

## The Practice of Thai Courts on the Right to a Fair Trail through Transnational Criminal Proceeding\*

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**Abstract:** *To achieve the goal of criminal justice, criminal proceedings must respect the right of the accused to a fair trial recognized by international human rights instruments, in particular, the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial must be guaranteed along the whole process of criminal proceedings not only in the proceeding in one single state but also in the trans-border criminal proceedings. Thailand is a party to the ICCPR, thus a right to a fair trial has been recognized by the provisions of the Constitution of the Kingdom of Thailand as well as the Criminal Procedure Code. However, in 2013, the Constitutional Court delivered its decision which may violate the right of the accused to a fair trial guaranteed by the Constitution. This study will be conducted to evaluate the practice of the Constitutional Court with regard to the right to a fair trial through transnational cooperation in criminal matters by comparing it with the practices of the European Court of Human Rights (ECtHR).*

### 1. INTRODUCTION

The national judicial mechanism for prosecuting crimes, which contains some cross-border elements, cannot proceed to bring criminals to justice successfully by using only the exercise of criminal jurisdiction of one sovereign state. Therefore the prosecution of such crimes may involve the exercise of jurisdiction of more than one sovereign state. In practice, trans-border proceedings often face problems, such as the complexity of evidence gathering abroad, possible delays in the proceedings, difficulties in communicating in another language, explaining what is exactly required for a criminal investigation and, above all, the differences which exist between the different legal systems.<sup>1</sup> Thus, transnational cooperation in criminal matters has been developed to regulate the cooperation between sovereign states to enhance the efficiency of transnational criminal proceedings such as investigations, delivery of property, search and seizure, local inspection in a foreign country; gathering evidence abroad; service of documents; and extradition and transfer of prisoners. In order to simplify and speed up international cooperation in criminal matters among sovereign states, it has traditionally resulted in a mutual legal assistance convention, either bilateral or multilateral.

Notably, in criminal procedure, the goal of criminal justice (utility) and basic values (justice, humanity) must be balanced, not only in national criminal proceedings but also in transnational as well as international criminal proceedings.<sup>2</sup> The efficiency of transnational prosecution to achieve the goal of realizing an efficient system of law enforcement, the

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<sup>1</sup> Lorena Bachmaier Winter, *Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law*, 9 UTRECHT L.REV. 127 (2013).

<sup>2</sup> Giulio Illuminati, *Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees*, in TRANSNATIONAL INQUIRIES AND THE PROTECTION OF FUNDAMENTAL RIGHTS IN CRIMINAL PROCEEDINGS 17 (Stefano Ruggeri ed., 2013).

respect of human rights, especially, the right to a fair trial must be taken into account and guaranteed throughout the criminal proceeding.<sup>3</sup>

Nowadays, the role played by judicial cooperation around the globe is increasing, especially at the EU level. The European Court of Human Rights (ECtHR) has made it clear that there is a need to enhance the protection of human rights in transnational criminal proceedings and to advance towards a common legal framework for proceedings with cross-border elements.<sup>4</sup> At present, transnational cooperation in criminal matters between jurisdictions may risk violating the right of the accused to a fair trial; *for example*, the right to confront witnesses, problem with language and because evidence may be gathered differently abroad, witness testimony may be heard in the accused's absence.

Internationally, the right to a fair trial appears in Article 14 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which is ratified by 168 state Parties, including Thailand.<sup>5</sup> As a result, Thailand has obligations to respect, protect, and fulfill the rights recognized by the ICCPR, including the right to a fair trial of a person charged with criminal offence. Thus, a number of provisions of the Constitution as well as the Criminal Procedure Code expressly guarantee the right of the accused in very similar words as appears in the ICCPR.

To serve the necessity of transnational cooperation in criminal matters, Thailand promulgated the Act on Mutual Assistance in Criminal Matters B.E. 2535 (AMACM) and this applies to all processes of providing and seeking assistance upon receiving requests from foreign states or Thai agencies. The AMACM provides assistance regarding investigation, inquiry, prosecution, forfeiture of property, and other proceedings relating to criminal matters including the admissibility for hearing of all evidence and documents derived under this Act.

