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SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) TO THE UN COMMITTEE AGAINST TORTURE IN VIEW OF THE COMMITTEE'S EXAMINATION OF THAILAND'S INITIAL REPORT UNDER ARTICLE 19 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

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ICJ SUBMISSION TO THE COMMITTEE AGAINST TORTURE IN VIEW OF THE COMMITTEE'S EXAMINATION OF THAILAND'S INITIAL REPORT

Introduction

1. During its 52nd session, from 28 April to 23 May 2014, the UN Committee Against Torture (the Committee) will examine Thailand's compliance with its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention), including in light of the State Party's initial report under Article 19 of the Convention. In this context, the International Commission of Jurists (ICJ) welcomes the opportunity to submit the present briefing to the Committee.

2. In this submission, the ICJ focuses solely on concerns about the implementation by Thailand of Articles 2, 4, 5, 6, 7, 11, 12, 13, 14 and 16 of the Convention. The organization's concerns arise from Thailand's failure to effectively discharge its Convention obligations to (a) take effective legislative, administrative, judicial or other measures to prevent acts of torture and other ill-treatment of persons in detention; (b) investigate and prosecute perpetrators of torture, giving rise to impunity; and (c) prevent, investigate and prosecute violence against women.

Prevention of torture and other ill-treatment, Articles 2, 11, 12, and 13

3. There are currently three special security laws in force in Thailand: the Martial Law Act B.E. 2457 (1914) (ML),[1] the Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (ED),[2] and the Internal Security Act B.E. 2551 (2008) (ISA).[3]

4. All three laws provide for enlarged executive powers of administrative detention without adequate judicial supervision. Preventive detention and other forms of administrative detention are generally prohibited under international law, save under narrow circumstances, particularly pursuant to a lawful derogation under a declared state of emergency. Such practices typically leave detainees vulnerable to torture and cruel, inhuman or degrading treatment or punishment and related violations, such as enforced disappearance. Administrative detention is therefore necessarily an extraordinary and temporary measure that requires stringent legal safeguards to prevent torture and other ill-treatment.

Martial Law

5. Section 15 *bis* of ML gives "the military authority" powers to arrest and detain any person without a warrant for interrogation up to seven days where, in the

[1] Martial Law is currently enforced in at least 31 of Thailand's 77 provinces; Kanchanaburi, Chantaburi, Chiangrai, Chiangmai, Trad, Tak, Narathiwat, Nan, Buriram, Prachuabkirikan, Pattani, Payao, Pitsanulok, Petchburi, Maehongsorn, Yala, Ranong, Ratchburi, Loey, Sri-saket, Satul, Songkla, Sakaew, Surin, Umnajchareon, Utaradit, Ubonratchthani, Chumbhorn, Nakornanom, Mukdaharn, and Nongkai.

[2] The ED has been enforced in the four southernmost provinces since 2005 and has been extended 35 times up to the present. The most recent extension was on 11 March 2014 by PM Yingluck Shinawatra.

[3] The ISA replaced ML and has been enforced in four districts of Songkhla; Jana, Tepha, Natawee, Sabayoi, except Sadao, since December 2010 and in a district of Pattani, Mae Lan since January 2011 to present. The ED and the ISA have also been used in Bangkok and surrounding provinces when certain political protests haven taken place, for example during the 2008 violence between pro- and anti-government demonstrators during the term of former Prime Minister Samak Sundaravej, and the seizure of Don Muang Airport by People's Alliance for Democracy (PAD) during the term of former Prime Minister Mr. Somchai Wongsawat; during the 2009-2010 Red-shirt protest under the administration of former Prime Minister Abhisit Vejjajiva; and during the 2012-2013 anti-government protests and the People's Democratic Reform Committee (PDRC) protests.

discretion of military personnel, there is a sufficient reason to "suspect any individual of being an enemy or of being in opposition to the contents of this Act or to the orders issues by military personnel…" The use of ambiguous terms such as "being an enemy", and "being in opposition to the contents of this Act", gives the military broad discretion to arrest and detain people.

6. When the authorities exercise these powers they are not required to bring detainees before a court at any stage of their detention. This results in a lack of judicial supervision, which is important not only to review the basis for the deprivation of liberty, but also detainees' treatment and their detention conditions. Further, the location of detention is not always disclosed, with detainees sometimes held at military bases or in *ad hoc* locations without visitors. Failure to disclose the whereabouts of a detainee may constitute an act of enforced disappearance.

