Mr. Wisit Wisitsoraat
Permanent Secretary
Ministry of Justice
Government Centre Building A
120 Moo 3
Chaengwattana Road
Lak Si
Bangkok 10210

23 November 2017

Dear Permanent Secretary:

Recommendations concerning the Draft Prevention and Suppression of Torture and Enforced Disappearances Act

We write in response to a request by the Ministry of Justice for civil society organizations to provide feedback concerning the Draft Prevention and Suppression of Torture and Enforced Disappearances Act ('Draft Act'). The enclosed briefing provides recommendations to strengthen the Draft Act and ensure its compliance with Thailand's international legal obligations, particularly under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the International Convention for the Protection of All Persons from Enforced Disappearance, the International Covenant on Civil and Political Rights and customary international law.

Background

In February 2017, the National Legislative Assembly (NLA) announced that it had decided that it would then take no action to adopt the Draft Act, which was produced by the Ministry of Justice in consultation with non-governmental organizations and other civil society actors. In March 2017, at the UN Human Rights Committee's review of Thailand's compliance with the ICCPR, Thailand confirmed the Draft Law "had been submitted to the National Legislative Assembly, which had requested the Cabinet to further review the bill, with a view to introducing amendments and launching a public consultation process."[1]

On 25 April 2017, the UN Human Rights Committee stated in its Concluding Observations on Thailand:

> *The State party should ensure that legislation fully complies with the Covenant, in particular by prohibiting torture and enforced disappearance in accordance with the Covenant and international standards. The State party should expeditiously enact a law on the prevention and suppression of torture and enforced disappearances.*[2]

The International Commission of Jurists (ICJ) and Amnesty International welcome the Thai government's undertaking to criminalize torture and enforced disappearances. The passage of the

[1] UN Human Rights Committee, 119th Session, Consideration of reports submitted by States parties under article 40 of the Covenant - Second periodic report of Thailand (continued), UN Doc. CCPR/C/SR.3350, 22 March 2017, para 5.
[2] UN Human Rights Committee, Concluding observations on the second periodic report of Thailand, UN Doc. CCPR/C/THA/CO/2, 25 April 2017, para 20.

Draft Act, if amended to address current inconsistencies with Thailand's international human rights obligations, could represent a major step towards eradicating torture and enforced disappearances in Thailand. We also appreciate the sustained engagement our organizations have enjoyed with partners in the Thai government—including, in particular, the Ministry of Justice—on the development of the Draft Act over the last three years.

Proposed Recommendations

The enclosed briefing outlines our major concerns regarding the latest version of the Draft Act which was disseminated to civil society. In short, the briefing addresses concerns regarding:

- The incomplete definitions of the crimes of torture and enforced disappearance, as well as of other key terms;
- The absence of provisions concerning cruel, inhuman and degrading treatment (CIDT/P);
- The inadequacy of provisions on the inadmissibility of statements and other information obtained by torture, CIDT/P and enforced disappearances as evidence in legal proceedings;
- The inadequacy of provisions relating to modes of liability for crimes described in the Draft Act; and
- The shortcoming of provisions concerning safeguards against torture, CIDT/P and enforced disappearances.

In August 2017, the Ministry of Justice identified to the ICJ five issues concerning the Draft Act which had been raised by the NLA. On these issues, some of which are addressed in the enclosed briefing, the position of the ICJ and Amnesty International is as follows:

a. *Article 5. Definition of the crime of torture.* As described in paragraphs 7 to 20 of the enclosed briefing, the ICJ and Amnesty International recommend that the definition of torture provided in article 5 of the Draft Act mirror the definition provided in article 1 of the UNCAT. Specifically, we recommend adding the element of intention to the definition, including a "lawful sanctions" clause, and expanding the clause on discrimination to specify that an act committed "for any reason based on discrimination of any kind" may constitute torture. To the extent that terms in this article are unclear, they should be interpreted with respect to their meaning under international law.

b. *Article 11. Emergency situations*. The ICJ and Amnesty International believe that it is imperative to retain article 11 of the Draft Act, which states that the prohibition on torture applies in all circumstance, including states of emergency. International law prohibits torture and other cruel, inhuman or degrading treatment or punishment absolutely, in all circumstances and without exception. Moreover, article 11 of the Draft Act is drawn directly from the language of Article 2(2) of the UNCAT, and its removal would leave a key element of that Convention unimplemented in Thai law.

