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Ministry of Justice

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20 December 2019

Dear Minister of Justice:

Recommendations concerning the Draft Prevention and Suppression of Torture and Enforced Disappearance Act

The International Commission of Jurists ("ICJ") is a non-governmental organization consisting of distinguished judges and lawyers working to advance understanding and respect for rule of law as well as the legal protection of human rights throughout the world.

We write in response to a request by the Ministry of Justice for all concerned stakeholders, including civil society organizations, to provide feedback concerning the Draft Prevention and Suppression of Torture and Enforced Disappearances Act ("Draft Act").

As a preliminary matter, we express our concern at the continuing delay in the amendment and enactment of the Draft Act. We regret the decision of the Ministry of Justice to withdraw the draft Act from the Cabinet "for further revision", which has served to further delayed the passage of essential legislation criminalizing torture and enforced disappearances.

We also regret that the latest Draft Act, after several rounds of revisions and public hearings, still has not addressed the principal shortcomings which we and other stakeholders and experts have indicated would be necessary in order to bring it into line with Thailand's international human rights obligations, particularly under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT") and the International Covenant on Civil and Political Rights ("ICCPR"). As it stands, it is also inconsistent with the International Convention for the Protection of All Persons from Enforced Disappearance ("ICPPED"), which Thailand has signed and committed itself to ratify.

For your ease of reference, we enclose herewith our comments and recommendations in relation to the amendments of the Draft Act, many of which we have previously made in a submission to your office on 23 November 2017 together with Amnesty International and to the National Legislative Assembly's Committee Considering the Draft Prevention and Suppression of Torture and Enforced Disappearance Act on 18 January 2019. The key concerns include:

- Definitions of the crimes of torture and enforced disappearance, as well as of other key terms, that are incomplete or otherwise discordant with international law;
- The absence of provisions concerning cruel, inhuman and degrading treatment (CIDT/P);
- The inadequacy of provisions on the inadmissibility of statements and other information obtained by torture, CIDT/P and enforced disappearances as evidence in legal proceedings;

- The inadequacy of provisions relating to modes of liability for crimes described in the Draft Act;
- The inadequacy of provisions concerning safeguards against torture, CIDT/P and enforced disappearances; and
- The absence of provisions concerning the continuous nature of the crime of enforced disappearance and statute of limitations for torture and enforced disappearance crimes.

We also appreciate and welcome that Article 12 on *non-refoulement* has been retained in the current version of the Draft Act. We believe that right against *non-refoulement* must be explicitly protected under the Draft Act and provide express legislative guidance with respect to *non-refoulement* cases.

The ICJ remains committed to work with the Royal Thai Government on the Draft Act and welcomes any 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 faithfully,



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Cc.

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RECOMMENDATIONS ON THE DRAFT PREVENTION AND SUPPRESSION OF TORTURE AND ENFORCED DISAPPEARANCE ACT

No.	Provisions in Draft Act	Recommendations	Comments
Definition of "Public Official"			
1	<p><u>Article 3</u></p> <p>"public official" means a person exercising public authority or who was authorized, assigned, permitted, supported, or directly or indirectly allowed to exercise public authority to execute operations according to the law.</p>	<p><u>Article 3</u></p> <p>"public official, <u>or other person acting with official capacity</u>" means a person exercising public authority or who was authorized, assigned, permitted, supported, or directly or indirectly allowed to exercise public authority <u>by such a person</u>.</p>	<ol style="list-style-type: none"> 1. The Recommendations submitted by the ICJ and Amnesty International ("AI"), dated 23 November 2017¹ ("ICJ and AI Recommendations") proposed that the phrase "public official" be amended to "public official, or other person acting with official capacity" to include a more accurate description of individuals potentially incurring liability throughout the Draft Act and one that is more consonant with Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT").² 2. The ICJ and AI Recommendations further recommended that the words "according to the law" appear to be unnecessary, given that a person exercising public authority would be liable without these qualifications, and to avoid the risk of impunity arising out of defenses based

