



The ICJ and Amnesty International analysis of the existing shortcomings of the Draft Prevention and Suppression of Torture and Enforced Disappearance Act

(As approved by the House of Representatives on 24 August 2022)

The unofficial translation of the Draft Act [here](#)

1. Article 5. Definition of torture

Pursuant to Article 5 of the Draft Act, “torture” occurs when public officials caused severe pain or suffering, whether physically or mentally, for one of the identified four purposes. Such text appears to imply that the four purposes identified are exhaustive, when the plain language of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘UNCAT’), as well as jurisprudence of the Committee against Torture and other authorities make clear that these purposes are illustrative and not exhaustive. If current text is left as it is, some of the most severe types of ill-treatment may escape the classification of torture. For example, in a case where there is a sadistic or sexually predatory prison official who commits acts of extreme brutality or sexual violence against a detainee, but the purpose is to satisfy personal ends, this might not be seen as falling under the purposes listed in the Draft Act.

2. Article 7. Definition of enforced disappearance

Subject to Article 7 of the Draft Act, “enforced disappearance” occurs when public officials caused the deprivation of liberty of another person and denied committing such an act or concealed the fate or whereabouts of the victim. Rather than using the phrase “denied committing”, The ICJ and Amnesty International recommended using the term “failed to acknowledge or refused to acknowledge”, which is derived from Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances (‘ICPPED’). Under the ICPPED, there is no requirement that the authorities must actively “deny” the deprivation of liberty. Silence about the deprivation of liberty or giving ambiguous answers, such as that the situation is “under investigation” when the deprivation is known, would all constitute a refusal to acknowledge, even if there is no denial.

The ICJ and Amnesty also regret that there is no provision requiring the effective investigation and prosecution of persons identified as responsible for an act of enforced disappearance, where the act had been committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice, as provided in Article 3 of the ICPPED.

3. *Article 12. Exemption of the application of laws relating to amnesty*

The ICJ and Amnesty International regret the removal of the clause exempting the application of the laws relating to amnesty for public officials who commit the offences under this Draft Act. Without this clause, public officials who are responsible for torture or cruel, inhumane, or degrading treatment and punishment ('CIDT/P') and/or enforced disappearance could potentially be granted amnesty or otherwise evade accountability for their crimes. Amnesties of this kind are non-compliant with international law, including the jurisprudence of UN Treaty Bodies and Principle 24 of the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (E/CN.4/2005/102/Add.1, 2005), which states that the perpetrators of "serious crimes under international law", encompassing torture, enforced disappearance, and slavery, may not benefit from any measures relating to amnesty.

4. *Article 14 and 20. Composition of the Committee on the Prevention and Suppression of Torture and Enforced Disappearance and their Duties*

The ICJ and Amnesty International regret that "injured persons and the representatives of the injured persons" were no longer included as members of the Committee on the Prevention and Suppression of Torture and Enforced Disappearance. This Committee has the key duty to propose measures to prevent and suppress the crimes of torture, CIDT/P and enforced disappearance to the relevant authorities and hence it is imperative to include injured persons and their representatives as important stakeholders. It is unfortunate that the Committee will now only be composed of governmental authorities and independent experts.

The duty of the Committee to inspect places of detention was also removed, irrespective of the repeated international commitments made by Thailand to accede to the Optional Protocol to the UNCAT, including during the third cycle of the Universal Periodic Review (UPR) taking place in November 2021. The Optional Protocol implements the preventative obligations already required under articles 2 and 16 of the UNCAT and requires State Parties to set up, designate or maintain a "national preventive mechanism" (NPMs) and allow visits by such mechanisms to any place under their jurisdiction and control where persons are or may be deprived of their liberty.

The investigatory function on individual cases is also not appropriate for the Committee of this kind, as such allegations in relation to a crime of this gravity should fall within the exclusive competence of law enforcement. However, the Committee might retain the power to review complaints submitted to them alleging, for example, that an investigation has not taken place or, that, it has not met the required standards of effectiveness, independence, impartiality, thoroughness, promptness, and transparency. In the future, the composition of the Committee should be adjusted to ensure that it does not include high-level public officials who may compromise the independence and impartiality of the investigation.