Emergency Decree

7. Under the ED, the Prime Minister may authorize a "competent official" to arrest and detain a person without charge.[4] In Thailand's restive southern border provinces, namely Songkhla, Pattani, Yala and Narathiwat, members of the Royal Thai Army are often those who are designated "competent officials" with the power to arrest and detain suspects.

8. The grounds for detaining a suspected person, set out in Section 11 of the ED, are vaguely defined and are therefore open to abuse: *"(…) having a role in causing the emergency situation, or being an instigator, a propagator, a supporter of such act or concealing relevant information relating to the act which caused the emergency situation, provided that this should be done to the extent that is necessary to prevent such person from committing an act or participating in the commission of any act which may cause a serious situation or to foster cooperation in the termination of the serious situation."*

9. Any person who "has a role" or is a "supporter of such act" could be detained, provided that the detention is deemed necessary to prevent a "serious situation" or to "engender cooperation in the termination of a serious situation". This language could result in persons who are only remotely connected to the immediate security threat facing arrest and detention on spurious grounds.

10. Pursuant to Section 12 of the ED, the authorities may detain a suspect for an initial seven days, with the leave of the Court, with the possibility of applying to the Court to extend the detention period by seven days at a time, provided the total detention period does not exceed 30 days. In the southern border provinces, members of the Royal Thai Army reportedly use the detention provisions of ML and the ED consecutively in order to obtain a total period of detention of 37 days without charge.

11. With respect to judicial supervision, Section 12 of the ED states that the Criminal Procedure Code (CPC) shall apply *mutatis mutandis* (with the necessary changes being made) to the initial application for a warrant. With respect to the procedure governing applications for renewal of detention, an Internal Security Command (ISOC) Region 4 Regulation stipulates that it is not necessary to bring a person held in custody to the court unless the court requests it.[5] Therefore, in practice, while the court supervises each stage of the process, there is no requirement that a detainee be brought before it.

[4] Section 11 (1) of the ED.
[5] ISOC Region 4, Regulation of Internal Security Operations Command Region 4 Concerning Guidelines of Practice for Competent Official as per Section 11 Of the Emergency Decree on Government Administration in States of Emergency B.E. 2548 (2005), paragraph 3.7, para. 2, unofficial translation.

Internal Security Act

12. Pursuant to Part 2 of the ISA, the authorities are given wide powers that may be used arbitrarily to detain individuals for investigative purposes. In particular, Sections 16, 18, 19 and 21 of the ISA may be invoked to give officials designated by the ISOC powers of arrest, detention, investigation, search and seizure.

13. Unlike the CPC, Section 18 of the ISA fails to set out criteria governing ISOC official's use of powers of arrest and detention. In the absence of clear standards governing the use of discretionary powers, there is a risk that ISOC personnel will detain individuals for the purposes of investigation or intelligence gathering, particularly in areas where personnel are accustomed to exercising such powers under ML and the ED.

14. Section 21 of the ISA provides for judicial review of detention, but the applicability and scope of the right to counsel, the standard of review, and all other aspects of the judicial procedure are not set out.

15. Section 23 of the ISA provides that any prosecution of a violation of Part 2's "regulations, notifications, orders or actions" falls under the jurisdiction of the Courts of Justice, and refers to the application of the CPC in relation to such cases. However, in the past, essential pre-trial due process rights, which should also serve to protect against the threat of torture or other ill-treatment during periods of custodial investigation, have not always been respected or strongly enforced where emergency laws are in force.[6]

16. In the absence of clear, strong statutory language requiring robust judicial review of arrest, detention and other restrictions on liberty there is a risk that ISOC personnel employing police powers delegated under the ISA, will not adhere scrupulously to the safeguards contained within the CPC, which include: seeking court warrants before carrying out searches, seizures or arrests; bringing suspects arrested before a court or judicial officer within 48 hours; and ensuring regular access to detainees by lawyers, family members and medical personnel.

