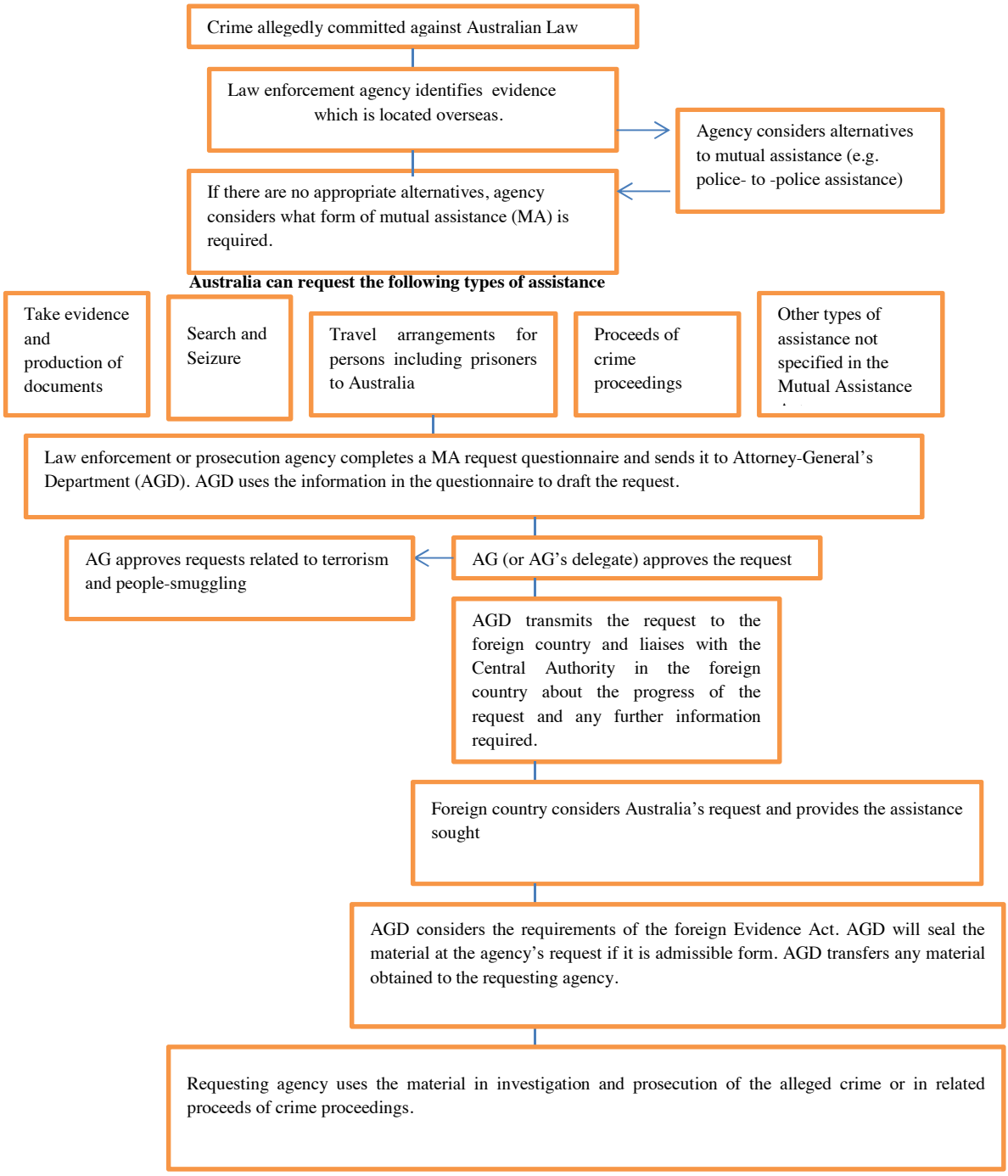
[455] Secretary, International Crime Cooperation Central Authority, Attorney-General's Department of Australia Government, *Mutual assistance overview* (2013) <http://www.ag.gov.au/Internationalrelations/Internationalcrime> at 30 May 2013.

[456] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 10 (1) (2).

[457] Asian Development Bank Organization for Economic Co-operation and Development Anti-Corruption Initiative for Asia and the Pacific, *Mutual Legal Assistance,* above n 391, 103.

Figure 7: Overview of the process of making a mutual assistance request to a foreign country.



Source: Secretary, International Crime Cooperation Central Authority, Attorney-General's Department of Australia Government, *Mutual assistance overview* (2013) <http://www.ag.gov.au/Internationalrelations/Internationalcrime>

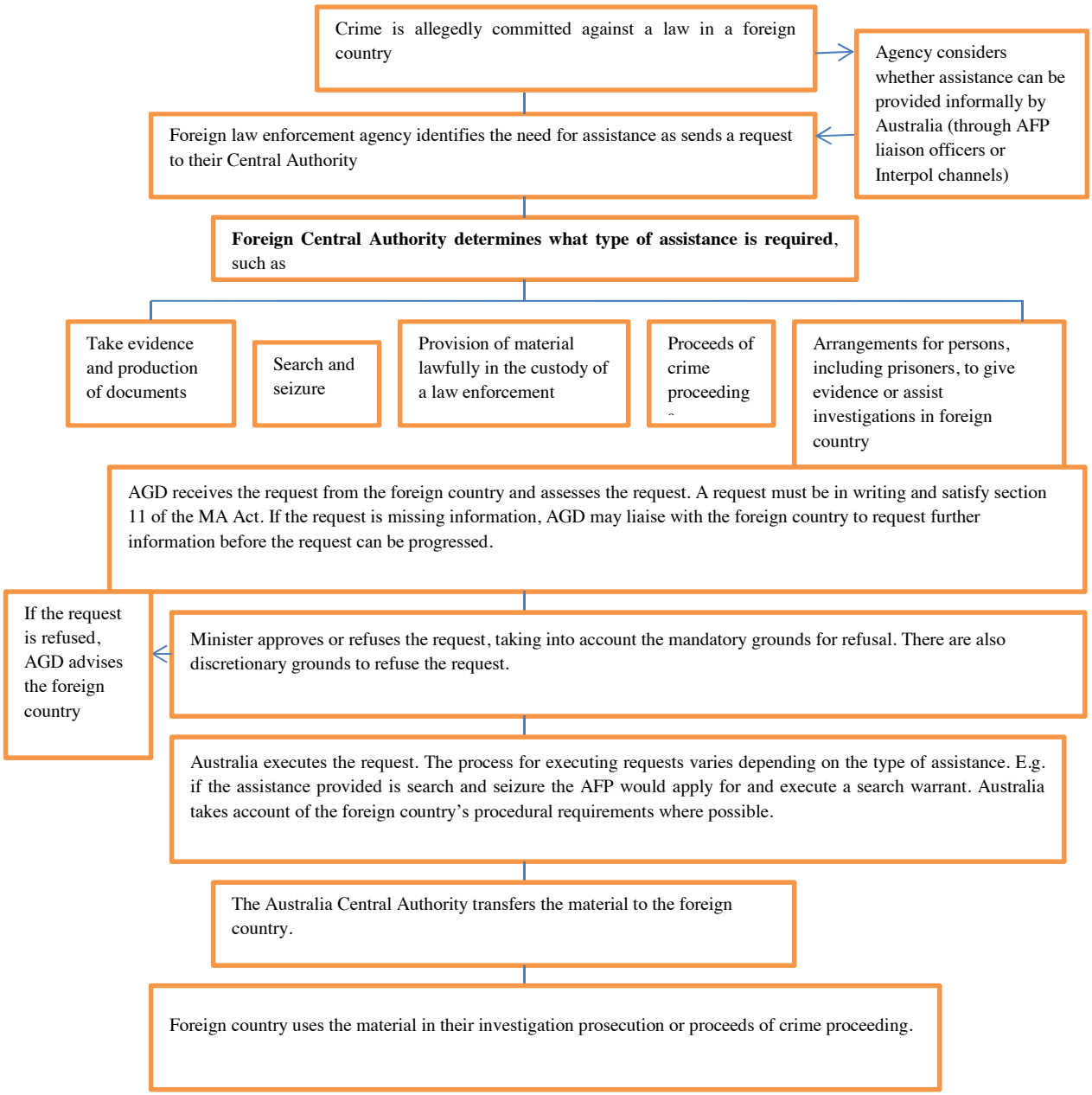
Mutual assistance requests by foreign countries to Australia

A request by a foreign country may be made to the Attorney General or a person authorized by the Attorney General. If a foreign country makes a request directly to a court or other Australian agencies in Australia, the court or other agencies must refer the request to the Attorney General.[458] A request by a foreign country must be in writing and include the name of the authority, a description of the nature of the criminal matter and a summary of the relevant facts and laws, the purpose of the request, a summary of the applicable law (including the penalty for the offence under investigation). However, a failure to comply with this subsection is not a ground for refusing the request.[459]

[458] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 11(4).

[459] *Mutual Assistance in Criminal Matters Act 1987(Cth)* s 11(2).

Figure 8: Overview of the process of making a mutual assistance request to Australia.



Source: Secretary, International Crime Cooperation Central Authority, Attorney-General's Department of Australia Government, *Mutual assistance overview* (2013) <http://www.ag.gov.au/Internationalrelations/Internationalcrime>

5.1.4.2 The treaty on Mutual Assistance in Criminal Matters between Australia and Thailand

The Treaty between Australia and Thailand on Mutual Assistance in Criminal Matters was adopted on 27 July 2006 at Kuala Lumpur in Malaysia and entered into force on 18 June 2009. It provides a formal framework for the provision of mutual assistance in criminal matters between Australia and Thailand.[460]

Australia passed the Mutual Assistance in Criminal Matters (Thailand) Regulations 2008 in accordance with s 7(2) *of the Mutual Assistance in Criminal Matters Act 1987* to implement the Treaty. These Regulations stipulate that the Mutual Assistance in Criminal Matters Act 1987 applies to Thailand subject to the Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters adopted at Kuala Lumpur on 27 July 2006.

According to the treaty, Thailand and Australia have obligations to provide mutual assistance to each other in criminal proceedings such as taking of evidence and obtaining of statements of persons, providing information, documents, records and evidence, serving documents, executing requests for searches and seizures, seeking the consent of persons to be available to give evidence or to assist in investigations, locating and identifying persons or objects, measures to locate, restrain and forfeit the instruments or proceeds of crime, and other assistance consistent with the objects of the Treaty and consistent with the law of the Requested State.[461] However, other assistance does not

[460] The Joint Standing Committee on Treaties of eight treaty actions tabled in Parliament, *Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters,* Report 87: Treaties Table on 13 June 2007, 6.

[461] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 1 (3).

include the arrest or detention of any person with a view to the extradition of that person or the extradition of any person, the execution of criminal judgments, verdicts or decision rendered in the Requesting State, the transfer of sentenced persons for serving sentences, and the transfer of criminal proceeding.[462]

Grounds for Refusal or Postponement

The Requested State (Thailand or Australia) can refuse to provide assistance or refuse to execute a request if it relates to the following:[463]

- The request would prejudice the sovereignty, security, national interest or other essential public interest of the Requested State;
- The request relates to a political offence;
- There are substantial grounds for the Requested State to believe that the request has been made for the purpose of an investigation, prosecution, punishment or proceeding against a person on account of that person's race, sex, religion, nationality or political opinions;
- The request relates to the prosecution of a person for an offence in respect of which the offender has been finally acquitted or pardoned or has served the sentence imposed;

Moreover, there are discretionary grounds for refusing a request for mutual assistance. These are:[464]

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[462] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 1 (6).

[463] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 2 (1).

[464] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 2 (2).

- The request relates to the prosecution or punishment of a person for an offence where the act or omission alleged to constitute that offence would not constitute an offence if it had taken place within the jurisdiction of the Requested State;
- The request relates to the prosecution or punishment of a person for an offence which should no longer be prosecuted by reason of lapse of time;
- Provision of the assistance sought could prejudice an investigation or proceeding in the Requested State;
- Provision of the assistance sought could prejudice the safety of any person;
- Provision of the assistance sought imposes an inordinate burden on the resources of the Requested State;
- The request is made in respect of an offence punishable by the death penalty under the law of the Requesting State but not under the law of the Requested State. Notwithstanding the foregoing, the request may not be refused if the Requesting State gives such assurances as the Requested State considers sufficient that the death penalty will not be pronounced or, if it is pronounced, will not be executed. Where the Requesting State had provided such assurance but the Requested State still denies the request, the Requesting State is entitled to exercise discretion to refuse to execute a request from the other state relating to an offence of a similar nature and gravity.

