



**International
Commission
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29 July 2021

Dear Secretary-General of the Office of the Council of State,

Re: the so-called additional principles to the “Draft Act on the Operation of Not-for-Profit Organizations” proposed by the Anti-Money Laundering Office

We write to you regarding the so-called additional principles to “the Draft Act on the Operation of Not-for-Profit Organizations” (‘Draft Act’) proposed by the Anti-Money Laundering Office (AMLO) on 25 May 2021.

On 29 June 2021, the Thai Cabinet approved the so-called additional principles and directed the holding of a public consultation on them between 1 July and 1 August 2021.¹

Having given them detailed consideration, including in light of Thailand’s binding obligations under international human rights law, the International Commission of Jurists (ICJ) is concerned that, should Thailand eventually enforce these so-called additional principles as currently formulated, the country would employ its purported counter-terrorism financing oversight powers in an overly broad and arbitrary manner against not-for-profit organizations (NPOs), which, in turn, would be inconsistent with Thailand’s obligations under international human rights law and standards.

In this regard, we also write to reiterate a number of recommendations we made in the enclosed letter dated 31 March 2021 regarding the Draft Act on the Operation of Not-for-Profit Organizations. In that letter, we concluded, in particular, that the Draft Act, then under review by the Council of State, did not comply with Thailand’s international human rights law obligations, particularly with respect to the rights to freedom of association, freedom of assembly, freedom of expression, the right to take part in political affairs, the right to privacy and the right to an effective remedy under articles 2, 17, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights (ICCPR), by which Thailand is bound since 29 October 1996.²

¹ Available at: https://lawtest.egov.go.th/listeningDetail?survey_id=326

² ICJ, ‘Thailand: repressive draft law on the operation of not-for-profit organizations must be revised or scrapped’, 31 March 2021, available at: <https://www.icj.org/thailand-repressive-draft-law-on-the-operation-of-not-for-profit-organizations-must-be-revised-or-scrapped/> (‘Enclosed Letter’)

So-called additional principles proposed to the Draft Act

The Thai Cabinet approved the so-called additional principles proposed by AMLO maintaining that they are needed to address “eight issues arising under international standards on Anti-Money Laundering and Combating the Financing of Terrorism and Proliferation of Weapons of Mass Destruction (AML/CFT), which Thailand fails to comply with”. These reportedly include the requirements for the NPOs to register; to maintain information on the purpose and objectives of the organization’s activities, directors or those who are in charge, the beneficiaries of funds, identity of donors, and information supplied by NPOs to foreign organizations; to issue detailed annual statements; to maintain records of all transactions; to be subjected to the investigation on the disbursement of funds; and to effective and proportionate penalties.³

In light of the above, the ICJ considers that these, so-called, additional principles, in the main, reprise problematic provisions already featured in the first draft of the Draft Act currently under review by the Council of State.⁴

International Human Rights Law and AML/CFT standards

For reasons set out in detail in the following paragraphs, the ICJ is of the view that the Thai government has interpreted international standards on AML/CFT in an overly broad and arbitrary manner, in a manner that would harm NPOs in violation of Thailand’s obligations under international human rights law and standards, as well as in a manner that is inconsistent with the AML/CFT standards themselves.

‘Soft law’ cannot undermine ‘hard law’

We wish to emphasize that treaty obligations in the human rights domain, such as those arising under the ICCPR, are binding,⁵ and must be ensured when Thailand seeks to implement any ‘soft law’ standard.

The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has emphasized that “Financial Action Task Force member jurisdictions are bound by their relevant obligations under international law, specifically international human rights and humanitarian law, including during participation in

³ Cabinet, ‘Issue 21 in the meeting minutes of the Cabinet meeting of the Royal Thai Government’, 29 June 2021, available at: <https://www.naewna.com/politic/583940>

⁴ Available at: <https://www.krisdika.go.th/detail-law-draft-under-consideration-by-the-office-of-the-council-of-state?billCode=279>

⁵ Under the principle of *pacta sunt servanda* and general principles governing the law of treaties, Thailand is bound to apply in good faith all international treaties to which it is a party. Furthermore, Thailand may not rely on provisions of its internal law to justify a failure to meet a treaty obligation. See United Nations, ‘Vienna Convention on the Law of Treaties’, 23 May 1969, United Nations, Treaty Series, vol. 1155, at 331, Article 26 and 27, available at: <https://www.refworld.org/docid/3ae6b3a10.html>; UN Human Rights Committee, ‘General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant’, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.3-4, available at: <https://www.refworld.org/docid/478b26ae2.html>.

