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**MORE POWER, LESS ACCOUNTABILITY:
THAILAND'S NEW EMERGENCY DECREE**

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SUMMARY

On 15 July 2005 the Prime Minister of Thailand enacted the Emergency Decree on Government Administration in States of Emergencies (the Emergency Decree) and on 19 July declared a state of emergency in three southern provinces.¹ The Prime Minister has justified the Emergency Decree as a necessary response to the deepening conflict in the south of Thailand.

The Emergency Decree authorizes the Prime Minister to declare a state of emergency in parts or in the whole country, and grants him far-reaching powers during an emergency to override the authority of any government ministry or agency, civilian or military. The Decree provides him with the power to proclaim regulations limiting and suspending a wide range of fundamental human rights guaranteed under the Thai Constitution and the United Nations International Covenant on Civil and Political Rights (ICCPR), which Thailand has ratified and which is therefore legally binding on Thailand.

The central feature of the Emergency Decree is that it provides far-reaching powers that are often only vaguely defined, while at the same time reducing the accountability of the Government to the parliament and the courts for declaring a state of emergency and for the measures taken. In light of past experiences and the present crisis in the south of the country, the ICJ urges the Government to review the Emergency Decree as it provides increased power with less oversight. Fewer checks and balances usually create an environment in which abuse of power is more likely.

The ICJ recognizes the security threat the Government faces in the south of Thailand. However, the political legitimacy of emergency measures should flow from their compliance with the Constitution, the rule of law and international legal obligations that bind Thailand. Human rights law allows states to fight security threats effectively, including the right to limit and suspend certain rights in a state of emergency, but it requires that a state does so as an extension and not abrogation of the rule of law.

The concerns about the Emergency Decree are only heightened by serious concerns raised by Thailand's National Human Rights Commission, non-governmental organizations and UN experts about repeated human rights violations and abuses of powers in the south, especially by the military and police under martial law. These violations have exacerbated political tensions.

Increased and vaguely worded powers

The Emergency Decree contains several provisions that are so vague and broad that they grant almost unlimited powers to the Prime Minister. Most extraordinarily, Section 11 (6) authorizes the Prime Minister to order any person "not to perform any act or to perform and act" as long as this is necessary for national security. In another provision the situations in which the Prime Minister may declare a state of emergency are so broadly worded that it would encompass situations that would not justify such as drastic measure.

The risk of vagueness is exacerbated by the fact that the Emergency Decree authorizes the Prime Minister to delegate sweeping emergency powers to "competent officials" who are not defined or described in any way in the Emergency Decree. Certain authorities would be unsuited to carry out emergency powers. In general,

¹ Yala, Pattani, Narathiwat

for example military forces are not sufficiently trained or accountable to carry out police functions, such as investigations, arrests and supervision of detainees.

The Decree allows “competent officials“ to arrest and detain persons for up to 30 days outside the normal criminal justice system, *i.e.* even if they are not suspected of having committed a criminal offence. While international law does not prohibit such administrative detention, it is an extraordinary and temporary measure that requires stringent legal safeguards to prevent many serious abuses such as arbitrary detention, torture and enforced disappearances. The authorities should reaffirm that any person arrested must be brought promptly before a judge and has the right to challenge the legality of the detention before a court (*habeas corpus*). While the Emergency Decree contains some safeguards against abuse, the law should reaffirm that detainees will have immediate access to a lawyer of their choice, the right to inform their family of the arrest and to receive medical assistance and visits from their family.

Inexplicably, the Emergency Decree says that detainees in an emergency will not be held in regular police stations, detention centres, penal institution or prisons. Detaining people in irregular places of detention, without regularized procedures and safeguards will significantly increase the risk of serious abuse of detainees.

The Decree contains vaguely-worded powers to restrict the media and other forms of expression. Only in highly exceptional cases could a nation's security be threatened by a person's exercise of the right to freedom of expression. At the very least the Government would have to show a clear direct and immediate connection between the words and the threat to national security, particularly incitement to violence. In times of crises freedom of the media is vital, to allow critical reflection on the emergency, to voice sometimes controversial views and to expose wrongdoing. The provisions could have a chilling effect on media freedom and should be repealed or substantially amended.

Reduced accountability to parliament and courts

The Emergency Decree was enacted in response to escalating violence in southern Thailand. This violence, however, does not constitute a new or sudden threat to the nation, nor has it affected the functioning of parliament. Legislation setting out the framework for the possible declaration of a state of emergency should have been subject to public debate and parliamentary approval. The Government should urgently submit the Emergency Decree to parliament for detailed consideration. The Emergency Decree does not give the parliament any role in discussing and approving the actual declaration or extension of each and every state of emergency. In a democratic state the legislature should be able to probe and question the justification of the declaration of a state of emergency, before or after the fact, and to assess the proportionality of the special powers exercised by the executive.

People whose rights are limited because of an emergency law should always be able to challenge the legality of the measures taken against them. The Emergency Decree does not provide individuals effective ways to test or challenge in court any interference into their rights by the authorities. The Decree expressly prevents individuals seeking usual remedies from administrative courts. The courts should also be able to examine the constitutionality and legality of any declaration of a state of emergency and measures taken during the emergency.

Section 17 of the Emergency Decree limits criminal, disciplinary or civil action against officials who abuse their emergency powers. Such a legal immunity clause will perpetuate impunity for human rights violations committed in the course of security operations and will lead to a cycle of human rights violations. It is clear from experience all over the world that impunity does not improve the security situation, but exacerbates political and social tensions and deepens the security crisis. The legal immunity deepens even further the way in which the Emergency Decree restricts and weakens democratic accountability.

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MORE POWER, LESS ACCOUNTABILITY: THAILAND'S NEW EMERGENCY DECREE

Introduction

On 15 July 2005, Thaksin Shinawatra, the Prime Minister of Thailand, enacted by executive decree the Emergency Decree on Government Administration in States of Emergency, B.E. 2548 (the Emergency Decree). The decree entered into force on 16 July 2005.

The Emergency Decree modifies the existing legal framework for emergency situations. It does not proclaim a state of emergency itself but authorizes the Prime Minister to declare a state of emergency - subject to Cabinet approval - in parts or in the whole of the country and provides the legal basis for a range of special powers during an emergency.