17. Prolonged detention without adequate judicial supervision greatly increases the risk of torture or other ill-treatment. Article 9 of the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is a party, applies to cases of administrative or preventive detention[7] and states that detainees must be brought promptly before a judge and are entitled to trial within a reasonable time or to release.[8] In its concluding observations on Thailand, the UN Human Rights Committee said with respect to the ED, "Detention without external safeguards beyond 48 hours should be prohibited (art. 4)."[9]

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[6] See post mortem inquest in relation to the death of Imam Yapa Kaseng, Order of 25 December 2008, Narathiwat Provincial Court, Black Case No. Or Chor 9/2551, Red Case No. Or Chor.19/2551; ICJ Observation of Post-Mortem Inquest into the death of Yakareeya Paoh-manee, Testimony of Khunying Porntip Rojanasunan M.D., Yala Provincial Court, 7 April 2009. Note that in a civil suit brought by the family of Imam Yapa, government lawyers argued -- without admitting any wrongdoing -- that claims ought to have been brought against ISOC: ICJ Trial Observation, 28 August 2009, Bangkok Civil Court. See also: NHRC Tak Bai Report, paragraphs 9.1.1 – 9.3.2.

[7] See e.g. UN Human Rights Committee, General Comment No. 8, para. 4 and Concluding Observations of the Human Rights Committee: Norway, CCPR/C/79/Add.112, para. 11.

[8] Concluding Observations of the Human Rights Committee: Jordan, CCPR/C/79/Add.35; A/49/40, paras.226-244; Observations finales du Comité des droits de l'homme: Maroc, CCPR/C/79/Add.44, para. 21; Concluding observations of the Human Rights Committee: Viet Nam, CCPR/ CO/75/VNM, para. 8; Concluding observations of the Human Rights Committee: Cameroon, CCPR/C/79/Add.116, para. 19.

[9] Concluding Observations of the Human Rights Committee: Thailand, 8 July 2005, CCPR/CO/84/THA, para. 13.

18. Under international law, the requirement that a detained person should physically appear before a court provides an important protection of the physical safety of the detained person by affording an opportunity for the detainee to raise any incident of torture or other ill-treatment with the court and for the Judge to observe the detainee's physical condition.

19. As the Committee has pointed out in its General Comment 2, "Certain basic guarantees apply to all persons deprived of their liberty… Such guarantees include, inter alia, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment."[10]

Failure to prosecute perpetrators of torture, giving rise to impunity, Articles 4, 5, 6, and 7

20. The ICJ is concerned that provisions contained within the ML and the ED may lead to impunity for perpetrators of serious human rights violations, including torture and ill-treatment, which is inconsistent with Thailand's international obligations, including under the Convention.

Martial law

21. Section 7 and Annex of ML provides the Military Court with broad jurisdiction, which could be used to prevent military personnel from being tried civilian courts, even in circumstances where there is credible evidence that they have been responsible for serious human rights violations, including torture or other ill-treatment.

Emergency Decree

22. Section 17 of the ED explicitly limits the accountability of those carrying out responsibilities under the emergency laws and regulations by providing a form of legal immunity, including in respect of torture:

> *"A competent official under this Emergency Decree shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act provided that such an act is performed in good faith, is non-discriminatory and is not unreasonable in the circumstances of exceeding the extent of the necessity. This shall not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful acts."*

23. As the Committee has pointed out in its General Comment 2, States parties "are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention. Thus, States parties should adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture. The Committee has concluded that States parties are in violation of the Convention

[10] Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, General Comment No. 2, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), para 13.

when they fail to fulfill these obligations."[11]

24. The Committee went to on to say that where "State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission."[12]

25. In its concluding observations on Thailand, the UN Human Rights Committee said the Committee was "especially concerned that the Decree provides for officials enforcing the state of emergency to be exempt from legal and disciplinary actions, thus exacerbating the problem of impunity" and recommended that Thailand "should ensure that all alleged cases of torture, ill- treatment, disproportionate use of force by police and death in custody are fully and promptly investigated, that those found responsible are brought to justice, and that compensation is provided to the victims or their families." [13]

26. With respect to Section 17 of the ED, in the 2011 Universal Periodic Review (UPR), the Working Group made the following recommendations:[14]