Task Force standard-setting processes and assessment proceedings, as well as when transposing relevant standards domestically.”⁶

On 28 March 2019, the UN Security Council adopted Resolution 2462 regarding preventing and combating the financing of terrorism. The Resolution provides that all measures taken to counter terrorism must comply with UN member States’ obligations under international law, including international human rights law.⁷

Previously, for example on 8 September 2006, the General Assembly in endorsing the United Nations Global Counter Terrorism Strategy, had reiterated that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”.⁸

This notion is also enshrined in article 21 of the International Convention for the Suppression of the Financing of Terrorism.⁹

Importantly, according to the Interpretive Notes to Financial Action Task Force (FATF) Recommendation 8 on Non-Profit Organisations, “it is also important for such measures [to protect NPOs from potential terrorist financing abuse] to be implemented in a manner which respects countries’ obligations under the Charter of the United Nations and international human rights law”.¹⁰ The FATF’s Best Practices Paper on Combating the Abuse of Non-Profit Organisations stipulates: “as a matter of principle, complying with the FATF Recommendations should not contravene a country’s obligations under the Charter of the United Nations and international human rights law to promote universal respect for, and observance of, fundamental human rights and freedoms, such as freedom of expression, religion or belief, and freedom of peaceful assembly and of association”.¹¹

In light of the above, as highlighted in our letter of 31 March 2021 (enclosed), the Draft Act was not compliant with ‘hard law’ - i.e., articles 2, 17, 19, 21, 22 and 25 of the ICCPR. The application and enforcement of ‘soft law’ counter-terrorism standards, such as AML/CFT standards and the FATF recommendations, cannot be allowed to result in a *de facto*

⁶ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, ‘Promotion and protection of human rights and fundamental freedoms while countering terrorism’, 29 August 2019, UN Doc. A/74/335, 29 August 2019, para 38, available at: <https://undocs.org/A/74/335>

⁷ UN Security Council, ‘Resolution 2462 (2019)’, UN Doc. S/RES/2462 (2019), 28 March 2019, para 6, available at: [https://undocs.org/en/S/RES/2462\(2019\)](https://undocs.org/en/S/RES/2462(2019))

⁸ UN General Assembly, ‘60/288. The United Nations Global Counter-Terrorism Strategy’, UN Doc. A/RES/60/288, 8 September 2006, at 9, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/288&referer=/english/&Lang=E

⁹ Article 21 provides that “Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.”

¹⁰ FATF, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’, at 58, available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> (‘FATF Recommendations’)

¹¹ FATF, ‘Best Practices Paper on Combating the Abuse of Non-Profit Organisations’, June 2015, para 22, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf> (‘FATF Best Practices’)

undermining of binding international law norms, including the above noted articles of the ICCPR.¹²

"One size fits all" is not appropriate

We recall that, according to the FATF Recommendation 8 on NPOs, countries should apply "focused and proportionate measures", "in-line with the risk-based approach" to NPOs to protect them from terrorist financing abuse.¹³ FATF further note that countries should ensure that measures to prevent or mitigate money laundering and terrorist financing be "commensurate with the [terrorism financing] risks identified".¹⁴

The FATF's Best Practices Paper on Combating the Abuse of Non-Profit Organisations points out that, "not all NPOs are high risk," therefore, "it means that a "one size fits all" approach to all NPOs is not appropriate".¹⁵ Recently, the FATF's Statement addressing COVID-19 and measures to combat illicit financing recognised that "FATF Standards do not require that all NPOs be considered high-risk and that most NPOs carry little or no TF risk".¹⁶

Explicit reference to the "risk-based approach" have also been made in recommendations made to Thailand pursuant to its Mutual Evaluation Report on anti-money laundering and counter-terrorist financing measures, released in December 2017.¹⁷

With respect to taking a risk-based approach, FATF requires countries to "identify which subset of organizations fall within the FATF definition of NPO, and use all relevant sources of information, in order to identify the features and types of NPOs which by virtue of their activities or characteristics, are likely to be at risk of terrorist financing abuse", then review the adequacy of measures in order to be able to take proportionate and effective actions to address the risks identified.¹⁸

In light of the above, the fact that the so-called additional principles are to be incorporated into the Draft Act and applied to all NPOs in a uniform manner without assessing and determining risks, in consultation with NPOs, is inconsistent with FATF's recommendation to adopt a risk-based approach.

