

Council of the State

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22 April 2019

Dear Secretary-General of the Council of State,

Re: Recommendations for the repeal or amendment of Head of the NCPO and NCPO orders and announcements

In the present document, the International Commission of Jurists (ICJ) sets out its recommendations to the Council of the State in view of its ongoing review of the announcements and orders of the National Council for Peace and Order (NCPO) and of the Head of the NCPO (HNCPO). We recommend the repeal or amendment of a number of such announcements and orders because they are contrary to international human rights law obligations by which Thailand is bound.

Background

On 25 April 2017, after reviewing Thailand's compliance with its obligations under the International Covenant on Civil and Political Rights (ICCPR), by which Thailand is bound, the UN Human Rights Committee, the international expert body charged with supervising the implementation of the ICCPR, issued its Concluding Observations where, among other things, it recommended that:

"Thailand should review all measures adopted under the interim Constitution of 2014, in particular under sections 44, 47 and 48, in the light of its obligations under the Covenant, and make sure that all measures to be adopted under the new draft Constitution, including section 279, will be consistent with its obligations under the Covenant".¹

According to the "Information Received from Thailand on Follow-Up to the Concluding Observations of the UN Human Rights Committee on the Second Periodic Report of Thailand", submitted on 18 July and published on 10 August 2018, Thailand declared that:

"Announcements, orders, and acts of the NCPO or the Head of the NCPO are regularly reviewed on the basis of necessity and relevance to the changing circumstances. As Thailand is approaching the final phase of the 3-stage Roadmap, the NCPO plans to review all of the laws, regulations and measures enacted under the Interim Constitution."²

¹ UN Human Rights Committee, 'Concluding Observations', CCPR/C/THA/CO/2, 25 April 2017, para 8, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fCO%2fTHA%2fCO%2f2&Lang=en

² UN Human Rights Committee, 'Information received from Thailand on follow-up to the concluding observations, Addendum to the Concluding Observations', CCPR/C/THA/CO/2/Add.1, para 7

In line with this declaration, on 14 February 2019, we were informed by the Ministry of Foreign Affairs' Department of International Organizations that the Thai Government, through the Council of the State, is currently reviewing NCPO and HNCPO announcements and orders that are currently in force to assess their necessity and relevance. We were also advised that we could submit any inputs or recommendations to the Council of the State.

The ICJ's general recommendations to the Council of the State in connection with its ongoing review

We welcome the Thai Government and the Council of the State's effort to review the above-mentioned orders and announcements, and are grateful for the opportunity to make submissions to the Council of the State in the context of the ongoing review.

We note that since 22 May 2014, the Head of the NCPO has issued at least 204 Orders under Article 44 of the 2014 interim Constitution. In addition, the NCPO has issued at least 214 general orders and 130 announcements during the same period.³

We further note that Article 279 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) provides that all NCPO orders, announcements and acts, including those issued under Article 44 of the 2014 interim Constitution, "...irrespective of their constitutional, legislative, executive or judicial force, shall be considered constitutional and lawful and shall continue to be in force under this Constitution." Article 279 of the 2017 Constitution also provides that NCPO orders and announcements may only be repealed or amended by the passage of an Act.

In addition, Article 265 of the 2017 Constitution provides that the power of the Head of the NCPO and of the NCPO, including to issue orders and announcements, shall remain in existence until "the new Council of Ministers appointed subsequent to the first general election under this Constitution assumes its duties".⁴ As a result, the Head of the NCPO and the NCPO have continued to enjoy sweeping, unchecked powers contrary to human rights and the three fundamental pillars of the rule of law, namely, equality, accountability and predictability.

- In light of this, we urge that Thailand immediately end the use of special powers, including those enshrined under Article 44 of the 2014 interim Constitution, and retained through Article 265 of the 2017 Constitution.

We also note that, on 11 December 2018, the Head of the NCPO invoked Article 265 of the 2017 Constitution and Article 44 of the 2014 interim Constitution to issue HNCPO Order No. 22/2561. The Order repealed, in whole and in part, nine HNCPO orders, NCPO orders, NCPO announcements, including Article 12 of HNCPO Order No. 3/2558, which prohibited the gathering of five or more persons for a "political purpose."⁵

- We welcome the repeal of the above-noted orders and announcements, and recommend that the review process of the remaining HNCPO and NCPO announcements and orders be carried out with increased public participation, openness, and transparency.

Furthermore, we are informed the current review is being conducted "on the basis of necessity and relevance to the changing circumstances".⁶

³ List of HNCPO and NCPO orders and announcements:
<http://library2.parliament.go.th/giventake/ncpo.html> (in Thai)

⁴ Unofficial translation of the Constitution, please see:
<http://www.krisdika.go.th/wps/wcm/connect/d230f08040ee034ca306af7292cbe309/CONSTITUTION+OF+THE+KINGDOM+OF+THAILAND+%28B.E.+2560+%282017%29%29.pdf?MOD=AJPERES&CACHEID=d230f08040ee034ca306af7292cbe309>

⁵ See, HNCPO Order No. 22/2561, available at:
http://library2.parliament.go.th/giventake/content_ncpo/ncpo-head-order22-2561.pdf (in Thai)

⁶ Information received from Thailand on follow-up to the concluding observations, para 7

- In addition to those considerations, we recommend that the ongoing review of the orders and announcements should also take into consideration the very important principles of rule of law, due process of law and respect of human rights.
- We also recommend the repeal or amendment, as relevant, of the following HNCPO and NCPO orders and announcements that are clearly inconsistent with Thailand's international human rights law obligations and the 2017 Constitution, and which are neither necessary, proportionate, nor relevant to the current situation.