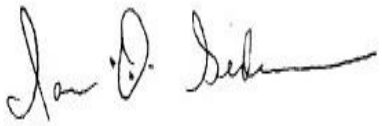
c. *Article 12. Non-refoulement.* The ICJ and Amnesty International also believe that it is imperative to retain article 12 of the Draft Act, which prohibits the forcible transfer of individuals to where they would subsequently be at risk of torture or enforced disappearance. The principle of non-refoulement, which is clearly defined as a state obligation under article 3 of the UNCAT and is also established by customary international law, is fundamental to the protection against torture and enforced disappearance. Thai law does not currently protect individuals from refoulement. Thailand would continue to fall short of its obligations under international law if it passed a version of the Draft Act that did not include an effective non-refoulement provision.

d. *Article 27. Jurisdiction*. The ICJ and Amnesty International are not able to provide a recommendation on whether jurisdiction over crimes defined in the Draft Act should rest with the Criminal Court on Corruption and Misconduct Cases, as provided in article 27 of the current version of the Draft Act, or with ordinary criminal courts, as suggested by the NLA. Under international human rights law and standards, the key requirements for any court with jurisdiction over these crimes are that it is a competent, independent, adequately resourced civilian court which follows proceedings that meet international standards of fairness.

e. *Article 32. Command responsibility*. As described in paragraphs 34 to 40, the ICJ and Amnesty International recommend strengthening article 32 of the Draft Act by specifying that a supervisor may be held responsible for the actions of a subordinate "under his or her effective authority or control". We also recommend adding a clause allowing for a supervisor to be held accountable when he or she "consciously disregarded information which clearly indicated" that a subordinate was about to or had already committed a crime defined in the Draft Act. Beyond these recommendations, we would strongly oppose any amendments that would shield from accountability supervisors exercising effective authority and control over subordinates, regardless of their rank or position.

The ICJ and Amnesty International remain committed to supporting the Thai government's efforts to passing the Draft Act in a form that offers the strongest protection against torture and enforced disappearance and ensures Thailand's compliance with international law. Please feel free to contact us if you require any further information or advice.

Sincerely,



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Recommendations on the Draft Prevention and Suppression of Torture and Enforced Disappearance Act (2016)

I. Introduction

1. The International Commission of Jurists (ICJ) and Amnesty International welcome the initiative of the Thai government to draft the Prevention and Suppression of Torture and Enforced Disappearance Act (hereinafter the 'Draft Act') and invite recommendations from civil society and non-governmental organizations towards reviewing the Draft Act. Our organizations appreciate the Thai government's effort to criminalize torture and enforced disappearances and enshrine within law measures to prevent these acts, which are serious violations of human rights and crimes under international law.

2. During the past three years, our organizations have met officials and made several written submissions to the Thai government in an effort to ensure that, once finalized and adopted, the Draft Act fully incorporates into Thai domestic law the provisions of two treaties in respect of which it has assumed obligations and commitments, namely the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[1] (UNCAT) and the International Convention for the Protection of All Persons from Enforced Disappearance[2] (ICPPED), and otherwise complies with international human rights law and standards. To this end, we urge the Thai government to address existing shortcomings in the Draft Act and, once they are addressed, ensure its passage into law without delay.

3. In this briefing, the ICJ and Amnesty International identify particular concerns regarding provisions in the Draft Act and set out recommendations aimed to bring the proposed legislation in line with international human rights law and standards. We also provide examples of legislation against torture and enforced disappearance in other countries. The provision of these examples are for comparative purposes only and should not be understood as an endorsement of these texts as a whole.

II. Recommendations by the ICJ and Amnesty International

A. Definition : 'Public Official'

Concerns

4. Article 3 of the Draft Act defines a "public official" as "a person exercising public authority or who was authorized, assigned, permitted, supported, or directly or indirectly allowed to exercise public authority to execute operations according to the law". This definition is mostly in line with the assertion by the Committee against Torture ("CAT") assertion that "public official" should be defined broadly,[3] in order to include authorities "acting in official capacity" who may not be strictly construed as State agents but who "exercise certain prerogatives comparable to those normally exercised by legitimate governments".[4] It is similarly consistent with general principles of State responsibility under international law, which provide that conduct of persons or entities who are empowered by the State to exercise elements of governmental authority, is to be considered an act of State, even if those persons or entities are not formally State agents.[5] With respect to article 3, the ICJ and Amnesty International also highlight that the words "according to the law" appear to be

[1] Adopted by UN General Assembly resolution 39/46 of 10 December 1984, entered in to force 26 June 1987. Thailand ratified the Convention in 2007.
[2] Adopted by UN General Assembly resolution 61/177 on 20 December 2006, entered into force 23 December 2010. Thailand signed the Convention in 2012.
[3] Report of the Committee against Torture, 51st and 52nd sessions (2013-2014), UN Doc. A/69/44, pp. 38, 113, 114 and 121.
[4] CAT, *Elmi v Australia* (25 May 1999), UN Doc. CAT/C/22/D/120/1998, §6.5.
[5] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc. A/56/10, article 5.

unnecessary, given that a person exercising public authority would be liable without these qualifications.

Recommendations

5. The ICJ and Amnesty International propose that the phrase "public official" be amended to "public official, or other person acting with official capacity" to provide a more accurate description of potential perpetrators throughout the Draft Act and one that is more consonant with article 1 of the UNCAT.