Process and Execution

The process of the request under this Treaty is made via the Central Authority of each country which is Attorney General. Normally, a request for assistance is submitted by letter but in urgent circumstances, a request can be made by facsimile or any other modern means of communication. All requests must include necessary facts and details

relating to the requests: for example, the name of the competent authority, a description of the nature of the investigation, prosecution or proceeding including a summary of the relevant facts and laws; a description of the statement, evidence or information sought, or the acts of assistance to be performed; the need, if any, for confidentiality and the reasons, therefore, specification of any time limit and so on.[465]

When the requirement is met, a request for assistance must be executed promptly in accordance with the law of the Requested State. The Requested State must promptly inform the Requesting State of circumstances which are likely to cause a significant delay in responding to the request.[466]

The Requested State must pay all costs relating to the execution of the request including the expenses associated with conveying custodial or escorting officers required by the Requested State in fulfilling the request. If the execution of the request requires expense of an extraordinary nature, Thailand and Australia may consult to determine the terms and conditions under which the requested assistance can be provided.[467]

The process of taking of evidence and obtaining statements of persons are the responsibility of the Magistrate acting under the Mutual Assistance in Criminal Matters Regulations 1988. The Magistrate may issue a summons requiring a named person to attend as a witness before the Magistrate to give evidence as required under the summons,

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[465] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 5.

[466] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 6 (1).

[467] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 7.

answer questions, and produce documents and other Articles in the person's custody or control. A person summoned must attend at the place and time, and on the date, specified in the summons. If the person fails to attend as required, the Magistrate may issue a warrant for the apprehension of that person.[468]

The Requested State shall, upon request, take all reasonable measures to locate and identify persons or Articles believed to be in the Requested State and needed in connection with a criminal investigation, prosecution or proceeding in the Requesting State.[469] However, this request may be denied if the provision of the assistance sought could prejudice the safety of any person.[470]

Information and evidence obtained under the Treaty shall not be disclosed or used for purposes other than those stated in the request without the prior consent of the Requested State. In addition, the Requesting State may require that the application for assistance, its contents and related documents, and the granting of assistance be kept confidential.[471]

5.1.5 Proposed Law Reform

Despite Thailand enacting the Mutual Assistance in Criminal Matters Act B.E. 2535 (1992) for requesting and granting mutual legal assistance, there are loopholes in the Act resulting in a deviation from the requirements of the United Nations Convention against

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[468] *Mutual Assistance in Criminal Matters Regulations 1988 (Cth)* ss 3, 4, 5.

[469] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 15(1).

[470] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, sign 27 July 2006 (entered into force 18 June 2009) art 2(2)(d).

[471] *Treaty on Mutual Assistance in Criminal Matters, Australia-Thailand*, signed 27 July 2006 (entered into force 18 June 2009) art 8.

Transnational Organized Crime. This section provides suggestions for a proposed reform of mutual legal assistance.

1) Relocation witnesses between states.

Thailand should enact a new provision enabling Thai nationals or residents to be relocated to a foreign country and enabling foreign nationals or residents to be relocated to Thailand under the special protection measures provided by the Witness Protection Office as stated in Chapter Four. This is considered necessary as there is presently no law in Thailand authorizing the Thai Attorney-General to receive foreign national or residents in order to provide protection in Thailand and no legislation authoring any specific agency to be responsibility for foreign witness protection.

Assistance in criminal matters involving a foreign country can be implemented via the Mutual Assistance in Criminal Act B.E. 2535 (1992). According to the Act, the Attorney General is the responsible agency for the central authority in receiving of a request from a foreign country.

It is necessary to reform the Mutual Assistance in Criminal Matters Act B.E. 2535 (1992) by inserting a new provision in the Act. This is because the relocation of witnesses in Thailand cannot guarantee the witnesses' security especially in cases involving transnational organized crime. The new provision could read as follows:

Part 7/1
Protection of Foreign Nationals or Residents
Section 30/1 If, upon receipt of a request from an appropriate authority of a foreign country to provide protection in Thailand to a person who is a citizen or a resident of that country, the Central Authority is satisfied that an appropriate authority of a foreign country has provided all material that is necessary to support the request and it is appropriate to do so in all the circumstances, the Central Authority shall refer the request to the Competent Authorities for execution. The competent Authorities shall execute the request in accordance with recommendations provided by the Central Authority and shall report to the Central Authority.

2) Application of video conferencing in the testimony of the witness.

Conducting criminal procedures across national boundaries via video conferencing is another means to increase efficiency in rendering mutual legal assistance. The use of modern technology, such as video conferencing, can overcome some of the difficulties involved in obtaining the testimony of witnesses located outside the prosecuting state. Moreover, these must include safeguards such as limiting the disclosure of the address and identifying particulars of witnesses. The current Act on Mutual Assistance in Criminal Matters has not yet provided for this technique. Thus, it is necessary to revise the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) and add a provision on video conferencing. It is suggested that the provision could read as follows:

Section 30/2 If, upon receipt the assistance from an appropriate authority of a foreign country to conduct testimony via video conferencing in cases where the witness cannot go to testify in the court of the requesting state, the Central Authority is satisfied that the authority has provided all material that is necessary to support the request and it is appropriate to do so in all the circumstances, the Central Authority shall refer the request to the Court having jurisdiction for execution.

3) New practices in the forfeiture and seizure of properties.

Under the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992), properties forfeited upon the request of the requesting state belong to the Thai government.[472] The

[472] *Mutual Assistance in Criminal Matters Act B.E. 2535 (1992)* s 35.

Act does not include any provision to accommodate the concept of assets sharing. The concept of non-sharing assets recognizes the need to compensate the wok performed by the requested state in tracing, freezing, and seizing of proceeds of crime of the transnational criminal organization. Thailand takes the view that the requested state has expended resources and hence it should be reasonable to allow the state the fruits of its labor.[473]

The United Nations Convention against Transnational Organized Crime clearly encourages the principle of asset sharing. This is achieved via Article 14 paragraph 3 which provides that state parties must return all confiscated property to the requesting state (the rightful owner).[474]

Accordingly, Thailand should consider amending the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992). Thailand may experience problems reciprocating when other state parties share confiscated property with Thailand. It is suggested that Thailand should follow the principle of reciprocity by returning confiscated property to its rightful owner if the requesting state must promise to render similar assistance upon receiving a request from Thailand.

In addition, the expenses involved in the process of confiscation and return of the property may be deducted at the rate applied by the requesting country. In the case of confiscated property of unknown ownership, such as money derived from the sale of narcotics, the property may be divided for the costs incurred by the state parties

[473]Tiyapan, above n 402, 5.

[474] *UNTOC* art 14 para 3.

involved.[475] Hence, it is crucial to revise the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) by amending the provision of forfeiture or seizure of properties as follows:

Part 9 Forfeiture or Seizure of Properties
Section 35 The properties forfeited by the judgment of the Court under this part shall become the properties of the State, but the Court may pass judgment for such properties to be rendered useless, or to be destroyed. If the properties forfeited by the judgment of the Court are related to transnational organized crime case, the Court may pass judgment to return the properties forfeited to the requesting state (the requesting state must promise to render similar assistance upon receiving a request from Thailand).

[475] Roujanavong, above n 430, 157.

CHAPTER 6

SPECIAL INVESTIGATIVE TECHNIQUES

Obviously, mutual legal assistance measures own their own are not enough to eradicate organized criminal groups. Transnational organized crime has the capability to adapt and resist law enforcement efforts. In response to the threat of transnational organized crime, criminal justice authorities use special tools such as covert intelligence, electronic surveillance and similar investigative techniques.[476] The following chapter, therefore, examines the provision of special investigative techniques in the United Nations Convention against Transnational Organized Crime.

6.1 Article 20: Special investigative techniques

Technological advances permit organized criminal groups to use communication technology for their illegal activities and to evade prosecution.[477] To address these problems, the United Nations against Transnational Organized crime provides techniques such as electronic surveillance, undercover operations and controlled delivery for state parties to adopt in their domestic legislation, as well as applying this provision for cooperation at the international level.[478]

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[476] *UNTOC* art 20.

[477] *Travauxpréparatoires* Article 20, Special investigative techniques, *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4 (19-29 January 1999).

[478] *UNTOC* art 20.

6.1.1 Provision in the United Nations Convention against Transnational Organized Crime

Article 20 of the United Nations against Transnational Organized Crime provides that each state party must use special investigative techniques such as controlled delivery, electronic surveillance and undercover operations for combating organized crime. Moreover, state parties have to conclude bilateral and multilateral cooperation agreements and arrangements to enable joint investigations and cross-border use of special investigative techniques as follows:

1. If permitted by the basic principles of its domestic legal system, each state party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate used of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.

2. For the purpose of investigating the offences covered by this Convention, state parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of states and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the states parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the states parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part.

6.1.2 Purpose of the convention provisions

Article 20 of the United Nations against Transnational Organized Crime was drawn from Article 11 of the 1988 Convention. However, both Articles differ in terms of application. Article 11 of the 1988 Convention focused on the use of one special investigative techniques - namely controlled delivery- at the international level, while Article 20 of the United Nations against Transnational Organized Crime examined the use of special investigative techniques at the national level and international level.[479]

During the negotiations, some delegations asked why the list of the investigative measures was not exhaustive. A non-exhaustive list was used so that the provision could be further developed in future in response to the evolution of organized crime. Accordingly, the phrase "other special investigative techniques" is used. In this way, the Convention provides an opportunity for state parties to use other special investigative techniques which are suitable for combating transnational organized crime. However, state parties must respect the territorial integrity and sovereignty of other state parties when applying this provision.[480]

The following sections of this thesis examine special investigative techniques under Thai legislation as compared with Australian legislation. The special investigative techniques

[479] *Travauxpréparatoires* Article 20, Special investigative techniques, *United Nations Convention against Transnational Organize Crime*, 1st sess, UN DOC A/AC.254/4 (19-29 January 1999).

[480] Ibid.

used in Australia are regarded as successful mechanisms for dismantling criminal activity.[481]

6.1.3 Controlled delivery

6.1.3.1 Thai Legislation

Controlled delivery is an efficient measure for arresting an entire organized criminal group. Therefore, s 20 of the Anti-Transnational Organized Crime Act B.E. 2556 (2013) stipulates the meaning of control delivery. It means the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence. Moreover, this section provides that the controlled delivery measure can be applied in the process of investigation of the transnational organized crime offence. However, the inquiry official or competent official must be authorized by the Attorney-General or Commissioner-General. The reason for this requirement is to limit and monitor the excessive power of competent official. In addition, the authorization of controlled delivery measure must be under the Regulation of the Public Prosecutor and must also approved by a cabinet.[482]

However, the above mentioned provision just started applying at the beginning, Therefore, looking to controlled delivery in Australia is still beneficial for Thailand. Due

[481] Standing Committee of Attorneys-General and Australasian Police Minister Council Joint Working Group on National Investigation Powers, *Discussion Paper on Cross-border Investigative Powers for Law enforcement*, 1 <http://www.ag.gov.au> at 10 September 2013.

[482] *The Anti-Transnational Organized Crime Act B.E.2556 (2013)* s 20.

to Australia applies the measure of controlled delivery in many different types of cases such as money laundering, all forms of trafficking, smuggling people, corruption and bribery and so on. The notion of "controlled delivery" is thus given a much wider application. The following section, therefore, examines controlled delivery in Australia with the aim of discovering techniques which can be used in Thailand. Where appropriate, recommendations for reform will be made throughout the discussion.

6.1.3.2 Comparative Law

A controlled operation in Australia is a successful law enforcement mechanism and permits law enforcement agencies to dismantle criminal activity that transnational organized crime.[483] A controlled delivery is:

> [a]n investigative method used by law enforcement agencies to identify suspects, obtain evidence and allow suspects to be prosecuted. It may be used to investigate a range of criminal offences such as murder, money laundering, forms of trafficking, smuggling, corruption and bribery. The aim of a controlled operation is often to gather evidence and intelligence against those who organize and finance crime, rather than merely focusing on couriers and intermediaries.
>
> In a controlled operation, instead of seeking to terminate immediately a criminal scheme, law enforcement officers allow the scheme to unfold under controlled conditions. During the process of allowing the scheme to unfold, an informant, agent or undercover police officer may themselves need to commit offences (for example, they may need to possess or sell an illicit drug).[484]

Although controlled operations have been used in law enforcement for many years, there was no legislation involving controlled operations until 1995. Until that time, police

[483] Australia Commission for Law Enforcement Integrity, *Australia Government Controlled operations Annual Report 2011-2012* <http://www.aclei.gov.au> at 10 September 2013.

