

**Office of the United Nations High Commissioner for Human Rights  
Regional Office for South-East Asia**

**Technical Note on the National Human Rights Commission of Thailand  
in the draft 2015 constitution**

This Technical Note contributes to the on-going constitution drafting process in Thailand, specifically with regard to the sections related to the National Human Rights Commission of Thailand (NHRCT). The latest draft constitution proposes to merge the NHRCT with the Office of the Ombudsman. In response, the Technical Note first summarizes the significance of the work of National Human Rights Institutions (NHRIs), as recognized at the international level. The Note then argues against the proposed merger and urges for compliance of the selection process of the commissioners with the Paris Principles. The Note concludes with recommendations to the Constitution Drafting Committee, the National Reform Council, the Cabinet and the National Council for Peace and Order.

**I. Roles and Significance of National Human Rights Institutions**

NHRIs, are independent institutions entrenched in the Constitution and/or established by law to promote and protect all human rights at national level.

In 1993, the UN General Assembly adopted a set of principles relating to the status of NHRIs (known as the Paris Principles). The Paris Principles serve as the minimum standard that NHRIs are required to meet. There are six key criteria: (1) clearly defined and broad mandates for the promotion and protection of human rights, (2) autonomy from the government, (3) independence guaranteed by legislation or the constitution, (4) pluralism (including membership that includes representatives from civil society), (5) adequate resources and (6) powers of investigation (this is not a requirement and is optional).<sup>1</sup> In the same year, at the World Conference on Human Rights in Vienna, NHRIs that comply with the Paris Principles were recognized as key actors in the promotion and protection of human rights and the Conference called for the establishment and enhancement of such NHRIs.

The International Coordinating Committee on National Institutions for the Promotion and Protection of Human Rights (ICC) was also established in 1993.<sup>2</sup> The mandate of the ICC includes bringing the legal framework and operation of NHRIs in line with the Paris Principles, encouraging cooperation between NHRIs and the international human rights system and promoting information sharing among NHRIs. The ICC Sub-committee on accreditation reviews NHRIs' founding laws and legislative background as well as their operation in practice to assess their compliance with the Paris Principles with a view to accrediting them at the international level with the following categories:

“A” status: NHRIs that comply with the Paris Principles. They are ICC members. They are also able to participate in, take the floor and submit documentation to the UN Human Rights Council, including during the UPR.

“B” status: NHRIs that partially comply with the Paris Principles. They are ICC observers. They do not get access to, take the floor at or submit documentation to the UN Human Rights Council.

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<sup>1</sup> Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.

<sup>2</sup> The ICC is an international association of national human rights institutions (NHRIs). It holds its meetings in Geneva.

although they are allowed, as anyone is, to submit stakeholders' reports for Universal Periodic Review.

“C”: is no status . These are institutions that have been reviewed and have been assessed as not in compliance with the Paris Principles.

The National Human Rights Commission of Thailand was first accredited “A” status in 2004. However, the ICC has been raising a number of concerns about the NHRCT’s structure and functions, including the selection process since it was modified under the 2007 Constitution. Since such concerns remained unaddressed, the ICC recommended in October 2014 that the NHRCT be downgraded to “B” status after a one-year grace period during which the NHRCT can submit supporting documents to show that concerns raised by the ICC have been addressed.

## **II. Merger of the NHRCT and the Ombudsman risks weakening the NHRI in Thailand**

In January 2015, as part of the on-going drafting process of a new constitution of Thailand, the Constitution Drafting Committee proposed to merge the NHRCT with the Office of the Ombudsman. The draft provided to OHCHR by the Constitution Drafting Committee provides that the “Human Rights Ombudsmen” will consist of 11 individuals who have “apparent integrity and knowledge and experience in the protection of rights and liberties of the people, the administration of State’s affairs or activities of common interests of the public”. Given the challenges faced by the current NHRCT and the differences in mandates and functions of an NHRI and an Ombudsman Office, the proposed merger raises concerns that it will result in further weakening of the NHRI in Thailand.

