

HUMAN RIGHTS COUNCIL
12TH SESSION OF THE WORKING GROUP
ON THE UNIVERSAL PERIODIC REVIEW
ICJ SUBMISSION ON THAILAND (MARCH 2011)

1. In connection with the 12th session of the Working Group on the Universal Periodic Review (UPR) reviewing the Royal Thai Government's compliance with respect to relevant human rights norms and obligations, the International Commission of Jurists (ICJ) respectfully submits this report to the Human Rights Council (HRC).

2. The report focuses on four issues: (a) the prohibition against torture and other ill-treatment, particularly in Thailand's southern border provinces; (b) the right to be free from arbitrary detention; (c) the situation of enforced disappearances and the related problem of impunity for state officials; and (d) freedom of expression and censorship.

3. Thailand is a newly-elected member of the HRC and the first from Asia Pacific to serve as HRC President, and a State Party to most universal human rights treaties. Thailand acceded to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) on 2 October 2007. It has been a party to the *International Covenant on Civil and Political Rights* (ICCPR) since 1996.

4. The ICJ calls on the Royal Thai Government to demonstrate its commitment to advancing the rule of law and human rights by:

- A. enacting legislation to criminalize torture as required under Articles 2, 4 and 14 of the CAT; ending impunity of state officials in high profile emblematic cases such as Somchai Neelapaijit, Imam Yapa Kaseng and Tak Bai; and ensuring the right of victims to truth, justice and an effective remedy in law;**
- B. undertaking regular Parliamentary review of the scope and application of special security laws (Martial Law, the Emergency Decree and the Internal Security Act), including in Southern Thailand;**
- C. acceding to the International Convention for the Protection of All Persons from Enforced Disappearance, and enacting legislation to criminalize enforced disappearance; and**
- D. reviewing and amending excessive restrictions on freedom of expression in times of both emergency and normalcy.**

A. The prohibition against torture and other ill-treatment

5. The CAT and the ICCPR (Article 7) provide for the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment and require states to take particular preventative and remedial measures in that respect. Section 32 of the *2007 Kingdom of Thailand Constitution* similarly prohibits torture and cruel, inhuman, or degrading treatment.

6. The prohibition against torture and cruel, inhuman or degrading treatment is an absolute norm from which there can be no derogation even in a lawfully declared state of emergency pursuant to ICCPR Article 4.

7. From 2007 to July 2010, the National Human Rights Commission of Thailand (NHRCT) received 34 complaints alleging torture in the Southern border provinces of Songkhla, Yala, Pattani and Narathiwat, by methods including electric shocks, cigarette burns, and beatings causing severe injuries and in some cases death.¹

8. The NHRCT also reported that, in connection with the deaths by suffocation of 78 civilian protestors from Tak Bai during transit to a detention facility, the National Human Rights Council reported that Thai authorities had violated the demonstrators' right not to be subject to torture or cruel, inhuman or degrading treatment as well as their rights to life, liberty and security of the person.² The government-appointed Independent Commission of Investigation also concluded that senior military officers failed to discharge their command responsibilities properly.

9. Despite these findings on the Tak Bai incident, the Attorney General issued a non-prosecution order in 2010, without explanation.

10. The 2008 case of *Imam Yapa Kaseng*, in which an inquest hearing concluded that an imam was tortured and killed by members of the Thai military, remains at the investigative stage with no public information available. In a letter to the UN Special Rapporteur on Torture dated 9 April 2008, the Royal Thai Government pledged that "those responsible would be held accountable without exception."³

11. Despite public assurances to revise its domestic law, the Royal Thai Government has yet to enact legislation to define or criminalize the offence of torture and of cruel, inhuman and degrading treatment, as required under the CAT Articles 2, 4 and 14.

✓ **The ICJ calls on the Royal Thai Government to:**

- **enact legislation to criminalize torture as required under CAT;**
- **hold accountable those responsible for human rights violations regardless of rank or position, and ensure effective investigation and prosecution in emblematic cases such as Imam Yapa and Tak Bai;**
and
- **ensure the right of victims and families to truth, justice and an effective remedy in law.**

B. The right to be free from arbitrary detention

12. In 2005, under the newly-enacted Emergency Decree, the Government declared a "severe emergency situation" in Pattani, Narathiwat and Yala, without notifying the United Nations pursuant to article 4 of the ICCPR. These provinces have also been under *Martial Law* since the military coup in 2006.⁴ The Emergency Decree in the South has been renewed every three months by the Prime Minister and Cabinet, enabling the continued use of overlapping special security laws that increase the military's powers at the expense of democratic accountability.

¹National Human Rights Commission, *Report on the Examination of Human Rights Violations*, Report No. 275-308/2553, at p 3.

² Fact-Finding Sub-committee on violence in the South of the National Human Rights Commission (B.E. 2548), *Fact finding Report on the Violent Incident in front of Tak Bai District Police Officer, April 2005* (available in Thai).

³ Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Document A/HRC/10/44/Add.4, 17 February 2009 p 342-345.

⁴ Article 4 of the *Martial Law Act 1914* (B.E.2457).

