

Lawyers' Rights Watch Canada

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Thailand: Systematic violations of international human rights including arbitrary detention, suspected enforced disappearance, removal of independent judicial oversight

Statement 20 June 2014

Lawyers' Rights Watch Canada (LRWC) is a committee of Canadian lawyers who promote human rights and the rule of law through advocacy, education and research. LRWC is an NGO in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN).

LRWC is alarmed at human rights violations being committed against persons in Thailand based on their political beliefs and affiliations since the military take-over of the country on 22 May 2014. Violations include systematic arbitrary detention and at least one suspected enforced disappearance along with unlawful derogation of the rights to freedoms of expression, association and assembly.

A number of UN officials and States have condemned decisions of the Royal Thai Army to seize control from Thailand's elected government by declaring martial law throughout Thailand on 20 May 2014 and taking control of the State and suspending the Thai Constitution on 22 May 2014. Since then, Royal Thai Army generals, operating under the name of the National Council for Peace and Order (NCPO), have taken over all legislative, executive and judicial functions of the State.

Since the coup on 22 May, the NCPO has subjected approximately 500 persons to arbitrary arrest and/or detention, and freedoms of expression, association and assembly have been severely curtailed in violation of the *International Covenant on Civil and Political Rights (ICCPR)* ratified by Thailand in 1996. All criticism of the NCPO is forbidden, as are political gatherings of more than five persons. The NCPO has taken into military custody elected officials, political activists, academics, journalists, human rights defenders and lawyers. A number of people have been charged with offences declared by the NCPO to be subject to military courts. Civilian courts have been ordered to operate under NCPO directives. Those who fail to obey NCPO orders may be detained without bail for extended periods of investigation. They may be tried in military courts in proceedings held in camera without legal representation and with no right of appeal.

Many persons have been questioned and detained incommunicado for periods ranging from hours to days in secret military locations without access to family members, lawyers or independent courts. LRWC is alarmed about the possible enforced disappearance of Ms. Kritsuda Khunasen, 27, a political activist with the United Front for Democracy against Dictatorship (UDD). She was arrested on 28 May and has been held incommunicado in a secret location without access to lawyers or family members. Her arrest was reportedly documented on television. She has been detained beyond the seven days allowed by the *Martial Law Act*. Military officials have refused to provide information as to her whereabouts to her family or to Thailand's National Human Rights Commission. Instead of revealing her place of detention, on 17 June 2014 the NCPO included her name on a list of 33 persons summoned to report to the military by 18 June or face arrest. This

appears to be an attempt to provide a false impression that Ms. Kritsuda is not in detention.

The risk of enforced disappearance is increased by the NCPO's practice of incommunicado detention and its failure to provide detailed lists of detained persons. LRWC has received no indication of any independent monitoring of the condition of detainees or places of detention. Some individuals have reported being released on conditions of no political activities, no violation of NCPO orders and no travel overseas without permission. Some have reportedly been told that they must insist they were not ill-treated while in detention.

On 1 June 2014, 38 persons were summoned to report to the Army Club in Bangkok under threat of trial in a military court and possible imprisonment for failure to obey. Among those summoned were several human rights defenders, including: labour activist Ms. Jitra Kotchadet; journalist and human rights defender Mr. Tewarit Maneechay; academic human rights defenders Dr. Suthachai Yimprasert and Mr. Kengkij Kitirianglarp; advocate for political prisoners and human rights defender Ms. Pranee Danwattananusorn; and lawyer for political prisoners Mr. Karom Phonpornklang. LRWC has learned that Dr. Suthachai Yimprasert and Mr. Kengkij were released after several hours of interrogation. Dr. Suthachai was reportedly released on condition that he not join any anti-coup activity or write about the *lèse majesté* law. Ms. Jitra was out of the country at the time of the summons, and she states she reported to the Thailand Embassy in Sweden on 3 June. Nevertheless, a warrant was issued for her arrest on 8 June, and she was arrested on 13 June 2014 at Suvarnabhumi airport upon her return to Thailand. She was reportedly charged with violating the NCPO summons.

On 23 May 2014 and again on 9 June, academic human rights defender, Prof. Worachet Pakeerat was summoned to report to the military. On 10 June, his wife provided documents to the NCPO attesting that illness prevented Prof. Worachet from reporting on time. He turned himself in at Bangkok's Don Muang Airport on 16 June upon his return from Hong Kong. Prof. Worachet was charged with defying NCPO orders. Police took him to Bangkok Military Court and requested his detention for 12 days for interrogation. On 18 June the military court released him on bail.

The use of military tribunals to hear civilian matters stems from an NCPO order on 25 May 2014 that certain offences were subject to military court jurisdiction, including violation of NCPO orders, offences against the monarchy (*lèse majesté*) and security offences. Some detainees have been charged with such offences after the expiry of the seven-day period of detention allowed by the *Martial Law Act 1930*. One example is Mr. Apichart Pongsawat, a Thammasat University graduate student who has worked with the Law Reform Commission of Thailand. He was arrested while allegedly holding a banner at a 23 May protest and was held for seven days without charge. After being released from detention on 30 May, he was immediately transferred to police headquarters and charged with violating the NCPO order banning political gatherings of more than five persons. Later that day, the indictment was amended to add a charge of *lèse majesté* under the *Computer Crimes Act* because of a Facebook post allegedly made in 2010. Mr. Apichart was denied bail and is reportedly being held in the Bangkok Remand Prison. In this case, military court jurisdiction over civilians has been expanded retroactively to include acts occurring prior to the NCPO's order of 25 May.

Thailand's international law obligations: "Peremptory norms" and treaty obligations

The declaration of martial law throughout Thailand, the suspension of the Constitution, the widespread human rights violations and the take-over by the NCPO of government, legislative and judicial functions are unlawful responses to the political tensions in Thailand and are violations of Thailand's multilateral international treaty obligations and of peremptory norms of international human rights law.

International human rights law permits States to temporarily suspend or derogate from certain rights and obligations guaranteed in the ICCPR in "time[s] of public emergency," provided that "such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the

ground of race, colour, sex, language, religion or social origin.”¹ States are not permitted to deviate from international human rights standards except to “the extent strictly required by the exigencies of the situation.”² According to the UN Human Rights Committee (HR Committee), state parties must “provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.”³

There is a high threshold to prove that an actual state of emergency exists. The *travaux préparatoires* of the ICCPR regarding Article 4 indicate that:

The main concern was to provide for a qualification of the kind of public emergency in which a State would be entitled to make derogations from the rights contained in the Covenant which would not be open to abuse. The . . . wording is based on the view that the public emergency should be of such a magnitude as to threaten the life of the nation as a whole.⁴

Thailand’s political impasse, ongoing protests and sporadic violence in certain parts of Thailand did not constitute a “public emergency which threatens the life of the nation” as required by Article 4 of the ICCPR to support derogation of the right to liberty and freedoms of expression, association or assembly throughout the country. Thailand’s political impasse, ongoing protests and sporadic violence during demonstrations in some locations in Thailand do not justify the declaration of martial law throughout Thailand for an indefinite period of time, nor do these factors justify suspension of the Constitution and a military takeover of all branches of government.

ICCPR Article 9 states:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
 3. 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. . .
 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- ...

The NCPO is observing none of these rights.

There are also certain standards, called peremptory or *jus cogens* norms, which are non-derogable under any circumstance.⁵ For instance, the right to life, freedom from torture and cruel or degrading treatment or punishment, freedom from slavery and servitude and protection from *ex post facto* criminal law, and freedom of thought, conscience and opinion, are international standards that require universal protection, along with freedom from enforced disappearance.

The HR Committee has confirmed that Article 4 of the ICCPR does not grant state parties the right to act

1 *International Covenant on Civil and Political Rights*, Article 4(1).

2 *Ibid.*

3 Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, para. 5.

[http://www.unhcr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361/\\$FILE/G0144470.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf)

4 10 GAOR Annexes, UN Doc. A/2929, part II, ch. 5, para. 39 (1955).

5 *Vienna Convention on the Law of Treaties*, Article 53, May 23, 1969, 1155 U.N.T.S 331.

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contrary to peremptory norms:

...[s]tates parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through *arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial*, including the presumption of innocence (emphasis added).⁶

The HR Committee has emphasized the peremptory or otherwise non-derogable nature of the prohibitions of arbitrary detention, unacknowledged detention and discrimination,⁷ as well as the need to respect, in all circumstances, safeguards "...based on the principles of legality and the rule of law," including the right to habeas corpus:

... the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the *right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant* (emphasis added).⁸

Enforced disappearance is one of the worst human rights violations according to Jeremy Sarkin, former co-chair of the UN Working Group on Enforced Disappearances.⁹ Enforced disappearance is a violation of customary international law, and experts argue that it is a violation of peremptory norms.¹⁰

The *Declaration to Protect all People from Enforced Disappearances*, A/RES/47/133, 18 1992 ("the *Declaration*") of the UN General Assembly confirmed that States have a positive duty to prevent and punish enforced disappearance as part of their obligations under the ICCPR and the *Universal Declaration of Human Rights* to ensure rights to liberty and security, freedom from torture and to the equal protection of the law. The *Declaration* also confirms that: "No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances." Failure to act quickly and effectively to remedy arbitrary detention in secret locations may itself constitute a violation of the ICCPR.¹¹

The *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPPED). Article 2 of the ICPPED defines enforced disappearance as

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State

⁶ UN Human Rights Committee (HR Committee), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.5, available at:

<http://www.refworld.org/docid/453883fd1f.html>

⁷ *Ibid.* at paras. 11, 13(b), 13(c).

⁸ *Ibid.* at para. 16.

⁹ Jeremy Sarkin, chair of the Working Group on Enforced Disappearances in 2010 quoted in "Enforced Disappearances 'turn humans into non humans,' says UN expert body on key anniversary," UN News Centre, 26 February 2010, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9849&LangID=E>

¹⁰ Jeremy Sarkin, "Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law," *Nordic Journal of International Law* 81 (2012) 537–583.

¹¹ The UN Human Rights Committee stated "There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of *States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities*" (emphasis added). Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

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* (emphasis added).

Thailand signed the ICCPED on 9 January 2012 but has not yet ratified it. However, as a signatory State, Thailand is expected to respect its provisions by ensuring that in all cases the whereabouts and condition of each detainee is made known to their relatives and lawyers.

International condemnation of Thailand’s military take-over and violation of human rights

On 22 May, the UN Secretary General Ban Ki-moon appealed “for a prompt return to constitutional, civilian, democratic rule.” On 13 June, four UN Special Rapporteurs issued a press release saying the limitations on fundamental rights put in place since the military took control of the country are “deeply disturbing.” The Special Rapporteurs called upon the NCPO to “reverse all measures affecting basic rights and to restore democratic rule in the country.”¹² In addition, a number of States have expressed concern or condemned the military take-over.

Recommendations to the NCPO and to other States

LRWC urges the NCPO to:

- cease all arbitrary detentions and enforced disappearances immediately;
- release immediately and unconditionally all those detained by the NCPO unless they are immediately charged with a recognizable criminal offence that was in existence at the time it was committed and ensure all those charged are promptly brought before an independent civilian court, accorded rights to pre-trial release and fair trial rights pursuant to the ICCPR;
- provide all detainees access to their family members, lawyers, civilian courts and necessary medical care and ensure the physical and psychological integrity of all detainees;
- prevent enforced disappearances by making all arrests public and prohibiting incommunicado detention and ensuring the right of habeas corpus;¹³
- provide immediate access to all places of detention by independent monitors for the purpose of visiting and inspecting all detention facilities used by the NCPO in order to assess compliance with international human rights standards including the UN *Basic Principles for the Treatment of Prisoners*;¹⁴
- restore rights to freedom of expression, association and assembly; and
- restore civilian rule by means of a free and fair multi-party election supervised by independent election bodies and civilian courts in accordance with international standards.

LRWC recommends that other States:

1. Make firm, clear and consistent statements:
 - a. condemning the military takeover, martial law, arbitrary detentions, enforced disappearance, and

¹² “Fundamental rights at stake in Thailand” – UN experts concerned about arbitrary detentions and restrictions. Press release of Mr. Mads Andenas, Chair-rapporteur of the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; Mr Frank La Rue, Special Rapporteur on the right to freedom of opinion and expression; Mr Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association and Mr Juan Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

¹³ UN Special Rapporteur on States of Emergency, Nicole Questiaux, Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment: *Study of the implication for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc. E/CN.4/Sub.2/1982/15, of 27 July 1982, para. 184. <http://daccessdds.un.org/doc/UNDOC/GEN/N82/117/27/PDF/N8211727.pdf?OpenElement>

¹⁴ Basic Principles for the Treatment of Prisoners, Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>
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- restrictions of the right to liberty and freedoms of expression, association and assembly, and
- b. urging the NCPO to restore the Constitution and democratic rule and to reverse all steps taken in violation of international human rights treaties including the NCPO's unlawful derogation of civil and political rights in violation of Article 4 of the ICCPR.
2. Suspend all bilateral assistance to, or cooperation with, Thailand pending restoration of:
 - a. democratic civilian rule by means of free and fair elections;
 - b. the jurisdiction of independent civilian courts over all matters involving civilians; and
 - c. respect for and compliance with Thailand's international law obligations including obligations under the ICCPR.
 3. Undertake diplomatic initiatives seeking:
 - a. complete information about persons detained by the NCPO including names, dates of arrest, place of detention;
 - b. meetings by diplomatic staff with NCPO detainees; and
 - c. attendance by diplomatic staff at hearings of persons charged or detained under the *Martial Law Act* of 1930, Section 112 of the *Criminal Code* and other offences related to political dissent.
 4. Undertake diplomatic initiatives at the current session of the UN Human Rights Council (HRC) to support action by Council members urging Thailand to uphold its international human rights obligations including ceasing arbitrary detention; restoring freedoms of expression, association and assembly; restoring the role of civilian courts; and restoring civilian rule by means of free and fair elections.