¹² For example, Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, 'Communication Reference: AL SRB 3/2020', 6 November 2020, at 4-5, available at:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qId=25652>

¹³ FATF Recommendations, at 13 and 58

¹⁴ FATF Best Practices, para 21.

¹⁵ FATF Best Practices, para 7(b) and 22.

¹⁶ FATF, 'Statement by the FATF President: COVID-19 and measures to combat illicit financing', 1 April 2020, available at: <https://www.fatf-gafi.org/publications/fatfgeneral/documents/statement-covid-19.html>

¹⁷ APG, 'Mutual Evaluation Report on anti-money laundering and counter-terrorist financing measures', December 2017, at 149, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/APG-MER-Thailand-2017.pdf> ('Thailand's 2017 Mutual Evaluation Report')

¹⁸ FATF, 'Methodology: for assessing technical compliance with the FATF recommendations and the effectiveness of AML/CFT systems', November 2020, at 39, available at: <https://www.fatf-gafi.org/media/fatf/documents/methodology/fatf%20methodology%2022%20feb%202013.pdf>

In addition, as far back as 2016, it was reported that Thailand had conducted an assessment of the NPO sector risk of terrorist financing abuse, which had recommended that: “the risk-based approach needs to be deepened to go beyond the southern border provinces”.¹⁹ However, to our knowledge, no further NPO sector risk assessment has been carried out. We are also not aware that any NPOs in Thailand, particularly those beyond the southern border provinces, has been meaningfully consulted in any risk assessment process in the past few years.

As noted by the FATF, an advantage of applying measures that are commensurate to the risks identified (rather than applying a “one size fits all” approach) is to avoid “over-regulation of the sector which may place a disproportionate burden on NPOs that have not been identified as being at risk and/or may inadvertently disrupt or discourage legitimate charitable activities”.²⁰

Discouraging NPO’s ability to access resources and activities

Experts, including the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism, have previously noted that a previous version of Recommendation 8 had been used “as a means of reducing civil society space and suppressing political opposition”, and had caused “incalculable damage to civil society”.²¹

Furthermore, the Interpretive Note to Recommendation 8 on NPOs stresses the vital role played by NPOs in “providing essential services, comfort and hope to those in need around the world”, therefore, “focused measures adopted by countries to protect NPOs from terrorist financing abuse should not disrupt or discourage legitimate charitable activities”.²²

Similarly, in its Best Practice Paper, FATF notes that: “it is also important that the measures taken to protect them do not disrupt or discourage legitimate charitable activities, and should not unduly or inadvertently restrict NPO’s ability to access resources, including financial resources, to carry out their legitimate activities”.²³

Conclusion and recommendations

In light of the above, as well as of the concerns we expressed in our letter of 31 March 2021 (enclosed), the ICJ calls for an immediate review of the so-called additional principles to the Draft Act. In particular, the organization recommends that, in imposing effective counter-terrorist financing measures:

1. Countries must respect human rights. “Soft law” counter-terrorism standards cannot be used to undermine binding international law human rights obligations, including

¹⁹ Thailand’s 2017 Mutual Evaluation Report, at 147 and 149. Thailand has conducted NPO sector risk scoping as part of its 2016 National Risk Assessment where they identified which NPOs that fall within the FATF definition along with subsets of those NPOs, which by virtue of their activities or characteristics are likely to be at risk of terrorist financing abuse.

