

# Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

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## **Thailand: Trials of civilians in military courts violate international fair trial rights** *Judicial harassment of lawyers and human rights defenders*

**Statement**  
**25 May 2015**

*Lawyers' Rights Watch Canada (LRWC) is a committee of 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).*

Since the May 2014<sup>1</sup> military coup in Thailand, at least 700 civilians have been tried in military courts in 30 locations in Thailand. Thailand's military court system fails to provide fair trial rights guaranteed by Article 14 of the *International Covenant on Civil and Political Rights (ICCPR)*,<sup>2</sup> ratified by Thailand in 1996. Many of the charges against civilians facing military courts involve denials of rights to freedoms of expression, association and assembly, and a number of civilians, including human rights defenders, have been arbitrarily detained. Thailand's military government, the National Council for Peace and Order (NCPO), has failed to investigate allegations of torture of persons in military custody as required by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*,<sup>3</sup> ratified by Thailand in 2007. LRWC calls for immediate action to: stay all prosecutions of civilians in military courts; restore judicial and prosecutorial independence; cease judicial harassment of human rights defenders; and withdraw charges against Anon Numpa, Sirawit Serithiwat, Pansak Srithep, Wannakiet Chusuwan, Jittra Cotshadet and Worachet Pakeerut.

### **1. Trials of civilians by Military Courts have resulted in arbitrary detention**

In response to expressed concerns about trials of civilians in Military Courts,<sup>4</sup> on 13 March 2015,

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<sup>1</sup> Announcement of the NCPO No. 37/2557 [2014]: Offences Under the Power of the Military Court to Examine and Decide, 25 May 2014, <http://www.thaigov.go.th/en/announcement-2/item/83706-id83706.html>; International Commission of Jurists (ICJ), Submission to the UN Committee on Economic, Social and Cultural Rights, 11 May 2015, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/05/Thailand-ICJ-CESCR-submission-Advocacy-non-legal-submission-2015-ENG.pdf>

<sup>2</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>;

<sup>3</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 available at: <http://www.refworld.org/docid/3ae6b3a94.html>.

<sup>4</sup> Statement by the Colombian Commission of Jurists, 28th Regular Session of the UN Human Rights Council, 13 March

Thailand's delegation to the United Nations (UN) stated to the UN Human Rights Council (HRC) that Thailand "is committed to the promotion and protection of human rights of all persons" and that "only a limited number of cases of those who are accused of committing serious offences are submitted to the military court. These offences include those relating to possession of weapons and firearms, and murder."<sup>5</sup> This statement is not accurate.

In fact, at least 700 civilians<sup>6</sup> have been taken before the military courts in 30 locations since May 2014. Numerous civilians before military courts have been charged with offences related to the exercise of freedoms of expression, association and assembly, including:

- violating Section 112 of the *Criminal Code* (lèse majesté);<sup>7</sup>
- taking part in symbolic political demonstrations, posting messages to social media or scattering leaflets opposing the NCPO;
- refusing to obey military orders to report to the NCPO for interrogation (with no charges).

At least one lawyer and a number of human rights defenders and pro-democracy activists have been tried by Military Courts with no appeal. After the May 2014 declaration of martial law, Military Courts assumed jurisdiction over civilians pursuant to the *Martial Law Act (1914)*<sup>8</sup> and NCPO Order

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2015, available at

[https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/28thSession/OralStatements/19\\_ColombianCommissionJurists\\_28.pdf](https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/28thSession/OralStatements/19_ColombianCommissionJurists_28.pdf) (enter <HRC extranet>, password <1session>).

<sup>5</sup> The Thailand delegation stated that: "... only a limited number of cases of those who are accused of committing serious offences are submitted to the military court. These offences include those relating to possession of weapons and firearms, and murder. Defendants before the military court are entitled to the same set of rights accorded to those who appear before an ordinary court. This includes the right to legal counsel and the right to be presumed innocent until proven guilty." Right of Reply by the Delegation of Thailand, 28<sup>th</sup> Session of the Human Rights Council, 13 March 2015, available at [https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/28thSession/OralStatements/Thailand\\_GD2-3\\_27\\_RR.docx](https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/28thSession/OralStatements/Thailand_GD2-3_27_RR.docx) (enter <HRC extranet>, password <1session>). Thailand's delegation repeated these incorrect claims on 17 March 2015 in another statement on right of reply to the Statement Delivered by Pornpen Khongkachonkiet on behalf of Asian Forum for Human Rights and Development (FORUM-ASIA), 28th Regular Session of the UN Human Rights Council, Tuesday, 17 March 2015, available at <https://www.forum-asia.org/?p=18575>.

<sup>6</sup> International Commission of Jurists (ICJ), *Submission to the UN Committee on Economic, Social and Cultural Rights*, 11 May 2015, para. 14, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/05/Thailand-ICJ-CESCR-submission-Advocacy-non-legal-submission-2015-ENG.pdf>. Thai authorities have denied this number but said they did not know the number. Pravit Rojanaphruk, "No figures on civilians being tried by military court," *The Nation*, 19 March 2015, available at <http://www.nationmultimedia.com/politics/No-figures-on-civilians-being-tried-by-military-co-30256300.html>. The ruling military authorities, the National Council for Peace and Order (NCPO), have retained military court jurisdiction after replacing martial law with similar and expanded powers under Section 44 of the interim constitution on 1 April 2015. TLHR, Fact Sheet: The consequences of revocation of Martial Law and the Order of the Head of National Council for Peace and Order (NCPO) No. 3/2558 (2015), available at <https://tlhr2014.wordpress.com/2015/04/02/fact-sheet-the-consequences-of-revocation-of-martial-law-and-the-order-of-the-head-of-national-council-for-peace-and-order-ncpo-no-32558-2015/>; NCPO Order Number 3/2558 (3/2015) on Maintaining Public Order and National Security, unofficial translation available at <http://www.prachatai.com/english/node/4933>; NCPO Order No. 5/2015 (Thai language), available at <http://www.ratchakitcha.soc.go.th/DATA/PDF/2558/E/085/1.PDF>, see "Thai junta expands definition of 'Assistant Peace-keeping Officer'," *Prachatai*, 16 April 2015, available at <http://www.prachatai.com/english/node/4970>

<sup>7</sup> *Criminal Code*, Section 112 criminalizes criticism of the King, Queen, Crown Prince, and Regent but has been interpreted to ban criticism of royal projects or the royal institution, even previous or deceased monarchs. The number of lèse majesté cases, primarily against political activists, has increased dramatically since the coup. The NCPO has even sought extradition of thirty-one lèse majesté suspects living in other countries on the grounds that the crime is not a political crime but is related to national security. "Govt eyes extradition of lese majeste suspects," *The Nation*, 21 March 2015, available at <http://www.nationmultimedia.com/politics/Govt-eyes-extradition-of-lese-majeste-suspects-30256466.html>

<sup>8</sup> *Martial Law Act*, B.E. 2457 (1914), English translation available at

<http://www.thailawforum.com/laws/Martial%20Law.pdf>. For LRWC's position on the unlawfulness of *Martial Law* in Thailand, see "Thailand: Arbitrary Arrests and Incommunicado Detentions," 28 May 2004, available at Re: Trials of civilians in military courts violates international fair trial rights: Judicial harassment of lawyers and human rights defenders

37/2557.<sup>9</sup> On 1 April 2015, the NCPO revoked martial law but replaced it with similar and expanded powers<sup>10</sup> retaining the Military Courts' jurisdiction over civilians in cases of lèse majesté, national security crimes, weapons offences and violations of NCPO orders.<sup>11</sup> A number of peaceful activists and other civilians have been convicted by Military Courts and given harsh prison sentences.<sup>12</sup> Two cases involving peaceful human rights defenders with ongoing or upcoming trials in Military Courts are outlined below.

**a. Lawyer Mr. Anon Numpa, and democracy activists Sirawit Serithiwat, Pansak Srithep, and Wannakiet Chusuwan**

On 14 February 2015, a human rights lawyer, Mr. Anon Numpa, and three democracy activists, Sirawit Serithiwat, a student activist from Thammasat University; Pansak Srithep, a pro-democracy activist and the father of a boy killed by the military during the 2010 political violence; and Wannakiet Chusuwan, a pro-democracy activist and taxi driver, were arrested for allegedly violating an order of the NCPO banning political gatherings of five persons or more.<sup>13</sup> Anon Numpa is a volunteer lawyer with the organization Thai Lawyers for Human Rights (TLHR), established in May 2014 to provide legal assistance to activists and those charged with lèse majesté offences in the Military Courts after the May 2014 coup. The four were reportedly involved in a peaceful Valentine's Day 2015 protest in Bangkok entitled "The election that was loved [stolen]."<sup>14</sup> The protest included a mock election and a call for revocation of martial law. All four persons were detained and interrogated for nine hours before being released on bail.

On 5 March 2015, Mr. Anon reported to Bangkok's Pathumwan police station in response to a complaint under Article 14 (2) of the *Computer Crimes Act*.<sup>15</sup> The complaint alleged that while in

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<http://www.lrwc.org/thailand-arbitrary-arrests-and-incommunicado-detentions-letter/>

<sup>9</sup> *Supra* note 1.

<sup>10</sup> TLHR, Fact Sheet: The consequences of revocation of Martial Law and the Order of the Head of National Council for Peace and Order (NCPO) No. 3/2558 (2015), available at <https://tlhr2014.wordpress.com/2015/04/02/fact-sheet-the-consequences-of-revocation-of-martial-law-and-the-order-of-the-head-of-national-council-for-peace-and-order-ncpo-no-32558-2015/>. See Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014), unofficial translation, available at <http://lawdrafter.blogspot.ca/2014/07/translation-of-constitution-of-kingdom.html>; NCPO Order Number 3/2558 (3/2015) on Maintaining Public Order and National Security, unofficial translation available at

<http://www.prachatai.com/english/node/4933>; NCPO Order No. 5/2015 (Thai language), available at <http://www.ratchakitcha.soc.go.th/DATA/PDF/2558/E/085/1.PDF>, see "Thai junta expands definition of 'Assistant Peace-keeping Officer'," *Prachatai*, 16 April 2015, available at <http://www.prachatai.com/english/node/4970>

<sup>11</sup> See NCPO Order Number 3/2558 (3/2015) on Maintaining Public Order and National Security, unofficial translation available at <http://www.prachatai.com/english/node/4933>.

<sup>12</sup> For example, see "Military court gives 1st lèse majesté verdict, double sentence of civilian court," *Prachatai*, 18 November 2014, available at <http://www.prachatai.com/english/node/4498>; "Military court becoming even tougher on lèse majesté cases," *Prachatai*, 15 November 2014; "Military court gives red shirt 25 years for lèse majesté comment on Facebook," *Prachatai*, 31 March 2015, available at <http://www.prachatai.com/english/node/4923>; "Military court sentences elderly man to 1.5 years in prison for lèse majesté graffiti in restroom," *Prachatai*, 20 March 2015, available at <http://www.prachatai.com/english/node/4889>. Also see TLHR, *Martial Law and the Military Court: Civil and Political Rights in Thailand (22 May 2014-15 January 2015)*, 2 February 2015 [TLHR report January 2015] at 15, available at <http://humanrightsinasean.info/system/files/documents/TLHR%20report-Civilians%20in%20Military%20court.pdf> Also see TLHR, *Martial Law and the Military Court: Civil and Political Rights in Thailand (22 May 2014-15 January 2015)*, 2 February 2015 [TLHR report January 2015] at 15, available at <http://humanrightsinasean.info/system/files/documents/TLHR%20report-Civilians%20in%20Military%20court.pdf>

<sup>13</sup> Announcement of the National Peace and Order Maintaining Council No. 7/2557 Subject: Prohibition of Political Assembling, available at <http://www.thaigov.go.th/en/announcement-2/item/83673-announcement-of-the-national-peace-and-order-maintaining-council-no-7/2557-subject-prohibition-of-political-assembling.html>

<sup>14</sup> "Human rights lawyer interrogated over Facebook messages deemed anti-junta," *Prachatai*, 22 February 2015, available at <http://www.prachatai.com/english/node/4803>.

<sup>15</sup> *Commission of an Offence relating to Computer Act*, B.E. 2550 (2007) (unofficial English translation), available at <http://www.thailaws.com/>. Section 14 states:

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police custody on February 14, 2015, he had damaged national security by posting five Facebook messages criticizing the role of the military in the administration of justice under martial law.<sup>16</sup> On 16 March 2015 Mr. Anon and the other activists were charged with defying NCPO Order No. 7/2014 and taken to the Bangkok Military Court where the Military Court prosecutor has not yet decided whether to confirm the charges. The preliminary hearing commenced on 14 May 2015 and is set to continue on 4 June 2015. If found guilty, they face up to one year in prison and a fine of up to 20,000 baht (approximately US\$625). Since the complaints were made during the period of martial law, there will be no right of appeal from the Military Court's determination. If convicted under the *Computer Crimes Act*, Mr. Anon faces up to 25 years imprisonment and a fine of up to 500,000 baht (approximately US\$15,625).

**b. Labour rights leader and political activist, Ms. Jittra Cotshadet**

On 1 June 2014, the NCPO summoned Ms. Jittra Cotshadet, a labour rights leader and political activist, to report to army headquarters. At that time, the NCPO was summoning hundreds of elected officials, opposition politicians, journalist, activists and others for interrogation and detention without charge in secret locations without access to lawyers, family members or courts for periods ranging from a few hours to seven days (or more in some cases). Ms. Jittra was travelling outside Thailand at the time of the summons and on 3 June 2014 reported to Thailand's embassy in Sweden. On 9 June 2014, the Military Court authorized a warrant for her arrest, and she was detained at the airport on her return to Thailand on 13 June 2014. The Military Court released her on bail.<sup>17</sup> On 12 May 2015, she appeared before the Military Court for the opening day of her trial for allegedly violating the orders of the NCPO.<sup>18</sup> The Military Court has set the next day of trial on 17 July 2015.

**a. Dr. Worachet Pakeerut, Associate Professor, Faculty of Law, Thammasat University**

Dr. Worachet Pakeerut is a member of the Nitirat Group (Enlightened Jurists) of law scholars based at Thammasat University who criticized the legality of Thailand's 2006 coup d'état and have campaigned for amendment of the lèse majesté law to bring it into conformity with human rights law.<sup>19</sup> On 23 May 2014, Dr. Worachet's name was among those broadcasted on radio and television with a demand pursuant to NCPO order No. 5/2557 that they present themselves to the NCPO on 24 May 2014.<sup>20</sup> Dr. Worachet was named again in a list of names broadcast on radio and television demanding that those

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Section 14. If any person commits any offence of the following acts shall be subject to imprisonment for not more than five years or a fine of not more than one hundred thousand baht or both:

- (1) that involves import to a computer system of forged computer data, either in whole or in part, or false computer data, in a manner that is likely to cause damage to that third party or the public;
- (2) that involves import to a computer system of false computer data in a manner that is likely to damage the country's security or cause a public panic;
- (3) that involves import to a computer system of any computer data related with an offence against the Kingdom's security under the Criminal Code;
- (4) that involves import to a computer system of any computer data of a pornographic nature that is publicly accessible;
- (5) that involves the dissemination or forwarding of computer data already known to be computer data under (1) (2) (3) or (4).

<sup>16</sup> "Human rights lawyer hears charges related to anti-military Facebook posts," *Prachatai*, 5 March 2015, available at <http://www.prachatai.com/english/node/4831>

<sup>17</sup> ILAW, "Jittra: Defying NCPO Order 41/2014, Case #617, available at <http://freedom.ilaw.or.th/en/case/617#detail>

<sup>18</sup> "Jittra insists trial in military court wrongful," *Bangkok Post*, 13 May 2015, available at

<http://www.bangkokpost.com/news/general/559731/jittra-insists-trial-in-military-court-wrongful>

<sup>19</sup> Duncan McCargo & Peeradej Tanruangporn (2015) "Branding Dissent: Nitirat, Thailand's Enlightened Jurists," *Journal of Contemporary Asia*, 45:3, 419-442

<sup>20</sup> Thailand: Human rights defender and law professor charged by the junta, Asian Human Rights Commission, 18 June 2014, available at <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-121-2014>

named present themselves to the NCPO on 10 June 2014 Order No. 57/2557. On 11 June 2014, Dr. Worachet's wife reported to the NCPO on his behalf, saying that he was sick and could not report to the military himself. On 16 June 2014, Dr. Worachet reported in person to the NCPO where he was taken into military custody. On 18 June 2014, he was taken to the Crime Suppression Division for further investigation, and on the afternoon of 18 June, he was taken to Bangkok Military Court and formally charged with violating an order of the NCPO. He was released on bail later that day. On, 26 May 2015, the Military Court is schedule to hear witnesses in Dr. Worachet's trial.

## **2. Military Courts do not accord the same rights as Thailand's civilians courts**

On 13 March 2015, the Thailand delegation to the HRC stated to the HRC that: "...Defendants before the Military Court are entitled to the same set of rights accorded to those who appear before an ordinary court. This includes the right to legal counsel and the right to be presumed innocent until proven guilty."<sup>21</sup> This statement is inaccurate. Trials in Thailand before military courts violate internationally protected fair trial rights including rights to a fair and public hearing by a competent, impartial and independent tribunal, legal representation and appeal.

### **a. Lack of competence, independence and impartiality of Military Court**

The ICCPR Article 14 (1) stipulates that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Thailand civilian courts are formally independent from the executive, but Thailand's Military Court system is not. The Military Court is a unit of the Ministry of Defense, and Military Court judges are appointed by and remain under the orders of their commanders.<sup>22</sup> Also, judges in civilian courts all have legal training. Military Courts have panels of three judges, and only one of the three must have legal training; the other two members of the panel are military officials with no required legal training.<sup>23</sup> TLHR reportedly "submitted a motion asking the Bangkok Military Court to refer the question of the impartiality of the judges to the Constitutional Court for consideration, but the military judges ordered the attorneys to change their request on the basis that it constituted a 'violation against the NCPO.'"<sup>24</sup> This demonstrates the lack of independence of Military Courts from the NCPO.

### **b. Right to Counsel: Civilians have not had the same rights as soldiers in Military Courts**

The Military Court system provides a military judge advocate to soldiers appearing before the Military Court. In January 2015 TLHR noted that

civilians may have to go through processing in the military court without access to court-appointed lawyers to provide them with basic legal counseling, help apply for bail, fight the charges or write a statement expounding the confession. This demonstrates that there is no guarantee of the basic right to legal counsel for the accused in the military court system.<sup>25</sup>

On 15 May 2015, welcome amendments to the *Military Court Act* of 1955 went into effect that provide for court-appointed lawyers for civilians. Prior to 15 May, civilians needed to seek counsel from

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<sup>21</sup> *Supra* note 9.

<sup>22</sup> TLHR, *Marital Law and the Military Court: Civil and Political Rights in Thailand (22 May 2014-15 January 2015)*, TLHR, 2 February 2015 [TLHR report January 2015], available at

<http://humanrightsinasean.info/system/files/documents/TLHR%20report-Civilians%20in%20Military%20court.pdf>

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

among the limited number of lawyers in Thailand able and willing to take on their cases.

***b. No appeal to civilian courts, and no appeal at all for civilians tried in Military Court between 20 May 2014 and 1 April 2015.***

The ICCPR Article 14(5)(3) guarantees that “everyone convicted of a crime shall have the right to review of his conviction and sentence by a higher tribunal.” For Military Court offences alleged to have been committed during the period of martial law between 20 May 2014 and 1 April 2015, there is no appeal.<sup>26</sup> The revocation of martial law on 1 April means that the normal appeal provisions of the *Military Court Act of 1955* apply to new military court charges after that date.<sup>27</sup> While appeals to higher levels of military courts are available to civilians charged in military courts after 1 April 2015, these appeals are not heard by an independent and impartial civilian court and this violates international fair trial rights.

***c. Secrecy***

The ICCPR Article 14 guarantees the right of everyone to a public hearing. Thailand civilian court hearings are normally public. However, the Military Courts are operating in a secret fashion. Even the number of cases heard in Military Courts has not been revealed by the Military Courts or the NCPO.<sup>28</sup> TLHR reports that while some trials of civilians in the military courts are reported to be open to the public, lèse majesté cases in the military court system under Section 112 of the *Criminal Code* are generally held in secret:

All people not concerned with the case, even including representatives from foreign missions and international organizations, are asked to vacate the room. When lawyers have asked to make a copy of the court order to hold the hearing in secret, the military court judges have denied the request and given the explanation that the order was already verbally made and understood in the court.<sup>29</sup>

***d. The presumption of innocence is compromised***

International law provides that an alleged offender must be granted pre-trial release save in exceptional circumstances.<sup>30</sup> The Military Courts compromise the right to the presumption of innocence by refusing bail as a general rule in cases of lèse majesté. The TLHR reports that the Military Court often claims when denying bail that “since Article 112 cases carry a heavy punishment, there is a flight risk.” Heavy punishment is not a valid reason for denying pre-trial release, nor is it a reason to presume a flight risk. Bail must be granted in the absence of evidence presented by the prosecutor that establishes a risk of flight, interference with evidence or reoccurrence or the alleged offence(s), and detention is the only means of preventing the established risk(s).<sup>31</sup> The WGAD has found that “Thailand’s laws on lèse majesté, namely section 112 of the penal code, suppress important debates on matters of public interest, thus putting in jeopardy the right to freedom of opinion and expression.”<sup>32</sup> Detention on such charges —before or after conviction—is arbitrary and violates the ICCPR.

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<sup>26</sup> *Ibid.*, at 4

<sup>27</sup> *Act on the Organization of Military Courts* (B.E. 2498), Article 61, Para 1.

<sup>28</sup> *TLHR report, supra note 18*

<sup>29</sup> *Ibid.*

<sup>30</sup> Lois Leslie, *Pre-trial release and the right to be presumed innocent: A handbook on international law rights to pre-trial release* (Vancouver: LRWC, 2013, available at <http://www.lrwc.org/ws/wp-content/uploads/2013/04/Pre-trial-release-and-the-right-to-be-presumed-innocent.pdf>)

<sup>31</sup> *Ibid.*

<sup>32</sup> Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27–31 August 2012 - No. 35/2012 (Thailand), available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=20940](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=20940) (scroll down).

### *e. Harsher treatment and sentences in Military Courts*

A comparison of lèse majesté cases tried in civilian and military courts demonstrates that the Military Courts are holding more lèse majesté trials in secret and imposing considerably harsher sentences than civilian courts.<sup>33</sup>

### *f. Amendment to Military Courts Act 1955 provides for arbitrary detention*

On 15 May 2015, amendments to *Military Court Act* of 1955 came into force that empower military commanders to detain persons for up to 84 days without charge or judicial oversight, bypassing judicial oversight provided by Thailand's *Criminal Procedure Code*.<sup>34</sup> This amendment could be used to authorize military commanders to issue detention orders for both military personnel and civilians for up to 84 days without judicial oversight for specific offences deemed by the NCPO to be within Military Court jurisdiction (including lèse majesté, national security crimes, weapons offences and violation of NCPO orders). The National Legislative Assembly stated that such concerns were unfounded and that the amendment applies only to military personnel.<sup>35</sup> However, the language of the amendment provides no such limitation as it refers to "persons." This amendment provides the potential for violations of Article 9 of the ICCPR.

## **3. Incommunicado detention and torture before charges are laid in the Military Courts**

Oversight of civilians' detention by independent civilian courts is essential to prevent torture and ill-treatment of those being interrogated or detained. During the period of martial law from 20 May 2014 to 1 April 2015, the NCPO summoned, detained incommunicado and interrogated hundreds of civilians in secret, unofficial military prisons without charge and without access to lawyers or judicial review for periods ranging from hours to seven days. In some cases, detentions exceeded the seven-day period allowed by the *Martial Law Act*.<sup>36</sup> The NCPO took into incommunicado military custody elected officials, political activists, academics, journalists, human rights defenders and lawyers. Such arbitrary arrests and/or detentions by military authorities violate the ICCPR, Article 9.<sup>37</sup>

<sup>33</sup> "Compare civilian and military courts when dealing with lese majeste cases," Prachatai, 3 December 2015, available at <http://www.prachatai.com/english/node/4554>

<sup>34</sup> "Proposed amendments to military court laws in Thailand draw UN rights office concern," UN News Centre, 10 February 2015, available at <http://www.un.org/apps/news/story.asp?NewsID=50044#.VV0WP1JLWGO>. Also see Human Rights Lawyers Association, "Press Release: Opposing the amendment of Article 46 of the Act on the Organization of Military Court B.E.2498: The amendment shall enable the military to hold in custody civilians beyond judicial review," HRLA, 6 February 2015, available at <http://naksit.org/index.php/en/statement/209-press-release-opposing-the-amendment-of-article-46-of-the-act-on-the-organization-of-military-court-b-e-2498-the-amendment-shall-enable-the-military-to-hold-in-custody-civilians-beyond-judicial-review>.

<sup>35</sup> OHCHR 'misunderstood' military court amendment, *The Nation*, 13 February 2015, available at

<http://www.nationmultimedia.com/politics/OHCHR-misunderstood-military-court-amendment-30253967.html>

<sup>36</sup> TLHR report, supra note 18. For further commentary on the proclamation of martial law in May 2014, LRWC's statement of 20 June 2014, available at: <http://www.lrwc.org/?p=8201>.

<sup>37</sup> 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.

...

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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court,

The risk of enforced disappearance, torture, and other ill-treatment is known to increase significantly when detainees are held incommunicado.<sup>38</sup> The NCPO's continued practice of incommunicado detention and its failure to provide detailed public lists of detained persons creates significant risk of torture and ill-treatment in violation of the CAT.

Allegations of torture of persons in military custody began to surface in May 2014. A report on 8 September 2014 by the TLHR reports they received 80 complaints of torture of which they identified 14 allegations that may amount to torture or ill-treatment of persons during interrogation while in military detention, including allegations of kicking, punching, application of electrical shocks to genitals and threats of death or abuse.<sup>39</sup> In September 2014, TLHR reported fourteen cases of suspected torture and ill-treatment during military detention.<sup>40</sup> Recently, allegations of torture were made by four men who had been in military custody from 9 to 15 March 2015 before being taken to the Military Court where they were charged with offences relating to a Bangkok grenade explosion on 7 March 2015.<sup>41</sup> The four prisoners have claimed that prior to the laying of charges in the Military Court, military officers tried to coerce confessions by beating and punching them. One man complained of being tortured with electrical shocks. No prompt, independent and impartial investigations into torture and ill-treatment allegations have been conducted as required by Article 12 of the CAT. Promptness is essential in investigations of torture allegations because of the urgency of preserving evidence. Instead of ensuring an investigation, on 23 March, military authorities threatened to take "legal action" against those who spread such information.<sup>42</sup> Officials also appear to have obstructed an independent investigation into the torture allegations by the National Human Rights Commission (NHRC). On 25 March 2015, NHRC Commissioner, Dr. Niran Pitakwatchara, reported that prison wardens at Bangkok Remand Prison turned him and a group of Ministry of Justice forensic science experts away from the prison where they planned to meet with the four prisoners to investigate and collect evidence of the prisoners' claims that they were tortured while in military custody.<sup>43</sup> Prison wardens reportedly refused the NHRC visit on the grounds that the NHRC Commissioner did not have the necessary authorization from the Director of the Department of Corrections. Dr. Niran reported that he had filed a request for the visit on 20 March but that it had not yet been approved, but that never before had his visits been hindered. In March 2015, the TLHR sent a letter to the prison seeking a doctor's certificate and photographs of the four prisoners taken immediately after their transfer to the transfer to the Bangkok Remand Prison. On 21 April 2015, Bangkok Remand Prison sent a letter of reply stating that the Department of Corrections could not supply the requested medical certificates and photographs due to national security concerns.

Thailand military authorities have also retaliated against human rights defenders who report torture and other human rights abuses. For example, in August 2014, the Cross Cultural Foundation (CCF)

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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.

38 Nigel S. Rodley, "Reflections on Working for the Prevention of Torture," *Essex Human Rights Review* 6, no. 1 (2009), 15-21, at 15, available at <http://projects.essex.ac.uk/ehrr/V6N1/Rodley.pdf>.

39 TLHR, *The Human Rights Situation 100 Days after the Coup*, 8 September 2013, available at <http://protectionline.org/files/2014/09/ALL-EN-TLHR-100-days-Human-Rights-Report1.pdf>

40 *Ibid.*

41 "Martial Court Denies Alleged Torture Victim Bail," *Khaosod*, 23 March 2015, available at <http://www.khaosodenglish.com/detail.php?newsid=1427113315>

42 *Ibid.*

43 "Human Rights Officials Barred From Visiting Alleged Torture Victims in Prison," *Khaosod*, 25 March 2015, available at <http://www.khaosodenglish.com/detail.php?newsid=1427290004&section=11&typecate=06>

released a report on torture allegedly committed by Thai military authorities in Thailand's deep south. On 24 August 2014 Ms. Pornpen Khongkachonkiet, Director of the (CCF), was charged with criminal defamation by the Army Task Force. Ms Pornpen was informed by police in December that the case against her had been dropped with no explanation.<sup>44</sup>

#### 4. Summary of International law on trials of civilians in military courts<sup>45</sup>

The UN Human Rights Committee (HR Committee) has concluded that “the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel.”<sup>46</sup> In 1984, the HR Committee affirmed in its General Comment 13 that military tribunals are prohibited from trying civilians except in extraordinary, objectively determined and narrowly defined circumstances such as cases where fair, independent and impartial civilian courts are unavailable.<sup>47</sup> The HR Committee commented that whenever a State tries a civilian before a military or another special tribunal, it must offer the due process standards under Article 14 of the ICCPR. States are also required to provide objective reasons for trying civilians in a military court and why ordinary courts cannot be used.<sup>48</sup> NCPO has not provided any reasons why civilian courts are not available to try civilians other than the existence of martial law proclaimed under the *Martial Law Act, 1914*.

Principle 5 of the *Basic Principles on the Independence of the Judiciary*, endorsed by the UN General Assembly in 1985<sup>49</sup> affirms that “everyone has the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

In 2006, Emmanuel Decaux, the UN Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, prepared *Draft Basic Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*.<sup>50</sup> The *Decaux Principles* were created in consultation with human rights experts, jurists and military personnel from around the world and are based on the foundational principle that military justice should be an integral part of the normal

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<sup>44</sup> Achara Ashayagachat, “Persecuted' pair ramp up efforts for women's rights,” *Bangkok Post*, available at <http://www.bangkokpost.com/news/general/491232/persecuted-pair-ramp-up-efforts-for-women-rights>.

<sup>45</sup> This section is excerpted from Erika Chan et al, *Right to Trial by Civilian Courts: International Law on the Use of Military Tribunals to Determine the Rights of Civilians*. Working Paper. Vancouver: Lawyers' Rights Watch Canada, January 2015, available at <http://www.lrwc.org/?p=8776>

<sup>46</sup> Cited in Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux to the UN Commission on Human Rights in 2006 (*Decaux Principles*); available at: <http://www1.umn.edu/humanrts/instree/DecauxPrinciples.html>.

Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux to the UN Commission on Human Rights in 2006 [*Decaux Principles*]; available at: <http://www1.umn.edu/humanrts/instree/DecauxPrinciples.html>.

<sup>47</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, paragraph 4 [CCPR General Comment No. 13], available at: <http://www.refworld.org/docid/453883f90.html> [accessed 16 December 2014].

<sup>48</sup> *Ibid.*

<sup>49</sup> *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> .

<sup>50</sup> *Decaux Principles*, *supra* note 43 .

judicial system and should operate in a way that guarantees full compliance with internationally protected human rights.

In 2006, the UN Commission on Human Rights reviewed and affirmed the *Decaux Principles*, which state:

Military courts should, in principle, have no jurisdiction to try civilians. The State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts<sup>51</sup> and that no tribunals may be created that “displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”<sup>52</sup>

The *Decaux Principles* further state that even when trying military personnel, military tribunals must always be conducted “within the framework of the general principles of the administration of justice” and apply fair trial standards in accordance with international human rights law and international humanitarian law.<sup>53</sup> In October 2013, the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, called for the adoption of the *Decaux Principles* by the Human Rights Council (the successor body to the UN Commission on Human Rights) and endorsement by the General Assembly.<sup>54</sup>

## 5. Recommendations

The NCPO should immediately:

- Cease judicial harassment of human rights defenders:
  - Ensure that all charges against Mr. Anon Numpa, Sirawit Serithiwat, Pansak Srithep and Wannakiet Chusuwan, Ms. Jittra Cotshadet and Dr. Worachet Pakeerut are withdrawn; and,
  - Put an end to retaliation against or interference with the legitimate work of lawyers and human rights defenders in conformity with the provisions of the UN *Declaration on Human Rights Defenders*, adopted by the General Assembly of the UN on December 9, 1998, especially Article 1, which states that “everyone has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels,” and Article 12.2, which provides that “the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.”
- Ensure access to civilian courts by all civilians in military custody for determination of charges and the legality of detention and treatment, in accordance with the ICCPR:

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<sup>51</sup> *Decaux Principles*, principle 5, para 20, *supra* note 43.

<sup>52</sup> *Decaux Principles*, principle 5, para 20, *supra* note 43.

<sup>53</sup> *Ibid.*

<sup>54</sup> Gabriela Knaul, quoted in “Military tribunals need stronger regulation, says UN expert on the independence of the judiciary,” UN News Centre 28 October 2013, available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13911&>

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- Adopt the *Decaux Principles* in all relevant legislation and policy;
  - Revoke all NCPO orders authorizing or requiring the trial of civilian by military courts and return any such cases to to civilian courts;
  - Revoke NCPO Orders 11/2557 and 33/2557 and restore the independence of civilian courts and prosecutors;
  - Revoke NCPO Order Number 3/2558 (3/2015) and NCPO Order No. 5/2015;
  - Ensure that all revisions of the Military Court Act of 1955 adhere to the *Decaux Principles*, and in particular that civilians may not be tried by Military Courts and that the provisions of the *Military Court Act of 1955* adhere to the ICCPR;
  - Ensure that all people in Thailand enjoy without discrimination, the rights articulated by the UDHR and guaranteed by the ICCPR, including fair trial rights, the presumption of innocence and international standards of pre-trial release;
  - Ensure the implementation and enforcement of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1987. Make publicly available the details of all cases of civilians being held in military custody or being processed in the Military Court system, including names, dates of arrest and places of detention;
  - Ensure that officials of the NHRC are granted unhindered opportunity to conduct investigation into all complaints of human rights abuses, including unhindered access to all prisons and all places of detention; and
  - Ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2006.<sup>55</sup>
- Ensure that the draft Constitution 2015 adheres to all Thailand's international human rights law obligations including those arising from the ICCPR and CAT;
  - Restore democratic rule through free and fair full-suffrage elections.

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<sup>55</sup> UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199, available at: <http://www.refworld.org/docid/3de6490b9.html>.  
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