¹ For full recommendations and examples of relevant legislation in other countries, please see: ICJ and Amnesty International, Recommendations on the Draft Prevention And Suppression of Torture and Enforced Disappearance Act (2016), 23 November 2017, available at: <https://www.icj.org/thailand-icj-amnesty-advise-changes-to-proposed-legislation-on-torture-and-enforced-disappearances/> or <https://goo.gl/RViXdA>

² Article 1 of the UNCAT states that "1. The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

			on inappropriate interpretation of domestic law.
Definition of "Torture"			
2	<p><u>Article 3</u></p> <p>"Torture" means any act that inflicts severe pain or suffering, whether physical or mental, on a person.</p>	DELETE	<ol style="list-style-type: none"> 1. As highlighted in the ICJ and AI Recommendations, in order to ensure internal consistency and compliance with the UNCAT, the ICJ and AI recommended that the Draft Act provide a single definition of torture that contains all elements of torture provided in the UNCAT iteration,³ by deleting the language defining torture presently contained in article 3 and instead providing for a definition of the crime completely in article 5. 2. The Draft Act appears to imply that the three purposes identified are exhaustive, when the language of the UNCAT, and the plain language of the UNCAT, as well as jurisprudence of the Committee against Torture ("CAT") and other authorities make clear that these purposes are illustrative and not exhaustive. Without the proposed amendment, some of the most severe types of ill-treatment to

³ Ibid

<p><u>Article 5</u></p> <p>A person who is a public official and has caused severe pain or suffering physically or mentally for one of the following purposes:</p> <p>(1) To obtain information or a confession from suffered person or a third person,</p> <p>(2) To punish the suffered person for the act that s/he or a third party has committed or is suspected of having committed, or</p> <p>(3) To threaten or coerce the suffered person or a third person.</p> <p>Commits the act of torture.</p>	<p><u>Article 5</u></p> <p>A person who is a public official, <u>or other person acting with official capacity</u>, and has <u>intentionally inflicted</u> severe pain or suffering, whether physically or mentally, for a purpose <u>such as</u>:</p> <p>(1) To obtain information or a confession from suffered person or a third person,</p> <p>(2) To punish the suffered person for the act that s/he or a third party has committed or is suspected of having committed,</p> <p>(3) To threaten or coerce suffered person or a third person, or</p> <p><u>for any reason based on discrimination of any kind</u>, commits the act of torture.</p> <p><u>That person does not commit an act of torture if the act arises only from, is inherent in, or is incidental to any lawful sanctions that are consistent with provisions of international legal obligations and standards including under the International Covenant for Political and Civil Rights and the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)</u></p>	<p>escape 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 satisfy his or her own sadistic desires, this might not be seen as falling under the purposes listed in the Draft Act.)</p> <p>3. The Draft Act crucially removes the infliction of pain or suffering for the purpose of discrimination from the definition of torture, contrary to the UNCAT.</p> <p>4. The ICJ and AI also recommended adding a “lawful sanctions” clause, specifying that such clause must include sanctions which are consistent with provisions of international law.</p> <p>5. The organizations further recommended that the definition of a perpetrator be expanded in accordance with the aforementioned recommendation.</p> <p>6. Noting Article 59 of the Penal Code, the organizations recommended adding the term ‘intentionally’ to this provision to reflect the crucial psychological element, or <i>mens rea</i>, of ‘torture’ as a crime in the Draft Act.</p>
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Definition of "Enforced Disappearance"			
3	<p><u>Article 3</u></p> <p>"Enforced disappearance" means the arrest, detention, abduction or any other form of deprivation of physical liberty followed by a refusal of committing such act or concealment of the fate or whereabouts of a person.</p>	DELETE	<ol style="list-style-type: none"> 1. The ICJ and AI recommended that the definition of enforced disappearances be deleted from article 3 of the Draft Act, and be replaced by a single definition—consistent with the International Convention for the Protection of All Persons from Enforced Disappearances ("ICPPED").⁴ 2. ICJ and AI further recommended that article 6 be modified to ensure that a perpetrator be liable to prosecution for committing either the crime of unlawful deprivation of liberty, the crime of concealing information regarding a victim's fate or whereabouts, or both. This approach in the present text is problematic because the act of deprivation of liberty and the concealment of an individual's whereabouts are often, in practice, committed by different persons. Indeed, the ICPPED provides that an individual