The law grants the Prime Minister, and undefined "competent officials" designated by him, far-reaching powers during an emergency to override the authority of any government ministry or agency, civilian or military. They have the power to proclaim regulations limiting and suspending a wide range of fundamental human rights guaranteed under the Thai Constitution and the United Nations International Covenant on Civil and Political Rights (ICCPR), which Thailand has ratified and which is therefore legally binding on Thailand. These rights include the rights to liberty and security, freedom of expression, movement, private life and property. It limits parliamentary scrutiny over the declaration of a state of emergency and measures taken in an emergency and limits the role of the judiciary to examine the legality of the emergency measures. It reduces the possibility of civil, criminal or disciplinary action against those exercising authority under the law.

The Prime Minister has already used his powers under the new law and declared a "serious emergency"¹ in three southern provinces of Thailand.² Martial law had already been in place in these areas since January 2004.

Thailand has made many significant advances in human rights since 1992 and has been developing a range of democratic checks and balances since the Constitution was overhauled in 1997. In the past, however, the country has also had a history of martial laws and sweeping laws on states of emergencies, which led to serious human rights violations during regular periods of emergency or military rule. The International Commission of Jurists (ICJ) documented and analyzed how these far-reaching emergency powers often undermined the rule of law, including as far back as 1983 in a detailed global study on states of emergencies and their impact on human rights.³

The Emergency Decree and the subsequent declaration of a state of emergency have been enacted in response to the present crisis in the south of Thailand. Martial law was imposed in

January 2004 but the violence and loss of life have continued to escalate. The Government does face significant security problems in the south and individuals have carried out violent criminal acts, often targeting civilians. Nevertheless, serious concerns have been raised by the Thai National Human Rights Commission and non-governmental organizations about human rights violations and abuses of power in the south, in particular by the military and police under martial law.⁴ The Human Rights Committee, a group of 18 independent experts responsible for supervising implementation of the ICCPR by states that have ratified it, considered Thailand's report only days after the Emergency Decree was enacted. The experts also raised concerns "about the persistent allegations of excessive use of force by law enforcement officials, as well as ill-treatment at the time of arrest and during police custody" in Thailand.⁵ Such violations in the south have exacerbated political tensions.

In light of past experiences and the present crisis in the south of Thailand, the ICJ urges the Government to review the Emergency Decree, as it opens the door to more abuse by providing authorities increased power with less oversight. Fewer checks and balances usually create an environment in which abuse of power is more likely.

This document assesses the compatibility of the Emergency Decree⁶ with rule of law principles, which are also reflected in the Thai Constitution, and with international human rights law, in particular the ICCPR. It does not address the much broader question of whether the most effective approach to resolve the conflict in the south is by declaring a state of emergency and exercising extraordinary security powers. However, from many experiences around the world it is clear that the absence of justice and the rule of law in government policy will only deepen the conflict. The starting point for ensuring the legitimacy and impact of any government policy in the south is that all security measures must respect human rights and the rule of law.

International law on states of emergencies

International human rights law, as well as the Constitution of Thailand, envisages that the Government may sometimes have to take exceptional measures and suspend (or derogate from) some rights when facing an emergency that threatens the life of the nation.⁷ Indeed, as reflected in the *ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, states have the right and duty under international law to protect the security of people under their control.⁸

However, international law also sets clear limits and constraints on the measures a government can take to respond to an emergency. The limitations are not designed to unduly hamper the operational needs of a swift response to a crisis. Rather, they reflect that a state of emergency is an extension of the rule of law and not the end the rule of law.

The United Nations Human Rights Committee has explained how a state must respect the rule of law in a state of emergency. This guidance is contained in decisions on individual cases, conclusions after the experts consider a state report on implementation and in General Comment 29, which is the key reference for the assessment of any emergency measures.⁹

Under Article 4, ICCPR, a state may declare a temporary state of emergency and suspend certain rights only if the emergency “threatens the life of the nation”.¹⁰ Not every disturbance or violent act creates this level of seriousness. The situation must be of such imminent and actual threat and magnitude that it threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to protect and ensure rights recognized in the ICCPR.¹¹ Local and isolated law and order disturbances or the commission of grave crimes alone are not enough. States do have a certain margin of appreciation in deciding whether a threat justifies declaring a state of emergency. In order to be valid, a state of emergency must also be publicly proclaimed and the United Nations must be notified.¹²

Even in an emergency certain rights can never be suspended - under any circumstances - such as the right not to be tortured, or suffer cruel, inhuman or degrading treatment or punishment, the right not to be arbitrarily deprived of life and the right to freedom of thought, conscience and religion or fundamental principles of justice, including the presumption of innocence.¹³ Not even war or dire threat to the nation can justify ignoring these most basic rights.

During properly declared emergencies some rights can be temporarily suspended if necessary. There is a heavy burden on the state to justify that each and every suspension of a right is strictly required by the exigencies of the situation; that is it must be temporary, necessary and proportionate to meet the security threat. The state must also show that no lesser measures are adequate to meet the threat. During an emergency a state must continue to protect against abuse, in particular that people have a right to challenge the legality of emergency measures taken.

A state is prohibited from taking emergency measures that discriminate solely on the grounds of race, color, sex, language, religion, or social origin. A state also cannot use the state of emergency to limit or escape from other obligations under international law, including international humanitarian law or international norms that must be applied at all times.¹⁴

DEMOCRATIC OVERSIGHT AND ACCOUNTABILITY

The executive often has the power to actually declare a state of emergency. However, it is the parliament and courts in a democratic state that should retain an oversight role over the declaration of an emergency and the measures taken. There should also be sufficient safeguards to ensure that those who exercise authority under an emergency are accountable for abuse under the law and human rights violations. The ICJ is concerned that the Emergency Decree fails to ensure there are sufficient democratic and judicial checks and balances on executive power.

Accountability to Parliament

➤ *Emergency Legislation by Executive Decree*

The Emergency Decree was enacted by a decision of the Prime Minister immediately following violent attacks on a power station, a department store, two hotels and a restaurant in Yala province. The violence in the south, however, is not a new or sudden threat to the nation. The violence has been escalating at least since 2002 and martial law was in force from January 2004. There have been calls and debates about the preparation of special security legislation for a number of months. Especially given that the crisis in the south has not affected the functioning of the parliament, a new emergency law should have been subject to a much needed open and transparent parliamentary reflection.

Under the Constitution an executive decree, such as this Emergency Decree, which has not been adopted as a regular bill, should at least be subsequently submitted to Parliament.¹⁵

Recommendation:

The ICJ urges the Government to seek the approval of parliament as soon as possible in accordance with article 218(3) of the Constitution, if necessary by convening an extraordinary session of the National Assembly.

