

Committee Considering the Draft Prevention and Suppression of Torture and Enforced Disappearance Act

Foreign Affairs Office
National Legislative Assembly

18 January 2019

Dear Honorable Chair of the Committee Considering the Draft Prevention and Suppression of Torture and Enforced Disappearance Act,

Re: DRAFT PREVENTION AND SUPPRESSION OF TORTURE AND ENFORCED DISAPPEARANCE ACT

Background

We refer to our letter to the Ministry of Justice dated 23 November 2017 in which we set out our recommendations concerning the Draft Prevention and Suppression of Torture and Enforced Disappearance Act ("Draft Act").

We write to you regarding the most recent amendments to the Draft Act that was approved by the National Legislative Assembly, in its first reading, on 20 December 2018.

We reiterate and strongly urge that the Draft Act be amended without delay in order to ensure compliance with Thailand's international legal obligations.

As enshrined in the preamble of the Draft Act, the Act was promulgated "in order to facilitate effective compliance with the Convention and to raise Thailand's standard of human rights protection to be on par with international standards", including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT") and the International Convention for the Protection of All Persons from Enforced Disappearances ("ICPPED").

While the Draft Act currently addresses certain gaps in Thailand's legal framework, there remain several shortcomings which should be addressed in order to bring it into line with Thailand's international human rights obligations.

For your ease of reference, we **enclose** a summary of our comments and recommendations in relation to the amendments of the Draft Act – the key concerns include:

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

While certain provisions in Thai law touch upon key issues of modes of liability; use of information as evidence obtained by torture, CIDT/P and enforced disappearances; and safeguards against torture, CIDT/P and enforced disappearances, the adoption of our recommendations would ensure that Thailand's international human rights obligations are clearly protected under Thai law, and guarantee effective and adequate prevention and suppression of torture, CIDT/P and enforced disappearances.

This would represent a significant and historic move to prevent grave violations and protect the rights of victims.

We also appreciate and welcome that *Article 11. Emergency situations* and *Article 12. Non-refoulement* have been retained in the current version of the Draft Act. 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. The principle of non-refoulement, which is clearly defined as a state obligation under Article 3 of the UNCAT, is also fundamental to the protection against torture and enforced disappearance. Thailand will continue to fall short of its obligations under international law if it passes a version of the Draft Act that does not include an effective non-refoulement provision.

The ICJ remains committed to work with the Royal Thai Government on the Draft Act and welcomes any opportunity to address any comments or questions you may have in response to the contents of this letter.

We appreciate your urgent attention to this matter.

Yours faithfully,



Kingsley Abbott
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International Commission of Jurists

**SUMMARY OF RELEVANT RECOMMENDATIONS ON THE DRAFT PREVENTION AND SUPPRESSION OF TORTURE AND ENFORCED DISAPPEARANCE ACT
LETTER DATED 23 NOVEMBER 2017, ICJ AND AMNESTY INTERNATIONAL¹**

No.	Provisions in Draft Act	Recommendations	Comments
1	Definition of "Public Official"		
	<p><u>Article 3</u></p> <p>"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.</p>	<p><u>Article 3</u></p> <p>"public official, <u>or other person acting with official capacity</u>" means a person exercising public authority or who was authorized, assigned, permitted, supported, or directly or indirectly allowed to exercise public authority <u>by such a person.</u></p>	<ol style="list-style-type: none"> 1. ICJ and Amnesty International ("AI") proposed that the phrase "public official" be amended to "public official, or other person acting with official capacity" to include a more accurate description of potential perpetrators throughout the Draft Act and one that is more consonant with Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT").² 2. The words "according to the law" appear to be unnecessary, given that a person exercising public authority would be liable without these qualifications.