[484] Standing Committee of Attorneys-General and Australasian Police Minister Council Joint Working Group on National Investigation Powers, above n 481, 2.

operatives who became involved in criminal activities as part of an operation were in some circumstances liable to be charged with criminal offences and relied on other police and prosecutors to refrain from charging and prosecuting them with offences arising from their work.[485] However, this approach changed in 1995 following the High Court decision in *Ridgeway v. R*.[486]

In *Ridgeway v. R*, the Australian Federal Police (AFP) were informed by Malaysian authorities that Ridgeway was seeking to arrange, through informers (Chong and Lee), the purchase of heroin for importation into and sale within Australia. The informers, acting with the cooperation of AFP, then imported heroin and handed over it to Ridgeway who was arrested by AFP for importing heroin.

Ridgeway appealed to the High Court against his conviction. The issue at appeal was whether the court should have excluded evidence unlawfully obtained, or stayed the proceedings as an abuse of process. The High Court held, by majority, that proceedings should have been stayed and quashed Ridgeway's conviction.[487]

As a result of the *Ridgeway* decision, a number of Australian jurisdictions (South Australia 1995, the Commonwealth 1996, New South Wales in 1997 and Queensland in

[485] See for example the Victorian Prosecutorial Guidelines published in the Director of Public Prosecutions, Annual Report 2000/01.

[486] Base on the High Court's decision in *Ridgeway v R* (1995) 184 CLR 19; (1995) 129 ALR 41, <http://www.austlii.edu.au>.

[487] *Ridgeway v R* (1995) 184 CLR 19, 44 (Mason CJ, Deane and Dawson JJ), 54 (Brennan J), 64-5 (Toohey J), 78 (Gaudron J).

2000)[488] enacted legislation providing for controlled operations. The purpose of these provisions is to authorize otherwise illegal activities by law enforcement agencies.

Commonwealth of Australia

In Australia, the Commonwealth Parliament passed Part 1AB of *the Crimes Act 1914* which provides that a controlled operation can be undertaken with respect to any serious Commonwealth offence or serious state offence that has a federal aspect.[489] Under Part IAB of *the Crimes Act 1914* (the Act), controlled operations can be undertaken with respect to any serious Commonwealth offence or serious state offence that has a federal aspect. A controlled operation is defined by the Act as one that:

(1) involves the participation of law enforcement officers; and

(2) is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence[490] or a serious state offence that has a federal aspect; and

(3) may involve a law enforcement officer or other person in conduct that would apart from section 15HA constitute a Commonwealth offence or an offence against a law of a state or territory.

A major controlled operation is a controlled operation that is likely to:

(1) involve the infiltration of an organized criminal group by one or more undercover law enforcement officers for a period of more than seven days; or

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[488] *Criminal Law (Undercover Operations) Act 1995*(SA); *Crimes Act 1914* (Cth) Part 1AB; *Law Enforcement (Controlled Operations) Act 1997* (NSW); *Police Powers and Responsibilities Act 2000* (QLD) Chapter 5.

[489] *The Crimes Act 1914* Part 1AB.

[490] *The Crimes Act 1914* (Cth) s 15HB
A serious Commonwealth offence means an offence against a law of the Commonwealth:
(1) that involves: theft; fraud; tax evasion; currency violations; controlled substances; illegal gambling; obtaining financial benefit by vice engaged in by others; extortion; money laundering; perverting the course of justice; bribery or corruption of , or by, an officer of the Commonwealth, of a state or of a territory; bankruptcy and company violations; harbouring of criminals; forgery (including forging of passports); armament dealings; illegal importation or exportation of fauna into or out of Australia; espionage, sabotage or threats to national security; misuse of computer or electronic communications; people smuggling; slavery; piracy; the organization, financing or perpetration of sexual servitude or child sex tourism; dealings in child pornography or material depicting child abuse; importation of prohibited imports; exportation of prohibited exports; violence; firearms; or that involves a matter that is of the same general nature as a matter mentioned in one of the preceding paragraphs; or
(2) that is punishable on conviction by imprisonment for a period of three years or more.

(2) continue for more than three months; or

(3) be directed against suspected criminal activity that includes a threat to life.

Section 15GC of the Crime Act 1914 provides the Australian law enforcement officer is the mainly authority which is responsible for authorization the conduct of controlled operation.[491]

Applications for Controlled Operations

Applications for authorities to conduct controlled operations can be divided into two types as follows: a formal application for an authority may be made by an Australian law enforcement officer by means of a written document. An application made orally, in person or by telephone or any other means of communication, on the other hand is an urgent application. However, an urgent application must be followed up in writing within seven days.[492]

The form and content of a controlled operation authority are required to include the name of the applicant, certain information concerning the illicit goods, identity of persons authorized to engage in controlled conduct and the nature of the criminal activity the controlled operation is targeting.[493]

[491] *The Crimes Act 1914* s 15GC.

[492] *The Crimes Act 1914* s 15GH.

[493] *The Crimes Act 1914* s 15GK.

An urgent controlled operation authority can only remain in force for up to 7 days.[494] While a formal or major controlled operation authority may be in force for up to 3 months from the date it was given unless a variation application to extend the authority is made within the last 2 weeks of the period of effect.[495]

Accountability and Monitoring Regime

As soon as practicable after 30 June in each year, the Chief Officer of each authorizing agency must submit a report to the Minister and ombudsman in relation to controlled operations for which the agency was the authorizing agency during the previous 12 months.[496]

New South Wales (Law Enforcement Controlled Operations) Act 1997

The Law Enforcement (Controlled Operations) Act 1997 was proclaimed on 1 March 1998. The Act aims to provide law enforcement agencies with the investigative tools they need to effectively investigate serious crime, particularly organized crime and drug trafficking and provide a strict system of accountability for the approval of controlled operations[497] and the conduct of controlled activities by ensuring that authorizations are granted only in accordance with statutory guidelines [498] and by providing external monitoring of compliance with these requirements by the New South Wales

[494] *The Crimes Act 1914* s 15GH (4)(c)(ii).

[495] *The Crimes Act 1914* s 15GH (4)(c)(i).

[496] *The Crimes Act 1914* s 15HN.

[497] NSW Ombudsman, Annual Report 2011-2012 Law Enforcement (Controlled Operations), December 2012, 4 <http://www.ombo.nsw.gov.au> at 10 September.

[498] *The Law Enforcement (Controlled Operations) Act 1997* s 6, 7.

Ombudsman.[499] Moreover, the Act protects officers by providing an indemnity against departmental, criminal or civil prosecution for all controlled activities they undertake.[500]

The Act enables the chief executive officer (CEO) or delegate of a prescribed law enforcement agency to authorize the conduct of a controlled operation for a number of purposes. They are:[501]

(a) obtaining evidence of criminal activity or corrupt conduct, or

(b) arresting any person involved in criminal activity or corrupt conduct, or

(c) frustrating criminal activity or corrupt conduct, or

(d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c).

being an operation that involves, or may involve, a controlled activity.

Who can conduct controlled operations?

Section 5 of *the Law Enforcement (Controlled Operations) Act 1997* stipulates that a law enforcement officer of a law enforcement agency[502] can apply to the Chief Executive

[499] *The Law Enforcement (Controlled Operations) Act 1997* part 4 monitoring of controlled operations ss 21-24.

[500] *The Law Enforcement (Controlled Operations) Act 1997* s 20M.

[501] *The Law Enforcement (Controlled Operations) Act 1997* s 3.

[502] Law enforcement agencies are empowered to authorized and conduct controlled operations. Section 3 of *the Law Enforcement (Controlled Operations) Act 1997* defines a law enforcement agency as:
(a) the NSW police Force
(b) the Independent Commission Against Corruption
(c) the New South Wales Crime Commission
(d) the police Integrity Commission

Officer (CEO) of the agency for authority to conduct a controlled operation.[503] The Act and the Regulations permit the CEO to delegate his or her functions under the Act,[504] but only in a limited manner. In the case of the NSW Police Force, the Act permits the Commissioner to delegate his functions to officers of the rank of Deputy Commissioner, Assistant Commissioner and to two named Superintendents (in practice these have been Chief Superintendents).[505]

Applications to conduct controlled operations

The application to conduct a controlled operation can be divided into two types: formal applications or non-urgent applications. A formal application can be submitted by a written application to the Chief Executive Officer (CEO) or delegate. An urgent application, on the other hand, can be made orally in person, over the phone or via 2-way radio. Urgent applications can be made where the urgency of circumstances makes a formal application impractical.[506] Written notes of an urgent application must be kept,

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(e) such of the following agencies as may be prescribed by the regulations as law enforcement agencies for the purposes of this Act:
(i) the Australian Federal Police
(ii) the Australian Crime Commission
(iii) the Australian Custom Service.

[503] *The Law Enforcement (Controlled Operations) Act 1997* s 5.

[504] *Clause 14 of the Law Enforcement (Controlled Operations) Regulation 2007* permits the respective the Chief Executive Officer (CEO) to delegates to:
- Independent Commission Against Corruption: Assistant Commissioner
- Police Integrity Commission: Assistant Commissioner
- NSW Crime Commission: Director
- Australian Federal Police: the member responsible for the AFP in NSW
- Australian Crime Commission: Director, National Operations; General Manager, National operations; an SES employee of the ACC
- Australian Customs Service: Regional Director (NSW)

[505] *The Law Enforcement (Controlled Operations) Act 1997* s 29.

[506] *The Law Enforcement (Controlled Operations) Act 1997* s 5.

being: the date and time the application was made, the identity of the applicant and the information given to the CEO in the support of the application.[507]

Section 8 of *the Law Enforcement (Controlled Operations) Act 1997* sets out the information that must be provided to the authorizing officer in an application to conduct a controlled operation.[508] When a controlled operation is approved, these completed forms must be provided to the NSW Ombudsman. Further information is also provided to the Ombudsman at the completion of an operation.[509]

In addition, Part 3A of the aforementioned Act provides the process by which cross-border controlled operations can be authorized. The Act defines a cross-border controlled operations as "…a controlled operation that is, will be, or is likely to be, conducted in this jurisdiction and in one more participating jurisdictions".[510]

The Act recognizes the controlled operations legislation of a number of other Australian jurisdictions (specially, the Commonwealth, Queensland, Victoria, the ACT and Tasmania). This means that those jurisdictions can conduct controlled operations within NSW in accordance with their own controlled operations regimes. NSW will recognize an authorization under those interstate Acts as having the same effect as one issued under NSW legislation. In addition, other jurisdictions also recognize NSW controlled

[507] *The Law Enforcement (Controlled Operations) Act 1997* s 5.

[508] *The Law Enforcement (Controlled Operations) Act 1997* s 8.

[509] *The Law Enforcement (Controlled Operations) Act 1997* s 21.

[510] *The Law Enforcement (Controlled Operations) Act 1997* s 3.

operations legislation. This means that NSW law enforcement officers can conduct controlled operations in those other states, in accordance with NSW legislation.[511]

However, s 7 of the Act stipulates that the controlled operation conduct cannot be authorized in some circumstances. The provision is extracted below:[512]

> (1) An authority to conduct a controlled operation must not be granted in relation to a proposed operation that involves any participant in the operation:
>
> (a) inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that other person could not reasonably be expected to engage in unless so induced or encouraged, or
>
> (b) engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property, or
>
> (c) engaging in conduct that involves the commission of a sexual offence against any person.
>
> (2) A person must not be authorized to participate in a controlled operation unless the chief executive officer is satisfied that the person has the appropriate skills to participate in the operation.
>
> (3) A civilian participant:
>
> (a) must not be authorized to participate in any aspect of a controlled operation unless the chief executive officer is satisfied that it is wholly impracticable for a law enforcement participant to participate in that aspect of the operation, and
>
> (b) must not be authorized to engage in a controlled activity unless it is wholly impracticable for the civilian participant to participate in the aspect of the controlled operation referred to in paragraph (a) without engaging in that activity.

It can be seen that ss 6 and 7 of the law Enforcement (Controlled Operations) Act 1997 address various issues stemming from the *Ridgeway v. R.* judgment that differentiate legitimate covert investigations from entrapment.[513] Section 7 of the Act specifically

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[511] NSW Ombudsman, above n 497, 4.