In 2013, the provisions of the AMACM was challenged by the Constitutional Court in its decision no. 4/2556, where the Prosecutor requested to take testimony of a witness in a foreign country, by stating that the provision of Section 41 of the AMACM,<sup>6</sup> which allows the Court to consider all evidence and documents derived under the Act as admissible for hearing, violates the right of the accused to a fair trial recognized by Article 14 of the ICCPR and Section 40 of the 2007 Constitution of the Kingdom of Thailand (2007 Constitution) because the accused is unable to accord an effective opportunity to challenge the evidence against the accused and to check the truthfulness and reliability of the witness, which will be cross-examined in a foreign state.<sup>7</sup>

It can be argued that even when all evidence and documents are admissible for hearing according to the Thai Criminal Procedure Code, the Court shall exercise its discretion in considering and weighting all the evidence taken and the judgment will be delivered only when the Court is fully satisfied that an offence has actually been perpetrated and the accused has committed that offence. In addition, if any reasonable doubt exists, the benefit of doubt

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<sup>3</sup> *Id.*; Stefano Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Comparative Law: Model of Gathering Oversea Evidence in Criminal Matters*, in TRANSNATIONAL INQUIRIES AND THE PROTECTION OF FUNDAMENTAL RIGHTS IN CRIMINAL PROCEEDINGS 540 (Stefano Ruggeri ed., 2013).

<sup>4</sup> Winter, *supra* note 1, at 128.

<sup>5</sup> Thailand accessed the International Covenant on Civil and Political Rights 1966 (ICCPR) to become a state Party on 29 Oct 1996.

<sup>6</sup> The Act on Mutual Assistance in Criminal Matters B.E. 2535, Section 41 provides that "All evidence and documents under this Act shall be deemed as admissible for hearing"

<sup>7</sup> The Constitutional Court of Thailand, Decision No. 4/2556, 13 March 2013.

shall be given to him.<sup>8</sup> Regarding this, the provision of the AMACM does not limit the exercise of discretion of the Court in hearing and weighing the evidence to prove the innocence or the guilt of the accused.

Hence, to analyse the necessity of the existence of transnational cooperation in criminal matters the respect of the right to a fair trial must be balanced. Also, the international human rights norms and practices through the jurisprudence of the Court, in particular, ECtHR must be reviewed to analyse the practice of the Thai Constitutional Court concerning the AMACM in respect to the right to a fair trial recognized under the 2007 Constitution.

## 2. FAIR TRIAL *VIS-À-VIS* TRANSNATIONAL COOPERATION

As aforementioned, the criminal justice system is based on both rationales concerning utility of the system as its goal, while the basic values of justice and humanity shall be paralleled.<sup>9</sup> On the one hand, the effectiveness of criminal prosecution shall achieve the goal of realizing an efficient system of law enforcement. On the other hand, however, human rights especially the right to a fair trial shall be taken into account and guaranteed because individuals must be protected from certain depredations against their person by state authority's use of its coercive power in criminal justice is just as important at the international level.<sup>10</sup>

### 2.1 *Internationalization of Fair Trial Guarantee*

The right of the accused to a fair trial appears in ICCPR, one of core international human rights instruments. Section 14 of the ICCPR enshrines the right to a fair trial of the accused persons charged with a criminal offence namely: the rights of the accused persons charged with a criminal offence; the right of the accused will be tried in his presence; the right to defend himself in person or through legal assistance of his own choosing; the right to examine, or have examined, the witnesses against the accused and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and Article 14 paragraph 3 of the ICCPR<sup>11</sup> also provides fair trial guarantees for the accused.

Apart from the ICCPR, the right to a fair trial has been recognized by other regional conventions on human rights, such as Europe, American as well as Africa, which also

<sup>8</sup> The Criminal Procedure Code, Section 227.

<sup>9</sup> Giulio, *supra* note 2, at 17.

<sup>10</sup> *Id.*; Stefano, *supra* note 3, at 540.

<sup>11</sup> ICCPR, Section 14 para. 3 provides:

- "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality :
- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt."

guarantee the right of the accused to a fair trial in very similar wording as provided in Article 14 of the ICCPR.<sup>12</sup>

As a state Party to the ICCPR, Thailand has obligations to respect, protect, and fulfill the rights recognized by the Convention including the right to a fair trial, which is also confirmed under the Constitution and the Criminal Procedure Code. The Constitution guarantees the right to a fair trial as fundamental rights of the accused in criminal justice,<sup>13</sup> while the Criminal Procedure Code reaffirms the right of the accused in criminal proceedings.<sup>14</sup>

Admittedly, at national level, the right of the accused has been guaranteed during the criminal proceedings. But, transnational criminal proceedings may face a higher risk of the violation of the right to a fair trial because it involves the exercise of criminal jurisdiction of more than one sovereign state. The witness testimony in the court of another state may violate the right to confront a witness especially in some countries where witness testimony may be heard in the accused's absence. This does not only increase the complexity of transnational justice, but undoubtedly has a negative impact on the protection of fundamental rights and the efficiency of international judicial cooperation, hindering also the free circulation of evidence and its admissibility at trial.<sup>15</sup>

