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SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS AND THAI LAWYERS FOR HUMAN RIGHTS TO THE UNIVERSAL PERIODIC REVIEW OF THAILAND

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Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Thai Lawyers for Human Rights (TLHR), a coalition of human rights lawyers and defenders, formed immediately following the May 2014 coup d'état in Thailand. The collective's aim has since been to raise awareness about human rights violations resulting from the imposition of martial law and military rule in the country. The organization runs a 24-hour hotline and uses the information gathered to disseminate public awareness and advice for those summoned or arrested. TLHR provides free litigation and legal assistance for vulnerable people whose rights have been affected by martial law and who do not have legal representatives.

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Background

1. The International Commission of Jurists (ICJ) and Thai Lawyers for Human Rights (TLHR) welcome the opportunity to contribute to the Human Rights Council's (HRC) Universal Periodic Review (UPR) of Thailand.
2. In this submission, the ICJ and TLHR wish to draw the attention of the HRC and the Working Group on the UPR to the organizations' concerns about:
 - a. Thailand's Constitution and legal framework;
 - b. freedom of expression and assembly; and
 - c. the right to life, freedom from torture and enforced disappearance.

Constitution and Legal Framework

3. Following its second UPR cycle in 2016, while Thailand simply noted recommendations calling for all or certain National Council for Peace and Order ('NCPO') orders to be repealed, including Head of the NCPO ('HNCPO') Order No.3/2558 and 13/2559,¹ it accepted recommendations regarding its Constitution, including ensuring its compliance with Thailand's international obligations.² Since then, these recommendations have not been fully implemented.
4. Thailand's constitutional framework has not yet been brought into compliance with the country's international law obligations. In particular, certain sections of the constitution remain in force, continuing to reaffirm the constitutionality of NCPO orders, despite their being clearly inconsistent with Thailand's international law obligations.
5. In 2020 and up to the time of writing, abuse of the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005) ('Emergency Decree'), which already, on its face, is incompatible with human rights law and standards, has been rampant.

Constitution, HNCPO, NCPO Orders and Announcements

6. Between the 2014 *coup d'état* and the dissolution of the NCPO in July 2019, the Head of the NCPO issued at least 212 HNCPO Orders under Article 44 of the 2014 Interim Constitution, and the NCPO issued at least 214 general orders, and made 132 announcements during the same period.³ The constitutional basis of such orders and announcements is reaffirmed by article 279 of the 2017 Constitution "irrespective of their constitutional, legislative, executive or judicial force", and may only be repealed or amended by the passage of an Act.
7. Several of these orders were repealed, in whole and/or in part, by virtue of the HNCPO Order Nos. 22/2561 and 9/2562.⁴ However, the repeal of these orders and announcements did not affect the human rights violations to which their enforcement had given rise before they ceased to be in force;⁵ indeed, some of those violations are ongoing to this day.

8. In addition, several other orders, which are clearly inconsistent with Thailand's international law obligations, remain in force, including orders granting the military superior powers over civil authorities (i.e., HNCPO Order Nos.3/2558 and 13/2559). These orders continue to endow military officers with broad and unchecked powers to investigate, arrest and detain persons in places not officially recognized as detention places for up to seven days, with no judicial oversight, in violation of Article 9 of the ICCPR, guaranteeing the right to liberty and security of person.⁶
9. Announcements/orders criminalizing those who were called to report to the NCPO after the 2014 *coup* (e.g., NCPO Announcement Nos.25/2557, 29/2557 and 41/2557) were not repealed. However, on 22 December 2020, the Constitutional Court ruled that the criminal punishments provided in NCPO Announcement Nos.29/2557 and 41/2557 were "inappropriate", "disproportionate", "unnecessarily restrictive of rights or liberties of a person" and "contrary to the rule of law", thus in violation of article 26 of the 2017 Constitution. The Court further ruled that NCPO Announcement No.29/2557 violated article 29(1) of the Constitution because it retroactively imposed criminal punishment for actions committed before the order's enactment.⁷ At the time of writing, it was unclear whether this ruling would apply to other pending trials of defendants charged with failing to reporting to the NCPO.⁸ In any event, this ruling would not retroactively affect other judgments already delivered, and those who have already been punished under the above-mentioned announcements are not entitled to claim compensation or damages.⁹

Transferring of Cases from Military to Civilian Courts

10. After NCPO Announcement Nos.37/2557, 38/2557 and 50/2557 were repealed by HNCPO Order No.9/2562, 162 cases were transferred from military to civilian courts, according to statistics obtained by the OHCHR.¹⁰ However, this is a very small number of cases, as compared to the total number of civilians who were tried by military courts during the NCPO era.
11. According to the Judge Advocate-General's Office, 2,408 civilians were tried before military courts in 1,886 cases during the NCPO's five-year rule.¹¹ Of the cases that have concluded, it is not clear how many cases concerned "crimes" committed under Martial Law. Notably, in those cases, the right to appeal does not apply and, therefore, a conviction under Martial Law would be final.¹² Moreover, the trial of civilians in military courts in Thailand gives rise to serious fair trial concerns, especially their lack of compliance with Article 14 of the ICCPR and Thailand's Constitution.¹³ In particular, the military courts lack the competence, independence and impartiality to prosecute civilians.¹⁴
12. In light of these concerns,¹⁵ ICJ and TLHR have repeatedly called for all civilians who were convicted of an offence in military courts to be granted a re-trial before the civilian courts. Such re-trials are justified in exceptional circumstances under international law, including instances where initial proceedings did not afford the defendant the right to a fair trial.¹⁶ Re-trials of defendants convicted by military courts may be carried out on a case-by-case basis, taking into consideration and respecting the wishes of defendants. Those whose rights were violated by the military court must also be provided with effective remedies and reparations.¹⁷