> The following recommendations will be examined by Thailand, which will provide responses in due time, but no later than the nineteenth session of the Human Rights Council in March 2012:
> …
>
> 89.19. Repeal Section 17 of the Emergency Decree (Switzerland);
>
> 89.20. Abolish provisions in the Martial Law Act and Section 17 of the Emergency Decree that grant immunity for criminal and civil prosecution to State officials (Canada);
> …

Failures to prevent, investigate and prosecute gender-based violence, Articles 2, 11-14, and 16

27. As the Committee has underlined on numerous occasions, under the Convention and general international law State authorities are obliged to exercise due diligence to prevent, investigate, prosecute and punish acts of torture and ill-treatment perpetrated by non-State officials or private actors, including gender-based violence such as sexual violence and domestic violence.[15] In addition, as

[11] Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), para 17.
[12] Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), para 18.
[13] Concluding Observations of the Human Rights Committee: Thailand, 8 July 2005, CCPR/CO/84/THA, para. 15.
[14] Human Rights Council Nineteenth session Agenda item 6 Universal Periodic Review
Report of the Working Group on the Universal Periodic Review, Thailand, 8 December 2011, A/HRC/19/8 pp.20,22.
[15] Articles 2, 11-14, 16, Convention against Torture; Committee Against Torture, General Comment No.2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008 Paras. 18, 22; Committee Against Torture, General comment No. 3, Implementation of article

stated above, the Committee has also held that, "where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts."[16] The Committee has made clear that this duty requires States to "prevent and protect victims from gender-based violence, such as rape, domestic violence."[17]

28. Compliance with these Convention obligations requires, at a minimum, that: (i) laws, procedures and practice appropriately and adequately define and prohibit all forms of gender-based violence and provide for the imposition of effective, proportionate and dissuasive sanctions and punishment; (ii) that independent, impartial and effective investigations are promptly conducted into all credible allegations of gender-based violence with a view to ensuring the fair and effective prosecution of alleged perpetrators; (iii) that investigatory, prosecutorial, judicial and courtroom procedures and practices respect and protect the dignity and rights of participants and do not result in re-victimization of survivors of gender-based violence.[18]

29. In the past decade, Thailand has taken steps towards the establishment of a legal framework that adequately deals with acts of violence against women. However, a number of flaws and gaps in this framework, and related conduct and responses by relevant justice-sector officials, remain inconsistent with Thailand's obligations under the Convention and general international law and continue to undermine women's ability to access legal protection and redress when they face gender-based violence. These concerns are summarized in the following sections and analyzed in more detail in the 2012 ICJ Report on Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change.[19]

30. In addition to the issues identified below a range of additional concerns arise in relation to the Thai authorities' response to gender-based violence faced by marginalized groups of women. These are summarized in the 2012 ICJ Report on Women's Access to Justice in Thailand: Identifying the Obstacles and Need for

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14 by States parties CAT/C/GC/3, 13 December 2012 (in general). See also: Article 7, International Covenant on Civil and Political Rights; Article 2, Convention on the Elimination of All Forms of Discrimination against Women; Declaration on the Elimination of Violence Against Women, 20 December 1993, General Assembly Resolution A/RES/48/104; Human Rights Committee, General Comment 31, The Nature of the General Obligations Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13; CEDAW, General Recommendation 19, Violence Against Women, U.N. Doc. CEDAW/C/1992/L.1/Add.15; CEDAW, General Recommendation 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28, 2010.

[16] Committee Against Torture, General Comment No.2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008, para. 18.

[17] Ibid.

[18] Ibid. And see also Goekce v. Austria, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc.CEDAW/C/39/D/5/2005; Yildirim v. Austria, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005; A.T. v. Hungary, CEDAW Communication No. 2/2003, View of 26 January 2005, UN Doc. A/60/38 (Annex III); Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; Jallow v. Bulgaria, CEDAW Communication No. 32/2011, Views of 23 July 2012, UN Doc. CEDAW/C/52/D/32/2011; V.K. v. Bulgaria, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008; V.V.P v. Bulgaria, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011.

[19] International Commission of Jurists, Report, Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change, 2012: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/ICJ-JPF-Report-Thailand-Womens-Access-to-Justice-English.pdf.

Change. In particular migrant women,[20] Malay Muslim women in the Southern Border Provinces,[21] and sex workers[22] face a range of particular barriers in accessing legal protection and redress when they face ill-treatment, including gender-based violence.

