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THE INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ADVANCE OF THE EXAMINATION OF THAILAND'S INITIAL AND SECOND PERIODIC REPORTS UNDER ARTICLES 16 AND 17 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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P.O. Box, 91, Rue des Bains, 33, 1211 Geneva 8, Switzerland
Tel: +41(0) 22 979 3800 – Fax: +41(0) 22 979 3801 – Website: http://www.icj.org
E-mail: info@icj.org

SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE INITIAL AND SECOND PERIODIC REPORTS OF THAILAND

Introduction

1. During its 55th session, from 1 June to 19 June 2015, the UN Committee on Economic, Social and Cultural Rights (the Committee) will examine Thailand's compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights (the Covenant), including in light of the State Party's initial and second periodic reports under articles 16 and 17 of the Covenant,[1] as well as of the additional information provided by the State in response to the Committee's List of Issues.[2] In this context, the International Commission of Jurists (ICJ) welcomes the opportunity to submit the following comments to the Committee.

2. In this submission, the ICJ wishes to provide the Committee with information about certain obstacles that undermine the implementation of the Covenant. First, the ICJ highlights the obstacles to the enjoyment of the rights guaranteed by the Covenant that have arisen as a result of the new legal and institutional framework since the Thai military implemented Martial Law nationwide on 20 May 2014[3] and staged a military coup on 22 May 2014.[4] The submission further describes barriers faced by women to their enjoyment of their rights under the Covenant on the basis of equality and freedom from discrimination. This second part of the submission is based on extensive research on access to justice for women in the country that the ICJ published as a report in 2012 together with the Justice for Peace Foundation under the title:

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[1] Committee on Economic, Social and Cultural Rights, Initial and second periodic reports of States Parties: Thailand, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/THA/1-2 (2013).

[2] Committee on Economic, Social and Cultural Rights, Replies of Thailand to the list of issues, List of issues in relation to the combined initial and second periodic report of Thailand, UN Doc. E/C.12/THA/Q/1-2/Add.1 (2015).

[3] The nationwide implementation of Martial Law was lifted on 1 April 2015, but was replaced by a series of orders issues under Article 44 of the 2014 Interim Constitution that give the military many of the same powers they had under Martial Law.

[4] *Thailand: authorities must revoke Martial Law, restore media freedom*, ICJ. http://www.icj.org/thailand-authorities-must-revoke-martial-law-restore-media-freedom/; *Thailand: ICJ condemns military coup*, ICJ. http://www.icj.org/thailand-icj-condemns-military-coup/; *A reckless coup in Thailand*, ICJ. http://www.icj.org/a-reckless-coup-in-thailand/; *Thailand: interim Constitution seems to ignore key pillars of rule of law*, ICJ. http://www.icj.org/thailand-interim-constitution-seems-to-ignore-key-pillars-of-rule-of-law/; *Thailand: allegations of torture against activist Kritsuda Khunasen require immediate investigation*, ICJ. http://www.icj.org/thailand-allegations-of-torture-against-activist-kritsuda-khunasen-require-immediate-investigation/; *Thailand: immediately withdraw criminal defamation complaint against human rights defender*, ICJ. http://www.icj.org/thailand-immediately-withdraw-criminal-defamation-complaint-against-human-rights-defender/; *Thailand: court ruling raises questions about protection against torture*, ICJ. http://www.icj.org/thailand-torture-victim-denied-redress-government-should-comply-with-international-rights-obligations/; *Thailand: End prosecution of civilians in military tribunals*, ICJ. http://www.icj.org/thailand-end-prosecution-of-civilians-in-military-tribunals/; *Thailand: transfer all civilians to civilian courts*, ICJ. http://www.icj.org/thailand-transfer-all-civilians-to-civilian-courts/; *Thailand: Lift martial law and return the country to civilian authority*, ICJ. http://www.icj.org/thailand-lift-martial-law-and-return-the-country-to-civilian-authority/ (Accessed 23 April 2015).

Women's Access to Justice: Identifying the Obstacles & Need for Change – Thailand.

Impact of Martial Law on the enjoyment of Covenant's rights

Article 2.1 – State obligations to realize the rights guaranteed by the Covenant, including by providing effective remedies

3. Under article 2.1 of the Covenant, state parties are required to "take steps…with a view to achieving progressively the full realization of the rights…by all appropriate means, including particularly the adoption of legislative measures". Article 2.1 imposes obligations on all branches of the state, including the judiciary. As elucidated by the Committee,[5] the judiciary plays a fundamental role in enforcing and protecting people's rights under the Covenant, including by ensuring the right to an effective remedy in cases of violations of these rights. Thus, in its review of state parties' periodic reports, the Committee has regularly addressed issues concerning access to justice and remedies and addressed concerns arising in respect of institutions in charge of delivering such remedies.[6]

4. To be effective, the right to a remedy, including reparations, requires the existence of an independent judiciary, adequately empowered to preside over and ensure fair and impartial proceedings.[7] In this regard, the current situation in Thailand, including the new institutional framework established in the aftermath of the military *coup*, gives rise to numerous obstacles and undue limitations on the exercise of a range of rights guaranteed by the Covenant as illustrated below.