Emergency Decree

13. The Emergency Decree was initially imposed in the southern border provinces of Thailand, which, over the years, has experienced varying degrees of separatist activity. The Decree, together with Martial Law B.E. 2457 (1914) ('Martial Law'), are still in place in most districts of the southern border provinces. The ICJ and TLHR have repeatedly called for the Decree and Martial Law to be lifted as Thailand's Criminal Procedure Code and Criminal Code already provide the appropriate domestic criminal law framework to address any criminality in the southern border provinces.
14. In the past two years, the Emergency Decree was used as a basis for quelling political unrest, several protests and, purportedly, to combat the COVID-19 outbreak in Thailand.¹⁸ On 25 March 2020, exercising its power under the Emergency Decree, the Thai government declared an "emergency situation" in all areas of Thailand with the stated intention to combat the COVID-19 outbreak. The declaration was extended ten times, most recently on 23 February 2021 to last until 31 March 2021.¹⁹ In addition, on 15 October 2020, the Thai government declared a "serious emergency situation" in Bangkok, ending it a week later.²⁰ The Emergency Decree's invocation came after months of intermittent youth-led anti-government protests in Thailand. Regulations containing several emergency decree measures were subsequently announced pursuant to Emergency Decree powers.²¹
15. Legitimate concern arises as to whether the state of emergency declarations on 25 March²² and 15 October²³ 2020 and their extensions would meet the strict test under article 4 of the ICCPR, which provides that derogations are permissible only in a "public emergency which threatens the life of the nation".²⁴ With regard to the COVID-19 outbreak, the legitimacy of the state of emergency extensions was questionable, especially when the number of confirmed cases was low, with almost no local transmissions in the third and fourth quarters of 2020, coupled with the fact that emergency powers (contained in regulation adopted under the Emergency Decree) were used to prosecute political activists exercising their freedom of peaceful assembly.²⁵ The 15 October Declaration was also imposed notwithstanding several reports that protesters had been unarmed and incidents of violence or confrontation had been few and ostensibly not such as to "threaten the life of the nation".²⁶
16. While on 4 June 2020, the Thai government informed the UN Secretary General that Thailand was derogating from some of its ICCPR obligations, particularly article 12 (freedom of movement) "to cope with the COVID-19 pandemic" from 26 March to 30 June 2020,²⁷ in the absence of any subsequent notification to the UN Secretary General concerning the extensions of the state of emergency, it must be presumed that Thailand is not purporting to derogate from any ICCPR rights at the time of writing, and that its derogation from article 12 ceased on 1 July 2020.
17. In addition, there are concerns about: a) the limited judicial scrutiny provided by the court of the measures imposed pursuant to the Emergency Decree;²⁸ b) legal immunity from prosecution of any authorities exercising powers during an emergency;²⁹ and c) emergency decree measures that unduly restrict freedom of expression, information, association and assembly, and the right to liberty and freedom from arbitrary detention, both in the contexts of COVID-19 and the anti-government protests, measures which have been taken without due regard to their legality, necessity and proportionality as required under international human rights law binding on Thailand, notably under the ICCPR.³⁰ Moreover, those who fail to comply with such emergency measures may incur up to two years' imprisonment or a fine of no more than THB 40,000 baht (USD 1,300), or both.³¹

Restrictions on Freedom of Expression and Peaceful Assembly

18. In addition to other laws that are not human rights compliant, the Emergency Decree was used by the Thai authorities to restrict freedom of expression and freedom of assembly in the context of COVID-19 and the pro-democracy protests (for detail, see below at paragraph 28-41).
19. Under the Emergency Decree, the Thai authorities issued several orders banning assemblies or public gatherings with a view to stifling participation in the anti-government protests. According to TLHR, between 25 March 2020 and 24 March 2021, there have been 149 cases where at least 393 protesters and activists were charged for violating the Emergency Decree (23 cases concern charges of Emergency Decree violations in connection with the protests during the serious emergency situation between 15 and 22 October 2020 in Bangkok); 126 cases concern charges of Emergency Decree violations in connection with the Covid-19 outbreak.³² To ICJ's and TLHR's knowledge, there is no evidence that the political activities during this time had contributed to an increased spread of COVID-19. Furthermore, no counter protester has been prosecuted.