### Challenges faced by the current NHRCT

The current NHRCT has been criticized for not effectively discharging its functions. In the November 2008 report, the ICC raised concerns that the NHRCT’s recommendations to the relevant authorities had not been implemented and that such Commissions need to follow-up on recommendations in their reports and publicize how the government is implementing its recommendations.<sup>3</sup> More recently, the ICC has strongly criticized the NHRCT for not addressing human rights violations in a timely manner. Clarifying the appropriate role of such bodies, the ICC questioned the NHRCT’s delays in investigating and issuing reports on the political violence in 2010 and 2013 and stressed that “[i]n fulfilling its protection mandate, a National Institution must not only monitor, investigate and report on the human rights situation in the country, it should also undertake rigorous and systematic follow up activities to promote and advocate for ... the protection of those whose rights were found to have been violated.”<sup>4</sup> While acknowledging the difficult environment in which the NHRCT operates, the ICC raised strong concerns that the NHRCT was yet to issue a report on the political violence in 2013.<sup>5</sup>

The ICC has also noted shortcomings in the structure of the current NHRCT that might have led to its operative ineffectiveness. For example, the ICC noted that the NHRCT Secretariat’s permanent staff members are seconded from various ministries.<sup>6</sup> Currently, the most senior staff of the NHRCT

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<sup>3</sup> Referring to ICC General Observations 1.6 “Recommendations by National Human Rights Institutions.”

<sup>4</sup> Referring to the Paris Principles section A(3) and ICC General Observations 1.6 “Recommendations by National Human Rights Institutions.”

<sup>5</sup> ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, Geneva, 27-31 October 2014, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCA-Reports.aspx> (hereinafter “ICC October 2014 report”).

<sup>6</sup> ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, Geneva, 18-22 November 2013, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCA-Reports.aspx> (hereinafter “ICC November 2013 report”).

Secretariat can be filled only by civil servants, closing its doors to external candidates. This provision clearly contravenes the ICC's General Observation that "[w]here a National Institution's staff members are seconded from the public service, and in particular where this includes those at the highest level in the National Institution, it brings into question the capacity of the National Institution to function independently."<sup>7</sup> The ICC further stressed that the recruitment of staff through an open, transparent and merit-based selection process is critical for the effectiveness of the NHRCT.<sup>8</sup> Similarly, the ICC noted that the NHRCT did not have a regional or local office outside of Bangkok, and recommended a permanent presence in the regions of Thailand to enhance its accessibility.<sup>9</sup> Establishing presences in the regions is encouraged under the Paris Principles.<sup>10</sup> The ICC notes that ensuring accessibility to the NHRCT is important for vulnerable sections of society, who are often in geographically remote areas.<sup>11</sup> It is also critical that these regional presences receive adequate funding to function effectively.<sup>12</sup>

#### Different mandates, legal basis and working methods between the NHRCT and the Ombudsman

Given the challenges already faced by the NHRCT, there are concerns that the merging of the NHRCT and the Ombudsman's Office to form the "Human Rights Ombudsman" could further weaken the effectiveness of the NHRI since the functions and working methodologies of the two institutions are different. Under the 2007 Constitution, the office of the Ombudsman and the NHRCT had different functions and different legal bases for their operations. The primary task of the Ombudsman is to investigate performances of or omissions to perform duties according to law by government officials and agencies.<sup>13</sup> The 2007 Constitution also provides that the primary task of the NHRCT is "to examine and report the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties to which Thailand is a party, and propose appropriate remedial measures to persons or agencies committing or omitting such acts for taking action."<sup>14</sup>

While the constitution and relevant administrative laws are the only bases of the Ombudsman's work, the foundational guidelines for the NHRCT's work are derived from additional frameworks beyond the constitution, including international human rights standards and other international declarations and principles. The Paris Principles provide that an NHRI should have as broad a mandate as possible, including promoting and ensuring the harmonization of national practice with international human rights instruments.<sup>15</sup> Similarly, while the Ombudsman focuses on the conduct of government officials, the NHRCT's mandate is and should be broader. The ICC specifically provides that an NHRI's mandate should "extent to the acts and omissions of both the public and private sectors."

The NHRCT and the Ombudsman also have different working methods. Notably, under the 2007 Constitution, the office of the Ombudsman is required to investigate "complaints"<sup>16</sup>. Contrarily, the NHRCT must "examine and report the commission or omission of acts which violate human rights..." without any explicit requirement of a complaint to be filed, indicating its power to take *sua motu* action. In this regard, the NHRCT also possesses the power "to demand relevant documents or evidence from any person or summon any person to give statements of fact" under the 2007 Constitution.<sup>17</sup> This power which had not been given to the Ombudsman under the 2007 Constitution is notably absent in relation to

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<sup>7</sup> ICC General Observations 2.5 "Staffing of the National Human Rights Institution by secondment."

<sup>8</sup> ICC November 2013 report.

<sup>9</sup> Ibid.

<sup>10</sup> Paris Principles, section C(e).

<sup>11</sup> ICC November 2013 report.

<sup>12</sup> Ibid.