Classification of sexual and domestic violence as compoundable offences: monetary settlements and failures to investigate

31. Although Thai law now makes domestic violence an offence,[23] it classifies it a compoundable offence.[24] Meanwhile Thai criminal law specifies that where rape or indecent assault do not take place in public and do not involve use of a weapon or result in grievous bodily harm or death, they are also to be treated as compoundable offences.[25] Under Thai law the classification of crimes as compoundable offences means:
    - in order for a legal process to be initiated, the victim must decide to pursue a case and must file a complaint within three months of the incident. It is only after this that an official investigation will be initiated; [26]
    - the State must cease any legal proceedings if a victim withdraws the complaint and/or reaches a monetary settlement with the alleged perpetrator.[27]

32. The classification of domestic violence and various forms of sexual assault in this way is inconsistent with Thailand's above-outlined obligation to ensure that where authorities know or have reasonable grounds to believe that gender-based violence is being perpetrated, they must of their own motion, immediately, thoroughly, and impartially investigate such violence, and, where warranted by that investigation, they must also ensure an effective and fair prosecution of those allegedly responsible. As the Committee has specified, the Convention requires that "competent authorities promptly, effectively and impartially investigate and examine," all cases of alleged ill-treatment.[28] A legal regime that enables a perpetrator of gender-based violence to escape legal accountability by reaching a monetary settlement with the victim, which prohibits a State investigation and/or prosecution from continuing following such a monetary settlement, and which predicates the initiation of an official investigation and prosecution on a victim's decision to initiate legal proceedings does not meet this standard.

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[20] International Commission of Jurists, Report, Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change, 2012: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/ICJ-JPF-Report-Thailand-Womens-Access-to-Justice-English.pdf, Sections 4.1.
[21] Ibid. Section 4.4.
[22] Ibid. Section 4.2.
[23] Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 4.
[24] Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 4.
[25] Criminal Code Section 281 revised by Declaration of the Revolutionary Council No.11, 21st Nov B.E. 2514 (1971); Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 4.
[26] Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 7 & 8. See also Criminal Procedure Code, Section 121, generally applicable to compoundable offences, which specifies that in such cases an official investigation cannot be initiated unless the victim makes an official complaint. It should be noted that Section 5 of the Domestic Violence Victim Protection Act does state that where a victim is "in a condition that he is unable to file a complaint on his own or has no opportunity in so doing the competent official may file a complaint on his behalf." In some respects this could leave open the possibility that officials could pursue investigations and legal proceedings on their own initiative and volition in certain instances. However the Act does not define the circumstances in which this exception will apply, and those interviewed indicated that the likelihood is that the clause is intended to apply in situations where the victim is physically unable to file a complaint.
[27] Criminal Procedure Code, Section 39.
[28] Committee Against Torture, General comment No. 3, Implementation of article 14 by States parties CAT/C/GC/3, 13 December 2012, Para. 23; See also V.V.P v. Bulgaria, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011 (re: classifications of crimes of sexual violence).

Domestic violence: prioritizing the "peaceful cohabitation of the family"

33. In addition to its classification of domestic violence as a compoundable offence, Thai law specifies that when dealing with cases of domestic violence Thai courts should work towards a case settlement that promotes the peaceful cohabitation of the family.[29] It provides that courts should be guided by four principles: the rights of the victim; the prevention of separation or divorce by cohabiting men and women; the protection and assistance of the family; and the provision of assistance that can enable married couples and family members to cohabit in harmony.[30] It further specifies that in order to promote the settlement of cases, State officials and judges may appoint a mediator who shall endeavor to work with the parties to settle the case. Such mediators may include fathers, mothers, brothers or sisters of the parties.[31]

34. A number of Thai civil society organizations working with survivors of domestic violence have told the ICJ that in their experience these legal provisions do nothing to address the prevailing notion in Thai society that domestic violence is a private matter. Instead, they convey the impression that the goal of Thai law is to preserve the family at the expense of protecting women's lives and health and right to freedom from ill-treatment. Concerns have been expressed to the ICJ that in the vast majority of domestic violence cases that do reach the courts the parties negotiate for settlement under the supervision of court-appointed mediators and that, in its preference for settlement rather than sanctions for the perpetrator, the regime may at times place those facing domestic violence at risk of continued violence and abuse.[32]

Rape and sexual assault: discriminatory rules of evidence

35. Thai law currently lacks provisions or guidelines regulating the admissibility of evidence in cases of rape and sexual assault. As a result, discriminatory evidence is regularly admitted in Court and in relevant prosecutions and in their decisions judges regularly place a significant weight on a range of factors including:[33]
    - the presence or absence of proof of injury or other physical evidence of struggle;
    - the time-lapse between the alleged incident and the victim's bringing it to the attention of the authorities; and
    - the victim's sexual history and relationship between the victim and alleged perpetrator.