Provisions in Draft Act	Recommendations
Article 3 "public official" means a person exercising public authority or who was authorized, assigned, permitted, supported, or directly or indirectly allowed to exercise public authority to execute operations according to the law.	Article 3 (amended) "public official, or other person acting with official capacity" means a person exercising public authority or who was authorized, assigned, permitted, supported, or directly or indirectly allowed to exercise public authority by such a person.

B. Definitions : Torture

6. Article 3 of the Draft Act defines "torture" broadly as "any act that inflicts severe pain or suffering, whether physical or mental", omitting key elements that are part of the definition of torture provided in article 1 of UNCAT. The article 3 definition of torture would thus encompass acts that cause severe pain and suffering but are lawful and legitimate, such as medical procedures. Although additional elements of the crime of torture are provided in article 5, the incomplete definition in article 3 introduces contradictions into the Draft Act and makes it inconsistent with the UNCAT.

7. The Committee against Torture has clearly stipulated that domestic legislation should follow the definition provided in the UNCAT or, in the alternative and at a minimum, incorporate all elements of torture as defined by the UNCAT.[6] The following elements of torture as defined by the UNCAT are missing in article 3:

Element of purpose

8. Although article 5 of the Draft Act requires that acts causing severe pain or suffering be carried out for purposes in order for the act to constitute torture—thus partly tracking the definition provided by the UNCAT—the article 3 definition does not include this requirement. In addition, the draft appears to imply that the four purposes identified are exhaustive, when the language of the UNCAT, and the jurisprudence of the CAT and other authorities, make clear that these purposes are illustrative and not exhaustive of all that will attract liability for torture.

Element of state action

9. Likewise, although article 5 of the Draft Act requires that an act causing severe pain or suffering be carried out by a public official—another element of the UNCAT definition—this requirement is not included in the article 3 definition. Also, as recommended above in paragraph 6, the term "public official" should be expanded to be "public official or other person acting with official capacity". Incorporating the involvement of public officials or others acting in an official capacity into the definition of torture is necessary, as state action is a key element of the offence of torture as defined by the UNCAT.

[6] Committee against Torture, General Comment No 2, Op. Cit. 1, §8; See also Committee against Torture, Concluding observations of the Committee against Torture on Germany (12 December 2011), UN Doc. CAT/C/BIH/CO/2-5, §9.

Element of intention

10. Neither article 3 nor article 5 of the Draft Act include the key element of intention that is contained in the definition of torture provided by UNCAT. This element is crucial as it establishes the psychological element, or *mens rea*, of 'torture' as a crime.

Lawful sanction clause

11. Neither article 3 nor article 5 of the Draft Act provide a "lawful sanctions" clause, such as that contained in article 1 of the UNCAT, which provides that "pain or suffering arising only from, inherent in or incidental to lawful sanctions" does not constitute torture.

Recommendations

12. In order to ensure internal consistency and compliance with the UNCAT, the ICJ and Amnesty International recommend that the Draft Act provide a single definition of torture that contains all elements of torture provided in the UNCAT, including a lawful sanction clause. The organizations therefore advise deleting the language defining torture presently contained in article 3 and instead providing for a definition of the crime completely in article 5.

13. The ICJ and Amnesty International also recommend specifying that the lawful sanction clause must include sanctions which are consistent with provisions of international law to protect against lawfully sanctioned acts which may contravene international human rights principles.

Provisions in Draft Act	Recommendations
Article 3 "torture" means any act that inflicts severe pain or suffering, whether physical or mental, on another person.	Article 3 (amended) DELETE
Article 5 A person who is a public official and has caused severe pain or suffering physically or mentally for one of the following purposes: (1) To obtain information or a confession from suffered person or a third person, (2) To punish the suffered person for the act that s/he or a third party has committed or is suspected of having committed, (3) To threaten or coerce the suffered person or a third person, or (4) To discriminate. Commits the act of torture.	Article 5 (amended) A person who is a public official, or other person acting with official capacity, and has intentionally inflicted severe pain or suffering, whether physically or mentally, for a purpose such as: (1) To obtain information or a confession from suffered person or a third person, (2) To punish the suffered person for the act that s/he or a third party has committed or is suspected of having committed, (3) To threaten or coerce suffered person or a third person, or for any reason based on discrimination of any kind, commits the act of torture. That person does not commit an act of torture if the act arises only from, is inherent in, or is incidental to any lawful sanctions that are consistent with provisions of international legal obligations and standards including under the International Covenant for Political and Civil Rights and the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

Examples of relevant legislation in other countries

14. Anti-torture laws in other countries have incorporated the definition of torture provided by article 1 of CAT, with slight modifications.