[512] *The Law Enforcement (Controlled Operations) Act 1997* s 7.

[513] Entrapment is usually used as a pejorative term, referring to actions which are improper. There are some acceptable ways in which offences may be facilitated or induced in order to gain evidence for their prosecution. For example, a covert operative may offer to purchase a product or service from someone suspected of breaching the terms of a licence or may offer a bribe to an official suspected of corruption. Depending on the circumstances, such investigative practices may involve what would technically be unlawful participation in the resulting offences under general principles of secondary liability. Yet, few people would criticize such investigative practices if there were a reasonable suspicion of criminal activity, if there were no other viable way of obtaining evidence for a prosecution, and if the operative was to do no

provides that an authority to conduct a controlled operation cannot be granted where proposed operations involves inducing or encouraging any other person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless do induced or encouraged.[514]

For the application approval process, the Chief Executive Officer (CEO) or nominated delegates are the only persons who can approve the controlled operations conduct. In order to approve a controlled operation, the CEO or delegate must be furnished with specific information under s 5 that the need to provide a full copy of the operational detail in the application creates an unnecessary administrative burden and adds to the risk of administrative error, while adding little to advance the object of the Act.[515]

Accountability and Monitoring Regime

The Act provides broad powers to the Ombudsman to review controlled operations. The Ombudsman has discretion to choose the best manner in which to exercise oversight. For example, the Act requires the Ombudsman to inspect the records of each law enforcement agency at least once every 12 months.[516] The Ombudsman may also inspect the records of

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more than provide an opportunity for the offence to occur under controlled circumstances. Where, however, evidence is sought by improperly facilitating or inducing the commission of offences, the term entrapment may be used to describe what has happened. Colvin, above n 22, 4

[514] NSW Ombudsman, above n 497, 4.

[515] *The Law Enforcement (Controlled Operations) Act 1997* s 5 (2A) states that "in any application, whether formal or urgent, the applicant must provide the following particulars:
(a) a plan of the proposed operation,
(b) the nature of the criminal activity or corrupt conduct in respect of which the proposed operation is to be conducted,
(c) the nature of the controlled activity in respect of which an authority is sought,
(d) a statement of whether or not the proposed operation, or any other controlled operation, with respect to the same criminal activity or corrupt conduct, has been the subject of an authority and, if so, whether or not the authority was given or variation granted.

[516] *The Law Enforcement (Controlled Operations) Act 1997* s 22 (1)(a).

any law enforcement agency at any time to determine whether the requirements of the Act are being met.[517]

Furthermore, the Ombudsman may require the chief executive officer to furnish such information concerning the authority, variation or report as is necessary for the Ombudsman's proper consideration.[518] These broad powers along with the expertise and experience of the staff of the Ombudsman's office make the Ombudsman the appropriate body to oversee controlled operations.[519]

To monitor the conduct of a controlled operation, the CEO of a law enforcement agency has a duty to notify the Ombudsman whenever an authority is granted or varied and when a report on the conduct of an operation is received. The time limit for providing such notifications to the Ombudsman is 21 days for both authorizations and reports on conduct. [520] Written notice of a retrospective authority must be provided to the Ombudsman as soon as practicable and no later than 7 days after the authority is granted.[521]

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[517] *The Law Enforcement (Controlled Operations) Act 1997* s 22 (1)(b).

[518] *The Law Enforcement (Controlled Operations) Act 1997* s 21 (2).

[519] NSW Ombudsman, above n 497, 4.

[520] *The Law Enforcement (Controlled Operations) Act 1997* s 21.

[521] *The Law Enforcement (Controlled Operations) Act 1997* s 21 (1B).

The Ombudsman may report to Parliament at any time via a special report. The Ombudsman is also required to provide an annual report to Parliament on the Ombudsman's work and activities under the Act. Confidentiality safeguards are built in.[522]

As mentioned above, the controlled delivery legislation in Australia contains a rigorous approvals process and adequate accountability and scrutiny mechanisms. Thus, it is useful for Thailand to adopt with any necessary adaptations and use Australian law as a guide in this context. The cognate Australian legislation allows for the use of controlled delivery in Australia in a wide variety of different settings. Conversely, in Thailand, the cognate measure of controlled delivery is highly limited in terms of its scope and, as mentioned earlier, can apply only in case involving drug trafficking. It is recommended that Thailand may look to Australian legislation when considering reforms in this field of law. It is argued that Thailand would benefit from introducing a new provision in its law which would explain the procedure and reasons for approval for controlled delivery, including the operational plan. However, both, monitoring and accountability safeguards must be built in to prevent misuse of the procedure.

The next section in this thesis considers the role that undercover operations play in investigating crime. Undercover operations constitute a second class of special investigative techniques which are useful for law enforcement agencies. Agencies can use this technique to obtain evidence. This is usually done by infiltrating an organized criminal groups via an undercover operative. However, infiltration in criminal activity may affect the safety of the undercover operative. Thus, the legislation should allow the

[522] See *Ombudsman Act 1974 (NSW)* ss 30 (2) and 31 AA.

police or other law enforcement officials acting under an assumed identity to protect their safety. The discussion below, therefore, examines Thai legislation which involves undercover operations. Again, where appropriate, relevant recommendations for reform will be made.

6.1.4 Undercover Operations

6.1.4.1 Thai Legislation

In Thailand, undercover operations can be conducted under the Director General of Special Investigation and the person(s) assigned by him. The Director General is competent to give any persons the permission to conduct the special investigation by undercover operations into any organization or any group for the purposes of searching and gathering evidence and providing the document or any evidence by means of the special investigation.[523]

Further, the regulation of the Department of Special Investigation governing evidence of assumed identity provides that:[524]

> 1) The Director-General or the Deputy Director-General can approve the production of evidence of assumed identity for the purpose of investigation.

[523] *The Special Case Investigation Act B.E. 2547 (2004)* s 27 "If it is necessary and to benefit the compliance with this Act, the Director-General or person designated thereby shall have a power to have anyone prepare a document or evidence or falsify his/her identity in an organization or a group of people for the benefit of the investigation, which however shall be according to the regulations provided by the Director-General.
When preparing such document or evidence or when falsifying his/her identity in a particular organization or a group of persons for the purpose of the investigation as stated in paragraph one, this action shall be considered legitimate."

[524] *The regulation of the Special Investigative Department relating to evidence of assumed identity B.E. 2548 (2005)* s 54.

> 2) The Director-General or the person assigned by him is competent to give any persons permission to conduct the special investigation by undercover operations into any organization or any group for the purposes of searching and gathering evidence and providing the document or any evidence by means of the special investigation.
>
> The Director-General has to authorize the registrar to keep all the evidence of assumed identity for the purpose of controlling and monitoring transparency.[525]

Moreover, the Special Investigative Department can cooperate with other agencies to execute the special investigation. The Special Case Investigation Act B.E. 2547 (2004) gives the Board of Special Case (BSC) power to issue regulations and to ask other government officials to join the special investigations.[526] For a case involving drug trafficking, the authority of the undercover operations can be executed by obtaining written permission from the National Police Commander, the Secretary General of the Counter Drugs Commission or person entrusted by him.[527]

In addition, in urgent circumstances, an authority may authorize undercover operations for the sake of investigation of any offence under the drug-related law but the authority

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[525] Ibid.

[526] *The Special Case Investigation Act B.E. 2547 (2004)* s 22/1 (added by s 9 of *the Special Case Investigation Act (No.2), B.E. 2551 (2008)*) "In performing tasks to prevent and suppress the crimes related to special case, the Department of Special Investigation may request state agencies or other state officials to provide assistance or, support, or engage in joint operation as appropriate.
For the benefit of the efficient execution of this Act, the state agencies or state officials in paragraph one shall provide assistance or support, or engage in joint operation where circumstances warrants, and be entitled to receive reimbursement for the expense or other remuneration as required to provide such service."

[527] *Drug Case Procedure Act B.E. 2550 (2007)* s 7 states "In case of necessity and for the purpose of enforcing this Act, an authority having obtained written permission of the National Police Commander, Secretary General of the Counter Drugs Commission or person entrusted by him, as the case may be, may conduct undercover operations in order to investigate any offence under the drug-related law.
Undercover operations means any action the status or objectives of which are kept confidential and which is carried out in the manner deviating the understanding of another or concealing the truth about the performance of public duty of the authority.
In case of an urgent need on the reasonable basis, an authority may render undercover operations for the sake of investigating any offence under the drug-related law and later, but without delay, refer the matter to the person empowered to grant permission pursuant to paragraph 1.
Permission and undercover operations referred to in paragraph 1, as well as the action set forth in paragraph 3, shall be subject to the criteria, procedure and conditions determined in the ministerial regulations which must, at least, provide the measures for controlling and scrutinizing the exercise of power.
The facts ascertained and the evidence obtained by the authorities through their undercover operations under this section shall be admissible."

has to notify the National Police Commander, Secretary General of the Counter Drugs Commission or a person entrusted by him to grant permission without delay.[528] The facts ascertained and the evidence obtained by the authorities through their undercover operations under this Act can be admissible[529] except in cases of evidence obtained through unlawful process or entrapment.[530]

It is relevant to point out at this juncture that a research project has reached a conclusion that under the Act of Special Investigation B.E. 2547 (2004), the Director General of Special Investigation and the person assigned by him are competent to give any persons permission to conduct the special investigation.[531] The aforementioned power of the Director General is not transparent. This is because no authority can inspect the Director General of Special Investigations performance.[532]

In practice, there is a problem in cooperation between government agencies. For example in one case, a special case officer sent a civil participant to work as an informant for the Special Investigative Department (DSI) in a Southern province.[533] But the undercover operative was arrested by the police, even though he told the police that he was an

[528] Ibid.

[529] Ibid.

[530] The court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

[531] *The Special Case Investigation Act B.E. 2547 (2004)* s 27.

[532] Police Lieutenant-Colonel Worrakiat Nuansuwan, *Undercover Investigation* (2005), LLM thesis, Faculty of Law Chulalongkorn University, 22.

[533] Ibid, 40.

undercover operative for DSI. The police did not believe him as he had no document to prove his status. Later, DSI had to send a special case officer to confirm his status.[534]

The problem in this case arose because of the lack of co-operation between the DSI and the police in the Southern Province.[535] The result is sub-optimal efficiency of the special investigation and the safety of the undercover operative. There is no law to protect the official or the civilian participant who acts as an undercover operative. This prejudices the safety of the undercover operative. Accordingly, it is argue that, where the undercover operative is a police officer or a civilian participant, he or she should be protected from criminal liability if the act or omission was necessary to protect a person's safety, or to protect the identity of a covert operative, or take advantage of an evidence gathering opportunity in relation to an organized crime offence.

Moreover, section 19 of the Anti-Transnational Organized Crime Act B.E. 2556 (2013) involves undercover operations which can be used as a special legal measure to investigate for transnational organized crime case. The undercover operations means any action the status or objectives of which are kept confidential and which is carried out in a

[534] Ibid.

[535] As already stated in chapter Four, The Royal Thai Police force is responsible for offering protection to witnesses, with this protection offered by police who have jurisdiction throughout the country. While the Department of Special Investigation of Ministry of Justice is responsible for offering protection to witnesses under specific crimes, such as Financial and Banking crimes, Intellectual Property Rights crimes, Taxation crimes, Consumer Protection and Environmental crimes, Technology and Cyber or Computer Crimes, Corruption in Government Procurement, and other serious crimes that have a seriously negative effect on public peace and order, the morals of the people, national security, international relations, and the economic or financial system.

manner deviating the understanding of another or concealing the truth about the performance of public duty of the authority.[536]

Moreover, this Act provides that the undercover operations can operate when necessary and beneficial for investigation participation in an organized criminal group offence. The Attorney-General, the Commissioner-General or assigned person can authorize another person to create documents or evidence for undercover operations under Regulation of Attorney-General. [537] The documents, evidence or undercover operations for the achievement of investigative purpose shall be considered legitimate.[538]

The following section examines the law governing undercover operations in Australia. The object of the laws, *inter alia*, is to protect the real identity of undercover operatives for the purpose of gathering evidence. These laws are discussed and some comparisons between Australian and Thai provisions are made, where appropriate. It is suggested that Thailand may possibly look to Australia when reforming some of its laws governing undercover operations.

[536] *The Anti-Transnational Organized Crime Act B.E.2556 (2013)* s 19 para 2.

[537] *The Anti-Transnational Organized Crime Act B.E.2556 (2013)* s 19 para 1.