13. Section 15bis of the *Martial Law Act* allows the military to detain a person for the purposes of interrogation without a warrant for up to 7 days.⁵ There is no right to challenge the legality or necessity of the detention before a court of law, including through a writ of *habeas corpus*, as required under article 9(4) of the ICCPR. The site of the detention is often undisclosed, with detainees often held in military bases or other *ad hoc* locations.

14. Section 12 of the *Emergency Decree* allows for detention with a court warrant but without criminal charge for up to 7 days, renewable up to 30 days. The rules of the *Criminal Procedure Code* apply *mutatis mutandis* to the *Emergency Decree* which means that detainees have a right to appear before a judge every 7 days to challenge the necessity of their detention. In practice, however, detainees in the South are rarely brought before the Court.

15. The *Martial Law Act* and the *Emergency Decree* are often used in combination to enable detention without charge for up to 37 days.

16. Under section 21 of the *Internal Security Act*, a person may be ordered by a Court to be detained in a military training camp for up to six months, without any requirement of pending criminal charge or conviction.

17. Section 76 of *Criminal Procedure Code* (CPC) allows an accused, detained pursuant to a criminal charge, to be remanded in custody up to 84 days for the most serious offences. Despite the pre-trial release provisions in the CPC, accused are generally held in custody pending trial, sometimes in shackles and often in the same facilities as prisoners. Pre-trial delay can extend for years.

18. The ICJ is concerned that detention provisions under the special security laws violate Articles 9 and 10 of the *ICCPR* and contravene the principle of legality: they are overbroad, vague and lacking predictability, and in practice frequently lead to arbitrary detention. Conditions of detention often amount to cruel, inhuman or degrading punishment, specifically when shackles are used. Moreover, there is a lack of judicial scrutiny and regular independent monitoring of the detainees.

- ✓ **The ICJ calls on the Royal Thai Government to:**
 - **undertake regular Parliamentary review of the scope and application of the special security laws with respect to the problem of arbitrary detention, including in South Thailand; and**
 - **accept the request of the Working Group on Arbitrary Detention to undertake an official visit to Thailand.**

C. Enforced disappearances and the related problem of state impunity

19. The Working Group on Enforced and Involuntary Disappearances has accepted 55 cases from Thailand, of which 52 remain unresolved.⁶ In its most recent reporting period, the WGEID accepted two more enforced disappearance cases from Thailand.⁷

⁵ Article 15bis, *Martial Law Act 1914* (B.E. 2457).

⁶ UN Document A/HRC/13/31, p 113.

⁷ UN Document A/HRC/16/48, 26 January 2011.

20. On 12 March 2004, prominent human rights defender Somchai Neelapaijit was the victim of an enforced disappearance in Bangkok. Under Thai law, there is no criminal offence that captures the gravity or the elements of the offence of enforced disappearance. In the trial of first instance, four police officers were acquitted of the minor crime of coercion (section 309 of the Thai Penal Code) and one was convicted and given the maximum sentence of 3 years. Almost seven years later, on 11 March 2011, the Court of Appeal overturned the lone conviction.

21. Impunity of State officials continues to be a serious problem in Thailand. Under the *Martial Law Act*, military personnel are immune from criminal prosecution and civil suit. Under section 17 of the *Emergency Decree*, officials are immune from civil, criminal or disciplinary liabilities so long as they are acting in good faith and in a manner not unreasonable to the circumstances. In practice, this clause is interpreted to provide immunity for actions taken pursuant to superior orders, in contravention of international standards. Although there are domestic law provisions to hold State officials accountable for their actions, there continues to be a culture of impunity even for gross human rights violations.

22. In 2004 police and army personnel killed all 32 suspected insurgents who had fled inside the historic Krue Se mosque. A government-appointed commission concluded the police and military used disproportionate force and recommended an investigation and eventual prosecution of the high-ranking officers responsible for the operation. Similarly, the National Reconciliation Commission released a comprehensive report on 24 April 2005 that concluding that the use of heavy weaponry by security forces was excessive. Nevertheless, the Attorney General issued a non-prosecution order on 10 February 2009, on the grounds that the force used was reasonable in the circumstances.

23. As described earlier, a non-prosecution order was also issued in the *Tak Bai* case, and, similarly, the recent Appeal Court judgment in the Somchai Neelapaijit case absolved the State of any criminal responsibility for his enforced disappearance.

✓ **The ICJ calls on the Royal Thai Government to:**

- **accede to the International Convention for the Protection of All Persons from Enforced Disappearance and criminalize enforced disappearance;;**
- **accept the request of the Special Rapporteur on extrajudicial, summary or arbitrary executions to visit Thailand;**
- **review the Attorney General's decisions not to pursue prosecution in the Krue Se or Tak Bai cases; and**
- **provide victims and families with an effective, prompt and accessible remedy leading to full reparation, as provided by international law.**

D. Freedom of expression and censorship

24. Restrictions on freedom of expression must be strictly necessary and proportionate to protect the rights or reputations of others or in the interests of national security, public order, or public health or morals, and must not put in jeopardy the right itself.⁸ The current application of the *lese majeste* laws⁹

⁸ Human Rights Committee, General Comment 10, UN Document HRI/GEN/1/Rev.1 at 11 (1994).

significantly curtails legitimate political expression and social media discussion.

