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**Amicus Curiae Brief in the case of the petitioner
Ms. Rorheemah Useng (Black Case Number Tor Por
1/2557).**

I. Introduction

1. The International Commission of Jurists (ICJ) submits this *Amicus Curiae* Brief to the Pattani Provincial Court of Thailand in the case of the petitioner Ms. Rorheemah Useng, Black Case Number Tor Por 1/2557 (2014) of 2nd May 2014.

2. The ICJ, founded in 1952, is composed of 60 eminent jurists from the different legal systems of the world. It works to advance the rule of law including through promoting the domestic implementation of international human rights law and standards. The ICJ has been working in Thailand's Deep South for more than a decade, including with the Royal Thai Government, the Region 9 Judiciary, academics, and legal practitioners.

3. This Brief addresses the obligation of all authorities of the state, including the judiciary, to take measures to prevent torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment), in all circumstances, and to ensure access to an effective remedy and reparation to victims under the international human rights treaties to which Thailand is a party.

4. In this case, the petitioner alleges that members of the Royal Thai Army tortured or ill-treated her brother, Mr. Hasan Useng, while he was in detention and seeks remedial measures under article 32 of the 2007 Thai Constitution. Counsel for the Army has argued that the petitioner's claim must fail because on 22 May 2014, the National Council for Peace and Order (NCPO) suspended and later terminated most of the 2007 Thai Constitution, including article 32.¹

5. As set out below, international law binding on Thailand obliges it to ensure a prompt, effective remedy and reparations are made available to victims of torture and ill-treatment, notwithstanding the suspension and later termination of most of the 2007 Thai Constitution, including article 32.

II. Law

¹ National Council for Peace and Order, Announcements 5/2557 and 11/2557, both of 22 May 2014.

a) International law framework

6. Thailand is bound to apply in good faith those international treaties to which it is a party.² Furthermore it may not rely on provisions of its internal law to justify a failure to meet a treaty obligation.³
7. These treaties include the International Covenant on Civil and Political Rights (ICCPR), an international human rights treaty that requires States that are parties to it to guarantee a range of civil and political rights; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), an international human rights treaty that seeks to prevent acts of torture from being committed around the world. These treaties require State parties to take a range of measures to prevent, prohibit, investigate, and punish acts of torture and other ill-treatment, and ensure that remedies and reparation are provided to victims.⁴
8. In addition to its treaty obligations, Thailand is also bound to respect norms of customary international law, including peremptory norms of general international law – that is: norms accepted and recognized by the international community of States as a whole.⁵

b) The right to be free from torture and other cruel inhuman or degrading treatment

9. The right of all persons to be free from torture and other ill-treatment is found in a number of international human rights instruments including the Universal Declaration of Human Rights, as well as to treaties to which Thailand is a party including the ICCPR, the CAT and the 1949 Geneva Conventions.⁶
10. The prohibition is so broadly accepted by so many countries, that it is considered to be a peremptory norm of international law, and is thus recognized by the international community of States as a whole as a norm from which no derogation is

²Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.3; article 26 of the Vienna Convention on the Law of Treaties. The Human Rights Committee is the body of independent experts established by the International Covenant on Civil and Political Rights (ICCPR), and mandated to monitor States Parties' implementation of the ICCPR. The interpretations of the Human Rights Committee and other treaty monitoring bodies, including the Committee against Torture, which monitors implementation of the Convention against Torture (CAT), of the relevant treaty (including through general comments, recommendations to states parties following examination of their periodic reports on implementation under and jurisprudence) are authoritative. See Judgment of the International Court of Justice (30 November 2010), paras.66-68, available at <http://www.icj-cij.org/docket/files/103/16244.pdf>.

³Article 27 of the Vienna Convention on the Law of Treaties, adopted in May 1969 at the UN Conference on the Law of Treaties; see Human Rights Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 4; Article 26 of the Vienna Convention on the Law of Treaties; *General Comment No. 31, supra* note 1.

⁴Thailand ratified the ICCPR on 29 October 1996 and acceded to the CAT on 2 October 2007.

⁵These norms may not be subject of derogation and only be modified by a subsequent norm of general international law having the same character. See article 53 of the Vienna Convention on the Law of Treaties.

⁶ Article 5 Universal Declaration of Human Rights; article 7 ICCPR; and article 2 CAT.

permitted and which can be modified only by a subsequent norm of general international law having the same character.⁷

11. All branches of the State in Thailand are thus bound to respect the prohibition against torture and other ill-treatment under both treaty and general international law.