[538] *The Anti-Transnational Organized Crime Act B.E.2556 (2013)* s 19 para 3.

6.1.4.2 Comparative Law

The Australian Approach

The purpose of undercover operations is to obtain evidence, arrest any person engaged in criminal activity or corrupt conduct, or carry out an activity reasonably necessary to facilitate the achievement of those purposes. It is a powerful investigative methodology used in situations where more conventional investigative approaches are impractical or unlikely to succeed. Moreover, undercover operations can be of considerable benefit to investigators because they produce evidence that is often incontrovertible.[539] The Australian legislation, therefore, has been drafted in a manner which takes into account the inherent purpose of undercover operations.

Commonwealth of Australia

Under the Crimes Act 1914, Part IACA the real identity of an undercover operative, who is or was using an assumed identity, is protected from disclosure. Section 15ME of the Crimes Act 1914 states that a witness protection identity certificate must be issued by the Chief Executive Officer of a law enforcement agency or his delegation when the chief officer is satisfied on reasonable grounds that disclosure of the operative's identity is likely to (i) endanger the safety of the operative or another person: or (ii) prejudice any current or future investigation; or (iii) prejudice any current or future activity relating to security.[540] These certificates aim to prevent the disclosure of an operative's true identity in any court proceedings or judicial process. The certificate may not be examined or

[539] The product of covert investigation is very often incontrovertible evidence which the defence would undoubtedly regard as prejudicial to any protestations of innocence. Sharpe, above n 23, 64.

[540] *The Crimes Act 1914* (Cth) s 15ME.

questioned beyond its face and allows operatives to give sworn evidence under an assumed identity.[541]

Moreover, the Act exempts law enforcement officers from legal liability when engaged in undercover operations that involve unlawful activities.[542] The Act stipulates that anything done by an officer of an authorized agency, or an employee of a government or private body committed in good faith and for the purpose of executing tasks assigned to them under the Act, will not subject that person to any action, claim or liability.[543]

However, in some circumstances civilians may participate in a controlled operation as agents of the authorizing law enforcement agency.[544] In this case, the authorized civilian is not criminally responsible for the offence if the offence is done under any direction of his or her supervisor[545] under the authority.[546]

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[541] AFP Governance, National Guideline on Assumed Identities (2010) <http://www.afp.gov.au> at 15 September 2013.

[542] Paul Marcus and Vicki Waye, 'Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds' (2004) 12 Tulane Journal of International and Comparative Law 75, <http://scholarship.law.wm.edu/facpubs/224> at 15 September 2013.

[543] *The Crimes Act 1914* (Cth) s 15KR.

[544] *The Crimes Act 1914* (Cth) section 15ME (c) "if the application is for authorization of an assumed identity for a person who is not an officer of either an intelligence agency or a law enforcement agency—that it would be impossible or impracticable in the circumstances for an officer to acquire or use the assumed identity for the purpose sought."

[545] *The Crimes Act 1914* (Cth) s 15KB (3) "If an authority is granted for an authorized civilian, the chief officer must appoint an officer of the law enforcement agency or the intelligence agency (as the case may be) to supervise the acquisition or use of the assumed identity by the authorized civilian."

[546] *The Crimes Act 1914* (Cth) s 15KQ.

Accountability and Monitoring Regime

The Chief Executive Officer of either law enforcement agency or an intelligence agency must keep a record of every assumed identity approval, variation or revocation and these records must be audited at least once every 6 months by a person appointed by the chief executive officer.[547]

Moreover, the chief officer of a law enforcement agency must make an annual report containing information on the number of assumed identity approvals granted or revoked, as well as the general nature of the duties undertaken by the officers concerned and whether any fraudulent or other criminal behavior was revealed in the most recent audit. The report must be submitted to the Minister.[548]

The chief officer of an intelligence agency must make an annual report containing information on the number of assumed identity approvals granted or revoked, the general nature of the duties undertaken by the officers concerned and whether any fraudulent or other criminal behavior was revealed in the most recent audit. The report must be submitted to the Inspector-General of Intelligence and Security.[549]

[547] *The Crimes Act 1914* (Cth) s 15LG.

[548] *The Crimes Act 1914* (Cth) s 15LD.

[549] *The Crimes Act 1914* (Cth) s 15LE.

New South Wales (The Law Enforcement and National Security (Assumed Identities) Act 2010

An assumed identity is crucial in the use of undercover operations where officers are required to infiltrate criminal groups and where there is a need to protect witnesses in these cases. The *Law Enforcement and National Security (Assumed Identities) Act 2010* allows certain authorized state and Commonwealth agencies to request false identity documents from the New South Wales and Commonwealth government for the purpose of investigating an offence or gathering intelligence and performing support related activities and to safely administer the witness protection programs.[550]

The Act provides that the Chief Executive Officer of an authorized agency may grant approval for the acquisition and use of an assumed identity in New South Wales. The approval authorizes the officer to whom it applies to acquire an assumed identity specified in the approval and to use that identity when carrying out the officer's official duties.[551]

Furthermore, the *Law Enforcement and National Security (Assumed Identities) Amendment Bill 2013*, provides a function for law enforcement and intelligence agency to facilitate their work in infiltrating criminal organization and protecting witnesses that require such protection as follows:[552]

[550] Parliament of New South Wales, *Law Enforcement and National Security (Assumed Identities) Bill 2010*, <http://www.parliament.nsw.gov.au> at 9 October 2013.

[551] *Law Enforcement and National Security (Assumed Identities) Bill 2010* s 5.

[552] Parliament of New South Wales, above n 550, 1.

1) The chief executive officer may delegate five delegations[553] to assist in the creation, management and cancellation of assume identities.

2) The Australian Security Intelligence Organization (ASIO) and the Australian Secret Intelligence Service (ASIS) can authorize entries for assumed identities to be made in the Births, Deaths and Marriages Register and such entries can be cancelled as required.[554]

Cross-Border Provisions

Cross-border provisions[555] were first introduced on 29 September 2010 to facilitate cross-border recognition of assumed identities.[556] Achieving the cross-border recognition of assumed identities is the key purpose of this Act. This is because the Commonwealth does not administer a register of births, deaths and marriages. Commonwealth agencies rely on mutual recognition provisions of State and Territory assumed identities laws to obtain evidence to support their assumed identity authorities.[557] For example, this provision allows the NSW Police Force to request a driver license registry in another jurisdiction to issue a driver license in the assumed name of an undercover officer from the NSW Police Force. As the Commonwealth does not administer a register of births, deaths and marriages, Commonwealth agencies rely on mutual recognition provisions of State and Territory assumed identities laws to obtain evidence to support their assumed

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[553] *Law Enforcement and National Security (Assumed Identities) Amendment Bill 2013* schedule 1[3] The amendments increase from four to five the number of delegations of a chief officer's functions under the principal Act that may be in force at any one time in respect of a law enforcement agency. The reason for increasing the number of delegation of a chief officer's is the growth of cybercrime, the New South Wales Police Force needs assumed identities to investigate cybercrimes such as fraud perpetrated through social media sites. According to the Federal Attorney-General, identity theft. The increase of delegation enables the Commissioner for Police to delegate his or her powers to a senior officer within field operations, in addition to those powers already delegated to senior officers within specialist operations. Tim Owen, *Law Enforcement and National Security (Assumed Identities) Amendment Bill 2013*, <http://www.timowen.com.au/site/index.cfm?module> at 13 October 2013.

[554] *Law Enforcement and National Security (Assumed Identities) Amendment Bill 2013* schedule 1 [2].

[555] *Law Enforcement and National Security (Assumed Identities) Bill 2010* ss 27, 28.

[556] Owen, above n 553, 6.

[557] Parliament of New South Wales, above n 550, 1.

identity authorities. New South Wales has prescribed every other jurisdiction's equivalent assumed identities laws as corresponding laws, except for Western Australia.[558]

Accountability and Monitoring Regime

- The applications for orders to make or cancel entries for assumed identities in the Births, Deaths and Marriages Register must be heard in the chambers of the judge authorized under the principal Act to hear such applications and not in open court.[559] This is because the creation of an assumed identity must be done with a high degree of confidentiality.
- The Chief executive officer must keep a record of every assumed identity approval, variation or revocation and these records must be audited after the end of each financial year by a person appointed by the chief executive officer.[560] Every authorized agency must make an annual report containing information on the number of assumed identity approvals granted or revoked, as well as the general nature of the duties undertaken by officers conducts during undercover operations.[561] Furthermore, the Act requires a review of the Act 12 months after its commencement to determine if the policy objectives of the Act remain valid and

[558] Owen, above n 553, 6.

[559] *Law Enforcement and National Security (Assumed Identities) Amendment Bill 2013* schedule 1[1] requires applications for orders to make or cancel entries for assumed identities in the Births, Death and Marriages Register to be heard in the chambers of judge authorized under the principal act to hear such applications and not in open court. This amendment will mean that full confidentiality and integrity of the operation will remain intact as the applications will not be listed in the Supreme Court's schedule. The Supreme Court will institute procedures that will guarantee confidentiality, as some of the undercover operatives may use assumed identities where they need to have direct contact with suspects such as suspected drug or paedophile rings. Owen, above n 553, 6.

[560] *Law Enforcement and National Security (Assumed Identities) Bill 2010* s 35.

[561] *Law Enforcement and National Security (Assumed Identities) Bill 2010* s 36.

whether the terms of the Act remains appropriate for securing those objectives. Reviews are review conducted by the Inspector of the New South Wales Police Integrity Commission.[562]

- The chief officer who grants an authority must cancel the use of the assumed identity if it is no longer necessary.[563] This requirement will improve the security of the cancellation of the assumed identity when it is no longer required.

In this context it is also important to note that the conduct of undercover operation involves significant intrusions into people's private lives.[564] For example, when law enforcement officials have involved themselves too substantially in the criminal activity for which they seek to prosecute the defendant they can intrude into people's private lives. Moreover, some commentators have pointed out undercover operations by their very nature carry a risk that significant harm may occur since they necessarily involve an element of deception and secrecy.[565] This has resulted in the withdrawal of public cooperation with government agencies.[566] Similarly, Asworth warns that there is a:[567]

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[562] Report of the Inspector of the Police Integrity Commission, New South Wales, *Review of the Law Enforcement and National Security (Assumed Identities)* Act 1998 (April 2000).

[563] *Law Enforcement and National Security (Assumed Identities) Bill 2010* s 9 (1)(b).

[564] Edwin W.Kruisbergen, Edward R. Kleemans and Deborah de Jong, 'Controlling Criminal Investigations: The Case of Undercover Operations' (2012) 6 *A Journal of Policy and Practice* 401-2; Jed Rubenfeld, 'The End of Privacy' (2008) 61 *Standford Law Review* 133.

[565] See Elizabeth E. Joh, 'Breaking The law to Enforce It: Undercover Police Participation in Crime' (2009) 62 *Stanford Law Review* 160-1; Vick Conway and P.J Dermont, 'Current Developments in Police Governance and Accountability in Ireland' (2011) 55 *Crime, Law and Social Change* 247-251; Ross J. E, 'Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint' (2008) 4 *Annual Review of Law and Social Science* 263-65.

[566] See Jona Goldschmidt and Anon, 'The Necessity of Dishonesty: Police Deviance, "Making the Case", and the Public Good' (2008) 18 *Policing and Society: An international Journal of Research and Policy* 113.

[567] Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell, 2002) 107.

> …need to be on guard against the covert expansion of the categories of cases to which exceptional and intrusive investigation methods apply. Just because some method can be used does not mean it should be used.

It is suggested that government agencies cognizant of the above concerns ought to enact provisions which includes these four principles:[568]

- Evidence to sustain a prosecution or intelligence to facilitate investigation management must be obtained in a manner that preserves the integrity of the criminal justice system and its actors.
- Statutory rights of the suspect should not be breached except when the following criteria are met in full: the rights are qualified, *breach is necessary* and there is statutory authority to do so.
- The rights and privacy of those citizens not suspected of criminal conduct must be protected: collateral harm as a consequence of covert investigation should be minimized through effective investigation management.
- The professional integrity of investigators must be demonstrated, or, if necessary, its absence exposed.

Overall, it can be seen that controlled operations and undercover operations are an important investigation tool for suppression organized crime in Australia. This is because both measures allow law enforcement agencies to infiltrate criminal groups especially those engaged in drug trafficking and organized crime. This has resulted in obtaining evidence to prosecute criminal offences or expose corrupt conduct. The next section moves on to consider the regulation of undercover operations under Thai legislation. The

[568] Clive Harfield and Karen Harfield, *Covert Investigation*, (Oxford University Press, 2nd, 2008), 17-20.

discussion raises the most pertinent issues that arise in this context. Where appropriate relevant recommendations for reform are made.

