

## **Commentary**

# **Development of Legislation to Prevent and Suppress Torture and Enforced Disappearance in Thailand**

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*The promulgation of legislation to prevent and suppress torture and enforced disappearance in Thailand has been an issue of public scrutiny for many years, unfortunately with repeated setbacks. As cases continue to emerge, including a case involving police officers who allegedly interrogated a drug suspect by beating him with his head covered in plastic bags and demanding a bribe, public pressure prompted the Thai parliament to revisit and enact the Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E.—, which had remained idle for a few years. This short commentary on the development of this draft legislation is an adaptation of a research report written by the author for King Prajadhipok's Institute, entitled “Legislation to Prevent and Suppress Torture and Enforced Disappearance,” published in November 2021.*

## **I. THAILAND’S INTERNATIONAL OBLIGATIONS**

Thailand acceded to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Convention)<sup>1</sup> on 2nd October 2007. Upon

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<sup>1</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT Convention).

accession, Thailand made three interpretive declarations<sup>2</sup> and one reservation.<sup>3</sup> Thailand indicated at the time of accession that it already had comparable provisions in its domestic legislation, including the Thai Penal Code, and it did not pre-conditionally accept the jurisdiction of the International Court of Justice. On the other hand, Thailand had not ratified the International Convention for the Protection of All Persons from Enforced Disappearance (CED Convention);<sup>4</sup> it had only signed the CED Convention on 9 January 2012. However, Thailand stated that promulgating the Draft Act would enable the ratification of the CED Convention.<sup>5</sup>

As part of its international obligations under the CAT Convention, Thailand submitted an initial report, albeit with a delay of five years, to the CAT Committee.<sup>6</sup> This report highlighted Thailand's implementation process, including the affirmation, as a constitutional right, of the right not to be subjected to "torture, brutal acts or punishment by cruel or inhumane means" under Section 32 of the 2007 Constitution.<sup>7</sup>

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<sup>2</sup> "Thailand's Interpretive Declaration" *United Nations Treaty Collection* <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en)>:

1. With respect to the term "torture" under Article 1 of the Convention, although there is neither a specific definition nor particular offence under the current Thai Penal Code corresponding to the term, there are comparable provisions under the aforesaid Thai Penal Code applicable to acts under Article 1 of the Convention. The term "torture" under Article 1 of the Convention shall accordingly be interpreted in conformity with the current Thai Penal Code. The Kingdom of Thailand shall revise its domestic law to be more consistent with Article 1 of the Convention at the earliest opportunity.

2. For the same reason as stipulated in the preceding paragraph, Article 4 of the Convention which stipulates: "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture," shall be interpreted in conformity with the current Thai Penal Code. The Kingdom of Thailand shall revise its domestic law to be more consistent with Article 4 of the Convention at the earliest opportunity.

3. Article 5 of the Convention which provides: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 . . ." is interpreted by the Kingdom of Thailand to mean that the jurisdiction referred to in Article 5 shall be established in accordance with the current Thai Penal Code. The Kingdom of Thailand shall revise its domestic law to be more consistent with Article 5 of the Convention at the earliest opportunity.

<sup>3</sup> "The Kingdom of Thailand does not consider itself bound by Article 30, paragraph 1, of the Convention." *ibid*.

<sup>4</sup> International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED Convention).

<sup>5</sup> UNHRC "National Report Submitted in Accordance With Paragraph 5 of the Annex to Human Rights Council Resolution 16/21" (17 August 2021) UN Doc A/HRC/WG.6/39/THA/1, para. 120.

<sup>6</sup> UN Committee Against Torture, "Consideration of Reports Submitted by States Parties Under Article 19 of the Convention" (9 July 2013) UN Doc CAT/C/THA/1.

<sup>7</sup> Constitution of the Kingdom of Thailand B.E. 2550 (2007) s 32:

A person shall enjoy the right and liberty in his life and person. A torture, brutal act or punishment by a cruel or inhumane means shall not be made; provided that punishment under judgments of the Courts or by virtue of the law shall not be deemed the punishment by a cruel or inhumane means under this paragraph. Arrest and detention of person shall not be made except by order or warrant issued by the Courts or there is a ground as provided by the law.