<sup>13</sup> The Constitution of the Kingdom of Thailand (2007), section 245.

<sup>14</sup> Ibid. at section 257.

<sup>15</sup> Paris Principles sections A2 and A3(b); see also ICC General Observations 1.2 "Human rights mandates."

<sup>16</sup> The Constitution of the Kingdom of Thailand (2007), section 244(1)

<sup>17</sup> Ibid. at section 257.

the proposed “Human Rights Ombudsman.” The Paris Principles require NHRIs to “maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights.”<sup>18</sup> The Principles also recognize the roles of non-governmental organizations and encourages developing relations with them.<sup>19</sup>

#### Concerns with the current draft constitution to merge the NHRCT and the Ombudsman

While section [2/5/4]2 of the current draft constitution contains tasks of both the two institutions summarized above, it does not clarify how the “Human Rights Ombudsmen” will discharge these primary tasks fairly. It provides that “[t]he Human Rights Ombudsmen shall allocate the duties and responsibilities...among themselves clearly and distinctively,” but it does not provide how they are to do so, especially given the very different legal bases and working methods of NHRIs and the classical Ombudsman. The absence of the power to subpoena also raises concerns in that it would further limit the body’s capacity to conduct effective fact-finding. In short, given the challenges that the NHRCT currently faces and its structural issues on one hand and substantive differences between the mandates and working methods of the NHRCT and the office of the Ombudsman on the other hand, merging both bodies risks exacerbating already existing problems and further dilute the functions of the NHRCT.

At the global level, the ICC has accredited 106 NHRIs over recent decades. Among them, the model of an independent commission, like the NHRCT, is the most common. In the ASEAN sub-region, the formula of having the NHRI and the office of the Ombudsman as two separate bodies is common. For example, Indonesia has the National Commission on Human Rights and the Ombudsman of the Republic of Indonesia. The Philippines retains the Commission on Human Rights and the Office of Ombudsman. Malaysia notably has an accredited NHRI but no Ombudsman. All three NHRIs in Indonesia, Malaysia and the Philippines have maintained “A” status under ICC accreditation. In the broader Asia-Pacific region, out of 22 NHRIs accredited by the ICC, only two NHRIs function as Ombudsmen offices, namely the Provedor for Human Rights and Justice of Timor Leste and the Ombudsman of Samoa. In both countries, merged institutions were not desired, but considered necessary for practical reasons, including limited budgets, limited number of qualified personnel and consideration of the very small geographical and population size of both countries. Given that Thailand is a middle-sized and middle-income country with a large population and complex human rights challenges, the merged model would be inappropriate.

### **III. The selection process has to be inclusive, involving civil society and relevant stakeholders**

#### Key requirements for the selection process under the Paris Principles

The selection process of the commissioners is considered one of the most critical elements in determining the effectiveness of an NHRI’s functions. The Paris Principles require “a clear, transparent, merit-based and participatory selection and appointment process”, because such a process is critical to ensure an NHRI’s independence, effectiveness and public legitimacy.<sup>20</sup> The Principles require an NHRI’s composition to be established according to a procedure that ensures a pluralist representation of civil society involved in the promotion and protection of human rights.<sup>21</sup> Individuals, such as representatives of non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, and professional associations of lawyers, doctors and journalists should be included.<sup>22</sup>

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<sup>18</sup> Paris Principles, section C(f).

<sup>19</sup> Ibid. at section C(g).

<sup>20</sup> ICC General Observations 1.8 “Selection and appointment of the decision-making body of National Human Rights Institutions.”

<sup>21</sup> Paris Principles, section B(1).

<sup>22</sup> Ibid. at section B(1)(a).

The selection process should promote merit-based selection, while ensuring pluralism. Key requirements for such a process are:

1. Broad publication and advertisement of vacancies,
2. Maximization of the number of candidates from a wide range of societal groups,
3. Broad consultation and/or participation during the application, screening, selection and appointment process,
4. Assessment of applications on the basis of pre-determined, objective and publicly available criteria, and
5. Selection of members serving in their own individual capacity rather than representing an organization.<sup>23</sup>

Open and fair consultation by the selection body with NGOs and civil society and consideration of their expertise and experiences are critical for public legitimacy of an NHRI.<sup>24</sup> Similarly, broad consultation and inclusive participation in the application, screening, selection and appointment process promote transparency, pluralism and public confidence in the selection process itself, the commissioners chosen and, ultimately, the functioning of the NHRI.