Background

5. Since 20 May 2014, the Thai military has progressively replaced civilian power with military rule by implementing martial law throughout the country,[8] staging a *coup d'etat*,[9] dissolving the caretaker government, suspending the 2007 Thai Constitution (but for the Chapter that deals with the King), extending the jurisdiction of military courts to civilians, and appointing a 32-member Cabinet that includes 12 members of the military.

6. While the military junta claimed the coup was necessary to restore order to Thailand and oversee political reforms, the response of the international community has been condemnatory. For example, the Secretary General of the United Nations said he was "seriously concerned" by the military takeover and appealed for a prompt

[5] Committee on Economic, Social and Cultural Rights, General Comment No. 9 on the domestic application of the Covenant, UN Doc. E/C.12/1998/24 (1998), para. 5.
[6] Committee on Economic, Social and Cultural Rights, Concluding Observations on the second to fourth periodic reports of Viet Nam, UN Doc. E/C.12/VNM/CO/2-4 (2014), para. 9; Concluding Observations on the second and third periodic reports of Switzerland, UN Doc. E/C.12/CHE/CO/2-3 (2010), para. 5.
[7] UN 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 A/RES/60/147 (2006).
[8] *Thailand: authorities must revoke Martial Law, restore media freedom*, ICJ, available at: http://www.icj.org/thailand-authorities-must-revoke-martial-law-restore-media-freedom/ (Accessed 23 April 2015).
[9] A reckless coup in Thailand, ICJ. http://www.icj.org/a-reckless-coup-in-thailand/; *Thailand: ICJ condemns military coup*, ICJ. http://www.icj.org/thailand-icj-condemns-military-coup/ (Accessed 23 April 2015).

return to constitutional, civilian, and democratic rule.[10] The Japanese Government stated that "it is deeply regrettable that the National Peace and Order Maintaining Council…has assumed the full power of the government in Thailand…Japan strongly urges those concerned that democracy in Thailand be quickly restored."[11]

Interim Constitution

7. On 22 July 2014, the military junta, using the name "the National Council for Peace and Order" (NCPO), promulgated an interim Constitution that gives the NCPO sweeping, unchecked powers violating the fundamental pillars of the rule of law and human rights, including equality, accountability, and predictability of the law.[12]

8. Article 44 of the interim Constitution gives the head of the NCPO unfettered power to give any order deemed necessary for "…the benefit of reform in any field and to strengthen public unity and harmony, or for the prevention, disruption or suppression of any act which undermines public peace and order or national security, the Monarchy, national economics or administration of State affairs." Article 47 provides that all NCPO announcements and orders given since the coup and up until the National Council of Ministers takes office "…regardless of their legislative, executive or judicial force..," are also "… deemed to be legal, constitutional and conclusive"; and Article 48 states that all those carrying out acts under orders of the NCPO in relation to the coup, even if the acts are illegal, "…shall be exempted from being offenders and shall be exempted from all accountabilities."[13]

9. The revocation of the 2007 Constitution, which guaranteed remedies for torture or other cruel, inhumane or degrading treatment, was used to deny appropriate remedies to Hasan Useng, who claimed he was tortured by security forces in the country's restive 'deep South'.[14] On 7 October 2014, the Pattani Provincial Court ruled that Hasan Useng was not entitled to judicial remedies and reparation as his claim had been made under Article 32 of Thailand's 2007

[10] *Statement attributable to the Spokesman for the Secretary-General on Thailand.* New York, United Nations, available at: http://www.un.org/sg/statements/index.asp?nid=7700 (Accessed 23 April 2015). In addition, in a statement by its Spokesperson, the European Union said that the "military must accept and respect the constitutional authority of the civilian power as a basic principle of democratic governance. International human rights standards, including media freedom, must be upheld. It is of the utmost importance that Thailand returns rapidly to the legitimate democratic process." Statement available at: http://eeas.europa.eu/statements/docs/2014/140522_03_en.pdf (Accessed 23 April 2015).

[11] Statement by Minister for Foreign Affairs, on the *coup d'État* in Thailand, Japan. http://www.mofa.go.jp/press/release/press4e_000285.html

[12] *Thailand: interim Constitution seems to ignore key pillars of rule of law*, ICJ. http://www.icj.org/thailand-interim-constitution-seems-to-ignore-key-pillars-of-rule-of-law/ (Accessed 23 April 2015); unofficial English translation is available here: http://lawdrafter.blogspot.com/2014/07/translation-of-constitution-of-kingdom.html (Accessed 30 April 2015).

[13] Please see unofficial translation available at: http://www.isranews.org/isranews-article/item/31533-translation.html (Accessed 8 May 2015).

[14] Thailand's southernmost provinces are predominantly populated by ethnically Malay Muslims; the simmering resistance against incorporation into Thailand erupted into an armed insurgency in 2004, killing between 4,000-6,000 people since then. For more information, see ICJ's report on Thailand's Internal Security Act: risking the rule of law? available at: http://www.icj.org/thailands-internal-security-act-risking-the-rule-of-law (Accessed 8 May 2015).