The definition of transnational cooperation means the assistance of a judicial authority afforded upon request or by the commission of another judicial authority for the purpose of affecting certain judicial measures. By theory, the international law principle of equality of States shall be respected. This means that the exercise of State sovereign functions in the territory of another state without the consent of the latter constitutes a violation of state sovereignty. The sovereign acts include all measures taken in the course of criminal proceedings, from the first police investigations down to the enforcement of criminal judgments. Regarding this, in the case that evidence required in criminal proceedings is in

<sup>12</sup> The 1948 Universal Declaration of Human Rights (UDHR), Article 10; the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 6; the 1969 American Convention on Human Rights (ACHR) (1969); and the 1981 African Charter on Human and Peoples' Rights (ACHHR).

<sup>13</sup> Currently (at the time of writing this paper), Thailand is under the Constitutional of the Kingdom of Thailand (Interim) 2014 and is under the process of codification of the new Constitution. Before the 2014 *Coup d'état*, however, the 2007 Constitution of the Kingdom of Thailand, Section 40 provides the fair trial guarantees that:

“A person shall have the following rights in the administration of justice:

- (1) the right to have easy, expeditious, speedy and comprehensive access to justice;
- (2) the fundamental rights in legal proceedings, in respect of which fundamental assurances must be accorded as to the openness of trial, adequate opportunities to receive information and examine documents, the submission of facts, arguments and evidence, the challenge of judges, trial by judges of a duly constituted quorum and reasoned decisions, judgments or orders;
- (3) a person has the right to have his or her case tried in a correct, speedy and fair manner;
- (4) the injured person, the suspect, the plaintiff, the defendant, the party, the interested person or the witness has the right to proper treatment in the administration of justice, including the right to correct, speedy, fair inquiries and the right not to make statements incriminating himself or herself;
- (5) the injured person, the suspect, the accused and the witness in a criminal case has the right to receive necessary and appropriate protection and aids from the State, provided that necessary remuneration, compensation and expenses shall be as provided by law;
- (6) the children, the youth, women the elderly or the disabled or persons of infirmity have the right to be accorded protection with regard to appropriate trials and have the right to receive proper treatment in cases related to sexual violence;
- (7) in a criminal case, the suspect or the accused has the right to correct, speedy and fair inquiries or trials, adequate opportunities to defend himself or herself and to examine or be informed of evidence as necessary, legal assistance from an attorney and a provisional release;
- (8) in a civil case, a person has the right to receive appropriate legal aids from the State.”

<sup>14</sup> For instance, the right to be tried a case speedily, continuously and fair (Section 8); the right to correct, speedy and fair inquiries or trials (Section 134 paragraph 3).

<sup>15</sup> Winter, *supra* note 1, at 128.

foreign countries, it cannot, in principle, be obtained without the foreign state cooperation; the same applies where documents are to be served on persons or any other procedural measure is to be taken in that country.<sup>16</sup> As a result, nowadays, every criminal proceeding requiring cooperation by the authorities of another state represents a challenge: added complexity, possible delays, and difficulties in communicating in another language as well as requirements for the criminal investigation in different legal systems.<sup>17</sup>

## *2.2 Relationship between Transnational Cooperation and Fair Trial: The Practices of the ECtHR*

Unquestionably, the right to a fair trial is recognized at all domestic, regional and international levels. Apart from international recognition by the ICCPR, the right to a fair trial has been reaffirmed by Regional Human Rights Conventions. In Europe, Article 6 of 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantees the right to a fair trial.<sup>18</sup> Thus, the right to a fair trial has already been guaranteed at the national level of European countries.

Also, the increasing role played by judicial cooperation in Europe has made it clear that there is a need to enhance the protection of human rights in transnational criminal proceedings and to advance a common legal framework for proceedings with cross-border elements.<sup>19</sup> Even though there are some practices in cases before the ECtHR, at present there is neither a common idea on how transnational criminal proceedings should be regulated, nor a uniform understanding of the concept of transnational criminal proceedings. Only one point is agreed that is transnational criminal procedures should not negatively affect the right to defence and should not result in a lowering of the procedural rights of the accused.<sup>20</sup>

Traditional forms of judicial cooperation between sovereign states in Europe and the current situation of transnational cooperation poses new challenges that might demand new solutions and different models of judicial cooperation, in particular, dealing with criminal cases with

<sup>16</sup> Heinrich Grütznier, *International Judicial Assistance and Cooperation in Criminal Matters*, in A TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME I CRIMES AND PUNISHMENT 189 (M. Cherif Bassiouni and Ved P. Nanda eds., 1973).