6.1.5 Interception of Communication and Electronic Surveillance

6.1.5.1 Thai Legislation

The interception of communications can be used for obtaining information relating to transnational organized crime offence under the following conditions:

1) When there are probable grounds to believe that documents or other information sent by post, telegraph, telephone, computer, tools or other communication device, electronic media or other electronic communication have been used for committing an offence relating to transnational organized crime, the competent authority, with the approval of the Attorney General, the Commissioner General or assigned person, may submit a unilateral petition to the Chief Justice of the Criminal Court, to ask for approval to obtain such document or information.[569]

However, authorization for interception communication has to consider the invasion of privacy or the reason and necessity as follows:[570]

(1) there are probable grounds to believe that offence involves an organized criminal group or the committed offence will involve an organized criminal group.

(2) there are probable grounds to believe that will be obtained information relating to transnational organized crime offence by accessing such document or information.

(3) it is impracticable or inappropriate to intercept communications by less intrusive means.

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[569] *The* Anti *Transnational Organized Crime Act B.E. 2556 (2013)* s 17 para 1.

[570] *The Anti Transnational Organized Crime Act B.E. 2556 (2013)* s 17 para 2.

The Chief Judge of the Criminal Court can authorize the interception for not more than 90 days. The Chief Judge of the Criminal Court can provide for any conditions. Moreover, the person relating the information obtained by interception has to cooperate with the competent official. However, after authorization if the information is no longer needed or the circumstance changes, the Chief Judge of the Criminal Court may change his authorization or can extend the time depending on his discretion.[571]

After the inquiry official execute the Chief Judge of the Criminal Court order, he has to report on the outcomes of information obtained by interception.[572] According to Regulation of Attorney General, the information obtained by interception must contain only information relating the case or evidence for criminal proceeding. Other information may have to be destroyed immediately when there is no need or obvious use for them.[573]

2) Section 46 paragraph 1 of the *Money Laundering Control Act B.E. 2542 (1999)* stipulates that "when there are probable grounds to believe that the accounts of financial institutions, tools or instruments for communication, or computers are being used or have been used for the benefit of committing a money laundering offence, the competent authority, with the approval of the Secretary-General of the Anti-Money Laundering Office (AMLO), may submit a unilateral petition to the Civil Court to seek approval to

[571] *The Anti Transnational Organized Crime Act B.E. 2556 (2013)* s 17 para 3.

[572] *The Anti Transnational Organized Crime Act B.E. 2556 (2013)* s 17 para 4.

[573] *The Anti Transnational Organized Crime Act B.E. 2556 (2013)* s 17 para5.

access accounts, communication information or computer instruments in order to acquire such information."[574]

3) Section 25 of the Special Case Investigation Act B.E. 2547 (2004) states that "where there are reasonable grounds to believe that any other document or information sent by post, telegram, telephone, facsimile, computer, communication device or equipment or any information technology media has been used or may be used to commit a Special Case offence, the Special Case Inquiry Official, approved by the Director-General in writing, may submit an *ex parte* application to the Chief Judge of the Criminal Court asking for an order to permit the Special Case Inquiry Official to obtain such information."[575] It can be seen that this section provides power to public officials to access information for cases involving transnational organized crime.[576]

Moreover, s 21 of the Anti-Transnational Organized Crime Act B.E. 2556 (2013) relates to electronic surveillance. According to this section, the inquiry official or competent official may use electronic surveillance for tracking the offender who participates in an organized criminal group or for the purpose of investigating, arresting, searching and gathering the evidence of an organized crime offence under the Regulation of the Attorney-General.[577]

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[574] *The Special Case Investigation Act B.E. 2547 (2004)* s 46 para 1.

[575] *The Special Case Investigation Act B.E. 2547 (2004)* s 25.

[576] Roujanavong, above n 430, 38.

[577] *The Anti-Transnational Organized Crime Act B.E.2556 (2013)* s 21.

Telephone interception and other forms of electronic surveillance can intrude on the right to privacy. This power can open a door for excessive use of interceptions for police. As already stated in the Case Study in Chapter Four (Case One: Angkhana Neelaphaijit), the witness who was protected under the witness protection program had her phone tapped and she felt that she was being harassed by the police. It was argued in that Chapter that telephone interception must be done in accordance within the framework of an appropriate a monitoring and accountability regime. Otherwise citizens' privacy rights may be diminished.

Thus, government officials must seek measures which balance the right to privacy and the public interest (in suppression of transnational organized crime). In the next section of this chapter, the author examines the law relating to telecommunication interception and electronic surveillance in Australia so that Thailand may adapt some measures for its legislation, where to do so would be beneficial. The discussion, therefore, highlights the purposes behind the legislation and the reasons why Thailand may consider using some of the Australian legislative provisions as a guide.

6.1.5.2 Comparative Law

Privacy Protection under Australian Law

The Commonwealth Telecommunications (Interception and Access) Act 1979 (TIA ACT) [578] aims to protect the privacy of individuals who use the Australian

[578] *The Telecommunication (Interception and Access) Act 1979* s 6 defined the term "interception" that means listening to or recording, by any means, a communication in its passage over a telecommunications system without the knowledge of the person making the communication.

telecommunications system and specifies the circumstances in which it is lawful to intercept and access communications and to authorize the disclosure of telecommunications data.[579]

The TIA Act protects the privacy of individuals who use the Australian telecommunication system as follows:

- Section 7 of TIA Act prohibits the interception of a communication in its passage over the Australian telecommunication network.
- Section 8 of TIA Act prohibits access to stored communication.[580] This section was amended in 2006 to allow the interception of communications of an innocent third party known to communicate with a person of interest. These amendments also provided for stored communication warrants. These warrants are obtained by law enforcement agencies to lawfully access by covert means – e-mails, SMS and voicemail message that are stored on telecommunications service providers' equipment.[581] This provision can be the innovative mechanism for fighting transnational organized crime where criminals use sophisticated technology for their activities.
- Access to telecommunications data [582] is prohibited under the *Telecommunication Act 1997*.

The main exceptions to these prohibitions allow for the interception of, or access to, communications under a warrant, or the disclosure of telecommunications data under an authorization in accordance with TIA Act which are:

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[579] The New South Wales Force, the Crime Commission, *New South Wales Ombudsman Annual Report 2007-2008*, 161 <http://www.spy4u.com.au> at 28 September 2013.

[580] *The Telecommunication (Interception and Access) Act 1979* s 7 defined the term "stored communication" that means communications which:
(a) have passed over the telecommunications system, and
(b) are accessed with the assistance of a telecommunications carrier without the knowledge of one of the parties to the communication.
Voice mail, e-mail and SMS messages are examples of stored communications.

[581] The New South Wales Force, above n 579, 1.

[582] Telecommunication data is not defined but can include information such as subscriber details and the date, time and location of communication. Telecommunication data does not include the content or substance of the communication. Ibid.

- A telecommunications interception warrant may be sought by an interception agency to assist with the investigation of a serious offence.[583]
- A telecommunications interception warrant may be sought by an interception agency to assist in the enforcement of the criminal law, laws imposing criminal penalties and laws aimed at protecting public revenue.

Application for a telecommunication interception warrant

The TIA Act requires that an application for a telecommunication interception warrant be in writing and be accompanied by a supporting affidavit. An application must contain the name of the agency and person making the application, the facts on which the application is based, the period for which the warrant is sought to be in force and information regarding any previous warrants obtained in relation to the same matter.[584]

However, in urgent circumstances, an application may be made by telephone and subsequently provided in writing (within one day). In either case, the warrant takes effect only when completed and signed by the judge or nominated Administrative Appeals

[583] *The Telecommunication (Interception and Access) Act 1979* s 5D states that " A serious offence includes the following types of offences:
- murder, kidnapping and equivalent offences
- serious drug offences
- terrorism offences
- offences punishable by at least 7 years imprisonment that involve conduct such as:
  - risk of loss of a person life, serious personal injury, serious property damage endangering personal safety
  - serious arson
  - bribery or corruption, and
  - tax evasion, fraud, loss or revenue to the Commonwealth
- offences relating to people smuggling, slavery, sexual servitude, deceptive recruiting and trafficking in persons
- sexual offences against children and offences involving child pornography
- money laundering offences, cybercrime offences, serious cartel offences
- offences involving organized crime, and
- ancillary offences, such as aiding, abetting and conspiring to commit serious offences.

[584] *The Telecommunication (Interception and Access) Act 1979* s 31.

Tribunal (AAT) member. The telecommunication interception warrant can be issued by an inception agency which is usually one of the following:

- the Australia Crime Commission (ACC)
- the Australian Commission for Law Enforcement Integrity (ACLEI)
- the Australia Federal Police (AFP); or
- an eligible authority of a state or the Northern Territory which was subject of a declaration under section 34 of the TIA Act; or
- an eligible Judge[585] or nominated Administrative Appeals Tribunal (AAT) member [586] may issue a telecommunication interception warrant on application by an agency.

An issuing authority must consider the following matters before issuing a telecommunication interception warrant:

- how much the privacy of any person or persons would be likely to be interfered with
- the gravity of the offence under investigation
- how much the information likely to be obtained would assist the investigation
- the availability of alternative methods of investigation
- how much the use of alternative methods would assist the investigation, and
- how much the use of alternative methods would prejudice the investigation by the agency, whether because of delay or for any other reason.

Where an application for a warrant includes a request that the warrant authorize enter on to premises, the Judge or nominated AAT member must also be satisfied that it *would be impracticable or inappropriate to intercept communications by less intrusive means*.[587] This is an important safeguard intended to protect individuals' privacy.

[585] An eligible Judge is a Judge who has consented in writing and been declared by the Attorney-General to be an eligible Judge. In the reporting period, eligible Judges included members of:

- the Federal Court of Australia
- the Family Court of Australia and
- the Federal Magistrates Court

[586] A nominated member refers to a Deputy President, senior member or member of the AAT who has been nominated by the Attorney-General to issue warrants.

[587] *The Telecommunication (Interception and Access) Act 1979* s 48.

Accountability and Monitoring regime

The TIA Act sets out a number of provisions for controls in relation to interception as well as some reporting requirements as follows:

- The Chief Officer of each interception agency must give copies of telecommunications interception warrants [588] and revocations [589] and reports on outcomes of information obtained by interception within three month of a warrant ceasing to be in force.[590]
- The Managing Director of a carrier who enables interception to occur under a warrant must report to the Attorney General within three months of the warrant ceasing to be in force. The report must include details of the acts done by employees of the carrier to effect interception under the warrant and to discontinue interception when the warrant expires or is revoked.[591]
- The Secretary of the Attorney General's Department is required to maintain the General Register which includes particulars of all telecommunications interception warrants. [592] Secondly, the Secretary of the Attorney General's Department must deliver the General Register to the Attorney General for inspection every three months.[593]
- The Secretary of the Attorney General's Department is required to maintain a Special Register recording the details of telecommunications interception warrants

[588] *The Telecommunication (Interception and Access) Act 1979* s 57.

[589] *The Telecommunication (Interception and Access) Act 1979* s 59A.

[590] *The Telecommunication (Interception and Access) Act 1979* s 94.

[591] *The Telecommunication (Interception and Access) Act 1979* s 97.

[592] *The Telecommunication (Interception and Access) Act 1979* s 81A.

[593] *The Telecommunication (Interception and Access) Act 1979* s 81B.

which did not lead to a prosecution within three months of the expiry of the warrant. The Special Register is delivered to the Attorney General for inspection together with the General Register.[594]

- Agencies must destroy restricted records which are original records. Once the chief officer of the agency is satisfied that the record will not be needed for any permitted purpose and the Attorney General has inspected the relevant Register, those records must be destroyed.[595]
- The Australian Crime Commission (ACC), the Australian Commission for Law Enforcement Integrity (ACLEI) and the Australian Federal Police (AFP) are required to maintain records relating to interceptions and the use, dissemination and destruction of intercepted information.[596] These records must be inspected by the Commonwealth Ombudsman on a regular basis.[597] The Commonwealth Ombudsman has to then report to the Attorney General regarding these inspections and to include in his or her report a summary of any deficiencies identified and any remedial action taken. Parallel requirements are imposed by State and Territory legislation on State and Territory interception agencies. The reports of the inspections of the declared State and Territory agencies are given to the responsible State or Territory Minister who must provide a copy to the Commonwealth Attorney General.[598]

[594] *The Telecommunication (Interception and Access) Act 1979* s 81C.