III. Nature and applicability of the prohibition

12. The absolute nature and duty of States to respect the prohibition of torture and other ill-treatment at all time derives from its nature as a peremptory norm,⁸ and from treaty provisions.
13. For example the CAT clarifies (in article 2(2)) that "no exceptional circumstances whatsoever" can justify torture.
14. Furthermore, while article 4(1) of the ICCPR sets out the conditions in which states may derogate from (temporarily restrict the obligation to provide the full scope of certain rights) some of the guarantees set out in the Covenant, so as to allow States to take exceptional, necessary and proportionate measures to respond to an emergency that constitutes a "threat to the life of the nation", article 4(2) specifies that even during an officially declared state of emergency, including during situations of internal or international armed conflict, the ICCPR allows for no derogation of the right to be free from torture and other ill-treatment.
15. The absolute and non-derogable nature of the prohibition has also been repeatedly affirmed in resolutions adopted by the UN General Assembly.⁹

⁷Article 53 of the Vienna Convention on the Law of Treaties. See also article 53 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

⁸Article 53 of the Vienna Convention on the Law of Treaties.

⁹United Nations General Assembly resolution 67/161 of 20 December 2012, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/67/161 [UNGA resolution 67/161]; United Nations General Assembly resolution 65/205 of 28 March 2011, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/65/205 [UNGA resolution 65/205]; United Nations General Assembly resolution 64/153 of 26 March 2010, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/64/153 [UNGA resolution 64/153]; United Nations General Assembly resolution 63/166 of 19 February 2009, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/63/166 [UNGA resolution 63/166]; United Nations General Assembly resolution 62/148 of 4 March 2008, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/62/148 [UNGA resolution 62/148]; United Nations General Assembly resolution 61/153 of 14 February 2007, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/61/153 [UNGA resolution 61/153]; United Nations General Assembly resolution 59/182 of 8 March 2005, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/59/182 [UNGA resolution 59/182]; United Nations General Assembly resolution 57/200 of 16 January 2003, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/57/200 [UNGA resolution 57/200]; United Nations General Assembly resolution 54/156 of 4 February 2000, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/54/156 [UNGA resolution 54/156]; United Nations General Assembly resolution 53/139 of 1 March 1999, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/53/139 [UNGA resolution 53/139].

IV. Definition of torture and other cruel inhuman or degrading treatment or punishment

16. Article 32 of the 2007 Thai Constitution prohibited torture and ill-treatment, but did not set out a definition. However, article 1 of the CAT sets out a definition of torture for the purposes of that treaty. Thailand, as a State Party to the CAT is required to ensure, at a minimum, that the following acts are criminalized as torture, and are punishable by penalties that reflect the gravity of the offence:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

17. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly in 1975, clarifies that:

Torture is an aggravated form of cruel, inhuman or degrading treatment or punishment.¹⁰

18. Consistent with the intent to provide the greatest possible protection to individuals against their rights to physical and mental integrity and respect for their human dignity, human rights instruments do not however define cruel, inhuman or degrading treatment or punishment.

19. For example, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that the term "cruel, inhuman or degrading treatment or punishment" should be interpreted "so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."¹¹

20. The Human Rights Committee of the UN provides further guidance on the definition of torture and "cruel, inhuman or degrading treatment," noting that while it will not give a specific definition, the prohibition applies "not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."¹²

21. Finally, it must be emphasized that the obligations to prevent torture and other ill-treatment under the CAT are interdependent, indivisible and interrelated.¹³

¹⁰ Article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly (9 December 1975).

¹¹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly, resolution 43/173 (9 December 1988), footnote to Principle 6.

¹² Human Rights Committee, *General Comment No. 20, article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 5.

¹³ Committee against Torture, *General Comment No. 2, Implementation of article 2 by States Parties*, 24 January 2008, UN Doc. CAT/C/GC/2, para. 3.

V. Right to remedies and reparations for victims of torture and other ill-treatment

22. The express provisions of the CAT as well as the UN Human Rights Committee's authoritative clarifications of the requirements of the ICCPR make clear that a State's duty to prohibit torture and other ill-treatment includes: the duties to prevent and prohibit it; ensure that investigations are initiated when complaints are made or even in the absence of a complaint when the authorities have reasonable grounds to believe that such an act has been committed in any place or by a person under its jurisdiction; to bring those responsible to justice; and to ensure that victims have access to effective remedies and receive adequate reparation.

23. With regard to the right to a remedy, international law prescribes that States must provide a prompt and effective remedy, and full reparation for everyone whose rights have been violated.¹⁴ The remedy must be made known, so that all persons can avail themselves of it without discrimination. In order to be effective, the authority competent to investigate and decide on the case must be independent and impartial. In all cases, the remedy must be practical and effective and not illusory:

(a) It must be effective, prompt and accessible.