<sup>17</sup> Winter, *supra* note 1, at 127.

<sup>18</sup> ECHR, Article 6 provides:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

<sup>19</sup> Winter, *supra* note 1, at 128.

<sup>20</sup> Aukje A.H.van Hoek and Michiel J.J.P. Luchtman, *Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights*, 1 UTRECHT L.REV. 16 (2005); for more empirical study at EU level see G. VERMEULEN, W. DE BONDT AND Y. VAN DAMME, EU CROSS-BORDER GATHERING AND USE OF EVIDENCE IN CRIMINAL MATTERS: TOWARDS MUTUAL RECOGNITION OF INVESTIGATIVE MEASURES AND FREE MOVEMENT OF EVIDENCE? (2010).



regard to the admission and assessment of evidence obtained abroad.<sup>21</sup> While the necessity of transnational cooperation is increasing, especially in criminal matters, it appears that the protection of the individual rights of the suspect and the accused, rather than becoming a priority, have been widely disregarded.<sup>22</sup> Concerning this, in many legal systems, evidence obtained abroad is admitted without testing the legality of the execution of the international cooperation request. As a result, transnational cooperation and human rights protection should be sought to reach an adequate balance between efficiency and respect for procedural safeguards.

With regard to criminal evidence in general, the rule on admissibility of evidence is a matter of regulation by national law and national courts, however, the proceedings have to be fair and respect the rights of the accused; all evidence must be produced in the presence of the accused at the public hearing because this involves the opportunity to question witnesses and to comment on their evidence.

Practically, the European human rights standard has triggered abundant case law and scholarly debate; it serves as a regular reference point of current EU law in the area of freedom, security and justice.<sup>23</sup> Even though there is no single, comprehensive definition of a fair trial; there is a common understanding of some its crucial aspects; ‘equality of arms’ being among them. In addition, the notion of equality of arms has been shaped by the ECtHR in Strasbourg. Article 6(3)(b) of ECHR guarantees the accused adequate time and facilities for the preparation of his defence. The accused must have the opportunity to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.<sup>24</sup> Moreover, the ECtHR has emphasized the duty of the prosecution to ensure that the accused receives a fair trial and that any difficulties caused to the defence by a limitation on its right must be sufficiently counterbalanced by the procedure followed by the judicial authorities.<sup>25</sup>

Even though the ECtHR has tried to shape the notion of equality of arms, cooperation across borders in criminal matters has long been criticized by defence lawyers and NGOs.<sup>26</sup> Investigation across borders and evidence transfer has led to a series of questions about the dangers posed to a fair trial in transnational criminal proceedings. These include possible problems with evidence gathered in a different country, and the opportunity to confront witnesses and challenge the documentary evidence in a foreign country. With regard to witness examination, the ECtHR set out the general rule that before an accused can be convicted; all the evidence against him must normally be produced in his presence at the public hearing with a view to adversarial argument.<sup>27</sup> This rule requires the presence of the witness at the trial; however, the Court has allowed exceptions to the right to a public hearing

<sup>21</sup> Winter, *supra* note 1, at 127.

<sup>22</sup> ALBIN ESER, OTTO LAGODNY AND CHRISTOPHER L BLAKESLEY, *THE INDIVIDUAL AS SUBJECT OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS: A COMPARATIVE STUDY* 761 (2002).

<sup>23</sup> Sabine Gless, *Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle*, 9 *UTRECHT L.REV.* 91 (2013).

<sup>24</sup> ECtHR, *Natunen v Finland*, appl. no. 21022/04, 31 March 2009, para. 42 with reference to the Commission’s report of *Can v Austria*, appl. no. 9300/81, Series A no. 96, 12 July 1984, para. 53; and ECtHR, *Moiseyev v Russia*, appl. No. 62936/00, 9 October 2008, para. 220.

<sup>25</sup> ECtHR, *Jasper v The United Kingdom*, appl. no. 27052/95, 16 February 2000, para. 52 with reference to ECtHR *Doorson v The Netherlands*, appl. no. 20524/92, 26 March 1996, para. 72 and ECtHR *Van Mechelen and Others v The Netherlands*, appl. nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, para. 54.

