

The Courts and COVID-19 in Thailand

A Briefing Paper
October 2021



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1. Background

The anti-COVID19 pandemic measures have affected several aspects of the functioning of justice systems in many countries around the world, including Thailand. In response to the COVID-19 pandemics, Thai courts are adopting different modalities for the conduct of the hearings and, to reduce the caseload, limiting the range of matters than can be brought before them, while also postponing certain kinds of cases, particularly complicated criminal cases such as cases where the defendant pleaded innocent or cases where significant amount of evidence were produced therefore requiring extended consideration. While such measures may have been seen as necessary to effectively tackle the pandemic, at the same, such limitations on the operations of the administration of justice will in many instances serve to impede the right to access to justice and the right to a fair trial.

This briefing note summarizes the obligations to ensure the role of courts under international human rights law in the midst of the COVID-19 pandemic. It then examines, in this context, impairments to judicial functioning in Thailand, such as the suspension and postponement of certain cases, changes in the modality of hearings including by using video-conferencing, the publicity of hearings and the right to a lawyer.

While this paper is a stand-alone document, it will be useful to read it in conjunction with the ICJ's general briefing note on *The Courts and COVID-19*,¹ the global guideline on *Videoconferencing, Courts and COVID-19: Recommendations Based on International Standards*,² which explain relevant international laws and standards in more detail.

2. Courts and specific issues in situations of emergency

Thailand is a party to a number of principle human rights treaties, including (i) International Covenant on Civil and Political Rights (ICCPR); (ii) International Covenant on Economic, Social and Cultural Rights (ICESCR); (iii) Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; (iv) Convention on the Rights of the Child (CRC) and its three Optional Protocols; (v) International Convention on the Elimination of All Forms of Racial Discrimination; (vi) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and (vii) Convention on the Rights of Persons with Disabilities.

¹ ICJ, 'ICJ Guidance on the Courts and COVID-19', 7 April 2021, available at: <https://www.icj.org/icj-guidance-on-the-courts-and-covid-19/> ('ICJ Guidance on the Courts and COVID-19')

Under international law, the responsibility to ensure that human rights are guaranteed and protected is not limited to the legislative and executive branches of government, but must also effectively be discharged by the judiciary. To put it another way, the obligations the States have under international human rights law engage the responsibility of the judiciary.³

Judicial institutions may play a role in making sure all human rights guarantees are effectively discharged, including by supervising any administrative act of State. In this respect, the judiciary plays an essential role in securing the rule of law during times of emergency, by ensuring that the actions of other branches of government respect the law.⁴ The ICJ, in its 2008 Geneva Declaration, has identified the particular responsibilities of judges and lawyers to uphold human rights and the rule of law in times of crisis, including public health emergencies.⁵

Some other particular responsibilities of the judiciary include ensuring the right to a fair trial by an independent and impartial court (e.g. article 14, ICCPR); the right to judicial control of deprivation of liberty (e.g. article 9(3) and (4), ICCPR); and the right to an effective remedy (e.g. article 2(3), ICCPR).

While international human rights law recognizes that State institutions, including the judiciary and court services, may, and in some cases must, take measures that serve to limit the scope of certain rights during public health measures, such measures must meet the criteria for limitation or derogation, including requirements of legality, non-discrimination, necessity, and proportionality (and time-limitedness, particularly for derogations).⁶ Nevertheless, certain rights, including, among others, the right to life and aspects of fair trials, are never subject to such derogation or limitation.

In four particular areas, there have been stresses on the Thai justice system and Thai courts in discharging their responsibility to uphold human rights and the rule of law during the COVID-19 pandemic:

- A. the suspension of certain cases and the consequences of the postponement;
- B. changes in the modality of hearings;
- C. the right to a lawyer; and
- D. the right to a public trial.

A. Suspension of certain cases and the consequences of the postponement

In the early stages of the COVID-19 pandemic, judiciaries in many countries suspended all trials, and in some cases even some other judicial matters except those deemed 'urgent'. These measures have been typically grounded in the imperative of protecting public health, which itself a human rights obligation under such treaties as the ICESCR and the CRC. However, such measures may entail serious implications for certain rights including the right to "a fair and public hearing by a competent, independent and impartial tribunal established by law" (article 14(1), ICCPR), the right to be tried "without undue delay" (article 14(3) (c), ICCPR), and the right of pretrial detainees to be released if not tried "within a reasonable time" (article 9(3), ICCPR).

³ UN Human Rights Committee, 'General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 4 and 15.

⁴ See ICJ Guidance on the Courts and COVID-19. See also ICJ, 'Legal Commentary to the Geneva Declaration', 2011, available at: <https://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/>

⁵ ICJ, 'Legal commentary to the ICJ Geneva Declaration: upholding the rule of law and the role of judges & lawyers in times of crisis', 31 May 2011, available at: <https://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/>

⁶ The ICJ has previously reviewed, assessed and made recommendations in relation to the possible ways to limit or restrict human rights during an emergency situation, the implementation of Thailand's Emergency Decree and the imposition of its emergency measures in several reports and briefings, including ICJ, 'The Implementation of the Emergency Decree in Response to the COVID-19 Pandemic in Thailand', July 2021, available at: <https://www.icj.org/thailand-covid-19-emergency-decree-must-not-be-used-to-undermine-human-rights/> ('ICJ Briefing on COVID-19 and the Emergency Decree')

Unlike some ICCPR rights, these rights generally are not those which contain clauses allowing for limitations for purposes of national security, public health, public order and public morals. The exception is that under article 14 of the ICCPR, there can be limitations on the right to a public trial, hence there can in principle be limitations placed on public courtroom attending.