25. The Special Rapporteur on Freedom of Expression has cited with concern the increasing number of criminal investigations, detentions and trials under the *lese majeste* laws. In 2009, the Special Rapporteur issued an urgent appeal on the following *lese majeste* cases: *Suwicha Takor*, *Jitsanu Promsorn*, *Boonyuen Prasetying*, *Daranee Charnchoengsilpakul*.

26. Ms. Chiranuch Premchaiporn, a human rights defender and director of an independent political affairs website, is being prosecuted under the *Computer Crimes Act* for not preventing website users from posting contents deemed to be threatening to national security. If convicted Ms. Premchaiporn faces up to 50 years in prison.

27. Section 9(3) of the *Emergency Decree* allows for sweeping censorship of radio, television, print publications, and websites under the guise that such news sources are distorting information about the emergency situation.¹⁰ During the declared state of emergency in Bangkok and surrounding areas throughout 2010, entire news outlets and tens of thousands of websites were censored and blocked rather than specifically restricting individual articles for posing a specific threat to the life of the nation.¹¹

28. Freedom of expression may be derogated from in times of emergencies declared to the UN pursuant to article 4 of the ICCPR. However, any restriction must be strictly required and proportionate to meet the specific exigencies of the crisis.

- ✓ **The ICJ calls on the Royal Thai Government Thailand to review and amend its restrictions on freedom of expression in times of emergency and normalcy, and disclose information regarding freedom of expression cases to the Special Rapporteur on Freedom of Expression and to the general public.**

⁹ Articles 9 of the *2007 Constitution of the Kingdom of Thailand*, section 112 of the *Criminal Code* and article 14(2) and 16(2) of the *2007 Computer Related Crime Act*.

¹⁰ *Emergency Decree*, section 9(3).

¹¹ See, e.g.: Pravit Rojanaphruk, "Decree shuts down red media and those deemed sympathetic", *The Nation*, 9 April 2010; Southeast Asian Press Alliance, "SEAPA troubled by Thailand's clampdown on TV station, websites; free expression gravely threatened under state of emergency", 9 April 2010; Reporters Without Borders, "Government uses state of emergency to escalate censorship", 8 April 2010.

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INTERNATIONAL COMMISSION OF JURISTS SUBMISSION TO THE
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ANNEX I: TABLE –POWERS PURSUANT TO NATIONAL SECURITY LAWS FRAMEWORK

| I. Restrictions | Martial Law | 2005 Emergency Decree | Internal Security Act |
|---|---|---|--|
| 1. Curfew | ✓ | ✓ | ✓ |
| 2. Prohibition of the use of communication devices | ✓ | ✓ | ✓ |
| 3. Right to order civilians to vacate designated areas | ✓ | ✓ | ✓ |
| 4. <i>Assembly:</i> Prohibition on any form of public assembly in any location | ✓ | ✓ | None |
| 5. <i>Expression:</i> Prohibition on the distribution, dissemination, or publication of news, television and radio broadcasts. | ✓ | ✓ | None explicit |
| 6. The right to occupy, alter or demolish buildings or dwellings for military purposes | ✓ | ✓ | None explicit |
| II. Arrest & Detention | <ul style="list-style-type: none"> - Permitted to detain without a warrant for the purposes of interrogation for up to 7 days - No right to be brought before a court to challenge detention - Detained by military in non-disclosed location No right to legal counsel | Detention pursuant to a Court Order – no criminal charge required – for 7 days for up to 7 days After 7 days, the suspect has the right to be brought before a court to challenge the legality of the detention. The Order for detention may be renewed for an additional 7 days up to a maximum of 30 days. | Detention in training camp for up to six months or imposition of any other conditions with Court approval. |

| I. Restrictions | Martial Law | 2005 Emergency Decree | Internal Security Act |
|--|--|---|--|
| | No contact to outside | | |
| III. Accountability and Right to Effective Remedy and Reparations | <p>Broad scope of Military Court jurisdiction, which may be used to exclude the possibility of trying military personnel in civilian courts.</p> <p>No compensation claims permitted against individual officials.</p> | <p>Competent officials not subject to civil, criminal, disciplinary liabilities for acts in good faith, that are non-discriminatory and not unreasonable.</p> <p>Jurisdiction of Administrative Courts removed. Jurisdiction of Courts of Justice and Military Courts. Law on Administrative Procedures does not apply.</p> | <p>Where enforcement action results in loss to a “person in good faith”, appropriate compensation to be provided according to Cabinet provided principles/conditions.</p> <p>Jurisdiction of Courts of Justice over any actions. Jurisdiction of Administrative and Military Courts apparently removed.</p> <p>Application of Civil Procedure Code and Criminal Procedure Code to court cases related to enforcement actions, but inapplicability of Law on Administrative Procedures.</p> |