²⁰ FATF Best Practices, para 32(a)

²¹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, ‘Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders’, UN Doc A/HRC/40/52, 1 March 2019, para 6, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/52 (‘A/HRC/40/52’)

²² FATF Recommendations, at 58-59

²³ FATF Best Practices, para 22

those protecting the rights to freedom of association, freedom of peaceful assembly, freedom of expression, the right to take part in political affairs, the right to privacy, and the right to an effective remedy (all enshrined in and guaranteed by the ICCPR, binding on Thailand);

2. All measures must embrace a risk-based approach. Wholesale measures that strictly regulate civil society, regardless of actual activities, evidence of collusion in terrorism financing, or the risk of such collusion, are in violation of the principles of proportionality and necessity²⁴ under the ICCPR, as well as being inconsistent with the FATF recommendations; and
3. Countries should adopt measures that protect NPOs from being exploited by, or actively supporting, terrorist activity or terrorist organisations, as opposed measures that disrupt or discourage NPOs' legitimate activities under international human rights law.

Please do not hesitate to contact us if you have any questions or require further information or advice.

Yours very truly,



Saman Zia-Zarifi
Secretary General
International Commission of Jurists

Enclosure:

ICJ letter regarding the Recommendations concerning the Draft Act on the Operation of Not-for-Profit Organizations B.E..., dated 31 March 2021

CC:

Pol Maj Gen Piyaphan Pingmuang
Secretary-General
Anti-Money Laundering Office

Ruangsak Suwaree
Director-General
Rights and Liberties Protection Department (RLPD), Ministry of Justice

Nadhavathna Krishnamra
Director-General
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²⁴ A/HRC/40/52, para 31.

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31 March 2021

Dear Secretary-General of the Office of the Council of State,

Re: Recommendations concerning the Draft Act on the Operation of Not-for-Profit Organizations B.E.....

We write to you regarding the Draft Act on the Operation of Not-for-Profit Organizations B.E. ... ('Draft Act') proposed by the Office of the Council of State. It is scheduled for public consultation between 12 and 31 March 2021.¹

In the paragraphs below, we would like to express our concerns and call for immediate action to repeal the draft Act or substantially revise its offending provisions because they are non-compliant with Thailand's international legal obligations to respect and protect the right to freedom of association, expression, peaceful assembly, the right to take part in the conduct of public affairs, the right to privacy and the right to an effective remedy. The Draft, if adopted and implemented, would serve to unduly obstruct the essential work of human rights defenders and hinder efforts by Thailand and international stakeholders to engage in international cooperation and assistance on human rights.

We note several problematic provisions, chief among them the following: (1) that the Draft Act aims to provide oversight on "Not-for-Profit Organizations" ('NPOs')². Under the Draft Act, all NPOs would be required to register in order to legally operate and become eligible for promotion and support from the State pursuant to the relevant laws (section 5). (2) It requires NPOs to disclose amounts and sources of funding for their operations, and to use financial assistance from foreign sources to fund only certain activities as permitted by the Minister of Interior (section 6). (3) The draft also empowers certain officials with sweeping powers to enter the premises of all NPOs, search and seize their electronic data, in order to inspect the use of funding and their activities (section 6). Finally, (4) Violators would have their registration revoked (section 9), and those who operate without registration would be liable to criminal punishment with imprisonment (section 10).

Thailand's obligations under international human rights law

1. Rights to freedom of association, expression, peaceful assembly, and the right to take part in the conduct of public affairs

Article 22(1) of the ICCPR, to which Thailand is a State party, provides that "everyone shall have the right to freedom of association with others...". It protects the right of persons acting in associative capacity as members of NPOs to pursue their activities and operate without

¹ The Draft Act is available at: https://www.krisdika.go.th/detail-law-draft-under-consideration-by-the-office-of-the-council-of-state?billCode=279&lawdraftType=between&fbclid=IwAR2TDN4i8UIbFEb8wKW_Rv3uZxVrE3iVsi0EbBhcyLDtZ2952q4zvNex1Zo (in Thai)

² This submission also uses the terms "civil society", "CSO", and "NGO" as appropriate

interference by State authorities, save in narrow circumstances specified in 22(2). Article 21 of the ICCPR similarly protects the right to peaceful assembly,³ which is vital to the work of NPOs that promote the realization of human rights as it enables them to collectively and publicly voice their message.⁴

The UN Declaration on Human Rights Defenders,⁵ adopted by the UN General Assembly with the consensus of Thailand and all other States, makes clear that the rights to freedom of peaceful assembly and of association for civil society are critical in relation to the works of civil society and the realization of all human rights, and that it is the responsibility of States to protect and promote those rights to that end. The UN Human Rights Council (HRC) has repeatedly affirmed this principle.⁶