1. Orders providing the military with superior powers over civil authorities (e.g. HNCPO Order No. 3/2558 and HNCPO Order No. 13/2559)

HNCPO Order No. 3/2558, later amended by HNCPO Order No. 5/2558⁷, gives appointed "peace and order maintenance officers" and their assistants, drawn from military officials, wide-ranging powers to "prevent and suppress" certain offences, including to summon, investigate, search, arrest, and detain an individual for not more than seven days in premises other than police stations, detention facilities, or prisons – mainly at military premises. If any person resists, obstructs or fails to comply with orders of the officers, he or she can be punished with imprisonment.⁸

HNCPO Order No. 13/2559 also provides appointed "prevention and suppression officers" and their assistants, drawn from military officials, with wide-ranging powers to "prevent and suppress" 27 categories of "crimes", including crimes against public peace, liberty and reputation, immigration, human trafficking, narcotics, and weapons. Prevention and suppression officers are granted extensive police powers, including the power to arrest, search and detain suspects in places not officially recognized as places of detention – mainly in military premises - for up to seven days.⁹

Since the coup in 2014, military officers have reportedly summoned many individuals to report or meet local authorities on military bases, invoking HNCPO Orders No. 3/2558 and 13/2559.

We consider that the wide-ranging civilian policing powers granted to military personnel, including powers of detention of any non-military persons at a military facility, are clearly contrary to international human rights law obligations binding on Thailand. We set out our reasons in the following section.

Military armed forces in law enforcement missions

Ordinarily, military armed forces are tasked, trained and equipped to fight, including through the use of lethal force, an enemy of their country. Thus, in addressing internal law enforcement situations, they are required to fundamentally change their manner of thinking and *modus operandi*. The legal and procedural frameworks governing their operations are also different from those that apply to law enforcement officers. Thus, the deployment of military armed forces in law enforcement missions should be avoided, unless effective and stringent protective measures and safeguards are put in place to govern the operation of military armed forces in such missions.¹⁰

In addition, in Thailand, due to a lack of publicly available information, it is unknown precisely what procedures governing detention are in place at detention facilities on military premises, and what training military officers have received in relation to law enforcement operations, and whether such procedures and training meet Thailand's international human rights law obligations.

⁷ The order broadened the definition of "peace and order maintenance officers" and their assistants.

⁸ For unofficial translation of the Order, please see: <https://prachatai.com/english/node/4933>

⁹ For more information, please see: ICJ, 'Thailand: Human rights groups condemn NCPO Order 13/2016 and urge for it to be revoked immediately', 5 April 2016, available at: <https://www.icj.org/thailand-human-rights-groups-condemn-ncpo-order-132016-and-urge-for-it-to-be-revoked-immediately/>

¹⁰ ICRC, 'International Rules And Standards For Policing', June 2015, at 25, available at: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf>

Arbitrary arrest and detention

Section 28 of the 2017 Constitution enshrines for any person the right to life, liberty and security of person; it also guarantees that arrest and detention of a person shall not be permitted "except by an order or a warrant issued by the Court or on other grounds as provided by law". Search of a person or any act affecting the right to life, liberty and security of person shall also not be permitted "except on grounds as provided by law".

In this respect, the United Nations Human Rights Committee has noted in its General Comment No. 35 that "arrests and detention may be [...] legally permitted but arbitrary" because the notion of "arbitrariness" is not to be equated with "against the law", but "must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."¹¹

In its General Comment No. 20, the Committee has also stated that "to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends."¹²

In addition, as specifically set out in Principle 11 of the UN Principles Governing the Administration of Justice Through Military Tribunals, and in line with the Standard Minimum Rules for the Treatment of Prisoners, international law is clear that civilians should not be held in military prisons, including disciplinary blocks, military prisons or other internment camps under military supervision, and this rule should apply to all prisoners, whether in pretrial detention or serving sentence after conviction for a military offence.¹³

In contrast to this, there have been reports that in cases brought under the abovementioned HNCPO Orders, people have been arrested and detained incommunicado in places not officially recognized as places of detention¹⁴. Lawyers have also reported difficulties in obtaining access to clients who were arrested and detained without charge for up to seven days by military personnel. During the seven-day detention period, relatives and lawyers reportedly have been unable to contact or access detainees held in military custody.¹⁵

Notably, HNCPO Order No. 3/2558 and certain NCPO orders that were passed prior to the issuance of HNCPO Order No. 3/2558¹⁶ allow military officers to exercise law enforcement powers to "prevent and suppress" certain "crimes" through "security detention" (sometimes known as administrative detention or internment) that does not require contemplation of

¹¹ UN Human Rights Committee, 'General comment no. 35, Article 9: Liberty and Security of person', CCPR/C/GC/35, 16 December 2014, para 12

¹² UN Human Rights Committee, 'General Comment No. 20, Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment', Forty fourth session, 10 March 1992, para 11

¹³ United Nations Economic and Social Council, 'Principles Governing the Administration of Justice Through Military Tribunals', 2010, at 18, <https://www.dcaf.ch/sites/default/files/publications/documents/UN%2520MJ%2520Standards%252011-01-11.pdf>

¹⁴ For example, ICJ, 'Thailand: immediately end the practice of arbitrarily detaining persons in unofficial places of detention', 4 May 2017, <https://www.icj.org/thailand-immediately-end-thepractice-of-arbitrarily-detaining-persons-in-unofficial-places-of-detention/>

¹⁵ ICJ and TLHR, 'Joint Submission in advance of the examination of the Kingdom of Thailand's Second Periodic Report under Article 40 of the International Covenant On Civil And Political Rights', para 42, March 2017, available at: <https://www.icj.org/wp-content/uploads/2017/02/Thailand-ICCPR-Submission-ICJ-TLHR-Advocacy-Non-legal-submissions-2017-ENG.pdf>

