

## UPR SUBMISSION LAWYERS FOR LAWYERS – THAILAND – NOVEMBER 2021

### A. Introduction

1. Lawyers for Lawyers (“L4L”) submits this report on the state of human rights in Thailand, especially in respect of the legal profession, with recommendations for the 39<sup>th</sup> session of the Universal Periodic Review (“UPR”) Working Group in the UN Human Rights Council (“HRC”) in November 2021.
2. L4L is an independent and non-political foundation based in The Netherlands, which was established in 1986 and is merely funded by lawyers’ donations. L4L promotes the proper functioning of the rule of law through the free and independent exercise of the legal profession around the world. L4L has special consultative status with ECOSOC since 2013.

### B. Executive Summary

3. This submission highlights key concerns regarding Thailand’s compliance with its international human rights obligations to guarantee the right to independent counsel as set out in the UN Basic Principles on the Role of Lawyers<sup>i</sup> (“Basic Principles”) and other international human rights instruments, focusing on the lack of effective guarantees for the functioning of lawyers, including the lack of freedom of expression and association of lawyers.

### C. Normative and Institutional Framework of the State

4. The adequate protection of human rights and fundamental freedoms requires that every citizen has effective access to justice and legal assistance. Legal assistance can only be provided effectively in a judicial system where lawyers, along with judges and prosecutors, are free to carry out their professional duties independently of the government and political pressure. This follows inter alia from the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (“ICCPR”), to which Thailand is a party.
5. On 22 June 2017, the United Nations Human Rights Council (HRC) passed a resolution condemning in general “*the increasingly frequent attacks on the independence of [lawyers], in particular threats, intimidation and interference in the discharge of their professional functions*”. The HRC expressed its deep concern “*about the significant number of attacks against lawyers and instances of arbitrary or unlawful interference with or restrictions to the free practice of their profession*”.<sup>ii</sup>
6. In its task of promoting and ensuring the proper role of lawyers, the Government of Thailand should respect the Basic Principles within the framework of its national legislation and practice. The Basic Principles provide a concise description of international standards relating to key aspects of the right to independent counsel. Adherence to the Basic Principles is considered a fundamental precondition to fulfilling the requirement that all persons have effective access to independent legal assistance.<sup>iii</sup>
7. During the UPR, Thailand received<sup>iv</sup> and accepted<sup>v</sup> recommendations concerning the need to ensure that human rights defenders<sup>vi</sup> can exercise their right to freedom of expression and assembly<sup>vii</sup>, the protection of human rights defenders<sup>viii</sup>, the investigation of reported cases of intimidation, harassment and attacks of human rights defenders<sup>ix</sup>, and the end of arbitrary detentions and arrests<sup>x</sup>.
8. However, reports gathered by L4L, including information received from lawyers in Thailand, demonstrate that Thailand has not consistently upheld the necessary guarantees for the proper functioning of the legal profession to fulfil the requirements set out in the Basic Principles. Consequently, lawyers encounter difficulties in carrying out their professional

duties. This also undermines the proper functioning of the judicial system, including the right to fair trial and effective access to justice.

#### **D. No Effective Guarantees for the Functioning of Lawyers**

##### ***i) Difficulties with access to clients***

9. Lawyers for Lawyers was informed by lawyers from Thailand that they often experience difficulties with access to their clients in detention.
10. The Basic Principles provide that governments “*shall ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention*”<sup>xi</sup>. In addition, the Basic Principles provide that “[*A*ll arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality”. The right to meet with a lawyer is also a right protected under the Thai Criminal Procedure Code<sup>xii</sup>.
11. According to our information, lawyers in Thailand encounter problems with access to their clients. It has been reported during the protests taking place on a large scale from October 2020 to March 2021, many individuals (at least 179 people)<sup>1</sup> were arrested and detained by the police officers at the Border Patrol Police Region1, in a province outside of the capital and not an official police station under Thai Criminal Procedure Code. In order for them to meet with their clients, lawyers need to travel approximately an hour from Bangkok to the camp, and when they arrive they often have to wait one to five hours before they can access their clients. Lawyers were compelled by police inside the camp to leave their mobile phones before meeting their lawyers, resulting in difficulties to communicate to the outside world and concerns on their safety and security.
12. Moreover, law enforcement officers sometimes do not communicate the exact whereabouts of clients. As the clients sometimes don’t know where they are being held themselves, it is nearly impossible to request assistance of a lawyer. It was reported that officials sometimes communicate a location where clients are being held to their lawyers, and upon arrival the lawyer is informed that the client is transferred to another location, severely delaying the meeting between lawyer and client.