➤ *Parliamentary control over the declaration of a state of emergency*

The Emergency Decree is the enabling act for the Prime Minister to declare a specific state of emergency in response to a particular situation. The Emergency Decree does not give the parliament any role in discussing or approving the actual declaration or extension of a state of emergency. The only check and balance on the power of the Prime Minister set out in the Decree is the requirement that the Council of Ministers approve the declaration of a state of emergency and any extension beyond the initial three-month period.¹⁶ However, the Council of Ministers is an executive body whose members are nominated and supervised by the Prime Minister himself. In a democratic state it is the legislative branch that should be able to probe and question the justification for the declaration of a state of emergency by the executive, before or after the fact, and to assess the proportionality of the special powers exercised by the executive.

The need for parliamentary control over decisions of the executive to declare and extend emergencies has been recognized in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights as one of the most important guarantees against unnecessary suspension of rights.¹⁷ It provides: “The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.”¹⁸

➤ ***Broad definitions of emergency***

Parliamentary scrutiny is particularly vital because the Decree defines a state of emergency in overly broad terms. Section 4 allows an emergency to be declared, among others, in case of:

“(...) a situation, which (...) may affect public order or endangers the security of the State or may cause the country or any part of the country to fall into a state of acute difficulty (...) pursuant to which it is necessary to enact emergency measures to preserve”, among others, “the peaceful way of life of the people, the protection of rights, liberties and public order or public interest.”

The wording is so broad that it could easily encompass situations that do not “threaten the life of the nation” as required by the ICCPR and accepted principles on states of emergency. A problem with public order may well require the state to take certain law enforcement or other actions, but those measures could usually be taken within the ordinary legal and institutional framework without suspending rights.

Recommendation:

The ICJ recommends that the definition of situations that would justify a state of emergency be brought into line with the ICCPR.

The Government should also clarify that the declaration of a state of emergency and the regulations enacted are subject to parliamentary scrutiny at regular intervals.

Subsequent approval by parliament of the Emergency Decree under Article 218 of the Constitution mentioned above should include an examination of the declaration of the state of emergency and the powers actually assumed in its implementation.

Limited scrutiny by the courts

➤ ***Judicial scrutiny of emergency declaration and measures***

Even in a state of emergency the authorities have to ensure that extraordinary powers do not lead to the arbitrary exercise of power or a weakening of accountability.

The UN Human Rights Committee has repeatedly stated that courts should have the power to examine the legality of the declaration of emergency and the measures taken during an emergency. This also reflects long-standing experience that the courts, especially higher courts,

play an essential role in ensuring that extraordinary powers are not abused. In its concluding observations on Colombia, the Human Rights Committee stressed, "Constitutional and legal provisions should ensure that compliance with article 4 of the Covenant can be monitored by the Courts."¹⁹ Equally, on Sri Lanka, the Committee expressed "(...) concern that courts do not have the power to examine the legality of the declaration of a state of emergency and of different measures taken during the state of emergency."²⁰

It is unclear to what extent the declaration of a state of emergency in Thailand and the regulations enacted during an emergency can be examined by the courts. Members of parliament may have the power to access the Constitutional Court under article 218 of the Constitution regarding the constitutionality of emergency decrees themselves. It is unclear, however, whether there is any way to challenge the constitutionality of a declaration of a state of emergency itself or the regulations enacted under the Emergency Decree.

➤ ***Right of individuals to seek a court remedy for abuse***

By ratifying the ICCPR Thailand has reaffirmed that it will deal with security threats without abandoning the most basic notions of the rule of law. People whose rights are limited because of the emergency legislation should always be able to challenge the legality of the measures taken against them, for example if they are prevented from leaving their country or if publications or demonstrations are prohibited. The Emergency Decree does not provide individuals effective ways to test or challenge any interferences into their rights by the authorities. This is especially important because some of the special powers mentioned in Sections 9 and 11 are so broadly and vaguely described that they could easily lead to arbitrary exercise of power. Rather than setting out remedies available to those negatively affected by emergency measures, the Emergency Decree explicitly excludes access to administrative courts in Section 16:

"A regulation, announcement, order or an act under this Emergency Decree shall be subject to neither the law on administrative procedures nor the law on the Establishment of Administrative Court nor to the Administrative Court and Court Procedure."

"Competent officials" under the law are not required to apply ordinary administrative procedures in using their powers, nor will there be any administrative court remedies against any unlawful regulation, order or act under Section 9 and 11. Under Article 276 of the Constitution, administrative courts have jurisdiction over disputes between state agencies and private individuals. By excluding such court remedies, the Government has severely limited the possibility of challenging the legality of measures taken by the authorities. It could mean, for example, that someone whose house has been demolished, who has been evacuated from their place of residence, who has been prevented from moving freely within the country, or who has been prevented from expressing and publishing information about the emergency or holding a public gathering, will not be able to access remedies usually provided under Thai law. It is not clear how excluding such remedies would be necessary to meet even severe security threats, as long as the courts are able to continue functioning.

The lack of effective remedies itself constitutes a violation of the ICCPR. The UN Human Rights Committee noted in its recent General Comment 29 on States of Emergency:

“Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This right is not mentioned in the list of non-derogable rights provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.”

Recommendation:

The ICJ recommends that the Government reconsider the exclusion of administrative court remedies and that it ensures that at all times individuals affected by the emergency powers can go to an independent court to challenge the legality of decisions, acts and regulations under the Emergency Decree and seek effective remedies.

The Government should also ensure that judicial scrutiny extends to the legality of the Emergency Decree itself and specific declarations of emergencies.

Impunity - Legal immunity from prosecution

Under international law states are obliged to conduct a prompt, effective, impartial and independent investigation²¹ into human rights violations and to bring those responsible to justice.²² In addition, states are required to provide reparations to victims of violations of human rights, especially for gross violations such as of the right to life, freedom from torture, cruel, inhuman and degrading treatment or punishment and enforced disappearances.²³

Section 17 of the Emergency Decree provides a specific immunity clause for law enforcement officials:

“A competent official and a person having identical powers and duties as a competent official under this Emergency Decree shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act provided that such act is performed in good faith, is non-discriminatory and is not unreasonable in the circumstances of exceeding the extent of necessity. This shall not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful acts”.

The ICJ welcomes the reaffirmation of the right to compensation for wrongful acts by governmental agencies. Compensation is an important element of the right to reparation under international law.²⁴ However, the ICJ is concerned that the Emergency Decree severely limits the accountability of any civilian or military authorities exercising powers during an emergency.²⁵

It is not clear whether Section 17 will prevent criminal, civil and disciplinary proceedings being started, or is meant to guide and restrict a tribunal when it decides whether to hold an individual before it accountable. Either way, Section 17 clearly seeks to limit the accountability of those carrying out responsibilities under the emergency laws and regulations by providing a form of legal immunity.