Arbitrary Arrest and Detention

20. Under the Decree, during a serious emergency situation, a person suspected of "having a role" or an "instigator, a propagator, a supporter of such act or concealing relevant information relating to the act" which caused "the emergency situation" could be arrested and detained in places not officially recognized as places of detention. The detention is for an initial seven days, with the leave of the Court, with the possibility of applying to the Court to extend the detention period by seven days at a time, provided the total detention period does not exceed 30 days (section 11(1) and 12).
21. Between January and April 2019, the Jaringan Mangsa Dari Undang-Undang Darurat (JASAD), a human rights group based in southern border provinces, documented at least 41 alleged detentions under Martial Law and the Emergency Decree in those provinces. In its report, Duay Jai Group also recorded that, between 2005 and 2018, 127 minors were reportedly arrested and/or detained by virtue of the Emergency Decree. Only 16 of them were ever prosecuted.³³
22. Between 13 October 2020 and 21 March 2021, TLHR documented at least 179 alleged detentions at the Border Patrol Police Region 1 ('BPP'), a designated detention facility under the Emergency Decree. Among these cases, at least 56 individuals were held there before the "serious emergency situation" was in force or after it was lifted.³⁴
23. In addition, the Decree does not make clear whether or not the arrested person must be brought physically before a judge. In practice, at least in the southern border provinces, the Thai authorities do not consider it necessary to bring a detainee to court unless the court requests it, as stated in the Regulation of the Internal Security Operations Command ('ISOC') Region 4 – the agency responsible for implementing emergency decree measures and running detention facilities under the Decree in the region. This constitutes a violation of the right to be brought promptly before a judge, as guaranteed by article 9(3) of the ICCPR.³⁵
24. During the declaration of a serious emergency situation in Bangkok in mid-October 2020, TLHR found that the court did not issue any arrest warrant pursuant to the Emergency Decree. The arrests were carried out through normal criminal procedures. Several protesters were arrested because they had active arrest warrants under the

Criminal Procedure Code against them, while several others were arrested purportedly as they had been caught committing an “offence in flagrante” or were “likely to cause harm and danger to another person or property”, and thus, as allowed by the Criminal Procedure Code,³⁶ without requiring an arrest warrant; some of them were arrested without being informed of the reasons for their arrest. Considering this, the detention of individuals in the BPP, as described in paragraph 22 above, appears to be arbitrary because the BPP is a designated place of detention during the serious emergency situation under the Emergency Decree, but the arrests were carried out pursuant to ordinary criminal procedures.

25. The detention in locations that are not recognized places of detention is unlawful under international human rights law; the risk of human rights violations when detainees are held in such places without regularized procedures and safeguards to protect them increases.³⁷ TLHR documented several examples of violations of various rights of suspects who were in the custody of the BPP. For instance, lawyers were not immediately granted access to their clients and permission had to be sought from superior officials at every visit. The detention facility is also located far from the location where the protests took place and made visits difficult. There were also instances where the officials confiscated the lawyers’ phones during the visit, which rendered coordination for legal assistance impossible.³⁸

Martial Law and Internal Security Act

26. Martial Law continues to grant military officers broad and unchecked powers to investigate, arrest and detain persons in places not formally recognized as places of detention for up to seven days, with no judicial oversight, in violation of Article 9 of the ICCPR which guarantees the right to liberty and security of person. It is still in place in most districts of the southern border provinces.
27. In several districts of the southern border provinces, Martial Law and the Emergency Decree were revoked, and the Internal Security Act B.E. 2551 (2008) (‘ISA’) applied instead. However, while the powers provided by the ISA are more limited in scope and less restrictive of rights than those under the Emergency Decree or Martial Law, concerns about the ISA remain. These include: (i) vague and overbroad definitions and provisions that potentially criminalize a wide range of behaviors posing no security threat; (ii) the risk of fundamental rights being violated, especially the rights to liberty and security of person, fair trial and due process, and to freedom of movement, association and expression; and (iii) sweeping powers granted to the security forces undermining the principle of civilian authority that is at the heart of democratic governance.³⁹

Freedom of Expression and Assembly

28. Following its second UPR cycle, Thailand accepted recommendations to respect the right to freedom of expression and peaceful assembly, and to take measures to ensure such rights, especially in the context of peaceful protests.⁴⁰ Since then, Thailand has failed to implement these recommendations. In addition, Thailand simply noted several other recommendations, including to bring its national legislation in compliance with international law.⁴¹
29. Moreover, the Thai authorities have continued to use laws that are not human rights compliant to arbitrarily restrict the right to freedom of expression, association and peaceful assembly. This is apparent in their response to the pro-democracy protests and COVID-19.

Laws that are not Human Rights Compliant

30. The authorities have abused laws that are not human rights compliant to arbitrarily restrict freedom of expression, association and assembly. These laws include: articles 112, 116 and 215 of the Criminal Code for *lèse majesté*, a sedition-like offence and illegal assembly of more than 10 people;⁴² the Computer-Related Crime Act ('CCA'); criminal defamation provisions under articles 326 to 328 of the Criminal Code; contempt of the court provisions; the Emergency Decree; and the Public Assembly Act.
31. The deficiencies in these laws have enabled the authorities and other non-State actors to abuse them. These deficiencies include the laws' vague and overbroad provisions and the provision of harsh penalties incompatible with the requirements of necessity and proportionality.⁴³ For instance, in order to combat "false information" online, the vaguely worded section 14(2) of the CCA criminalizes the entering of "false computer data" that is "likely to cause damage to the protection of national security, public safety... or cause panic to the public" with up to five years' imprisonment, a fine of up to 100,000 Baht (USD 3,250), or both.⁴⁴ The Emergency Decree was also used by the Thai authorities to impose measures to curb the spread of information "which may instigate fear amongst the people or is intended to distort information which misleads understanding of the emergency situation" and, therefore, used as a justification to restrict freedom of expression and access to information.
32. The renewed use of article 112, after a three-year hiatus,⁴⁵ is of particular concern. To the alarm of UN human rights experts,⁴⁶ civilian courts issued decisions sentencing individuals to disproportionately severe prison sentences under article 112 for online expression.⁴⁷ One case resulted in a sentence of over 43 years in prison,⁴⁸ and another resulted in a sentence of four years and six months in prison.⁴⁹