15. Section 2 of **New Zealand**'s anti-torture legislation defines "torture" as "any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—
(a) for such purposes as—
(i) obtaining from that person or some other person information or a confession; or (ii) punishing that person for any act or omission for which that person or some other person is responsible or is suspected of being responsible; or
(iii) intimidating or coercing that person or some other person; or
(b) for any reason based on discrimination of any kind;—
but does not include any act or omission arising only from, or inherent in, or incidental to, any lawful sanctions that are not inconsistent with the Articles of the International Covenant on Civil and Political Rights."[7]

16. Section 1 of **Ireland**'s law prohibiting torture defines "torture" as "an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—
(a) for such purposes as—
(i) obtaining from that person, or from another person, information or a confession,
(ii) punishing that person for an act which the person concerned or a third person has committed or is suspected of having committed, or
(iii) intimidating or coercing that person or a third person, or
(b) for any reason that is based on any form of discrimination, but does not include any such act that arises solely from, or is inherent in or incidental to, lawful sanctions."[8]

17. Section 1 of the Irish law further clarifies that a "public official includes a person acting in official capacity" and section 2 continues to state that "(a) person, whatever his or her nationality, other than a public official, who carries out an act of torture on another person, whether within or outside the State, at the instigation of, or with the consent or acquiescence of, a public official shall be guilty of the offence of torture."

18. Section 3 of the **Philippines**' Anti-Torture Act 2009 defines "torture" as "an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession; punishing him/her for an act he/she or a third person has committed or is suspected of having committed; or intimidating or coercing him/her 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 person in authority or agent of a person in authority. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[9]

19. Section 2 of **Uganda**'s anti-torture legislation defines "torture" as "any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as—
(a) obtaining information or a confession from the person or any other person;
(b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or

[7] New Zealand, Crimes of Torture Act of 1989, Act No 106.
http://www.legislation.govt.nz/act/public/1989/0106/latest/DLM192818.html
[8] Ireland, Criminal Justice (United Nations Convention against Torture) Act of 2000, Act No 11.
http://www.irishstatutebook.ie/eli/2000/act/11/enacted/en/pdf
[9] Philippines, Anti-Torture Act 2009, Republic Act No. 9745.
http://www.lawphil.net/statutes/repacts/ra2009/ra_9745_2009.html

(c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act."[10]

C. Definitions : Enforced Disappearances

Concerns

20. As with the crime of torture, the Draft Act defines the crime of enforced disappearance in two places, resulting in inconsistencies both within the law itself and between the law and the ICPPED. The definition of enforced disappearances provided in article 3 of the Draft Act omits the element of state responsibility, whereas that element is included in article 6 of the Draft Act and is a key element of the definition provided in article 2 of the ICPPED.

21. Moreover, article 6, which describes the acts which would attract criminal liability for enforced disappearances requires that a perpetrator has both (a) acted to deprive a person of his or her physical liberty *and* (b) denied having committing the act or concealed the fate or whereabouts of the person. This approach is problematic because the act of deprivation of liberty and the concealment of an individual's whereabouts are often, in practice, committed by different persons. Indeed, ICPPED provides that an individual may be held liable for an enforced disappearance by contributing to *either* the unlawful deprivation of liberty *or* the concealment of an individual's whereabouts. If the Draft Act is passed without amending article 6, application of the law will in many instances be ineffective and non compliant with the object and purpose of the ICPPED, because each perpetrator will need to be proven to have satisfied both elements of the crime.

Recommendations

22. The ICJ and Amnesty International recommend that the definition of enforced disappearances be deleted from article 3 of the Draft Act to ensure that a single definition—consistent with the ICPPED—is provided.

23. The ICJ and Amnesty International further recommend that article 6 be modified to ensure that a perpetrator can be prosecuted for committing either the crime of unlawful deprivation of liberty, the crime of concealing information regarding a victim's fate or whereabouts, or both. The organizations also recommend that the definition of a perpetrator in article 6 be expanded to include individuals acting with State authority, facilitation or other support, similar to the liability attaching to the commission of torture. (see para. 5)

Provisions in Draft Act	Recommendation
Article 3 "enforced disappearance" means the arrest, detention, abduction or any other form of deprivation of physical liberty followed by a refusal of committing such act or concealment of the fate or whereabouts of a person.	Article 3 (amended) DELETE
Article 6 A person who is a public official and has arrested, detained, abducted, or by other means caused the deprivation of liberty and that person denied committing such act or	Article 6 (amended) An enforced disappearance occurs when public officials, or other persons acting with official capacity have arrested, detained, abducted or by other means caused the deprivation of liberty of another person and have denied committing such

[10] Uganda, Prevention and Prohibition of Torture Act 2012. https://www.ulii.org/ug/legislation/act/2012/3/prevention_prohibition_of_torture_act_no_3_of_2_17440.pdf

concealed fate or whereabouts of another person. A person commits the act of enforced disappearance.	act or concealed the fate or whereabouts of such person. Any person who participates in either (a) the arrest, detention, abduction or deprivation of liberty of another person or (b) the denial of such act or concealing of the fate or whereabouts of such person in relation to an event described in the above paragraph, commits the act of enforced disappearance.