This constitutional right survived and became Section 28 of the current 2017 Constitution.<sup>8</sup> In response, in its 2014 Concluding Observations on the Initial Report of Thailand, the CAT Committee expressed<sup>9</sup> “deep concerns” about the declaration of martial law throughout Thailand at that time, as well as about the absence of a Convention’s definition of torture and the criminalization of torture in Thai domestic law, whether in separate legislation or under the Penal Code.<sup>10</sup>

## II. RELIANCE ON THE PENAL CODE

Identified by the CAT Committee as having shortcomings,<sup>11</sup> Thailand’s interpretive declaration suggests that Thailand views its provisions under the Penal Code as being already in compliance with its international obligations under the CAT Convention.<sup>12</sup> As a criminal act, Thailand believes that torture could already fall under several grounds for prosecution.

As a specific criminal offence, Section 295 stipulates that causing bodily or mental harm to another person is an offence of battery.<sup>13</sup> A heightened punishment is imposed when a person commits such an offence under aggravating circumstances.<sup>14</sup> When such action results in death, Section 290 imposes imprisonment of up to fifteen

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Search of person or act affecting the right and liberty under paragraph one shall not be made except by virtue of the law. In the case where there is an act affecting right and liberty under paragraph one, the injured person, public prosecutor or any person acting for the benefit of the injured person shall have the right to bring lawsuit to the Courts so as to stop or nullify such act and to impose appropriate measure to alleviate damage occurred therefrom.

<sup>8</sup> Constitution of the Kingdom of Thailand B.E. 2560 (2017) s 28:

A person shall enjoy the right and liberty in his or her life and person. Arrest and detention of a person shall not be permitted, except by an order or a warrant issued by the Court or on other grounds as provided by law. Search of the person or any act affecting the right or liberty in life or person shall not be permitted except on the grounds as provided by law. Torture, brutal acts or punishment by cruel or inhumane means shall not be permitted.

<sup>9</sup> UN Committee Against Torture, “Concluding Observations on the Initial Report of Thailand” (20 June 2014) UN Doc CAT/C/THA/CO/1, para. 4.

<sup>10</sup> *ibid* para. 9.

<sup>11</sup> *ibid*.

<sup>12</sup> “Thailand’s Interpretive Declaration” (n 2).

<sup>13</sup> “Whoever causes bodily or mental harm to another person is deemed to commit the offence of battery, and shall be liable to imprisonment for a term not exceeding two years or a fine not exceeding four thousand baht, or both.” Penal Code of Thailand (Penal Code) s 295.

<sup>14</sup> “Whoever commits the offence of battery under any of the circumstances as listed in Section 289 shall be liable to imprisonment for a term not exceeding three years or a fine not exceeding six thousand baht, or both.” Penal Code, s 296; “Whoever commits the offence of battery, and thereby causes grievous bodily harm on any other person shall be liable to imprisonment from six months to ten years.” Penal Code, s 297.

years.<sup>15</sup> In addition, the term “torture” is scattered throughout the Penal Code. For instance, committing murder by employing torture or acts of cruelty is an offence under Section 289(5),<sup>16</sup> obtaining a ransom by employing torture or acts of cruelty is an offence under Section 313,<sup>17</sup> and committing a robbery by employing torture or acts of cruelty is an offence under Section 340.<sup>18</sup>

However, none of the provisions under the Thai Penal Code fully correspond with the Convention’s definition of torture. Article 1(1) of the CAT Convention<sup>19</sup> stipulates three main elements of torture for the purpose of the CAT Convention: (1) severity of pain or suffering (2) convention purposes, such as obtaining information or confession and imposing punishment, and (3) relevance of official capacity. Evidently, the elements of convention purposes and relevance of official capacity are absent from the provisions under the Thai Penal Code. In addition to the divergence in the definition, other obligations and legal guarantees stipulated by the CAT Convention

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<sup>15</sup> “Whoever, without intention to murder, causes death to any person by inflicting the offence of battery on such person shall be liable to imprisonment from three years to fifteen years.” Penal Code, s 290.

<sup>16</sup> “Whoever commits murder on . . . (5) the other person by employing *torture or acts of cruelty* . . . shall be punished with death [emphasis added].” Penal Code, s 289(5).