These rights are also interrelated with other fundamental freedoms, including the rights to freedom of expression guaranteed under article 19 of the ICCPR⁷ and the right to take part in the conduct of public affairs guaranteed under article 25 of ICCPR, which entails “exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.”⁸

While the rights to freedom of association, assembly, expression and to take part in the conduct of public affairs are not absolute, the State may impose limitations on NPOs only in narrow circumstances and subject to strict conditions. For example, under article 22(2) of the ICCPR, any restriction on freedom of association must (a) be prescribed by law, (b) have a legitimate aim limited to protecting either “national security”, “public safety”, “public order”, “public health or morals” or the “rights and freedoms of others”, and (c) be strictly necessary and proportionate to that aim.⁹ These same conditions apply to certain other fundamental freedoms protected under the ICCPR, including freedom of expression and freedom of assembly.

³ UN Human Rights Committee, ‘General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 37 on the right of peaceful assembly (article 21)’, UN Doc CCPR/C/GC/37, 17 September 2020. Pursuant to paragraph 6, protected assembly consists of, among other things, demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs, wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof.

⁴ Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’, UN Doc. A/HRC/23/29, 2013, paras 44-45.

⁵ The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (‘Declaration on Human Rights Defenders’) (UN Doc. A/RES/53/144 (1999)) explicitly recognizes the rights of human rights defenders to peacefully assemble, to form, join and participate in non-governmental organizations, associations or groups and to communicate with non-governmental and intergovernmental organizations (article 5)

⁶ For example, Human Rights Council, ‘Resolution 24/5. The rights to freedom of peaceful assembly and of association’, UN Doc A/HRC/RES/24/5, 8 October 2013, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=dtYoAzPhJ4NMMy4Lu1TOebIM8c1X4GZjGEGHV9SBM9XQqV7F5z%2BPq5GlmI5ITjdvdVU0tGVMSyUViLAYIYQwI2IDE8JUwqK%2F20i0Zmegp1WZS1z2fjpK5mEtIYLwTQXE5>. See also: Human Rights Council, ‘Resolution 22/6. Protecting human rights defenders’, UN Doc A/HRC/RES/22/6, 12 April 2013, available at: <https://www.refworld.org/docid/53bfa8564.html>. (‘HRC Resolution 22/6’)

⁷ See also: UN Human Rights Committee, ‘General Comment 34: Article 19 – Freedoms of opinion and expression’, U.N. Doc. CCPR/C/GC/34, 2011.

⁸ UN Human Rights Committee, ‘General Comment 25: Article 25 (Participation in Public Affairs and the Right to Vote) - The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service’, U.N. Doc. CCPR/C/21/Rev.1/Add.7, 1996, para 8.

⁹ See also Article 17, Declaration on Human Rights Defenders, which says that limitations on rights and freedoms provided in the Declaration will only be limited to “applicable international obligations and ...determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

However, for the reasons set out below, several provisions in the Draft Act do not meet the conditions of legality, legitimate purpose, necessity and proportionality, thus failing to comply with the above-noted obligations under the ICCPR.

A. Legality: overbroad language of the Draft Act (e.g. section 4, 5 and 6)

The UN Human Rights Committee, the supervisory body responsible for clarifying the content of ICCPR obligations, has emphasized that to meet the requirement of legality, the restrictions in the law would need to be expressed with a degree of precision that would enable an individual or an organization to regulate their conduct accordingly. The UN Human Rights Committee affirmed in respect of restrictions on freedom of expression that a law limiting a right must not confer on those who implement it “unfettered discretion” to restrict the right.¹⁰ This principle is reinforced by the UN Special Rapporteur on human rights defenders who says that laws regulating public safety and public order should contain “clearly defined provisions”.¹¹

In disregard of this principle, the Draft Act contains imprecise and overbroad language, which leaves it open to abusive and arbitrary application by the authorities in violation of Thailand’s obligations under the ICCPR. For example, it broadly defines the term NPOs in **section 4** to include “a group of individuals that is not established by any specific law, but conduct activities that do not have the purpose of seeking income or profits to be shared”.¹² Such definition may place any individuals or groups of people who conduct activities on matters of public policy and human rights under registration requirements, and thus open to criminal prosecution, in contravention of international human rights law and the “legality” principle.