[595] *The Telecommunication (Interception and Access) Act 1979* s 79.

[596] *The Telecommunication (Interception and Access) Act 1979* s 80.

[597] *The Telecommunication (Interception and Access) Act 1979* s 83.

[598] *The Telecommunication (Interception and Access) Act 1979* s 92A.

New South Wales Telecommunications (Interception and Access) Act 1987

The Commonwealth Telecommunications (Interception and Access) Act 1979 allows authorized State law enforcement agencies to apply for warrants to intercept the rural telecommunications to assist in the investigation of prescribed offences, To facilitate this, the *Telecommunications (Interception and Access) (New South Wales) Act 1987* sets out the administrative procedures that are to be followed by authorized New South Wales agencies such as the keeping and destruction of records. The Commonwealth Act has been amended a number of time in recent years, and this has given rise to concerns that in some respects, the New South Wales Act is no longer consistent with that Act.

The Telecommunications (Interception and Access) (New South Wales) Amendment Bill 2008[599] is, therefore, intended to harmonize the provisions of the New South Wales Act with those of the Commonwealth Act. The bill proposed six amendments to the principal Act to implement the revisions that have been made to the Commonwealth Act since the principal Act in New South Wales was last amended in 2006.[600] The amendments are: to amend the New South Wales Act to allow for the original warrant, or a certified copy of warrant, to be kept; to amend the New South Wales Act to allow for reporting directly to the Commonwealth Minister; to allow for the exchange of information between the New South Wales Ombudsman and the Commonwealth Ombudsman; and to clarify and amend

[599] Parliament of New South Wales, *Telecommunications (Interception and Access) (New South Wales Amendment Bill 2008* <http://www.parliament.nsw.gov.au> at 15 October 2013.

[600] Ibid.

the definition of "certifying officer" in the New South Wales Act to include the director and assistant director of the New South Wales Crime Commission.[601]

The Amendment Bill provides new sections that strengthen the mechanisms to protect the privacy of individuals especially in new s 3A. This section gives the New South Wales Ombudsman expanded powers to obtain information or to ask questions when conducting an inspection of an eligible authority's records. The provision allows the New South Wales Ombudsman to exchange information with the Commonwealth Ombudsman in relation to certain matters concerning the administration of the New South Wales Act and the Commonwealth Act.[602]

As mentioned above, it can be seen that Australian Law governing interception of telecommunications sets out a fine balancing act between the public interest in maintaining privacy and the ability of law enforcement agencies to undertake their functions. This is considered crucial in law enforcement and Thailand may consider adopting Australia's approach.

Electronic Surveillance

The Final Report of the Wood Royal Commission considered the use of electronic surveillance as the single most important factor in achieving a breakthrough in

[601] Ibid.

[602] Ibid. Section 92A of the Commonwealth Act provides for the exchange of information between the Commonwealth Ombudsman and a State Ombudsman regarding eligible authorities from that State, but there is no equivalent provision in the New South Wales Act. These amendments will provide for the exchange of information.

investigations. The use of electronic surveillance has a number of advantages. These can be summarized as follows:[603]

> - Obtaining evidence that provides a compelling, incontrovertible and contemporaneous record of criminal activity;
> - The removal of the incentive to engage in process corruption;
> - The opportunity to effect an arrest while a crime is in the planning stage, thereby lessening the risks to lives and property;
> - Overall efficiencies in the investigation of corruption offences and other forms of criminality that are covert, sophisticated, and difficult to detect by conventional methods, particularly where those involved are aware of policing methods, are conscious of visual surveillance and employ counter surveillance techniques;
> - More defendants pleading guilty to charge by reason of unequivocal surveillance evidence; and
> - The reduction of the possibility of harm to police, undercover operatives and informants, because police can be forewarned of planned reprisals and criminal activities.

Although the use of surveillance has a number of benefits for investigating crime, the use of surveillance involves significant intrusions into people's private lives.[604] However, protecting society against crime is a competing public interest. This is because criminals often have access to the most advanced technology to further their activities. The police similarly need access to surveillance technology to detect and prevent serious crime.

Any legislation regulating covert surveillance must, hence, seek to achieve a balance between these two competing public interests. Justice James Wood in the final report of Royal Commission into the New South Wales Police Service which was released in Mat 1997 considered that it is crucial to equip law enforcement agencies with adequate

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[603] Parliament of New South Wales, above n 599, 3.

[604] As noted by the New South Wales Law Reform Commission, the following privacy interests can be affected by surveillance:

- The interest in controlling entry to personal territory;
- The interest in freedom from interfere with one's person and personal space;
- The interest in controlling one's personal information and
- The interest in freedom from surveillance and from interception of one's communications.

New South Wales Law Reform Commission, *Surveillance: An Interim Report*, Report 98 (2001).

resources and electronic surveillance capacity to execute their investigative role and keep ahead of the increasing sophistication of organized crime activity.[605] However, at the same time law enforcement agencies need to take into account that these special investigative techniques are an intrusion into privacy. Thus, Justice Wood has proposed that a number of measures should be used to achieve a balance between privacy and law enforcement as follows:[606]

- Suitable legislative prescription of the circumstances in which video surveillance is allowed;
- The need for a court approved warrant before targeted individual surveillance extending to conversation is allowed, in which conditions can be imposed; and
- A statutory regime governing the use, storage and destruction of all electronically gathered products, to ensure that it is *used only for legitimate purposes of law enforcement*.

Commonwealth of Australia

In Australia, the *Surveillance Device Act 2004* (the SD Act) was enacted to provide a legislative regime for Commonwealth agencies to utilize surveillance powers while still regulating the use of information obtained through these investigative tools.[607] As a general rule, all information obtained under a surveillance device and all information

[605] Justice James Wood made this comment in the final report of Royal Commission into the New South Wales Police Service which was released in May 1997. The final Report sets out the Royal Commission's findings on police corruption and recommendations for reform. <http://www.pic.nsw.gov.au/RoyalCommission.aspx> at 1 November 2013.

[606] New South Wales, Royal Commission into the New South Wales Police Service, Final Report (1997) <http://www.parliament.nsw.gov.au> at 28 September 2013.

[607] *The Surveillance Device Act 2004*.

relating to the existence of a surveillance device warrant is "protected information" and may only be used for the express purposes set out in the SD Act.[608]

The Act defines "surveillances devices" as data surveillance devices, listening devices, optical surveillance devices and tracking devices.[609] Surveillance devices may be used by law enforcement agencies which include the Australia Federal Police (AFP), the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Crime Commission (ACC), all State and Territory Police Forces, the New South Wales Crime Commission, the Independent Commission against Corruption of New South Wales, the Police Integrity Commission of New South Wales, the Crime and Misconduct Commission of Queensland and the Corruption and Crime Commission of Western Australia.[610]

Application for surveillance device warrant

Generally, surveillance devices may be used under the authority of a warrant issued by an eligible judge or nominated Administrative Appeal Tribunal (AAT) member. An application for a warrant must usually be in writing and be accompanied by an affidavit setting out the grounds on which the warrant is sought.[611] However, in urgent circumstances, applications may be made by telephone. In either case, the warrant takes

[608] *The Surveillance Device Act 2004* Part 6 Division 1 Restriction on use, communication and publication of information.

[609] *The Surveillance Device Act 2004* s 6.

[610] Australia Government, *Surveillance Device Act 2004 Report for the year ending 30 June 2007*<http://www.ag.gov.au/NationalSecurity/TelecommunicationsSurveillance> at 14 October 2013.

[611] *The Surveillance Device Act 2004* s 14.

effect only when completed and signed by judge or nominated AAT member.[612] The information required for a written application must also be provided to a Judge or nominated AAT member at the time of a telephone application and the applicant must supply the relevant supporting affidavits to the Judge or nominated AAT member within 48 hours of the warrant being issued.[613]

A warrant takes effect when it is issued and expires on the date specified in it, being more than 90 days away date from the date it is issued, unless it is revoked earlier or extended. A warrant may be extended or varied by an eligible judge or nominated AAT member if he or she is satisfied that the grounds on which the warrant was issued still exist.[614]

Where special circumstances of urgency exist, a member of an agency of at least Senior Executive Service (SES) level may issue an emergency authorization.[615] These special circumstances must involve a serious risk to a person risk to a person or property,[616] the recovery of child[617] or a risk of loss evidence for certain serious offences such as drug offences, terrorism, espionage, sexual servitude and aggravated people smuggling.[618] The

[612] *The Surveillance Device Act 2004* s 35.

[613] *The Surveillance Device Act 2004* s 33.

[614] *The Surveillance Device Act 2004* s 19.

[615] Australia Government, above n 610, 2.

[616] *The Surveillance Device Act 2004* s 28.

[617] *The Surveillance Device Act 2004* s 29.

[618] *The Surveillance Device Act 2004* s 30

use of a surveillance device must be retrospectively approved by a Judge or an AAT member within 48 hours of issue of the authorization.[619]

Optical surveillance devices may be used without a warrant if the device can be installed and retrieved without either entering premises or interfering with the interior of a vehicle or thing without permission.[620] Listening devices also may be used without a warrant by a law enforcement officer who is a party to the conversation being recorded.[621]

A tracking device authorization, being an authorization issued by a member of the agency of at least SES level, may authorize the use of tracking device that does not involve either entering premises or interfering with the interior of a vehicle or thing without permission. A tracking device authorization may only be issued in relation to the same offences for which surveillance device warrants may be issued.[622]

Accountability and Monitoring Regime

The SD Act requires all enforcement agencies to maintain records relating to the use of surveillance devices and use of surveillance product. All law enforcement agencies must maintain a register of warrants recording details of all warrants and must provide a report

[619] *The Surveillance Device Act 2004* s 33.

[620] *The Surveillance Device Act 2004* s 37.

[621] *The Surveillance Device Act 2004* s 38.

[622] *The Surveillance Device Act 2004* s 39.

on each warrant or authorization issued under the SD Act to the Attorney General, as the Minister responsible for administering this Act.[623]

The Commonwealth Ombudsman is required to inspect law enforcement agencies to ensure compliance with the SD Act. The Ombudsman must make a written report to the Attorney-General at six monthly intervals on the results of each inspection. The Attorney-General must prepare and table the report in Parliament.[624]

New South Wales (The Surveillance Devices Act 2007)

The Surveillance Devices Act 2007 allows surveillance devices to be used by law enforcement agencies to investigate crime and obtain evidence of the commission of such crime or the identity or location of the offender(s).[625] While the Act covers the installation, use and maintenance of listening, optical, tracking, and data surveillance devices, it also restricts the communication and publication of private conversations, surveillance activities and information obtained through the use of such devices. Furthermore, under the *Law Enforcement (Controlled Operations) Act 1997*, relevant law enforcement agencies can intercept telephone conversations and plant devices to listen to and video conversations and track positions of objects. They can also carry out controlled delivery or undercover operations that may involve committing breaches of the law.[626]

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[623] *The Surveillance Device Act 2004* s 50.

[624] Ibid.

[625] *The Surveillance Device Act 2004* s 4.

[626] Ombudsman New South Wales, Report under section 49(1) of *the Surveillance Devices Act* for the period ending 31 December 2012, 1 (2013) <http://www.ombo.nsw.gov.au> at 9 September.

Section 7 (4) of the Surveillance Devices Act 2007[627] permits law enforcement officers who are participating in an approved controlled operation, and operating under an assumed name or identity (that is 'undercover') to wear surveillance devices to record a conversation they are party to, without seeking a further warrant under that Act.[628]

However, there is no similar exemption provided for civilian participants in a controlled operation. The use of surveillance devices by civilian participants is still subject to the safeguards provided for within *the Law Enforcement (Controlled Operations) Act 1997*.[629] A civilian participant is permitted to participate in a controlled operation only when it is impossible for a law enforcement officer to do so. The intended use of the device would obviously be included in the operational plan and be a matter the Chief Executive Officer would have to consider when deciding whether or not to authorize that operation. It might be noted that the exemption provided *for the Surveillance Devices Act* applies only to law enforcement officers who are acting undercover: "A law enforcement officer acting undercover is comparable to a civilian participant who, although not operating under an assumed identity, is acting covertly on behalf of a law enforcement agency."[630] The reason for providing such an exemption would save police and court time[631] in preparing and

[627] Ibid. The Act also empowers the use of surveillance devices by the Australian Crime Commission but the inspection and reporting of that agency's use of surveillance devices is carried out by the Commonwealth Ombudsman.