¹⁶ For example, NCPO Order Nos. 1/2557, 2/2557, 3/2557, 5/2557, 6/2557, 12/2557, 13/2557, 14/2557, 23/2557, 25/2557, 29/2557, 15/2557, 16/2557, 18/2557, 19/2557, 23/2557, 25/2557, 29/2557, 30/2557, 31/2557, 34/2557, 35/2557, 36/2557, 42/2557, 43/2557, 44/2557, 46/2557, 48/2557, 49/2557, 50/2557, 52/2557, 53/2557, 57/2557, 58/2557, 61/2557, 63/2557, 65/2557, 68/2557, 82/2557, 86/2557, etc. In addition, NCPO Announcement No. 41/2557 also criminalize those who were called to report themselves to the NCPO but did not comply with such order to up to 2 years imprisonment or a fine up to 40,000 baht, or both. They will also be banned from doing any financial transactions or any transactions that linked to their properties.

prosecution on a criminal charge. Such security detentions were reportedly carried out under a different name, including “attitude adjustment”, “invitation for a talk” or “request for cooperation”.¹⁷ According to documentation collected by Thai Lawyers for Human Rights (TLHR), at least 876 individuals have been summoned to participate in attitude adjustment sessions.¹⁸ The UN Human Rights Committee has explicitly considered such detention to “present severe risks of arbitrary deprivation of liberty”.¹⁹

In conclusion, the ICJ considers that the practices allowed under both HNCPO Order No. 3/2558 and HNCPO Order No. 13/2559 violate the right to liberty and security of person, including because they allow arbitrary detention in military custody, and in particular incommunicado detention. As such, they are contrary to Article 9 of the ICCPR, which provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Lack of judicial oversight

Article 9(3) of the ICCPR provides that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.” The Human Rights Committee has further stated that the requirement under Article 9(3) that those arrested and detained be brought promptly before a judge “applies in all cases without exception... so long as the person is arrested or detained on suspicion of criminal activity”, and this Article 9(3) “is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control.”²⁰

In the view of the Committee, “48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.”²¹ Importantly, the Committee has explicitly stated that, “longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment.”²²

In light of the above, the ICJ considers that the length of detention permitted under HNCPO Orders No. 3/2558 and No. 13/2559 violates the right to liberty and security of person guaranteed under Article 9 of the ICCPR, as clarified by the Human Rights Committee.

Right to challenge legality of detention before a court

Article 9(4) of the ICCPR enshrines the fundamental principle of *habeas corpus* – the right of anyone detained to challenge the legality of detention before a court – which “applies to all detention by official action or pursuant to official authorization, including [...] military detention, security detention, counterterrorism detention [...] and wholly groundless arrests.”²³

Although section 90 of the Thai Criminal Procedure Code makes provision to challenge the legality of detention before a court, Thai courts have dismissed *habeas corpus* writs challenging military custody under HNCPO orders. In a case documented by TLHR, the Bangkok Criminal Court refused to conduct a hearing as required by the law, and ruled, on the next day, that the arrest and custody were lawful under HNCPO Order No. 3/2558 as the time that had elapsed between the date of the arrest and the date of the submission of a *habeas corpus* writ was not more than seven days; the Court therefore held that such arrest and detention were not unlawful according to Section 90 of the Criminal Procedure Code.²⁴

¹⁷ TLHR, ‘The State of Human Rights in Thailand’, 22 June 2018, at 20, available at: https://www.tlhr2014.com/?wpfb_dl=100

¹⁸ Ibid, at 17

¹⁹ General Comment No. 35, para 15

²⁰ Ibid, para 32

²¹ Ibid, para 33

²² Ibid

²³ Ibid, para 40

²⁴ TLHR, ‘Eleven “Court” Contributions under the NCPO’s Regime in 2016’, 29 December 2016,

Furthermore, according to a report of the National Human Rights Commission of Thailand ('NHRCT') dated 24 November 2015,²⁵ the NCPO had claimed that nationwide Martial Law was a necessary measure to suppress and control political unrest in Thailand, and that its implementation was restricted only to "convicts", and "dissenting individuals" who were summoned for "attitude adjustment" and were later released. Notwithstanding these claims, in its report, the NHRCT concluded that the enforcement of Martial Law and/or any other NCPO announcements that allow military officers to summon any individuals, and detain them for up to seven days were "inappropriate" in restricting "the prohibition of arbitrary arrest or detention" and "inconsistent with Article 9 of the ICCPR".²⁶

A number of United Nations' independent experts have expressed concern about HNCPO Orders No. 3/2558, 5/2558 and 13/2559 in similar terms. For example, in their Communication No. AL THA 4/2016,²⁷ dated 27 May 2016, three UN independent experts raised concern regarding the adoption of HNCPO Orders No. 3/2558, 5/2558 and 13/2559, especially with respect to the powers they confer to various security officers, which allow for disproportionate restrictions on the exercise of the rights to freedom of association and freedom of expression and opinion, including by providing military officers without law enforcement experience the power to take part in the investigation, search, and arrest of persons, and the power to authorize the deprivation of liberty of persons for up to seven days in unrecognized places of detention without judicial oversight.

In addition, in April 2017, in its Concluding observations adopted following its review of Thailand's second periodic report under the ICCPR, the Human Rights Committee expressed concern regarding "reports of the arbitrary detention of hundreds of individuals for 'attitude adjustments' after the 2014 coup, and that such individuals were reportedly often detained without charge and held incommunicado at undisclosed places of detention for periods of up to seven days, with no judicial oversight or safeguards against ill-treatment and without access to a lawyer." The Committee recommended that Thailand "should immediately release all victims of arbitrary detention and provide them with full reparation. It should also bring its legislation and practices into compliance with article 9 of the Covenant, taking into account the Committee's general comment No. 35".²⁸

In conclusion, as set out above, the exercise of law enforcement power by military personnel under HNCPO Orders No. 3/2558 and No. 13/2559 to arrest and detain "suspects" without a warrant, and the power to hold people in places not formally recognized as places of detention are arbitrary since, among other things, they fail to meet the conditions of necessity, reasonableness and proportionality, in violation of Article 9 of the ICCPR.²⁹

In addition, HNCPO Orders No. 3/2558 and No. 13/2559 allow for violations of the right of any person arrested or detained in connection with a criminal charge to be brought promptly before a judge or other officer authorized by law to exercise judicial power under Article 9(3) of the ICCPR.