(b) It must be a remedy before an independent authority.

(c) The victim should have access to legal counsel and if necessary to free legal assistance.

(d) The remedy must be capable of leading to relief, including reparation and compensation.

(e) The right to a prompt, effective and impartial investigation is part of the right to a remedy.

(f) The remedy must be expeditious and enforceable by the competent authorities.

(g) The remedy must be judicial in case of gross human rights violations.

(h) Reparation must not be limited solely to monetary provision, but includes restitution, satisfaction, guarantees of non-repetition, rehabilitation, and compensation.¹⁵

a) Cases of torture and other ill-treatment

24. The right of victims to an effective remedy and to reparation for acts of torture and other ill-treatment is enshrined in articles 12, 13 and 14 and 16 of the CAT.

¹⁴ International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a practitioners' guide*, 2006; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. 60/147, (2005).

¹⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. 60/147, (2005), articles 19-23.

25. These articles require *inter alia*, that “prompt and impartial” and thorough investigations are carried out when complaints of torture or other ill-treatment are made or even in the absence of a complaint when the authorities have reasonable grounds to believe that such an act has been committed in any place or by a person under its jurisdiction. They also require reparation. These duties are considered to be inherent in the prohibition set out in article 7 of the ICCPR, including in conjunction with article 2 of the ICCPR, which more broadly requires states to provide an “effective remedy” for violations of the rights set out in the Covenant, even if the accused is a State actor.
26. This right to a remedy for torture and other ill-treatment is inherent in the prohibition and is non-derogable under the ICCPR and CAT. Among other things it applies to all victims without discrimination.¹⁶ Furthermore as the Committee against Torture has recently emphasized, the right of a victim to a remedy applies whether or not the perpetrator has been identified, apprehended, prosecuted or convicted.¹⁷
27. The Human Rights Committee clarifies that the obligation to ensure a remedy applies at all times, even in states of emergency.¹⁸ Furthermore, failing to provide an effective remedy can become its own separate violation of the ICCPR.¹⁹
- b) Duty to investigate
28. Among the required remedies for allegations of torture is the right to a “prompt and impartial” investigation.²⁰ A failure by a state to investigate allegations of torture or other ill-treatment is a violation of the right to an effective remedy and the right not to be subjected to torture or ill-treatment.²¹ As noted, this right exists independent of a complaint filed by the victim.²²
29. The investigation should be carried out in a manner that is consistent with the principles cited in the Istanbul Protocol, which specifically delineates the elements of an effective investigation into torture or other ill-treatment. It clarifies that “the

¹⁶ ICCPR, article 2; CAT, article 2.

¹⁷ Committee against Torture, *General Comment No. 3, implementation of article 14 by States Parties*, 19 November 2012, UN Doc. CAT/C/GC/3, para. 3.

¹⁸ Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 14.

¹⁹ Human Rights Committee, *General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 15.

²⁰ Human Rights Committee, *General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, paras. 15-16; CAT, article 12; ICCPR, article 2.

²¹ See e.g., *Avadanov v Azerbaijan*, HRC, UN Doc. CCPR/C/100/D/1633/2007 (2010) §9.3-9.5; *Aydin v Turkey* (23178/94), European Court Grand Chamber (1997) §103.

²² Committee Against Torture, *General Comment No. 3, Implementation of Article 14 by States Parties*, 19 November 2012, UN Doc. CAT/C/GC/3, para. 27.

fundamental principles of any viable investigation into incidents of torture are competence, impartiality, independence, promptness, and thoroughness."²³

30. The Istanbul Protocol also establishes the three special concerns in a torture investigation: (1) clarification of facts and establishment of responsibility, (2) identification of measures to prevent recurrence, and (3) facilitation of prosecution.²⁴ Special care should be made in the interviewing of witnesses, accumulation of physical evidence, and medical and psychological examination in order to properly document the incident and to bring those responsible to justice.²⁵
31. In addition to the duty to investigate the authorities must ensure other forms of reparation are provided to victims of torture and other ill-treatment, including compensation and rehabilitation.

VI. Submission

32. In the event that, following an effective and impartial investigation, the Court finds that Mr. Useng was subjected to torture or other ill-treatment, he is entitled to reparation and the remedies under international human rights law set out above. He is entitled to reparation and remedies notwithstanding any finding by the Court that the suspension and later termination of most of the 2007 Thai Constitution, including article 32, has the result that remedies and reparation are not available under the Constitution.

²³ *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Submitted to the UN High Commissioner for Human Rights, 9 August 1999, para. 74.

²⁴ *Ibid.*, para. 78.

²⁵ *Ibid.*, paras. 83, 99, 102-106.