Examples of relevant legislation in other countries

24. In the **Philippines**, the Anti-Enforced or Involuntary Disappearance Act was passed in December 2012. Section 3 of the law adopts the ICPPED definition of 'enforced disappearance' as "the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law."[11]

25. Section 2(2) of **Argentina's** Act No. 26200 adopts the definition provided in article 7 of the Rome Statute, namely, 'enforced disappearance' as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time".[12]

D. Criminalization of acts of Cruel, Inhumane and Degrading Treatment or Punishment (CIDT/P)

Concern

26. The Draft Act does not specifically criminalize CIDT/P, even though it refers to CIDT/P in articles 19 and 20, which describe the powers of the Committee for the Prevention and Suppression of Torture and Enforced Disappearance and the Department of Rights and Liberties Protection. Although CAT does not define CIDT/P for purposes of domestic criminal law, article 16 obliges State parties to prevent CIDT/P and, as international authorities have made clear, this generally requires criminalization of conduct constituting CIDT/P. Importantly, CIDT/P is unequivocally prohibited alongside torture under the ICCPR,[13] as a non-derogable prohibition.[14]

Recommendation

27. The ICJ and Amnesty International recommend that acts of CIDT/P be explicitly criminalized under the Draft Act to ensure that complaints, investigations and prosecutions under the Act are not limited only to that conduct which strictly meat the definition of torture under the Act. Indeed, many forms of the CIDT/P constitute acts which inflict devastating harm to the people on whom it is inflicted. The criminalization of acts of CIDT/P would also send a clear

[11] Philippines, Anti-Enforced or Involuntary Disappearance Act of 2012, Republic Act No. 10353. http://www.lawphil.net/statutes/repacts/ra2012/ra_10353_2012.html
[12] ICPPED, Report of the Committee on Enforced Disappearances, 'Consideration of reports of States parties under article 29 of the Convention', 22 January 2013, UN Doc. CED/C/ARG/1, p4. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/ARG/1&Lang=en
[14] ICCPR, article 7.
[15] ICCPR, article 4.

legislative message that acts of cruel, inhuman or degrading treatment or punishment would not be tolerated and ensure that responsibility cannot be evaded by framing certain serious acts of malfeasance as "only" cruel, inhuman or degrading treatment or punishment and not torture.

Provisions in Draft Act	Recommendations
Currently none.	Article […] (Proposed under Chapter 1 General Provisions) Other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined under article 3, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity[15], will be considered offences under this Act for the purposes of articles 24, 25, 26 and 27. [Add the appropriate penalty under Chapter 5 of the Draft Act.] **or** Refer to relevant provisions for offences in the Thai Criminal Code (such as sections 295, 296, 297 (1), 297(2), 297(3), 297 (4), 297(6) and 297(7)) when such offences are committed by a public official or other person acting with official capacity, and the acts do not amount to torture.

Examples of relevant legislation in other countries

28. Section 15 of **Azerbaijan**'s Criminal Code guarantees the "right to inviolability of the person" and prohibits "the use of torture and …the use of other cruel, inhuman or degrading treatment and punishment".[16]

29. Section 7 of **Uganda**'s anti-torture legislation dictates that "inhuman or degrading treatment or punishment committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official or private capacity, which does not amount to torture as defined in section 2, is a criminal offence" and further denotes the penalty incurred upon conviction.[17]

30. Sections 3 and 5 of the **Philippines'** Anti-Torture Act 2009 criminalize "(o)ther cruel, inhuman and degrading treatment or punishment" as "deliberate and aggravated treatment or punishment not enumerated under Section 4 of this Act, inflicted by a person in authority or agent of a person in authority against a person under his/her custody, which attains a level of severity causing suffering, gross humiliation or debasement to the latter", with the appropriate penalty provided in section 14(h).[18]

[16] Wording derived from UNCAT, article 16.
[17] Azerbaijan, Code of Criminal Procedure of the Azerbaijan Republic, section 15.2.1. http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=64892
[18] Uganda, Prevention and Prohibition of Torture Act 2012. https://www.ulii.org/ug/legislation/act/2012/3/prevention_prohibition_of_torture_act_no_3_of_2_17440.pdf
[19] Philippines, Anti-Torture Act 2009, Republic Act No. 9745. http://www.lawphil.net/statutes/repacts/ra2009/ra_9745_2009.html

E. Modes of liability

Concerns

31. Chapter 5 of the Draft Act does not cover the full range of forms of liability nor types of perpetrators who should be held liable for acts of torture and enforced disappearance under international human rights law. It does not provide clarity on how the Act is to penalize perpetrators who did not directly commit the acts, such as those who attempted, participated in or were complicit in carrying out the crimes.