<http://www.tlhr2014.com/th/?p=3168>; See also, ICJ and TLHR, 'Joint Submission in advance of the examination of the Kingdom of Thailand's Second Periodic Report under Article 40 of the International Covenant on Civil and Political Rights', para 45

²⁵NHRCT, 'Report on their Decisions No. 1270-1294/2558', 24 November 2015, available at:

<https://tlhr2014.files.wordpress.com/2016/06/nhrc-report.pdf>

²⁶ Ibid, at 49

²⁷ Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, 'Communication', AL THA 4/2016, 27 May 2016, available at:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qId=3164>

²⁸ UN Human Rights Committee, 'Concluding Observations', CCPR/C/THA/CO/2, 25 April 2017, para 25-26.

²⁹ See also ICJ and HRW, 'Thailand: The ICJ and Human Rights Watch express concerns over detentions', 24 November 2015, available at: <https://www.icj.org/thailand-human-rights-watch-and-the-icj-express-concerns-over-detentions/>

Furthermore, as mentioned above, Thai Courts have failed to ensure that people detained under HNCPO Orders No. 3/2558 and No. 13/2559 enjoy their right under Article 9(4) of the ICCPR to challenge the lawfulness of their detention, including on the grounds that their detention extends beyond 48 hours without judicial control.

- In light of the above, the ICJ recommends that both HNCPO Orders No. 3/2558 and 13/2559 should be repealed, and other relevant HNCPO and NCPO orders and announcements be amended accordingly, to bring them in compliance with Thailand's international human rights law obligations, including, in particular, under the ICCPR.

2. Orders which allow the military courts to prosecute civilians (NCPO Announcements No. 37/2557, 38/2557, 50/2557 and HNCPO Order No. 55/2559)

HNCPO Order No. 55/2559,³⁰ dated 12 September 2016, phases out the heavily criticized practice of prosecuting civilians before military courts for four categories of "offences", including "offences" against internal security; "violations" of NCPO orders; possession and use of war weapons; and the serious "offence" of *lèse majesté* (NCPO Announcements No. 37/2557, 38/2557, and 50/2557).³¹

This Order, however, only applies to alleged "offences" committed on or after 12 September 2016 and not retroactively to past or pending cases. According to the Judge Advocate General's Office, as of June 2018, there were 193 civilian cases pending before regional military courts nationally and 88 cases civilian cases pending before Bangkok Military Court.³² In addition, criminal cases arising from facts that allegedly occurred between the date on which Announcements No. 37/2557, 38/2557, and 50/2557 entered into force in 2014 and 12 September 2016 could be tried in military courts at any moment.

Of the cases that have concluded, it is not clear how many cases concerned "crimes" committed under Martial Law. Notably, in those cases, the right to appeal does not apply and, therefore, a conviction under Martial Law would be final.

Article 14 of the ICCPR states that every person has the right to a "fair and public hearing by a competent, independent and impartial tribunal established by law." Article 14(5) states that every person "convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

These rights are also guaranteed in the 2017 Constitution under Section 188, which guarantees "judges and justices are independent in trial and adjudication of cases, in accordance with the Constitution and laws in the swift and fair manner, and without any partiality".

The UN Human Rights Committee, in its General Comment No. 32, has held that the trial of civilians in military courts raises "serious problems as far as the equitable, impartial, and independent administration of justice".³³ According to international human rights law and standards, military courts lack the competence, independence and impartiality to prosecute 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

³⁰ Unofficial translation of the Order, please see: <https://prachatai.com/english/node/6556>

³¹ ICJ, 'Thailand: ICJ welcomes Order phasing out prosecution of civilians in military courts but government must do much more', 22 September 2016, available at: <https://www.icj.org/thailand-icj-welcomes-order-phasing-out-prosecution-of-civilians-in-military-courts-but-government-must-do-much-more/>

³² iLaw, '4 years passed, military court still has 281 pending civilian trials', 1 August 2018, available at: <https://freedom.ilaw.or.th/4yearsofmilitarycourt>

³³ UN Human Rights Committee, 'General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial', CCPR/C/GC/32, 23 August 2007, para 22.

appropriate, in the case of serious crimes under international law, of an international or internationalized court."³⁴

The Principles Governing the Administration of Justice through Military Tribunals also affirm that the jurisdiction of military courts should be restricted to military personnel (Principle 5) in relation to military offences (Principle 8), and that the right to fair trial, including the right to appeal should be upheld, even in times of martial law (Principle 15).

The trial of civilians in military courts in Thailand gives rise to serious concern with respect to the independent administration of justice, and violates the right to a fair trial guaranteed under Article 14 of the ICCPR and Thailand's Constitution.

The Thai military justice system is separate and independent from the civilian justice system, accountable only to the Ministry of Defence, where the Minister of Defence is responsible for its administration.³⁵ At the military court of first instance, only one of the three adjudicators must be a legally trained member of the Judge Advocate-General's Office (JAG). The other two must be commissioned military officers.³⁶ The composition of the judicial bench of military courts creates a real risk that the right to a fair and public hearing by a competent court of law be violated.