Thai Government's Response to the Pro-Democracy Protests

33. Between 2020 and 2021, the Thai authorities have responded to the protests by intensifying their abuse of the aforementioned laws to restrict the right to freedom of expression, association and assembly through a variety of means, including: prosecution of persons for merely exercising their freedom of expression and assembly; suppressing participation in protests; blocking of online content; prosecution of social media companies; and crackdown on journalists and news outlets.
34. The Thai authorities prosecuted protesters through numerous criminal complaints and charges, including article 116 of the Criminal Code, section 14 of the CCA, contempt of court provisions, measures imposed under the Emergency Decree and the Public Assembly Act.⁵⁰ According to TLHR, between 18 July 2020 and 28 February 2021, at least 382 people in 207 cases were charged in connection with their participation in the protests and expression of their political opinions. The Thai authorities also invoked article 112 of the Criminal Code with TLHR documenting at least 60 individuals being charged for *lèse majesté* offences in 47 cases between November 2020 and 28 February 2021.⁵¹
35. Among these, at least 23 minors were charged in 26 cases for taking part in the protests with, *inter alia*, charges under the Emergency Decree, the CCA and section 112 and 116 of the Criminal Code. Seventeen of them were reportedly arrested *in flagrante*, without warrant and/or without being informed of the reasons for their arrest.⁵²

36. The Thai authorities also attempted to stifle participation in the pro-democracy protests by blocking the messaging application Telegram, commonly used for the organization of protests.⁵³ During the serious emergency situation, the government warned protestors that using social media to convince others to join the protests, taking selfies at the marches, livestreaming the demonstrations and posting these on social media would breach the rules of the state of emergency.⁵⁴ On 19 October 2020, the Minister of Digital Economy and Society ('MDES') announced to the media that they would submit complaints to the police against social media users, with almost 300,000 URLs allegedly having violated orders under the Emergency Decree.⁵⁵ The government also filed criminal complaints under the CCA and Emergency Decree against at least ten individuals for "convincing others to join the protests" on Facebook and Twitter,⁵⁶ following its warning that this would breach the rules of the state of emergency.⁵⁷
37. The Thai authorities sought judicial orders to block online content across various platforms deemed to violate existing laws, such as the CCA and Emergency Decree. The platforms targeted have included YouTube,⁵⁸ Change.org⁵⁹ and Facebook.⁶⁰ The MDES regularly filed requests to the courts to remove content deemed inappropriate from social media platforms, including content criticizing the monarchy, with 1,024 URLs targeted in August 2020 and more than 3,000 URLs in September 2020.⁶¹ Notably, it was reported that the Facebook group "Royalist Marketplace" was blocked in Thailand on 24 August 2020 for sharing sensitive information on the monarchy.⁶²
38. In this respect, the Thai government filed legal complaints against the parent companies of Twitter and Facebook in September 2020 under the CCA for missing deadlines to comply fully with court-issued takedown orders of content on their platforms.⁶³ This followed reports that Facebook was preparing to legally challenge the Thai government after being compelled by a court order to block access to the Facebook group "Royalist Marketplace".⁶⁴
39. The Emergency Decree was also used by the Thai authorities to restrict the ability of journalists and news platforms covering the protests. For instances, on 16 October 2020, a reporter from Prachatai was arrested for covering the police crackdown of protests in Bangkok on Facebook Live. He was taken to the BPP, a designated place of detention under the Emergency Decree without warrant. He was eventually released a few hours after his arrest, after paying a THB 300 fine (approximately USD 10), apparently for "defying an order of the authorities" under section 368 of the Criminal Code.⁶⁵ In November 2020, it was reported that a reporter for Voice TV, who had been covering the protests, was summoned by the police to face a charge for violating the Emergency Decree.⁶⁶ On 20 October 2020, it was reported that the MDES had obtained closure orders from the Bangkok Criminal Court to shut down the online platforms of Voice TV, Prachatai, The Reporters, The Standard and Free Youth for allegedly disseminating "false information" about the protests, in violation of the Emergency Decree and the CCA. However, this order was revoked by the same court on 21 October 2020, ruling that only specific illegal content should have been blocked instead of the entire platforms.⁶⁷

Thai Government's Response to COVID-19

40. Several individuals were prosecuted, purportedly to combat the COVID-19 pandemic, under an overly expansive justification of "public health" and "curbing the spread of false information relating to the virus". Among them were people who may have disseminated information without prior verification but without ill intent, and those who circulated news suggesting that the virus infected certain individuals or regarding the government's measures to curb the spread of COVID-19.⁶⁸