##### ***ii) Lack of respect for lawyer-client confidentiality***

13. The Basic Principles provide that “*all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials*” and “*governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential*”<sup>xiii</sup> Furthermore, the UN Human Rights Committee stated in its General Comment No.32 on Article 14 of the ICCPR that “*the right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications*”<sup>xiv</sup>.
14. It has been reported that when detained clients are meeting with their lawyer, officers sometimes stand in the corner of the room and will move closer to the lawyer and client in an

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<sup>1</sup> <https://tlhr2014.com/en/archives/26177>

attempt to monitor the lawyer and client, and record the conversation. When lawyers communicate to the police officers that there is a need for private time between lawyer and client, officers will say something along the lines of “*you can talk with your client, but we will just stand here*”.

### **iii) Harassment and intimidation of lawyers**

15. Article 16 of the Basic Principles states that governments must “*ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference (...) and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics*”<sup>xv</sup>.
16. L4L has been informed by lawyers in Thailand that they are subjected to threats, intimidation, and improper interference or attempts to pressure them by members of law enforcement agencies, or the military. This is demonstrated by the following examples:

#### **Lawyers of Thai Lawyers for Human Rights (TLHR)**

*Following the mass demonstration in 2020, TLHR’s volunteer lawyers were monitored and visited at their homes by police officers. A police officer visited a lawyer’s house without identifying his unit but claiming to be an investigative officer. Also, some lawyers were visited by police officers and warned not to participate in any political activities.*

17. Some lawyers are the subject of criminal investigations and prosecution in connection to their legitimate activities. Impunity for the enforced disappearance of Thai human rights defenders, including lawyers, is still a major concern. Also, Thai lawyers have been subjected to legal harassment based on acts performed in their professional capacity. Lawyers should never be identified with their clients or their clients causes as a result of discharging their function. This is illustrated by the following cases:

#### **Mr. Somchai Neelapaijit**

*Somchai Neelapaijit disappeared on 12 March 2004, one day after he had publicly accused the police of torturing his detained clients. Since then, nothing has been heard of him. Shortly after the disappearance of Mr. Neelapaijit, five police officers were arrested and prosecuted for their alleged involvement. On 11 March 2011, the Appeal Court acquitted all five suspects, even though there seemed to be clear evidence against all five suspects. Subsequently, the Supreme Court acquitted all five suspects on 29 December 2015, denying crucial evidence and refusing to admit Mr. Neelapaijit’s relatives as party in the proceedings, which led to the closure of the case.<sup>xvi</sup> On 5 October 2016, the Department of Special Investigation (DSI) closed the investigation into Somchai’s disappearance on the grounds that no perpetrators and no new evidence had been found. On 3 November 2016, Angkhana Neelapaijit, submitted a letter to the DSI to object to the decision to stop the investigation of the case. However, until date, no further investigation has been conducted. On 12 March 2021, 17 years after Mr. Neelapaijit’s disappearance, Angkhana Neelapaijit submitted a new letter to the DSI requesting further investigation of the case. After 17 years, this case remains unresolved and the perpetrators unpunished. On 25 April 2017, the UN Human Rights Committee expressed its concern about widespread impunity for enforced disappearances of Thai human rights defenders, including Mr. Neelapaijit, and the slow progress in investigating such cases.<sup>xvii</sup>*

#### **Mr. Nakorn Chompuchart and Mr. Sira Osottham**

*In November 2018, Natural Fruit limited company issued a claim for misuse of the right to justice against lawyers Nakorn Chompuchart and Sira Osottham, requesting for a compensation of damages of 50,000,000 Baht, which amounts to nearly 1.5 Million Euros. This claim is related to the legal services provided to their client, Andy Hall, a migrant rights*

activist who reported on human rights abuses towards migrant workers who were employed at Natural Fruit. When Natural Fruit accused Mr. Hall of defamation and ‘intentional input or alteration of inauthentic computer data’, Mr. Chompuchart and Mr. Osottham filed a counter claim against Natural Fruit for abusing false evidence before the court. Natural Fruit responded by initiating claims alleging misuse of the right to justice against the lawyers themselves. Furthermore, if convicted, Mr. Chompuchart and Mr. Osottham would not have been able to perform their professional activities anymore. On 8 June 2020, the court dismissed the case completely, and ruled that Mr. Chompuchart and Mr. Osottham had merely used their right to justice.