Furthermore, documented examples of violations of fair trial rights in cases where civilians were tried before military courts exist in practice, notwithstanding the fact that, in principle, civilian criminal procedure should apply in Thailand's military courts where these procedural regulations do not exist in military courts.³⁷ According to TLHR, examples of violations of fair trial rights include: the passage of several months before a copy of the indictment is provided to an accused; defence lawyers being prohibited from making copies of the court file, including of important orders, such as those concerning bail; the failure of judges to disclose their names in written decisions; the failure to make hearings accessible to the public in certain cases, or as a result of the fact that the court is located on a military base or because of the small size of the courtroom; refusal to allow the public to take notes; the conduct of inquiries and sentencing hearings *in camera*; unusual opening hours of the courts; the absence of stationed judges; and long administrative delays,³⁸ due to the inability of military court personnel to process the sharp increase in the case-load resulting from an influx of civilian cases. Lawyers defending civilians in military courts have also observed that the average length of proceedings has increased in certain cases due to the time it takes the courts to conduct witness examinations and issue decisions.³⁹

The trial of civilians in military courts in Thailand gives rise to serious concern with respect to the right to fair trial enshrined in Article 14 of the ICCPR and Thailand's Constitution. With respect to this, the ICJ notes that, in its report dated 24 November 2015, the NHRCT also stated that, according to Article 14 of the ICCPR and Principle 5 of the Principles Governing the Administration of Justice through Military Tribunals, "the military court shall, in principle, not have any jurisdiction over civilians' cases".⁴⁰

In addition, in April 2017, in its Concluding Observations on Thailand, the UN Human Rights Committee expressed concern at "reports of hundreds of ongoing cases and arrest warrants against civilians that remain to be adjudicated before the military jurisdiction, as well as civilians who were convicted by military courts and did not enjoy the right of appeal...[and]...reports that all guarantees provided for by article 14 of the Covenant are not

³⁴ 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.

³⁵ Article 5, Act on the Statute of Military Courts (B.E. 2498)

³⁶ Articles 26 - 27, Act on the Statute of Military Courts (B.E. 2498)

³⁷ Section 45, Act on the Statute of Military Courts (B.E. 2498)

³⁸ For more information, TLHR, 'Delays in the Military Court: Civilian Cases Still Pending Despite the NCPO's Eased Grip', 3 April 2019, available at: <https://www.tlhr2014.com/?p=11607&lang=en>

³⁹ ICJ and TLHR, 'Joint Submission in advance of the examination of the Kingdom of Thailand's Second Periodic Report under Article 40 of the International Covenant on Civil and Political Rights', para 53

⁴⁰ NHRCT, 'Report on their Decisions No. 1270-1294/2558', 24 November 2015, at 49.

implemented during trials by the military courts”, and recommended that Thailand “should ensure that all trials before military courts are exceptional and take place under conditions that genuinely afford the full guarantees stipulated in article 14 of the Covenant and Committee’s general comment No. 32”.⁴¹

During the UN Human Rights Committee’s examination of Thailand’s second periodic report, the Thai delegation stated that:

*“Offences committed before 12 September 2016 would remain under the jurisdiction of military courts for a number of reasons. First, transferring cases was time-consuming and would not benefit the parties. Proceedings would have to start again from scratch, and suspects’ and defendants’ rights might be affected. Secondly, in some ongoing cases, a number of persons had already pleaded guilty and would thus be prosecuted twice for the same crime. Thirdly, there was no legal provision for the transfer of cases from military to civilian jurisdiction, which could lead to problems during the appeals process”.*⁴²

In this respect, we note that the principle of *ne bis in idem* – the right of a person once convicted or acquitted of a certain offence not to be subject to successive prosecutions, either before the same court again or before another tribunal, for the same offence - is not absolute. International law does not prohibit the resumption of a criminal trial justified by exceptional circumstances.⁴³ Such circumstance shall include instances where initial proceedings did not afford the defendant the right to a fair trial - including because of a lack of compliance with standards of impartiality, independence, and competence established by international norms.⁴⁴ We would also like to highlight that the transferring of cases from military to civilian courts, while time-consuming and requiring additional procedures, is necessary to ensure respect for the right to a fair trial guaranteeing a fair and public hearing by a competent, independent and impartial tribunal established by law. The transfer or retrial of cases may be carried out on a case-by-case basis, taking into consideration and respecting the autonomy of defendants who may not choose such a retrial.

In the end, the UN Human Rights Committee recommended that Thailand “take the measures necessary to accept transfer requests from military courts for offences committed prior to 12 September 2016, transfer all such pending cases to civilian courts and provide the opportunity for appeal in civilian courts of cases involving civilians already adjudicated under military jurisdiction”.⁴⁵

In conclusion, we are concerned that civilian cases remain or continue to be at risk of being brought under the jurisdiction of military courts, in contravention of Thailand’s international human rights law obligations.

- In light of the above, we recommend that all cases of civilians facing proceedings before military courts be transferred to civilian courts, and all civilians convicted of an offence in military courts be granted a re-trial in civilian courts.
- In addition, due to the above-noted concerns, we recommend that HNCPO Order No. 55/2559 be amended, and other relevant HNCPO and NCPO orders and announcements be

⁴¹ UN Human Rights Committee, ‘Concluding Observations’, CCPR/C/THA/CO/2, 25 April 2017, paras 31-32.

⁴² UN Human Rights Committee, ‘Summary record of the 3349th meeting’, 119th session, CCPR/C/SR.3349, 22 March 2017, para 55.

⁴³ General Comment No. 32, para 56

⁴⁴ For example, Protocol No. 7 to European Convention for the Protection of Human Rights and Fundamental Freedoms provides in its article 4(2) that this principle “shall not prevent the re-opening of the case ... if there has been a fundamental defect in the previous proceedings, which would affect the outcome of the case”. Article 20(3) of the Statute of the International Criminal Court also provides for exceptions for such other court proceedings if such proceedings were otherwise “not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”

⁴⁵ UN Human Rights Committee, ‘Concluding Observations’, CCPR/C/THA/CO/2, 25 April 2017, para 32

amended accordingly, to allow the transfer of all civilian cases before military courts to civilian courts, and for all civilians convicted by military courts to be granted a re-trial in civilian courts.

3. Orders that infringe on the rights to freedom of expression and assembly, restrict media freedom and the right to information (e.g. HNCPO Order No. 22/2561, NCPO Order No. 7/2557, NCPO Announcement Nos. 97/2557,103/2557 and HNCPO Order No. 3/2558)

Peaceful Assembly

The ICJ had already expressed concern in the past⁴⁶ about the fact that the prohibition of all political gatherings of five or more persons under Article 12 of HNCPO Order No. 3/2558 violated Thailand's international human rights law obligations, including with respect to the principles of necessity and proportionality; it also violated Thailand's Constitution.