<sup>26</sup> Gless, *supra* note 23, at 91.

<sup>27</sup> STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 291 (2005).

as well as to the right to cross-examine witnesses in certain cases such as those of terrorism,<sup>28</sup> or domestic violence against a female victim.<sup>29</sup>

Additionally, in the case concerning witness testimony obtained abroad through international cooperation, the Court delivered its decision by the Commission in *P.V. v Germany*<sup>30</sup>. Here the witness was questioned by Turkish authorities while executing a letter rogatory issued in Germany. The Commission held that the use of this evidence involved such limitation on the rights of the defence that it amounted to a violation of Article 6 of the ECHR.<sup>31</sup> This decision shows that in the case where there has not been an opportunity to be present during the questioning of the witness abroad, the Court has considered that Article 6 has not been violated if the defence has had the opportunity to send written question to the witness.

### *2.3 Fair Trial Guarantee through Transnational Cooperation: The Practice of the Constitutional Court*

Regarding fair trial guarantee, Thailand complies with international obligations to respect, protect, and fulfill the rights of the accused to a fair trial under the ICCPR through its Constitution as well as law on criminal procedure thus the right as such is deemed as a fundamental right of the accused in criminal justice, both in national and transnational levels.

#### *2.3.1 Thailand's Practices on the Application of the AMACM B.E. 2535*

Due to transnational cooperation, the aims of preventing and suppressing transnational crimes can be achieved efficiently. Thailand has promulgated a substantial law on mutual assistance in criminal matters since 1992, namely the AMACM B.E. 2535, which is a legal instrument setting a formal comprehensive framework for cooperation relating to criminal justice and covering the various aspects of criminal justice.<sup>32</sup>

The AMACM grants power and authority to the Attorney General to function as the Central Authority for other actions to achieve the objectives set forth in the Act. It allows any country to request assistance in criminal matters from Thailand through diplomatic channels, even in the absence of a bilateral treaty; this only requires the Requesting State to offer some clear sign that it would render the same assistance in return upon receipt of a similar request from Thailand.<sup>33</sup>

In practices of Thailand, the AMACM has been applied as a tool to provide assistance in criminal matters requested by foreign states as well as to request legal assistance from other states. Unlike that of European countries, transnational cooperation in criminal matters with regard to the right of the accused to a fair trial due to cross-border criminal proceedings did not occur in Thailand until the year 2013 before the Constitutional Court of Thailand.

#### *2.3.2 Fair Trial Guarantee through the AMACM B.E. 2535 of the Thai Constitutional Court*

<sup>28</sup> ECtHR, *Hulki Günes v Turkey*, appl. no. 28490/95, 19 June 2003.

<sup>29</sup> ECtHR, *Asch v Austria*, appl. no. 12398/86, 26 April 1991.

<sup>30</sup> ECtHR, *P.V. v Federal Republic of Germany*, appl. no. 11853/85, 13 July 1987

<sup>31</sup> Winter, *supra* note 1, at 135.

<sup>32</sup> Namely: investigation, inquiry, and testimony; compiling and providing documents or information; delivery of documentary evidence; search and seizure; transferring or accepting a person in custody for taking testimony; tracing of subjects or individuals; initiating criminal proceeding upon request; and confiscation or seizure of assets.

<sup>33</sup> The AMACM, Section 9(1)

The case before the Thai Constitutional Court in 2013 resulted from the case of *Prosecutor v S. and others* before the Criminal Court, where the 5 accused were charged with offences of false imprisonment causing death and murder. During the proceedings, the prosecutor requested to take testimony of a witness in Cambodia and Saudi Arabia in accordance with the AMACM because the case affected the credibility of Thai criminal justice and this may cause damage to the relationship between Thailand and other countries as well as for the sake of justice according to the Criminal Procedure Code, Section 228.<sup>34</sup>

The accused objected to the Request of the Prosecutor by claiming that some provisions of the AMACM would violate the right to a fair trial recognized by the provisions of the 2007 Constitution. The witness testimony in a foreign country would be done in a foreign language without translating measures for the accused and their lawyers, the accused did not have the right to cross-examine the witness and the witness testimony violated the principle of evidence that it must be produced in his presence at the public hearing recognized by the 2007 Constitution. In addition, Section 41 of the AMACM concerning the admissibility of all evidence and documents derived from under this Act would violate fundamental rights and freedom of the accused recognized under Sections 3 paragraph 2,<sup>35</sup> 29<sup>36</sup> and 40(2) (3) (4) (7)<sup>37</sup> of the 2007 Constitution.<sup>38</sup>