Even if Thailand were to derogate under a state of emergency, as contemplated by ICCPR article 4, the UN Human Rights Committee has made clear that the core parts of the right to a fair trial and judicial control over detention cannot be derogated from.⁷

Indeed, the UN Human Rights Committee issued a Statement on derogations from the ICCPR in connection with the COVID-19 pandemic. Among other things, it reaffirmed that the right of access to court, due process guarantees and the right of victims to obtain an effective remedy cannot be derogated even in times of public emergency.⁸

Cases For Particular Considerations

In the early stages of the COVID-19 pandemic, the Thai judiciary suspended and postponed most hearings with some listed as exceptions.⁹ These included witness examinations in criminal cases where the defendant is subjected to pre-trial detention; uncomplicated criminal cases that can be completed relatively quickly, such as witness examination hearings where the defendant pleads guilty; certain types of civil cases, such as hearings for declarations of missing persons, hearings to appoint guardians for juveniles and probate hearings; and hearings where a judge believes that trials can be proceeded without affecting the security of any parties and postponement would result in damages to the parties, taking into consideration the consent of both parties.¹⁰ Nevertheless, whenever the incidences of locally-transmitted COVID-19 cases have reduced, Thai courts have sometimes returned to normal operation.

As of 8 May 2020, the Secretary General of the Court of Justice revealed that 163,620 cases were postponed.¹¹ Between 1 January and 31 May 2021, approximately 287,000 cases have been postponed for many reasons, including due to the COVID-19 outbreak.¹²

After May 2021, due to the severity of the virus outbreak, Thai judges decide to resort to 'virtual justice' by relying more on alternative electronic means – i.e. videoconferencing, as an alternative to physical hearings.¹³ Fewer cases were postponed as a result of the efforts of the Thai judiciary who put in place technological equipment and other practical arrangements in order to avoid undue delay of civil and criminal proceedings or judicial review of detention. These measures were taken on the sole authority of the judiciary under rules of the court.

⁷ UN Human Rights Committee, 'General Comment No. 29: Article 4: Derogations during a State of Emergency', UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 16.

⁸ UN Human Rights Committee, 'Statement on derogations from the Covenant in connection with the COVID-19 Pandemic', UN Doc. CCPR/C/128/2, 24 April 2020, available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>

⁹ Thailand's Court of Justice had issued monthly announcements on the guideline to handle cases during the pandemic, available at: <https://jla.coj.go.th/th/content/page/index/id/187643>

¹⁰ For example, Announcement of the Judicial Administration Commission regarding the Handling of Cases During the COVID-19 Pandemic, 28 March 2020, available at: <https://ojac.coj.go.th/th/content/category/detail/id/22/iid/186113?fbclid=IwAR227oGW731azBovz-Zpb5vRFvCfinLbWfjYXvd3aU8qytoK4YIGZAI8TRC>; Conventus Law, 'Thailand Further Details Case Management And Judicial Procedure Under The Covid-19 Crisis', 7 May 2020, available at: <https://www.conventuslaw.com/report/thailand-further-details-case-management-and/>. See also: Court of Justice, 'the Handling of Cases During the COVID-19 Pandemic' (No. 1) (No.2) (No.3)(No.4)(No.5)(No.6) and (No.8), dated 28 December 2020, 29 December 2020, 4 January 2021, 15 January 2021, 17 February 2021, 29 March 2021 and 13 April 2021, respectively, available at: <https://jla.coj.go.th/th/content/page/index/id/187643>

¹¹ Thai PBS, 'COVID-19 Cause Courts to Postpone 1.6 hundred thousand cases', 8 May 2020, available at: <https://news.thaipbs.or.th/content/292236>

¹² ICJ Interview with representatives from the Court of Justice, dated 7 October 2021. The ICJ acknowledges that this is an approximate number and the postponement could occurred due to many reasons.

¹³ For example, Court of Justice, 'the Handling of Cases During the COVID-19 Pandemic' (No. 10) (No.11) (No. 12) and (No.21), dated 4 May 2021, 24 May 2021, 22 June 2021 and 10 September 2021, available at: <https://jla.coj.go.th/th/content/page/index/id/187643>

Nevertheless, it is crucial that the following matters are considered 'urgent' and should neither be suspended nor postponed: (i) cases involving violations of human rights and constitutional rights; (ii) protective measures for women, children, older persons, persons with disabilities, and others; and (iii) cases involving persons deprived of liberty. However, some of the above noted cases were not brought to trial within a reasonable time.¹⁴

Protection of human rights during states of emergency

It is generally accepted under international law that retaining scope for judicial review by independent courts is essential to upholding human rights and the rule of law during states of emergency. Emergency measures that are imposed to cope with the COVID-19 pandemic should always be subject to some degree of judicial review.¹⁵

In Thailand, apart from cases where individuals or business operators sue the Thai government due to lack of compensation or for alleged mismanagement of COVID-19 crisis,¹⁶ there were at least three cases where the plaintiff challenged emergency measures that are imposed to cope with the COVID-19 pandemic. In one case, the trial was initially rejected, reversed on appeal and then delayed. As for the other two cases, the petition was admitted by the court. The temporary injunction requests were concluded within a few days.