<sup>17</sup> Penal Code, s 313:

Whoever, in order to obtain a ransom, (1) takes away a child not yet over fifteen years of age; (2) takes away a person over fifteen years of age by using deceitful means, threat, doing any act of violence, unjust influence or mode of coercion by any other means; or (3) restrains or detains any person, shall be punished with imprisonment of fifteen to twenty years and fined of thirty thousand to forty thousand baht, or imprisonment for life, or death.

If the commission of the offence according to the first paragraph causes grievous bodily harm to such person taken away, restrained, or detained, or is by acts of *torture or acts of cruelty* [emphasis added], so as to cause bodily harm or mental harm to such person, the offender shall be punished with death or imprisonment for life. If the commission of such offence causes death to the person taken away, restrained, or detained, the offender shall be punished with death.

<sup>18</sup> Penal Code, s 340:

Whoever, with three persons or more, participate in committing robbery, such persons are said to commit gang-robbery, and shall be punished with imprisonment of ten to fifteen years and fined of twenty thousand to thirty thousand baht.

If the gang-robbery is committed by acts of cruelty, so as to cause bodily or mental harm to the other person, by shooting with a gun, by using explosive or by acts of *torture*, the offender shall be punished with imprisonment for life or imprisonment of fifteen to twenty years. If the gang-robbery causes death to the other person, the offender shall be punished with death.

<sup>19</sup> CAT Convention, art. 1(1):

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

are not present in Thailand's domestic legislation. Examples of the absent obligations and legal guarantees include an obligation not to expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture<sup>20</sup> and an obligation not to invoke exceptional circumstances to justify torture.<sup>21</sup>

Regarding enforced disappearance, the Penal Code does not contain the provisions required to implement certain obligations and legal guarantees under the CED Convention. For instance, a person's obligation to establish superior criminal responsibility for acts of his or her subordinates<sup>22</sup> and an obligation to guarantee access by competent and legally authorized authorities to the places where persons are deprived of liberty<sup>23</sup> are absent in Thailand's domestic legislation. With these shortcomings and the continuation of allegations of widespread use of torture and ill-treatment,<sup>24</sup> the CAT Committee strongly recommended Thailand to revise its Penal Code and Criminal Procedure Code, or to draft new legislation to address the issues of torture and enforced disappearance.<sup>25</sup>

### III. DRAFT PREVENTION AND SUPPRESSION OF TORTURE AND ENFORCED DISAPPEARANCE ACT B.E.—

Thailand's initiative to draft new specific legislation in preparation for its ratification of the CED Convention can be dated back to 2009, when the Rights and Liberties Department of the Ministry of Justice commissioned research on Thailand's readiness to ratify the CED Convention.<sup>26</sup> Plagued by continuous delays, Parliament revisited the draft in 2018, and again in 2021 following an unfortunate incident in Nakhon Sawan province.<sup>27</sup> Of the four versions,<sup>28</sup> the House of Representatives on 15

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<sup>20</sup> "1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT Convention, art. 3(1).

<sup>21</sup> "2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification of torture." CAT Convention, art. 2(2).

<sup>22</sup> CED Convention, art. 6(1)(b).

<sup>23</sup> CED Convention, art. 17(2)(e).

<sup>24</sup> UN Committee Against Torture, "Concluding Observations" (n 9) para. 10.

<sup>25</sup> *ibid* para. 14.

<sup>26</sup> Pokpong Srisanit and others, *Report on Thailand's Readiness to Ratify International Convention for the Protection of All Persons from Enforced Disappearance*, Rights and Liberties Department (Ministry of Justice 2009).

<sup>27</sup> "Joe Ferrari, 6 Other Nakhon Sawan Police Officers Slapped with 4 Charges" *The Nation Thailand* (2 November 2021) <<https://www.nationthailand.com/in-focus/40008310>>.

<sup>28</sup> The four versions of the draft act are as follows:

1. The draft act, proposed by the Rights and Liberties Department, Ministry of Justice;
2. The draft act, proposed by the Committee on Law, Justice, and Human Rights, House of Representatives;
3. The draft act, proposed by Mr Wan Muhamad Noor Matha and others;

September 2021 selected the version drafted by the Rights and Liberties Department as the main draft to proceed, and established a joint committee to work on the final draft.

Pending the release of the final draft, this commentary highlights certain issues contained in the main draft that are different from other versions and remain subject to debate.