36. The failure to regulate the admissibility of such evidence is inconsistent with the obligations to ensure that laws, procedures and practice appropriately and adequately define and prohibit all forms of gender-based violence and to ensure that investigatory, prosecutorial, judicial and courtroom procedures and practices respect and protect the dignity and rights of participants and do not result in re-victimization of survivors of gender-based violence. As the Committee has underscored, "Judicial and non-judicial proceedings shall apply gender sensitive procedures which avoid re-victimization and stigmatization of victims of torture or ill-treatment. With respect to sexual or gender-based violence and access to due process and an impartial judiciary, the Committee emphasizes that in any

[29] Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 15.
[30] Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 15.
[31] Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 16.
[32] International Commission of Jurists, Report, Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change, 2012: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/ICJ-JPF-Report-Thailand-Womens-Access-to-Justice-English.pdf, Section 3.2.
[33] Ibid. And see also for an in depth exploration: Research on Gender Insensitivity in Judicial Decisions of the Supreme Court, Report, Law Faculty of Chiang Mai University, 2008, http://cedaw-seasia.org/docs/thailand/T1_research_gen_insensitivity.pdf.

proceedings ... rules of evidence and procedure in relation to gender-based violence must afford equal weight to the testimony of women and girls, as it should be for all other victims, and prevent the introduction of discriminatory evidence and harassment of victims and witnesses."[34] As the Committee on the Elimination of Discrimination against Women (CEDAW) has specified, "all legal procedures in cases involving crimes of rape and other sexual offenses must be impartial and fair, and not affected by prejudices or stereotypical gender notions."[35] Further, the CEDAW has held, in this regard, that assumptions, "in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence," amount to discrimination against women.[36] Similarly, it has held that judicial assessments as to a survivor's credibility and veracity of her account of events that are based on stereotypes and gender norms constitute discrimination. These include assessments of credibility based on whether the survivor "followed what ... was considered to be the rational and ideal response of a woman in a rape situation," or whether the perpetrator and the victim knew each other.[37]

Justice sector responses to sexual and domestic violence: failures to investigate and prosecute

37. As detailed in the ICJ 2012 Report, the impact of the gaps and flaws in the Thai legal framework concerning sexual and domestic violence are reportedly exacerbated by common discriminatory responses by police and prosecution officials to instances of such violence. Thai fficials typcially fail to treat sexual and domestic violence as serious criminal offences requiring an effective investigation and prosecution. Moreover, their lack of gender sensitivity and reliance on wrongful gender stereotypes and norms lead to re-victimization of women survivors of violence and undermine women's faith and confidence in the justice system, meaning for example that many women who face violence never seek legal protection or redress.[38]

38. A range of actors report that on numerous occassions individual justice sector officials treat domestic violence as though it is a private matter that should be resolved exclusively within the family. For example, when women seek to report the matter to the police they may often be told to go home and resolve the problem with their partner. Even when the authorities do intervene they may often encourage and prioritize reconciliation and reports indicate that the propensity is often to appoint a mediator, such as an elder brother, and try to resolve the case through compromise. Reports also indicate that officials regularly fail to take the practical preventative steps available to them under the law to protect victims, even while mediation or legal procedings are ongoing, for example through imposing provisional remedial measures envisaged by the Domestic Violence Victim Protection Act.[39]

39. Reports of a similar failure to deal with sexual violence as a serious criminal matter and ensure investigation and prosecution in a gender sensitive manner, are also common. It appears that officials will often pressure women to settle the case, wishing to resolve the matter speedily rather than spend time investigating