Thai courts have dismissed at least eight cases pending before them concerning alleged "violations" of Article 12 of HNCPO Order No. 3/2558 on the basis that the offence no longer exists in law as a result of the adoption of HNCPO Order No. 22/2561.

However, in one case concerning Article 12 of HNCPO Order No. 3/2558, the Bangkok Military Court sentenced the defendant to four months' imprisonment after he pleaded guilty to the charge.⁴⁷

The ICJ remains concerned as these cases pertaining to freedom of expression and assembly should never have been brought to the courts in the first place. Notwithstanding the adoption of HNCPO Order No. 22/2561, the individual concerned is still unable to seek a remedy or appeal against the sentence or otherwise seek to have it annulled as Article 2 of HNCPO Order No. 22/2561 states that "prosecutions, actions or operations" already in effect by virtue of those orders will not be affected by the coming into force of HNCPO Order No. 22/2561.

There is also concern regarding NCPO Order No. 7/2557, which unlike the nine orders mentioned above, has not been explicitly repealed by HNCPO Order No. 22/2561 and is, therefore, still in force. It is unclear whether NCPO Order No. 7/2557 – which concerns the banning of political gatherings of five or more people – has, in fact, been annulled by the adoption of Article 12 of HNCPO Order No. 3/2558, and should therefore be considered as no longer being in force; the lack of clarity arises because HNCPO Order No. 3/2558 did not explicitly consider the revocation of NCPO Order No. 7/2557. "Violations" of NCPO Order No. 7/2557 are punishable with criminal penalties of up to one year's imprisonment and/or a maximum fine of 20,000 Thai Baht.

In a case documented by TLHR, a person suspected of "violating" NCPO Order No. 7/2557 did not see his case automatically dismissed, as it would have if his case had been brought as a violation of Article 12 of NCPO Order No. 3/2558. In February 2019, however, the court ruled in favour of the defendant and eventually dismissed his case on the basis that the language of NCPO Order No. 7/2557 is in essence the same as Article 12 of NCPO Order No. 3/2558, and his case should therefore be treated in a manner similar to any case brought under the now-phased out article.⁴⁸

⁴⁶ For example, ICJ, 'Thailand: Lift ban on political gatherings and fully reinstate all fundamental freedoms in Thailand', 1 October 2018, available at: <https://www.icj.org/thailand-lift-ban-on-political-gatherings-and-fully-reinstate-all-fundamental-freedoms-in-thailand/>

⁴⁷ The case of Thanet Anantawong who allegedly violated Article 12 of HNCPO Order No. 3/2558 during a train trip to Rajabhakti Park in Prachuap Kirikhan in December 2015 as part of their call for an investigation into alleged irregularities in the park's construction. See, Bangkok Post, 'Court drops anti-coup activists case', 16 Feb 2019, available at: <https://www.bangkokpost.com/news/general/1629942/court-drops-anti-coup-activists-case>

⁴⁸ TLHR, '4 years' after, the (beloved) election case, the trial end', 15 February 2019, available at: <https://www.tlhr2014.com/?p=10931>

- We recommend that HNCPO Order No. 22/2561 and other HNCPO and NCPO orders and announcements should all be interpreted in a manner that respects the right to remedy of any person whose rights have been violated, in line with article 2(3)(a) of the ICCPR, which provides that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”, and consistent with article 25 paragraph 4 of the 2017 Constitution which affirms that “any person injured from the violation of his or her rights or liberties or from the commission of a criminal offence by another person, shall have the right to remedy or assistance from the State, as prescribed by law”.
- In light of the above, we recommend that HNCPO Order No. 22/2561 be amended to allow the seeking of remedy for any person whose rights were violated by the adoption of HNCPO and NCPO orders;
- Any other relevant HNCPO and NCPO orders and announcements be amended accordingly, and be interpreted in a manner that respects the right to remedy of any person under international law and the Constitution.
- NCPO Order No. 7/2557 should be explicitly repealed.

Media Freedom

Several orders have restricted media freedom and the right to information,⁴⁹ including NCPO Announcement No. 97/2557,⁵⁰ later amended by NCPO Announcement No. 103/2557,⁵¹ which prohibits any persons, editors, facilitators, journalists, owners of print, radio, TV “to invite persons ... who could give interview or opinions in a manner that can inflict or worsen the conflict, distort information, create confusion in the society or lead to the use of violence.”⁵²

The said Announcements also prohibit media operators or individuals from distributing information that “harm[s] the national security, including defaming other persons,” “criticise[s] the work of the NCPO in bad faith in order to discredit the credibility of the NCPO based on false information”, “cause[s] confusion, incites or provokes conflict, or cause[s] divisions in the Kingdom,” or “cause[s] panic or fear amongst the people”.⁵³ The “violators” will be investigated by the ethics committees of their professional associations.⁵⁴ The Announcements also empowered provincial governors, civil servants under the Ministry of Interior, the Commissioner of the Metropolitan Police Bureau and Police Chiefs in each province “to suspend all protests or activities that oppose the work of the NCPO”.⁵⁵

In addition, pursuant to HNCPO Order No. 41/2559⁵⁶, any broadcast content in “violation” of the above-noted NCPO Announcements can be deemed as “programmes containing issues that instigate the overthrow of the administration under the democratic form of government with

⁴⁹ For more information: iLaw, ‘Why should the NCPO Announcements/Orders be rescinded?’, October 2018, available at:

<https://ilaw.or.th/sites/default/files/Why%20should%20the%20NCPO%20Announcements%20Orders%20be%20rescinded.pdf>

⁵⁰ NCPO Announcement No. 97/2557, see:

http://library2.parliament.go.th/giventake/content_ncpo/ncpo-annouce97-2557.pdf (In Thai)

⁵¹ NCPO Announcement No. 103/2557, see:

http://library2.parliament.go.th/giventake/content_ncpo/ncpo-annouce103-2557.pdf (In Thai)

⁵² Article 2. See, partly translation of the NCPO Order No. 97/2557, available at:

<https://asiancorrespondent.com/2014/07/thai-junta-to-media-criticize-us-and-we-will-shut-you-down/>

⁵³ Article 3.