The objection of the accused was opposed by the Prosecutor who stated that the witness testimony in a foreign country by the request of Thailand had to be conducted in accordance with the rules and procedures of the requested state. This assumed that all evidence derived from a fair and public trial could be brought through criminal proceedings in Thailand. The accused and lawyers had the right to be present at the trial, the right to cross-examine the witness and the witness testimony. Even though the trial would be conducted in a foreign language, translation was already provided. In addition, the necessity to have this witness testify in foreign country was because the witness is unable to travel to Thailand.<sup>39</sup>

At the Constitutional Court, four issues of the case were declared, including the issue of the right of the accused to a fair trial that whether Sections 36, 37, 38, 39 and 41 of the AMACM B.E. 2535 violate Sections 3 paragraph 2, 29 and 40(2) (3) (4) (7).

On March 13 2013, the Constitutional Court delivered its decision that Sections 36, 37, 38 and 39 of the AMACM Matters B.E.2535 provide guidelines and mechanism for requesting various acts of assistance from a foreign state such as interrogation, investigation, litigation or seizure of property through the Central Authority. The Court delivered its decision by

<sup>34</sup> Criminal Procedure Code, Section 228 provides that "During the course of a trial, the Court may, of its own motion or upon the application of a party, take additional evidence; such may be taken by the Court itself or by the commission."

<sup>35</sup> 2007 Constitution, Section 3 paragraph 2 provides:

"The performance of duties of the National Assembly, the Council of Ministers, the Courts, and the constitutional organs as well as State agencies shall be under the Rule of Law.

<sup>36</sup> 2007 Constitution, Section 29 provides:

"The restriction of such rights and liberties as recognised by the Constitution shall not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties.

The law under paragraph one shall be of general application and shall not be intended to apply to any particular case or person; provided that the provision of the Constitution authorising its enactment shall also be mentioned therein.

The provisions of paragraph one and paragraph two shall also apply *mutatis mutandis* to by-laws issued by virtue of provisions of law.

<sup>37</sup> 2007 Constitution, Section 40, *supra* note 14.

<sup>38</sup> The Constitutional Court of Thailand, Decision No. 4/2556, 13 March 2013, at 2-3.

<sup>39</sup> *Id.*



seven votes to two that these provisions do not limit rights and freedom of a person as well as rights in criminal justice recognized by Sections 3 paragraph 2, 29 and 40 (2) (3) (4) (7) of the 2007 Constitution.<sup>40</sup>

One last remaining issue before the Court was whether Section 41 of the AMACM violates the provisions of Sections 3 paragraph 2, 29 and 40(2) (3) (4) (7) of the 2007 Constitution. The Court, however, decided by five votes to four that the provision in Section 41 of the Act does not provide the guidelines and mechanism in gathering all evidence and documents from a foreign state; in addition, it does not provide the accused opportunity to cross-examine the witness in a foreign country. Even though the Criminal Procedure provides that the Court shall consider and weigh all the evidence gathered in the case carefully in Sections 227 and 227/1, these provisions are not strict prohibitions for the Court. Therefore this may lead to unfairness for the accused and violate the rights of the accused recognized by Section 40 (2) (3) (4) (7) of the 2007 Constitution.<sup>41</sup> In addition, as a Party to the ICCPR, this would be a violation of the obligation under Article 14.3 of the Convention concerning the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.<sup>42</sup>

In conclusion, the Court declared that Section 41 of the Act restricts the rights and freedom of a person charged with a criminal offence and this affects the rights of the accused in criminal justice recognized by Section 29 and 40 (2) (3) (4) (7) of the 2007 Constitution, respectively. In addition, this provision does not comply with the principle of the rule of law enshrined by Section 3 paragraph 2 of the Constitution.

### **3. EXPLORING THE PRACTICE OF THAI COURT TOWARDS THE ECtHR'S CASE LAW**

The decision of the Constitutional Court has led to much debate among scholars in Thailand. The Court decided that all evidence and documents derived from transnational cooperation in criminal matters that shall be deemed as admissible for hearing stipulated in Section 41 of the Act violates the right of the accused to a fair trial recognized by the 2007 Constitution. This decision has impacted the mechanism of trans-border criminal proceedings under the AMACM which were adopted to prevent and suppress transnational organized crimes with cooperation of other sovereign states.

This is the first and only practice of the Court with regard to the question of balancing the right to a fair trial and the aims of transnational cooperation in criminal matters. Hence, to evaluate the reasoning of the Constitutional Court concerning the right to a fair trial, the practices and jurisprudence of the ECtHR shall be taken into account to identify the international human rights norms on the right to fair trial.