## A. Definition

In the main draft, the definition of torture seems to be a translation of the definition under the CAT Convention, with a minor difference. The “purpose” element is incorporated in the main draft as an exhaustive list using the denominator “which are,”<sup>29</sup> whereas the wording “for such purposes as” in the CAT Convention reflects a non-exhaustive list.<sup>30</sup> The definition of enforced disappearance in the main draft is also a direct translation of the definition under the CED Convention.<sup>31</sup>

## B. Term of Imprisonment

Both Conventions oblige State Parties to make the offences of torture and enforced disappearances punishable by appropriate penalties, considering their grave nature.<sup>32</sup> The UN Working Group on Enforced or Involuntary Disappearance suggested a term of imprisonment of between 25 and 40 years.<sup>33</sup> The main draft currently proposes a

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4. The draft act, proposed by Mr Suthat Ngoenmuen and others.

<sup>29</sup> Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E.—, proposed by the Rights and Liberties Department, Ministry of Justice, s 5:

Whoever, as a government official, inflicts another person severe pain or suffering, whether physical or mental, for the purposes, which are:

- (1) confession from that person or a third person
- (2) punishing that person or a third person
- (3) intimidating or coercing that person or a third person
- (4) unfair discrimination

commits an offence of torture.

<sup>30</sup> CAT Convention, art. 1(1).

<sup>31</sup> “Whoever, as a government official, arrests, detains, abducts, or commits any other form of deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, commits an offence of enforced disappearance.” Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E.— (n 29) s 6.

<sup>32</sup> “2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.” CAT Convention, art. 4(2); “1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.” CED Convention, art. 7(1).

<sup>33</sup> UNHRC, “Report of the Working Group on Enforced or Involuntary Disappearances—Addendum—Best Practices on Enforced Disappearances in Domestic Criminal Legislation” (28 December 2010) UN Doc A/HRC/16/48/Add.3, para. 40.

term of imprisonment of 5–15 years and a fine of 100,000–300,000 baht.<sup>34</sup> The proposed term is significantly higher than for other related offences. For instance, Section 310 imposes a term of imprisonment of not more than 3 years or a fine of not more than 60,000 baht for an offence of deprivation of liberty by confinement.<sup>35</sup>

## C. Statute of Limitation

As an option, a State Party to the CED Convention can choose to apply a statute of limitation, provided that the statute of limitation is of long duration and is proportionate to the extreme seriousness of the offence of enforced disappearance.<sup>36</sup> Despite the continuous nature of the offence, the main draft does not contain any reference to a statute of limitation, nor does it have any explicit provision not to apply a statute of limitation. Hence, the main draft employs the normal statute of limitation under the Penal Code and Criminal Procedure Code, which is 15 or 20 years depending on the term of imprisonment.<sup>37</sup> On the other hand, other drafts do not apply any

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<sup>34</sup> “Whoever commits an offence of torture [and enforced disappearance] is punishable by imprisonment of five to fifteen years or a fine of 100,000 to 300,000 Baht.” Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E. — (n 29) ss 28–29.

<sup>35</sup> “Whoever detains or confines another person, or, by any other means, deprives such person of the liberty of person, shall be punished with imprisonment not exceeding three years or a fine not exceeding six thousand Baht, or both.” Penal Code, s 310.

<sup>36</sup> CED Convention, art. 8(1):

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:
  - (a) Is of long duration and is proportionate to the extreme seriousness of this offence;
  - (b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

<sup>37</sup> Penal Code, s 95:

In a criminal case, if the offender is not prosecuted and brought to the Court within the following specified periods of time as from the date of the commission of the offence, the prosecution shall be precluded by prescription:

- (1) Twenty years in case of offences punishable with death, imprisonment for life or imprisonment of twenty years;
- (2) Fifteen years in case of offences punishable with imprisonment of over seven years but not up to twenty years;
- (3) Ten years in case of offences punishable with imprisonment of over one year up to seven years;
- (4) Five years in case of offences punishable with imprisonment of over one month up to one year;
- (5) One year in the case of offences punishable with imprisonment of one month downwards or other punishment.

statute of limitation<sup>38</sup> or set it at 50 years.<sup>39</sup>

## D. Non-Invocation of Exceptional Circumstances as a Justification

Both Conventions prohibit the invocation of exceptional circumstances, such as a state of war, internal political instability, or any other public emergence, to justify acts of torture or enforced disappearance.<sup>40</sup> This prohibition is currently non-existent in both the Constitution and the Penal Code. While the main draft already contains this provision,<sup>41</sup> certain government agencies view this provision to be unnecessary: if an official commits an offence under this draft act, such a commission is already unlawful and cannot be justified by any reason. For the sake of clarity and advance notice to all officials, this provision should be retained in the main draft.