Constitution, which had been revoked at the time of the judgment.[15] This case illustrates how Thailand's new institutional framework and the way in which it has been interpreted by certain Courts have been preventing alleged victims of human rights violations from seeking remedies and reparation from the courts.

Martial Law

10. On 20 May 2014, two days before the coup, martial law was imposed nationwide. Between 22 May 2014 and 31 March 2015, Internet Law Reform Dialogue (iLaw), a civil society organization monitoring the situation after the military coup, reported that at least 1,131 individuals were summoned and/or arrested by the military.[16]

11. Nearly a year after imposing martial law, on 1 April 2015, the NCPO lifted martial law from most provinces in Thailand. However, martial law still remains in place in those areas where it was already imposed prior to 20 May 2014, including the southern border provinces (SBP) of Pattani, Yala, Narathiwat, and most of the provinces along Thailand's borders with Malaysia, Myanmar, Lao PDR and Cambodia.

12. At the same time as lifting martial law, the NCPO invoked Article 44 of the Interim Constitution to issue order No. 3/2015, later augmented by order No. 5/2015, which gives appointed "peace and order maintenance officers" many of the same powers the military has under martial law, including to administratively detain people in military facilities for up to seven days without charge; carry out warrantless searches; and curb freedom of expression.[17] It also upholds the ban on political gatherings of more than five people; the prosecution of civilians in military courts; and gives the military even broader powers than it has under martial law, including to carry out investigations. Order No. 3/2015 also states that any actions taken under it are not subject to review by the Administrative Court and that claims for compensation brought against peace and order maintenance officers who have acted in good faith are prohibited.

Independence of the judiciary and use of military courts

13. While Article 26 of the Interim Constitution guarantees the independence of the judiciary in accordance with the law and interim Constitution, in practice, judicial independence has been affected negatively by the new institutional framework, contrary to the assertion of the State in its response to the CESCR List of Issues.[18]

14. One material example of the lack of judicial independence in Thailand under the new institutional framework is the use of military courts to prosecute civilians. Shortly after the coup, the NCPO

[15] Switzerland. 2014. *Thailand: court ruling raises questions about protection against torture.* Geneva, ICJ. http://www.icj.org/thailand-torture-victim-denied-redress-government-should-comply-with-international-rights-obligations/ (Accessed 23 April 2015).

[16] Thailand. 2015. *2015:when "Resistent citizens"and the military arrested group of 15 who attacked a criminal court with grenades.* Bangkok, iLaw. http://freedom.ilaw.or.th/blog/March2015 (Accessed 30 April 2015). To arrive at this figure, iLaw relies on open sources and its network as official statistics have not been released.

[17] Thailand. 2015. *Villagers 'seeking justice' in land dispute.* http://www.nationmultimedia.com/national/Villagers-seeking-justice-in-land-dispute-30253657.html (Accessed 27 April 2015).

ordered the jurisdiction of military courts to be extended to certain offences, including purported violations of the NCPO's orders and the overly broad and vague crime of *lèse majesté.*[19] Since then, reliable sources have indicated that more than 700 civilians have been tried in the 30 military courts located throughout Thailand. For any crimes allegedly committed during the 11-month period Martial Law was in place, Thai law prescribes that those convicted shall not have the right to appeal against their conviction.[20]

15. International standards, including Article 14 of the International Covenant on Civil and Political Rights, to which Thailand is a party, provide that military courts lack the competence, independence and impartiality to try civilians, and provide that the "jurisdiction of military tribunals must be restricted solely to specifically military offenses committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized court." [21]

16. The current legal and judicial situation in Thailand, as set out above, is contrary to the right to an effective remedy as guaranteed under international law, including the Covenant, and impedes access to justice and to impartial and fair proceedings, including in cases of violations of the rights guaranteed under the Covenant. It is also enabling the criminalization of the legitimate exercise of human rights, including freedom of expression and right to peaceful assembly, which in turn impedes the work of human rights defenders including those working to protect and promote the rights guaranteed by the Covenant.

NCPO orders and announcements

17. Since 22 May 2014, the NCPO has issued more than 300 orders and announcements, including imposing a nationwide curfew, banning political gatherings of more than five people, limiting media freedom, summonsing individuals to military camps, ordering the prosecution of civilians in military courts for certain offences, including for violating the NCPO orders and *lèse majesté*, and regulating various aspects of public affairs. Many of these orders violate rights guaranteed by the Covenant, as set out below. The Bangkok Military Court, in a number of recent decisions following challenges to its jurisdiction over civilians, held that the NCPO's orders were final and binding on the Court.[22]

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[19] For more information on *lèse majesté*, please see: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11478&LangID=E (Accessed 8 May 2015).

[20] Article 61 paragraph 2, Act on the Organization of Military Courts (B.E. 2498); 8 April 2015. *Military Courts to Allow Appeals now that Martial Law is Gone.* Bangkok, The Nation. http://www.nationmultimedia.com/politics/Military-courts-to-allow-appeals-now-that-martial--30257643.html (Accessed 30 April 2015).