⁴ Article 2 of the ICPPED states that "For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

	<p><u>Article 6</u></p> <p>A person who is a public official and has arrested, detained, abducted, or by other means caused the deprivation of liberty and that public official denied committing such act or concealed fate or whereabouts of another person. Such person commits the act of enforced disappearance.</p>	<p><u>Article 6</u></p> <p><u>An enforced disappearance occurs when public officials, or other persons acting with official capacity have arrested, detained, abducted or by other means caused the deprivation of liberty of another person and have denied committing such act or concealed the fate or whereabouts of such person.</u></p> <p><u>Any person who participates in either</u></p> <p><u>(a) the arrest, detention, abduction or deprivation of liberty of another person or</u></p> <p><u>(b) the denial of such act or concealing of the fate or whereabouts of such person</u></p> <p><u>in relation to an event described in the above paragraph,</u> commits the act of enforced disappearance.</p>	<p>may be held liable for contributing to either of the two acts.</p> <p>3. Based on the Recommendations, ICJ and AI also recommended the definition of a perpetrator be expanded in accordance with the aforementioned recommendation.</p>
Existing Safeguards			
4	<p><u>Article 21</u></p> <p>In detaining anyone whose liberty is deprived in accordance with law, a public official whose duty is to legally hold a person whose liberty is deprived of in custody is obliged to record, at the minimum, the following information of such person ...</p>	<p><u>Article 21</u></p> <p>In detaining anyone whose liberty is deprived in accordance with law, a public official whose duty is to legally hold a person whose liberty is deprived of in custody is obliged to record, <u>immediately upon receiving such a person in the place of detention</u>, the following information of such person ...</p>	<p>1. The wording of the proposed provision to be inserted was from the wording of Article 22 of the ICPPED.</p> <p>2. ICJ and AI proposed that article 21 of the Draft Act does not comply with the requirement in Article 22 of the ICPPED⁵ that provides for the imposition of sanctions for the failure to record, the</p>

⁵ Article 22 of the ICPPED states that "... each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:
(a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;
(b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate;
(c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met."

	CURRENTLY NONE	<p><u>Article [...]</u> (proposed to be inserted)</p> <p><u>Whoever –</u></p> <p>(i) <u>delays or obstructs remedies to a person held in deprivation of liberty;</u></p> <p>(ii) <u>fails to record the deprivation of liberty of any person or records any information which the person responsible for the official register knew or should have known to be inaccurate;</u></p> <p>(iii) <u>refuses to provide information on the deprivation of liberty of a person, or provides inaccurate information on the deprivation of liberty of a person</u></p> <p><u>shall be liable to (penalty commensurate with the gravity of the crime).</u></p>	<p>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.</p> <p>3. ICJ and AI also recommended that the recording should be done “immediately upon receiving such a person in the place of detention”.</p>
5	<p><u>Article 23</u></p> <p>A public official depriving a person’s liberty or the Court may refuse to disclose information about the person whose liberty is deprived as prescribed in Article 21 if such disclosure would adversely affect the privacy or safety of the person or impede the criminal investigation.</p>	<p><u>Article 23</u></p> <p><u>On an exceptional basis,</u> a public official depriving a person’s liberty or the Court may refuse to disclose information about the person whose liberty is deprived as prescribed in Article 21 <u>only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control, where strictly necessary, and if</u> such disclosure would adversely affect the privacy or safety of the person or impede the criminal investigation.</p>	<p>1. The wording of the proposed provision to be inserted is derived from Article 20 of the ICPPED.</p> <p>2. Article 23 of the Draft Act does not comply with criteria set out in Article 20 of the ICPPED⁶ which provides that the right to information may be restricted only in exceptional circumstances and subject to very conditions. Without these, the conditions, there is a risk of abusive or inappropriate refusal of disclosure.</p>

⁶ Article 20 of the ICPPED states that “only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention...”