## E. Superior Criminal Responsibility

Only the CED Convention obliges State Parties to impose criminal responsibility on superiors who knew or consciously disregarded information about an offence of enforced disappearance committed by a subordinate under their effective control, and failed to take preventive or repressive measures.<sup>42</sup> The main draft extends the application of superior criminal responsibility to the offence of torture. However, the superior criminal responsibility under the main draft is not fully identical to that under the CED Convention. For instance, only a superior who “knew” of the offence committed by a subordinate under a “direct” chain of command can incur superior

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<sup>38</sup> “Offences under this Act are not subject to any statute of limitation.” Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E.—, proposed by the Committee on Law, Justice, and Human Rights, House of Representatives, s 42.

<sup>39</sup> “The statute of limitation of offences under this Act is fifty years.” Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E.—, proposed by Mr Wan Muhamad Noor Matha and others, s 41.

<sup>40</sup> CAT Convention, art. 2(2).

<sup>41</sup> “Emergency situations, war, internal instability, or any other exceptional circumstances may not be invoked to justify committing an offence under this Act as a lawful action.” Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E.— (n 29) s 11.

<sup>42</sup> CED Convention, art. 6(1)(b).

1. Each State Party shall take the necessary measures to hold criminally responsible at least:
  - . . . (b) A superior who: (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.



criminal responsibility,<sup>43</sup> whereas the CED Convention opts for a larger pool of superiors. Hence, a superior who “consciously disregarded” the information should also incur superior criminal responsibility. Also, the requirement of a “direct” chain of command should be replaced by an effective control test.

## F. Access to Places of Detention

As a legal guarantee to prevent secret detention, the CED Convention obliges State Parties to grant access by competent and legally authorized authorities and institutions to places where a person is deprived of liberty.<sup>44</sup> The main draft only contains a provision to empower the Committee of Torture and Enforced Disappearance (the Committee) to “identify measures to prevent secret detention.” On the other hand, other versions empower the Committee to inspect places of detention without prior notice. Adding the provision allowing site visits would correspond to Thailand’s commitment at the Universal Periodic Review to accede to the Optional Protocol of the CAT Convention (OP-CAT), which requires State Parties to establish a system of regular visits and a National Preventive Mechanism (NPM).<sup>45</sup>

## IV. CONCLUSION

The Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E.— (as of June 2022) still contains certain provisions which remain subject to debate. While the definitional elements prescribed by the Conventions are mostly translated into the main draft, other obligations and legal guarantees remain missing. In addition to the criminalization of torture and enforced disappearance, other existing legal infrastructure should be enhanced to provide a holistic form of protection, such as ensuring effective access to justice for victims and their families—

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<sup>43</sup> Draft Prevention and Suppression of Torture and Enforced Disappearance Act B.E.— (n 29) s 32:

A superior who knew that a subordinate under his or her direct chain of command will commit or has committed an offence under this Act, and failed to take necessary and appropriate measures to prevent or suppress the act, or failed to submit the matter to the competent authorities for investigation and prosecution is criminally liable for half of the punishment for the committed offence.

<sup>44</sup> CED Convention, art. 17(2)(e):

2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:  
 . . . (e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority.

<sup>45</sup> Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OP-CAT), art. 1.

including prompt investigation and free access to courts, with emphasis given to human rights defenders. Effective remedy and redress must also be provided to victims and their families, both nationals and non-nationals. Furthermore, criminal prosecutions or disciplinary measures against officials must be made public to ensure transparency, accountability, and non-impunity. Self-employed amnesty must not be invoked to escape criminal responsibility.

The relevant committee responsible for preparing the final draft carries a heavy expectation. Not only does it prepare Thailand to ratify the CED Convention, but it will also serve as an anchor of protection for all victims and their families, as well as a tool of prevention and suppression so that cases of torture and/or enforced disappearance, such as the notable Somchai Neelapaijit and Polajee “Billy” Rakchongcharoen cases, will not be repeated in the future.

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