32. Chapter 5 of the Draft Act also does not comply with the requirement in article 22 of the ICPPED that provides for the imposition of sanctions for the failure to record the deprivation of liberty of a person, the inaccurate recording or delay of such recording, the obstruction of the granting of remedies to a person deprived of liberty, or the refusal to provide information, or the provision of inaccurate information, on the deprivation of liberty of a person.

Recommendations

33. The ICJ and Amnesty International recommend that articles 31 to 33 of the Draft Act be amended to bring its provisions in line with article 4 of the UNCAT and article 6 of the ICPPED, which both impose obligations on state parties to penalize any instigation of, complicity in or attempts to commit acts of torture or enforced disappearance. The ICJ and Amnesty International also recommend that a new article be introduced under Chapter 5 to bring the Act in line with article 22 of the ICPPED.

34. The ICJ and Amnesty International further note that the relevant penalties for the commission of, attempts to commit, or complicity in committing acts of CIDT/P should be commensurate with the gravity and seriousness of the crime.

Provisions in Draft Act	Recommendations
Article 31 Whoever conspire on committing the offences under Article 28, 29 or 30 shall be liable to one-third of the punishment provided for such offence. Whoever is involved in committing the offences under article 28, 29 or 30 shall be liable to the same punishment as the principals, as indicated for such offences.	Article 31 (amended) Whoever – (i) attempts to commit; (ii) participates in the commission of; (iii) is complicit in the commission of; the offences under Article 28, 29 or 30 shall be liable to (penalty commensurate with the gravity of the crime). Whoever is involved in committing, ordering, soliciting or inducing the commission of [19] the offences under article 28, 29 or 30 shall be liable to the same punishment as the principals, as indicated for such offences.
Article 32 A supervisor who knows that his subordinate under his direct command is about to or has committed an offence under Article 28, 29 or 30 but fails to take necessary or reasonable measures to prevent or	Article 32 (amended) A supervisor who knows, or consciously disregarded information which clearly indicated, that a subordinate under his or her effective authority and control is about to or has committed an offence under Article 28, 29 or 30,

[20] ICPPED, article 6.

suspend the offence, or not undertake or forward case for investigation and prosecution shall be liable to half of the penalty as indicated for such offence.	and, while exercising, exercised effective responsibility for and control over activities which were concerned with the offence under Article 28, 29 or 30, but fails to take necessary or reasonable measures within his or her power to prevent or suspend the offence, or to undertake or forward case for investigation and prosecution shall be liable to half of the penalty as indicated for such offence. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence under Article 28, 29 or 30.[20]
Currently none.	Article […] (proposed to be inserted after article 29) Whoever – (i) attempts to commit; (ii) participates in the commission of; (iii) is complicit in the commission of; the offence of CIDT/P under Article _____ shall be liable to a (penalty commensurate with the gravity of the crime).
Currently none.	Article […] (proposed to be inserted after article 33) Whoever – (i) delays or obstructs remedies to a person held in deprivation of liberty; (ii) fails to record the deprivation of liberty of any person or records any information which the person responsible for the official register knew or should have known to be inaccurate; (iii) refuses to provide information on the deprivation of liberty of a person, or provides inaccurate information on the deprivation of liberty of a person[21] shall be liable to (penalty commensurate with the gravity of the crime).

[21] Wording from ICPPED, article 6.
[22] Wording from ICPPED, article 22.

Examples of relevant legislation in other countries

35. Section 4 of **South Africa**'s anti-torture legislation dictates that:
"(1) Any person who –
(a) commits torture;
(b) attempts to commit torture; or
(c) incites, instigates, commands or procures any person to commit torture, is guilty of the offence of torture …;
(2) Any person who participates or conspires with a public official to aid or procure the commission of or to commit torture is guilty of the offence of torture …;
(5) No one shall be punished for disobeying an order to commit torture."[22]

36. Similarly, section 2 of **Sri Lanka**'s anti-torture law establishes that:
"(1) Any person who tortures any other person shall be guilty of an offence under this Act.
(2) Any person who
(a) attempts to commit;
(b) aids and abets in committing ;
(c) conspires to commit, an offence under subsection (1), shall be guilty of an offence under this Act."[23]

37. In section 13 of the **Philippines'** the Anti-Torture Act 2009, the ICPPED obligations have been defined explicitly:
"Any person who actually participated Or induced another in the commission of torture or other cruel, inhuman and degrading treatment or punishment or who cooperated in the execution of the act of torture or other cruel, inhuman and degrading treatment or punishment by previous or simultaneous acts shall be liable as principal; …