For the first case, on 26 March 2020 an activist filed a petition with the Administrative Court demanding legal action against the Thai government for imposing a new border rule requiring Thai nationals to apply for a certificate of entry into the Kingdom from the Royal Thai Embassy in their country of residence, and to have a medical certificate attesting that the traveler is fit to travel which issued no longer than 72 hours before travelling. This requirement was said to have effectively stranded many Thai citizens overseas during the early months of the pandemic.¹⁷ The Rule was initially imposed by the Civil Aviation Authority of Thailand ('CAAT') in their Notification dated 19 March 2020,¹⁸ however, on 25 March 2020, the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 ('Emergency Decree') also imposed measures with the same requirements.

On 2 April 2020, the Central Administrative Court refused to admit the case because, under the Emergency Decree, the imposed measures are not subject to review by the Court.¹⁹ Nevertheless, eight months after this rejection, on 12 December 2020, the Supreme Administrative Court overturned the decision of its lower court and admitted the case. The Supreme Administrative Court pointed out that the plaintiff challenged the Notification of the CAAT. While the Emergency Decree later imposed the same measure, the disputed regulation is the CAAT Notification, which was not part of the Emergency Decree and therefore admissible. More than a year after the measures were imposed and brought to Thai court, the case is still pending before the Central Administrative Court.

¹⁴ ICJ Guidance on the Courts and COVID-19, at 4-5.

¹⁵ ICJ Guidance on the Courts and COVID-19, at 4. See also ICJ Briefing on COVID-19 and the Emergency Decree

¹⁶ For example, The Nation, 'Court to hear case against Prayut for alleged mismanagement of Covid crisis', 14 August 2021, available at: <https://www.nationthailand.com/in-focus/40004646>; and The Pattaya News, 'Massage parlor and spa operators sue Thai government in class action lawsuit for 200 million baht due to lack of compensation for mandated Covid-19 closures', 17 August 2021, available at: <https://thepattayanews.com/2021/08/17/massage-parlor-and-spa-operators-sue-thai-government-in-class-action-lawsuit-for-200-million-baht-due-to-lack-of-compensation-for-mandated-covid-19-closures/>

¹⁷ Bangkok Post, 'Hundreds of Thais stranded in Malaysia without health clearance', 20 April 2020, available at: <https://www.bangkokpost.com/thailand/general/1903600/hundreds-of-thais-stranded-in-malaysia-without-health-clearance>

¹⁸ Available at: <http://www.mfa.go.th/main/contents/files/news3-20200329-164122-910029.pdf>.

¹⁹ Section 16 of the Emergency Decree explicitly excludes access to Administrative Courts. BangkokbizNews, 'Central Administrative Court Rejected the Petition about Fit to Fly Announcement to Combat COVID-19' (in Thai), 21 April 2020, available at: <https://www.bangkokbiznews.com/news/detail/874190> (in Thai).

The same activist also seeks an alternate route and submitted the case to the Bangkok Civil Court. However, on 5 April 2020, Bangkok Civil Court dismissed the above case on the basis that the Order was issued by the Prime Minister with whom such power under the Emergency Decree is vested.²⁰

In the second case, on 2 August 2021 the Civil Court accepted a petition by a group of human rights lawyers, media companies and reporters seeking the revocation of the Emergency Decree's Regulation No. 29, which was said to be an attempt by the Thai Government to address "fake news" relating to the COVID-19 pandemic in Thailand. It empowered the authorities to censor online expression, prosecute individuals responsible for communications relating to the COVID-19 pandemic that may "instigate fear", and suspending their internet service.²¹

On 6 August 2021, the Civil Court issued an injunction suspending the enforcement of Regulation No. 29. The court noted that "the Prime Minister had no authorization under the Emergency Decree to suspend the provision of internet services" as provided for under the regulation, and such suspension could result in "hindering communication and dissemination of information not having malicious intent". The court further noted that the order would have resulted in "a superfluous and unnecessary deprivation of people's right(s) and freedom". Following the court injunction, on 9 August 2021, Prime Minister Gen. Prayut Chan-o-cha signed an announcement revoking Regulation No. 29.²² This case again illustrates the essential role of the judiciary in securing the rule of law by ensuring that the actions of the other branches of government respect the law.

In the third case, on 5 October 2021, three activists filed a complaint with the Civil Court against the Prime Minister, Military Commander-in-Chief, the Office of the Prime Minister, the Thai Armed Forces Headquarters, the Ministry of Finance, and the Royal Thai Police Headquarters, asking the Court to repeal the relevant orders, which bans public gatherings, on the grounds that the orders are a violation of basic rights and freedoms. Such orders were issued under the Emergency Decree in order to control the COVID-19 outbreak.²³ The three activists asked for compensation of 4.5 million Thai bath (USD 133,000), and asked the court for a temporary injunction suspending the gathering ban until the court issue a ruling on their request. The court accepted the activists' complaint. The urgent inquiry was conducted in the afternoon of the same day.²⁴

A few days later, on 8 October 2021, the Court refused to grant an injunction suspending the enforcement of the relevant Emergency Decree orders, citing that there is no sufficient reason to grant the injunction as there are still high number of confirmed COVID-19 cases. A hearing of this case is scheduled for 31 January 2022.²⁵

²⁰ Thai Post, 'Civil Court Dismissed Case, State can Asked for Fit to Fly' (in Thai), 5 April 2020, available at: <https://www.thaipost.net/main/detail/62089>.