Another section with imprecise and overbroad language is **section 5**, which requires any NPO, in order to organize activities in Thailand, to “register itself under the criteria, methods and conditions prescribed by the Minister”. It leaves open to arbitrary application by the authorities to come up with registration criteria that may not comply with international standards. In addition, mandatory registration requirement constitutes an impermissible restriction on the freedom of association under Article 22 of the ICCPR. In this respect, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has on numerous occasions emphasized that “the right to freedom of association applies to informal associations and does not require that a group be registered”.¹³

Section 6 paragraph 2 of the Draft Act regulates the activities of those who receive money or properties from foreign sources, requiring them to use it only to fund “certain activities in the Kingdom as permitted by the Minister”. The list identifying what these activities are to be published by the Minister of Interior. The law confers upon the Minister of Interior unfettered discretionary power to determine the prohibited activities as the Minister sees fit on account of the origin of funding, which, again, do not appear to comply with the “legality” principle, as require by the ICCPR.

Moreover, with regard to the access to resources and funding by NPOs, the UN Human Rights Committee, while evaluating laws on funding NPOs, has affirmed that access to funding is a

¹⁰ UN Human Rights Committee, ‘General Comment 34: Article 19 – Freedoms of opinion and expression’, U.N. Doc. CCPR/C/GC/34, 2011, para 25.

¹¹ Margaret Sekaggya, Special Rapporteur on the situation of human rights defenders, ‘Report of the Special Rapporteur on the situation of human rights defenders’, UN Doc. A/67/292, 2012, para 86

¹² Section 4, Draft Act

¹³ Note by Secretary-General, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’, A/74/349, 11 September 2019, para 49, available at: <https://undocs.org/A/74/349>.

part of the right to freedom of association.¹⁴ The UN Human Rights Council, in its Resolution 22/6 on Protecting Human Rights Defenders, has made clear that “no law should criminalize or delegitimize activities in defense of human rights on account of the origin of funding”.¹⁵ The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the UN Special Rapporteur on the situation of human rights defenders have stated that NGOs should have access to foreign funds to the “same extent” as the Government.¹⁶ The UN Special Rapporteur on the rights to freedom of assembly and of association has highlighted that access to resources is important for NGOs not only for the very existence of associations, but also to guarantee the enjoyment of other human rights of those who benefit from the work of the organizations. In this connection, undue restrictions on funding necessarily will adversely affect the full range of civil, cultural, economic, political and social rights the State is bound to protect.¹⁷

B. Legitimate Aim: discriminatory and overboard restriction against organizations that receive foreign funding (Rationales and the Preamble of the Draft Act)

ICCPR provides that the freedom of association, expression, and assembly, which includes access to funding can, where necessary, be restricted based on “national security”, “public safety”, “public order”, “public health or morals”, and “protection of the rights and freedom of others”.

The Draft Act states that the **rationale** for enacting the law is, *inter alia*, because: “several [NPOs] accepted money or properties from natural persons, juristic persons or group of individuals who are not Thai nationals or have not registered in the Kingdom of Thailand, and used them to fund activities that may affect the relationship between the Kingdom of Thailand and its neighboring countries, or public order within the Kingdom”. In **the preamble**, it further states that it is necessary to promulgate this Draft Act to ensure that NPOs operate with “propriety, openness, transparency, genuine serving the nation and its populations, without any hidden and fraudulent agenda in order to uphold public interest, public order and good morals of people”.¹⁸

Subject to the above, there is a clear tendency to discriminate against and stigmatize organizations that receive foreign funding. The Draft Act does invoke the terms “public interest”, “public order”, “good morals of people” and “the relationship between the Kingdom of Thailand and its neighboring countries” as bases to limit the exercise of human rights. However, “public interest” and “the relationship between the Kingdom of Thailand and its neighboring countries” are not enumerated grounds for restrictions in the ICCPR. “Public order” and “good morals of people” (public morals) are recognized as legitimate aims under the ICCPR but, where these terms and several restrictions are not defined, categories of persons and organizations who will be subject to restriction under this draft law can be overbroad. In addition, the restrictions set