[21] Article 29 of the UN Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity recommended by the UN Commission on Human Rights by Resolution 2005/81, UN Doc. E/CN.4/2005/102/Add.1 (2005).

[22] Judge advocate v. Sombat Boonngam-anong, Black case no. 24A/2014, Court decision of 23 January 2015, Judge advocate v. Worrachet Pakeerat, Black case no. 32A/2014, Court decision of 26 January 2015, Judge advocate v. Chaturon Chaisaeng, Black case no. 31A/2014, Court decision of 13 February 2015, Judge advocate v. Jittra Kotchadet, Black case no. 28A/2014, Court decision of 6 March 2015.

Impact of NCPO orders on article 11 – right to an adequate standard of living

18. As referred to in paragraph 17 above, since the imposition of martial law and the military's seizure of power, the NCPO has issued various orders and announcements to govern and regulate various aspects of public affairs.

19. Some of these orders concern the management of natural resources, including forests. On 14 June 2014, the NCPO issued order No. 64/2014, which allows government authorities to take measures against deforestation and encroachment on forest reserves in the country. Order No. 64/2014 was supplemented by order No. 66/2014, from 17 June 2014, which provides some protection for the poor and landless residing on the disputed forest lands. Despite the formal recognition of the need to protect the most disadvantaged in the course of the application of order No. 64/2014, the ICJ is greatly concerned by multiple accounts of forcible evictions and of violent repression of protests by local communities.

20. Various sources[23] report examples of how the application of orders No. 64/2014, No. 66/2014, and their implementing plan, the so-called "Master Plan on Solutions to Destruction of Forest Resources and Land Encroachment and Sustainable Forest Management", have in practice violated the rights of communities living in forest areas, including their right to adequate housing. The orders have notably been used to carry out forcible evictions in contexts of latent or already existing land conflicts between communities living in protected forest areas and the authorities. In this regard, the National Human Rights Commission of Thailand (NHRCT) has received a number of complaints about violations of the rights of rural communities arising from the application of Order No. 64/2014.[24]

21. In addition, according to information received from the Cross Cultural Foundation (CrCF), a leading national NGO and partner of the ICJ in Thailand working with affected communities, since the enactment of these orders and announcements, at least 173 communities in nine provinces of the upper northern region of Thailand are reported to be affected by the joint operation of the Internal Security Operations Command (ISOC), Military, Police forestry department, and national park department under the Ministry of Natural Resource Management who have evicted and/or threatened to take legal action against communities living in the restricted forestry areas in the northern provinces. To give just one example, according to reliable information provided to the ICJ, on 6 February 2015, a joint force of approximately 100 officers from the Royal Thai Police, Royal Thai Army and the Department of Forest and District Administration visited the community in Khok Yao forest in Chaiyaphum province in the northeast of Thailand. They demanded that the community leave the area and destroy all their

[23] OHCHR, Regional office for South-East Asia, **"**United Nations Human Rights Office concerned by the situation of human rights in relation to land in Thailand**"**, in *Press Statement*, 11 March 2015, available at: http://bangkok.ohchr.org/files/ROB%20Press%20Statement%20150311.pdf (Accessed 30 April 2015).

[24] *Moves against land encroachers 'flawed'*. Bangkok, The Nation. http://www.nationmultimedia.com/webmobile/politics/Moves-against-land-encroachers-flawed-30248406.html (Accessed 30 April 2015).

buildings and crops by 24 February for encroaching on the national forest, despite claims by the community that they had been living there peacefully since the 1970s.[25]

22. On 8 April 2015, the NCPO issued order No. 4/2015, which further empowers the military to assume the roles previously held by the police and other public officials to address land encroachment. The Prime Minister and head of the NCPO said "the new order was intended to allow soldiers to team up with police and forest officials to combat forest encroachers when there are not enough officers to handle the tasks."[26] The National Police Chief said the order "would shorten legal procedures and allow swifter prosecution of illegal encroachers", [27] which raises concerns about whether such an expedited legal process could lead to violations of the rights of individuals and communities to have their complaints fairly considered as part of an independent and impartial judicial process.

23. Villagers affected by these NCPO policies have protested saying that "since the junta's forest protection policies were enacted, many marginalized communities in the region have been affected by the continuous efforts of the ISOC and the Royal Forestry Department personnel to evict people from protected areas… [and] that the current forest protection policies of the junta constitute the monopolization of natural resources by the state. This is similar to the forest protection plan of 1992, which faced widespread public opposition and had to be withdrawn".[28]

Emblematic Cases: Killing of Human Rights Defenders working on land rights

24. A number of individual cases are emblematic of the general repression human rights defenders, including those working on ESC rights, are facing in Thailand. For example, the killing by gunmen of Mr. Chai Bunthonglek, a member of the Southern Peasant Federation of Thailand on 11 February 2015, demonstrates ongoing tensions over land disputes. Mr. Bunthonglek was actively involved in the land conflict that opposes his community to the business enterprise Jew Kung Juy Development Company, in his village of Klong Sai Pattana, in the Chaiburi District of the Surathhani Province. He is the fourth activist killed in similar circumstances in the village[29] and,

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[25] *Villagers 'seeking justice' in land dispute*. Bangkok, The Nation. http://www.nationmultimedia.com/national/Villagers-seeking-justice-in-land-dispute-30253657.html (Accessed 30 April 2015).