²¹ ICJ, 'Thailand: Immediately repeal emergency regulation that threatens online freedoms', 3 August 2021, available at: <https://www.icj.org/thailand-immediately-repeal-emergency-regulation-that-threatens-online-free-doms/>. See also: Bangkok Post, 'Court accepts petition against internet blocking', 2 August 2021, available at: <https://www.bangkokpost.com/tech/2158731/court-accepts-petition-against-internet-blocking>

²² Access Now, 'Thailand empowers state authorities to violate rights by censoring online content', 10 August 2021, available at: <https://www.accessnow.org/thailand-online-censorship/>

²³ These include Emergency Decree Regulation No. 15 and Announcements of the Chief Officer Responsible for Remediating the Emergency Situation on Matters Relating to Security No. 3.

²⁴ Prachatai, 'Activists challenge ban on public gathering', 5 October 2021, available at: <https://prachatai.com/english/node/9482>

²⁵ BBC Thai, 'Civil Court Refused the Request to Temporarily Halt the Use of Emergency Decree to Ban Political Gatherings', 8 October 2021, available at: <https://www.bbc.com/thai/thailand-58841747>

Cases involving persons deprived of liberty

Particular consideration must also be given to the situation of persons deprived of liberty noting the non-derogable nature of the right to challenge the lawfulness of detention before a tribunal, court or judge,²⁶ and the presumption of innocence,²⁷ even where there is a declared public emergency which threatens the life of the nation.

While the challenging of the lawfulness of detention are normally listed as an exception from postponement by Thai courts, the ICJ has received information from Thai Lawyers for Human Rights ('TLHR') that there were at least three cases where the defendants submitted applications challenging the lawfulness of detention and sought bail for release, but their hearings were postponed citing the COVID-19 outbreak.²⁸

The first case was, on 6 May 2021, where a court hearing for Parit "Penguin" Chiwarak and Chai-amorn "Ammy" Vibulphan, protest leaders who were held at Bangkok Remand Prison awaiting trial on lèse majesté and other charges, has been postponed because the two defendants did not complete their 14-day quarantine in prison.²⁹ Parit was later released on 11 May 2021, after being denied bail 10 times. Chai-amorn was later released on the same day.³⁰ Second, on 11 May 2021, a bail hearing for another activist, Panupong "Mike" Jadnok, was postponed pending the result of a COVID-19 test.³¹ According to his lawyer, his request for the hearing to be conducted via videoconferencing was rejected. He was sent back to a prison that was hit harshly by the pandemic.³² Two days later, he tested positive for COVID-19 in prison.³³ Third, on 3 May 2021, court denied to conduct bail hearing for Chukiat "Justin" Saengowng, who contracted COVID-19, but requested for his hearing to take place via videoconferencing.³⁴ On 14 May 2021, his hearing was postponed again because the prison officers could not bring him to the videoconference facility due to the outbreak in prison. On 19 May 2021, his hearing was again postponed because the prison imposed 'bubble and seal' measure, meaning prisoners could not leave the prison facilities, brought to court or videoconference facility.³⁵ His bail was finally granted on 1 June 2021.

²⁶ See, for example, UN Human Rights Committee, 'General Comment No. 29, States of Emergency (Article 4)', 31 August 2001, paras. 14 and 16 ('General Comment No. 29'); UN Human Rights Committee, 'General comment No. 35: Article 9 (Liberty and security of person)', 23 Oct 2014, para 67 ('General Comment No. 35'); Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3, 15 December 2003, paras. 62 and 85 and Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1994/27, 17 December 1993, para. 74.

²⁷ UN Human Rights Committee, 'General Comment No 32: Article 14, Right to equality before courts and tribunals and to fair trial', 23 August 2007, paras 6, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2F32%2F32&Lang=en ('General Comment No. 32'). See also: General Comment No. 29, paras 11 and 16

²⁸ TLHR, 'COVID-19 and the Restrictions on Freedom of Expression under the Emergency Decree', June 2021, at 16-17, available at: <https://bit.ly/3jXK0PL> ('TLHR COVID-19 Report')

²⁹ Thai PBS, 'Protest leader Anon catches COVID-19, while Penguin is returned to prison', 6 May 2021, available at: <https://www.thaipbsworld.com/protest-leader-anon-catches-covid-19-while-penguin-is-returned-to-prison/>

³⁰ Ann Carter, 'Activist who was denied bail tests positive for Covid-19 in jail', Thaiger, 13 May 2021, available at: <https://thethaiger.com/coronavirus/activist-who-was-denied-bail-tests-positive-for-covid-19-in-jail>

³¹ Reuters, 'Thai court grants bail to 2 protest leaders in jail for royal insults', 11 May 2021, available at: <https://www.reuters.com/world/asia-pacific/thai-court-grants-bail-2-protest-leaders-jail-royal-insults-2021-05-11/>

³² Naewna, 'Mike contracted COVID-19 from prison, his lawyer is subject to quarantine' (in Thai), 14 May 2021, available at: <https://www.naewna.com/politic/572874>.