### **Sirikan Charoensiri**

Sirikan Charoensiri is the co-founder of TLHR a lawyers’ collective founded shortly after the military coup on 22 May 2014 to provide legal aid and monitor the human rights situation in Thailand. Sirikan Charoensiri represented 14 students carrying out peaceful protests in May 2015 and calling for democracy and an end to military rule. In February 2016, Ms. Charoensiri was charged with “concealing evidence” and “refusing to comply with official orders”, because she refused to let the police search her car without a warrant during the night of 27 June 2015. This case was pending for over three years at the Prosecutor’s Office, where Ms. Charoensiri was required to report periodically. On 21 August 2019, after 12 postponements of the case, the Prosecutor decided not to indict Ms. Charoensiri.<sup>xviii</sup> However, police charges are still pending against Ms. Charoensiri since July 2016 at the Chanasongkram Bangkok police station for allegedly “submitting a false report to the police”, comprising of a complaint of malfeasance in office against police officers for illegally impounding her car on 27 June 2015.<sup>xix</sup> Another case that is still pending in March 2021 was brought against Ms. Charoensiri on 27 September 2016, for allegedly violating a ban on political gathering of five persons or more under the Head of the NCPO Order 3/2015 and sedition under Section 116 of Thai Criminal Code. All charges are related to the same peaceful protests in 2015.<sup>xx</sup>

18. The continuous postponement of legal proceedings, as in the case against Ms. Charoensiri, has a chilling effect on the lawyers’ profession and undermines the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power and to be entitled to trial within a reasonable time.<sup>xxixxxii</sup>

## **E. Freedom of Expression and Assembly of Lawyers**

19. Lawyers, like any other individual, have the right to freedom of expression and assembly. The Basic Principles provide that “lawyers like other citizens are entitled to freedom of expression, belief, association and assembly”. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization<sup>xxiii</sup>.
20. The freedom of expression that lawyers enjoy in connection to their professional functions should not only be guaranteed in light of the rights of the lawyer, but also in protection of the rights of their clients. Some lawyers in Thailand have faced disciplinary proceedings in connection to them exercising their right to freedom of expression and assembly. This is demonstrated by the following case:

### **Mr. Anon Nampha**

Mr. Anon Nampha is a lawyer and human rights defender, who is currently remanded during trial as a result of exercising his freedom of peaceful assembly and freedom of expression. On 7 August 2020, after Anon’s participating in a peaceful protest at the Democracy Monument on 3 August 2020, a complaint was filed with the Lawyers Council of Thailand against Mr. Anon Nampha by Mr. Aphiwat Khanthong, Assistant Minister in the Office of the Prime

*Minister, who claimed to be acting in his capacity as private attorney. Mr. Aphiwat Khanthong alleged that Mr. Arnon Nampa violated the Lawyers Council of Thailand's disciplinary rules, as his behaviour would "incite, intend to cause unrest, distort information and insult on the monarchy". Since 9 February 2021, Mr. Nampa has been remanded at Bangkok Remand Prison after indictment in a protest case and Court denied his bail requests. In late 2020, Mr. Nampa had been arrested and detained for several days in connection to his participation in peaceful pro-democracy demonstrations.<sup>xxiv</sup>*

#### **E. Professional association of lawyers**

21. Professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them.<sup>xxv</sup> The executive body of the professional association must exercise its functions without external interference.<sup>xxvi</sup>
22. L4L was informed that the Lawyers Council of Thailand has not always provided adequate protections for Thai (human rights) lawyers, when their rights and privileges are not being respected. The Lawyers Council must take into account and respect international law and internationally recognized principles on the role of lawyers. Moreover, its role as an independent legal institution should be at the forefront as there is a strong need in the Thai legal community for disciplinary proceedings to be independent, impartial, fair, and based on clearly established standards of conduct.

#### **F. Recommendations to the Government of Thailand:**

- **Take immediate measures to ensure that sufficient safeguards are in place, both in law and in practice, to guarantee the full independence and safety of lawyers and their effective protection against any form of retaliation in connection with their professional activity.**
- **Immediately take effective measures necessary to ensure that crimes, harassment, infringements and other violations against lawyers are effectively investigated and publicly condemned at all levels, and that the perpetrators of such acts are prosecuted.**
- **Refrain from any actions that may constitute harassment, persecution, or undue interference in the work of lawyers, including their criminal prosecution on improper grounds such as the expression of critical views or the nature of the cases that the lawyer is involved in.**
- **Take immediate measures to guarantee the effective protection of the right of freedom of expression of lawyers as set out in article 23 of the Basic Principles, in particular their right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights, without suffering professional restrictions by reason of their lawful action.**
- **Take immediate measures to guarantee that the Lawyers Council of Thailand can play their vital role in protecting their members from persecution and improper restrictions and infringements.**

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<sup>i</sup> The Basic Principles were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba on September 7, 1990. Subsequently, the UN General

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Assembly welcomed the Basic Principles in their 'Human rights in the administration of justice' resolution, which was adopted on December 18, 1990.

<sup>ii</sup> UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/35/12, 22 June 2017, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/35/L.20](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/L.20).

<sup>iii</sup> UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/29/6, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/29/L.11](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/L.11).