The immediate commanding officer of … law enforcement agencies shall be held liable as a principal to the crime of torture or other cruel or inhuman and degrading treatment or punishment for any act or omission, or negligence committed by him/her that shall have led, assisted, abetted or allowed, whether directly or indirectly, the commission thereof by his/her subordinates. If he/she has knowledge of or, owing to the circumstances at the time, should have known that acts of torture or other cruel, inhuman and degrading treatment or punishment shall be committed, is being committed, or has been committed by his/her subordinates or by others within his/her area of responsibility and, despite such knowledge, did not take preventive or corrective action either before, during or immediately after its commission, when he/she has the authority to prevent or investigate allegations of torture or other cruel, inhuman and degrading treatment or punishment but failed to prevent or investigate allegations of such act, whether deliberately or due to negligence shall also be liable as principals."[24]

F. Inadmissibility as evidence of statements or other information obtained by torture, CIDT/P or enforced disappearance

Concerns

38. The Draft Act does not prohibit the admission of statements or other information obtained by torture or ill-treatment or enforced disappearances, despite the clear provision for such prohibition in the UNCAT (Article 15). The absolute prohibition on the admissibility of such statements is necessary to discourage the commission of acts amounting to torture, CIDT/P

[23] South Africa, Prevention of Combating and Torture of Persons Act 2013. http://www.justice.gov.za/legislation/acts/2013-013.pdf
[24] Sri Lanka, Convention Against Torture and other Cruel. Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994. http://www.hrcsl.lk/PFF/LIbrary_Domestic_Laws/Legislations_related_to_Torture/Convention%20against%20Torture%201994%20of%2022.pdf
[25] Philippines, Anti-Torture Act 2009, Republic Act No. 9745. http://www.lawphil.net/statutes/repacts/ra2009/ra_9745_2009.html

or enforced disappearance. This has been affirmed by the Human Rights Committee in its General Comment on the prohibition of torture and other ill-treatment.[25]

39. In this regard, the ICJ and Amnesty International note that section 226 of the Thai Criminal Procedure Code excludes evidence obtained through illegal means and that exceptions to this rule are included within sections 226/1 and 226/2 of the Code granting Courts discretion in admitting such evidence. The ICJ and Amnesty International believe that an absolute prohibition on the admission of such statements as evidence should be included within the Draft Act in order to establish that Court discretion under sections 226/1 and 226/2 of the Criminal Procedure Code does not extend to cases of torture, CIDT/P or enforced disappearance.

Recommendations

40. The ICJ and Amnesty International recommend inserting a clause into the Draft Act prohibiting the admission of statements or other information derived from torture, CIDT/P or enforced disappearance, except against a person accused of torture or enforced disappearance as evidence that the statement was made. The clause should adopt the wording of article 15 of the UNCAT. It is noteworthy that while article 15 of the CAT only refers to the exclusion of statements obtained through torture, the Committee has clarified that article 15 should be obligatorily applied to both torture and CIDT/P.[26]

Provisions in Draft Act	Recommendations
Currently none.	Article […] – Any statement which is established to have been made or information obtained as a result of torture, CIDT/P or enforced disappearance shall not be invoked as evidence in any proceedings, except against a person accused of torture, CIDT or enforced disappearance as evidence that the statement was made.[27]

Examples of relevant legislation in other countries

41. Section 269.1 of **Canada**'s Criminal Code states:
"Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence … (4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained."[28]

42. Section 136a of **Germany**'s Criminal Code explicitly prohibits the admissibility of evidence obtained from CIDT/P in stating that:
"(1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.
(2) Measures which impair the accused's memory or his ability to understand shall not be permitted.

[26] See Human Rights Committee, General Comment 20, Article 7 (44th session, 1992), UN Doc HRI/GEN/1/Rev.1, §12.
[27] Committee against Torture, General Comment No 2, op. cit 1, §3, 6.
[28] Wording from UNCAT, article 15.
[29] Canada, Criminal Code (R.S., c. C-34, s1). http://laws-lois.justice.gc.ca/eng/acts/C-46/section-269.1.html

(3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use."[29]

43. Section 8 of the **Philippines'** Anti-Torture Act of 2009 states that:
"Any confession, admission or statement obtained as a result of torture shall be inadmissible in evidence in any proceedings, except if the same is used as evidence against a person or persons accused of committing torture."[30]

G. Safeguards : General

Concerns

44. The Draft Act currently does not ensure that crucial safeguards against torture, CIDT/P and enforced disappearance, such as access to legal counsel and relatives and the provision of information of the fate and whereabouts of detainees to relatives, are triggered immediately or promptly after arrest or detention. Based visits to detention centres around the world, UN Special Rapporteurs on Torture have often observed that "torture or ill-treatment are most likely to occur during the initial period in police custody".[31]

45. With respect to Thailand, the Committee against Torture concluded in 2014 that, "detainees are often denied the right to contact and receive visits by family members promptly after their deprivation of liberty; also, some necessary safeguards, such as the right to contact a lawyer and to be examined by an independent doctor promptly upon deprivation of liberty, are not guaranteed in law or in practice."[32] It went on to recommend that "(d)etainees taken into custody (be) permitted to contact family members, lawyers and independent doctors promptly following deprivation of liberty, both in law and in practice, and that the provision of these safeguards by the authorities (be) monitored effectively".[33]

Recommendations

46. The ICJ and Amnesty International recommend that a new provision be added to the Draft Act to ensure that safeguards against torture, CIDT/P and enforced disappearance are instituted immediately after arrest or detention. Accordingly, the organizations recommend that article 21 of the Draft Act be amended to reflect this provision.