³³ Bangkok Post, 'Another jailed rally leader has Covid', 13 May 2021, available at: <https://www.bangkokpost.com/thailand/politics/2115095/another-jailed-rally-leader-has-covid>

³⁴ TLHR, 'Court denied Justin's bail hearing for the fifth time because he was contracted with COVID-19, while he confirmed that he was undergoing an effective treatment' (in Thai), 6 May 2021, available at: <https://tlhr2014.com/archives/29312>

³⁵ TLHR, 'Court cited 'equality' to postpone Chukiat's bail hearing to 1 June because Department of Correction denied to bring to prisoner to designated area' (in Thai), 19 May 2021, available at: <https://tlhr2014.com/archives/29841>

Indeed, between 9 February and 22 September 2021, when Thailand experienced the worst wave of coronavirus outbreak since the start of the pandemic, there were at least 30 political activists detained in prison pending trial despite the recommendation made by the UN High Commissioner for Human Rights that “every person detained without sufficient legal basis, including political prisoners, and those detained for critical, dissenting views” should be released.³⁶ At least seven of these detainees contracted COVID-19 in prison.³⁷

Notably, since June 2021, Thailand’s overcrowded prisons were hit by a mass infection outbreak.³⁸ Out of approximately 300,000 prisoners in Thailand,³⁹ more than 67,586 people have tested positive and COVID-19 had contributed to 141 deaths as of 21 September 2021.⁴⁰

Dealing with the consequences of the postponement

Once the current crisis subsides, the courts will face a considerable backlog of postponed proceedings, as well as possibly greater-than-normal numbers of bankruptcy, insurance, labour law, and other such matters.

In upholding, among others, the right to be tried “without undue delay” (article 14(3)(c), ICCPR), the ICJ recommends that, in the immediate term the Thai judiciary should consider extending limitation periods and filing deadlines in the postponement of civil and criminal proceedings. For the long term, as it may not be possible for judiciaries to secure the resources to scale up capacity beyond pre-crisis levels, Thailand should consider decriminalizing or granting amnesty for minor non-violent offences and increasing the use of mandatory alternative dispute solution for a larger portion of civil litigation.⁴¹

B. Changes in the modalities of hearings

In response to the COVID-19 outbreak, Thai judiciaries are making available an option that individuals and their lawyers shall appear at hearings by videoconferencing in substitute for physical presence.⁴²

Generally, under international human rights law and rule of law standards, whenever all the parties give their free and fully informed consent to the use of videoconferencing in any given judicial proceedings, its use in such circumstances would be lawful. Without the party’s consent, the situation is different, as an accused has a right to be physically presence,⁴³ which should not be waived. For criminal cases, presence in the court room, the ability to consult face-to-face with one’s lawyer, and the exercising of the rights of defence, like confrontation of witnesses and full testing of evidence, will be compromised under these rules. In any event, any such restrictions must base in law, time-limited and demonstrably necessary and

³⁶ Office of the United Nations High Commissioner for Human Rights (‘OHCHR’), ‘Press briefing note on COVID-19’, 3 April 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25770&LangID=E>

³⁷ ICJ Interview with representative of TLHR, dated 22 September 2021.

³⁸ ICJ, ‘Thailand has failed to adequately address the disproportionate impact of COVID-19 on the economic, social and cultural rights of marginalized persons’, 25 August 2021, available at: <https://www.icj.org/thailand-has-failed-to-adequately-address-the-disproportionate-impact-of-covid-19-on-the-economic-social-and-cultural-rights-of-marginalized-persons/>

³⁹ Available at: http://www.correct.go.th/rt103pdf/report_index.php

⁴⁰ Department of Correction, available at: <https://www.facebook.com/prthaidoc/>

⁴¹ ICJ Guidance on the Courts and COVID-19, at 6.

⁴² According to the European Court of Human Rights, such adaptations of modalities can be a proportionate response, at least in civil matters and criminal appeals. See: *Yevdokimov v Russia*, 2016, paras 40 to 43, available at: <http://hudoc.echr.coe.int/eng?i=001-160620>; *Sakhnovskiy v Russia* [GC], 2010, paras 94 to 98, available at: <http://hudoc.echr.coe.int/eng?i=001-101568>; *Marcello Viola v Italy*, 2006, paras 64 to 72, available at: <http://hudoc.echr.coe.int/eng?i=001-77246>; and *Golubev v Russia* (decision), 2006, available at: <http://hudoc.echr.coe.int/eng?i=001-78357>. The Court was also of the view that the decision whether to adopt the videoconferencing technology in any particular case should be made by the judge on a case-by-case basis. See: *Yevdokimov v Russia*, 2016, paras 22-26, 33-53, available at: <http://hudoc.echr.coe.int/eng?i=001-160620>; and *Vladimir Vasilyev v Russia*, 2012, paras 75-90, available at: <http://hudoc.echr.coe.int/eng?i=001-108478>.