¹⁴ See UN Human Rights Committee, ‘Concluding Observations of the Human Rights Committee: Egypt’, U.N. Doc. CCPR/CO/76/EGY, 2002, para 21; and UN Human Rights Committee, ‘Concluding Observations of the Human Rights Committee: Ethiopia’, U.N. Doc. CCPR/C/ETH/CO/1, 2011, para. 25. In addition, the Declaration on Human Rights Defenders provides in Article 13 of the Declaration that everyone has the right “individually and in association with others” to “solicit, receive and utilize resources” for protecting human rights. Notably, it makes no distinction between funding from domestic and foreign sources.

¹⁵ HRC Resolution 22/6, para 9(b)

¹⁶ Margaret Sekaggya, Special Rapporteur on the situation of human rights defenders, ‘Report of the Special Rapporteur on the situation of human rights defenders’, UN Doc. A/67/292, 2012, para 49; and Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’, UN Doc. A/HRC/20.27, 2012, para 69.

¹⁷ Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’, UN Doc. A/HRC/23/29, 2013, para 9.

¹⁸ Paragraph 3, the Preamble

out in the draft law, including sections 5, 6, 8, 9 and 10, are not connected to achieve any of the noted legitimate aims of the law.

The Human Rights Committee has set out the meaning of public order and public morals as a basis for restrictions in terms of the ICCPR, most recently in its General Comment 37 on the Right to Peaceful Assembly. The Committee stressed that “public order” refers to the sum of the rules that ensure the proper functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly. States parties should not rely on a vague definition of “public order” to justify overbroad restrictions on the right of peaceful assembly. Peaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration. “Public order” and “law and order” are not synonyms, and the prohibition of “public disorder” in domestic law should not be used unduly to restrict peaceful assemblies”.¹⁹

In addition, “restrictions should only exceptionally be imposed for the protection of “morals”. If used at all, this ground should not be used to protect understandings of morality deriving exclusively from a single social, philosophical or religious tradition, and any such restrictions must be understood in the light of the universality of human rights, pluralism and the principle of non-discrimination.”²⁰

The rationale for the new law does not meet these conditions. It also fails to recognize the legitimate work carried out by associations and their contribution to national development, merely because they are funded by foreign sources.²¹ The purposes of restrictions in the Draft Act, therefore, do not appear to constitute a “legitimate aim”, as required by the ICCPR.

C. Necessity and proportionality: sanction for non-compliance (section 9 and 10)

Even if the restrictions were properly directed toward a legitimate purpose, they could not be deemed to be necessary and proportionate to that purpose. The restrictions need to be necessary and proportionate, that is, the State is required to apply the least intrusive means to achieve the legitimate aims.²²

Under **section 9** of the Draft Act, the Director General of the Department of Provincial Administration, acting as the registrar, can revoke registration of NPOs which, for example, fail to disclose “audited accounts”, “amount of financial support for their operations” and “fund sources”, or use their financial assistance from international sources to fund activities that were not permitted by the Minister of Interior.²³ Revocation of registration would essentially block the ongoing activity of any NPO, an arbitrary and drastic punishment that cannot be necessary or proportionate even to the already overbroad purposes of the Draft Act as stated above.

Section 10 of the Draft Act would impose criminal punishment on those who operate without registration with imprisonment not exceeding five years or fined not exceeding 100,000 THB (approx. 3,200 USD), or both,²⁴ in violation of the right to freedom of association of individuals involved in unregistered associations. The provision imposes disproportionately harsh sanction

¹⁹ UN Human Rights Committee, ‘General Comment No. 37: the right of peaceful assembly (article 21)’, UN Doc CCPR/C/GC/37, 2020, para. 44

²⁰ Ibid, para 46.