¹ For full recommendations and examples of relevant legislation in other countries, please see: ICJ and Amnesty International, Recommendations on the Draft Prevention And Suppression of Torture and Enforced Disappearance Act (2016), 23 November 2017, available at: <https://www.icj.org/thailand-icj-amnesty-advise-changes-to-proposed-legislation-on-torture-and-enforced-disappearances/> or <https://goo.gl/RViXdA>

² Article 1 of the UNCAT states that "1. The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

No.	Provisions in Draft Act	Recommendations	Comments
2	Definition of "Torture"		
	<p><u>Article 3</u></p> <p>"Torture" means any act that inflicts severe pain or suffering, whether physical or mental, on a person.</p>	<p>DELETE</p>	<ol style="list-style-type: none"> 1. In order to ensure internal consistency and compliance with the UNCAT, the ICJ and AI recommended that the Draft Act provide a single definition of torture that contains all elements of torture provided in the UNCAT³ by deleting the language defining torture presently contained in article 3 and instead providing for a definition of the crime completely in article 5. 2. The Draft Act appears to imply that the four purposes identified are exhaustive, when the language of the UNCAT, and the jurisprudence of the Committee against Torture ("CAT") and other authorities make clear that these purposes are illustrative and not exhaustive. 3. ICJ and AI recommended adding a "lawful sanctions" clause, specifying that such clause must include sanctions which are consistent with provisions of international law. 4. The definition of a perpetrator should be expanded in accordance with the aforementioned recommendation. 5. Noting Article 59 of the Penal Code, the organizations recommended adding the term 'intentionally' to this provision to reflect the crucial psychological element, or <i>mens rea</i>, of 'torture' as a crime in the Draft Act.
	<p><u>Article 5</u></p> <p>A person who is a public official and has caused severe pain or suffering physically or mentally for one of the following purposes:</p> <p>(1) To obtain information or a confession from suffered person or a third person,</p> <p>(2) To punish the suffered person for the act that s/he or a third party has committed or is suspected of having committed,</p> <p>(3) To threaten or coerce the suffered person or a third person, or</p> <p>(4) To discriminate.</p> <p>Commits the act of torture.</p>	<p><u>Article 5</u></p> <p>A person who is a public official, <u>or other person acting with official capacity</u>, and has <u>intentionally inflicted</u> severe pain or suffering, whether physically or mentally, for a purpose <u>such as</u>:</p> <p>(1) To obtain information or a confession from suffered person or a third person,</p> <p>(2) To punish the suffered person for the act that s/he or a third party has committed or is suspected of having committed,</p> <p>(3) To threaten or coerce suffered person or a third person, or</p> <p><u>for any reason based on discrimination of any kind, commits the act of torture.</u></p> <p><u>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)</u></p>	

³ Ibid.

No.	Provisions in Draft Act	Recommendations	Comments
3	Definition of "Enforced Disappearance"		
	<p><u>Article 3</u></p> <p>"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.</p>	<p>DELETE</p>	<p>1. ICJ and AI recommended that the definition of enforced disappearances be deleted from article 3 of the Draft Act to ensure that a single definition—consistent with the International Convention for the Protection of All Persons from Enforced Disappearances ("ICPPED")—is provided.⁴</p>
	<p><u>Article 6</u></p> <p>A person who is a public official and has arrested, detained, abducted, or by other means caused the deprivation of liberty and that public official denied committing such act or concealed fate or whereabouts of another person. Such person commits the act of enforced disappearance.</p>	<p><u>Article 6</u></p> <p><u>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 act or concealed the fate or whereabouts of such person.</u></p> <p><u>Any person who participates in either</u></p> <p><u>(a) the arrest, detention, abduction or deprivation of liberty of another person or</u></p> <p><u>(b) the denial of such act or concealing of the fate or whereabouts of such person</u></p> <p><u>in relation to an event described in the above paragraph,</u> commits the act of enforced disappearance.</p>	<p>2. ICJ and AI further recommended 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. Indeed, ICPPED provides that an individual may be held liable for contributing to either of the above acts. 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.</p> <p>3. The definition of a perpetrator be expanded in accordance with the aforementioned recommendation.</p>

⁴ Article 2 of the ICPPED states that "For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty 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 place such a person outside the protection of the law."

