

Summary of the ICJ analysis of the Draft Prevention and Suppression of Torture and Enforced Disappearance Act (dated 22 February 2019)

- *Article 5. Definition of torture*

The Draft Act appears to imply that the three purposes identified as constitutive of the crime of torture are exhaustive, while the language of UNCAT and the jurisprudence of the UN Committee Against Torture, which monitors the implementation of the UNCAT and provides interpretive guidance on the UNCAT, makes clear that these purposes are illustrative and not exhaustive. The Draft Act crucially removes the infliction of pain or suffering for the purpose of discrimination from the definition of torture.
- *Article 6. Definition of enforced disappearance*

In the Draft Act, criminal liability for the crime of enforced disappearance requires that a perpetrator has both (a) acted to deprive a person of his or her physical liberty and (b) denied having committed 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 or both.
- *Article 12. Non-refoulement*

The non-refoulement principle was removed from the Draft Act on the basis that Thailand recognizes the principle of non-refoulement as custom, even as it does not have determined guidelines governing the exercise of discretion with respect to non-refoulement. We however believe that articles 12 should be reinstated to ensure that these protections are explicitly protected under the law and to provide express legislative guidance with respect to dealing with non-refoulement cases.
- *Article 19. Committee's duties*

The Draft Act includes under the duties and authority of the Committee for the Prevention and Suppression of Torture and Enforced Disappearance, the power to "determine measures to protect and prevent allegations made in bad faith of a public official's commission of an offence under the Act". We believe that this power must be exercised strictly in line with the principles of necessity and proportionality. The Draft Act does not provide a clear definition of "in bad faith", but it must be clarified within the law that this article will not be used to curtail fundamental rights to free expression and freedom of information, or the legitimate work of human rights defenders. However, this clause was removed from the Draft Act on 6 March 2019.
- *Article 32. Command responsibility*

The Draft Act removes command responsibility for acts of torture on the basis that command responsibility is not explicitly governed under UNCAT. However, in its General Comment No. 2, the UN Committee Against Torture highlighted that "those exercising superior authority (...) cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measure". In addition, the ICPPED provides guidance that a supervisor who not just knew but "consciously disregarded information" should also face criminal liability.

- Continuous nature of the crime of enforced disappearance*

The Report of the Extraordinary Commissioner in Considering the Draft Prevention and Suppression of Torture and Enforced Disappearance Act states that the Draft Act will not apply retroactively to cases occurring prior to the passage of the law. Particularly with respect to the crime of enforced disappearance, the General Comment of the UN Working Group on Enforced or Involuntary Disappearances clarified that the continuous nature of the crime means the offence of enforced disappearance remains active “from the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.” For this reason, for an enforced disappearance offence, the Act should not apply with any limitation on retroactive application. This will bring Thailand’s law in line with the Working Group’s recommendation that “one consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non- retroactivity. The crime cannot be separated and the conviction should cover the enforced disappearance as a whole.”
- Criminalization of acts of Cruel, Inhumane and Degrading Treatment or Punishment (CIDT/P)*

CIDT/P was not included in the Draft Act. This means that complaints, investigations and prosecutions brought under the Act will be limited only to conduct that strictly meets the definition of torture under the Act. Although UNCAT does not define CIDT/P for the purposes of domestic criminal law, section 16 obliges State parties to prevent CIDT/P and, as international legal authoritative bodies have made clear, this generally requires criminalization of conduct constituting CIDT/P. Importantly, CIDT/P is unequivocally prohibited alongside torture under the ICCPR, as a non-derogable prohibition.
- Inadmissibility as evidence of statements or other information obtained by torture, CIDT/P or enforced disappearance*

The Draft Act did not explicitly declare inadmissible statements and/or information obtained by torture, CIDT/P or enforced disappearance on the basis that such safeguards are already enshrined in sections 135 and 226 of the Criminal Procedure Code. However, while section 226 of the Criminal Procedure Code excludes evidence obtained through illegal means, exceptions to this rule are included within sections 226/1 and 226/2 of the Code granting Courts discretion in admitting such evidence. We believe that an absolute prohibition on the admission of such statements as evidence should be included within the Act in order to establish that Court discretion under sections 226/1 and 226/2 does not extend to cases of torture, CIDT/P or enforced disappearance.
- Safeguards*

Extensive safeguards against torture, CIDT/P and enforced disappearance currently exist in the Criminal Procedure Code, but some safeguards are not yet addressed by Thai laws, including video and audio recordings of arrests and/or searches and/or interrogations. In addition, for existing safeguards enshrined in the Act, article 21 of the Act does not provide for the imposition of sanctions for such safeguards – including the failure to record, the inaccurate recording or delay of such recording, obstruction of the granting of remedies, or refusal to provide information, or the provision of inaccurate information on the deprivation of liberty of a person – requirements set out in the ICPPED.