Ordinary courts applying normal principles of criminal or civil law should always be free to determine the responsibility of individuals accused of committing human rights violations. Under criminal law, for example, a court would determine whether the accused carried out a criminal act, with the necessary intent. It is for the court to decide whether the actions of the individual were “reasonable” or whether any force used was proportionate. If an individual is held responsible, the courts could equally consider whether or not the accused acted in “good faith” when it decides the appropriate punishment.

The UN Human Rights Committee has stressed that a failure to investigate and bring to justice perpetrators of such violations would violate the ICCPR. In light of this duty, it stated:

“Accordingly, where public officials or State agents have committed violations of (such rights), the State party concerned may not relieve perpetrators from personal responsibility, as has occurred with amnesties and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments such as the establishment of legal responsibility should also be removed, such as the defense of obedience to superior orders or unreasonable short periods of statute of limitations (...).”²⁶

Exceptional circumstances such as political instability or public emergencies do not justify exempting law enforcement officials from possible criminal or civil liability for harm caused during emergency operations.²⁷

An immunity clause such as Section 17 will perpetuate impunity for human rights violations committed in the course of security operations and will lead to a cycle of human rights violations. It is clear from experience all over the world that impunity does not improve the security situation, but exacerbates political and social tensions and deepens the security crisis. The legal immunity deepens even further the way in which the Emergency Decree restricts and weakens democratic accountability to parliament and to the courts.

In its Concluding Observations on Thailand the UN Human Rights Committee expressed concerns that the Decree allows for “officials enforcing the state of emergency to be relieved of legal and disciplinary actions, thus exacerbating the problem of impunity”.²⁸ The Committee recommended that all alleged cases of disproportionate use of force by the police be fully and promptly investigated and that those found responsible be brought to justice.²⁹

Recommendation:

The ICJ urges the Government to repeal Section 17 of the Emergency Decree, which provides those exercising powers in an emergency immunity from criminal, civil or disciplinary action.

VAGUE DEFINITIONS AND SWEEPING POWERS

Vague definitions and powers

The Emergency Decree contains several provisions that are so vague and broad that they grant seemingly unlimited powers to the Prime Minister. Most extraordinarily, the Emergency Decree in effect authorizes the Prime Minister to order any person to do anything. Section 11 (6) gives the Prime Minister the power to “(...) issue a notification not to perform any act or to perform an act to the extent that this is necessary for maintaining the security of the state, the safety of the country or the safety of the people.”

This is so vague and broad that it will almost inevitably lead to abuse of power. In considering Thailand's report, the Human Rights Committee concluded that the Decree “does not explicitly specify, or place sufficient limits, on the derogations from the rights protected by the Covenant that may be made in emergencies and does not guarantee full implementation of article 4 of the Covenant.”³⁰

Undefined authority

A law on emergencies should not only prescribe the scope of special powers, but also set out sufficiently clearly who is entrusted to exercise such powers. The Emergency Decree concentrates special powers in the office of the Prime Minister, who in turn can delegate this authority to so-called “competent officials” or “a person having identical powers and duties to a competent official”. Nothing in the law, however, indicates who these officials might be. This is critical as these officials will be exercising sweeping powers to override civilian and military authorities and “shall be competent officials under the Penal Code, and shall have the powers and duties of an administrative official or police officer under the Criminal Procedural Code as prescribed by the Prime Minister.”³¹ There is no guidance to prevent highly intrusive and sweeping powers being given to persons or authorities that are not sufficiently accountable, trained, experienced or otherwise qualified.

Role of the military

Members of the armed forces could also be designated as “competent officials”. The use of military forces, in particular if there are no clear limits, gravely increases the risk of human rights violations, as the armed forces are not trained to act as an investigating body, as law enforcers or prison officials. The Human Rights Committee has for these reasons stated in past considerations of emergency laws in different countries, that providing judicial police functions to the military could lead to violations of the ICCPR in a state of emergency.³²

Recommendation:

The ICJ urges the Government to repeal the open-ended and vague Section 11(6) that grants the Prime Minister the power to order any person to do anything.

The emergency law should specify when and to whom, authority may be transferred in a state of emergency.

In this regard the authorities should ensure that the role of the armed forces is clearly defined and limited and that the military does not replace civilian authorities unless strictly necessary, for example because civilian authorities become incapable of performing their ordinary tasks and functions.

ARREST, DETENTION AND INVESTIGATION

Under the Emergency Decree the Prime Minister can authorize a “competent official” to arrest and detain a person for seven days initially, with possible extensions for up to 30 days in total. The “competent official” has to seek authorization from the courts for the detention and extensions. The ordinary procedure for detention under the Criminal Procedural Code only applies after the end of this period of detention.³³

Normally law enforcement officials should only arrest people because they are suspected of having committed a criminal offence. They should be charged and tried before an ordinary criminal court or released. The Emergency Decree appears to allow government officials, who may not be law enforcement officials, to arrest and detain people as a preventive measure, even if they are not suspected of having committed an offence under the ordinary criminal law. This is known as administrative detention. It appears that after no more than 30 days the detainee would be charged under ordinary criminal law or released. In the experience of the ICJ, administrative detention often results in other abuses, such as torture, cruel, inhuman, and degrading treatment and enforced disappearance, because it does not provide the usual legal safeguards that protect detainees.

Administrative detention is not prohibited under international law. However, it is an extraordinary measure that displaces the usual criminal justice system. The ICJ considers that it is only justifiable under a state of emergency if the normal criminal law and procedure are incapable of responding to a temporary, real and imperative security threat. In the vast majority of cases ordinary criminal offences, such as attempting or conspiring to commit a crime, are adequate to protect security. Effective legal and practical safeguards must be in place to protect administrative detainees, including the right of detainees to go to a court to challenge the legality of the detention.

Grounds for arrest and detention

Even during a state of emergency a government cannot arbitrarily detain people; meaning without good reason. The law must also state the permissible grounds for any detention clearly enough so people are aware of what acts could lead to detention. Section 11 of the Emergency Decree defines the grounds for detention as follows:

“(...) having a role in causing the emergency, or being an instigator, making propagation, a supporter of such act or concealing relevant information relating to the act which caused the State of Emergency, provided that this should be done to the extent that it is necessary to prevent such person from committing an act or participating in the commission of any act which may cause a serious situation or to engender cooperation in the termination of the serious situation;”³⁴

The ICJ is concerned that these grounds are formulated in broad and vague terms open to abuse. Any person who “has a role” or is a “supporter of the act” could be detained, provided that the detention is necessary to prevent a “serious situation” or to “engender cooperation in the termination of a serious situation”. These grounds could result in persons facing arrest and detention who are only remotely connected to the immediate security threat. It could also be used to suppress the legitimate right to freedom of expression, association and assembly.