⁴³ These include the right of the accused to be physically present for his or her criminal trial (article 14(3)(d), ICCPR), and the right of a person arrested or detained on criminal charges to be physically present for his or her initial hearing before the judge (article 9(3), ICCPR)

proportionate in the local circumstances of the present outbreak, with safeguards to address the other fair trial rights of the affected person.⁴⁴

Criminal Cases

National laws and rules should not permit, and in practice courts and other authorities should not proceed with, criminal trials in which an accused is denied the right to be physically present for the trial and is instead forced to participate by means of a video link or similar technology without his or her freely given and fully informed consent.⁴⁵

Under Thai law, subject to section 172 of the Criminal Procedure Code, “unless otherwise provided, the trial and the taking of evidence shall be conducted in open Court and in the presence of the accused”. Section 230/1 of the Criminal Procedure Code further provides that “in case of necessity, the witness cannot be brought to give testimony in Court, where a party makes a request or the Court thinks fit, the Court may permit such a witness to give testimony ... to other place out of the Court, with holding telecasting picture and sound in the manner of meeting in screen”.⁴⁶

In the context of the COVID-19 pandemic, Court of Justice’s Guidelines in Handling of Cases During the COVID-19 Pandemic, including Guideline No. 21, which is into effect between 16 September 2021 and 31 October 2021, allowing the use of videoconferencing in criminal cases in certain circumstances. For examination of the accused, if such person is subjected to pre-trial detention, with their consent, courts may use videoconferencing. If the accused is not subjected to pre-trial detention, the hearings can proceed as normal with their physical presence. For witness examination, courts must use videoconferencing. If such method is not possible, witnesses may physically participate the hearings.⁴⁷

In this regard, we received information from TLHR that there were cases where examinations of the accused were conducted via videoconferencing.⁴⁸ We, however, further received information that several judges did not play an active role in ensuring that the accused gave their free and fully informed consent to the use of videoconferencing prior to their judicial proceedings, partly because they trusted the lawyers whom, on their clients’ behalf, submitted requests for the trial to be proceed with such mean. Several judges assumed that the lawyers would have properly obtained informed consent from their clients.⁴⁹

Judicial Review of Deprivation of Liberty

Article 9(3) of ICCPR provides that, “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”⁵⁰ In addition, as mentioned above, the right to have access to a court to challenge any deprivation of liberty and the right of persons deprived of liberty on criminal law grounds to be promptly brought before a judge are recognized as non-derogable including in situations of public emergency.⁵¹

⁴⁴ See also Fair Trials, ‘Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings’, 30 March 2020, available at: <https://www.fairtrials.org/news/safeguarding-right-fair-trial-during-coronavirus-pandemic-remotecriminal-justice-proceedings>

⁴⁵ ICJ Guidance on the Courts and COVID-19, at 5; ICJ Guideline on Videoconferencing, Courts and COVID-19, at 8-9.

⁴⁶ See also: Regulation of the Chief of the Supreme Court regarding Witness Examination in Criminal Cases Via Video Conferencing B.E. 2556 (2013), available at: <https://ipitc.coj.go.th/th/content/article/detail/id/10303/iid/191254>

⁴⁷ Court of Justice, ‘the Handling of Cases During the COVID-19 Pandemic’ (No.21), 10 September 2021, part 1.1.2, available at: <https://jla.coj.go.th/th/content/category/detail/id/1602/iid/261595>.

⁴⁸ ICJ Interview with representative of TLHR, dated 22 September 2021.

⁴⁹ Ibid. ICJ Interview with representatives from the Court of Justice, dated 7 October 2021

⁵⁰ See also: Principles 32 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and Article 10 of the UN Declaration on the Protection of All Persons from Enforced Disappearances.

⁵¹ General Comment No. 29, para 16; General Comment No. 35, paras 64-67. Inter-American Court of Human Rights, Advisory Opinion on Habeas Corpus, 30 January 1987, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf

One reason that it is necessary for the person deprived of liberty to be physically before the judicial authority, so as the judiciary can effectively fulfil their role observing the individual for risk or actual signs of torture or other ill-treatment. The judge is likely to be less able to detect any indicia of abuse if the review is based solely on documents or conducted by videoconference hearing.⁵²

In Thailand, in the past few months due to the severity of the virus outbreak, judges in reviewing pre-trial detention application and challenging the deprivation of liberty, were allowed to question the defendants via videoconferencing in accordance with the relevant regulations of the Chief of the Supreme Court and section 87/1 of the Criminal Procedure Code, which provide that the court may permit videoconferencing if both parties do not object.⁵³

However, the ICJ has received information from TLHR that the review of pre-trial detention application and challenge of the deprivation of liberty are presently carried out by videoconferencing, and physical hearings depend on the police station that has jurisdiction over the case.⁵⁴ We further receive information that several judges did not play an active role in ensuring that the accused gave their free and fully informed consent to the use of videoconferencing prior to the review of pre-trial detention applications.⁵⁵

A welcome development is the provisions in the Recommendation of the Chief of the Supreme Court regarding Operational Guidelines During the COVID-19 Outbreak (No. 3)⁵⁶ and the Recommendation of the Chief of the Supreme Court regarding Enhancing Possibilities in Accessing Right to be Temporarily Release (2019),⁵⁷ which states that courts should consider releasing prisoners awaiting trial without bail, or by appointing monitoring persons or using electronic monitoring (EM) devices. The ICJ regrets that as of 22 September 2021, six protest leaders remained in pre-trial detention for their protest activities. Some were arrested by authorities from the protest sites. A number of them have been denied bail several times.⁵⁸

C. the Right to a Lawyer

Lawyers play an essential role in the protection of human rights including the right to a fair trial, the right to liberty, and the prevention of torture and other ill-treatment. Article 14(3)(b) of the ICCPR, for instance, provides for the right of everyone charged with a criminal offence "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".