47. Notably, extensive safeguards against torture, CIDT/P and enforced disappearance currently exist in the Thai Criminal Procedure Code. The ICJ and Amnesty International consider that the Draft Act should reflect these recommendations as they "translate" the views of the treaty monitoring bodies into more practicable terms and provide concrete and clear instructions to those in charge of arresting, holding or questioning persons. Even where such safeguards already exist in Thai law, it is important to reiterate them within the Draft Act, so as to create legislation that encompasses the full gamut of safeguards against torture, other ill-treatment and enforced disappearance.

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[30] Germany, The German Code of Criminal Procedure. http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1121
[31] Philippines, Anti-Torture Act 2009, Republic Act No. 9745. http://www.lawphil.net/statutes/repacts/ra2009/ra_9745_2009.html
[32] Report of the Special Rapporteur on the question of torture, Theo van Boven, Addendum: visit to Spain, UN Doc. E/CN.4/2004/56/Add.2 (2004), §41. See similarly, for instance, Torture and Other cruel, inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur, Mr. P. Kooijmans, UN Doc. E/CN.4/1993/26 (1992), §173 (concerning Egypt); Civil and Political Rights, including Questions of: Torture and Detention, Report of the Special Rapporteur, Sir Nigel Rodley, Addendum: Visit by the Special Rapporteur to Turkey, UN Do. E/CN.4/1999/61/Add.1 (1999), §15.
[33] Committee against Torture, Concluding observations on the initial report of Thailand, UN Doc. CAT/C/THA/CO/1, 20 June 2014, §12(b).
[34] *Ibid*.

Provisions in Draft Act	Recommendations
Article 21 In detaining anyone whose liberty is deprived in accordance with law, a public official whose duty is to legally hold a person whose liberty is deprived of in custody is obliged to record, at the minimum, the following information of such person …	Article 21 (amended) In detaining anyone whose liberty is deprived in accordance with law, a public official whose duty is to legally hold a person whose liberty is deprived of in custody is obliged to record, immediately upon receiving such a person in the place of detention, the following information of such person …
Currently none.	Article […] (proposed to be inserted under Chapter 3 as Article 26) Every detainee without exception shall be given access to legal counsel as soon as possible, and no later than within 24 hours from the moment of arrest, as also provided in Article 7/1(1) of the Criminal Procedure Code; In all circumstances, a relative of the detainee shall be informed of the arrest and place of detention immediately, and no later than within 18 hours from the moment of arrest, as also provided in Articles 7/1(1) and 83 of the Criminal Procedure Code; Detainees shall not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, shall not exceed a period of 48 hours from the moment of arrest, as also provided in Article 87 of the Criminal Procedure Code.

H. Safeguards : During interrogation

Concern

48. The Draft Act does not at present include safeguards against torture or CIDT/P during interrogation. This is crucial as torture and CIDT/P are most prevalently during the interrogation of detainees, often in order to extract information, 'confessions' or other kinds of 'evidence'.

Recommendations

49. The ICJ and Amnesty International recommend that a new provision be inserted in the Draft Act to discourage police or other law enforcement personnel from committing torture or CIDT/P during the interrogation of detainees, based on recommendations by the Committee against Torture and the UN Special Rapporteur on Torture.[34]

[35] See Committee against Torture annual report, UN Doc. A/52/44 (1997), §68; Report of the Special Rapporteur on the question of torture, UN Doc. E/CN.4/2003/68 (2002) §26(g); Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/65/273 (2010), §75.

Provisions in Draft Act	Recommendations
Currently none.	Article […] (proposed to be inserted under Chapter 3 as Article 27) Legal counsel for the person being interrogated shall be present during all interrogations, in concomitance with article 134/3 of the Criminal Procedure Code. Each interrogation shall be initiated with the identification of all persons present. All interrogation sessions shall be video or audio recorded, and the identity of all persons present included in the records. Statements or any other purported evidence from interrogations where legal counsel is not present or from non-recorded interrogations shall be excluded from court proceedings.

50. We hope that these recommendations will assist in improving the Draft Act, ensuring that it is in full accordance with the CAT and ICCPR, and guaranteeing strong protections against the commission of torture, CIDT/P and enforced disappearances in Thailand.