[26] *Encroachers face army crackdown*. Bangkok, Bangkok Post. http://www.bangkokpost.com/news/general/524019/encroachers-face-army-crackdown (Accessed 30 April 2015).

[27] *Ibid.*

[28] *Thailand's northerners, northeasterners urge junta to abandon 'return forest' policy*. Bangkok, Prachatai: http://prachatai.org/english/node/4919?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+prachataienglish+%28Prachatai+in+English%29 (Accessed 30 April 2015).

[29] Thailand. 2015. *Thailand military orders eviction Thai human rights defenders*. Protection International. https://protectionline.org/2015/03/18/thailand-military-orders-eviction-thai-human-rights-defenders/ (Accessed 30 April 2015), *Thailand : Joint open letter to the prim minister of Thailand on the killing of Mr. Chai Bunthonglek*. Protection International. https://protectionline.org/2015/03/12/thailand-joint-open-letter-prime-minister-thailand-killing-mr-chai-bunthonglek/ (Accessed 30 April 2015), *Thailand: Land Rights Activist Gunned Down.* Human Rights Watch. https://www.hrw.org/news/2015/02/14/thailand-land-rights-activist-gunned-down

according to the Office of the High Commissioner for Human Rights, the fourth human rights defender working on land rights to be killed in the South since May 2014.[30] The ICJ, along with other civil society organizations,[31] has pointed out the lack of an effective, prompt, thorough and impartial investigation into the killing of Mr. Bunthonglek or a definitive settlement of the land dispute in Klong Sai Pattana in compliance with Thailand's obligations under the Covenant and with other international and national human rights obligations.

Emblematic Cases: The apparent enforced disappearance of Karen Human Rights Defender, "Billy"

25. On 17 April 2014, a Karen minority human rights defender, Pholachi "Billy" Rakchongcharoen, was last seen in the custody of Kaeng Krachan National Park Officials, including the former Chief of the National Park. The officials claimed they detained Billy for illegal possession of wild honey but released him later the same day. He has not been seen since.[32]

26. At the time of his "disappearance", Billy had been working with ethnic Karen villagers and activists on legal proceedings the villagers had filed against the National Park, the Wildlife and Plant Conservation Department, the Ministry of Natural Resources and Environment, and the former Chief of Kaeng Krachan National Park concerning the alleged burning of villagers' homes and property in the National Park in 2010 and 2011.

27. A six-day *habeas corpus* inquiry monitored by the ICJ and which concluded on 17 July 2014, and a subsequent appeal delivered on 26 February 2015, were unsuccessful in shedding any light on Billy's fate or whereabouts.

28. The ICJ has repeatedly called for the Thai Government to carry out an impartial, thorough and effective investigation into Billy's "disappearance" and to bring any perpetrators to justice. However, at the time of filing this submission, the results of the investigation have not been released publically and no charges have been laid.

(Accessed 30 April 2015).

[30] OHCHR, Regional office for South-East Asia "Human rights defender advocating for land rights killed in southern Thailand", in *Press Statement*, 13 February 2015, available at: http://bangkok.ohchr.org/files/ROB%20Press%20Release%20130215.pdf, (Accessed 30 April 2015).

[31] Thailand. 2015. *Letter protesting murder of land rights activist in Southern Thailand*. http://focusweb.org/content/letter-protesting-murder-land-rights-activist-southern-thailand (Accessed 30 April 2015).

[32] Switzerland. 2014. *Thai authorities must urgently investigate Billy's 'disappearance'*. Geneva, ICJ. http://www.icj.org/thai-authorities-must-urgently-investigate-billys-disappearance/; *Thailand: "Disappearance" of Billy demands special investigation*, Geneva, ICJ. http://www.icj.org/thailand-disappearance-of-billy-demands-special-investigation/; *Thailand: enforced disappearances.* Geneva, ICJ. http://www.icj.org/thailand-enforced-disappearances/ ; *Thailand: strengthen efforts to solve the apparent enforced disappearance of "Billy".* Geneva, ICJ. http://www.icj.org/thailand-strengthen-efforts-to-solve-the-apparent-enforced-disappearance-of-billy/ (Accessed 30 April 2015).