[34] Committee Against Torture, General comment No. 3, Implementation of article 14 by States parties CAT/C/GC/3, 13 December 2012, Para. 33.
[35] Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, Para. 8.
[36] Ibid. Para. 8.9(b).
[37] Ibid. Para. 8.4 and 8.6.
[38] International Commission of Jurists, Report, Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change, 2012: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/ICJ-JPF-Report-Thailand-Womens-Access-to-Justice-English.pdf, Section 5.2
[39] Ibid.

or prosecuting. Reports also indicate that women seeking to report sexual violence may face derogatory treatment and assumptions that because of their conduct and dress they were to blame for the incident. In addition, it appears that law enforcement and prosecution officials may often fail to understand the particular nature of sexual violence and the specific needs of victims. For example, credible reports indicate that women are often not afforded any privacy when seeking to make a complaint of rape or sexual assault and are not interviewed about the matter in a private room but instead in busy public spaces.[40]

40. This conduct is inconsistent with Thailand's obligation, outlined above, to ensure that where the authorities know or have reasonable grounds to believe that gender-based violence is being perpetrated, they must of their own motion, immediately, thoroughly, and impartially investigate such violence, and, where warranted by that investigation, they must ensure an effective and fair prosecution of those allegedly responsible. Indeed, as the Committee has held, "the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent, and protect victims from, gender-based violence, such as rape, domestic violence."[41]

41. In addition to the issues identified above a range of additional concerns arise in relation to the Thai authorities' response to gender-based violence faced by marginalized groups of women. These are summarized in the 2012 ICJ Report on Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change. In particular migrant women,[42] Malay Muslim women in the Southern Border Provinces[43] and sex workers[44] face a range of particular barriers in accessing legal protection and redress when they face ill-treatment, including gender-based violence.

RECOMMENDATIONS

42. Against the background of the information provided within this submission, consistent with its obligations under the Convention, the ICJ considers that the Royal Thai Government must:

Articles 2, 11, 12, and 13

1. amend the three emergency laws to provide for the same rights for detainees guaranteed under the Thai Criminal Procedure Code;
2. apply procedures for arrest and detention that adhere to international human rights law and standards including the requirement that all detained persons must be brought before a judge promptly, together with the right to challenge the lawfulness of the detention, including the conditions of detention; and
3. enact legislation guaranteeing that all detainees held under ML, the ED and the ISA are, without exception, physically brought before a judge within 48 hours of arrest.

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[40] Ibid.
[41] Committee Against Torture, General Comment No.2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008 Para. 18.
[42] International Commission of Jurists, Report, Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change, 2012: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/ICJ-JPF-Report-Thailand-Womens-Access-to-Justice-English.pdf, Sections 4.1.
[43] Ibid. Section 4.4.
[44] Ibid. Section 4.2.

Articles 4, 5, 6 and 7

4. amend the ML to explicitly conform with international standards so as to ensure that persons suspected of torture and ill-treatment are held criminally accountable and are not shielded or made immune from prosecution in relation to their alleged involvement in the perpetration of human rights violations, including torture or other ill-treatment; and
5. repeal Section 17 of the ED, which provides those exercising powers in an emergency immunity from criminal, civil or disciplinary action.

Articles 2, 11-14 and 16 in connection with gender-based violence

6. initiate a process towards the revision and amendment of relevant provisions of the Thai Penal Code, Criminal Procedure Code and Domestic Violence Victim Protection Act, so as to:
   - remove the classification of sexual and domestic violence as compoundable offences;
   - remove relevant possibilities of monetary settlement; and
   -remove the emphasis on mediation in domestic violence cases and prioritization of any goal other than the wellbeing and safety of the survivor.
7. issue directives to law enforcement and other officials specifying that:
   - sexual and domestic violence involves serious criminal conduct and must be effectively investigated and perpetrators be held criminally responsible;
   - survivors must not be encouraged to withdraw complaints or settle cases;
   - officials must not treat domestic violence as a problem to be resolved within families; and
   - officials must have recourse to the range of protective and provisional remedial measures provided for in Section 10 of the Domestic Violence Victim Protection Act.
8. develop detailed procedural guidelines for officials dealing with instances of sexual and domestic violence; and
9. provide ongoing and regular training and continuing education to a cross-section of judges, prosecutors, civil servants, police officers and other officials at all levels regarding their responsibilities in respect of sexual and domestic violence.