⁵⁴ Article 5 (amended by NCPO Announcement No. 103/2557). For example, the case of Manager Online, NCPO Order No. 108/2557, see: http://library2.parliament.go.th/giventake/content_ncpo/ncpo-order108-2557.pdf (In Thai)

⁵⁵ Article 4.

⁵⁶ HNCPO Order No. 41/2559, see: http://library2.parliament.go.th/giventake/content_ncpo/ncpo-head-order41-2559.pdf (In Thai)

the King as Head of State or having effects on the State security, public order or good morals of the people” as per Section 37 of the Broadcasting and Television Business Act B.E. 2551 (2008).⁵⁷ This provision empowers the National Broadcasting Commission to investigate each case and suspend broadcasting immediately.

Article 5 of HNCPO Order No. 3/2558 also empowers military officers to issue orders “prohibiting the propagation of any item of news or the sale or distribution of any book or publication or material likely to cause public alarm or which contains false information likely to cause public misunderstanding to the detriment of national security or public order.”

There are also other Announcements and Orders that require online media outlets and service providers to: a) cooperate “not to disseminate information that may incite, instigate and harbour violence, lack of credibility and defiance of the laws as well as any information deemed critical to the work of the NCPO”;⁵⁸ b) “to monitor, investigate and suppress the dissemination of any information that distorts, incites or instigates an unrest or has an adverse effect on the national security or good morals of the people”;⁵⁹ they also task a working group that was set up by the Permanent Secretary of the Ministry of Information and Communication Technology (MICT) with the power to monitor, suspend and investigate content that may “incite, instigate and harbour violence, a lack of credibility and a lack of respect for the law, or which may be critical of the work of the NCPO.”⁶⁰

We are concerned that these orders and announcements that ban “all political gatherings”, and impose prohibitions on the broadcasting and dissemination of information in vague terms, such as “national security”, “criticism of the work of the NCPO”, information which “incites or provokes conflict, or cause divisions in the Kingdom” or “causes confusion, panic or fear amongst the people”, are likely to infringe on fundamental rights under the ICCPR, in particular, the rights to freedom of opinion and expression, including the right to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice (article 19, ICCPR); freedom of peaceful assembly (article 21, ICCPR); and the citizen’s right to have access to public service in his country (article 25, ICCPR).

Such rights are also guaranteed under the 2017 Constitution. Section 34 enshrines a person’s right to “enjoy the liberty to express opinions, make speeches, write, print, publicize and express by other means;” Section 35 ensures “a media professional shall enjoy the liberty to present news or express opinions in accordance with professional ethics” and “censorship by a competent official of any news or statements made by a media professional before the publication in a newspaper or any media shall not be permitted, except during the time when the country is in a state of war”; Section 36 ensures “a person shall enjoy the liberty of communication by any means”; and Section 44 ensures that “a person shall enjoy the liberty to assemble peacefully and without arms.”

While in certain limited circumstances, Thailand may restrict such rights, these limitations should be in accordance with the ICCPR and the Constitution, and should be provided by law, in a manner that is clear and accessible to everyone and formulated with sufficient precision to enable an individual to regulate his or her conduct; they should also be necessary for respect of the rights or reputations of others, for the protection of national security or of public order

⁵⁷ For translation, please see:

[http://www.krisdika.go.th/wps/wcm/connect/d51cc5004ba4484f9efcbf8b0853d392/BROADCASTING+AND+TELEVISION+BUSINESSES+ACT,+B.E.+2551+\(2008\).pdf?MOD=AJPERES&CACHEID=d51cc5004ba4484f9efcbf8b0853d392](http://www.krisdika.go.th/wps/wcm/connect/d51cc5004ba4484f9efcbf8b0853d392/BROADCASTING+AND+TELEVISION+BUSINESSES+ACT,+B.E.+2551+(2008).pdf?MOD=AJPERES&CACHEID=d51cc5004ba4484f9efcbf8b0853d392)

⁵⁸ NCPO Announcement No. 12/2557, see:

http://library2.parliament.go.th/giventake/content_ncpo/ncpo-annouce12-2557.pdf (In Thai)

⁵⁹ NCPO Announcement No. 17/2557, see:

http://library2.parliament.go.th/giventake/content_ncpo/ncpo-annouce17-2557.pdf (In Thai)

⁶⁰ NCPO Announcement No. 26/2557, see:

http://library2.parliament.go.th/giventake/content_ncpo/ncpo-annouce26-2557.pdf (In Thai)

(ordre public), public health or morals, in strict accordance with the principles of necessity and proportionality.⁶¹

In addition, in its General Comment No. 34, the UN Human Rights Committee also highlighted that “a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights” and “constitutes one of the cornerstones of a democratic society”;⁶² it also reaffirmed that a free press and other media must be “able to comment on public issues without censorship or restraint and to inform public opinion,”⁶³ and that it is the State’s duty to guarantee editorial freedom and ensure public broadcasting services can be operate in an independent manner.⁶⁴ In particular, the Committee stressed that the right of access to information includes “a right whereby the media has access to information on public affairs and the right of the general public to receive media output”.⁶⁵

We are concerned that restrictions on media outlets and individuals under the above-noted orders and announcements do not provide sufficient precision to enable an individual to regulate his or her conduct accordingly. There is also no clear guarantee in law that implementation of the orders and announcements will be strictly in line with the principles of necessity or proportionality, in contravention of Thailand’s international legal obligations and its Constitution. We are of the view that these announcements and orders fail to ensure that only strict limitations directly connected to one or more of the permissible legitimate aims for such limitations (e.g. public order or the respect of the rights of others); indeed, we are concerned that the above-noted announcements and orders allow for disproportionate measures, which, in turn, would constitute violations of the rights to freedom of expression and freedom of peaceful assembly and association.