Emblematic Cases: Repression of Human Rights Defenders by resorting to Criminal Defamation

29. Human Rights Defenders have faced multiple criminal defamation lawsuits in Thailand. Criminal defamation, if committed through a computer system, carries a sentence of up to five years of imprisonment upon conviction. For instance, in February 2013, a company filed a defamation complaint against Andy Hall, a labour researcher, for his research on allegedly poor labour conditions, and the use of illegal child labour, often in insecure conditions.[33] Alarmingly, the Government has also initiated such lawsuits, attacking Human Rights Defenders for their work to monitor human rights violations. In December 2013, the Royal Thai Navy filed a criminal complaint against the editors of a Thai news website, Phuketwan, for reproducing part of an article written by the Reuters news agency concerning the alleged smuggling and trafficking of Rohingyas.[34]

Impact of NCPO orders on the work of human rights defenders and on the respect of human rights norms and principles for participation, consultation and transparency

30. Limitations to the right to peaceful assembly and to freedom of expression have an impact on a whole range of human rights, including on those guaranteed in the Covenant.

31. In particular, the prohibition on public gatherings of more than five persons for political purposes that has been imposed through NCPO order No. 7 from 22 May 2014[35] and NCPO order No. 3/2015 from 1 April 2015[36] has been used against human rights defenders and other activists claiming ESC rights. At least one community in the Northeast of Thailand, which is protesting against mining in its district, complained directly to the ICJ in June 2014 that the NCPO order prohibiting public gathering has made them fearful of holding community events to discuss community issues including their ongoing legal proceedings against the mine. When they did hold such a meeting, the military attended and monitored the discussion, which caused them to stop holding meetings. Other Thai community organizers told the ICJ of the same problem in their communities. A leading Thai NGO and partner of the ICJ, Thai Lawyers for Human Rights (TLHR), advised the ICJ that, according to its monitoring, at least 146 individuals have been arrested while protesting peacefully (as at the end of February 2015).

32. In September 2014, TLHR itself was prohibited by the NCPO from holding a public event to launch a report on the human rights

[33] For more information, see the articles available at: http://time.com/3254687/thailand-andy-hall-migrant-labor-rights-finnwatch-natural-fruit, http://freedom.ilaw.or.th/en/case/469#detail (Accessed 6 May 2015).

[34] For more information, see the articles available at: http://www.icj.org/thailand-immediately-withdraw-criminal-defamation-complaint-against-human-rights-defender/, http://eeas.europa.eu/delegations/thailand/documents/news/141114_eu_homs_statement_on_misuse_of_criminal_defamation_laws_en.pdf, http://www.prachatai.com/english/node/3793 (Accessed 6 May 2015).

[35] According to Order No. 7, contravention against the ban on public gathering is punishable by one-year-imprisonment and/or a fine of up to 20,000 Thai baht.

[36] According to Order No. 3/2015, contravention against the ban on public gathering is punishable by 6-month-imprisonment and/or a fine of up to 10,000 Thai baht.

situation after the *coup d'etat*.[37]

33. In another example of the negative impact of the NCPO orders restricting public gathering on the enjoyment of the rights under the Covenant, very recently, on 1 May 2015, the NCPO ordered the cancellation of a planned rally organized by trade unions on the occasion of Labour Day to bring the demands of workers to the attention of the local government in Chiang Mai.[38]

34. On 1 April 2015, the UN Special Rapporteur on Freedom of Expression condemned the continuing threats against the media for voicing criticism against the conduct and policies of public authorities.[39] These restrictions and the resulting repression prevent rights-holders from claiming their rights, especially in case of violations or threats against those rights. They also violate the right of individuals and communities to take part in the conduct of public affairs[40] and, in particular, to be consulted over measures that affect especially their access and control over land, and their right to housing and food.[41]

Impact of NCPO orders on articles 6 and 7 – right to work and to just and favourable conditions of work

35. The enactment of the NCPO orders has generated concern about their impact on migrant workers. The following section briefly sets out the ICJ's concern about potential violations of the rights guaranteed by the Covenant that migrant workers have experienced since then.

36. NCPO announcement No. 67 from 16 June 2014, and No. 68 from 17 June 2014 [42] were formally issued in order to prevent human trafficking and exploitation of migrant workers, and to regulate the situation of migrant workers without valid documents.[43] However, civil society, including Human Rights Watch, have raised concerns about the impact of these announcements in practice. In particular, the mandatory listing and registration of migrant workers by employers generated fears of a surge in violent repression by the

[37] Thailand. 2014. *NCPO forces rights groups to cancel forum.* Bangkok, Bangkok Post. http://www.bangkokpost.com/lite/topstories/430103/ncpo-forces-rightsgroups-to-cancel-forum (Accessed 27 April 2015).
[38] For more information, see the article available at: http://prachatai.org/english/node/5023?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+prachataienglish+%28Prachatai+in+English%29 (Accessed 6 May 2015).
[39] Office of High Commissioner for Human Rights, UN expert dismayed over Thai leader's intimidating statements against freedom of the press, in *News Release*, 2015, available at: http://bangkok.ohchr.org/files/OHCHR%20News%20Release_010415.pdf (Accessed 30 April 2015).
[40] Office of High Commissioner for Human Rights, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), UN Doc. CCPR/C/21/Rev.1/Add.7(1996), para. 8.
[41] Covenant on Civil and Political Rights, article 25. See also: Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmonal, UN Doc. A/HRC/23/36 (2013).
[42] NCPO Announcement No. 67/2557: Temporary measures in addressing migrant workers and No. 68/2557: Urgent measures in preventing and suppressing human trafficking and solving problems on migrant workers.
[43] Committee on Economic, Social and Cultural Rights, Replies of Thailand to the list of issues, List of issues in relation to the combined initial and second periodic report of Thailand, UN Doc. E/C.12/THA/Q/1-2/Add.1 (2015), para. 78.