Prosecution			
6	<p><u>Article 27</u></p> <p>The offence under this Act shall be under the jurisdiction of the Criminal Court of Corruption and Malfeasance Cases and the Procedure Code for Corruption and Malfeasance Cases, shall apply mutatis mutandis.</p>	<p><u>Article 27</u></p> <p>The offence under this Act shall be under the jurisdiction of the Criminal Court of Corruption and Malfeasance Cases and the Procedure Code for Corruption and Malfeasance Cases, shall apply mutatis mutandis.</p> <p><u>Inquiries relating to cases under the jurisdiction of military courts shall be under the jurisdiction of ordinary courts.</u></p>	<ol style="list-style-type: none"> 1. This article may allow crimes under the Draft Act to be tried by military courts in cases where military courts have jurisdiction in accordance with the Constitution Military Court Act (1955), since Article 4 of the Procedure Code for Corruption and Malfeasance Cases allows the Act to be applied in military courts mutatis mutandis. 2. International law and standards establish that while resorting to military jurisdiction is allowed for the prosecution of military offences committed by military personnel, in all cases, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.⁷

⁷See, UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Impunity Principles"), UN Doc E/CN.4/2005/102/Add.1, 2005. Principle 29 of the Impunity Principles provides that "the jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court." See also, UN Commission on Human Rights, Draft Principles Governing the Administration of Justice Through Military Tribunals ("Decaux Principles"), U.N. Doc. E/CN.4/2006/58 (2006), 13 January 2006, No. 9

Mode of Liability			
7	<p><u>Article 31</u></p> <p>Whoever conspire on committing the offences under Article 28, 29 or 30 shall be liable to one-third of the punishment provided for such offence.</p> <p>Whoever is involved in committing the offences under article 28, 29 or 30 shall be liable to the same punishment as the principals, as indicated for such offences.</p>	<p><u>Article 31</u></p> <p>Whoever –</p> <p>(i) <u>attempts to commit;</u></p> <p>(ii) <u>participates in the commission of;</u></p> <p>(iii) <u>is complicit in the commission of;</u></p> <p>the offences under Article 28, 29 or 30 shall be liable to <u>(penalty commensurate with the gravity of the crime).</u></p> <p>Whoever is involved in <u>committing, ordering, soliciting or inducing the commission of</u> the offences under article 28, 29 or 30 shall be liable to the same punishment as the principals, as indicated for such offences.</p> <p><u>Article [...]</u> (proposed to be inserted)</p> <p><u>Whoever –</u></p> <p>(i) <u>attempts to commit;</u></p> <p>(ii) <u>participates in the commission of;</u></p> <p>(iii) <u>is complicit in the commission of;</u></p> <p>the offence of CIDT/P under Article [...] shall be liable to a <u>(penalty commensurate with the gravity of the crime).</u></p>	<ol style="list-style-type: none"> 1. Noting Chapter 4-6, Book I, of the Penal Code, ICJ and AI proposed that article 31 of the Draft Act does not cover the full range of forms of liability nor types of perpetrators who should be held liable for acts of torture and enforced disappearance in accordance to Article 4 of the UNCAT and Article 6 of the ICPPED. 2. Article 4 of the UNCAT imposes obligations on state parties to penalize those who “attempt to commit torture and to an act by any person which constitutes complicity or participation in”, while Article 6 of the ICPPED impose obligations on state parties to penalize those who “commits, orders, solicits or induces the commission of, attempts to commit”. 3. ICJ and AI was also of the view that the full range of forms of liability and types of perpetrators who should be held liable for acts of CIDT/P shall as well be stipulated in the Draft Act.