#### Thailand's NHRCT selection process under 1997 and 2007 constitutions

The 1997 Constitution established the NHRCT as a body with a president and 10 members. It provided that selection of the members of the NHRC, along with matters concerning their qualifications, prohibitions, removal and determination of remunerations, are to be decided by law.<sup>25</sup> Accordingly, the National Human Rights Commission Act adopted in 1999 established the selection process. Under the 1999 Act, a Selective Committee consisted of:

- The President of the Supreme Court,
- The President of the Supreme Administrative Court,
- The Prosecutor-General,
- The Chairman of the Law Council,
- Five (5) rectors or representatives of high education institutions ,
- Ten (10) representatives from civil society,
- Five (5) representatives from political parties, and
- Three (3) representatives from the media.<sup>26</sup>

The Selective Committee was to nominate 22 candidates for the NHRC membership with votes from no less than three-quarters of the Committee members.<sup>27</sup> From the 22 nominees, the Senate was to vote to select 11 NHRC members by secret ballots.<sup>28</sup>

The 2007 Constitution changed the selection process to reflect the same process in place to appoint the Constitutional Court and changes determination of the Selection Committee to be the same as the Ombudsman (Section 256).<sup>29</sup> Thus, the Selection Committee comprises of

- The President of the Supreme Court of Justice,
- The President of the Constitutional Court,

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<sup>23</sup> ICC General Observations 1.8 "Selection and appointment of the decision-making body of National Human Rights Institutions."

<sup>24</sup> Ibid.

<sup>25</sup> The Constitution of the Kingdom of Thailand (1997), section 199.

<sup>26</sup> National Human Rights Commission Act (1999), section 8(1).

<sup>27</sup> Ibid.

<sup>28</sup> Ibid. at section 8(2).

<sup>29</sup> The Constitution of the Kingdom of Thailand (2007), section 256.

- The President of the Supreme Administrative Court,
- The President of the House of Representatives,
- Leader of the Opposition in the House of Representatives,
- One person (1) elected by the General Assembly of the Supreme Court of Justice, and
- One person (1) elected by the General Assembly of judges of the Supreme Administrative Court.

The Selection Committee nominates candidates with more than two thirds of votes prior to Senate approval.<sup>30</sup>

As seen above, the Selection Committee under the 1999 National Human Rights Commission Act was much more diverse with most members coming from the non-governmental sector. The requirement of no less than three-quarters of votes (at least 21 out of 27) to nominate 22 candidates meant that civil society members had a critical voice, as the votes of non-civil society members (17 out of 27) alone could not reach this number. The process resulted in the selection of individuals with diverse and vast expertise in civil, cultural, economic, political and social rights to serve as commissioners. Despite the challenge of a slow selection process due to a large number of nominees, the selection process of NHRCT commissioners under the 1999 National Human Rights Commission Act was regarded as the most effective selective mechanism in the South-East Asian region at the time. The first panel of commissioners who served from 2001 to 2007 was considered domestically and internationally as a reasonably effective body.<sup>31</sup>

#### ICC comments on the NHRCT selection process under the 2007 Constitution

Since the selection process was changed under the 2007 Constitution, the ICC has been raising concerns regarding the new selection procedure of the NHRCT Commission. In 2008, soon after the change, the ICC stressed the need for broad consultation with civil society and vulnerable groups during the nomination and selection of Commissioners.<sup>32</sup> Five years later, in 2013, while stressing that the recommendations in its 2008 report had not been addressed, the ICC noted that the selection process exclusively involved officials only from a small number of public institutions with no representation of broader stakeholders and civil society. The ICC further noted that no discretion was allowed in facilitating broader representation and diversity in the Selection Committee. In 2013, the ICC deferred consideration of the re-accreditation of the NHRCT until 2014.<sup>33</sup> In October 2014, the ICC recommended that the NHRCT be downgraded to “B” status. Its primary concern was once again the selection process, especially with respect to the composition of the selection committee. The ICC summarized its concerns as the following:

- The selection committee consisted of officials from a very small number of public institutions without clear representation or any requirement to consult with key stakeholder groups or civil society.
- Absence of provision for broad consultation and/or participation during the application, screening and selection process.
- Absence of clear and detailed criteria to assess the merit of eligible applicants.
- Absence of requirement to advertise vacancies of the NHRCT.<sup>34</sup>

<sup>30</sup> The Constitution of the Kingdom of Thailand (2007), section 206.

<sup>31</sup> See United Nations Development Programme, *Human Security Today and Tomorrow: Thailand Human Development Report 2009* (2010), available at <http://www.undp.org/content/dam/thailand/docs/NHDR2010.pdf>, at 53; Andrew Harding, “Thailand’s Reforms: Human Rights and the National Commission”, *Journal of Comparative Law*, Issue I (2007), 88-99, at 98.