41. The Thai authorities have used the CCA and article 112 of the Criminal Code against individuals expressing criticism of the government's COVID-19 response by labelling such criticism as "false information".⁶⁹ For example, in January 2021, the MDES filed a criminal complaint under article 112 against Thanathorn Juangroongruangkit, the former leader of an opposition party, for comments he made on Facebook Live about the government's vaccine strategy.⁷⁰ While on 31 January 2021 the Bangkok Criminal Court ordered the removal of Thanathorn's clip for containing comments purportedly violating the CCA,⁷¹ on 8 February 2021 the court order was revoked after Thanathorn successfully challenged it.⁷²

Right to Life, Freedom from Torture and Enforced Disappearance

Death Penalty

42. In 2016, following its second UPR cycle, Thailand accepted recommendations regarding the abolition of the death penalty.⁷³ To date, however, it has failed to implement them. As of December 2020, 16 prisoners in Thailand were sentenced to death by a final judgment.⁷⁴
43. Moreover, in June 2018, Thailand executed a prisoner.⁷⁵ Prior to this execution, in practice, there had effectively been a nine-year moratorium on capital punishment in the country.

Allegations of Torture, Other Ill-Treatment and Enforced Disappearance

44. Following its second UPR cycle, Thailand accepted recommendations to undertake prompt, thorough and impartial investigations into all allegations of torture and other ill-treatment, and to ensure accountability of those responsible for the commission of enforced disappearances.⁷⁶ The recommendations Thailand accepted included the creation of an independent body to investigate all torture allegations and bringing perpetrators to justice. To date, Thailand has not fully implemented these recommendations.
45. Local CSOs continue to receive complaints of alleged human rights abuses at the hands of security forces, including torture or other ill-treatment. For instance, the Muslim Attorney Centre documented 27 torture allegations in 2016, 54 in 2017, 16 in 2018, 39 in 2019 and 7 in 2020. The number of cases in which these allegations have been investigated, let alone perpetrators prosecuted, remain slow, as is the case concerning the provision of remedies and reparations to victims.
46. From 1980 to August 2020, the UN Working Group on Enforced or Involuntary Disappearances ('WGEID') recorded and transmitted 91 cases of alleged enforced disappearance to Thailand. Currently, 75 cases remain outstanding ('WGEID's list').⁷⁷

Committee Managing Complaints for Torture and Enforced Disappearance Cases

47. On 15 November 2019, pursuant to Prime Minister's Office Order No.339/2562, the Committee Managing Complaints for Torture and Enforced Disappearance Cases, chaired by the Minister of Justice, was established to formulate policies for the prevention of acts of torture and enforced disappearance, and to investigate and provide remedies for torture and enforced disappearance cases.⁷⁸ The Committee created four sub-committees, including the Sub-committee to Monitor and Investigate Torture and Enforced Disappearance Cases. According to the Ministry of Justice, 67 outstanding enforced disappearance cases from the WGEID's list were followed up by

the Sub-Committee, and information was compiled and sent to the Ministry of Foreign Affairs, who would communicate it to the WGEID.⁷⁹

48. The ICJ and TLHR are concerned about CSOs' reports that the Sub-Committee's investigation process seemed to focus on reducing the number of cases on the WGEID's list, instead of conducting investigations that meet international law and standards into such cases and bringing perpetrators to justice.⁸⁰
49. In January 2021, the Sub-Committee invited the ICJ, the OHCHR Regional Office for Southeast Asia and Thailand's National Human Rights Commission of Thailand to observe its meeting with relatives of two victims featured on the WGEID's list. The Sub-Committee asked observers to provide recommendations on their interview protocol in an effort to improve the transparency of the interview. Recommendations made by the observers, including the ICJ, to the Sub-Committee included: (i) the relatives must be apprised about the progress of the criminal investigation that has been conducted into their loved one's alleged enforced disappearance and of the consequence of case's removal from the WGEID's list; (ii) other consequence of the withdrawal from the WGEID's list must also be communicated – including, the fact that the WGEID would not be able to help the relatives follow up on the case in the future; and (iii) the relatives have the right to be accompanied by lawyer, member of CSO, and/or other person whom they trust. The relatives of the two victims who met with the Sub-Committee firmly refused the withdrawal of their loved ones from the WGEID's list, and called for an effective investigation of their cases. To date, it is too early to say whether the Sub-Committee will implement these recommendations.
50. In any event, the ICJ and TLHR are concerned that it is not clear what legal framework - domestic and/or international - will ground the Sub-Committee's operations, given that, under domestic law, torture, other ill-treatment and enforced disappearance are still not criminalized (see below for greater detail).⁸¹

Draft Law on Torture and Enforced Disappearance

51. Following its second UPR cycle, Thailand accepted recommendations regarding the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention against Torture, and the passing of domestic legislation criminalizing enforced disappearance and torture.⁸² To date, Thailand has yet to implement these recommendations.
52. Thailand's failure to date to enact domestic legislation criminalizing torture, other ill-treatment and enforced disappearance is of particular concern. The Draft Prevention and Suppression of Torture and Enforced Disappearance Act ('Draft Act') came close to being enacted in 2018 when it was approved by the National Legislative Assembly at first reading. However, it was eventually withdrawn and sent back to the Ministry of Justice, causing further delay in the process. According to the Ministry of Justice, the Draft Act is currently with the parliament awaiting consideration. In addition, there are three other draft laws criminalizing torture and enforced disappearance proposed by members of the parliament. These three bills are similarly awaiting parliamentary time to be considered.⁸³
53. Nevertheless, the government's latest Draft Act still has not addressed the principal shortcomings that the ICJ and TLHR, as well as other stakeholders and experts, have identified as priorities in order to ensure that the draft legislation complies with Thailand's international human rights obligations, including:

- a. Incomplete definitions of the crimes of torture and enforced disappearance, as well as other key terms inconsistent with international law;
- b. The absence of provisions concerning cruel, inhuman and degrading treatment (CIDT/P);
- c. The inadequacy of provisions on the inadmissibility of statements and other information obtained by torture and CIDT/P as evidence in legal proceedings;
- d. The inadequacy of provisions relating to modes of liability for crimes described in the Draft Act;
- e. The inadequacy of provisions concerning safeguards against torture, CIDT/P and enforced disappearances; and
- f. The absence of provisions concerning the continuous nature of the crime of enforced disappearance and the removal of any statute of limitations for torture and enforced disappearance crimes.⁸⁴

Recommendations

54. In light of the above-mentioned concerns, the ICJ and TLHR call upon the HRC and the Working Group on the UPR to recommend:

Constitution and Legal Framework

- a) The legislature to amend or, where appropriate, repeal, all existing HNCPO and NCPO orders and announcements, including HNCPO Order Nos.3/2558 and 13/2559 as a matter of priority, and section 279 of the Constitution, which prevent the effective realization of human rights;
- b) The judiciary to ensure that effective, prompt and accessible judicial and non-judicial remedies are provided to those who are affected by the implementation of HNCPO and NCPO orders;
- c) The legislature and judiciary to grant a re-trial in civilian courts to all civilians who were convicted of an offence in military courts and who wish such a re-trial;
- d) The legislature to repeal or substantially amend the Emergency Decree, Martial Law and ISA to ensure their compliance with Thailand's international legal obligations, especially concerning the guarantees against incommunicado detention enumerated in the ICCPR and in the UN Human Rights Committee's General Comment No.35;⁸⁵
- e) The government to lift the Martial Law and Emergency Decree in the provinces currently under them without undue delay, particularly as the situation does not appear to meet the "threat to the life of the nation" as required under article 4 of the ICCPR.

Freedom of expression, information, association and peaceful assembly

- f) The legislature to repeal or substantially amend criminal law provisions that criminalize or unduly restrict the rights to freedom of expression, information, peaceful assembly and other related rights, including but not limited to articles 112, 116, 326, 327 and 328 of the Criminal Code; section 14 of the CCA; and the legal provisions on contempt of court;
- g) All branches of the State to cease harassment and persecution of all individuals for merely exercising their rights to free expression, information and peaceful assembly, through the abuse of laws and administrative regulations, such as the CCA, Emergency Decree, articles 112 and 116 of the Criminal Code and contempt of court provisions; and enable access to adequate, effective and prompt remedy for all individuals whose rights have been violated;
- h) The prosecuting authorities to refrain from future charges and drop all existing charges against individuals and social media companies facing prosecution for alleged violation of domestic provisions that are inconsistent with Thailand's obligations under international human rights law guaranteeing the rights to freedom of expression, information, association and peaceful assembly. All persons held in pre-trial detention or imprisoned upon conviction in such cases should be immediately released;
- i) The government to refrain from restricting or blocking online content unless the blocking decision has been undertaken following a full analysis that applies international standards concerning legality, legitimate purpose, necessity, proportionality and non-discrimination, and has been authorized pursuant to an order by an independent and impartial judicial authority, in accordance with due process with the express guarantee of the right to appeal;

Right to life and freedom from torture and enforced disappearance

- j) All branches of the State to take immediate steps to end the practice of capital punishment, as repeatedly called by United Nations General Assembly Resolutions;
- k) The government to ratify the International Convention for the Protection of All Persons from Enforced Disappearance and the Optional Protocol to the Convention against Torture;
- l) The investigative and prosecuting authorities to ensure that all allegations and complaints of torture, ill-treatment and enforced disappearance be investigated promptly, independently, impartially and thoroughly. Ensure the prosecution of alleged perpetrators and, if convicted, the judiciary should ensure that they be punished with appropriate sanctions commensurate with the gravity of the offence. Ensure that the victims be provided with full reparation, including satisfaction and

guarantees of non-repetition;

- m) The government to ensure that the Committee Managing Complaints for Torture and Enforced Disappearance Cases is equipped with necessary resources and mandated to conduct investigations that meet international law and standards into cases of torture and enforced disappearance;
- n) The legislature to amend the Draft Prevention and Suppression of Torture and Enforced Disappearance Act to ensure its compliance with Thailand's obligations under international law and pass it without any further delay.

ENDNOTES

¹ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Thailand', second cycle review, A/HRC/33/16, 15 July 2016, para 158-159, available at: <https://undocs.org/A/HRC/33/16> ('2016 UPR Report'). For example, Recommendation number 159.14 and 159.40, made by the United States of America; 159.15, made by Australia; 159.42, made by Belgium; 159.47, made by Luxembourg; and 159.53, made by Canada.