5. *Article 23. Existing Safeguards*

Article 23 of the Draft Act requires the responsible public official to continuously record audio and video throughout the arrest and detention process until the person is delivered to the inquiry official or released. However, the ICJ and Amnesty International are of the view that all interview sessions should be video and audio recorded, including during the interviews conducted by the inquiry officials. It should also be explicitly stated in the Draft Act that statements or any other purported evidence from non-recorded interrogations shall be excluded from court proceedings. We noted that there is the Order of the Royal Thai Police that require inquiry officials to continuously record audio and video throughout the interview of certain serious offences (e.g. Order No. 178/2564). However, such orders carry less force than statutory requirements and can be revoked at any time. Therefore, we are of the view that such safeguards should be reiterated in this Draft Act so as to create legislation that encompasses the full gamut of safeguards against torture, CIDT/P and enforced disappearance.

6. *Article 26. The disclosure of information about the person whose liberty is deprived*

Article 26 of the Draft Act provides circumstances where responsible public officials or the Court may refuse to disclose information about the person whose liberty is deprived. However, the ICJ and Amnesty International recommended wording such as "on an exceptional basis" and "where strictly necessary" to be inserted in this provision. As it currently stands, Article 26 of the Draft Act does not fully comply with the criteria set out in Article 20 of the ICCPR which provides that the right to information may be restricted only in exceptional circumstances and subject to very strict conditions. Without these conditions, there is a risk of abusive or inappropriate refusal of disclosure that could potentially facilitate torture, CIDT/P, or enforced disappearance.

7. *Article 24 and 45. Failure to impose penalties over certain offenses*

The ICJ and Amnesty International regret that the Draft Act does not fulfill the requirements in Article 22 of the ICCPR that provides for the imposition of sanctions for the failure to record the deprivation of liberty of any person, the inaccurate recording or delay of such recording, the obstruction of the granting of remedies, or the refusal to provide information, or the provision of inaccurate information, on the deprivation of liberty of a person.

Article 45 of the Draft Act imposes sanctions on a supervisor "who knows that subordinates under his or her control is about to or has committed an offence under [this Act]... but fails to take necessary or reasonable measures to prevent or suspend the offence, or to undertake or forward case for investigation and prosecution in accordance with law". However, Article 6 of the ICCPR imposes obligations on State Parties to penalize not only a supervisor who knew but also those who "consciously disregarded information which clearly indicated that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance". Similarly, in its General Comment No. 2, the UN Committee Against Torture highlighted that the UNCAT requires that those exercising superior authority

cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates, not only where they knew but also when they “*should have known*” that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measure”.

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

The ICJ and Amnesty International regret that the provision governing the inadmissibility as evidence of statements or other information obtained by torture, CIDT/P or enforced disappearance was removed from the Draft Act. The absence of this provision removes a critical deterrent to dissuade authorities from engaging in prohibited treatment in order to obtain “confessions” or other information from detainees. We noted that section 226 of the Thai Criminal Procedure Code excludes evidence obtained through illegal means and that exceptions to this rule are included within sections 226/1 and 226/2 of the Criminal Procedure Code granting courts discretion in admitting such evidence. The ICJ and Amnesty believe that an absolute prohibition on the admission of such statements as evidence should be expressly included within the Draft Act in order to establish clearly that Court discretion under sections 226/1 and 226/2 of the Criminal Procedure Code does not extend to cases of torture, CIDT/P or enforced disappearance.

9. *Absence of provisions regulating the statute of limitation*

The ICJ and Amnesty International regret that the statute of limitation for the crimes under the Draft Act was reduced to one to twenty years, depending on the severity of the punishment, in accordance with Article 95 of the Penal Code, while the UN Committee against Torture, in its General Comment No. 3 and in numerous concluding observations, noted that there should be no statutes of limitations for the crime of torture. Additionally, according to Article 8 of the ICCPED, if any statute of limitations in respect of enforced disappearance is contemplated, it must be “of long duration and proportionate to the extreme seriousness of this offence”.