<sup>32</sup> ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, Geneva, 3-6 November 2008, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCA-Reports.aspx> (hereinafter “ICC November 2008 report”).

<sup>33</sup> ICC November 2013 report.

<sup>34</sup> ICC October 2014 report.

#### The selection process under the current draft constitution

Under Section (3/2/5-1) 3 of the current draft constitution, the “Human Rights Ombudsmen” are to be selected through the same process as all independent agencies under the draft constitution. Under this provision, the Selection Committee is to consist of:

- Four (4) persons appointed by meetings of Supreme Court and Supreme Administrative Court,
- Three (3) persons appointed from political parties,
- One (1) person appointed by the cabinet,
- Two (2) persons appointed by meetings of university rectors, and
- Two (2) persons appointed from the National Ethics Assembly.

As compared to the 2007 Constitution, the selection process under the current draft has been expanded to include representatives from the university rectors. However, the concern raised by the ICC regarding a diverse composition of members is still not adequately addressed. Besides university rectors, there is no representative from civil society or other key stakeholder groups, such as lawyers’ associations or human rights organizations. Although the current draft constitution provides that due regard should be given to “representation from private organizations”, it does not provide how this should be ensured or which kinds of “private organizations” are to be considered. As the selection process is to be the same as other independent agencies, it is not clear how the broad consultation and participation in the selection process which is considered critical for an NHRI’s effectiveness and legitimacy will be ensured. The generic selection process also does not provide clear criteria to assess candidates based on their qualifications for the mandates of an NHRI, primarily to investigate allegations of human rights violations. It also does not include a requirement that vacancies be broadly publicized.

To ensure that the NHRI will be independent, effective and legitimate, the Constitutional Drafting Committee should address shortcomings of the current NHRCT highlighted by the ICC and in recommendations from other international human rights mechanisms. In 2011, during its first Universal Periodic Review under the United Nations Human Rights Council, Thailand accepted the recommendations to strengthen its national human rights institution.<sup>35</sup> Thailand’s second Universal Periodic Review is scheduled in next April/May 2016, and it is most likely that effectiveness of the NHRI will likely be questioned once again. Similarly, in June 2014, the UN Committee against Torture highlighted that Thailand should ensure that the NHRCT effectively executes its mandate in accordance with the Paris Principles. The Committee further recommends that Thailand consider reviving previous procedures for selecting commissioners to the NHRCT that allow for the participation of representatives from non-governmental human rights organizations.<sup>36</sup>

#### **IV. Recommendations to the Constitution Drafting Committee, the National Reform Council, the Cabinet and the National Council for Peace and Order**

OHCHR would like to make the following recommendations:

Reconsider the proposal to merge the National Human Rights Commission of Thailand (NHRCT) with the office of the Ombudsman;

Should it decide to retain the separate NHRCT, ensure that the NHRCT is strengthened, by implementing the recommendations by the ICC, including:

- Autonomous functioning with respect to human resource allocation and financial matters.

<sup>35</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Thailand (A/HRC/19/8)*(2011).

<sup>36</sup> Committee against Torture, *Concluding observations on the initial report of Thailand (CAT/C/THA/CO/1)*(2014).

Should it decide to merge the NHRCT and the Ombudsman, ensure that the new body is an effective NHRI compliant with the Paris Principles, including:

- Clear provisions detailing how the new body will discharge different mandates that require different working methodologies.
- Retention of all powers of the NHRCT under the 2007 Constitution and 1999 NHRCT Act, specifically “the power to demand relevant documents or evidence from any person or summon any person to give statements of fact”.

Regardless of the decision pertaining to the merger, establish a separate selection process that complies with the Paris Principles for independent NHRIs, including:

- Ensuring pluralist representations of civil society and other key stakeholder groups in the selection committee.
- Requiring that the selection committee engage in broad consultation and participation from the non-government sector during the application, screening and selection process.
- Providing clear and detailed criteria to assess the merits of eligible applicants to effectively discharge the mandates, taking into account the applicants’ credible experiences in the promotion and protection of human rights.
- Ensuring that NHRCT Commissioners represent social, ethnic, religious, gender and geographical diversities in Thailand.

In considering these recommendations and before finalizing the draft constitution, OHCHR encourages the Government to hold broad consultations with members of civil society, non-governmental and human rights organizations and individuals and/or communities who have benefited from the work of the NHRCT to solicit comments and recommendations on how the NHRCT could be strengthened.