Judicial supervision and *habeas corpus*

The emergency decree requires a “competent official” to apply for “leave of the court” to authorize an arrest. It is not specified whether this “competent official” will be a civilian or military authority.³⁵ It is also not clear what scrutiny a judge can exercise under this procedure. The wording of Section 12 suggests that for the arrest to be legal the “competent official” must make a written submission to the court. It is unclear whether the arrested person must be brought physically before a judge.

The right of a detainee to be brought promptly before a judge or an officer exercising judicial authority helps to ensure that the detention is lawful and necessary.³⁶ It also provides a vital safeguard against torture and enforced disappearance as the judge can physically see the detainee and any noticeable signs of ill-treatment or consider allegations made by the detainee. Only in the most extreme situation when it is physically impossible to access a court, such as when the judiciary collapses because of an emergency, could it ever be justified not to bring detainees promptly before a judge. This is not the situation in Thailand, where the courts are functioning and active. In any case, any suspension of this important right beyond 48 hours would be even harder to justify.³⁷ The Human Rights Committee in its Concluding Observations on Thailand also stated, that “(a)ny detention without external safeguards beyond 48 hours should be prohibited”.³⁸ The ICJ urges the Government to clarify that with any arrest under the Emergency Decree the person must be brought promptly before a judge.

The Government should also reaffirm that any person arrested under this Decree or a person acting on behalf of the detainee, has the right to challenge the legality of the detention before a court (*habeas corpus*). The UN Human Rights Committee and other international human rights bodies have consistently stated that such a remedy must be provided even in times of a public emergency threatening the life of the nation.³⁹ Such a court remedy not only serves to maintain legality, but also constitutes another indispensable safeguard to protect those arrested from grave human rights violations, such as torture and enforced disappearance.⁴⁰ For this remedy to be effective the detainee must have access to a lawyer of their choice, to consult their lawyer in private and be represented in court by the lawyer.

Place of detention and access to the outside world

The Emergency Decree expressly stipulates that persons deprived of their liberty under this Decree will *not* be detained in a regular police station, detention centre, penal institution or prison. It does not specify where they would be held and under whose authority (civilian, military or special agencies).⁴¹ This is an extraordinary provision. The risk of severe human rights violations is significantly increased when detainees are held in locations that are not recognized places of detention, without regularized procedures and safeguards to protect detainees. These risks are exacerbated further if the detainee is held under the control of agencies that do not have sufficient experience of civilian law enforcement, such as the military. In fact, the decree may allow an authority that is not trained and competent to combine powers of arrest, detention and investigation, which further increases the risk of abuse.

The ICJ welcomes that the Emergency Decree provides some explicit safeguards against abuse, such as a written record of the arrest and detention, which is submitted to the court and is accessible to the family.⁴² However, the ICJ is concerned that the decree does not expressly reaffirm that detainees will enjoy other important rights and safeguards usually provided under Thai law, such as the right to be notified of the reasons for the arrest, and be able immediately to inform his or her relative, or a person of his confidence, or the right not to incriminate himself or herself.⁴³

In particular, the Government should reaffirm that no person may be held without having contact with the outside world during the 30 days of detention and that this access should be provided without delay after the arrest. International law prohibits the use of *incommunicado detention*, i.e. detention without access to the outside world. The Human Rights Committee has held that such detention may in itself constitute a violation of the absolute prohibition of torture, cruel, inhuman or degrading treatment or punishment or the right to be treated with humanity.⁴⁴ The Government should allow detainees access to a judge, a lawyer, family and medical care.⁴⁵ This was reaffirmed by the Human Rights Committee in its recent Concluding Observations on Thailand.⁴⁶ Detainees should be given access to legal counsel within 24 hours of arrest. In exceptional circumstances, where prompt contact with a detainee's lawyer might raise legitimate security concerns, it should at least be possible for a detainee to meet with an independent lawyer, such as one recommended by a bar association.⁴⁷ Equally, the Government should make it clear that those arrested have the right to inform their family of the arrest. The authorities should reaffirm, that nothing in the Emergency Decree derogates from the obligations to allow foreign prisoners to contact the consular authorities of their country.⁴⁸

The ICJ considers that the above-mentioned safeguards should be specifically provided in the emergency legislation itself and that any departure of legal rights and safeguards provided under ordinary criminal procedural law would need to be justified by clear imperative reasons of security.

Power to summon any person to report

Section 11 (2) authorizes a competent officer “to summon any person to report to the competent official or to give an oral statement or submit any documents or evidence relevant to the emergency situation.”

The authorities have a legitimate interest in an emergency situation to seek the cooperation of the population in identifying those responsible for crimes committed or those that are being planned. However, the summoning of persons must be based on reasonable grounds and must not lead to a general state of suspicion about ethnic or religious communities. Only ordinary law enforcement and judicial authorities should be able to summon people for questioning. Moreover, it should be reaffirmed that persons summoned under the decree have the right to remain silent and not to incriminate themselves, as provided under international law and the Thai Constitution.⁴⁹ The respect for privileged relationships, such as between family members or professional confidentiality between lawyer and client should also be reaffirmed.

Recommendation:

The Emergency Decree should be amended to clearly limit the reasons a person can be administratively detained outside the ordinary criminal law and procedure, to cases where there is a temporary, direct and imperative security threat.

The Government should reaffirm that any person arrested in an emergency must be brought promptly before a judge and that all detainees and those acting on their behalf have the right to challenge the legality of the detention before an ordinary court (*habeas corpus*).

Detainees should only be held in recognized places of detention, known to the outside world, with regularized procedures and safeguards to protect detainees. An administrative detainee should be presumed to be innocent of any criminal offence and treated accordingly. It should be clarified in legislation that detainees have the right immediately to access a lawyer of their choice, to inform their family of the arrest and to receive medical assistance and visits from their family. The authorities should reaffirm that nothing in the Emergency Decree derogates from the obligation to allow foreign prisoners to contact the consular authorities of their country.

Only law enforcement agencies should be competent to summon persons under the decree with full respect for the right to remain silent.

FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION

The Emergency Decree authorizes a “competent official” to enact regulations restricting the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds and the right to freedom of assembly.⁵⁰

Freedom of expression

Under Section 9(3) the Prime Minister or a competent official may enact regulations:

“(...) to prohibit the publication, distribution or dissemination of letters, print materials or any means of communication containing texts which may instigate fear amongst the people or is intended to distort information which causes misunderstanding of the emergency situation affecting the security of state or public order or public moral both in the area or locality where a State of Emergency has been declared or the whole Kingdom.”