The obligation of authorities to respect and ensure access to lawyers and the confidentiality of all communications between lawyers and clients is also recognised in the UN Basic Principles on the Role of Lawyers.⁵⁹ In its General Comment No. 32, the Human Rights Committee also considered that the right to communicate with a lawyer of one's own choosing, "in conditions that fully respect the confidentiality of their communications", is an important element of the guarantee of a fair trial and an application of the principle of equality of

⁵² This was also reaffirmed by the UN Human Rights Committee in the process leading to adoption of General Comment on Article 9 of the ICCPR. See: OHCHR, 'Human Rights Committee continues discussion on draft general comment on the right to liberty and security of person', 24 July 2014, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14901&LangID=E>. See also: UN Working Group on Arbitrary Detention, Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, 2015, Principle 11 available at: <https://undocs.org/A/HRC/30/37>.

⁵³ For example, Court of Justice, 'the Handling of Cases During the COVID-19 Pandemic' (No. 12), dated 22 June 2021, available at: <https://jla.coj.go.th/th/content/category/detail/id/1601/iid/249821>.

⁵⁴ Court of Justice, 'the Handling of Cases During the COVID-19 Pandemic' (No.21), 10 September 2021, part 1.3, available at: <https://jla.coj.go.th/th/content/category/detail/id/1602/iid/261595>. ICJ Interview with TLHR, 22 September 2021.

⁵⁵ ICJ Interview with representative of TLHR, dated 22 September 2021; ICJ Interview with representatives from the Court of Justice, dated 7 October 2021

⁵⁶ Available at: <https://pyojc.coj.go.th/th/content/category/detail/id/8/cid/14/iid/186575>

⁵⁷ Available at: <https://jla.coj.go.th/th/content/category/detail/id/10/cid/21/iid/175384>

⁵⁸ ICJ Interview with representative of TLHR, dated 21 September 2021.

⁵⁹ Principles 7, 8 and 22, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

arms.⁶⁰ Similar considerations arise in relation to the effectiveness of challenges to the lawfulness of deprivation of liberty,⁶¹ and protection of the rights of persons deprived of liberty more generally.⁶²

In the context of the COVID-19 pandemic, where videoconferencing is permissible for a particular hearing, care must still be taken to ensure full respect for the right of an accused or individual party to representation by and confidential communication with independent legal counsel.

In Thailand, to our knowledge, lawyers have been permitted to communicate with the accused confidentially, including in remand prisons, before the hearings. We, however, note that on 21 June 2021, TLHR issued a statement raising concern regarding the practice of eavesdropping on confidential lawyer-client conversations in prison, which constitutes a serious violation of Article 14 of the ICCPR.⁶³

Nevertheless, during the course of remote proceedings, video-conferencing system installed and operated by the court does not permit a secure and confidential means of communication between the lawyer and client. Lawyers also raised concerns about the difficulties in verifying evidentiary documents during videoconferencing as they have to show the documents, which they would like to verify with witnesses, through smart phones or laptops' cameras.⁶⁴

D. The Right to a Public Trial

International human rights law, including the ICCPR, incorporates the right to a "public hearing" in all determinations of criminal charges or of a person's "rights and obligations in a suit at law". Accordingly, "courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, *inter alia*, the potential interest in the case and the duration of the oral hearing".⁶⁵

Pursuant to article 14(1) of the ICCPR, courts also "have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice". Apart from such exceptional circumstances, "a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons".⁶⁶

"Public health" is not expressly listed as a ground for excluding publicity of proceedings, despite being listed as a ground for limiting other rights under the ICCPR, but arguably it may be an implicit basis for limitation. In many cases, it is possible to preserve publicity of proceedings by video and audio broadcasting or allowing particular individuals to have access to a video and audio feed.⁶⁷

⁶⁰ General Comment No 32, paras 32, 34.

⁶¹ General Comment No. 35, paras 35 and 46.

⁶² UN Committee Against Torture, 'General Comment No. 2: Implementation of Article 2 by States Parties', 24 January 2008, para 13; Body of Principles for the Protection of All Persons Deprived of Liberty, paras 15, 17, and 18.

⁶³ TLHR, 'Statement: Eavesdropping on confidential attorney-client conversations in prison constitutes a serious human rights violation', 21 June 2021, available at: <https://tlhr2014.com/en/archives/31055>

⁶⁴ ICJ Interview with representative of TLHR, dated 22 September 2021.

⁶⁵ General Comment No. 32, para 28.

⁶⁶ General Comment no 32, para 29.