[628] *The Surveillance Devices Act 2007* s 7 (4).

[629] *The Surveillance Devices Act 2007* s 7 (3) states that a civilian participant must not be authorized to participate in any aspect of a controlled operation unless the chief executive officer is satisfied that it is wholly impracticable for a law enforcement participant to participate in that aspect of operation"

[630] The Hon. Michael Gallacher, Law Enforcement (Controlled Operations) Amendment Bill 2012, 25 <www.parliament.nsw.gov.au/…/nswbills…/Law%20Enforcement%20operations> at 9 September 2013.

[631] Normally surveillance device warrants are issued by eligible judges of the Supreme Court or eligible Magistrates in the case of a surveillance device warrant authorizing the use of a tracking device only or a retrieval warrant in respect of a tracking device. Applications must include certain information and

giving consideration to surveillance device warrants and would also not to be out of step with the policy objectives of the Act.[632]

Accountability and Monitoring Regime

The Act requires the NSW Ombudsman to conduct inspections of the surveillance device records of law enforcement agencies to determine the extent of compliance by law enforcement agencies and law enforcement officers with the Act. Moreover, the Ombudsman is required to report to the Minister at 6-monthly intervals on the result of inspections.[633] The Minister is required to lay the report or cause the report to be laid before both Houses of Parliament within 15 days after receiving the report.[634]

Accordingly, as the discussion above illustrates, the laws governing interception and electronic surveillance in Australia provide strict mechanisms and an accountability regime. The next section considers proposals for reform in the Thai context.

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generally must be accompanied by an affidavit setting out the grounds on which the warrant is sought. While inspection of the records includes examining the matters required to be specified it does not the sufficiency, or otherwise, of the information provided in support of the application. That is determined by the relevant judicial officer. Ombudsman New South Wales, above n 626, 2.

[632] Ministry for Police and Emergency Services (NSW Government), Report on Review of the Law enforcement (Controlled Operations) Act 1997, 18 (2011) <http://www.emergency.nsw.gov.au> at 9 September 2013.

[633] *The Surveillance Devices Act 2007* s 49 (1).

[634] *The Surveillance Devices Act 2007* s 49 (2).

6.1.6 Proposed Law Reform

The provision for exempting the competent official or the civilian participant from legal liability when engaging in undercover operations

The undercover operations in Australia are not only used for investigating an offence but also for the safe administration of the witness protection program.[635] Thailand should follow the Australian legislation and adopt similar provisions to deal with undercover operations in its domestic law. This is because the conduct of undercover operations in Thailand is still sub-optimal. As mentioned earlier, the example case shows that lack of a good cooperation between the Special Investigative Department (DSI) and the police are resulted in the safety of undercover operatives. Therefore the safety of undercover operative must be ensured and shielded from liability.[636]

To address with this problem, Thailand should add provision to exempt competent official from legal liability when engaged in undercover operations that involve unlawful activities, where the conduct was committed in a good faith and for the purpose of investigating transnational organized crime offence. Moreover, where civilian participants act as undercover operatives, the civilian participant must be protected from legal liability if the offence commits with any direction by the competent official who supervises him or her. The proposed reform is to amend s 19 of *the Anti-Transnational Organized Crime Act B.E.2556 (2013)* as the as follows:

[635] Parliament of New South Wales, 550, above n ,1.

[636] Nuansuwan above n 532, 12.

if it is necessary and beneficial for investigation transnational criminal group offence, the Attorney-General, the Commissioner-General or assigned person can authorize other person to create document or evidence for undercover operations under Regulation of Attorney-General.

The undercover operations means any action the status or objectives of which are kept confidential and which is carried out in the manner deviating the understanding of another or concealing the truth about the performance of public duty of the authority.

The document, evidence or undercover operations for the achievement of investigative purpose shall be considered legitimate.

The undercover operative includes a police officer or a civilian participant, he or she must be protected from criminal liability if the act or omission was necessary to protect a person's safety, or to protect the identity of a covert operative, or take advantage of an evidence gathering opportunity in relation to an organized crime offence.

Where a civilian participant acts as the undercover operative, he or she should also be protected from legal liability if the offence commits under any direction by the law competent official who supervises him or her,

CHAPTER 7 CONCLUSION

This thesis examined mandatory offences, witness protection, mutual legal assistance and special investigative techniques in the United Nations Convention against Transnational Organized Crime. It also examined existing laws involving transnational organized crime and presented a number of case studies to show problems in Thailand's administration of justice. It is concluded there are a number of problems as follows:

A) Existing limitations in criminal offences

1) According to research anti-money laundering legislation in Thailand, as in many other countries in the ASEAN region, is being used as a weapon against criminals.[637] Therefore, in order to combat transnational organized crime, Thailand has to extend the reach of the money-laundering offences to catch all offences under the United Nations Convention against Transnational Organized Crime and the Protocol: for example corruption relating to transnational organized crime and migrant smuggling relating transnational organized crime, as already stated in chapter Three.

2) There are many laws addressing corruption in Thailand. However, no law stipulates the corruption offence relating to transnational organized crime. Thus, Thailand must enact a new provision to follow the provisions of the United Nations against Transnational organized Crime as already discussed in chapter Three.

[637] G.Madsen, above n 193, 120.

B) Corruption in Thailand

Corruption is a serious problem in Thailand's administration of justice. Although there are many laws addressing corruption under the 1997 People's Constitution they remain "paper tigers". For example, the case presented in Chapter Three demonstrates that despite the presence of anti-corruption policies, Thailand failed to prevent Thaksin Shinawatra from exploiting loopholes and enhancing his personnel wealth by corruption. As Thitipan Pongsudhisak has stated, "Thaksin and his supporters brilliant and shrewd in undermining, politicizing and capturing the constitution as well as violating the spirit of the constitution in Thaksin's court case and allowing Thaksin to get away with other violations for several years."[638] If this situation is not improved, the breakdown of Thailand's public integrity system will persist.

Legislation involving corruption is not enough. Politicians or officials must change their behavior. This is because corruption in Thailand is perceived as a low-risk, high reward activity since the probability of detecting and punishing corrupt offenders is low. Thus, corruption can be minimized when citizens perceive that it is a high-risk, low-reward activity. The corrupt offenders must be caught and severely punished for their offences.[639] Further, the media has an important role to play in this context, and details of such punishment must be widely publicized in the mass media to deter others and demonstrate the successful prosecution of corrupt offenders and credibility to the public.

[638] Thitinan Pongsudhirak and J.Funston(Ed), *Divided over Thaksin: Thailand's coup and problematic transition* (Institute of Southeast Asian Studies, 2009), 36.

[639] S.T. Quah above n 226, 462.

C) Influential officials or politicians or police often intervene in criminal justice administration.

Obstruction of justice is prevalent in Thailand. In cases where witnesses are called to give testimony in support of prosecutions against politicians or state officials, they may be not confident about their security as shown in Chapter Four. Another problematic issue is that influential officials or politicians or police often intervene in criminal justice administration. For example, the person who can authorize the execution of special protection measure under s 9 of the Witness Protection Act B.E. 2546 (2003) is the Minister of Justice. However, the Minister of Justice is a politician. Thus, in cases involving allegations of political corruption, witnesses may lack confidence to make a request to the Minister of Justice to authorize special measures under s 9 of the Witness Protection Act B.E. 2546 (2003).

D) The witness protection program has not succeeded in enhancing public trust in Thailand

The Witness Protection Office lacks truly independent investigative powers. As already mentioned in Chapter Four, most witnesses are protected by police under the witness protection program even in cases where the police are alleged to have been involved. For example, in the Angkhana Neelaphaijit case, the wife was protected by the police even though her husband had been abducted by the police.[640]

Witnesses who receive protection under the witness protection program feel unsafe, and are not confident in the witness protection program. Moreover, "if witnesses come to

[640] Thus, witness protection should be a unit independent from the police and state prosecuting authorities in order to maintain objectivity, confidentiality, operational readiness and accountability. United Nations Office on Drugs and Crime, above n 11, 25.

appear in court, they will deny earlier testimonies or lie blatantly in a desperate attempt to escape retribution."[641]

The administration responsible for enforcing the witness protection program is ineffective. Staff and funding are critical factors in agency performance because the Witness Protection Office cannot operate effectively without qualified personnel and adequate resources.

E) Relocation of witnesses only in Thailand cannot guarantee the witnesses' safety

In cases involving allegations of wrongdoing by influential officials, high rank, powerful politicians and criminals, most witnesses are not confident to give testimony to the authorities. Witnesses are afraid of the threat of future intimidation. As a result, in some cases, the relocation of witnesses within the Kingdom of Thailand alone cannot protect the witness' safety. As discussed in Chapter Four, special protection measures stipulated in the Witness Protection Act B.E. 2546 (2003) under the execution of the Witness Protection Office which provide for the relocation of witnesses only in Thailand's territory cannot guarantee the witnesses' security especially in cases involving allegations of wrongdoing by a person of influence in Thailand.

Witnesses and their families may be threatened or face revenge either before or after delivering their testimony. This has resulted in the death and disappearance of some witnesses.[642] It has, therefore, been argued in this thesis that Thailand must adopt the measure under Article 24 of the United Nations Convention against Transnational Crime

[641] Asian Legal Resource Centre, above n 27, 3.

[642] See case study in chapter 3, Somchai Neelaphaijit.

for relocation of the witnesses to foreign countries.[643] This would be an innovative approach to keep the key witnesses out of the reach of the influence of corrupt politicians in Thailand. Moreover, Thailand must, under the reciprocity principle, reform laws to include foreign nationals or residents of other countries in the special protection measures of the Witness Protection Office.

F) The privacy right of citizens are intruded by the excessive use of interceptions by law enforcement authorities

Limitations on government investigative techniques in Thailand are needed. This is because the use of electronic surveillance, interception of communication and undercover operations threaten individual rights and liberties.[644] As stated in Chapter Six, the police may use excessive powers to intercept the telephone when giving protection for witnesses (See the Angkhana Neelaphaijit case).[645]

Although the special investigative techniques are important for the government agencies to keep ahead of the increasing sophistication of organized crime activity and for the purpose of gathering transnational organized crime evidence, checks and balances are necessary to prevent misuse. Thailand government officials must consider the following principles which can provide balance between the right to privacy and the public interest:

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[643] *UNTOC* art 24 para 3.

[644] Michael King outlines four models in his consideration of social functions of the criminal justice system which are medical, bureaucratic, status passage and power. The Model "bureaucratic" is closely associated with due process values; however, whereas the due process approach is primarily concerned to avoid arbitrary use of state power against the individual, the bureaucratic approach is primarily concerned with speedy processing of defendants utilizing standard procedures. Therefore, the role of governance is to protect citizens from abuse of covert investigation, electronic surveillance and interception of communication powers by law enforcement agencies, particularly where the political agenda is inclined to the crime control model with its social function of punishment. Michael King, *The Framework of Criminal Justice* (Croom Helm Publishing, London, 1981), 41.

[645] Asian Legal Resource Centre, above n 27, 2.

a telecommunication interception or electronic surveillance must be sought only to assist with the investigation of transnational organized crime; or, alternatively, be aimed at protecting public revenue; or be used where there is no availability of alternative methods of investigation by less intrusive means.[646]

Undercover operations are a crucial investigative tool. As stated in Chapter Six, the undercover operations in Australia are not only used for investigating an offence but also for the safe administration of the witness protection program.[647] Thailand should follow the Australian legislation and adopt similar provisions to deal with undercover operations in its domestic law. This is because the conduct of undercover operations in Thailand is still sub-optimal. As stated in Chapter Six, there is a cooperation problem between the Special Investigative Department (DSI) and police which threaten the safety of undercover operatives. Therefore, the safety of undercover operative must be ensured and shielded from liability.[648] This exempting from legal liability must include both the competent official and the civilian participants who act as undercover.

Conclusion

As this thesis has demonstrated, Thailand must deal with a range of issues. This work has pointed the existing limitations in the current regime and undue political interference in the criminal justice system. The key contribution of the thesis resides in the many practical suggestion for reform. However, any realization of these suggestions will turn

[646] Harfield and Harfield above n 568, 18.

[647] Parliament of New South Wales, 550, above n ,1.

[648] Nuansuwan above n 532, 12.

on the degree of political will to implement them and this seems unlikely given the political context in Thailand in 2014.

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