The Constitutional Court held that Section 41 of the AMACM violates the right of the accused to a fair trial recognized under the Constitution in three separate reasoning: (1) the accused do not have the opportunities to cross-examine the witness; (2) all evidence must be testified in the presence of the accused at the public hearing; and (3) the admissibility of all evidence derived under this Act violates the right to fair trial.

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<sup>40</sup> *Id.*, at 8.

<sup>41</sup> *Id.*, at 9.

<sup>42</sup> *Id.*

### 3.1 The Right to Cross-Examine the Witness

In this case, the Constitutional Court held that the request to testimony of the witness in Cambodia or Saudi Arabia violates the right to a fair trial because the accused do not have the opportunities to cross-examine the witness in foreign countries. Due to the practice of the Thai Constitutional Court, the Court's reasoning shows that even the accused and their lawyers are able to travel to present at the trial in a foreign country, but there is no guarantee that their lawyers are able to play a role in the proceedings in the court of that country; the proceedings will be conducted in a foreign language; the accused have to be responsible for all expenses themselves; and there is no guarantee that the written questions submitted for the cross-examination will not be disclosed to the witness before the testimony.<sup>43</sup>

Before the ECtHR, in the decision by the Commission in *P.V. v. Germany*,<sup>44</sup> the case where the witness was questioned by the Turkish authorities while executing a letter rogatory issued in Germany. In this case, the defendant had no opportunity to cross-examine the witness because he was not summoned for the hearing. The Commission held that the use of the evidence involved such limitations on the rights of the defence that it amounted to a violation of Article 6 of the Convention. Additionally, the decision includes important statements on witness evidence obtained abroad:

“Furthermore, Article 6 para. 3 (d) does not require that the defence must always have the opportunity of directly examining the witness. According to this provision, the accused has the right to ‘examine or have examined’ witnesses. The Commission finds that this requirement is not only complied with if the accused or his defence counsel have the opportunity of putting questions to the witnesses themselves, but also if they can request that certain questions are put to the witness by the court. Especially, this holds true if the witness is to be examined by commission...”

This decision shows that in the case where there has not been an opportunity to present himself during the testimony of the witness in another country, if the defence has had the opportunity to send written question to the witness then it is not a violation of the right of a fair trial guaranteed by Article 6 of the ECHR.

Moreover, in the case *Hass v Germany*,<sup>45</sup> the prosecution tried to get a witness who was in Lebanon to travel to Germany to be questioned. As the transfer was not authorized, the written questions were sent to Lebanon with a request that the defence should be allowed to be present during the hearing of the witness. However, as this presence was not foreseen under domestic law, it was not granted. The written record of the witness's answers were admitted as evidence, and in this case the Court found no violation of the Convention because the evidence was treated with extreme care and there was other evidence to corroborate the recorded pre-trial witness statements.

Therefore, due to the practices of the ECtHR, the case before the Constitutional Court in the case no. 4/2556 would not be a violation of the right to cross-examine the witness of the accused recognized under the Constitution.

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<sup>43</sup> *Id.*, Personal Decision of Judge Wasun, at 11; Personal Decision of Judge Charoon, at 25.

<sup>44</sup> *P.V. v Federal Republic of Germany*, *supra* note 30.

<sup>45</sup> ECtHR, *Haas v German*, appl. No. 37047/01, 17 November 2005.

### 3.2 *The Right to Present of the Accused before the Hearing*

Regarding the presence of the accused before the hearing, the Constitutional Court held this right is a fundamental right of the accused in criminal proceedings. The testimony of the witness in a foreign court without the presence of the accused would be a violation of the right to be present before the hearing of the accused recognized by both the Constitution and the ICCPR.<sup>46</sup>

The ECtHR's case law in *Solakov v Former Yugoslav Republic of Macedonia*,<sup>47</sup> Court dealt with a case of drug trafficking where five witnesses were questioned in the US. The witnesses in this case were interviewed directly by a Macedonian Examining Magistrate in the US, without a lawyer being present. In fact, the lawyer had been given this opportunity but decided that it was not necessary to attend, so had waived the right. The testimonies were recorded in writing. The court did not breach Article 6 of the ECHR, as there was no proof that the applicant had been denied his right to be present during the witness questioning.<sup>48</sup>

With regard to jurisprudence of the ECtHR, the right to be present before the hearing of the accused must be respected; the date and place of the hearing must be informed and summoned. At the hearing, the actual presence or the absence of the accused does not lead to the violation of the right of the accused.