Although the right to freedom of expression can be suspended in a state of emergency, any such limitation must be strictly required and proportionate to the threat. The presumption must be that the right to freedom of expression continues unless there is a direct causal link between the words spoken or written and the legitimate security concern and that no other means short of restricting the right are adequate.

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information provide useful guidance on the relationship between freedom of expression and national security.⁵¹ They provide:

“Subject to (...), expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence;”⁵²

Only in highly exceptional cases could a nation's security be directly threatened by a person's exercise of the right to freedom of expression. Such a threat would require, at the very least, clearly establishing that the person was able and intended to take actions that directly threaten national security, in particular by inciting the use of violence.⁵³ Section 9 of the Emergency Decree allows the Government to suppress information that is intended to distort information and that leads to a misunderstanding of the emergency. This vaguely worded power could easily be used to curtail legitimate political and social dissent and media discussion, if in the view of the authorities, it is factually wrong or misleading. Critical debate and controversial perspectives about an emergency situation do not threaten national security. This will have a chilling effect on the vibrant press in Thailand. The Human Rights Committee has also raised concerns about the impact of this power to restrict the media and called on the Thai Government to take measures to prevent further erosion of freedom of expression.⁵⁴

Emergency measures must distinguish between information that could threaten national security and the legitimate expression of controversial ideas. The media and individual expression should not be suppressed because of perceived dangers that are so abstract, remote and hypothetical.⁵⁵ Even in times of crisis, freedom of expression and of the media are vital, to allow critical reflection about an emergency situation. Civil society and the media must also be

able to inquire into and speak out about possible abuse of power by the authorities. International human rights bodies have persistently upheld the great importance in a democratic society of bringing to light abuses of public officials, including human rights abuses, even when the state is actively protecting national security.⁵⁶

Freedom of assembly and association

Section 9(1) authorizes regulations “to prohibit the assembly or gathering of persons at any place or any conduct, which may incite or lead to unrest”. The permissible restrictions on the right to freedom of assembly and association in an emergency are similar to the restrictions on the right to freedom of expression. A clear distinction has therefore to be drawn between legitimate, peaceful assemblies and those that could incite violence or threaten security. It would be difficult, for example, to justify a general ban on peaceful, public demonstrations in which people express controversial ideas or criticize the government.

Recommendation:

The ICJ urges the Government to delete or substantially amend the provisions in the Emergency Decree allowing vague and broad restrictions on the right to freedom of expression and assembly.

PRIVACY AND FREEDOM OF MOVEMENT

Privacy

Section 11(4) enables a competent official “to issue a warrant for the search, removal, withdrawal or demolition of buildings, structures or obstructions as necessary in the exercise of functions in order to promptly terminate a serious situation where a delay may render the situation beyond control”. Section 11(5) expands these powers to issue an order to inspect letters, books, print materials, telegraphic transmissions, telephone conversations or any other means of communication.

Some of the powers, such as the search and seizure powers, the demolition of homes and the monitoring of communications are highly intrusive interferences into the right to privacy, including family, home or correspondence contained in Article 17 ICCPR. The ICJ is concerned that it is not clear what type of authority (civilian or military) will have the power to control communication or to issue search warrants or to order the demolition of buildings. These interferences do not require judicial authorization, as is usually required under the Constitution⁵⁷, or the authorization of another independent authority. The Emergency Decree does not offer any form of effective control mechanism over its implementation. The exclusion of administrative remedies (Section 16) further limits accountability.⁵⁸

Movement restrictions

The Emergency Decree confers considerable powers in sections 9 and 11 to a “competent official” to limit and suspend aspects of the right to freedom of movement. The right to freedom of movement is an important fundamental freedom, especially as it affects the enjoyment of other civil and political rights, and also economic, social and cultural rights.⁵⁹

➤ ***Evacuation of population***

Section 9(6) allows the Government “to evacuate people out of a designated area for the safety of such civilians or to prohibit any person from entering a designated area”. While a state may evacuate persons from particular areas, for example because of a bomb threat or a police operation against insurgents or armed opposition groups, any such evacuation must be strictly time-limited and must be genuinely based on the need to protect civilians as stipulated in the Decree. The evacuation or dislocation of persons in a particular area or village must not be for other, perhaps political reasons. Moreover, such evacuation must not lead to the “forced transfer” of a population from one part of the country to another in violation of international law.⁶⁰ In order to ensure that measures taken in this regard are proportionate there should be an effective remedy to challenge evacuation orders.

➤ ***Prohibition to leave one's country and expulsion***

Section 11(7) gives the Prime Minister the power to prevent a Thai citizen “from leaving his or her own country if there are reasonable grounds to believe that the departure from the Kingdom will affect the security of the safety of the country.” Article 12(2), ICCPR guarantees everyone's right to leave their own country. There will be a particularly heavy burden on the state to justify such limitation by imminent and pertinent security considerations subject to effective ways to challenge such a decision.

➤ ***Expulsion of aliens***

The Emergency Decree provides in section 11(8) that a competent official may “instruct an alien to leave the country in the case where there are reasonable grounds to believe that such person is a supporter in causing the emergency situation, provided that the law on immigration shall apply.”

The ordinary immigration regulations should usually provide the relevant legal framework for the expulsion and deportation of foreigners. The ICJ is concerned that the possible reasons for an expulsion order, such as a person being a “supporter in causing the emergency situation” are vague and increase the risk of arbitrariness and discrimination against people because of their ethnic, national or religious origins or their political views.

While the expulsion of foreigners who pose a security threat to a country is not prohibited, the authorities must never return a person to another country if the person may face serious violations of human rights, such as torture, cruel, inhuman or degrading treatment or punishment or enforced disappearance, or, where they may be subjected to a flagrant violation of the right to a fair trial.⁶¹ Since this right is an absolute right applicable at any time and in all circumstances, states have to ensure that there will always be an effective way to challenge the expulsion or deportation order.⁶²

Recommendation:

The ICJ recommends that the Government review the special powers affecting freedom of movement, the right to privacy and property. It should ensure that these powers are used only to the extent strictly necessary and that in any case safeguards against arbitrary use are provided and that searches and interferences into the right to privacy are subject to judicial control.

Annex I

Extracts from the Concluding Observations of the United Nations Human Rights Committee on Thailand CCPR/CO/84/THA, 28 July 2005

“ ...

