H.E. General Prachin Chantong
Deputy Prime Minister and
Minister of Justice
Ministry of Justice
120 Chaeng Watthana Road
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Bangkok 10210
Thailand

12 March 2018

Dear H.E. General Prachin Chantong,

AMENDMENTS TO THE DRAFT PREVENTION AND SUPPRESSION OF TORTURE AND ENFORCED DISAPPEARANCE ACT

Background

The International Commission of Jurists and Amnesty International write to you regarding the Draft Prevention and Suppression of Torture and Enforced Disappearance Act ('Draft Act'), further to our earlier correspondence to the Permanent Secretary of the Ministry of Justice on 23 November 2017, which outlined our organizations' comments on and recommendations for amendments to the Draft Act as it then stood (**attached**).[1]

We write to reiterate and strongly urge that the Draft Act be amended without delay in order to ensure compliance with Thailand's international legal obligations. Thailand has ratified the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Thailand has signed the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED). On 10 March 2017, Thailand's National Legislative Assembly (NLA) passed a resolution in favour of ratifying the ICPPED.[2] However, the Thai Government has yet to do so and has yet to set a clear time frame for depositing the treaty with the United Nations Secretary-General as required.

Our organizations have received advice that the Ministry of Justice has approved further amendments to the Draft Act dated 6 March 2018 and begun public consultations on

[1] ICJ and Amnesty International, 'Recommendations concerning the Draft Prevention and Suppression of Torture and Enforced Disappearances Act', 23 November 2017, https://www.icj.org/wp-content/uploads/2017/11/Thailand-Torture-and-ED-Advocacy-nonlegal-submission-ENG.pdf
[2] Ministry of Foreign Affairs of the Kingdom of Thailand, 'Press Releases: Thailand's Progress on Prevention and Suppression of Torture and Enforced Disappearance, 30 June 2017. http://www.mfa.go.th/main/en/news3/6886/78828-Thailand's-Progress-on- Prevention-and-Suppression.html

the Draft Act pursuant to article 77 of Thailand's 2017 Constitution.[3] Should the Draft Act be adopted in its current state, we are deeply concerned that it would fail to bring domestic law into compliance with Thailand's international legal obligations. Under international law, including article 27 of the Vienna Convention on the Law of Treaties, Thailand will not be able to invoke its internal law as justification for its failure to perform a treaty obligation under the ICCPR, UNCAT and, at least once ratified, ICPPED. It is therefore incumbent upon Thailand to bring its internal law into full alignment with these treaties so as not to run afoul of its international legal obligations.

In this light, we strongly urge the Royal Thai Government to prioritize amending the Draft Act along the lines recommended in this letter without further delay.

The most recent amendments are of particularly serious concern as they effectively remove significant legal safeguards necessary to enforce the absolute prohibition against torture, cruel, inhuman and degrading treatment or punishment (CIDT/P) and enforced disappearances in Thailand.

Furthermore, in our **joint statement of 9 March 2017**[4], our **joint statement of 26 June 2017**[5] and an open **letter of 30 August 2017** which we published with other leading international and national organizations[6], our organizations repeatedly expressed concerns about other shortcomings in the Draft Act. These concerns were not addressed in the recent revision, and the current Draft Act falls disappointingly far below the requirements of the treaties which it seeks to incorporate into Thai law.

Our main concerns following a review of the most recent version of the Draft Act are as follows:

1. *Non-derogability* – the deletion of article 11 (old) from the Draft Act[7] removes explicit pronouncement of the safeguard that the absolute prohibition against acts of torture and enforced disappearances must not be lifted during states of emergency. Article 11 should be reinstated in the Draft Act;[8]

2. *Non-refoulement* – the deletion of article 12 (old) from the Draft Act removes a fundamental international law principle (*non refoulement*) that prohibits *refoulement* of individuals to places where they face a real risk of torture, other CIDT/P or enforced disappearance. Article 12 should be reinstated in the Draft Act;[9]

3. *Command responsibility* – the amendment of article 32 (old) of the Draft Act, removing the affirmation of command responsibility entirely for supervisors whose subordinates commit acts of torture and narrowing command responsibility for supervisors whose subordinates commit acts of enforced disappearance to only those supervisors "responsible for and (with) the power to control the acts related to the enforced disappearance." Article 32 (old) of

