



association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

UN Committee against Torture

APT submission on Thailand

10 April 2014

Alternative report from the Association for the Prevention of Torture (APT) to the Committee against Torture providing background information and suggested questions and recommendations on torture prevention and the Optional Protocol to the UN Convention against Torture (OPCAT) for **Thailand**, whose initial periodic report will be reviewed by the Committee during its 52nd session in Geneva.

The Association for the Prevention of Torture (APT) is an independent NGO based in Geneva, working for a world free from torture, where the rights and dignity of all persons deprived of liberty are respected.

To achieve this vision we:

- *Promote transparency and monitoring of places of detention*
- *Advocate for legal and policy frameworks*
- *Strengthen capacities of torture prevention actors and facilitate exchanges*
- *Contribute to informed public policy debates*

1. Summary

Thailand acceded to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT” or “Convention”) on 2 October 2007. Thailand has yet to accede to the Optional Protocol (“OPCAT”).

Through the Office of the Attorney General and the Ministry of Justice, Thailand prepared two draft amendments to the Penal and Criminal Procedure Code, in order to criminalise torture¹. In addition to Ministry of Justice’s draft bills, Thai civil society and a Thai legal expert have also initiated two other bills to criminalise torture. As a result, the overlapping of anti-torture bills and a complex legislative process in Thailand has left the process of torture criminalisation pending.

During their 2012 UPR review, in addition to pledging to amend criminal laws in conformity with the UNCAT, Thailand also committed to conduct a study on ratification of the OPCAT.² However, to date, Thailand is yet to take significant steps towards OPCAT ratification.

2. Background information on proposed legal reforms

To fulfil various obligations under the Convention, Thailand initiated the following legal reforms:

- i. Draft 166/1: to amend the Penal Code by adding a chapter on offences related to torture. Chapter covers definition, perpetrators of torture and acts constituting torture.
- ii. Draft 90/1: to amend the Criminal Procedure Code by having more effective and comprehensive remedies for damage caused by violations of rights and liberties under Section 32 of the Constitution, which in this context, includes torture cases.

The process of criminalising torture in Thailand has been ongoing since 2007. While recognising the recent challenges related to national security and political instability affecting legal reform efforts in the country, we understand the process has been delayed principally due to the challenges in harmonising various different draft laws on torture. In addition to the drafts from the Thai legal expert and Ministry of Justice, civil society has recommended a stand-alone anti-torture law. However, the legal committee of the Ministry of Justice recommended that the best way to proceed would be to amend the penal and criminal code because in practice, these are the key laws used daily by the relevant actors.³

¹ See Thailand’s initial report to the Committee against Torture, ¶ 16, CAT/C/THA/1 (9 July 2013).

² See Human Rights Council, Report of the Working Group on the Universal Periodic Review, Thailand, ¶¶ 88.3, 88.4, 93, UN Doc. A/HRC/19/8 (8 Dec. 2011); Human Rights Council, Report of the Working Group on the Universal Periodic Review, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, Thailand, ¶ 4, UN Doc. A/HRC/19/8/Add.1 (6 March 2012).

³ See Key Issues in Drafting Anti-Torture Legislation, Expert Meeting: Report: Expert, Advice and Good Practices ¶ 20, (2-3 November 2012) : Report can be found at http://www.apt.ch/content/files_res/report-expert-meeting-on-anti-torture-legislation-en.pdf

The APT submitted a legal opinion on the two government draft laws, drafts 166/1 and 90/1, during a public hearing on 26 July 2013 organized by the Law, Justice and Human Rights Standing Committee Working Group of the House of Representatives (“Working Group”). The legal opinion touched on the following matters:

2.1 Revision to the Thai Penal Code: Draft Article 166/1

- **Definition of torture**

“Torture” under Article 166/1 is defined as;

- 1). an act of rape as per Article 276 of the Criminal Code;
- 2). physical assault as per Article 297 of the Criminal Code; and
- 3). an act of physical assault causing the other person to suffer prolonged mental harm.

The definition of “torture” under draft 166/1 is restricted to the offences stated above and does not apply the definition set forth under Article 1 of the Convention.

- **Liability for torture**

Draft 166/1 enlists various acts of public officials that may amount to torture but it does not include “instigation, consent and acquiescence” as enshrined in Article 1(1) of the Convention. Instead, it specifies that officials who instigate, consent to or have been aware that another person was going to commit such an act and made no attempt to prevent it, or have concealed it, are considered as having committed the offence of torture. This excludes cases where third persons inflict severe pain or suffering at the instigation, with the consent or acquiescence of a public official, therefore falling short of the obligation in Article 1(1) of the Convention.

APT recalls the Committee’s Concluding Observations on Japan, which state *“the Committee is concerned that Japanese legislation does not cover all types of public officials, individuals acting in an official capacity, or individuals acting at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity, such as members of the Self Defense Forces and immigration officials”*,⁴ and submit that “perpetrators of torture” under Draft 166/1 should be revised to include third persons who act at the instigation, with the consent or acquiescence of a public official.

- **Acts constituting torture**

Draft 166/1 categorizes “acts constituting torture” as “rape and physical assault” (that are already criminal offences under Article 276 and 297 of the Thai criminal code) as well as acts of physical assault that cause persons to suffer “prolonged mental harm” when committed for a particular purpose. The APT notes that this formulation risks

⁴ CAT, Concluding Observations on Japan, CAT/C/JPN/CO/1, 3 August 2007, ¶10.

excluding other conduct amounting to torture under the Convention, such as psychological torture.