10. The Committee is concerned at the persistent allegations of serious human rights violations, including widespread instances of extra-judicial killings and ill-treatment by the police and members of armed forces, illustrated by incidents such as the Tak Bai incident in October 2004, the Krue Se Mosque incident on 28 April 2004 and the extraordinarily large number of killings during the “War on Drugs” which began in February 2003. Human rights defenders, community leaders, demonstrators and other members of civil society continue to be targets of such actions, and any investigations have generally failed to lead to prosecutions and sentences commensurate with the gravity of the crimes committed, creating a “culture of impunity”. The Committee further notes with concern that this situation reflects a lack of effective remedies available to victims of human rights violations, which is incompatible with article 2, paragraph 3 of the Covenant (arts. 2, 6, 7).

The State party should conduct full and impartial investigations into these and such other events and should, depending on the findings of the investigations, institute proceedings against the perpetrators. The State party should also ensure that victims and their families, including the relatives of missing and disappeared persons, receive adequate redress. Furthermore, it should continue its efforts to train police agents, members of the military and prison officers to scrupulously respect applicable international standards. The State party should actively pursue the idea of instituting an independent civilian body to investigate complaints filed against law enforcement officials.

...

13. The Committee is concerned that the Emergency Decree on Government Administration in States of Emergency, B.E. 2548, which came into immediate effect on 16 July 2005, and on the basis of which a state of emergency was declared in three southern provinces, does not explicitly specify, or place sufficient limits, on the derogations from the rights protected by the Covenant that may be made in emergencies and does not guarantee full implementation of article 4 of the Covenant. It is especially concerned that the Decree provides for officials enforcing the state of emergency to be relieved of legal and disciplinary actions, thus exacerbating the problem of impunity. Any detention without external safeguards beyond 48 hours should be prohibited. (art. 4).

The State party should ensure that all the requirements of article 4 of the Covenant are complied with in its law and practice, including the prohibition of derogation from the rights listed in its paragraph 2. In this regard, the Committee draws the attention of the State party to its General Comment No.29 and the obligations imposed upon the State party to inform other State parties as required by its paragraph 3.

...

15. The Committee is concerned about the persistent allegations of excessive use of force by law enforcement officials, as well as ill-treatment at the time of arrest and during police custody. The

Committee is also concerned about reports on the widespread use of torture and cruel, inhuman or degrading treatment of detainees by law enforcement officials, including in the so-called “safe houses”. It is also concerned at the impunity flowing from the fact that only a few of the investigations into cases of ill-treatment have resulted in prosecution, and if any, in conviction, and that adequate compensation to victims has not been provided (arts. 2, 7, 9).

The State party should guarantee in practice unimpeded access to legal counsel and doctors immediately after arrest and during detention. The arrested person should have an opportunity immediately to inform the family about the arrest and the place of detention. Provision should be made for a medical examination at the beginning and end of the detention period. Provision should also be made for prompt and effective remedies to allow detainees to challenge the legality of their detention. Anyone arrested or detained on a criminal charge must be brought promptly before a judge. The State party should ensure that all alleged cases of torture, ill-treatment, disproportionate use of force by police and death in custody are fully and promptly investigated, that those found responsible are brought to justice, and that compensation is provided to the victims or their families.

...

18. The Committee is concerned about reports of intimidation and harassment against local and foreign journalists and media personnel as well as of defamation suits against them, originating at the highest political level. It is also concerned at the impact of the Emergency Decree on Government Administration in States of Emergency, B.E. 2548, which impose serious restrictions on media freedom (art. 19, para. 3).

The State party should take adequate measures to prevent further erosion of freedom of expression, in particular, threats to and harassment of media personnel and journalists, and ensure that such cases are investigated promptly and suitable action is taken against those responsible, regardless of rank or status.

19. While welcoming the aspiration of the State party to accept and foster a vibrant civil society, including many human rights organisations, the Committee is nevertheless concerned at the number of incidents against human rights defenders and community leaders, including intimidation and verbal and physical attacks, enforced disappearances and extra-judicial killings (arts. 19, 21 and 22).

The State party must take measures to immediately halt and protect against the harassment and attacks against human rights defenders and community leaders. The State party must systematically investigate all reported instances of intimidation, harassment and attacks and guarantee effective remedies to victims and their families.

...

26. In accordance with rule 70, paragraph 5, of the Committee's rules of procedure, the State party should provide information, within one year, on its response to the Committee's recommendations contained in paragraphs 13, 15 and 21. The Committee requests the State party to provide information in its next report on the other recommendations made and on the implementation of the Covenant as a whole.”

¹ The decree foresees states of emergency (Section 4-9) and “serious” emergency situations (Section 10), under which more powers are given to the Prime Minister.

² Yala, Pattani, Narathiwat.

³ International Commission of Jurists, *States of Emergency, Their Impact on Human Rights*, 1983, at 289 et seq.

⁴ Thai National Human Rights Commission, Report on the fact-finding of the incident at Takbai, Narathiwat province, 4 May 2005, <http://www.nhrc.or.th/en/news/ReportTakbai20050504.html>; Asian Centre for Human Rights, Thailand: Not Smiling on Rights, 18 July 2005, <http://www.achrweb.org/>; Amnesty International, Thailand: Open letter to Prime Minister Thaksin Shinawatra, 25 November 2004, Thailand, Memorandum on Human Rights Concerns, 27 October 2004, Thailand: Death of demonstrators must be fully investigated, 26 October 2004, www.amnesty.org; International Crisis Group, Southern Thailand: Insurgency, Not Jihad, Asia Report N°98, 18 May 2005, www.crisisweb.org; Human Rights Watch, Letter to Prime Minister Thaksin Shinawatra, 28 October 2004, Thailand: Prosecute and Discipline Officials responsible for Southern Violence, 5 August 2004, Thailand: Probe Use of Lethal Force in Muslim South, 29 April 2004, Thailand: Lawyer's Disappearance Darkens Rights Climate, 17 March 2004, www.hrw.org

⁵ Concluding Observations of the UN Human Rights Committee on Thailand CCPR/CO/84/THA (13), 28 July 2005 (Advanced Unedited Version)

⁶ The analysis of the Emergency Decree is based on an unofficial translation circulated by the delegation of Thailand attending the session of the UN Human Rights Committee, considering Thailand's periodic report to the UN Human Rights Committee.

⁷ See in particular Article 29 of the Constitution of Thailand and Article 4 ICCPR.