⁶⁷ ICJ Guideline on Videoconferencing, Courts and COVID-19, at 7

In Thailand, even before the COVID-19 outbreak, there are several documented examples of violations of the right to a public trial due to the failure to make hearings accessible to the public, including because of the small size of the courtroom.⁶⁸ During the outbreak, pursuant to the court internal guidelines, the number of people who enter the court premises are to be limited, without mentioning about any substitutes.⁶⁹ The ICJ obtained information from lawyers that, in some cases, video and/or audio broadcasting were used by Thai courts to broadcast the proceedings. However, in other cases, it was documented that members of the public, including the relatives of the defendants, were refused entry to observe the hearings on the ground of the COVID-19 without video and audio broadcasting of the proceeding and without access to a video and audio feed.⁷⁰

Judges also routinely banned members of the public, including trial observers, from taking notes in court.⁷¹ If they did so, they were told by the judges that they could face contempt of court charges.⁷²

3. Recommendations:

1. In determining cases that can be postponed or suspended, the following matters should be considered 'urgent' by the Thai judiciary:
 - a. Matters related to violations of human rights and constitutional rights, particularly those where there is a real risk of irreparable harm. Courts must remain competent and capable to evaluate and, if necessary, nullify any unlawful imposition or unjustified extension of emergency measures and the unjustified use of emergency measures;
 - b. The situation of persons in vulnerable situations, including women and children, older persons, persons with disabilities, and others, who do or may face increased risks of violence, abuse or neglect, during the pandemic; and
 - c. Persons deprived of liberty who must be brought before the court without undue delay, including during the outbreak. A judge may decide that participation in the hearing should exceptionally take place via videoconferencing, but only with the defendant's fully informed consent and where no inappropriate pressure has been placed on the defendant to give such consent. Such a decision should be taken only based on the judge's assessment, with reasons, that the imposition of such a measure is necessary and proportionate to the local circumstances of the emergency in question.

⁶⁸ See also: ICJ and TLHR, 'Joint Submission in Advance of The Examination of The Kingdom of Thailand's Second Periodic Report under Article 40 of The International Covenant on Civil and Political Rights', 6 February 2017, para 53 and 63, available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_CSS_THA_26602_E.pdf

⁶⁹ For example, Court of Justice, 'Security Guidelines in Cases of the Outbreak of the COVID-19 Pandemic', 26 March 2020, available at: <https://fngc.coj.go.th/th/file/get/file/20200403914f58c965a36c9a18faa41dfaf8c99c193600.pdf>. See also: Recommendation of the Chief of the Supreme Court regarding Operational Guidelines During the COVID-19 Outbreak (No. 3)

⁷⁰ For example, TLHR, 'Trial Observation Report, When the 4 Defendants in 'Thai Republic' Case has to go to prison', 29 April 2021, available at: <https://tlhr2014.com/archives/29029>; ICJ Interview representative of TLHR, dated 15 July 2021.

⁷¹ For example, Regulation of the Criminal Court regarding the Securing of Public Order in Court Area, dated 17 March 2020.

⁷² For example, Columbia Law School Human Rights Institute and Lionel Blackman, 'Government of Thailand & Chaiwat Limlikhitaksorn v. Wuth Boonlert & Samak Donnapee', July 2020, at 12 and 16, available at: <https://cfj.org/wp-content/uploads/2020/07/Fairness-Report-on-the-Trials-of-Wuth-Boonlert-and-Samak-Donnapee-in-Thailand.pdf>

2. In dealing with the consequences of postponement, Thai judiciary and/or parliament should consider:
 - a. Extending limitation periods and filing deadlines in the postponement of civil and criminal proceedings, including through amending the Criminal and Civil Codes or enacting an exception;
 - b. Decriminalizing or granting amnesty for certain offences, presumably focusing on minor non-violent matters; and
 - c. Increasing the use of mandatory alternative dispute solution for a larger portion of civil litigation.
3. Ensure the availability of appropriate videoconferencing technology for those litigants and accused who may choose to use it, including in prison facilities. In the event that undue delay nevertheless occurs, governments and the courts should give effect to the right of persons to be released;
4. Any time that videoconferencing is used as a substitute for physical presence, judicial authorities must actively assess and ensure that the defendant gave their free and fully informed consent to the use of videoconferencing and there was no inappropriate pressure placed on the defendant to give such consent;
5. Any time that videoconferencing is used as a substitute for physical presence, authorities must also ensure that individual parties and accused persons are able to effectively participate in the proceedings and provide confidential instructions to counsel where necessary, including by ensuring that the accused or his/her lawyer can inspect evidence and other documents through appropriate means during proceedings;
6. Any time that videoconferencing is used as a substitute for physical presence, authorities must ensure that any individual party or accused that is deprived of liberty has access to legal counsel before, during and after the hearings, through a secure and confidential means of communication between the lawyer and client, including by equipping courts and detention facilities with rooms and means to enable counsel to confidentially communicate with their clients during the course of remote proceedings, whether when they are physically present, or if they choose to communicate by other means; and
7. The requirements of publicity of hearings must continue to be met despite any movement from in-person hearings to video-conferenced hearings, through options such as access to the video feed upon application by individual members of the public, or simultaneous broadcast of the proceedings.

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March 2021 (for an updated list, please visit www.icj.org/commission)

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