In similar terms, in its April 2017 concluding observations following its examination of Thailand’s second periodic report, the UN Human Rights Committee expressed concern about “criminal proceedings ... brought against ... journalists”, “excessive restrictions imposed on the freedom of peaceful assembly since the military coup of 2014, in particular the strict banning of any public gathering of more than five people and political gatherings of more than four people” and was particularly concerned about “the arrest of hundreds of people for having organized or taken part in peaceful gatherings”, and recommended Thailand to “take all measures necessary to guarantee the enjoyment of freedom of opinion and expression in all their forms, in accordance with article 19 of the ICCPR”, noting that “any restriction should comply with the strict requirements of article 19 (3), as further developed in the Committee’s general comment No. 34 (2011) on the freedoms of opinion and expression, including the strict tests of necessity and proportionality”, and “effectively guarantee and protect the freedom of peaceful assembly”.⁶⁶

In its report dated 24 November 2015, the NHRCT also recommended that Thailand should not restrict the full exercise of the rights to freedom of expression and peaceful assembly as guaranteed by article 19 and 21 of the ICCPR, and considered that the existing laws in Thailand are “enough to effectively use to oversee the gatherings”.⁶⁷

In conclusion, the restrictions on the rights to freedom of expression and assembly, media freedom and the right to information, including those provided by NCPO Order No. 7/2557, NCPO Announcement Nos. 97/2557, and 103/2557 and HNCPO Order No. 3/2558, contravene

⁶¹ UN Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’, Frank La Rue, 4 June 2012, A/HRC/20/17, para. 64 and 81, available at: <http://www.refworld.org/docid/5008134b2.html>; and UN Human Rights Committee, ‘General comment no. 34, Article 19, Freedoms of opinion and expression’, 12 September 2011, CCPR/C/GC/34, para. 21-36, available at: <http://www.refworld.org/docid/4ed34b562.html>

⁶² General comment no. 34, para. 13

⁶³ Ibid

⁶⁴ Ibid, para. 16

⁶⁵ Ibid, para. 18

⁶⁶ UN Human Rights Committee, ‘Concluding Observations’, paras 35-36, 39-40

⁶⁷ NHRCT, ‘Report on their Decisions No. 1270-1294/2558’, 24 November 2015, at 50.

Thailand's international legal obligations. Such restrictions are also unnecessary and disproportionate in light of Thailand's current situation.

- In light of the above, we recommend that NCPO Announcements No. 97/2557, 103/2557 and HNCPO Order No. 3/2558 be repealed, and other relevant HNCPO and NCPO orders and announcements amended accordingly, to bring Thailand in compliance with its international human rights law obligations.

4. Orders that infringe on community and environmental rights (e.g. HNCPO Orders No. 17/2558, 3/2559 and 74/2559)

Several HNCPO and NCPO orders and announcements allow for the infringement of community and environmental rights, including, for example, HNCPO Orders No. 17/2558, 3/2559 and 74/2559, which authorize the acquisition of land for special economic zones (SEZs) while allowing for the bypassing of the usual checks and balances required under Thai law for projects that would have required an assessment of their impact on the environment, health and on the rights of community groups living in affected land areas.

We are concerned that these orders and announcements infringe on rights protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the rights to social security and to the highest attainable standard of physical and mental health.

Regarding, the right to the highest attainable standard of physical and mental health under article 12 of the ICESCR, in its General Comment No. 14, the Committee on Economic, Social and Cultural Rights affirmed the legally enforceable components of the right to health.⁶⁸

Fact Sheet No.31 by the United Nations High Commissioner for Human Rights and the World Health Organization define the key aspects of the right to health to include safe drinking water and adequate sanitation, safe food, adequate nutrition and housing, healthy working and environmental conditions, health-related education and information and gender-equality.⁶⁹ Noting the interdependent, indivisible and interrelated nature of human rights, the violation of the right to health may often impair the enjoyment of other human rights, such as the rights to education or work.

Furthermore, the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement set out standards to be followed by States and other parties responsible for the displacement of persons for development purposes, including: fully exploring alternatives to displacement; ensuring an appropriate planning process with sufficient opportunities for meaningful and informed participation; ensuring displaced persons do not experience a deterioration in living standards, including by ensuring appropriate compensation and alternative livelihood options; and prohibiting all forced evictions.⁷⁰

Moreover, the UN Guiding Principles on Business and Human Rights (UNGPR) further enshrines the State obligation to protect against violation of rights in relation to business conduct. International law is clear that the obligations of a State, as a duty bearer, include the obligations to respect, protect and fulfill human rights, including to ensure that individuals within a State's

⁶⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)', 11 August 2000, E/C.12/2000/4, available at: <https://www.refworld.org/pdfid/4538838d0.pdf>

⁶⁹ Office of the United Nations High Commissioner for Human Rights, 'Fact Sheet No. 31: The Right to Health', at 3, available at: <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>

⁷⁰ Basic Principles and Guidelines on Development-based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, available at: http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf ; See also, CESCR, 'General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions', 20 May 1997, E/1998/22, available at: <https://www.refworld.org/docid/47a70799d.html>

territory and/or jurisdiction are not subject to human rights violations committed by third parties, including business enterprises.⁷¹

In conclusion:

- For the reasons noted above, we recommend that HNCPO Orders No. 17/2558, 3/2559 and 74/2559 be repealed or amended, and other relevant HNCPO and NCPO orders and announcements be amended accordingly, to ensure that Thailand's laws do not infringe its international human rights law obligations.

We remain at your disposal for any further information or clarifications you may require.

Yours faithfully,



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cc.

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⁷¹ Human Rights Council, 'UNGP', A/HRC/17/31, available at:
https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf