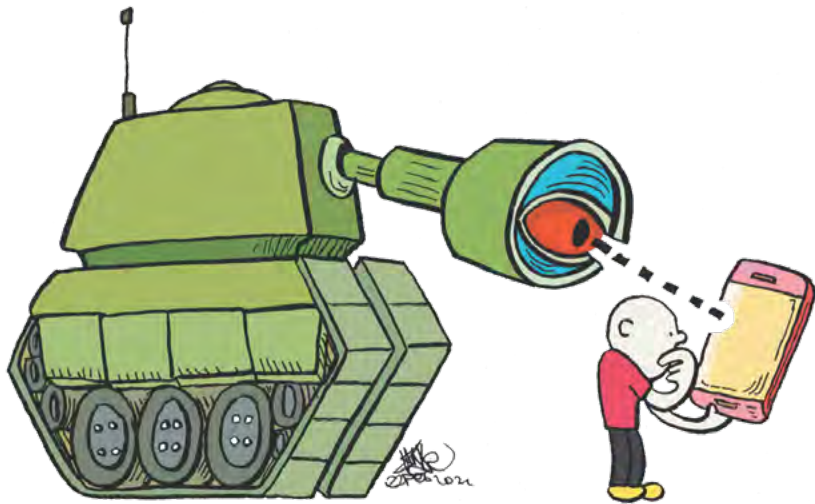


Dictating the Internet: Curtailing Free Expression and Information Online in Thailand



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This briefing paper was researched and drafted by Daron Tan. Legal advice and direction were provided by Sanhawan Srisod and Dhevya Sivaprakasam. Ian Seiderman provided legal and policy review.

The cartoon included in this paper was drawn by Zunar.

® Dictating the Internet: Curtailing Free Expression and Information Online in Thailand

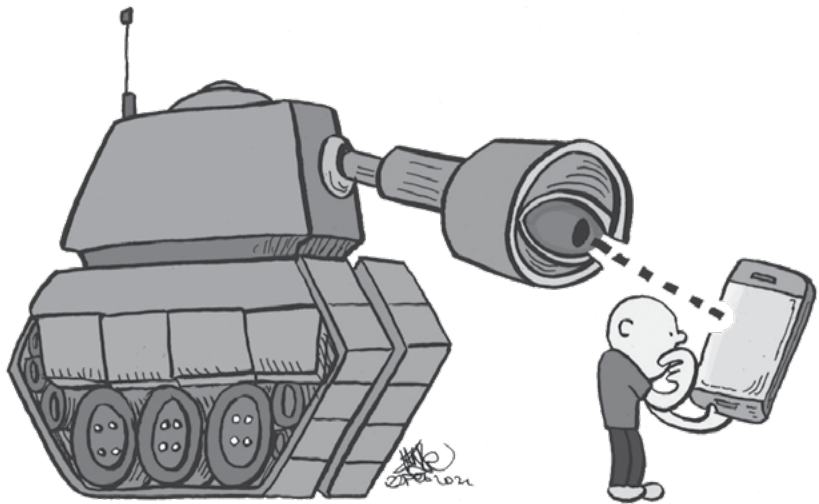
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Published in April 2021

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Dictating the Internet: Curtailing Free Expression and Information Online in Thailand



The ICJ would like to acknowledge the following organizations, whose monitoring, research and analyses informed this paper:

ARTICLE 19

Cross Cultural Foundation

Fortify Rights

Human Rights Lawyers Association

Human Rights Watch

International Federation for Human Rights

Manushya Foundation

Thai Lawyers for Human Rights

And all journalists, researchers, lawyers and individual partners whose analyses and input informed this paper.

Introduction

In December 2019, the International Commission of Jurists released its [report](#) entitled "*Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia*", which mapped out a pattern of abuse of the law by governments across Southeast Asia to restrict freedom of expression, opinion and information of individuals online. In a regional analysis of laws and case studies, the report traced decades-long trends of States crafting and implementing non-human rights compliant laws to control and moderate content online in violation of human rights.

In this report, the ICJ focuses its analysis on **Thailand**. The updated information and analysis show how State authorities have continued abusing laws that in any event are not compliant with human rights law and standards to intensify their arbitrary restrictions on human rights in the digital sphere. The authorities have acted in response to the increased reliance by the public on online platforms to share information and opinions on the COVID-19 pandemic and the pro-democracy protests. They have pressured technological companies to censor content on their platforms through court-enforced takedown demands and the filing of criminal complaints for failing to comply. Further, they have failed to adequately protect individuals against the human rights abuses of private actors, who include companies abusing legal processes to silence their critics and perpetrators of online hate speech inciting discrimination, hostility or violence.

This paper monitors and analyzes cases which have continued to emerge in Thailand since December 2019, highlighting cases which reflect how infringement of the rights to freedom of expression, opinion and information online is often accompanied by violations of other rights, including the rights to peaceful assembly and health.

The information in this report is accurate as of 5 April 2021.

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Dictating the Internet: Curtailling Free Expression and Information Online in Thailand

I. Background

In December 2019, the ICJ released its report “Dictating the Internet”, highlighting a range of non-human rights compliant laws that have been abused by governments across Southeast Asia, including Thailand, to unduly restrict freedom of expression and other human rights in the digital sphere. The report identified how vague and overbroad provisions enable laws to be abused in Thailand, often in the name of “national security” and “public order”. The laws, applied without independent oversight mechanisms, served to arbitrarily interfere with fundamental freedoms, resulting in severe penalties.¹

Since then, Thailand’s political turbulence has intensified, with the youth-led, pro-democracy movement gaining significant momentum in the country. The COVID-19 pandemic has also engendered new challenges and obstacles to the exercise of freedom of expression and information online, with the invocation of new restrictions.

The Thai authorities have made concerted attempts to extend State restrictions on permitted expression to the online sphere.² Social media usage in Thailand is high,³ and this coincides with an increasing role that social media platforms now play as a

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- 1 ICJ, *Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia*, December 2019 (‘ICJ Dictating the Internet Report, 2019’), available at: <https://www.icj.org/southeast-asia-icj-launches-report-on-increasing-restrictions-on-online-speech/>.
 - 2 Supalak Ganjanakhundee, “Social Media and Thailand’s Struggle over Public Space”, *ISEAS Perspective*, 22 June 2020, pp. 2 – 4, available at: https://www.iseas.edu.sg/wp-content/uploads/2020/05/ISEAS_Perspective_2020_67.pdf.
 - 3 Statista, “Penetration of leading social networks in Thailand as of January 2020”, available at: <https://www.statista.com/statistics/284483/thailand-social-network-penetration/>; DataReportal, “Digital 2020: Thailand”, 18 February 2020, available at: <https://datareportal.com/reports/digital-2020-thailand>.

decentralized space for individual users to express their opinions and access information on matters that may have previously been restricted or censored in traditional media.⁴

The role of the Internet has been especially apparent in the lead up to the pro-democracy protests, where social media platforms, such as Facebook and Twitter,⁵ and online messaging apps, such as Telegram,⁶ were used extensively for advocacy, information-sharing and political organizing.⁷

These protests began in February 2020 on academic campuses, in direct response to a decision by the Constitutional Court to dissolve a major political opposition party, the Future Forward Party.⁸ After a brief pause brought on by the COVID-19 pandemic, the rallies resumed again on 18 July 2020.⁹ The protestors have demanded that the government headed by Prime Minister Prayut Chan-o-cha be dissolved; that a new Constitution be drafted; and that the authorities stop harassing its critics.¹⁰ In August 2020, thousands gathered at a demonstration at Thammasat University where the organizer of the demonstration, the United Front of Thammasat and Demonstration, called for reform of the monarchy.¹¹ Since then, the reform of the monarchy has been one of the core demands of the movement. In October 2020, it was reported that tens of

4 Pavin Chachavalpongpun, "Redefining Power: The Politics of Social Media and Information in Thailand", *Global Asia*, December 2014, available at: https://www.globalasia.org/v9no4/feature/redefining-power-the-politics-of-social-media-and-information-in-thailand_pavin-chachavalpongpun.

5 Aim Sinpeng, "Twitter Analysis of the Thai Free Youth Protests", 30 August 2020, available at: <https://www.thaيداتapoints.com/post/twitter-analysis-of-the-thai-free-youth-protests>.

6 Bangkok Post, "Alternative chat apps appeal to protesters", 20 October 2020, available at: <https://www.bangkokpost.com/business/2004767/alternative-chat-apps-appeal-to-protesters>

7 See, for instance, DW, "Thailand's protests and their digital dimension", 18 October 2020, available at: <https://www.dw.com/en/thailands-protests-and-their-digital-dimension/a-55315079>.

8 Reuters, "Hundreds join protest against ban of opposition party in Thailand", 22 February 2020, available at: <https://www.reuters.com/article/us-thailand-politics-idUSKCN20G0EW>.

9 Bloomberg, "Thousands in Bangkok Rally Against Thai Government", 18 July 2020, available at: <https://www.bloomberg.com/news/articles/2020-07-18/thousands-in-bangkok-rally-against-thai-government>.

10 BBC News, "Thailand protests: Thousands join huge rally demanding reforms", 19 September 2020, available at: <https://www.bbc.com/news/world-asia-54217284>.

11 Prachatai, "[Full statement] The demonstration at Thammasat proposes monarchy reform", 11 August 2020, available at: <https://prachatai.com/english/node/8709>.

thousands of protestors participated in a protest movement,¹² in defiance of the week-long “serious emergency situation” declared in Bangkok by Prime Minister Prayut Chan-o-cha.¹³

Thailand has drawn recognition for its apparent success in containing the initial wave of COVID-19 infections.¹⁴ Since March 2020, the country has been under a state of emergency in order to contain the COVID-19 pandemic.¹⁵ The emergency responses have entailed disproportionate and unnecessary restrictions on human rights. There was a second wave of outbreaks starting from December 2020, originating from Samut Sakhon province. A tendency to ascribe blame for the outbreak on migrants is evident from media sources.¹⁶ This second wave has caused a surge in of xenophobic expression online, some of which has led to an unlawful incitement of violence and discrimination online against migrants from Myanmar on social media platforms.¹⁷

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- 12 BBC News, “Thai protests: Tens of thousands gather again in mass defiance of government”, 15 October 2020, available at: <https://www.bbc.com/news/world-asia-54548988>.
 - 13 The Government Public Relations Department, “Declaration of a Serious Emergency Situation in Bangkok”, 15 October 2020 (‘Declaration of a Serious Emergency Situation in Bangkok’), available at: https://thailand.prd.go.th/ewt_news.php?nid=10227&filename=index. In Thailand, there are two levels of emergency situations: an “emergency situation” and a “serious emergency situation”. Upon the invocation of a “serious emergency situation”, the Prime Minister and his/her designated competent officials are granted with greater powers to impose measures than during an “emergency situation”.
 - 14 See, for instance, Thai PBS, “WHO director praises Thailand as a good model for containing COVID-19”, 15 November 2020, available at: <https://www.thaipbsworld.com/who-director-praises-thailand-as-a-good-model-for-containing-covid-19/>; UN News, “Thailand’s COVID-19 response an example of resilience and solidarity: a UN Resident Coordinator blog”, 4 August 2020, available at: <https://news.un.org/en/story/2020/08/1069191>.
 - 15 The Straits Times, “Thailand to invoke emergency decree as coronavirus cases soar”, 24 March 2020, available at: <https://www.straitstimes.com/asia/se-asia/thailand-to-declare-1-month-emergency-on-march-26>; TAT News, “Thailand extends Emergency Decree for eleventh time until 31 May 2021”, 31 March 2021, available at: <https://www.tatnews.org/2021/03/thailand-extends-emergency-decree-for-eleventh-time-until-31-may-2021/>.
 - 16 Reuters, “Anti-Myanmar hate speech flares in Thailand over virus”, 24 December 2020, available at: <https://www.reuters.com/article/uk-health-coronavirus-thailand-myanmar/anti-myanmar-hate-speech-flares-in-thailand-over-virus-idUKKB-N28Y0KQ?edition-redirect=uk>.
 - 17 *Ibid.*

Key observations and findings

This report summarizes and evaluates the developments that have occurred since the release of ICJ's 2019 *Dictating the Internet* report. The ICJ has observed a deteriorating trend of journalists, human rights defenders and others being investigated, charged, prosecuted and/or imprisoned solely for exercising their rights to freedom of expression and information online. Restrictions on the freedom of expression, information, peaceful assembly and other rights have intensified amidst the political unrest and COVID-19 pandemic, under the guise of national security, public health and curbing "false information" online.

This vigor displayed by the Thai authorities to restrict online expression can be contrasted with their comparative inertia in fulfilling their obligations to take positive steps to adequately protect the right to freedom to expression and information of those within their jurisdiction. Strategic lawsuits against public participation (SLAPP lawsuits) have persisted against human rights defenders and journalists, brought typically by companies and other private actors, particularly to control and restrict information critical of unethical or non-human rights compliant business practices.

Additionally, three emerging trends merit closer attention and remediation:

1. The Thai government has actively attempted to further constrict civic space online by placing pressure on and co-opting technological ('tech') companies and online networks to censor online expression and information. Some social media platforms have complied with court-enforced demands from the Thai government to block or remove content on their platforms, under pressure imposed through State abuse of already deficient domestic laws, and in consideration of their profit-driven mode of operation. When tech companies like Facebook and Twitter have resisted some of these demands, the Thai government has

responded by filing legal complaints against these entities to intimidate or force them into cooperating.

2. Amidst the COVID-19 pandemic, the Thai government has further restricted freedom of expression and access to information online, under an overly expansive justification of public health and curbing “false information”. While extraordinary and effective measures are required to combat an unprecedented health crisis and protect the right to health, it is apparent that the government has imposed limitations on online expression and information that are unnecessary and disproportionate, in contravention of international human rights law and standards.
3. The COVID-19 pandemic has also shone a spotlight on the inadequacy of the Thai legal system in responding to expression inciting discrimination or violence against people from Myanmar, who have been targeted online for a second wave of COVID-19 in the country. This is despite the Thai government’s obligations to prohibit by law such online vitriol in a manner that is in line with the principles of legality, proportionality and necessity. Tech companies, particularly Facebook, have a responsibility to respect human rights on their platforms, which entails that they undertake measure of due diligence to regulate online content. The responsibility of regulating such content, including the use of artificial intelligence to combat such prohibited speech, however, not only falls on these platforms but also on the State to ensure that companies abide by their corporate responsibility and that mechanisms for redress and remedy are provided for violations online.

II. International law and standards

International human rights law and standards anchor the analysis in this report of the conduct of the Thai authorities in their efforts to monitor, delimit and censor online content to the detriment of human rights both online and offline. This section sets out Thailand's international legal obligations and key international legal standards governing the rights to freedom of expression, opinion, information, privacy, health, association and political participation to provide the starting point for analysis.¹⁸

i. Rights to freedom of expression, opinion and information

Article 19 of International Covenant on Civil and Political Rights (ICCPR) – to which Thailand is a State party – guarantees the right of each individual to freedom of expression and opinion. This includes the freedom to seek, receive and impart information and ideas through any media and regardless of frontiers.¹⁹

The UN Human Rights Committee, the body tasked with interpreting and supervising the implementation by States Parties to the ICCPR, has set out the nature and scope of the obligations of States to respect and ensure the right to freedom of expression in a General Comment.²⁰ The Committee clarified that the rights to freedom of expression and opinion form the “foundation” of a free society in ensuring the “transparency and accountability” crucial to the

¹⁸ See also ICJ *Dictating the Internet* Report, 2019, section II.

¹⁹ Article 19 of the ICCPR provides: “1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom 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. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

²⁰ UN Human Rights Committee, *General Comment No. 34*, CCRPR/C/GC/34, 12 September 2011 (‘CCPR/C/GC/34’), paras. 2, 3.

promotion and protection of many other rights.²¹ States have obligations to protect and promote the freedom to engage in “political discourse, commentary on public affairs, discussion of human rights, journalism and religious discourse”, including through non-verbal means and “electronic and internet-based modes of expression”.²² With the proliferation in modern times of “internet and mobile based electronic information dissemination systems”, States are required to take steps to protect the important function of independent media online and offline to ensure “free communication of information and ideas... between citizens, candidates and elected representatives” and to “inform public opinion”.²³

Both treaty and non-treaty-based standards have affirmed that international law and standards apply online. In July 2018, the UN Human Rights Council adopted by consensus a Resolution affirming that “the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice”.²⁴

Legal bases for restricting or limiting the right to freedom of expression and information

As a general matter, the right to freedom of expression is only subject to restriction under the strict and narrow conditions set out in article 19(3) of the ICCPR, which applies to online and offline expression. Article 19(3) provides that that any restrictions

21 CCPR/C/GC/34, paras. 2, 3.

22 CCPR/C/GC/34, para. 11.

23 CCPR/C/GC/34, paras. 13, 15, 16.

24 UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UN Doc. A/HRC/38/L.10/Rev.1, 4 July 2018 (‘A/HRC/38/L.10/Rev.1’), p. 3. This was similarly affirmed in a Joint Declaration on Freedom of Expression and the Internet issued by four independent experts from the UN and regional systems covering questions of freedom of expression in June 2011: United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and the Internet*, 1 June 2011, para. 1a. available at: <https://www.osce.org/fom/78309?download=true>.

must meet the tests of legality, legitimate purpose, necessity, proportionality and non-discrimination.

Article 19(3) specifically provides that rights protected under article 19 may only be “subject to certain restrictions” as provided by law and necessary for the purpose of ensuring respect of the rights or reputations of others; or protecting national security, public order or public health or morals. These are exhaustive of the legitimate purposes for which expression may be restricted.

That a restriction be “provided by law” carries with it the requirement that it comply with the principle of legality. That principle dictates that laws imposing restrictions on the rights to free expression and opinion must be formulated with enough precision to: (i) enable individuals to ascertain and adjust their conduct; (ii) provide guidance to those charged with implementing the laws to ensure they can clearly identify which types of expression fall under restrictions and not exercise “unfettered discretion” in restricting freedom of expression; and (iii) not contravene other international human rights law or standards.²⁵

Any restriction must be applied without discrimination based on any protected status.²⁶ Additionally, any restriction must, in the express terms of article 19(3), meet the principles of necessity and proportionality, even where the restriction is pursued for a legitimate purpose. The UN Human Rights Committee has clarified that the test of necessity entails that limitations must not be imposed where protection can be provided through less restrictive measures, while the test of proportionality ensures that limitations are proportionate to their function, not overbroad and are the “least intrusive instrument amongst others to achieve their protective function”.²⁷

25 CCPR/C/GC/34, paras. 25, 26.

26 CCPR/C/GC/34, para. 26; UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <https://www.refworld.org/docid/453883fa8.html>.

27 CCPR/C/GC/34, paras. 33 to 35.

The State's obligation to respect, protect and fulfil the rights to free expression, opinion and information online and offline must be upheld by all branches of the State – executive, legislative and judicial – and other public or governmental bodies.²⁸ It also extends to protection for individuals from “any acts by private persons or entities that would impair the enjoyment of the freedoms ... to the extent [they] are amenable to application between private persons or entities”.²⁹ This obligation further entails that these rights are protected under domestic law, including provision for remedies when the rights are violated.³⁰ In this respect, “harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment” solely for the exercise of free expression rights amounts to a violation and “any form of effort to coerce the holding or not holding of any opinion” is prohibited under the ICCPR.³¹

Obligations to restrict expression, including for speech inciting discrimination, hostility or violence

Article 20 of the ICCPR not only permits, but expressly requires States to impose certain restrictions on freedom of expression. Article 20 provides that any “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” shall be prohibited by law.³²

The UN Human Rights Committee has made clear that articles 19 and 20 of the ICCPR are “compatible with and complement each other” and limitations provided for under article 20 must comply with and be justified “in strict conformity” with article 19.³³ The former UN Special Rapporteur on freedom of expression has emphasized that domestic laws to combat hate speech or incitement to violence

28 UN Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004 ('CCPR/C/21/Rev.1/Add.13'), para. 4, available at: <https://www.refworld.org/docid/478b26ae2.html>.

29 CCPR/C/GC/34, para. 7.

30 CCPR/C/GC/34, para. 8.

31 CCPR/C/GC/34, paras. 9, 10.

32 Article 20 provides: “1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

33 CCPR/C/GC/34, paras. 50, 52.

online and offline must adhere to the “requirements of legality, necessity and proportionality, and legitimacy” and ensure “robust public participation”, taking guidance from articles 19 and 20 of the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.³⁴

ii. Right to privacy

Article 17 of the ICCPR protects the right of every individual against arbitrary or unlawful interference with his or her privacy.³⁵ The UN General Assembly has affirmed that this and the free and independent exercise of the rights to expression and opinion are interdependent.³⁶ In its Resolution on Human Rights in the digital age, the UN General Assembly also stressed that technological advancement had expanded the capacity of States and non-State actors, including business enterprises, to collate, surveil and intercept data in ways that violated the right to privacy, and affirmed that States were obliged under international human rights law to prevent these violations in the context of digital communications.³⁷

As the UN Human Rights Council and the UN Office of the High Commissioner of Human Rights have affirmed, the principles of legality, legitimacy, necessity and proportionality apply to the right to privacy in the same manner as they do to freedom of

34 *Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression*, UN Doc. A/74/486, 9 October 2019 (‘A/74/486’), para. 57(b); Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights: Addendum*, UN Doc. A/HRC/22/17/Add.4 (‘Rabat Plan of Action’), 11 January 2013, available at: https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

35 Article 17 of the ICCPR provides: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks”.

36 UN General Assembly, *The right to privacy in the digital age*, A/RES/68/167, 18 December 2013, available at: <https://undocs.org/A/RES/68/167>.

37 *Ibid.*

expression and other fundamental freedoms.³⁸ These principles are relevant and enforceable both offline and online according to the Necessary and Proportionate Principles, particularly with regard to communications surveillance technologies and techniques.³⁹

iii. Rights to freedom of association, peaceful assembly and political participation

The rights to freedom of association, peaceful assembly and political participation are protected respectively under articles 21, 22 and 25 of the ICCPR.⁴⁰ These rights are also often exercised online. Their respective provisions under the ICCPR provide in the same terms as article 19, that restrictions to be placed on these rights must also comply with the principles of legality, legitimacy, necessity and proportionality. The principle of non-discrimination also applies to these rights.

38 *Report of the High Commissioner on Human Rights on the Right to Privacy in the Digital Age*, UN Doc. A/HRC/39/29, 3 August 2018, para 10; Human Rights Council, *The right to privacy in the digital age*, UN Doc. A/HRC/RES/34/7, 7 April 2017, para. 2.

39 *Necessary and Proportionate International Principles on the Application of Human Rights to Communications Surveillance*, May 2014, available at: <https://necessary-andproportionate.org/principles>. The ICJ is also a signatory to these Principles. In his 2014 report following on from resolution 68/167, the UN Office of the High Commissioner for Human Rights referred to the Necessary and Proportionate Principles, reiterating that the “overarching principles of legality, necessity and proportionality” apply to limitations on the right to privacy online. See *Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/27/37, 30 June 2014, para. 23.

40 Article 21 of the ICCPR provides: “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others”. Article 22 provides: “1. Everyone shall have the right to freedom of association with others, including the right to form trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.” Article 25 provides: “Every citizen shall have the right and the opportunity, without ... unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives”.

The rights to free expression, opinion, information and privacy often concurrently engage the rights to peaceful assembly, freedom of association and political participation within the context of communications online. The UN Human Rights Committee has acknowledged that restricting communication technologies can impede the right to assembly as they “offer the opportunity to assemble either wholly or partly online and often play an integral role in organizing, participating in and monitoring physical gatherings”.⁴¹ Thus, States must not “block or hinder Internet connectivity in relation to peaceful assemblies” or adopt “geotargeted or technology-specific interference” to restrict connectivity or access to content.⁴² States should also ensure that “the activities of Internet service providers and intermediaries do not unduly restrict assemblies or the privacy of assembly participants”.⁴³ The Committee also noted that although surveillance technologies “can be used to detect threats of violence and thus to protect the public”, they may also “infringe on the right to privacy and other rights of participants and bystanders and have a chilling effect”.⁴⁴

Human rights defenders

The UN Declaration on Human Rights Defenders provides for particular protections for human rights defenders, affirming that States must put in place legislative, administrative and other measures to ensure protection of their rights to association, assembly and political participation, along with their expression and privacy rights, both offline and online.⁴⁵

41 UN Human Rights Committee, *General Comment No. 37 on Article 21: the right to peaceful assembly*, UN Doc. CCPR/C/GC/37, 17 September 2020 (“CCPR/C/GC/37”), para. 10, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

42 CCPR/C/GC/37, para. 34.

43 *Ibid.*

44 CCPR/C/GC/37, para. 10.

45 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144, December 1998 (“UN Declaration on Human Rights Defenders”), available at: <https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

iv. Right to health

Expression and information online are not only connected with the exercise of other civil and political rights, but also with the promotion and protection of economic, social and cultural rights. This includes, in particular, the right to health. To this end, Thailand has the obligation to respect, protect and fulfill the right to the "enjoyment of the highest attainable standard of physical and mental health" as a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁶

Within the context of the COVID-19 pandemic, articles 12(1) and 12(2)(c) to (d) of the ICESCR require Thailand to take steps to achieve the "prevention, treatment and control of epidemic, endemic, occupational and other diseases", as well as the "creation of condition which would assure to all medical service and medical attention in the event of sickness".⁴⁷

The UN Committee on Economic, Social and Cultural Rights (CESCR), the supervisory body for the ICESCR, has made clear that the right to health includes the obligation to ensure accessibility of health facilities, goods and services to all individuals without discrimination, including access to information as an "integral component of the right to health".⁴⁸ This includes "the right to seek, receive and impart information and ideas concerning health issues", without infringing upon the right to maintain privacy and confidentiality of health-related data.⁴⁹

⁴⁶ ICESCR, article 12(1).

⁴⁷ Article 12(2) provides: "The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness".

⁴⁸ UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc. No. E/C.12/2000/4, 11 August 2000 ('GC No. 14'), paras. 3, 11, 21 – 23, 34 – 37, 44.

⁴⁹ GC No. 14, para. 12(b).

Respecting and protecting the right to health obliges Thailand as a State party to ensure non-discriminatory and universal access to health-related information; allow people to seek, receive and share ideas concerning health issues; abstain from “censoring, withholding or intentionally misrepresenting” health-related information; and refrain from obstructing people’s participation in health-related matters.⁵⁰

These obligations carry certain specificities in the midst of a public health emergency. The CESCR has indicated that COVID-19-related information must be provided by State authorities on a “regular basis, in an accessible format and in all local and indigenous languages” as a measure to combat false information on the virus and to “reduce the risk of transmission of the virus.”⁵¹ The State is also obliged to ensure affordable internet services, necessary technology for effective information dissemination and refrain from shutting down or otherwise limiting access to the internet.⁵²

The former UN Special Rapporteur on freedom of expression highlighted that, in the context of COVID-19, the State must: (i) ensure access to information held by authorities relating to the crisis, including an obligation to “provide information that is as accurate as possible” and “clear and honest guidance” to enable not only the State to understand the concerns of the public but also individuals to ascertain how to manage their fears; (ii) maintain access to the internet for all; (iii) promote and protect independent media so that the public can adequately exercise their right to information to “take appropriate steps to protect themselves and their communities”; (iv) control the spread of false information on the virus online, without infringing on rights protected under article

50 GC No. 14, paras. 3, 12(b), 34, 35, 44, 50. See also ICJ, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses*, September 2020 (‘ICJ Global COVID-19 report 2020’), pp. 24 to 25, available at: <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>

51 UN Committee on Economic, Social and Cultural Rights, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, UN Doc. No. E/C.12/2020/1, 17 April 2020, para. 18, available at: <https://undocs.org/E/C.12/2020/1>. See also ICJ Global COVID-19 report 2020, pp. 104 to 105.

52 *Ibid.*

19 of the ICCPR; and (v) ensure health surveillance to manage the crisis protects the right to privacy.⁵³

v. Business and Human Rights

The obligation to protect human rights, such as freedom of expression and information and the other rights highlighted above, includes the obligation to protect from the conduct of private entities, including businesses that would impair the enjoyment of human rights.⁵⁴

The UN Guiding Principles on Business and Human Rights (UNGPs), endorsed by the UN Human Rights Council, develop these obligations to protect and also makes clear that there is a concurrent responsibility for business enterprises to respect human rights in the context of business operations.⁵⁵ The Guiding Principles contain a framework for business and human rights which rests on three pillars: (i) the State's duty to protect against human rights violations; (ii) the corporate responsibility to respect human rights; and (iii) greater access to effective remedy – judicial and non-judicial – by victims of abuses.⁵⁶

States retain a primary duty to bring into effect appropriate and effective laws, policies and regulations to ensure protection against human rights violations and abuses online, even with respect to

53 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Disease pandemics and the freedom of opinion and expression*, UN Doc. No. A/HRC/44/49, 23 April 2020, available at: <https://undocs.org/A/HRC/44/49>.

54 CCPR/C/21/Rev.1/Add.13, para. 8; CCPR/C/GC/34, para. 7; UN Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, UN Doc. CRC/C/GC/16, 17 April 2013, para. 28; UN Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, UN Doc. E/C.12/GC/24, paras. 14 – 22.

55 The Guiding Principles were endorsed by the UN Human Rights Council in 2011 in Resolution 17/4: UN Human Rights Council, Resolution adopted by the Human Rights Council 17/4: *Human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/17/4, 6 July 2011.

56 OHCHR, *UN Guiding Principles on Business and Human Rights*, HR/PUB/11/04, 2011 ('UNGPs'), available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf

the exercise of rights on platforms regulated entirely by private tech companies.⁵⁷ This duty extends to taking necessary and appropriate measures to ensure that where violations and abuses occur, victims have access to effective and adequate remedy through judicial mechanisms or other administrative, legislative or regulatory means.⁵⁸ While tech companies have the responsibility to respect human rights in the course of their business operations and provide effective and adequate remedy for any violations, States are obliged to exercise an overarching oversight and regulatory role to ensure that companies comply with these obligations.⁵⁹

With respect to the duties of business enterprises, the UNGPs provide that all companies, including tech companies, have a responsibility to “respect human rights”, which “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations”.⁶⁰ This includes the responsibility to “avoid infringing on human rights”, including the rights to freedom of expression and information, association and privacy online; to “avoid causing or contributing to adverse human rights impacts through their own activities”; and to “take adequate measures” to “prevent, mitigate or remediate” such impacts, including putting in place “policies and due diligence processes” to ensure rights are respected.⁶¹

57 UNGPs, pp. 3 – 10.

58 UNGPs, pp. 27 – 35.

59 UNGPs, pp. 4 – 6.

60 UNGPs, pp. 13 – 18.

61 *Ibid.*

III. Use of non-human rights compliant laws

Thailand has adopted a range of laws that are both deficient on their face and have been systematically abused by the authorities to arbitrarily restrict and interfere with civic space online. At face value, these laws have purposes that appear legitimate, ranging from protecting the reputation of persons and the monarchy to controlling the spread of false information online. However, they are not human rights compliant. The deficiencies include vague and overbroad provisions, and the provision of harsh penalties incompatible with the requirements of necessity and proportionality.

The following section provides a summary of these laws that are non-human rights compliant. The majority of these laws have already been documented and analyzed by the ICJ in the ICJ's regional report in December 2019 and other publications of the ICJ.⁶² Two new trends have emerged since the release of that report: first, the rampant abuse of the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005) ("Emergency Decree"), in conjunction with other existing laws, to restrict the rights to free expression, association and peaceful assembly in relation to the anti-government protests; and second, the use of the Computer-related Crimes Act B.E. 2560 (2017) ("CCA") and the Emergency Decree to restrict the spread of alleged false information on COVID-19.

Articles 112 and 116 of the Criminal Code, criminal defamation provisions under the Criminal Code, the Computer-related Crimes Act, the Cybersecurity Act and contempt of court provisions are laws which were covered in depth in the ICJ's 2019 regional report. These have been reproduced summarily here as they remain relevant to emerging cases and trends in Thailand in 2020 and 2021. For further details and background, reference should be made back to the 2019 regional report.

⁶² ICJ Dictating the Internet Report, 2019.

i. Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005)⁶³

Since March 2020, Thailand has been under a state of emergency pursuant to the **Emergency Decree**, as a measure to contain the COVID-19 pandemic.⁶⁴ Additionally, in response to growing political unrest and pro-democracy protests, Prime Minister Prayut Chan-o-cha invoked sections 5, 9 and 11 of the decree to declare a "serious emergency situation"⁶⁵ in all areas of Bangkok on 15 October 2020,⁶⁶ which was lifted a week later.⁶⁷ The powers conferred by the decree and its related orders and regulations were invoked by the authorities to unduly restrict freedom of expression, information and association, both in the contexts of COVID-19 and the anti-government protests, together with the other laws covered below. According to the Thai Lawyers for Human Rights (TLHR), between 18 July 2020 and 31 January 2021 there have been 86 cases where at least 222 protesters and activists were charged for violating the Emergency Decree solely for exercising their right to peaceful assembly.⁶⁸

63 In October 2020, the ICJ published a legal briefing analyzing the implementation of the Emergency Decree in response to protests in 2020. The briefing reiterates the ICJ's recommendations and concerns made since 2005 that the longstanding Emergency Decree and emergency measures taken are non-compliant with Thailand's international human rights obligations. ICJ, *The Implementation of Thailand's Emergency Decree in Response to Protests in 2020*, 22 October 2020 ('ICJ Emergency Decree Briefing'), available at: <https://www.icj.org/wp-content/uploads/2020/10/Thailand-Protests-Legal-Briefing-2020-ENG.pdf>.

64 The Straits Times, "Thailand to invoke emergency decree as coronavirus cases soar", 24 March 2020, available at: <https://www.straitstimes.com/asia/se-asia/thailand-to-declare-1-month-emergency-on-march-26>; TAT News, "Thailand extends Emergency Decree for eleventh time until 31 May 2021", 31 March 2021, available at: <https://www.tatnews.org/2021/03/thailand-extends-emergency-decree-for-eleventh-time-until-31-may-2021/>.

65 ICJ Emergency Decree Briefing, p. 1.

66 Declaration of a Serious Emergency Situation in Bangkok.

67 Bangkok Post, "State of emergency ends in Bangkok", 22 October 2020, available at: <https://www.bangkokpost.com/thailand/politics/2006459/state-of-emergency-ends-in-bangkok>.

68 In 23 cases, defendants were charged for violating the Emergency Decree during the declaration of a serious emergency situation in Bangkok. 63 defendants were charged for violating the Emergency Decree to contain the COVID-19 pandemic. TLHR, "January 2021, Cases associated with assembly and association were increased to 183 cases with 291 defendants", 1 February 2021, available at: <https://tlhr2014.com/archives/25668>.

Section 9(3) of the Emergency Decree allows the government to issue regulations to prohibit “the press release, distribution or dissemination of letters, publications or any means of communication containing texts which may instigate fear amongst the people or is intended to distort information which misleads understanding of the emergency situation to the extent of affecting the security of state or public order or good moral of the people”.

In March 2020, Regulation No. 1 Pursuant to Section 9 of the Emergency Decree was issued. The Regulation prohibits the presentation or dissemination of information through any media “featuring content on the COVID-19 which is false or may instigate fear among the people, or to intentionally distort information which causes misunderstanding of the emergency situation to the extent of affecting public order or the good morals of people”.⁶⁹

In response to the protests, in October 2020 the Commissioner General of the Royal Thai Police (RTP), citing his power under Section 9 of the Emergency Decree, issued an announcement banning “audio transmitters, mobile phones, communication devices, electronic devices, or other devices that can present news, or distribute pictures, sounds or messages which may instigate fear amongst the people or is intended to distort information which misleads understanding of the emergency situation to the extent of affecting the security or state or public order or good moral of the people throughout the Kingdom”.⁷⁰

The vague language of “security”, “public order” and “serious situation” in the aforementioned provisions has not been accompanied by a clear delineation of what these overbroad terms actually mean, as required to comply with the principles of legality and legitimacy under article 19(3) of the ICCPR.⁷¹ This has allowed for

69 Clause 6, Regulation Issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (No. 1), 25 March 2020, available at: <https://www.mfa.go.th/en/content/115867-regulation-issued>.

70 Announcement of the Chief Official Responsible for Remedying the Serious Emergency Situation No. 4/2563, dated 16 October 2020, available at: <https://news.thaipbs.or.th/content/297443>.

71 ICJ, TLHR and CrCf, “Joint Supplementary Submission to the UN Human Rights

a broad scope of disproportionate executive action to be taken in the implementation of the law, as evident from the cases below.

ii. Articles 112 and 116 of the Criminal Code⁷²

Article 112 of the **Criminal Code** establishes the offence of *lèse-majesté* in criminalizing “(w)hoever, defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent” with three to fifteen years’ imprisonment”.⁷³

Article 116 of the **Criminal Code** criminalizes as sedition, with up to seven years of imprisonment, anyone using words, writings or other acts to:

- “bring about a change in the Laws of the Country or the Government by the use of force or violence”;
- “raise unrest and disaffection amongst the people in a manner likely to cause disturbance in the country”; or
- “cause the people to transgress the laws of the Country”.⁷⁴

The Thai government has wielded articles 112 and/or 116 to target disfavoured comments of the institution of the monarchy online, together with the CCA.⁷⁵

Committee”, 24 April 2020, p. 9, available at: <https://www.icj.org/wp-content/uploads/2020/04/Thailand-UN-Human-Rights-Committee-Supplementary-Submission-2020-ENG.pdf>.

72 See ICJ Dictating the Internet Report, 2019, pp. 62 – 69 for more details.

73 English translation of Thai Criminal Code B.E. 2499 (1956), available at: <http://library.siam-legal.com/thai-law/criminal-code-royal-family-sections-107-112/>

74 English translation of Thai Criminal Code B.E. 2499 (1956), available at: <https://library.siam-legal.com/thai-law/criminal-code-offense-internal-security-sections-113-118/>.

75 *Joint Submission of the International Commission of Jurists and Thai Lawyers for Human Rights 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*, 6 February 2017, paras. 42, 63, available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_CSS_THA_26602_E.pdf; TLHR, “Changes in Thailand’s *lèse majesté* prosecutions in 2018”, 15 January 2019, available at: <https://tlhr2014.com/en/archives/10431>; ICJ Dictating the Internet Report, 2019, footnote 531.

The UN Human Rights Committee has recommended that Thailand review article 112 of the Criminal Code.⁷⁶ The Committee noted that “the imprisonment of persons for exercising their freedom of expression” violates their right to freedom of expression, in failing to comply with the strict requirements of article 19(3) of the ICCPR.⁷⁷ This is in line with the Committee’s General Comment No. 34 that provides that all public figures are “legitimately subject to criticism and political opposition”, and “laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned”.⁷⁸

iii. Criminal Defamation⁷⁹

The offence of criminal defamation under sections 326 and 327 of the **Criminal Code** carries a maximum sentence of one year’s imprisonment, a fine of up to 20,000 Baht (approx. USD 670) or both. Section 328 criminalizes defamation “by means of publication” with up to two years’ imprisonment and a fine of up to 200,000 Baht (approx. USD 6,700).⁸⁰ State authorities and businesses have abused these provisions to target persons highlighting human rights violations.⁸¹

The Human Rights Committee has made clear that criminal penalties will generally not be an appropriate sanction for defamation and imprisonment is always a disproportionate sanction and a violation of article 19 of the ICCPR.⁸²

76 UN Human Rights Committee, *Concluding observations on the second periodic report of Thailand*, UN Doc. CCPR/C/THA/CO/2 (“Concluding observations on Thailand”), 25 April 2017, paras. 37 – 38.

77 *Ibid.*

78 CCPR/C/GC/34, para. 38.

79 See ICJ Dictating the Internet Report, 2019, pp. 50 – 59 for more details.

80 English translation of Thai Criminal Code B.E. 2499 (“Thai Criminal Code”), available at: <https://www.thailandlawonline.com/laws-in-thailand/thailand-criminal-law-text-translation#326>.

81 ICJ Dictating the Internet Report, 2019, pp. 51, 53; ICJ, “Thailand: ICJ condemns the use of criminal defamation law to harass Angkhana Neelapajit”, 27 November 2019, available at: <https://www.icj.org/thailand-icj-condemns-the-use-of-criminal-defamation-law-to-harass-angkhana-neelapajit/>.

82 CCPR/C/GC/34, para. 47.

While these criminal defamation provisions have been upheld by Thailand's Bangkok Criminal Court as not violating Thailand's obligations under the ICCPR,⁸³ this holding is inconsistent with international legal obligations and will constitute an excuse for failure to perform them.⁸⁴ The UN Human Rights Committee specifically called on Thailand to consider decriminalizing defamation, noting again that imprisonment and criminal sanctions are a disproportionate means of protecting the reputation of others.⁸⁵

iv. Computer-related Crimes Act B.E. 2560 (2017)⁸⁶

Section 14 of the **CCA** is used "to suppress the expression of critical and dissenting opinions"⁸⁷ in the name of combatting alleged false information online. It criminalizes:

- Putting "into a computer system distorted or forged computer data, partially or entirely, or false computer data, in a manner that is likely to cause damage to the public" (Section 14(1));

83 ICJ Dictating the Internet Report, 2019, p. 51. This was in response to an *amicus curiae* submission made by the ICJ in a preliminary hearing in 2019 of a criminal defamation case by Thammakaset Co. Ltd against human rights defenders. See: ICJ, "Thailand: ICJ and LRWC submit amicus in criminal defamation proceedings against human rights defenders Nan Win and Sutharee Wannasiri", 25 January 2019, available at: <https://www.icj.org/thailand-icj-and-lrwc-submit-amicus-in-criminal-defamation-proceedings-against-human-rights-defenders-nan-win-and-sutharee-wannasiri/>.

84 Article 27 of the Vienna Convention on the Law of Treaties (VCLT) provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." While Thailand is not a party to the VCLT, its main provisions, including article 27 reflect customary international law, applicable to all States. The VCLT has also been recognized by the Thai courts.

85 Concluding observations on Thailand, para. 36. See also, *Statement at the end of visit to Thailand by the United Nations Working Group on Business and Human Rights*, 4 April 2018, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22915&LangID=E>.

86 See ICJ Dictating the Internet Report, 2019, pp. 50 – 51, 116, 146 for more details.

87 Concluding observations on Thailand, paras. 35 – 36.

- The “entering of false computer data” which is “likely to cause damage to the protection of national security, public safety... or cause panic to the public” (Section 14(2)); and
- Any such “false” data entry which is “an offence against the security of the Kingdom or is an offence relating to terrorism” (Section 14(3)).

These crimes are punishable with up to five years’ imprisonment, a fine of up to 100,000 Baht (approx. USD 3,340) or both.⁸⁸ Commonly wielded in conjunction with the other laws on this list, the vagueness of the legal provisions has afforded the Thai government considerable flexibility in cracking down on a gamut of protected online expression.⁸⁹

Additionally, the subsections of section 14 do not include a requirement that the alleged false information was entered with malice or ill intent,⁹⁰ despite the UN Human Rights Committee’s affirmation that States should avoid “penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice”.⁹¹

The CCA also grants the Thai government powers – notably, under sections 15 and 27 – to compel tech companies to remove online content falling foul of section 14, or risk criminal sanctions and/or fines.⁹²

⁸⁸ English translation of Computer-related Crimes Act B.E. 2560 (‘Thai Netizen, CCA’), available at: <https://thainetizen.org/docs/cybercrime-act-2017/>.

⁸⁹ These include online content critical of the monarchy, “false information” about COVID-19, and calls on social media accounts to participate in anti-government rallies. It has also previously been used to protect the reputation of persons and the monarchy.

⁹⁰ ICJ communication with partner.

⁹¹ CCPR/C/GC/34, para. 47, 49.

⁹² Section 15 reads: “Any service provider who cooperates, consents or acquiesces to the perpetration of an offense under Section 14 within a computer system under their charge shall be subject to the same penalty as that imposed upon a person perpetrated an offense under Section 14. The Minister shall issue a Ministerial Notification prescribing procedural steps of for the notification, the suppression of the dissemination of such data, and the removal of such data from a computer system.” Section 27 reads: “Any person fails to comply with the court order or competent official under Section 18 or Section 20 or fails to comply with the court order under Section 21 shall be subject to a fine not exceeding two hundred thousand baht and a further daily fine not exceeding five thousand baht per day until the relevant corrective action has been taken”.

The CCA is routinely used alongside criminal defamation provisions under the Criminal Code. In the past, section 14(1) of the CCA was used to that end,⁹³ until the amendment in 2017 excluded its use in “defamation offences as under the Criminal Code”.⁹⁴ Since the 2017 amendment, other sections, particularly section 14(2) and (3), have been used instead, in part because they do not include express wording excluding its application to defamation offences.⁹⁵

v. Cybersecurity Act B.E. 2562 (2019)⁹⁶

The **Cybersecurity Act** provides sweeping powers to government authorities to monitor online information, and search and seize electronic data and equipment. In the ICJ’s 2019 report, the use of this provision in a case pertaining to *lèse-majesté* was documented.⁹⁷ This is done under an overarching framework of protecting “national security”, through protecting against “threats” to the country’s “Critical Information Infrastructure” (“CII”), where “national security” and CII are left vaguely defined.⁹⁸

93 The ICJ made a legal submission to Thai courts noting that Section 14(1) of the CCA is not in accordance with international human rights law and standards and rule of law principles: ICJ, “Thailand: amicus in criminal defamation proceedings against human rights defender Andy Hall”, 26 July 2016, available at: <https://www.icj.org/thailand-amicus-in-criminal-defamation-proceedings-against-human-rights-defender-andy-hall/>.

94 For instance, Thammakaset filed criminal complaints against Andy Hall and Suchanee Cloitre for violations of section 14(1) of the CCA, in addition to criminal defamation under the Criminal Code; see, FIDH Thammakaset Watch. See also, *Supplementary Submission by the International Commission of Jurists, Thai Lawyers for Human Rights and Cross-Cultural Foundation on Thailand’s Implementation of the Human Rights Committee’s Prioritized Recommendations following its Review of Thailand’s Second Periodic Report at its 119th Session*, April 2020, para. 38.

95 ICJ Dictating the Internet Report, 2019, pp. 51 and 53. iLaw, “Section 14(3) of the CCA: the new version of Lese Majeste Law”, 21 February 2020, available at: <https://freedom.ilaw.or.th/node/793> (in Thai).

96 See ICJ Dictating the Internet Report, 2019, pp. 132 – 136 for more details.

97 ICJ Dictating the Internet Report, 2019, footnote 531.

98 [Thai] Cybersecurity Act B.E. 2562 (2019), section 3, available at: http://www.ratchakitcha.soc.go.th/DATA/PDF/2562/A/069/T_0020.PDF. For the English translation of the Act, and related concerns, refer to Manushya Foundation, *Thailand’s Cybersecurity Act: Towards A Human-Centered Act Protecting Online Freedom And Privacy, While Tackling Cyber Threats*, September 2019, available at: <https://www.manushya-foundation.org/study-on-cybersecurity-act>.

vi. Contempt of Court⁹⁹

Sections 31 to 33 of the **Civil Procedure Code** govern the offence of contempt of court, where section 32 provides that the “author, editor or publisher” of any “newspaper or printed matter” can be deemed to be in contempt of court if the publication, “during a trial of a case up to final judgement, contains or expresses in any way whatsoever any information or opinion intended to influence the public sentiment or the Court or any party or witness in the case, likely to prejudice the fair trial of such case”, including “misrepresentation of case facts”, “biased or inaccurate reporting”, “unfair comment” or “inducement to commit perjury”.¹⁰⁰ Section 198 of the **Criminal Code** provides that “whoever, insulting the Court or the judge in the trial or adjudication of the case, or obstructing the trial or adjudication of the Court”, shall be punished with “imprisonment of one to seven years or fined of two thousand to fourteen thousand baht, or both”.¹⁰¹

Further, section 10 of the **Regulation of the Constitutional Court governing the Court’s Procedures** B.E. 2562 (2019), issued by virtue of the provisions of the **Organic Law on the Constitutional Court** B.E. 2561 (2018), prohibits “the distortion of facts or laws in the [Constitutional] Court’s orders or judgments, or criticism of the Court’s orders or judgments in bad faith, or using rude, sarcastic, provoking or threatening words”, which allows for prosecution under section 39 of the Organic Law, at the risk of being punished with penalties of up to one month in prison and/or a fine of up to THB 50,000 (approx. USD 1,652).¹⁰²

These sections have been wielded against expression criticizing the operations or judgments of the courts, going beyond the

99 For more details, see ICJ Dictating the Internet report, 2019, pp. 102 – 105.

100 English translation of Thai Civil Procedure Code B.E. 2477, available at: https://www.imol.in.org/doc/amlid/Thailand_The%20Civil%20Procedure%20Code.pdf

101 Thai Criminal Code.

102 The law also states that the court can issue a warning, or order an offender to leave its premises.

permissible purpose of maintaining “orderly proceedings”.¹⁰³ While fair criticism of the Constitutional Court’s rulings that is not “dishonest”, “sarcastic” or “rude” is technically permitted,¹⁰⁴ these terms are vague and not clearly defined.¹⁰⁵ This is especially important since the Constitutional Court has often been involved in adjudicating cases of political significance, and the independence of the court has been questioned by observers in Thailand.¹⁰⁶ The UN Human Rights Committee’s affirmation that imprisonment and criminal sanctions are disproportionate means of protecting the reputation of others¹⁰⁷ will apply also to the use of criminal contempt powers to punish “defamation” of a government institution such as the judiciary.

103 CCPR/C/GC/34, para. 31.

104 Section 38 of the Organic Law states that “the criticism of the Court’s orders or judgments in good faith, and not using rude, sarcastic, provoking or threatening words, are legal”.

105 Khemthong Tonsakulrungruang, “A Constitutional Court Silencing its Critics”, *Verfassungsblog*, 20 March 2018, available at: <https://verfassungsblog.de/a-constitutional-court-silencing-its-critics/>.

106 ICJ Dictating the Internet report, footnote 380.

107 CCPR/C/GC/34, para. 47; Concluding observations on Thailand, para. 36. See also, *Statement at the end of visit to Thailand by the United Nations Working Group on Business and Human Rights*, 4 April 2018, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22915&LangID=E>.

IV. State's response to protests and expression critical of the authorities

The mass youth-led pro-democracy protests in October saw the Thai authorities respond with a whirlwind of new measures aimed at restricting access to information, including expression deemed critical of the government or otherwise disfavoured. Between 15 and 22 October 2020, a "serious emergency situation" was declared in Bangkok,¹⁰⁸ and the authorities escalated their abuse of the legal provisions in the CCA and Emergency Decree. These measures were used to target social media users, journalists and media platforms.

i. Blocking online content by individual users on social media platforms

Since July 2020, the Thai authorities have intensified their suppression of disfavoured expression on online platforms in light of the protests. The authorities have demanded social media platforms to remove and block online content deemed to violate existing laws through court orders. These constitute unnecessary and disproportionate restrictions on the right to freedom of expression and access to information.

Legal process of blocking and restricting content

The Ministry of Digital Economy and Security (MDES) is the key agency which files requests to the courts to issue orders to remove and block online content.¹⁰⁹ Under section 20 of the CCA, the Minister of the MDES may appoint a "competent official" who may, with approval of the Minister, apply for a motion, together with evidence, to the court with jurisdiction to block the dissemination

¹⁰⁸ Declaration of a Serious Emergency Situation in Bangkok.

¹⁰⁹ Section 4 of the CCA states that the Minister of the MDES is vested with the power to "have charge and control of the execution" of the CCA.

of computer data.¹¹⁰ This includes data that “may affect the security of the Kingdom as prescribed in Book II, Title I or Title I/I of the Criminal Code”, which contains section 112 and 116 of the Criminal Code.¹¹¹ It also includes data that “is contrary to public order or good morals”,¹¹² although “public order” and “good morals” are not defined.

After the court has issued the order to suppress the dissemination of or remove the data,¹¹³ the competent official may do this themselves or order the relevant service providers¹¹⁴ to carry out the court order. These orders will also be submitted to the National Broadcasting and Telecommunications Commission (NBTC) for them to instruct the relevant Internet service providers and telecommunication companies to comply with such orders.¹¹⁵

In relation to the protests, on 15 October 2020, the MDES established the “Center Monitoring the Protest Situation”, which worked closely with security forces to identify online data that violate the CCA and the Emergency Decree, and submit complaints to the court to block such content.¹¹⁶

Instances of content being blocked and restricted

It was reported that the Facebook group “**Royalist Marketplace**”, a group with more than one million members which shared sensitive information on the monarchy on the platform, was blocked in Thailand on 24 August 2020.¹¹⁷ On 9 October 2020, it was reported that a video of human rights defender and lawyer **Anon Nampa**

110 Thai Netizen, CCA, Section 20.

111 Thai Netizen, CCA, Section 20(2).

112 Thai Netizen, CCA, Section 20(3).

113 This should only include specific illegal content, and not entire online platforms, according to the ruling of the Criminal Court. This will be discussed in greater detail at pp. 50 – 53.

114 Thai Netizen, CCA, Section 20.

115 Thai Netizen, CCA, Section 20; Thairath, “DES’ Operations”, 27 October, available at: <https://www.thairath.co.th/news/business/1961776> (in Thai).

116 RYT9, “DES submitted complaints against social media news channels for violating the Emergency Decree”, 20 October 2020, available at: <https://www.ryt9.com/s/iq01/3168465> (in Thai).

117 Prachatai, “Royalist Marketplace returns”, 25 August 2020, available at: <https://prachatai.com/english/node/8748>. The Group’s founder opened a new group on the following day. At the time of writing this report, the new Group is still accessible.

calling for reform posted on YouTube was blocked by the company for violating the CCA.¹¹⁸ On 16 October 2020, access to online petition site Change.org was blocked, reportedly after it hosted a petition calling for the King to be declared *persona non grata* in Germany.¹¹⁹ On 4 January 2021, it was reported that YouTube blocked access within Thailand to a popular music video by Thai rappers, **Rap Against Dictatorship**, for content critical of the Thai authorities.¹²⁰

ii. Prosecution of individual users for social media content

The Thai government has also filed criminal complaints and charges against social media users. Cases have been brought pursuant to articles 112 and 116 of the Criminal Code, section 14 of the CCA and contempt of court provisions. The Thai authorities also used these provisions to target alleged “false information” on the government’s response to the COVID-19 pandemic (see section VI).

Use of the CCA, article 116 of the Criminal Code and contempt of court

In February 2020, the alleged owner of a Twitter account named “**Niranam**” (meaning “anonymous” in Thai) was arrested and charged with eight counts of violations of section 14 of the CCA for posting comments related to the monarchy.¹²¹ On 19 August 2020, the MDES filed a complaint to the RTP against **Dr. Pavin Chachavalponpun** for six offences under section 14 of the CCA,

118 Prachatai, “YouTube locally blocks speech about monarchy reform at Thai government’s request”, 9 October 2020, available at: <https://prachatai.com/english/node/8833>.

119 BBC, “Thailand blocks Change.org as petition against king gains traction”, 16 October 2020, available at: <https://www.bbc.com/news/world-asia-54566767>.

120 Thai Enquirer, “YouTube Geoblocks critical rap group’s video by request of Thai government”, 4 January 2021, available at: <https://www.thaienquirer.com/22397/youtube-geoblocks-critical-rap-groups-video-by-request-of-thai-government/>.

121 Khaosod English, “Twitter User Gets More Charges Over Royal Criticism”, 10 June 2020, available at: <https://www.khaosodenglish.com/news/crimecourtscalamity/2020/06/10/twitter-user-gets-more-charges-over-royal-criticism/>; TLHR, “อัยการสั่งฟ้องคดี “นิรนาม” ข้อหาพ.ร.บ.คอมพิวเตอร์ฯ ทั้งหมด 8 ข้อความ”, 18 January 2021, available at: <https://tlhr2014.com/archives/25252>.

as the administrator of “Royalist Marketplace”.¹²² In September 2020, it was reported that the MDES had requested the police to prosecute five social media users on charges of committing sedition and putting false information into a computer system.¹²³ On 4 December 2020, the Director of the Constitutional Court’s litigation office filed charges of contempt of court under section 198 of the Criminal Code against **Parit Chiwarak (Penguin)**, a student protest leader, for his Facebook posts criticizing the Court’s ruling to acquit Prime Minister Prayut Chan-o-cha in a case of political significance.¹²⁴

Use of article 112 of the Criminal Code

Since the 2014 coup, there has been a significant increase in the use of *lèse-majesté* laws to silence disfavoured comment in relation to the monarchy, before its use was temporarily suspended three years ago.¹²⁵ According to the Prime Minister Prayut Chan-o-cha, this was because the King “has mercy and asked that it not be used”.¹²⁶

The suspension of its use was short-lived. In 2020 and 2021, Thai authorities began invoking article 112 of the Criminal Code again to curtail legitimate online expression.¹²⁷ TLHR documented

122 Prachatai, “Royalist Marketplace returns”, 25 August 2020, available at: <https://prachatai.com/english/node/8748>.

123 This was done presumably under article 116 of the Criminal Code and section 14 of the CCA. Bangkok Post, “Govt taking legal action against major social media providers”, 24 September 2020, available at: <https://www.bangkokpost.com/thailand/politics/1990975/govt-taking-legal-action-against-major-social-media-providers>.

124 The Thaiger, “Thai Constitutional Court official files contempt charge against protest leader”, 4 December 2020, available at: <https://thethaiger.com/hot-news/protests/constitutional-court-official-files-contempt-charge-against-protest-leader>. This mirrors the similar case of Anon Numpa, a human rights lawyer, who faced charges in 2017 for contempt of court and under the CCA, in relation to a Facebook post he made criticizing a verdict by the Khon Kaen Court finding seven anti-junta activists guilty for their peaceful assembly; see, Prachatai English, “Human rights lawyer faces computer crime charges for FB post”, 14 December 2017, available at: <https://prachatai.com/english/node/7511>.

125 FIDH documented that no legal action has been taken against individuals under Article 112 since July 2017. FIDH, “Lèse-majesté must not be used to criminalize pro-democracy protest leaders and participants”, 25 November 2020, available at: <https://www.fidh.org/en/region/asia/thailand/lese-majeste-must-not-be-used-to-criminalize-pro-democracy-protest>.

126 Bangkok Post, “HM urges ‘mercy’ for any slurs”, 16 June 2020, available at: <https://www.bangkokpost.com/thailand/general/1935280/hm-urges-mercy-for-any-slurs>.

127 This comes after an announcement by Prime Minister Prayut Chan-o-cha that “all

that between November 2020 and 14 February 2021, at least 59 individuals were charged for *lèse-majesté* offences in 44 cases.¹²⁸

On 8 February 2021, a group of independent experts appointed by the UN Human Rights Council denounced this new wave of prosecutions. The Special Rapporteur on the right to freedom of opinion and expression, the five members of Working Group on Arbitrary Detention and the Special Rapporteur on the rights to peaceful assembly and of association emphasized that *lèse-majesté* laws “have no place in a democratic country” and their “increasingly harsh application has had the effect of chilling freedom of expression and further restricting civic space and the enjoyment of fundamental freedoms in Thailand”.¹²⁹

The UN human rights experts also condemned civilian court decisions sentencing individuals to disproportionately severe prison sentences under article 112 for online expression, especially in the case of **Anchan Preelert**, who was sentenced to over 43 years in prison for insulting the royal family.¹³⁰ On 19 January 2021, the Bangkok Criminal Court sentenced her to 87 years in jail for sharing clips on YouTube and Facebook considered insulting to the monarchy, on 29 counts of violating article 112 of the Criminal Code and the CCA.¹³¹ This has been noted by several news outlets as being “a new record for royal defamation prison terms”.¹³² In accordance with Thai sentencing regulations, the court halved the sentence to 43 years and six months as Anchan confessed to her offence

relevant laws and their sections” will be applied against protestors who break the law; FIDH, “Lèse-majesté must not be used to criminalize pro-democracy protest leaders and participants”, 25 November 2020, available at: <https://www.fidh.org/en/region/asia/thailand/lese-majeste-must-not-be-used-to-criminalize-pro-democracy-protest>.

128 TLHR, “Drop charges against people and guarantee their rights to access justice”, 19 February 2021, available at: <https://tlhr2014.com/en/archives/26167>.

129 OHCHR, “Thailand: UN experts alarmed by rise in use of lèse-majesté laws”, 8 February 2021, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26727&LangID=E>.

130 *Ibid.*

131 Bangkok Post, “87 years in jail for lese majeste sets new record”, 19 January 2021, available at: <https://www.bangkokpost.com/thailand/general/2053471/87-years-in-jail-for-lese-majeste-sets-new-record>; Channel News Asia, “Thai court gives record 43-year sentence for insulting king”, 19 January 2021, available at: <https://www.channelnewsasia.com/news/asia/thai-court-record-43-year-sentence-insulting-king-lese-majeste-13993078>.

132 *Ibid.*

during the trial.¹³³ Her bail request was denied.¹³⁴ According to Anchan's lawyer, she decided not to appeal against her conviction.¹³⁵ In another case, on 18 January 2021 **Siraphop Kornaroot** was sentenced to a prison term of four years and six month under the CCA and article 112 of the Criminal Code for posting critical content relating to the late King Rama IX on Thai news outlet Prachatai's website between 2009 and 2014.¹³⁶

There have also been some limited positive developments. After *lèse-majesté* and sedition cases were transferred back to civilian courts from military courts in July 2019,¹³⁷ the ICJ observed the encouraging trend of individuals being acquitted for charges under the CCA and articles 112 and 116 of the Criminal Code for online content critical of the monarchy. On 25 June 2020, the Bangkok Criminal Court acquitted **Thanet Anantawong** after he was detained for five years. He had been charged in 2015 for making five Facebook posts criticizing the National Council for Peace and Order and the army.¹³⁸ On 22 December 2020, the Bangkok Criminal Court dismissed *lèse-majesté* charge against **Patnaree Chankij**, the mother of a prominent activist, who had faced charges under Article 112 and the CCA for giving a 'ja' (a non-committal, colloquial 'yes' in Thai language) response on Facebook Messenger during a private conversation. This reply was allegedly deemed to be a

133 *Ibid.*

134 Khaosod English, "Thanathorn Claps Back at Lese Majeste Accusation, Bail Denied in Historic 112", 21 January 2021, available at: <https://www.khaosodenglish.com/politics/2021/01/21/thanathorn-claps-back-at-lese-majeste-accusation-court-denies-bail-in-historic-112-case/>.

135 ICJ communication with TLHR lawyer.

136 Khaosod English, "Blogger Convicted of 112 After Secret Trial, 5-Year Captivity", 18 January 2021, available at: <https://www.khaosodenglish.com/politics/2021/01/18/blogger-jailed-over-lese-majeste-after-secret-trial-by-military/amp/>. The jail term is shorter than the time Siraphop already spent in prison while waiting for his trial – he was remanded in prison from 2014 until his release about four years and 11 months later, in 2019.

137 ICJ Dictating the Internet Report, 2019, p. 63; ICJ, 'Thailand: end prosecution of civilians in military courts', 22 April 2019, available at: <https://www.icj.org/thailand-end-prosecution-of-civilians-in-military-courts-and-repeal-or-amend-head-of-the-ncpo-and-ncpo-orders-and-announcements-in-line-with-international-human-rights-law/>.

138 Bangkok Post, "Activist freed after almost four years", 25 June 2020, available at: <https://www.bangkokpost.com/thailand/politics/1941004/activist-freed-after-almost-four-years>.

lèse-majesté statement.¹³⁹ On 13 January 2021, the Samutprakan Provincial Court acquitted **Thanakorn**, a factory worker, who was arrested in 2015 under the CCA and articles 112 and 116 of the Criminal Code.¹⁴⁰ In some of these cases, the Court confirmed that the statement made were protected as legitimate free expression, and in other cases, the courts were of the view that the evidence was insufficient and granted the defendants the benefit of the doubt.¹⁴¹ The proceedings at the civilian courts were clearly speedier than military court¹⁴² despite the restrictions imposed during the COVID-19 outbreak.

Irrespective of these acquittals, the conduct of the State authorities in prosecutions constituted a violation of the right to freedom of expression and the right to liberty during the periods of arrest of detention. The victims should enjoy access to an effective remedy and reparation for the resulting damage, including prolonged periods of mental distress, deprivation of liberty and financial burden while undergoing these judicial proceedings.

139 Bangkok Post, 'Ja New's mother cleared of lese majeste', 22 December 2020, available at: <https://www.bangkokpost.com/thailand/general/2039459/ja-news-mother-cleared-of-lese-majeste>.

140 Prachatai, "Commenting on supporters of late King's dog not illegal, says Court", 16 January 2021, available at: <https://prachatai.com/english/node/9015>; ICJ Dictating the Internet Report, 2019, p. 68.

141 For instance, in Thanet Anantawong's case, the court was quoted as saying: "The court believes his expression of opinions was not intended to stir up sedition or disobedience among people to the extent that it would cause unrest in the kingdom or law violations. It was legitimate free speech. Since the witnesses and evidence of the plaintiff do not carry sufficient weight to warrant a guilty verdict, we've dismissed the charges": Bangkok Post, "Activist freed after almost four years", 25 June 2020, available at: <https://www.bangkokpost.com/thailand/politics/1941004/activist-freed-after-almost-four-years>.

142 The average length of the proceedings in military courts were far higher than civilian courts due to the time it takes the courts to conduct witness examinations and issue decisions. In at least one case, a *lèse-majesté* suspect decided he would rather plead guilty than await the conclusion of his lengthy. 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", 6 February 2017, pp. 15 – 16, available at: <https://www.icj.org/wp-content/uploads/2017/02/Thailand-ICCPR-Submission-ICJ-TLHR-Advocacy-Non-legal-submissions-2017-ENG.pdf>.

iii. Suppressing participation in protests by restricting the use of online platforms and messaging

The Thai authorities sought to stifle participation in the anti-government protests by targeting individual users of online platforms, in violation of their rights to freedom of expression, association and peaceful assembly. Notably, the government warned protestors that using social media to convince others to join the protests, taking selfies at the marches, livestreaming the demonstrations and posting these on social media would breach the rules of the state of emergency, and be punishable with up to two years' imprisonment.¹⁴³

Following this warning, on 16 October 2020, the RTP announced that it would submit criminal complaints under the CCA and the Emergency Decree against ten individuals who posted on Facebook and Twitter for allegedly acting to "convince others to join the protest".¹⁴⁴ The actions were said to be in violation of the Regulations issued under the Emergency Decree that ban the assembly or gathering of five or more people¹⁴⁵ and prohibit the dissemination of electronic data that may affect the security of the Kingdom¹⁴⁶ and section 14(3) of the CCA.¹⁴⁷ The UN Special Rapporteur on the rights of peaceful assembly and association, the Special Rapporteur on the promotion and protection of the right to freedom of expression and the Special Rapporteur on the situation of human rights defenders expressed serious concern

143 ICJ Emergency Decree Briefing, pp. 17 – 18. Nikkei Asia, "Thailand's young protesters keep up pace despite 'selfie rules'", 18 October 2020, available at: <https://asia.nikkei.com/Politics/Turbulent-Thailand/Thailand-s-young-protesters-keep-up-pace-despite-selfie-rules>; Human Rights Watch, "Thailand: Outspoken TV Channel Banned", 21 October 2020, available at: <https://www.hrw.org/news/2020/10/21/thailand-outspoken-tv-channel-banned>.

144 Bangkok Biz News, "ต.จ. จัดดำเนินคดีชาวโซเชียล 10 ราย ผ่านพิน 'พทท.ชวนร่วมมือ'", 16 October 2020 ("Bangkok Biz News"), available at: <https://www.bangkokbiznews.com/news/detail/902969>.

145 Section 9(2) of the Emergency Decree; Clause 1, Regulation Issued under Section 9 and Section 11 of the Emergency Decree, 15 October 2020, available at: https://thailand.prd.go.th/ewt_news.php?nid=10240&filename=index.

146 Section 9(3) of the Emergency Decree; and Clause 2, Regulation Issued under Section 9 and Section 11 of the Emergency Decree, 15 October 2020, available at: https://thailand.prd.go.th/ewt_news.php?nid=10240&filename=index.

147 Bangkok Biz News.

at the charges against social media users “under the Computer Crimes Act for using their social media accounts to call the public to participate in the [pro-democracy] rallies”.¹⁴⁸ Additionally, the MDES announced to the media that they would submit complaints to the police against social media users, with almost 300,000 URLs allegedly having violated orders under the Emergency Decree.¹⁴⁹

Additionally, the police were reported to have unsuccessfully sought action by the MDES and NBTC to restrict Free Youth’s Telegram group on the application, and to even consider suspending the application.¹⁵⁰ This effort was confirmed by the leak of a “very confidential” document on 19 October 2020, which revealed that the MDES asked the NBTC to inform Internet providers and all mobile network operators to suspend the Telegram messaging app.¹⁵¹ The letter also referred to the Order of the Commissioner General of the RTP acting as the Chief Official Responsible for Remediating the Serious Emergency Situation No. 11/2563, in which the Commissioner General of the RTP claimed that the protests of Free Youth group had been organized through Telegram application, and ordered the MDES and NBTC to delete such data from the computer system.¹⁵²

148 UN Human Rights Special Procedures, “News Release: UN experts urge Thai government to allow peaceful protests and release unconditionally those arbitrarily detained”, 22 October 2020, available at: <https://bangkok.ohchr.org/news-release-un-experts-urge-thai-government-to-allow-peaceful-protests-and-release-unconditionally-those-arbitrarily-detained/>.

149 The Nation, “Social media users violating emergency orders will be reported to police: ministry”, 19 October 2020, available at: <https://www.nationthailand.com/news/30396428>.

150 Channel News Asia, “Thai police order media probe over protests, restrict Telegram app”, 20 October 2020, available at: <https://www.channelnewsasia.com/news/asia/thailand-protests--13313776>; BBC, “Thailand protests: Authorities move to ban Telegram messaging app”, 19 October 2020, available at: <https://www.bbc.com/news/world-asia-54598956>.

151 *Ibid.*

152 According to Clause 5 of the Announcement By Virtue of Section 11 of the Emergency Decree, dated 15 October 2020, the Chief Official Responsible for Remediating the Serious Emergency Situation was granted with the power to perform any act or to perform an act to the extent that this is necessary for maintaining the security of the state, the safety of the country or the safety of the people.

These restrictive measures are, on their face, unnecessary and disproportionate. They are impermissible limits on the rights of people in Thailand to freedom of expression, association and peaceful assembly, which are protected respectively under article 19, 21 and 22 of the ICCPR. The UN Human Rights Committee has made clear that article 21 protects the associated activities of peaceful assemblies both offline and online, including the mobilization of resources, planning, dissemination of information about an upcoming event and broadcasting of or from the assembly.¹⁵³

iv. Crackdown on journalists and news outlets for coverage of protests

The Thai authorities also restricted the ability of journalists and news platforms covering the ongoing protests on online platforms.

On 16 October 2020, **Kitti Pantapak**, a reporter from Prachatai was arrested for covering the police crackdown of protests in Bangkok on Facebook Live. He was taken to Border Patrol Police Region 1 Headquarters in Pathum Thani province, a designated place of detention under the Emergency Decree. He was released a few hours later after paying a 300 baht fine (approx. USD 10), apparently for “defying an order of the authorities” under section 368 of the Criminal Code.¹⁵⁴ Similarly, it was reported in November 2020 that **Sirote Klampaiboon**, a reporter for Voice TV who had been covering the protests, was summoned by the police to face a charge for violating the Emergency Decree.¹⁵⁵

153 CCPR/C/GC/37, paras. 10, 33.

154 Prachatai, “Prachatai reporter arrested while covering police crackdown”, 16 October 2020, available at: <https://prachatai.com/english/node/8848>; ICJ Emergency Decree Briefing, pp. 13 – 14.

155 ABC News, “Thailand’s pro-democracy protestors warn of possible coup”, 28 November 2020, available at: <https://abcnews.go.com/International/wireStory/thai-pro-democracy-protesters-warn-coup-74428250>.

Additionally, government authorities attempted to abuse the legal system to shut down the online platforms of news outlets. On 20 October 2020, it was reported that the MDES had obtained closure orders from the Bangkok Criminal Court to shut down the online platforms of **Voice TV, Prachatai, The Reporters, The Standard** and **Free Youth** for allegedly disseminating “false information” about the protests, in violation of the CCA and Emergency Decree. This closure attempt came after the chief of the RTP reportedly issued an order to broadcasting regulators to scrutinize these four news agencies and “stop their broadcast, halt their publication, or delete their computer data” in case of violations of the Emergency Decree.¹⁵⁶ This order was revoked by the same court on 21 October 2020, ruling that only specific illegal content should have been blocked instead of the entire platforms. The court noted that it had ordered the closure of URLs which had resulted in the shutdown of the platforms as the MDES had failed to explain to the court that its request to close the URLs would result in such a shutdown, and that the court had been denied accurate information in the MDES’ request.¹⁵⁷

The journalists and news outlets were apparently prevented from working and subsequently sanctioned for their work, solely for the feared or actual disseminating of information critical of the government or otherwise disfavoured. To the extent that this was the intended purpose, such an objective would be illegitimate. As affirmed by the UN Human Rights Committee, it is inconsistent with article 19(3) of the ICCPR to penalize or “prohibit a site or an information dissemination system from publishing from publishing material solely on the basis that it may be critical of the government”.¹⁵⁸

156 The order was not published on the government gazette. Khaosod English, “Gov’t Orders Censorship Of 4 Media Sites, Reports Say”, 19 October 2020, available at: <https://www.khaosodenglish.com/politics/2020/10/19/govt-orders-censorship-of-4-media-sites-reports-say/>.

157 ICJ Emergency Decree Briefing, pp. 17 – 18; Bangkok Post, “Media closure order lifted”, 21 October 2020, available at: <https://www.bangkokpost.com/thailand/politics/2005927/media-closure-order-lifted>.

158 CCPR/C/GC/34, paras. 42 – 43.

These measures thus illegitimately restrict the professional duties of journalists and media platforms to investigate and impart information to the public, fundamental for individuals in Thailand to exercise their rights as residents in a participatory and free democracy. As highlighted by the UN High Commissioner for Human Rights in November 2020, “[s]ound, independent media, empowered to investigate issues and cite critical views, are key to ensuring that governance and institutions are transparent and accountable”, as they “serve as watchdogs and early warning systems for the full range of potential dysfunctions.”¹⁵⁹

To the extent that the restrictions might have been directed toward a legitimate end, such as protecting public order, they were clearly unnecessary and disproportionate, in the absence of any conduct by journalists and media to incite violence. According to the UN Human Rights Committee, penalizing a media outlet or journalist solely for being critical of the government “can never be considered to be a necessary restriction of freedom of expression”.¹⁶⁰

In addition, the accused were deprived of their right to challenge these blocking orders, as they were not summoned to the inquiry by the responsible investigator before the Court ordered the blocking of the online content.¹⁶¹ It is critical that those deprived of a right by State authorities be afforded the opportunity to challenge such the action. This is part and parcel of the right to an effective remedy, protected under ICCPR article 2(3).

However, it was reported in February 2021 that the Court informed MDES officials of a change in its guidelines for similar cases: single-party inquiries would no longer be allowed, and the MDES must now inform the Court of the address of the accused so it could summon

159 UN High Commissioner for Human Rights, “Statement at Global Conference for Media Freedom”, 16 November 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26508&LangID=E>.

160 CCPR/C/GC/34, para. 42.

161 According to Voice TV, the police who filed the complaint to the Court did not contact or send any notice to Voice TV to allow Voice TV to challenge the allegations made against them; Voice TV, “ศาลสั่งยกคำร้องปิด ‘วอยซ์ ทีวี’ เหตุนำเสนอดามเลิทธิรัฐธรรมนุญ”, 21 October 2020, available at: <https://voicetv.co.th/read/77jAPmRpc>.

him or her to the inquiry before the court orders the blocking of online content.¹⁶² This is a positive development illustrating how a court may act to protect freedom of expression online.

162 This was reported in relation to Thanathorn Juangroongruangkit's case, which will be discussed in greater detail in Part VI of this report: Bangkok Post, "Court throws out request to block Thanathorn's clip", 8 February 2021, available at: <https://www.bangkokpost.com/thailand/general/2064655/court-throws-out-request-to-block-thanathorns-clip>. At the time of this report being prepared, the ICJ was unable to procure a copy of these guidelines.

V. State's failure to protect online free expression against abuse of judicial processes

Since December 2019, criminal prosecution and civil lawsuits have continued against human rights defenders and journalists who have utilized online platforms to shed light on human rights abuses and to express and share information relating to the concerns of victims. In particular, Thammakaset Limited Company ("Thammakaset"), a Thai poultry company, has continued their abuse of strategic lawsuits against public participation, or SLAPP lawsuits to silence those speaking out on online platforms against their alleged exploitative labour practices.¹⁶³

SLAPP lawsuits are undertaken with the principal objective or curtailing or deterring public criticism or opposition to certain activities of the entity of those initiating the legal action, including in the human rights area.¹⁶⁴

According to international non-governmental organization, the International Federation for Human Rights (FIDH), Thammakaset had filed some 39 criminal and civil cases against 23 defendants as of December 2020.¹⁶⁵

The following section analyzes how the current protective framework against SLAPP lawsuits is inadequate. This is patently demonstrated by Thammakaset's continued harassment through legal processes and intimidation of journalists, civil society activists, academics, human rights defenders and their former employees.

163 Several UN experts have identified these lawsuits as SLAPP lawsuits: OHCHR, "Thailand: judicial system abused by business to silence human rights defenders", 12 March 2020, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25714&LangID=E>.

164 ICJ and Human Rights Lawyers Association, *Re: Recommendations on draft National Action Plan on Business and Human Rights (Dated 14 February 2019)*, 15 March 2019 ('ICJ Letter to Ministry of Justice, 2019'), para. 1, available at: <https://www.icj.org/wp-content/uploads/2019/03/Thailand-SLAPP-Analysis-Advocacy-Analy-sis-brief-2019-ENG.pdf>.

165 FIDH, "Thailand: Thammakaset Watch", 13 February 2020 ('FIDH Thammakaset Watch'), available at: <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

i. Inadequacy of current protective framework

Thailand's Office of the Court of Justice has taken some steps to protect against the effective "weaponization" of judicial processes by companies to muzzle free expression. These steps include amending the **Criminal Procedure Code** to add articles 161/1 and 165/2. These provisions will be analyzed in detail below.

Thailand's National Action Plan on Business and Human Rights (NAP),¹⁶⁶ in addition to the above-noted amendments, also refers to the power of public prosecutors under the Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010) ("Public Prosecutors Act") as another measure to prevent SLAPP lawsuits. These steps have, however, stopped short of amending or repealing the legal provisions that are applied against human rights defenders.

Criminal charges filed by private companies or any State agents, such as those under sections 326 to 328 of the Criminal Code and section 14 of the CCA, against human rights defenders have persisted, exposing the gaps in the current framework to protect against SLAPP cases. The present framework is not a sufficiently effective measure to "protect against attacks aimed at silencing those exercising their right to freedom of expression", in contravention of Thailand's obligations under the ICCPR.¹⁶⁷

Articles 161/1 and 165/2 of the Criminal Procedure Code

Articles 161/1 and 165/2 of the **Criminal Procedure Code** allow the courts to dismiss certain SLAPP lawsuits or similar forms of harassment through legal processes.

¹⁶⁶ Ministry of Justice, *1st National Action Plan on Business and Human Rights (2019 – 2022)* ('1st National Action Plan'), at 105, available at: <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/nap-thailand-en.pdf>.

¹⁶⁷ CCPR/C/GC/34, para. 23.

Article 161/1 allows the court to dismiss a case and forbid a refiling of a complaint if it appears to the court that a private complainant has “filed the lawsuit in bad faith or distorted facts in order to harass or take undue advantage of a defendant, or to procure any advantage to which the complainant is not rightfully entitled”.¹⁶⁸

Article 165/2 protects the right to access to justice by allowing defendants during the preliminary hearing to submit and test evidence to demonstrate that the case “lacks merit”. This is done through submitting to the court “a significant fact or law”, including “evidence, persons or materials.” Thereafter, the court “may call such persons, documents or materials to provide evidence in its deliberation of the case as necessary and appropriate, and the complainant and the defendant may examine this evidence with the consent of the court”.¹⁶⁹

The continued legal harassment of human rights defenders and other over the past year indicates that these provisions may be inadequate on their face or inadequately implemented.

First, the substantive content of articles 161/1 and 165/2 cannot serve to fully and adequately prevent SLAPP lawsuits. The ICJ previously set out its concerns on articles 161/1 and 165/2.¹⁷⁰ They can be summarized as follows. In respect of Article 161/1, this provision:

168 [Thai] Article 161/1 of the Criminal Procedure Code, available at: http://web.senate.go.th/bill/bk_data/533-6.pdf. Paragraph two states that: “the filing of a lawsuit in bad faith as stated in paragraph one includes incidents where the complainant intentionally violated a final court’s orders or judgments in another criminal case without providing any appropriate reason.”

169 [Thai] Article 165/2 of the Criminal Procedure Code, available at: http://web.senate.go.th/bill/bk_data/535-6.pdf.

170 ICJ Letter to Ministry of Justice, 2019, paras. 12 – 23; ICJ, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, 20 March 2020, pp. 4 – 8 (‘ICJ Letter to Ministry of Justice, 2020’), available at: <https://www.icj.org/wp-content/uploads/2020/03/Thailand-SLAPP-Lawsuits-Letter-2020-ENG.pdf>. For an explanation on the difference between public and private prosecutions, see, ICJ, “Thai Companies in Southeast Asia: Access to Justice for Extraterritorial Human Rights Harms”, February 2021, p. 35, available at: <https://www.icj.org/wp-content/uploads/2021/02/Southeast-Asia-Access-to-Justice-Thai-companies-Publications-Thematic-report-2021-ENG.pdf>.

1. Fails to articulate a definition for “bad faith” or explicitly protect the free exercise of human rights and fundamental freedoms;
2. Allows a case to be adjudicated upon entirely up to judicial discretion, as the court may do this *suo moto*;
3. Is limited only to private criminal complainants, and not civil complaints or public prosecutions;
4. Does not expressly guarantee the right to appeal or judicial review; and
5. May curtail an individual’s rights to access to justice and a fair trial as it prohibits complainants who are determined to have intentionally, and without appropriate reason, violated a final court’s orders or judgments in another case from filing a lawsuit.

Similarly, article 165/2 is limited in its scope because it only covers criminal cases filed by a private complainant. It does not cover civil cases or criminal cases filed by a public prosecutor, as both types of cases do not guarantee a preliminary hearing stage.

Second, the ICJ has no knowledge of either sections being applied to date to dismiss SLAPP cases, even in the limited number of cases in which the articles can be used. The ICJ has documented how applications by defence lawyers to apply article 161/1 in the Thammakaset criminal cases have been unsuccessful. Out of seven cases the ICJ monitored that were submitted to courts after article 161/1 entered into force, the courts have responded to these applications in various ways, by: (i) not considering the request at all, (ii) merely acknowledging receipt of the request without referring to them again, and/or (iii) looking into the requests but deciding not to dismiss the SLAPP.¹⁷¹ This reluctance by judges to consistently apply these provisions in these SLAPP cases against

171 ICJ Letter to Ministry of Justice, 2020, p. 6.

journalists and human rights defenders has been corroborated by other human rights organizations.¹⁷²

Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010)

While articles 161/1 and 165/2 of the Criminal Procedure Code are applicable only to criminal cases filed by a private complainant, the Public Prosecutors Act applies to criminal cases filed by a public prosecutor.

Article 21 provides that a public prosecutor who finds that a “criminal prosecution will be of no use to the general public, will affect the national safety or security, or will impair a significant interest of the State” shall refer their opinion to the Attorney-General “who may then render an order of non-prosecution”.¹⁷³

In practical terms, this provision is difficult and time-consuming to apply, as any decision not to prosecute may be rendered only by the Attorney-General.¹⁷⁴ The government indicated in its National Action Plan that the Office of the Attorney General has applied this article “in many cases”.¹⁷⁵ However, the ICJ is aware of only one instance where public prosecutors and the Attorney General have used this provision specifically to dismiss SLAPP lawsuits, and this was not in relation to the lawsuits initiated by Thammakaset.¹⁷⁶

Public prosecutors do have internal guidelines about the factors that should be taken into consideration when deciding what cases are of no use to the general public, including the background of the offender, reasons for committing the crime, repentance on the part

172 ARTICLE 19, “Thailand: End harassment of Suchanee Cloitre, human rights defenders”, 26 October 2020, available at: <https://www.article19.org/resources/thailand-end-harassment-of-suchanee-cloitre-human-rights-defenders/>.

173 [Thai] Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010), available at: <http://web.krisdika.go.th/data/law/law2/%CD23/%CD23-20-2553-a0001.pdf>.

174 ICJ Letter to Ministry of Justice, 2020, p. 8.

175 1st National Action Plan, p. 106.

176 This case pertained to the 24 pro-election activists who rallied near the MBK Shopping Center in Bangkok, and were charged for violating the junta’s order on public assembly and the Public Assembly Act: Bangkok Post, “Prosecutor rejects case against 24 pro-poll activists”, 10 March 2018, available at: <https://www.bangkokpost.com/thailand/politics/1425818/24-pro-poll-activists-wont-be-prosecuted>.

of the offender, opinion of the victims, interest of the State, and the vague and not clearly defined “public or good morals”.¹⁷⁷ The ICJ is of the view that, instead of using article 21, public prosecutors should exercise their ordinary powers to dismiss cases which fall under the scope of SLAPP lawsuits at the outset to minimize undue and negative effect of SLAPP lawsuits.

ii. Continued legal harassment of journalists and human rights defenders by Thammakaset

SLAPP lawsuits have continued being used to harass human rights defenders for their rights advocacy online following the release of ICJ’s 2019 report, through the filing of new lawsuits and continuation of existing ones. For instance, Thammakaset filed a criminal defamation complaint against **Thanaporn Saleephol** on 30 March 2020 in relation to five social media posts expressing support for other human rights defenders facing criminal complaints by the company.¹⁷⁸

Thammakaset also filed additional criminal complaints against human rights defenders who already had existing charges filed against them. The company filed a complaint of criminal defamation against former Commissioner of the National Human Rights Commission of Thailand, **Angkhana Neelaphaijit**, for two posts she made on Twitter supporting other women human rights defenders facing complaints by the company. Similarly, the company filed a criminal defamation complaint against a senior analyst at the non-governmental organization Fortify Rights, **Puttanee Kangkun**, in relation to seven Twitter posts between November 2019 and

177 Regulation of the Office of the Attorney General Regarding the Prosecution of Criminal Cases that will be of No Use to the General Public, will Affect the National Safety or Security, or Will Impair a Significant Interest of the State, 22 April 2011, available at: http://www.ago.go.th/new_law/law_230554_4.pdf. See also: Naew Na, “SLAPP: The Misuse of Laws”, 2 June 2018, available at: <https://www.naewna.com/politic/columnist/35598>.

178 Fortify Rights, “Thailand: Dismiss Complaint, Prevent Spurious Defamation Cases by Thammakaset”, 21 April 2020, available at: <https://www.fortifyrights.org/tha-inv-2020-04-21/>.

January 2020 advocating for the rights of human rights defenders targeted by the company.¹⁷⁹

Notably, this fresh set of complaints came several weeks after a group of UN Human Rights Council experts “condemned the continued misuse of judicial processes by Thai poultry producer Thammakaset to harass and silence human rights defenders who have spoken out against its abusive and exploitative labour practices”.¹⁸⁰

Acquittals of human rights defenders after lengthy judicial proceedings

In spite of these efforts of legal harassment, Courts in Thailand have in several cases acquitted human rights defenders charged with criminal defamation by Thammakaset in 2020. On 8 June 2020, the Bangkok Criminal Court acquitted migrant worker **Nan Win** and human rights defender **Sutharee Wannasiri**.¹⁸¹ The allegations of criminal defamations filed by Thammakaset were based on their work to bring attention to alleged labour rights abuses at a Thammakaset-owned chicken farm.¹⁸²

On 27 October 2020, the Court of Appeals acquitted **Suchanee Rungmuanporn (Cloitre)**, a former Voice TV journalist, of criminal defamation charges.¹⁸³ The Court of Appeals Region 1 overturned

179 FIDH Thammakaset Watch.

180 These included three members of the UN Working Group on human rights and transnational corporations and other business enterprises, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Chair-Rapporteur of the Working Group on discrimination against women and girls: OHCHR, “Thailand: judicial system abused by business to silence human rights defenders – UN experts”, 12 March 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25714&LangID=E>.

181 FIDH, “Thailand: Dismissal of the cases against Mr. Nan Win and Ms. Sutharee Wannasiri”, 9 June 2020, available at: <https://www.fidh.org/en/issues/human-rights-defenders/thailand-dismissal-of-the-cases-against-mr-nan-win-and-ms-sutharee>.

182 ICJ, “Thailand: Drop defamation complaints against human rights defenders Nan Win and Sutharee Wannasiri”, 3 December 2018, available at: <https://www.icj.org/thailand-drop-defamation-complaints-against-human-rights-defenders-nan-win-and-sutharee-wannasiri/>.

183 The ICJ filed an *amicus curiae* in support of her appeal; see, ICJ, “Thailand: ICJ and Lawyers’ Rights Watch Canada intervene in criminal defamation proceeding against Thai journalist Suchanee Rungmuanporn (Cloitre)”, 27 April 2020, available at: <https://www.icj.org/thailand-icj-and-lawyers-rights-watch-canada-intervene-in-criminal-defamation-proceeding-against-thai-journalist-suchanee-rungmuanporn-cloitre/>.

the Lopburi Provincial Court's decision on 24 December 2019 to sentence her to two years' imprisonment for tweet-reporting on Thammakaset's labour rights abuses.¹⁸⁴ The Court of Appeal found that her statement had been made in good faith and constituted fair comment on issues subject to public criticism, an exemption from defamation under section 329(3) of the Criminal Code.¹⁸⁵

Yet even where SLAPP lawsuits may eventually result in acquittals, these suits drag human rights defenders through lengthy, costly and stressful judicial proceedings for solely exercising their right to freedom of expression online. The ICJ also notes the protracted timeline of these judicial proceedings. For instance, Thammakaset first filed the criminal complaint against Suchanee Rungmuanporn (Cloitre) on 1 March 2019, and she was only acquitted on 27 October 2020, after initially receiving a prison sentence of two years on 24 December 2019. These timelines have been further prolonged by challenges posed by the COVID-19 pandemic. For example, the verdicts for the criminal defamation charges of Nan Win and Sutharee Wannasiri were delayed several times, from 31 March 2020, to 27 April 2020, and then finally to 8 June 2020.¹⁸⁶ Similarly, the preliminary hearings for Angkhana Neelaphaijit and Puttanee Kangkun were postponed from 18 May 2020 to 8 June 2020.¹⁸⁷

These human rights defenders should not even have faced prosecution in the first place, as, under article 19 of the ICCPR, criminal penalties will generally not be an appropriate sanction for defamation and imprisonment is always a disproportionate sanction.¹⁸⁸ As noted by the UN Office of the High Commissioner for Human Rights for South-East Asia, these cases have "created an atmosphere of fear, self-censorship and have added to stress, undue financial

184 The post detailed an order by Thailand's Court of Appeal for Specialized Cases for Thammakaset to provide compensation to its 14 former employees from Myanmar, with the word "slavery" included in the post. This inclusion is the basis for defamation claim.

185 FIDH, "Thailand: Suchanee Cloitre conviction over Twitter post overturned in Thammakaset saga", 28 October 2020, available at: <https://www.fidh.org/en/region/asia/thailand/thailand-suchanee-cloitre-conviction-over-twitter-post-overturned-in>.

186 FIDH Thammakaset Watch.

187 *Ibid.*

188 CCPR/C/GC/34, para. 47; Concluding observations on Thailand, para. 36.

burden, and concerns for personal safety”.¹⁸⁹ Several UN Human Rights Council mandated experts have also noted the “chilling effect” of these cases and may “encourage other companies to file similar civil and criminal defamation cases” towards harassing and intimidating other human rights defenders seeking to bring to light rights violations committed in the course of business operations.¹⁹⁰ In this instance, the Thai authorities have failed to act in line with the UN Declaration on Human Rights Defenders, to provide adequate protections for human rights defenders including through legislative and administrative measures and reform.¹⁹¹

189 OHCHR, “NEWS RELEASE: Thailand – UN Human Rights Office welcomes acquittal of human rights defenders”, 8 June 2020, available at: <https://bangkok.ohchr.org/thailand-un-human-rights-office-welcomes-acquittal-of-human-rights-defenders/>.

190 These included three members of the UN Working Group on human rights and transnational corporations and other business enterprises, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Chair-Rapporteur of the Working Group on discrimination against women and girls: OHCHR, “Thailand: judicial system abused by business to silence human rights defenders – UN experts”, 12 March 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25714&LangID=E>.

191 UN Declaration on Human Rights Defenders, articles 2, 12.

VI. Impact of COVID-19

The COVID-19 pandemic has presented two emerging challenges for civic space online in Thailand. First, Thailand has invoked the public health imperative as a reason to curb the spread of “false information” online relating to the virus and therefore as a justification to restrict freedom of expression and access to information. These measures have been undertaken without due regard for provisions of legality, necessity and proportionality. Second, Thailand has failed to take effective measures to protect migrant workers from Myanmar from the amplification of online speech inciting discrimination, hostility or violence that has flared up as a result of the second wave of COVID-19 infections in Thailand.

i. Clampdown on COVID-19 “false information”

The Thai government has censored and sanctioned individuals for sharing legitimate concerns of public interest on the government’s response to the COVID-19 pandemic on online platforms under the broad justification of combating the spread of allegedly false information online. These actions have been undertaken in spite of guidance from the UN High Commissioner for Human Rights that everyone “must be allowed to express opinions on vitally important topics of public interest, such as the provision of health care and the handling of the health and socio-economic crisis, and the distribution of relief items”.¹⁹²

The ICJ has observed two worrying trends in this clampdown on information online relating to COVID-19: (i) the use of arrests as a disproportionate means of managing the spread of “false information”; and (ii) and the use of the pretext of combating

¹⁹² OHCHR, “Asia: Bachelet alarmed by clampdown on freedom of expression during COVID-19”, 3 June 2020 (“Michelle Bachelet statement on COVID-19, 2020”), available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25920&LangID=E>.

“false information” to curtail legitimate discussion and criticism of the government’s COVID-19 response.

Criminal sanctions for spreading “false information” online

Since the outbreak of the COVID-19 pandemic, numerous reports have emerged of individuals being arrested for allegedly sharing “false information” on social media in relation to the government’s response to the pandemic.¹⁹³ These arrests have been carried out by officials from the MDES and the Technology Crime Suppression Division of the RTP.¹⁹⁴ The arrests were accompanied by warnings from the MDES and its Anti-Fake News Centre that individuals are liable to be fined and imprisoned for such acts under the CCA and Emergency Decree.¹⁹⁵

Although the ICJ recognizes the necessity to combat the spread of false information online to protect public health during the uncertainty of a pandemic, this objective can and must be carried out using less disproportionate and intrusive means than arrests, detentions and onerous fines.¹⁹⁶ For example, timely, regular and clear rebuttals by the authorities on what they deem to be false information would have adequately advanced public health aims, while still respecting the rights to free expression and information. Additionally, critics have expressed concerns about the transparency in which the Anti-Fake News Centre makes decisions about what constitutes false information,¹⁹⁷ which raises doubt about whether the restrictions

193 Bangkok Post, “Four held for fake news over coronavirus”, 19 February 2020 (“Bangkok Post, 19 February 2020”), available at: <https://www.bangkokpost.com/thailand/general/1860504/four-held-for-fake-news-over-coronavirus>; The Thaiger, “10 arrested over spreading ‘fake news’ online”, 21 June 2020 (“The Thaiger, 21 June 2020”), available at: <https://thethaiger.com/hot-news/crime/10-arrested-over-spreading-fake-news-online>.

194 Bangkok Post, “Two held for sharing fake news on virus”, 30 January 2020 (“Bangkok Post, 30 January 2020”), available at: <https://www.bangkokpost.com/thailand/general/1847099/two-held-for-sharing-fake-news-on-virus>.

195 The Thaiger, “9 arrested for sharing ‘fake news’ about Covid-19, government hand-outs”, 6 June 2020 (“The Thaiger, 6 June 2020”), available at: <https://thethaiger.com/hot-news/crime/9-arrested-for-sharing-fake-news-about-covid-19-government-hand-outs>.

196 ICJ, “Southeast Asia: States must respect and protect rights in combating misinformation online relating to COVID-19”, 1 April 2020, available at: <https://www.icj.org/southeast-asia-states-must-respect-and-protect-rights-in-combating-misinformation-online-relating-to-covid-19/>.

197 Pattamon Anansaringkarn and Ric Neo, “How can state regulations over the online

on online content are targeted solely at false information online or also serve to stifle protected political expression.

Further, in the midst of a pandemic, where individuals can react in fear and panic, and spread information without verification but without ill intent, heavy-handed tactics to muzzle expression and information online can have the counterproductive effect of exacerbating panic and fear. In the aforementioned reports, the authorities failed to identify whether false information online was promulgated with ill intent or malice.¹⁹⁸ In this regard, article 19 of the ICCPR requires that there not be legal sanctions against “untrue statements that have been published in error but without malice”.¹⁹⁹

Combating “false information” as a pretext to curtail expression and information

Second, the authorities have used the CCA and article 112 of the Criminal Code against individuals expressing legitimate criticism of the government’s COVID-19 response, under the guise of curbing the spread of false information online. As a group of UN Human Rights Council experts has emphasized, restrictions “taken to respond to the virus must be motivated by legitimate public health goals and should not be used simply to quash dissent”.²⁰⁰

sphere continue to respect the freedom of expression? A case study of contemporary ‘fake news’ regulations in Thailand”, in *Information & Communications Technology Law*, 11 January 2021, pp. 15 – 16.

198 This is, in part, due to “malice” or “ill intent” not being a requirement to prove under section 14 of the CCA: Bangkok Post, 30 January 2020; Bangkok Post, 19 February 2020; The Thaiger, 6 June 2020; The Thaiger, 21 June 2020.

199 CCPR/C/GC/34, para. 47.

200 These include the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while combating terrorism, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the right to physical and mental health, the Special Rapporteur on the right to education, the Special Rapporteur on the right to privacy, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right to development, the Special Rapporteur on adequate housing, the Special Rapporteur on the human rights to safe drinking water and sanitation, the Independent Expert on human rights and international solidarity, the Independent Expert on the promotion of a democratic and equitable international order, the Special Rapporteur on the Independence of Judges and Lawyers, members of the Working Group on Arbitrary Detention and members of

For instance, **Danai Ussama**, an artist from Phuket, was arrested on 23 March 2020 under section 14(2) of the CCA for commenting online about the lack of COVID-19 screening measures at Suvarnabhumi Airport.²⁰¹ Danai was released on 24 March 2020 after being held in detention at a police station in Bangkok and Bangkok Criminal Court for 14 hours.²⁰² The UN High Commissioner for Human Rights identified his case as an example of “legitimate issues of public interest related to COVID-19” being targeted, which may create “an atmosphere of self-censorship”.²⁰³ In April 2020, the police threatened to charge the owner of an anonymous investigative Facebook page called “**Queen of Spades**” with violating the CCA, after she had allegedly posted photos on the group showing persons closely linked to a high-profile politician to be involved with illegally exporting facial masks to buyers in China amidst severe domestic shortage of personal protective equipment.²⁰⁴

The RTP charged opposition politician **Thanathorn Juangroongruangkit** under article 112 of the Criminal Code on 30 March 2021.²⁰⁵ This followed from the criminal complaint filed by the MDES in January 2021, for comments that he made on a 30-minute Facebook Live, titled “Royal Vaccines: Who Wins, Who Loses”, about the government’s vaccine strategy being too reliant on a company owned by the Crown Property Bureau.²⁰⁶ In response,

the Working Group on Enforced or Involuntary Disappearances: OHCHR, “COVID-19: States should not abuse emergency measures to suppress human rights – UN experts”, 16 March 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722>.

201 Prachatai, “Artist arrested for posting “Suvarnabhumi Airport has no screening for Covid-19” while in 14-day self-quarantine after his return from Spain”, 27 March 2020, available at: <https://prachatai.com/english/node/8432>.

202 TLHR, “The Artist criticized the Govt COVID Screening Measures at Suvarnabhumi Airport Was Released on Bail After 14 Hours in Detention”, 24 March 2020, available at: <https://tlhr2014.com/archives/16645>.

203 Michelle Bachelet statement on COVID-19, 2020.

204 Khaosod English, “Investigators Seeking Mask Hoarding Ring Whistleblower”, 10 April 2020, available at: <https://www.khaosodenglish.com/politics/2020/04/10/investigators-seeking-mask-hoarding-ring-whistleblower/>.

205 Reuters, “Thai police charge politician for insulting king over vaccine remarks”, 30 March 2021, available at: <https://www.reuters.com/article/us-thailand-politics-vaccine-idUSKBN2BMOUG>.

206 Channel News Asia, “Thai government to file royal defamation complaint against opposition figure Thanathorn”, 20 January 2021, available at: <https://www.channelnewsasia.com/news/asia/thai-government-to-file-royal-defamation-complaint-against-opposition-figure-thanathorn-14002118>.

the former Future Forward Party leader has stated that the public has “every right to question the government’s efforts to secure a coronavirus vaccine through a company owned by the palace”.²⁰⁷ Thailand’s obligation under the ICCPR entails that “public interest in the subject matter of the criticism should be recognized as a defence” to defamation laws.²⁰⁸

On 31 January 2021, based on the petition submitted by the MDES, the Criminal Court agreed to the blocking of the aforementioned clip that had been shared via a number of social media platforms, for undermining internal security and violating the CCA.²⁰⁹ On 8 February 2021, after Thanathorn challenged the order, the Criminal Court reversed its own decision and dismissed the petition to remove the clip, saying no part of the clip clearly showed he criticized or raised questions in any way that could be deemed insulting to the monarchy.²¹⁰

The broad-brush approach taken by the authorities has resulted in the deterrence of important information flows, meaningful debate and legitimate comment on government policy in relation to COVID-19. This contravenes the Thailand’s obligation to respect and protect the right to freedom of expression and information.

The actions also may violate Thailand’s obligation to respect the right to health under the ICESCR. The CESCR has underscored the immediate obligation to refrain from censoring, withholding or intentionally misrepresenting health-related information, and preventing people’s participation in all health-related matters.²¹¹ Thailand’s approach thus far has risked fostering an atmosphere of

207 Khaosod English, “Thanathorn Claps Back at Lese Majeste Accusation, Bail Denied in Historic 112 Case”, 21 January 2021, available at: <https://www.khaosodenglish.com/politics/2021/01/21/thanathorn-claps-back-at-lese-majeste-accusation-court-denies-bail-in-historic-112-case/>.

208 CCPR/C/GC/34, para. 47.

209 The Nation, “Court orders Thanathorn statement on vaccine to be removed from online channels”, 31 January 2021, available at: <https://www.nationthailand.com/news/30402065>.

210 Bangkok Post, “Court throws out request to block Thanathorn’s clip”, 8 February 2021, available at: <https://www.bangkokpost.com/thailand/general/2064655/court-throws-out-request-to-block-thanathorns-clip>

211 GC No. 14, para. 35.

self-censorship where people are afraid of sharing vital information or concerns about COVID-19 in fear of being targeted by the State for spreading allegedly false information online.

ii. Failure to protect against speech inciting discrimination, hostility or violence on online platforms

There have been reports of a surge of hate speech on social media against migrants, who are being blamed for transmitting and igniting a second wave of COVID-19.²¹² Several of these online comments incite violence and hostility against Burmese individuals. These include reports of a comment which encouraged others to shoot down people from Myanmar and another which called for COVID-19 infected migrant workers to remain untreated and punishment for people who had brought them into Thailand.²¹³ This follows the global trend of xenophobic and racist speech vilifying foreigners for spreading the virus.²¹⁴

Thailand's current legislative framework fails to adequately protect against speech that incites discrimination, hostility or violence. This is not an obligation that the government can delegate to the social media companies alone. Even if there are existing domestic legal provisions that may indirectly be used to counter such speech, these provisions have not been effectively implemented. This is in contravention of Thailand's obligations under article 20 of the ICCPR and article 4 of the ICERD to protect against such harmful expression, both online and offline.

212 Reuters, "Anti-Myanmar hate speech flares in Thailand over virus", 24 December 2020, available at: <https://www.reuters.com/article/uk-health-coronavirus-thailand-myanmar/anti-myanmar-hate-speech-flares-in-thailand-over-virus-idUKKB-N28Y0KQ?edition-redirect=uk>.

213 *Ibid*.

214 United Nations, *United Nations Guidance Note on Addressing and Countering COVID-19 related Hate Speech*, 11 May 2020, available at: <https://www.un.org/en/genocideprevention/documents/Guidance%20on%20COVID-19%20related%20Hate%20Speech.pdf>.

Inadequacy of current protective framework

Thailand does not have a standalone law relating to discrimination on the basis of race, nationality or other prohibited grounds. In 2015, it was reported that Thailand was considering passing a constitutional ban on hate speech as part of broader constitutional reform,²¹⁵ but this draft was rejected to prolong the junta's rule.²¹⁶ Thailand also lacks legal provisions that can be used specifically to investigate and penalize hate speech on online platforms inciting discrimination, hostility or violence, or provide adequate redress for victims of such abuses.

The Thai government has asserted that "incitement of racial hatred and hate speech may be punished as sedition, defamation or insult in line with the Criminal Act and [other laws]".²¹⁷ Presumably, this would be done pursuant to the laws that have been used to arbitrarily restrict freedom of expression online, including articles 116, 326, 327 and 328 of the Criminal Code.²¹⁸

215 UN Committee on the Elimination of Racial Discrimination, *Combined fourth to eight reports submitted by Thailand under article 9 of the Convention, due in 2016*, UN Doc. CERD/C/THA/4-8, 17 June 2019 ('Thailand ICERD state report'), paras. 15, 18; Anadolu Agency, "Fears of abuse as Thailand ponders hate speech law", 15 January 2015, available at: <https://www.aa.com.tr/en/world/fears-of-abuse-as-thailand-ponders-hate-speech-law/83794>; and Bangkok Post, "Draft constitution rejected by NRC", 6 September 2015, available at: <https://www.bangkokpost.com/thailand/politics/682280/draft-constitution-rejected-by-nrc>.

216 New York Times, "Thailand's Military Junta Rejects Draft Constitution", 6 September 2015, available at: <https://www.nytimes.com/2015/09/07/world/asia/thai-draft-constitution-rejected-by-junta-backed-council.html>.

217 Thailand ICERD state report, paras. 15, 18. The report also refers to, e.g., Section 37 of the Act on Broadcasting and Television Businesses B.E. 2551 (2008), which prohibits a licensee to broadcast a program that may affect national security, public order or good morals of the people, have a nature of obscenity or cause serious deterioration of mind or health. Section 22 of the Consumer Protection Act B.E. 2522 (1979) criminalizes an advertisement containing any statement which directly or indirectly supports violation of law or morals, is conducive to cultural depreciation of the nation, causes disunity or prejudice to unity of the people.

218 It should also be noted that defamation provisions may include civil defamation, under Section 423 of the Thai Civil and Commercial Code.

However, these legal provisions are too blunt and lack sufficient precision.²¹⁹ They protect against harms that may include those arising from speech inciting discrimination, hostility or violence, but not necessarily in all situations. For instance, speech inciting others to shoot all people based on their ethnic or national origin on sight may not be defamatory (under articles 326 to 328 of the Criminal Code) or seditious (under article 116 of the Criminal Code). In such cases, there are no specific legal provisions under which such abuses can be penalized, and no legal framework exists either to provide targets of such speech with access to an effective remedy under Thai law.

Further, the ICJ is not aware if these provisions have been used to investigate and prosecute such speech. It is also not clear if these provisions have ever been used to target the type of speech contemplated by article 20(2) of the ICCPR and article 4 of the ICERD. Notably, the cases identified by the Thai government in its State report as “related to racial discrimination” do not pertain to speech inciting discrimination, hostility or violence, or involve the use of articles 116, 326, 327 and 328 of the Criminal Code against such speech.²²⁰

The ICJ welcomes the fact that there have been several Thai officials who have spoken up against xenophobia amidst the pandemic.²²¹ This abides by the call from the UN Special Rapporteur on racism to “eradicate [COVID-19-related] xenophobia throughout all State policy and messaging”.²²²

219 CERD/C/GC/35, paras. 20.

220 Thailand ICERD state report, paras. 15, 22, 23. For instance, one of the cases cited relates to the right to marry a foreigner who temporarily enters the country without a certificate of residence, and another relates to a case of the Ministry of Natural Resources and Environment having to pay ethnic Karen dwellers damages and undertake remedies until lead contamination did not exceed the stipulated standards.

221 DW, “Thailand: COVID outbreak among Myanmar workers sparks anti-migrant backlash”, 28 December 2020, available at: <https://www.dw.com/en/thailand-covid-outbreak-among-myanmar-workers-sparks-anti-migrant-backlash/a-56075165>.

222 OHCHR, “States should take action against COVID-19-related expressions of xenophobia, says UN expert”, 21 March 2020, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25739&LangID=E>.

However, the Thai government needs to do more than speak out. Besides specifically prohibiting by law hate speech that crosses the threshold into incitement to violence online, the Thai government should also adopt positive measures to address intolerance, including education, awareness-raising and promoting community engagement on the causes of discrimination, among others, in line with the Rabat Plan of Action.²²³

²²³ Rabat Plan of Action, p. 13.

VII. Role of Big Tech

i. State compulsion to remove online content

The Thai government has increased its pressure on big tech companies with court-enforced demands to remove content it perceives as impermissible from online platforms. This has been enabled by the significant latitude granted to the Thai authorities by legal provisions in the CCA to censor and delimit such content, and even file legal complaints against tech companies for not complying with court-enforced takedown demands.

Use of current legal framework to pressure tech companies

The CCA contains provisions that impose strict liability on internet intermediaries for impermissible content on its platforms, or for failing to comply with takedown orders. According to a legal expert who advised the National Legislative Assembly committee that drafted the CCA's 2017 amendments, Section 15 of the CCA may be enforced against social media platforms if "authorities could prove [a tech company's] local office was aware of the flow of illegal content through its network but failed to remove such content by blocking particular URLs".²²⁴ Section 15 provides that any service provider who "cooperates, consents or acquiesces to the perpetration of an offense" under the CCA may be subject to the same penalty as the offender under section 14.²²⁵ This carries the possible penalty of up to five years' imprisonment, a fine of up to 100,000 Baht (approx. USD 3,200) or both.²²⁶

Further, the MDES has abused section 27 of the CCA to threaten big tech companies with criminal sanctions and/or criminal fines if they fail to comply with orders from the government to remove

224 The Nation, "Computer law 'may make Facebook act'", 12 May 2017, available at: <https://www.nationthailand.com/national/30315067>.

225 Thai Netizen, CCA, Section 15.

226 *Ibid.*

online content within a 15-day deadline.²²⁷ Section 27 provides that anyone who fails to comply with a court order or competent official shall be subject to a fine not exceeding 200,000 baht (approx. USD 6,400) and a further daily fine not exceeding 5,000 baht per day (approx. USD 160) until the relevant corrective action has been taken.²²⁸

Threats and pressure on tech companies to remove or restrict online content

The Thai government has frequently in the past used its authority against tech companies to restrict online content. Google's June 2020 transparency report noted that since 2009, it had received 1,001 removal requests, with 28,595 items named for removal.²²⁹ Between December 2019 and June 2020, Google received 37 removal requests, of which 95 percent related to "government criticism".²³⁰ Facebook noted that between January and June 2020, it restricted access to 202 items in response to reports from the MDES for alleged violations of *lèse-majesté* and the CCA.²³¹ Twitter's transparency report noted that between January and June 2020, it received seven legal demands to remove or withhold content from 44 specified accounts and had complied with two of these requests.²³²

The MDES ramped up this pressure on tech companies amidst political unrest in the country and the increasing ubiquity of social media as a tool for political expression and organizing. Aside from the individual instances documented in *Section IV* of this report, in August 2020, the MDES noted that it had demanded that Facebook remove 1,365 URLs in April 2020, but that Facebook had only taken down 236 links and not the other 1,129 pages required under court

227 Bangkok Post, "Facebook warned over URLs", 10 August 2020, available at: <https://www.bangkokpost.com/thailand/politics/1965883/facebook-warned-over-urls>.

228 Thai Netizen, CCA, Section 27.

229 Google Transparency Report: Thailand, available at: <https://transparencyreport.google.com/government-removals/by-country/TH>.

230 *Ibid.*

231 Facebook Transparency: Thailand, available at: <https://transparency.facebook.com/content-restrictions/country/TH>.

232 Twitter Transparency: Thailand, available at: <https://transparency.twitter.com/en/reports/countries/th.html>.

orders.²³³ During the same month, the MDES also announced that it was seeking cooperation from social media platforms to remove 1,024 URLs “deemed inappropriate” within 15 days, in line with court orders.²³⁴ It was reported that the 1,024 URLs included content deemed defamatory to the monarchy, or involved pornographic, gambling, drugs and violation of copyright.²³⁵ The blocked online content included 661 Facebook pages, 289 YouTube channels, 69 Twitter accounts and one Instagram account, according to the MDES.²³⁶ In September 2020, it was reported that the MDES had filed further requests to Facebook, Twitter and Google to remove more than 3,000 items, including those containing criticism of the monarchy.²³⁷

The MDES has emphasized that the government’s demands to social media platforms to remove or block online content are enforced through “court orders [...] in accordance with Thai law”.²³⁸ However, there are strong reasons to doubt the impartiality and transparency of these court orders, given the politically charged nature of much of the content being targeted and concerns about judicial independence in Thailand.²³⁹

233 Bangkok Post, “Facebook warned over URLs”, 10 August 2020, available at: <https://www.bangkokpost.com/thailand/politics/1965883/facebook-warned-over-urls>.

234 Bangkok Post, “DES: Facebook won’t take legal action”, 27 August 2020, available at: <https://www.bangkokpost.com/tech/1975143/des-facebook-wont-take-legal-action>.

235 *Ibid.*

236 It was reported that Facebook decided to block 225 URLs, Twitter blocked 5 URL, and YouTube blocked all the URLs. The Standard, “Putthipong will sue platforms after finding contents deemed defamatory to the monarchy, involved pornographic and gambling”, 23 September 2020, available at: <https://thestandard.co/puttipong-punnakanta-reported-facebook-twitter-and-youtube/>.

237 Reuters, “Thailand takes first legal action against Facebook, Twitter over content”, 24 September 2020, available at: <https://www.reuters.com/article/us-thailand-internet-idUSKCN26F0RZ>; The Standard, “Putthipong will sue platforms after finding contents deemed defamatory to the monarchy, involved pornographic and gambling”, 23 September 2020, available at: <https://thestandard.co/puttipong-punnakanta-reported-facebook-twitter-and-youtube/>. The MDES submitted 3,097 notices to block online contents (1,748 Facebook URLs, 607 YouTube URLs, 261 Twitter URLs, and 481 URLs belong to other websites). It was reported that the blocked online content included content deemed defamatory to the monarchy, involved pornographic, gambling, drugs and violations of copyright.

238 Bangkok Post, “Facebook warned over URLs”, 10 August 2020, available at: <https://www.bangkokpost.com/thailand/politics/1965883/facebook-warned-over-urls>.

239 The ICJ has previously expressed its concerns about judicial independence in Thailand; see, ICJ, “Thailand: Judge’s suicide attempt underscores need for strengthening judicial independence”, 7 October 2019, available at: <https://www.icj.org/thailand-judges-suicide-attempt-underscores-need-for-strengthening-judicial-independence/>.

On a positive note, in February 2021, the court reportedly informed MDES officials that it would develop a new guideline, which would mean that in the future it would summon the target of the content removal or blocking to the inquiry before the court orders the restriction of online content.²⁴⁰ Further, Thanathorn's case has demonstrated that it is possible for users to appeal against restrictions on their online content through the courts,²⁴¹ in line with the rule of law principle and the requirement that there should be appeal procedures provided "by a competent judicial authority".²⁴²

Prosecution of tech companies for failing to comply with removal demands

The MDES reported in September 2020 that they had filed legal complaints under sections 20 and 27 of the CCA against social media platforms Twitter and Facebook for missing deadlines to comply fully with court-issued takedown orders.²⁴³ The charges will go to the parent company of all the organizations and not their Thai subsidiaries.²⁴⁴ The MDES noted that this is the first time that the CCA was being "exercised to prosecute the service providers".²⁴⁵

This filing of complaints against Twitter and Facebook comes after it was reported in August 2020 that Facebook was preparing to legally challenge the Thai government after being compelled by a court order to block access to the Facebook group, the "Royalist Marketplace". According to Facebook, such demands from the

240 Bangkok Post, "Court throws out request to block Thanathorn's clip", 8 February 2021, available at: <https://www.bangkokpost.com/thailand/general/2064655/court-throws-out-request-to-block-thanathorns-clip>.

241 *Ibid.* However, it is worth noting that individual users whose content have been restricted may opt not to appeal these orders, and may instead prefer to just post their content elsewhere, e.g. through setting up a new Facebook group.

242 ICCPR, article 2(3); UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Addendum, Communications to and from Governments*, UN Doc. A/HRC/17/27, 16 May 2011 ('A/HRC/17/27'), para. 47, available at: <https://www.refworld.org/docid/50f3db632.html>.

243 Reuters, "Thailand takes first legal action against Facebook, Twitter over content", 24 September 2020, available at: <https://www.reuters.com/article/us-thailand-inter-net-idUSKCN26F0R7>.

244 *Ibid.*

245 Bangkok Post, "Govt taking legal action against major social media providers", 24 September 2020, available at: <https://www.bangkokpost.com/thailand/politics/1990975/govt-taking-legal-action-against-major-social-media-providers>.

government “contravene international human rights law, and have a chilling effect on people’s ability to express themselves”.²⁴⁶ In response to this, the MDES had stated that they were using “Thai laws to protect Thai cyber sovereignty”,²⁴⁷ without explaining how Thailand’s sovereignty was being threatened by the online content the authorities wanted removed.

These developments suggest that not only is the Thai government failing to respect the right to free expression and information online, but it is enlisting private companies to undermine freedom of expression. They also raise questions of the role that tech companies play in Thailand’s digital ecosystem, both for being complicit in enabling the Thai government’s online censorship, as well as being targets themselves of the Thai government’s unlawful restriction of the exercise of rights online.

Responsibilities of tech companies to respect human rights

Companies have themselves human rights responsibilities to act with due diligence to avoid infringing the rights of others and to address adverse impacts with which they are involved.²⁴⁸ Within the context of Thailand, tech companies should push back against increasing pressure and coercion from the authorities and do more to mitigate the harms arising from the government’s actions. The need for these tech companies to meet their responsibilities, including under the UNGPs, to respect human rights is critical given the role that social media plays in facilitating their users’ exercise of the rights to freedom of expression, association, peaceful assembly and other rights.²⁴⁹

246 Reuters, “Facebook blocks group critical of Thai monarchy amid government pressure”, 25 August 2020, available at: <https://www.reuters.com/article/us-thailand-facebook-idUSKBN25K25C>.

247 The Straits Times, “Thai minister says clampdown on social media content won’t stop as Facebook plans to fight order”, 26 August 2020, available at: <https://www.straitstimes.com/asia/se-asia/thai-minister-says-clampdown-on-social-media-content-wont-stop-as-facebook-plans-to>.

248 UNGPs, pp. 13 to 18.

249 A/HRC/17/27, para. 44.

Facebook and Twitter should utilize their significant financial resources and leverage to continue to push back against pressure to comply with takedown orders and extend rights protections online for its users.²⁵⁰ These and other online platforms may, however, have already failed to respect the rights to freedom of expression, information and other rights. For example, some companies have complied with demands from the Thai government to restrict protected and legitimate expression and information online, as noted earlier in this report, including Facebook in its geoblocking of the “Royalist Marketplace” group.²⁵¹ Google has not faced any legal action from the government because it complied with demands to remove content from YouTube,²⁵² which might include legitimate expression that should not be arbitrarily restricted.²⁵³ Additionally, the ICJ was unable to determine the full content of what was blocked on these online platforms, which is indicative of the lack of transparency in this removal process.

Tech companies must do more to mitigate the harms caused by these restrictions, even when they are compelled to comply with Thai laws. Google’s transparency report only highlights, with very short explanations, “requests that are of public interest to provide a glimpse of the diverse range of content removal requests” received,²⁵⁴ while Twitter’s report only quantifies the number of requests received without elucidating the reasons for the takedown

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- 250 As the former UN Special Rapporteur on freedom of expression has recommended, companies should “explore all legal options or challenge” when faced with problematic demands from the government: *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/HRC/38/35, 6 April 2018 (‘A/HRC/38/35’), para. 51.
- 251 Prachatai, “Royalist Marketplace returns”, 25 August 2020, available at: <https://prachatai.com/english/node/8748>.
- 252 Reuters, “Thailand takes first legal action against Facebook, Twitter over content”, 24 September 2020, available at: <https://www.reuters.com/article/us-thailand-inter-net-idUSKCN26F0R7>.
- 253 Prachatai, “YouTube locally blocks speech about monarchy reform at Thai government’s request”, 9 October 2020, available at: <https://prachatai.com/english/node/8833>; Thai Enquirer, “YouTube Geoblocks critical rap group’s video by request of Thai government”, 4 January 2021, available at: <https://www.thaienquirer.com/22397/youtube-geoblocks-critical-rap-groups-video-by-request-of-thai-government/>.
- 254 Google Transparency Report: Thailand, available at: <https://transparencyreport.google.com/government-removals/by-country/TH>.

requests.²⁵⁵ This information is not sufficient. They should be “supplemented with granular data concerning the types of requests received [...] and actions taken”, with “specific examples [being provided] as often as possible”.²⁵⁶

ii. Removal of hate speech

In response to the proliferation of online hate speech in Myanmar, it was reported that Facebook removed several posts for violating hate speech policies. Twitter was said to be “looking into the issue” and YouTube “did not respond to requests for comment”.²⁵⁷

Notably, Facebook also highlighted that its technology “detected 95% of hate speech”,²⁵⁸ in line with their increased use of artificial intelligence (AI) to detect hate speech.²⁵⁹ This figure is corroborated by Facebook’s November 2020 report on its enforcement of its “Community Standards” regulatory regime, which states that in the third quarter of 2020, Facebook took action on 22.1 million pieces of hate speech content on Facebook and 6.5 million pieces on Instagram, with about 95% of which was proactively identified.²⁶⁰

Tech companies like Facebook must take steps to counter speech that incite discrimination, hostility or violence online, in order to prevent or mitigate adverse human rights impacts linked to their operations. It is unclear, however, whether their community standards policies, in respect of standards and procedures, are

255 Twitter Transparency: Thailand, available at: <https://transparency.twitter.com/en/reports/countries/th.html>.

256 A/HRC/38/35, para. 52.

257 Reuters, “Anti-Myanmar hate speech flares in Thailand over virus”, 24 December 2020, available at: <https://www.reuters.com/article/us-health-coronavirus-thailand-myanmar/anti-myanmar-hate-speech-flares-in-thailand-over-virus-idUSKB-N28Y0KS?edition-redirect=uk>.

258 *Ibid.*

259 Facebook AI, “AI advances to better detect hate speech”, 12 May 2020, available at: <https://ai.facebook.com/blog/ai-advances-to-better-detect-hate-speech/>.

260 Facebook, “Community Standards Enforcement Report, November 2020”, 19 November 2020, available at: <https://about.fb.com/news/2020/11/community-standards-enforcement-report-nov-2020/>.

fully in line with international human rights law and standards.²⁶¹ Tech companies should continue to improve management of such online content consistent with human rights standards, including the principles of legality, necessity, legitimacy and proportionality.

These tech companies must do more to ensure that they are effectively meeting their human rights responsibilities.²⁶² One area for further improvement pertains to the increasing use of AI to target hate speech. While it is beyond the scope of this report to assess this aspect, the ICJ considers it a matter of concern due to the inherent dangers of overreliance on AI. While understanding the need for AI to assist with the resource-intensive work of content moderation, the use of AI should not entirely supplant the need for human evaluation. Tech companies must ensure that the use of AI still involves human-in-the-loop, i.e. people are still regularly involved in the monitoring and implementing of the AI.²⁶³ This is to the extent that even the most sophisticated AI will not be entirely able to assess the context and intent of online speech, which are important factors relevant in determining the severity of hate speech according to the Rabat Plan of Action.²⁶⁴

261 See for instance, ARTICLE 19, "Facebook Community Standards: Analysis against international standards on freedom of expression", 30 July 2018, available at: <https://www.article19.org/resources/facebook-community-standards-analysis-against-international-standards-on-freedom-of-expression/>.

262 This includes stronger alignment of their content moderation standards with human rights law; see, for instance, ARTICLE 19, "Facebook Community Standards", June 2018, available at: <https://www.article19.org/wp-content/uploads/2018/07/Facebook-Community-Standards-August-2018-1-1.pdf>.

263 A/74/486, para. 58(d).

264 Rabat Plan of Action, para. 29; A/74/486, para. 50.

VIII. Recommendations

Thailand retains a range of laws that is not compliant with international human rights law and standards, and in particular the country's international legal obligations under the ICCPR. As outlined above, many of these flawed laws have been increasingly applied to effectively stifle people's exercise of freedom of expression and other fundamental freedoms online. These efforts have intensified in response to the COVID-19 pandemic and the pro-democracy protests.

The authorities have also pressured big tech companies to contribute to these attacks on human rights with court-enforced takedown orders to restrict or block content on their platforms, and filed criminal complaints when they have not complied. The authorities have also failed to adequately protect individuals against SLAPP lawsuits and perpetrators of online speech inciting discrimination, hostility or violence.

Thai courts have not always interpreted and applied the law in conformity with Thailand's international legal obligations, which has sometimes resulted in convictions and serious sanctions against individuals exercising their right to freedom of expression among other rights. Particularly concerning has been cases involving judicial approval of takedown demands from the government to restrict or block protected expression.

In light of these concerns and challenges highlighted, the ICJ makes the following recommendations:

To the **Parliament of Thailand**:

- Repeal or substantially amend criminal law provisions that serve to criminalize or unduly restrict the rights to freedom of expression, information, association, political participation and other rights online as well as offline, including articles 112, 116, 326, 327 and 328 of the Criminal Code; section

14 of the CCA; and the legal provisions on contempt of court including article 198 of the Criminal Code;²⁶⁵

- In adopting further laws, administrative regulations and policies in respect of regulation of expression and information online, establish a participatory process to receive input from the general public, including civil society, academics, lawyers, technology experts and other independent policy advisers or technical experts. In line with the principle of transparency, publicize detailed reports on all content-related requests from State authorities issued to individuals, technological companies, internet intermediaries and internet service providers, and relevant updates or further information on requests;²⁶⁶
- Review and amend existing laws or develop a comprehensive standalone law to: (i) allow for the striking out of SLAPP lawsuits at the earliest occasion, with due process guarantees for both complainant and defendant; (ii) allow for a preliminary hearing to be conducted without undue delay in both civil and criminal cases, including cases brought by public prosecutors or private individuals; (iii) be applied to SLAPP lawsuits so as to protect individuals who are solely exercising their human rights and fundamental freedoms, in a manner consistent with Thailand's international human rights obligations; (iv) expressly guarantee the right to appeal the court's decision; and (v) provide for effective remedies for persons negatively affected by SLAPP lawsuits;²⁶⁷ and
- Review existing laws and develop legislation to expressly prohibit the promotion of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, with definitions clearly and strictly in line with article 20(2) of the ICCPR, and the principles of legality, necessity, proportionality and legitimate purpose.²⁶⁸

265 A/HRC/38/35, para. 65.

266 A/HRC/38/35, para. 69.

267 For more detailed recommendations, see ICJ Letter to Ministry of Justice, 2020.

268 A/74/486, paras. 57(a), (b).

To the executive branch of the **Thai government**, including the MDES, RTP and NBTC:

- The RTP and MDES should refrain from restricting or blocking online content unless the decision to block has been undertaken following a full analysis that applies international standards of legality, legitimate purpose, necessity, proportionality and non-discrimination and has been authorized pursuant to an order by an independent and impartial judicial authority, in accordance with due process with the express guarantee of the right to appeal;²⁶⁹
- Government officials should refrain from any measures that would serve to create undue pressure or inducements for tech companies to remove online content by users off platforms which amount to a legitimate exercise of users' rights to freedom of expression and information, including through the CCA;²⁷⁰
- Officials should cease harassment or persecution of all individuals solely for exercising their rights to free expression, information and peaceful assembly online, through the abuse of laws and administrative regulations, such as the CCA, Emergency Decree, articles 112 and 116 of the Criminal Code and contempt of court provisions, including article 198 of the Criminal Code; and
- Officials should ensure and facilitate equal access to adequate, effective and prompt remedy and reparation for all individuals who have had their rights impaired by harassment or persecution for the exercise of human rights online.

269 See also A/HRC/38/35, para. 66.

270 See also A/HRC/38/35, para. 66.

To inquiry officials, public prosecutors, and other justice sector actors:

- Drop all charges, issue non-prosecution orders, and refrain from further charges, particularly at the very inception of any such lawsuit, against any individual, including those named in this report, facing prosecution for alleged violation of laws that are non-human rights compliant on their face or which have been applied in a non-human rights compliant manner. This includes the CCA, Emergency Decree, articles 112, 116, 326, 327 and 328 of the Criminal Code and contempt of court provisions, including article 198 of the Criminal Code. With respect to the cases of convicted individuals for the aforementioned offences, quash their convictions, and with respect to individuals in pre-trial detention, cease investigation of their cases. All persons held in pre-trial detention or imprisoned on conviction in such cases should be immediately released.

To tech companies in the communications sector:

- Publicly affirm commitment to respect and protect human rights, and in that regard to apply international human rights standards, in line with the human rights treaties and their jurisprudence and the prescriptions of the UN Guiding Principles on Business and Human Rights and other industry-specific human rights guidelines developed by civil society, such as the Global Network Initiative;²⁷¹
- Amend internal content moderation and regulation standards to better reflect international human rights standards, in particular with respect to the prohibition of hate speech and the rights to freedom of expression, opinion, information and privacy;²⁷²

271 A/HRC/38/35, para. 70.

272 A/HRC/38/35, para. 70; A/74/486, para. 58(b).

- Adopt and implement effective safeguard mechanisms to monitor and ensure their products and services are compliant with international human rights law and standards, including contractual clauses that prohibit the customization, targeting, servicing or other use of mechanisms which impair human rights, incorporating design features to flag, prevent or mitigate misuse, and human rights audit processes;²⁷³
- Publish and publicize detailed transparency reports on all content-related requests issued by the Thai authorities, including detailed reports on requests for takedown of content, and the company’s measures in response;²⁷⁴
- Establish independent and effective grievance mechanisms to ensure redress and accountability for victims of rights abuses on their platforms;²⁷⁵
- Take all necessary and lawful measures to ensure their platforms do not cause, contribute to or become complicit in human rights abuses, including by ensuring that corporate partnership arrangements respect human rights and seek to mitigate any adverse rights impacts;²⁷⁶
- Engage with and solicit genuine inputs from the Thai public, civil society, academics, lawyers and other independent policy advisers or technical experts to assist with an informed development of policy and appropriate legal or administrative regulatory frameworks governing expression and information online in accordance with international human rights law and standards.

273 UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 28 May 2019, UN Doc. A/HRC/41/35 (‘A/HRC/41/35’), paras 66 to 69.

274 UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11 May 2016, UN Doc. A/HRC/32/38, paras 87 to 90.

275 A/HRC/41/35, paras. 66 to 69.

276 UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, UN Doc. A/HRC/35/22, paras. 82 – 83.

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