²¹ Note by the Secretariat, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’, UN Doc A/HRC/38/34, 26 July 2018, para 34, available at: <https://undocs.org/A/HRC/38/34>

²² UN Human Rights Committee, ‘General Comment No. 27: Article 12 (Freedom of Movement)’, UN Doc CCPR/C/21/Rev.1/Add.9, 1999, para. 14; See also: Arslan v. Turkey, App. No. 23462/94, Eur. Ct. H.R., 1999, para. 46

²³ Section 9, Draft Act

²⁴ Section 10, Draft Act

by applying criminal sanction to NPOs. This is in contrast with the recommendations made by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, which states that "individuals involved in unregistered associations should be free to carry out any activity and should not be subject to criminal sanctions", and "some laws even provide for heavy fines or criminal prosecution for failure to register [which] will only cause individuals to fall into deeper poverty and exclusion".²⁵

2. Right to Privacy

Article 17 of ICCPR provides for the right of all individuals to be protected against "arbitrary or unlawful interference with his privacy, family, home or correspondence". The UN Human Rights Committee, in its General Comment No. 16, observed that the term "home" as used in article 17 is to be understood to include the place where a person "carries out his usual occupation".²⁶ The Committee further states that searches of such places should be restricted to "a search for necessary evidence and should not be allowed to amount to harassment."²⁷

The UN Human Rights Committee has also affirmed that the principles of legality, legitimacy, necessity and proportionality apply to the right to privacy in the same manner as they do to freedom of association and other fundamental freedoms.²⁸

Nevertheless, **Section 6 paragraph 3** of the Draft Act confers on the Ministry of Interior's Department of Provincial Administration the authority to "enter the office of any NPOs to inspect the use of money or properties, or the implementation of activities [carried out by NPOs who receive funding from foreign sources]", and to "investigate and obtain and make a copy of electronic communications traffic made by the NPOs for further investigation". Such provision provides sweeping powers to government authorities to monitor activities, search and seize electronic data. From its plain language, the above provision allows the authorities to access information in the NPOs' electronic devices without any court warrant. Instead of requiring authorities to show specific threats for any legitimate ground, the Draft Act uses vague and overbroad language and allows for the removal of independent oversight. Such authority in the Draft Act is potentially egregious violations of the rights to privacy by State authorities under the law.

3. Right to an effective remedy

Under article 2(3) of the ICCPR, all persons have a right to an effective remedy for any violation of their Covenant rights.

Since the Draft Act does not specifically refer to any grievance system for redress or any appellate authority, in our opinion, the Administrative Procedure Act B.E. 2539 shall be applicable thus allowing NPOs to submit appeal requests to have the revocation decisions internally reviewed within the Ministry of Interior. If NPOs still find the appellate result unsatisfactory, they could then approach the Administrative Court to ask for the Government's decision to be struck down. However, section 9 also states that "any pending appeal to the

²⁵ Note by Secretary-General, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/74/349, 11 September 2019, para 49, available at: <https://undocs.org/A/74/349>.

²⁶ UN Human Rights Committee, 'General comment No. 16: Article 17 (Right to privacy)', 1988, para 5, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6624&Lang=en.

²⁷ Ibid, para 8

²⁸ OHCHR, 'The right to privacy in the digital age', UN Doc A/HRC/27/37, 30 June 2014, para 22, available at: https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session27/documents/a-hrc-27-37_en.doc; UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add. 13, 29 March 2004, para 6, available at: <https://undocs.org/CCPR/C/21/Rev.1/Add.13>

revocation of registration shall have no mitigation on the revocation". Such proceedings can take years to come to a conclusion, depriving members of NPOs their right to freedom of association and subject them to lengthy and stressful judicial and administrative proceedings for merely exercising their rights is a violation of their right to an effective remedy.

Conclusion

The Draft Act is not compliant with Thailand's international legal obligations, particularly those protecting the rights to freedom of association, freedom of assembly, freedom of expression, the right to take part in political affairs, the right to privacy, and the right to an effective remedy. It imposes undue restrictions and burdens on the legitimate activities of human rights defenders and activists while placing them at great risk. We would like to underscore that registration of NPOs should be on a voluntary basis and aim at supporting the work of human rights defenders. No law should criminalize or delegitimize activities in defense of human rights on account of the origin of funding.

Due to this, the ICJ calls for an immediate review of the Draft Act with a view to ensuring that it complies with Thailand's international human rights obligations. In our view, the review should result at repealing the Draft Act in its entirety or substantially amending at least five provisions of the Draft Act, i.e. sections 4, 5, 6, 9, 10, as a matter of priority.

Please do not hesitate to contact us if you have any questions or require further information or advice.

Yours sincerely,



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