Command Responsibility			
8	<p><u>Article 32</u></p> <p>A supervisor who knows that his subordinate under his command is about to or has committed an offence under Article 29 or 30 paragraph 2 but fails to take necessary or reasonable measures to prevent or suspend the offence, or not undertake or forward case for investigation and prosecution in accordance with law, shall be liable to half of the penalty as indicated for such offence.</p> <p>A supervisor in accordance with paragraph 1 must be those responsible for and with the authority to control activities relating to the crime of enforced disappearance.</p>	<p><u>Article 32</u></p> <p>A supervisor who knows, <u>or consciously disregarded information which clearly indicated</u>, that a <u>subordinate under his or her effective authority and control</u> is about to or has committed an offence under Article <u>28, 29 or 30</u>, and, while exercising, exercised effective responsibility for and control over activities which were concerned with the offence under Article 28, 29 or 30,</p> <p>but</p> <p>fails to take necessary or reasonable measures <u>within his or her power</u> to prevent or suspend the offence, or to undertake or forward case for investigation and prosecution in accordance with law shall be liable to half of the penalty as indicated for such offence.</p> <p>A supervisor in accordance with paragraph 1 must be those responsible for and with the authority to control activities relating to the crime of enforced disappearance.</p> <p><u>No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence under Article 28, 29 or 30.</u></p>	<ol style="list-style-type: none"> 1. The proposed amendment was from the wording of Article 6 of the ICCPED⁸ that imposes obligations on state parties to penalize a supervisor who “<i>knew, or consciously disregarded information which clearly indicated</i>, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance”. 2. The Draft Act removed command responsibility for acts of torture. However, 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 where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measure”. 3. According to the ICJ and AI Recommendations, the organizations further recommended the wording from Article 6(2) of the ICCPED, which is consistent with Article 2(3) of the UNCAT, be inserted in this provision where no

⁸ Article 6 of the ICCPED states that “1. Each State Party shall take the necessary measures to hold criminally responsible at least: [...] (b) A superior who: (i) Knew, or 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; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution; [...] 2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.”

			order or instruction from any public authority or other, may be invoked to justify such offences.
Criminalization of acts of Cruel, Inhumane and Degrading Treatment or Punishment ("CIDT/P")			
9	CURRENTLY NONE	<p>Article [...] (proposed to be inserted)</p> <p>Other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined under article 3, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, will be considered offences under this Act for the purposes of articles 24, 25, 26 and 27.</p> <p>[Add the appropriate penalty under Chapter 5 of the Draft Act.]</p> <p>or</p> <p>Refer to relevant provisions for offences in the Thai Criminal Code (such as sections 295, 296, 297 (1), 297(2), 297(3), 297 (4), 297(6) and 297(7)) when such offences are committed by a public official or other person acting with official capacity, and the acts do not amount to torture.</p>	<ol style="list-style-type: none"> 1. The proposed provision to be inserted was from the wording of article 16 of the UNCAT.⁹ 2. ICJ and AI recommended that acts of CIDT/P be explicitly criminalized under the Draft Act to ensure that complaints, investigations and prosecutions under the Act are not limited only to that conduct which strictly meet the definition of torture under the Act. 3. Although UNCAT does not define CIDT/P for purposes of domestic criminal law, Article 16 obliges State parties to prevent CIDT/P and, as international authorities have made clear, this generally requires criminalization of conduct constituting CIDT/P. Importantly, CIDT/P is unequivocally prohibited alongside torture under the International Covenant on Civil and Political Rights ("ICCPR"),¹⁰ to which Thailand is a State party, as a non-derogable prohibition.¹¹

⁹ Article 16 of the UNCAT states that "1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

⁸ ICCPR, article 7.

⁹ ICCPR, article 4.

Inadmissibility as evidence of statements or other information obtained by torture, CIDT/P or enforced disappearance			
10	CURRENTLY NONE	<p>Article [...] (proposed to be inserted)</p> <p>Any statement which is established to have been made or information obtained as a result of torture, CIDT/P or enforced disappearance shall not be invoked as evidence in any proceedings, except against a person accused of torture, CIDT or enforced disappearance as evidence that the statement was made.</p>	<ol style="list-style-type: none"> 1. The wording was adopted from Article 15¹² of the UNCAT.¹³ 2. ICJ and AI 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 Code granting Courts discretion in admitting such evidence. ICJ and AI believe that an absolute prohibition on the admission of such statements as evidence should be included within the Draft Act in order to establish 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.
Additional Safeguards			
11	CURRENTLY NONE	<p><u>Safeguards: General</u></p> <p>Article [...] (proposed to be inserted)</p> <p>Every detainee without exception shall be given access to legal counsel as soon as possible, and no later than within 24 hours from the moment of arrest, as also provided in Article 7/1(1) of the Criminal Procedure Code;</p>	<ol style="list-style-type: none"> 1. ICJ and AI recommended that new provisions be added to the Draft Act to ensure that safeguards against torture, CIDT/P and enforced disappearance are instituted immediately after arrest or detention. 2. Notably, extensive safeguards against torture, CIDT/P and enforced disappearance currently exist in the Thai Criminal Procedure Code, including in Article 7/1, 83 and 134/3. Some

¹² Article 15 of the UNCAT states that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

¹³ It is noteworthy that while article 15 of the UNCAT only refers to the exclusion of statements obtained through torture, the Committee has clarified that article 15 should be obligatorily applied to both torture and CIDT/P. See also: Committee against Torture, General Comment No 2, op. cit 1, §3, 6.