² 2016 UPR Report: recommendation number 158.26, made by Uganda; 158.27, made by Switzerland; 158.28, made by Pakistan; 158.130, made by Czech Republic; and 158.138, made by Austria.

³ See also: ICJ, Thai Lawyers for Human Rights (TLHR) and the Cross-Cultural Foundation (CrCF), 'Thailand: The ICJ and other human rights groups make supplementary submission to the UN Human Rights Committee', 24 April 2020, at 1, available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_NGS_THA_42036_E.pdf ('2020 Joint Submission to the Human Rights Committee')

⁴ 2020 Joint Submission to the Human Rights Committee, at 1-7.

⁵ Section 2 of the HNCPO Order No. 22/2561, and section 8 of HNCPO Order No. 9/2562

⁶ ICJ, 'Recommendations for the repeal or amendment of Head of the NCPO and NCPO orders and announcements', 22 April 2019, available at: <https://www.icj.org/wp-content/uploads/2019/04/Thailand-civilian-prosecutions-military-courts-Advocacy-Non-legal-submissions-2019-ENG.pdf>; ICJ, 'Thailand: lifting of the ban on political activities is welcome but more is needed', 13 December 2018, available at: <https://www.icj.org/thailand-lifting-of-the-ban-on-political-activities-is-welcome-but-more-is-needed/>

⁷ The judgment was published in the government gazette on 22 December 2020, available at: http://www.ratchakitcha.soc.go.th/DATA/PDF/2563/A/104/T_0027.PDF

⁸ For example, TLHR, 'Without NCPO but Sagium Was Still Charged with Not Reporting to the NCPO', 18 June 2020, available at: <https://tlhr2014.com/archives/18618>

⁹ Section 212, 2017 Constitution

¹⁰ TLHR, 'As if the NCPO Never Left: Six Years After the Coup and the Persistence of Human Rights Violations', 22 May 2020, available at: <https://tlhr2014.com/en/archives/17808>. TLHR represented the accused in 22 cases, which were transferred from military to civilian courts. Twenty cases are examined by the courts, other two are investigated by responsible investigators. Among these, defendants in 15 cases were charged with lèse-majesté and sedition laws, other five were charged with other offenses under the Criminal Code. For lèse-majesté cases, the Court of the First Instance rendered its judgments in 9 cases; four cases resulted in convictions, and five cases resulted in acquittals.

¹¹ Ibid

¹² Bangkok Post, 'Civilians can now appeal military court judgements', 8 April 2015, available at: <https://www.bangkokpost.com/thailand/general/521475/civilians-can-now-appeal-military-court-judgements>

¹³ TLHR documented numerous examples of violations of fair trial rights, including: the passage of several months before a copy of the indictment is provided to an accused; defence lawyers being prohibited from making copies of the court file, including of important orders, such as those concerning bail; the failure of judges to disclose their names in written decisions; the failure to make hearings accessible to the public in certain cases; refusal to allow the public to take notes; and the conduct of inquiries and sentencing hearings in camera. See: ICJ & TLHR, 'Joint submission to the UN Human Rights Committee by the ICJ and Thai Lawyers for Human Rights', 13 February 2017, available at: <https://www.icj.org/joint-submission-to-the-un-human-rights-committee-by-the-icj-and-thai-lawyers-for-human-rights/>

¹⁴ ICJ, 'Recommendations for the repeal or amendment of Head of the NCPO and NCPO orders and announcements', 22 April 2019, available at: <https://www.icj.org/wp-content/uploads/2019/04/Thailand-civilian-prosecutions-military-courts-Advocacy-Non-legal-submissions-2019-ENG.pdf>.

¹⁵ TLHR, 'problem concerning the transferal of civilian cases from the Military Court: from indefinite trial to a vacuum', 16 October 2019, available in Thai at: <https://tlhr2014.com/archives/14083>.

¹⁶ UN Human Rights Committee, 'General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial', CCPR/C/GC/32, 23 August 2007, para 56. For example, Protocol No. 7 to European Convention for the Protection of Human Rights and Fundamental Freedoms provides in its article 4(2) that this principle "shall not prevent the re-opening of the case ... if there has been a fundamental defect in the previous proceedings, which would affect the outcome of the case". Article 20(3) of the Statute of the International Criminal Court also provides for exceptions for such other court proceedings if such proceedings were otherwise "not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice"

¹⁷ ICJ, 'Recommendations for the repeal or amendment of Head of the NCPO and NCPO orders and announcements', 22 April 2019, available at: <https://www.icj.org/wp-content/uploads/2019/04/Thailand-civilian-prosecutions-military-courts-Advocacy-Non-legal-submissions-2019-ENG.pdf>.

¹⁸ ICJ, 'Thailand: lifting of serious emergency situation in Bangkok is welcome, but emergency laws remain deeply problematic – ICJ Briefing Paper', 27 October 2020, available at: <https://www.icj.org/thailand-lifting-of-serious-emergency-situation-in-bangkok-is-welcome-but-emergency-laws-remain-deeply-problematic-icj-briefing-paper/> ('ICJ Emergency Decree Briefing')

¹⁹ Royal Thai Government, 'Council of Ministries' meeting bulletin', 23 February 2021, available at: <https://www.thaigov.go.th/news/contents/details/39334>

²⁰ Bangkok Post, "State of emergency ends in Bangkok", 22 October 2020, available at: <https://www.bangkokpost.com/thailand/politics/2006459/state-of-emergency-ends-in-bangkok>.