authorities that triggered a flight of migrants back to Cambodia, Lao PDR, and Myanmar.[44]

37. In addition, the recent discovery, on 1 May 2015, of a mass grave in the border province in the South of Thailand, shows the limits of the efficiency of these measures. Apparently, the grave was holding victims of trafficking (most likely members of the Rohingya community) who were trafficked from Myanmar and Bangladesh.[45] This discovery highlights massive problems on trafficking of migrants, which have led to economic pressure from the EU and the US.[46]

Equal enjoyment by women of the rights guaranteed under the Covenant

Article 2.2 and article 3 of the Covenant: General legal gaps on gender equality

38. In its joint report with the Justice for Peace Foundation (JPF): "Women's Access to Justice: Identifying the Obstacles and Need for Change – Thailand" the ICJ and JPF identified the lack of a comprehensive and generally applicable law on gender equality and non-discrimination as an obstacle to equal enjoyment of rights by women.[47] The recent adoption of the Gender Equality Act after several attempts is partially addressing this gap.[48] However, the ICJ remains concerned that article 17 of the Act which prohibits unjust sexual discrimination, still permits sexual discrimination if it is justified for "the purpose of protecting well being and safety, religious practice and national security".

Articles 6 and 7 in conjunction with Articles 2(2) and 3 of the Covenant: rights to work and to just and favourable conditions of work for domestic and migrant women workers

39. The Labour Protection Act[49] guarantees and provides protection of workers' rights, including protection against discrimination and abuses committed by employers. The provisions are of general application to all workers and labour/employment sectors unless provided otherwise by ministerial regulations. In fact, exceptions and

[44] *Thailand: Fears of Crackdown Trigger Exodus*. New York, Human Rights Watch. http://www.hrw.org/news/2014/06/19/thailand-fears-crackdown-trigger-exodus, Roundup: The Cambodian Exodus. Bangkok, Prachatai http://www.prachatai.com/english/node/4145 (Accessed 30 April 2015).
[45] For more information, see the articles available at: http://www.hrw.org/news/2015/05/01/thailand-mass-graves-rohingya-found-trafficking-camp, http://www.theguardian.com/world/2015/may/05/us-calls-for-speedy-inquiry-into-mass-grave-deep-in-thai-jungle (Accessed 6 May 2015)
[46] For more information, see the articles available at: http://america.aljazeera.com/articles/2015/5/5/thai-police-find-new-human-trafficker-camps.html, http://www.nationmultimedia.com/business/EU-warning-to-Thai-fishery-30258478.html, http://europa.eu/rapid/press-release_IP-15-4806_en.htm, http://www.theguardian.com/environment/2015/apr/21/eu-threatens-thailand-with-trade-ban-over-illegal-fishing, http://www.bangkokpost.com/news/general/538787/us-house-told-of-slavery-in-thai-seafood-industry (Accessed 6 May 2015)
[47] International Commission of Jurists, *Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change*, 2012, part 3.1.
[48] Committee on Economic, Social and Cultural Rights, Replies of Thailand to the list of issues, List of issues in relation to the combined initial and second periodic report of Thailand, UN Doc. E/C.12/THA/Q/1-2/Add.1 (2015), para. 71.
[49] Thailand Labour Protection Act B.E.2541 (1998).

specific provisions have been introduced through such regulations with regard to agricultural work as well as with regard to domestic work that is not part of a business operation.[50] As far as the latter is concerned, it is important to note that the Homeworkers Protection Act that entered into force in 2010 only applies to persons working at home for an industrial enterprise, and thus does not cover domestic workers such as cooks, cleaners or caregivers. In addition, the Ministerial Regulation No. 14 (B.E. 2555) that entered into force on 9 November 2012, while improving the situation of domestic workers, failed to fill some important protection gaps. Those gaps include the failure to impose the payment of the minimum wage, working time limitations or compensation for overtime. [51] The Regulation also fails to integrate domestic workers in the system of social security protection as regulated by the Social Security Act.[52]

40. The Committee has clearly stated that, in order to comply with its obligations under the Covenant, the State must adopt legislation to regulate domestic work so that domestic workers can benefit from the same level of protection as other workers.[53] In addition, the gaps in protection for domestic workers have a disproportionally negative impact on women's rights to work and to just and favorable conditions of work, as women constitute the large majority of domestic workers.[54]