[3] Constitution of the Kingdom of Thailand, enacted 6 April B.E. 2560, unofficial translation available at http://www.constitutionalcourt.or.th/occ_en/download/article_20170410173022.pdf
[4] ICJ and Amnesty International, Joint Statement, 'Thailand: Prioritize the amendment and passage of legislation on torture and enforced disappearances', 9 March 2017, https://www.icj.org/wp-content/uploads/2017/03/Thailand-Joint-Statement-Torture-Legislation-News-2017-ENG.pdf
[5] ICJ and Amnesty International, 'Thailand must follow through on commitments to prevent torture and other ill-treatment', 26 June 2017, https://www.icj.org/thailand-must-follow-through-on-commitments-to-prevent-torture-and-other-ill-treatment/
[6] ICJ, Amnesty International, Human Rights Watch, International Federation for Human Rights (FIDH), Cross-Cultural Foundation (CrCF) and Thai Lawyers for Human Rights (TLHR), Open Letter to the Thai Government, 30 August 2017, https://www.icj.org/wp-content/uploads/2017/08/Thailand-ED-Day-letter-Advocacy-open-letters-2017-ENG.pdf
[7] 'Article (old)' refers to an article of the Draft Act as it stood of 23 November 2017.
[8] ICCPR, Articles 4, 7; UNCAT, Article 2(2); ICPPED, Article 1(2).
[9] UNCAT, Article 3; ICPPED, Article 16.

the Draft Act should be reinstated, and strengthened to ensure that supervisors may be held responsible where the superior "knew or should have known that conduct prohibited by the Act was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures";[10]

4. *Use of statements obtained by torture* – failure of the Draft Act to specifically prohibit the use of statements and other information obtained through torture or CIDT/P as evidence in proceedings. The Draft Act should be amended to dictate unequivocal rejection of such evidence;[11]

5. *Safeguards* – absence in the Draft Act of the provision of safeguards against enforced disappearance, torture and other CIDT/P, including visits to detainees by their lawyers and relatives, ongoing provision of information about the fate and whereabouts of detainees to their relatives and lawyers, presence of legal counsel during interrogations and video and/or audio recording of all interrogation sessions. These safeguards should necessarily be included in the Draft Act and the Criminal Procedure Code should be amended to align with the Draft Act[12];

6. *Definition* – omission from the definitions of enforced disappearance and torture in the Draft Act of crucial elements of both crimes as defined in the UNCAT and the ICPPED. The Draft Act should be amended accordingly;

7. *Criminal liability beyond direct commission* – lack of clarity in the Draft Act regarding the extension of criminal liability beyond direct commission of the crimes of enforced disappearance and torture. This should be rectified to clarify the extent of liability beyond direct commission and dictate appropriately severe penalties to different perpetrators;

8. *CIDT/P* – absence in the Draft Act of explicit criminalization of acts constituting cruel, inhuman and degrading treatment or punishment. The Draft Act should be modified to specifically criminalize acts of CIDT/P which are unequivocally prohibited alongside torture under articles 4 and 7 of the International Covenant on Civil and Political Rights (ICCPR) as a non-derogable right;

[10] Article 6 of the ICPPED provides for the criminalization of command responsibility for acts of enforced disappearance while article 2(2) of the UNCAT and article 6(2) of the ICPPED clarify that an order from a superior officer or public authority cannot be invoked as a justification of torture or enforced disappearance. In its General Comment on the implementation of article 2 of the UNCAT, the Committee against Torture clarified that State parties should, in investigating, preventing and punishing acts of torture and CIDT/P, pay "particular attention to the legal responsibility (of)… officials in the chain of command, whether by acts of instigation, consent or acquiescence". The Committee also highlighted that "those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures". See Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2, paras 7, 9, 26.

[11] A senior member of the Thai judiciary confirmed in an interview with Amnesty International that Article 226(1) of the Thai Criminal Procedure Code is, in judicial practice, understood to mean that "a court has discretion to consider the evidence even though the detainee was tortured into providing it." For more information, see: Amnesty International, "Make Him Speak by Tomorrow": Torture and Other Ill-Treatment in Thailand', September 2016, ASA 39/4747/2016, at 20.

[12] See **attached** Recommendations, pp. 12 to 14.

We further reiterate our call for the Royal Thai Government to ratify the ICPPED[13] and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT).[14]

We express deep regret that the recent amendments to the Draft Act and continuing failure to address other shortcomings in the Act are a step backward in the Thai Government's undertaking to criminalize torture and enforced disappearances – an undertaking which we had previously welcomed and continue to appreciate.

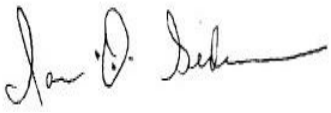
This undertaking, if implemented in accordance with Thailand's international obligations, would represent a significant and historic move to prevent grave violations and protect the rights of victims.

It is imperative that the Government's backtracking on the law is reversed and that the Draft Act is amended in a way to fully implement the provisions of the ICCPR, UNCAT and ICPPED.

Our organizations remain committed to work with the Royal Thai Government on the Draft Act and would welcome the opportunity to address any comments or questions you may have in response to the contents of this letter.

We appreciate your urgent attention to this matter.

Yours sincerely,



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[13] See also ICJ, 'Ten Years Without Truth: Somchai Neelapaijit and Enforced Disappearances in Thailand', March 2014, p15. http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/03/Ten-Years-Without-Truth-Somchai-Neelapaijit-and-Enforced-Disappearances-in-Thailand-report-2014.pdf
[14] See fn 5.

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