²¹ Available at: <https://www.mfa.go.th/en/page/press-release-information-2?menu=5d5bd3cb15e39c306002a9b9>

²² Available at: http://interaffairs.psu.ac.th/images/download/covid/Declaration_of_Emergency_in_Thailand.pdf. The 25 March Declaration declared that the COVID-19 outbreak was a situation that "threatens public order and the safety of the people which necessitates stringent and urgent measures to prevent the widespread transmission of the disease".

²³ The Government Public Relations Department, 'Declaration of a Serious Emergency Situation in Bangkok', 15 October 2020, available at: https://thailand.prd.go.th/ewt_news.php?nid=10227&filename=index. The 15 October Declaration referred to the situation where "certain groups of perpetrators intended to instigate an untoward

incident and movement in the Bangkok area by way of various methods (...) including causing obstruction to the royal motorcade, which is a violation of the Public Assembly Law and the Constitution of the Kingdom of Thailand and probable causes to chaos and incitement of conflict and public disorder (...) affecting national security and safety of the public and properties, COVID-19 pandemic control measures, and the nation's vulnerable economic security".

²⁴ See also: ICJ, 'Thailand: measures under the Emergency Decree to address the COVID-19 outbreak must conform to international law', 24 March 2020, available at: <https://www.icj.org/thailand-measures-under-the-emergency-decree-to-address-the-covid-19-outbreak-must-conform-to-international-law/>

²⁵ For example, Marwaan Macan-Markar, 'Thailand seeks to extend COVID emergency despite no new cases', Nikkei Asia, 29 June 2020, available at: <https://asia.nikkei.com/Politics/Turbulent-Thailand/Thailand-seeks-to-extend-COVID-emergency-despite-no-new-cases>

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²⁸ Section 16, Emergency Decree; ICJ Emergency Decree Briefing, at 7-11.

²⁹ Section 17, Emergency Decree; ICJ Emergency Decree Briefing, at 7-11.

³⁰ Section 9, 11 and 12, Emergency Decree.

³¹ Section 18, Emergency Decree.

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³⁶ Section 78, Criminal Procedure Code

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⁴⁰ 2016 UPR Report: recommendation number 158.130, made by Czech Republic; 158.131, made by Guatemala; 158.132, made by Japan; 158.133, made by Lebanon; 158.134, made by Republic of Korea; 158.135, made by Albania; 158.136, made by Chile; 158.137, made by France; 158.138, made by Austria; and 158.141, made by Costa Rica.

⁴¹ 2016 UPR Report: recommendation number 159.50, made by Finland; 159.51, made by United

Kingdom of Great Britain and Northern Ireland; 159.52, made by Belgium; 159.53, made by Canada; 159.52, made by Belgium; 159.54, made by Norway; 159.55, made by Spain; 159.56, made by Sweden; 159.57, made by Latvia; 159.58, made by Switzerland; 159.59, made by Germany; 159.60, made by Botswana; 159.61, made by Italy; 159.62, made by Iceland; 159.63, made by Brazil; and 159.52, made by Belgium.

⁴² Section 215 of the Criminal Code criminalise: “whenever ten persons upwards being assembled together do or threaten to do an act of violence, or do anything to cause a breach of the peace, every such person shall be punished with imprisonment not exceeding six months or fined not exceeding one thousand Baht, or both.”

⁴³ The ICJ has analyzed extensively the incompatibility of these legal provisions with international human rights law in previous publications. The ICJ also has a forthcoming report on freedom of expression online in Thailand, which is expected to be published by April 2021. For past works, see, for instance, ICJ, ‘Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia’, December 2019, available at: <https://www.icj.org/southeast-asia-icj-launches-report-on-increasing-restrictions-on-online-speech/> (‘ICJ Dictating the Internet Report, 2019’); ICJ Emergency Decree Briefing

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⁴⁸ Bangkok Post, ‘87 years in jail for lèse majesté sets new record’, 19 January 2021, available at: <https://www.bangkokpost.com/thailand/general/2053471/87-years-in-jail-for-lese-majeste-sets-new-record>.

⁴⁹ Khaosod English, ‘Blogger Convicted of 112 After Secret Trial, 5-Year Captivity’, 18 January 2021, available at: <https://www.khaosodenglish.com/politics/2021/01/18/blogger-jailed-over-lese-majeste-after-secret-trial-by-military/amp>. The jail term is shorter than the time Siraphop already spent in prison while waiting for his trial – he was remanded in prison from 2014 until his release about four years and 11 months later, in 2019.

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Slovakia, Sierra Leone and Belgium; 158.19, made by New Zealand; 158.20, made by Uruguay; 158.30, made by Slovakia; 158.32, made by Congo; 158.33, made by Canada; 158.76, made by New Zealand; 158.77, made by Spain; 158.78, made by Chile; and 158.79, made by Republic of Korea.

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