41. Not only are the vast majority of domestic workers women, but a large number of these workers are migrant women, who require heightened regulatory protection to ensure they receive effective protection and equality in the enjoyment of their rights under the Covenant. As alluded to in paragraph 36 above, the NCPO orders and announcements aiming at registering and regulating migrant workers have generated further insecurity for migrant workers. As in many other countries, undocumented migrants are particularly at risk of being victims of abuse including those affecting their rights at the workplace, and because of their legal status, the abuses will overwhelmingly remain unreported and unpunished. [55] However, even documented migrant women workers face significant obstacles in realizing and claiming their rights, especially due to the restrictions on travel or on change of employer that are imposed upon the delivery of work permits to these workers. By way of example, the ICJ-JPF report illustrates how these restrictions in fact prevent migrant women workers victims of gender-based violence at work from leaving the abusive work environment due to fears of breaching the terms of their work permits, hence of losing their status as documented migrants. [56]

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[50] International Commission of Jurists, *Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change*, 2012, p. 30.
[51] Thailand. 2013. Thailand : new Ministerial Regulation offers better protection of domestic workers' rights. http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_208703.pdf (Accessed 30 April 2015).
[52] International Commission of Jurists, *Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change*, 2012, p. 31.
[53] Committee on Economic, Social and Cultural Rights, General Comment 18 on the right to work, UN Doc. E/C.12/GC/18 (2006), para. 10.
[54] Committee on the Elimination of Discrimination against Women, General recommendation No. 26, on women migrant workers, UN Doc. CEDAW/C/2009/WP.1/R (2008), para. 26(b).
[55] International Commission of Jurists, *Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change*, 2012, p. 36.
[56] *Ibid*.

42. In that regard, the Committee has clearly prohibited discrimination on the ground of legal status, and stated that: "(t)he ground of nationality should not bar access to Covenant rights…The Covenant rights apply to everyone including non-nationals, such as…migrant workers and victims of international trafficking, regardless of legal status and documentation." [57]

43. As the UN Committee on Migrant Workers highlighted in its General Comment No. 1, "laws regulating the conditions of entry and stay in countries of employment are often a source of specific vulnerabilities for migrant domestic workers. Overly restrictive immigration laws may lead to higher numbers of migrant domestic workers who are non-documented or in an irregular situation, and thus particularly vulnerable to human rights violations. Even for workers with a documented or regular migration status, similar vulnerabilities arise where immigration laws tie their status to the continued sponsorship of specific employers. Consequently, migrant domestic workers may risk deportation if they try to escape an abusive employment relationship or seek legal remedies against their employers." [58]

RECOMMENDATIONS

44. In light of the above-mentioned concerns, the ICJ considers that the Government of Thailand should implement the following recommendations in order to comply with its obligations under the Covenant:

<u>Article 2.1 – legal framework for the guarantee and protection of ESCR</u>

i. Take all necessary steps to ensure the reestablishment of a democratic constitution in compliance with Thailand's international human rights obligations, including those regarding economic, social and cultural rights as a State party to the Covenant;
ii. Take all necessary measures to reestablish a civil, independent and impartial judiciary and immediately halt the trials of civilians by military courts including for non-respect of military orders regulating economic and social matters;
iii. Lift the orders, announcements and all regulations that prevent the effective defence of ESC rights and lead to the criminalization of human rights defenders, in particular lift the ban on public assembly of more than five persons;
iv. Repeal article 48 of the 2014 Interim Constitution of Thailand, clause 14 of NCPO order No. 3/2015, article 17 of the Emergency Act B.E. 2548 (2005) which exempt officials acting under these laws from judicial accountability;Lift martial law and all other measures of emergency rule that are in place throughout Thailand and replace them with laws and actions compliant with international human rights standards;

[57] Committee on Economic, Social and Cultural Rights, General Comment 20 on Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20(2009), para.10, para. 30.
[58] Committee of Migrant Workers, General Comment No. 1, UN Doc. CMW/C/GC/1 (2011), para. 21.

v. Remove any unduly restrictive limitations on freedom of assembly and freedom of expression;
vi. Repeal NCPO order No. 3/2015 and other orders created under article 44 of the Interim Constitution.

Articles 2.1 and 11 – Impact of the NCPO orders on the right to an adequate standard of living

i. Repeal NCPO orders No. 64 and No. 66;
ii. Take all necessary steps to ensure land tenure of rural communities and preserve the rights to housing and food of these communities;
iii. Carry out effective, prompt, thorough and impartial investigations into the alleged murders of human rights defenders in the context of land disputes and provide the victims with appropriate remedies and reparation;
iv. Carry out effective, prompt, thorough and impartial investigation into the apparent enforced disappearance of "Billy" and provide the victims with appropriate remedies and reparation;End the use of criminal defamation as a tool of repression against human rights defenders.

Article 2.2 and article 3 – Gender equality

i. Apart from positive discrimination in order to eliminate obstacles to gender equality, amend article 17 of the Gender Equality Act to leave no gap in protection against gender discrimination.

Articles 6 and 7 – Protection against violations of the right to just and favourable conditions of work for domestic and migrant workers

i. Take all necessary steps to fill the protection gaps affecting domestic workers, including with regard to the payment of the minimum wage, working time limitations or compensation for overtime, or their integration in the system of social security protection;
ii. Revise norms that prevent migrant workers to leave abusive labour situations, including NCPO announcements No. 67 and 68 that maintain the limits on freedom of movement and of change of employer of migrant workers.