Furthermore, draft 166/1 used the term “prolonged mental harm” which, as Thailand explains in the footnotes to the draft, was adopted from the United States. The APT recalls the Committee’s concluding observations on the United States in 2006;

*“The State party should ensure that acts of psychological torture, prohibited by the Convention, are not limited to “prolonged mental harm” as set out in the State party’s understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration”.*⁵

- **Purposes of torture**

The list of purposes in draft Article 166/1 is limited to the following:

- 1) To obtain from the person or the third person a statement of confession,
- 2) To punish the victim of torture, and
- 3) To compel the other person to act or to refrain from acting.

The list leaves out some of the purposes included in Article 1(1) including any reason based on discrimination of any kind.

- **Defences**

The draft is silent with respect to defences for the crime of torture. To the extent that general Thai criminal law would permit a defence of “necessity” for the crime of torture, the draft should be amended to explicitly preclude this possibility. In addition to the defence of “necessity”, the draft law should also be amended to preclude a defence of “superior orders” in line with article 2(3) of the Convention.

- **Statute of Limitations**

The Committee against Torture has taken the position in numerous concluding observations that there should be no statute of limitations or prescription period for the crime of torture. Therefore, to the extent those general provisions in Thai criminal law would provide for a statute of limitations for the newly created crime of torture, the draft should be amended to explicitly preclude the application of a statute of limitations for the crime of torture.

2.2 Revision to the Criminal Procedure Code: Draft Article 90/1

Draft 90/1 provides that any person subjected to an act of torture may file individual complaints at the Court of Justice. If the Court finds the complaint to be credible, the Court may:

⁵ CAT, Conclusions and recommendations, United States of America, ¶ 13, UN Doc. CAT/C/USA/CO/2 (25 July 2006); see also Report of the Committee against Torture, Twenty-third session (8-19 November 1999), Twenty-fourth session (1-19 May 2000), ¶ 32, UN Doc. A/55/44 (2000).

- 1) Order necessary protection to victim,
- 2) Order an inquiry to further investigate the allegation of torture,
- 3) Order an injunction to prevent the person from being subjected to continuing torture, or
- 4) Order perpetrators to provide remedies and compensate the victim.

In reviewing Draft 90/1, the APT submits the following observations and recommendations:

- In finding whether the complaint made is “credible”, the draft should indicate the appropriate standard of proof to ensure that the evaluation of the complaint will not jeopardise the person’s right to access justice.
- The “necessary protection” ordered by the Court to the complainant should also be extended to witnesses, those conducting the investigation, and family members of the person, as stipulated under Article 3(b) of the Istanbul Protocol.⁶
- The draft must include assurances that the complainant, as well as his or her counsel, will have access to all hearings and evidence related to the allegation of torture.
- The draft must also provide relief in the event that the victim of torture dies, such that dependants of the victim should be entitled to file a complaint or be entitled to remedy from the Court as well.
- The APT further notes that the draft should be revised to provide for as full rehabilitation as possible, and provide for alternative methods of reparation where appropriate, in line with General Comment No.3 (2012) on implementation of article 14 by States parties.

3. Awareness raising and possible OPCAT ratification

In the period under review, the APT continued raising awareness and understanding on torture prohibition for government officials, national human rights commission, lawyers and civil society by conducting 3 workshops on torture prevention between 2009 and 2010.

In addition, APT also conducted the following activities in relation to OPCAT:

- an advocacy visit in November 2006 to promote OPCAT ratification amongst key actors including the National Human Rights Commission of Thailand;

⁶ OHCHR, *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series 8/Rev.1 (2004), para. 112, ¶ 23.

- a high level workshop from 10-12 of November 2010 attended by government and civil society representatives, parliamentarians, academics and representatives of international organisations that are involved with issues of deprivation of liberty and the prevention of torture; and
- a national OPCAT seminar,⁷ on 19 February 2013, in cooperation with the Department of Rights and Liberties Protection (DRLP) of the Ministry of Justice. This workshop was attended by approximately 150 representatives from governmental ministries, civil society, Parliament and academic institutions.

During the national seminar, The DLRP added their commitment to conduct a study on OPCAT ratification to further complement their advocacy and awareness raising efforts.

Despite on-going awareness raising and educational activities to promote OPCAT ratification over the last 7 years, the government of Thailand has yet to take significant steps toward ratification.

4. Suggested questions and recommendations

In light of the background material above, the APT proposes that the Committee formulates the following questions and recommendations to the Thailand government:

- **Articles 1, 4, and 14**
 1. **Explain** the current status of legislative drafts 166/1 and 90/1 in the Parliament.
 2. **Recommend** that the substantive elements of draft 166/1 and 90/1 such as "definition of torture", "acts constituting torture", perpetrator of torture, purpose of torture, penalties, defences, and statute of limitation are further revised to ensure compliance with requirements under Article 1, 4, and 14.
- **OPCAT ratification**
 3. **Recommend** ratification of OPCAT to further complement Thailand's implementation of UNCAT, and enable the effective prevention of torture and other forms of ill-treatment to all persons deprived of liberty.

⁷ See a short feature on the workshop at http://www.apt.ch/en/news_on_prevention/asean-neighbors-discuss-torture-prevention/#.U0amzm04Sd4.