No.	Provisions in Draft Act	Recommendations	Comments
4	Existing Safeguards		
	<p><u>Article 21</u> 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 ...</p>	<p><u>Article 21</u> 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, <u>immediately upon receiving such a person in the place of detention</u>, the following information of such person ...</p>	<ol style="list-style-type: none"> 1. The wording of the proposed provision to be inserted was from the wording of Article 22 of the ICPPED. 2. ICJ and AI proposed that article 21 of the Draft Act does not comply with the requirement in Article 22 of the ICPPED⁵ that provides for the imposition of sanctions for the failure to record, the inaccurate recording or delay of such recording, the obstruction of the granting of remedies, or the refusal to provide information, or the provision of inaccurate information, on the deprivation of liberty of a person.
	CURRENTLY NONE	<p><u>Article [...]</u> (proposed to be inserted) <u>Whoever –</u></p> <ul style="list-style-type: none"> (i) <u>delays or obstructs remedies to a person held in deprivation of liberty;</u> (ii) <u>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;</u> (iii) <u>refuses to provide information on the deprivation of liberty of a person, or provides inaccurate information on the deprivation of liberty of a person</u> <p><u>shall be liable to (penalty commensurate with the gravity of the crime).</u></p>	<ol style="list-style-type: none"> 3. ICJ and AI also recommended that the recording should be done “immediately upon receiving such a person in the place of detention”.

⁵ Article 22 of the ICPPED states that “... each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:
 (a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;
 (b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate;
 (c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.”

No.	Provisions in Draft Act	Recommendations	Comments
5	Mode of Liability		
	<p><u>Article 31</u></p> <p>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.</p> <p>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.</p>	<p><u>Article 31</u></p> <p>Whoever –</p> <p>(i) <u>attempts to commit;</u></p> <p>(ii) <u>participates in the commission of;</u></p> <p>(iii) <u>is complicit in the commission of;</u></p> <p>the offences under Article 28, 29 or 30 shall be liable to <u>(penalty commensurate with the gravity of the crime).</u></p> <p>Whoever is involved in <u>committing, ordering, soliciting or inducing the commission of</u> the offences under article 28, 29 or 30 shall be liable to the same punishment as the principals, as indicated for such offences.</p> <p><u>Article [...]</u> (proposed to be inserted)</p> <p><u>Whoever –</u></p> <p>(i) <u>attempts to commit;</u></p> <p>(ii) <u>participates in the commission of;</u></p> <p>(iii) <u>is complicit in the commission of;</u></p> <p>the offence of CIDT/P under Article ____ shall be liable to a <u>(penalty commensurate with the gravity of the crime).</u></p>	<ol style="list-style-type: none"> 1. Noting Chapter 4-6, Book I, of the Penal Code, ICJ and AI proposed that article 31 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 in accordance to Article 4 of the UNCAT and Article 6 of the ICPPED. 2. Article 4 of the UNCAT imposes obligations on state parties to penalize those who “attempt to commit torture and to an act by any person which constitutes complicity or participation in”, while Article 6 of the ICPPED impose obligations on state parties to penalize those who “commits, orders, solicits or induces the commission of, attempts to commit”. 3. ICJ and AI was also of the view that the full range of forms of liability and types of perpetrators who should be held liable for acts of CIDT/P shall as well be stipulated in the Draft Act.