### 3.3 *Admissibility of Evidence*

The Constitutional Court held that to consider all evidence and documents derived under the AMACM as admissible for hearing violates the right to a fair trial guaranteed by the Constitution. With this regard, the Court held that the accused do not have opportunities to prove reliability and truthfulness of the evidence gathered abroad. Even though the Criminal Procedure provides the Court to consider and weigh all the evidence gathered carefully, these provisions are not strict prohibitions for the Court, thus this may lead to unfairness for the accused and violate the right of the accused as recognized by the Constitution.<sup>49</sup>

Due to the case law of the ECtHR, with regard to criminal evidence in general, the admissibility of evidence is a matter for regulation by national law and national courts, but in considering whether the proceedings as a whole were fair, respect for the defence requires that in principle all evidence must be produced in the presence of the accused at a public hearing where it can be challenged in an adversarial procedure. This involves the opportunity to question witnesses and to comment on their evidence.<sup>50</sup> However, in order to comply with Article 6(3)(d) of the ECHR concerning the right to a fair trial the general rule requires that the defence has the opportunity to cross-examine the witness at trial. Exceptions are admitted, as has been seen in the decisions and judgments that without the cross-examination at the pre-trial stage, the general rule is to determine inadmissibility of the evidence. However, the ECtHR exceptionally allows such evidence to be taken into account as long as it is not the sole evidence to be justified and the trial court must demonstrate that it had made reasonable efforts to ensure the presence of the witness at trial. The Court chooses to accept this untested

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<sup>46</sup> Constitutional Court of Thailand, Decision 4/2556, on 13 March 2013, at 9.

<sup>47</sup> ECtHR *Salokov v Former Yugoslav Republic of Macedonia*, appl. No. 47023/99, 31 October 2001.

<sup>48</sup> Winter, *supra* note 1, at 136.

<sup>49</sup> *Id.*, at 9.

<sup>50</sup> Winter, *supra* note 1, at 134.

pre-trial evidence, but compensates its unreliability by requesting that it is not the sole and decisive evidence.<sup>51</sup>

Due to this, the admissibility of evidence derived by transnational cooperation in criminal matters can be considered as admissible for hearing even when the testimony of such witness is conducted in a foreign country without the presence of the accused. The Court may choose to accept this evidence and exercise its discretion in considering and weighing all the evidence. However, to comply with the practice of the ECtHR, the Court shall not accept this evidence as the sole and decisive evidence to prove the innocence or guilt of the accused.

#### 4. CONCLUSION

It is easy to see that the right to a fair trial has been guaranteed internationally and domestically. In Thailand it is recognized under the Constitution and the Code of Criminal Procedure. All the accused can enjoy guarantee for a fair trial through the criminal proceedings. The increasing role of transnational cooperation to prevent and suppress transnational crimes, and the efficiency of criminal proceedings containing some cross-border elements, means that the right to a fair trial may be at risk of violations. The right to confront witnesses may be violated by the witness testimony in a foreign country; the problem of language may affect the rights of the accused; and because of evidence gathering abroad in some countries, witness testimony may be heard in the accused's absence.

Without any earlier practice, the case before the Constitutional Court held that the AMACM's provision in Section 41, which allows the Court to take evidence and documents derived under the transnational cooperation of the Act into account for proving the innocence or the guilt of the accused violates the right to a fair trial recognized by the 2007 Constitution. The decision had an impact among scholars as well as the prosecutors, who take an important role through the AMACM.

In addition, the study of the practices of the ECtHR concerning the right to fair trial through the transnational cooperation in criminal matters shows that the practice of the Constitutional Court does not comply with international human rights norms concerning the right to a fair trial shaped by the jurisprudence of the ECtHR. The reasoning of the Constitutional Court put more weight on the protection of the fair trial rights of the accused in transnational criminal proceedings, while the ECtHR balances the protection of the right to a fair trial and the opportunities provided for the accused to exercise their right to a fair trial.

Also, due to the AMACM, Section 41 is a core of the Act because the objective of transnational cooperation in criminal matters is to request and receive the assistance in criminal proceedings, which is mainly about witness testimony in a foreign country and evidence gathering abroad. The decision determines that the testimony of a witness conducted in a foreign country without the presence of the accused evidence is inadmissible for hearing, which challenges the future of Thailand's courts to enhance the efficiency of transnational criminal proceedings.

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<sup>51</sup> *Id.*