		<p>In all circumstances, a relative of the detainee shall be informed of the arrest and place of detention immediately, and no later than within 18 hours from the moment of arrest, as also provided in Articles 7/1(1) and 83 of the Criminal Procedure Code;</p> <p>Detainees shall not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, shall not exceed a period of 48 hours from the moment of arrest, as also provided in Article 87 of the Criminal Procedure Code.</p> <p><u>Safeguards: During interrogation</u></p> <p><u>Article [...]</u> (proposed to be inserted)</p> <p>Legal counsel for the person being interrogated shall be present during all interrogations, in concomitance with article 134/3 of the Criminal Procedure Code. Each interrogation shall be initiated with the identification of all persons present. All interrogation sessions shall be video or audio recorded, and the identity of all persons present included in the records. Statements or any other purported evidence from interrogations where legal counsel is not present or from non-recorded interrogations shall be excluded from court proceedings.</p>	<p>safeguards are considered by the government through proposed amendments to Thailand's Criminal Procedure Code, e.g. the provision regarding the video and audio recordings of arrests and/or searches. However, the ICJ and AI considered that the Draft Act should reflect these recommendations as they "translate" the views of the treaty monitoring bodies into more practicable terms and provide concrete and clear instructions to those in charge of arresting, holding or questioning persons. Even where such safeguards already exist in Thai law, it is important to reiterate them within the Draft Act, so as to create legislation that encompasses the full gamut of safeguards against torture, CIDT/P and enforced disappearance.</p>
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Continuous nature of the crime of enforced disappearance

12	CURRENTLY NONE	<p>Article [...] (proposed to be inserted)</p> <p><u>The offence under article 29 and 30 paragraph 2 is not applied with any limitation on retroactive application. Given the continuing nature of the enforced disappearance crime, the crime remains active from the time of the deprivation of liberty and extends for the whole period of time that the crime is not complete, until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.</u></p>	<ol style="list-style-type: none"> 1. The wording of the proposed provision to be inserted is derived from the 'General Comment on Enforced Disappearance as a Continuous Crime' of the UN Working Group on Enforced or Involuntary Disappearances ("WGEID").¹⁴ 2. In the General Comment, the WGIED further recommended that "one consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity. The crime cannot be separated and the conviction should cover the enforced disappearance as a whole." 3. The Report of the Extraordinary Commissioner in Considering the Draft Prevention and Suppression of Torture and Enforced Disappearance Act, dated 22 February 2019, which stated that the Draft Act will not apply retroactively to cases occurring prior to the passage of the law, is not in compliance with international standards.
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¹⁴ The General Comment clarified that the continuous nature of the crime means the offence of enforced disappearance remains active "from the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual." See: WGEID, 'General Comment on Enforced Disappearance as a Continuous Crime', available at: <https://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf> .

Statute of Limitation			
13	CURRENTLY NONE	<p><u>Article [...]</u> (proposed to be inserted)</p> <p>There should be no statute of limitations for the crimes of torture and enforced disappearance.</p> <p>The statutes of limitations as set out in Article 95 of the Criminal Code shall apply for the offence of CIDT/P.</p>	<ol style="list-style-type: none"> 1. The UN Committee against Torture, in its General Comment No. 3¹⁵ and in numerous concluding observations, noted that there should be no statutes of limitations for the crime of torture.¹⁶ 2. According to Article 8 of the ICPPED, 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", and "commence from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature".

¹⁵ UN Committee against Torture, General Comment NO. 3, para. 38.

¹⁶ Principle 23 of the Impunity Principles also provides that "Prescription shall not apply to crimes under international law that are by their nature imprescriptible."