No.	Provisions in Draft Act	Recommendations	Comments
6	Command Responsibility		
	<p><u>Article 32</u></p> <p>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 suspend the offence, or not undertake or forward case for investigation and prosecution in accordance with law, shall be liable to half of the penalty as indicated for such offence.</p>	<p><u>Article 32</u></p> <p>A supervisor who knows, <u>or consciously disregarded information which clearly indicated,</u> that a <u>subordinate under his or her effective authority and control</u> is about to or has committed an offence under Article 28, 29 or 30,</p> <p><u>and, while exercising,</u></p> <p><u>exercised effective responsibility for and control over activities which were concerned with the offence under Article 28, 29 or 30,</u></p> <p>but</p> <p>fails to take necessary or reasonable measures <u>within his or her power</u> to prevent or suspend the offence, or to undertake or forward case for investigation and prosecution in accordance with law shall be liable to half of the penalty as indicated for such offence.</p> <p><u>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.</u></p>	<ol style="list-style-type: none"> 1. The proposed amendment was from the wording of Article 6 of the ICPPED⁶ that imposes obligations on state parties to penalize a supervisor who “<i>knew, or consciously disregarded information which clearly indicated,</i> that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance”. 2. Such notion was in line with the CAT’s General Comment 2, paragraph 26, which states that “those exercising superior authority (...) cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they <i>knew or should have known</i> that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measure.” 3. ICJ and AI further recommended the wording from Article 6(2) of the ICPPED, which is consistent with Article 2(3) of the UNCAT, be inserted in this provision where no order or instruction from any public authority or other, may be invoked to justify such offences.

⁶ Article 6 of the ICPPED states that “1. Each State Party shall take the necessary measures to hold criminally responsible at least: [...] (b) A superior who: (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution; [...] 2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.”

No.	Provisions in Draft Act	Recommendations	Comments
7	Criminalization of acts of Cruel, Inhumane and Degrading Treatment or Punishment (“CIDT/P”)		
	CURRENTLY NONE	<p>Article [...] (proposed to be inserted)</p> <p>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, will be considered offences under this Act for the purposes of articles 24, 25, 26 and 27.</p> <p>[Add the appropriate penalty under Chapter 5 of the Draft Act.]</p> <p>or</p> <p>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.</p>	<ol style="list-style-type: none"> 1. The proposed provision to be inserted was from the wording of article 16 of the UNCAT.⁷ 2. ICJ and AI recommended 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 meet the definition of torture under the Act. 3. Although UNCAT 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 International Covenant on Civil and Political Rights (“ICCPR”),⁸ to which Thailand is a State party, as a non-derogable prohibition.⁹

⁷ Article 16 of the UNCAT states that “1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, 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. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”

⁸ ICCPR, article 7.

⁹ ICCPR, article 4.

No.	Provisions in Draft Act	Recommendations	Comments
8	Inadmissibility as evidence of statements or other information obtained by torture, CIDT/P or enforced disappearance		
	CURRENTLY NONE	<p>Article [...] (proposed to be inserted)</p> <p>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.</p>	<ol style="list-style-type: none"> 1. The wording was adopted from Article 15¹⁰ of the UNCAT.¹¹ 2. ICJ and AI noted 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. ICJ and AI 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.

¹⁰ Article 15 of the UNCAT states that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

¹¹ It is noteworthy that while article 15 of the UNCAT 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. See also: Committee against Torture, General Comment No 2, op. cit 1, §3, 6.

No.	Provisions in Draft Act	Recommendations	Comments
9	Additional Safeguards		
	CURRENTLY NONE	<p><u>Safeguards: General</u></p> <p><u>Article [...] (proposed to be inserted)</u></p> <p>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;</p> <p>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;</p> <p>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.</p> <p><u>Safeguards : During interrogation</u></p> <p><u>Article [...] (proposed to be inserted)</u></p> <p>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.</p>	<ol style="list-style-type: none"> 1. ICJ and AI recommended that new provisions be added to the Draft Act to ensure that safeguards against torture, CIDT/P and enforced disappearance are instituted immediately after arrest or detention. 2. Notably, extensive safeguards against torture, CIDT/P and enforced disappearance currently exist in the Thai Criminal Procedure Code, including in Article 7/1, 83 and 134/3. Some safeguards are considered by the government through proposed amendments to Thailand's Criminal Procedure Code, e.g. the provision regarding the video and audio recordings of arrests and/or searches. However, the ICJ and AI considered 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, CIDT/P and enforced disappearance.