<sup>iv</sup> UN Human Rights Council. Report of the Working Group on the Universal Periodic Review of Thailand, A/HRC/33/16. 15 July 2016, p. 13-28.

<sup>v</sup> UN Human Rights Council. Report of the Working Group on the Universal Periodic Review of Thailand. Addendum. Views on conclusions, and / or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/33/16/Add.1, 7 September 2016, p. 2-3.

<sup>vi</sup> Article 9.3 of the UN Declaration on Human Rights Defenders reads: '[...] everyone has the right, individually and in association with others, inter alia: (c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms'. We therefore understand human rights defenders to include lawyers. The recommendations on human rights defenders are also applicable to lawyers.

<sup>vii</sup> Recommendation 158.141 Take measures to ensure the rights of peaceful assembly, freedom of expression and freedom of assembly, especially in the context of peaceful protests (Costa Rica); 159.51 Ensure that there are no restrictions on freedom of expression especially for the media and human rights defenders, and that no one faces threats and harassment, including attitude adjustment, for expressing their views and that all legislation affecting freedom of expression is compatible and implemented in line with Thailand's international obligations as recommended by the Special Rapporteur on the situation of human rights defenders in 2016 (United Kingdom of Great Britain and Northern Ireland);

<sup>viii</sup> Recommendation 158.119 Protect the human rights defenders and investigate any reported cases of intimidation, harassment and attacks against them (Luxembourg); 158.120 Stop all forms of harassment and intimidation of human rights defenders and effectively implement measures aimed at preventing violence and crimes against them (Czech Republic).

<sup>ix</sup> Recommendation 158.121 Investigate and ensure justice to all reported cases of intimidation, harassment and attacks of human rights defenders and journalists (Botswana); 158.122 That all alleged attacks on human rights defenders are promptly and thoroughly investigated, and that perpetrators are held accountable (Norway).

<sup>x</sup> Recommendation 159.58 Guarantee and respect the right to freedom of expression, association and assembly putting an end to arbitrary detentions and arrests and any act of harassment against political actors and civil society, including human rights defenders (Switzerland);

<sup>xi</sup> Principle 7 of the Basic Principles.

<sup>xii</sup> Section 7/1 (2) of the Thai Criminal Procedure Code, available at: <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>

<sup>xiii</sup> UN Basic Principles on the Roles of Lawyers, Principle 8 and Principle 22

<sup>xiv</sup> CCPR/C/CG/32. UN Human Rights Committee. 23 August 2007.

<sup>xv</sup> UN Basic Principles on the Roles of Lawyers, Principle 16(a)(c)

<sup>xvi</sup> <https://lawyersforlawyers.org/en/16-years-since-disappearance-somchai-neelapaijit/>

<sup>xvii</sup>

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/THA/CO/2&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/THA/CO/2&Lang=En)

<sup>xviii</sup> . The charge of "concealing evidence" was dismissed on the basis that Sirikan Charoensiri had no intention to conceal the evidence in question and that the authorities had no reasonable ground for searching her car that night. The charge of "non-compliance with official orders" was dismissed because its statute of limitation had expired.

<sup>xix</sup> <https://lawyersforlawyers.org/en/thailand-ongoing-judicial-harassment-of-sirikan-charoensiri/>;

<https://lawyersforlawyers.org/en/one-case-dropped-against-lawyer-sirikan-charoensiri/>

<sup>xx</sup> <https://lawyersforlawyers.org/en/thailand-ongoing-judicial-harassment-of-sirikan-charoensiri/>;

<sup>xxi</sup> Article 9.3 ICCPR

<sup>xxii</sup> It is obligatory to have compliance within a reasonable time in order to avoid unnecessary delays that can lead to the deprivation or denial of justice. There should be no negligence on the side of the court, this might lead to a failure of compliance with procedural deadlines described by domestic law and also with international standards developed for determining reasonable time. Systemic delay inherent in the civil system justice system in general is considered as an unreasonable delay of state and must be avoided. Courts are not in a position to provide judicial protection if they do not attend to respective issues in a given case timely or effective. We are concerned that the undue delays in the Thai court proceedings may have a chilling effect for the profession of lawyers. Additionally, human rights lawyers have faced undue delays with regards to their pending charges.

<sup>xxiii</sup> UN Basic Principles on the Roles of Lawyers, Principle 23.

<sup>xxiv</sup> <https://lawyersforlawyers.org/harassment-of-anon-nampa/> and <https://lawyersforlawyers.org/letter-to-the-lawyers-council-of-thailand-on-disbarment-proceedings-against-anon-nampa/>

<sup>xxv</sup> UN Basic Principles on the Roles of Lawyers, Preamble.

<sup>xxvi</sup> UN Basic Principles on the Roles of Lawyers, Principle 24.