⁸ ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law while Combating Terrorism, Principle 1, which reads: “*All states have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. States must take measures to protect such persons, from acts of terrorism. To that end, counter-terrorism measures must themselves be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination.*” On the duty to protect, see also United Nations Human Rights Committee, decision of 12 July 1990, *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985, 23 August 1990, para. 5.5. Human Rights Committee, decision of 20 March 2000, *Carlos Dias v. Angola*, Communication N° 711/1996, UN Doc. CCPR/C/68/D/711/1996, 18 April 2000, para. 8.3, Human Rights Committee, decision of 25 October 2000, *Rodger Chongwe v. Zambia*, Communication No. 821/1998, UN. Doc. CCPR/C/70/D/821/1998, 9 November 2000. para. 5.3. Regional jurisprudence is along the same line. See European Court Human Rights, *Kiliç v. Turkey*, 28 March 2000, para. 62: “The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. the United Kingdom* judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36). See also Inter-American Court of Human Rights, *Neira Alegria* Case, Judgment of 19 January 1995, para. 75; Case 11.182, Report N° 49/00, *Carlos Florentino Molero Coca Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Peru*, 13 April 2000, Annual Report of the IACHR 1999, para. 58.

⁹ For a detailed recapitulation of applicable rights in a state of emergency, see Article 4 ICCPR and the General Comment No.29 on Article 4 by the UN Human Rights Committee, 24 July 2001, CCPR/C/21/Rev.1/Add.11, available at www.ohchr.org.

¹⁰ See Article 4 ICCPR.

¹¹ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle 39. The principles were developed by a conference of 31 international law experts in 1984 and are widely seen as a highly persuasive clarification of limitations and derogations in a democratic society.

¹² See article 4, paragraph 1, ICCPR which requires that any suspension of rights be based on an official proclamation of a state of emergency. Article 4, paragraph 3, ICCPR, contains the additional procedural requirement to notify the Secretary General of the United Nations on the provisions from which a country has derogated and of the reasons justifying doing so.

¹³ See for more exploration on the scope of these rights, UN Human Rights Committee, General Comment 29, par.7 et seq.

¹⁴ See UN Human Rights Committee, General Comment 29, par. 11 et seq. A state has in particular to comply with so-called preemptory norms of international law, that is obligations under general international law binding on all states at all times.

¹⁵ The Emergency Decree has been adopted under the special procedure provided under Section 218 of the Constitution which states that “If [the National Assembly] is out of session and it would be a delay to wait for the opening of an ordinary session, the Council of Ministers must proceed to convoke an extraordinary session of the National Assembly”

¹⁶ See Section 5 Emergency Decree on Governmental Administration in States of Emergencies.

¹⁷ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

¹⁸ *Ibid.*, Principle 55.

¹⁹ UN Human Rights Committee, Concluding Observations on Colombia, CCPR/C/79/Add. 76, para.38 and para. 23.

²⁰ UN Human Rights Committee, Concluding Observations on Sri Lanka, CCPR/C/79/Add.56, para.13.

²¹ See for example: Report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations, E/CN.4/Sub.2/1997/20/rev.1, para 27; General Comment No 20 on Article 7; 13 March 1992, HRI/GEN/1/Rev.7, par.14; Concluding Observations on Peru, 25 July 1995, CCPR/C/79/Add.62, para. 22; Ukraine, 12 November 2001, CCPR/CO/73/UKR, para.13.

²² See for example the decision of the UN Human Rights Committee, *Bautista de Arellana v. Colombia* (563/93), para.8.

²³ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, E/CN.4/Res/2005/35, par.18 et seq., according to which the right to reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

²⁴ *Ibid.*

²⁵ See Section 11 (10) and 15.

²⁶ See UN Human Rights Committee, General Comment 31, The Nature of the General Obligations Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13.

²⁷ CCPR/CO/Rus, para.13; See United Nations Basic Principles on the Use of Force and Firearms, Principle 8: "Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles."

²⁸ Concluding Observations of the Human Rights Committee CCPR/CO/84/THA (13), 28 July 2005 (Advanced Unedited Version)

²⁹ *Ibid.* CCPR/CO/84/THA (15),

³⁰ Concluding Observations of the UN Human Rights Committee CCPR/CO/84/THA (13), 28 July 2005 (Advanced Unedited Version)

³¹ Section 15.

³² See UN Human Rights Committee, Concluding Observations on Colombia, CCPR/C/79/Add.76, par.23, "The Committee expresses its deep concern at the recent proposals for constitutional reform (...) eliminating the powers of the Constitutional Court to review the declaration of a state of emergency, conceding function of the judicial police to military authorities, adding new circumstances under which a state of emergency can be declared, and reducing the powers of the Attorney's General Office and Public Prosecutor's Office to investigate human rights abuses and the conduct of the military. If these texts were adopted, they would raise serious difficulties with regard to article 4 of the Covenant".

³³ See Section 12, paragraph 1 – "Upon the expiration of such period, if the detention is still required, the competent official shall proceed under the Criminal Procedural Code."

³⁴ See Section 11 (1).

³⁵ See also Section 10 (11) and 15 of the Emergency Decree, which indicate that also the military may assume authorities under the penal law, the criminal procedural law and administrative law.

³⁶ See Article 9, paragraph 3 ICCPR.

³⁷ See for example, *Aksoy versus Turkey*, European Court of Human Rights, Judgment of 18 December 1996, 23 EHHR 417. The Court held that even in a valid state of emergency in Turkey the suspension to be brought promptly before a judge for 14 days could not be justified.

³⁸ Concluding Observations of the Human Rights Committee on Thailand CCPR/CO/84/THA (13), 28 July 2005 (Advanced Unedited Version)

³⁹ UN Human Rights Committee, General Comment No.29, para 14 and 16 "(...) In order to protect non-derogable rights, the right to take proceedings before a court to enable a court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."

⁴⁰ UN Human Rights Committee, General Comment No.29, par. 15; also the Special Rapporteur on the question of Torture (E/CN.4/2004/56., para. 39; E/CN.4/2003/68, para. 26 (i); and *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, para. 16) and the Inter-American Court on Human Rights (Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and (8) *American Convention on Human Rights*), para. 38; The importance of the habeas corpus in the prevention of enforced disappearance had been underline

by the UN Working Group on Enforced or Involuntary Disappearances (E/CN.4.1983/14, par. 141; E/CN.4.1986/18/Add.1, pars. 55-58; E/CN.4.1989/18/Add.1, par. 136; E/CN.4.1990/13, par. 346; E/CN.4.1991/20/Add.1, par. 167; E/CN.4.1991/20, par. 409; E/CN.4.1992/18, pars. 368-370; and E/CN.4.1993/ 25, par. 514.), the UN independent expert in charge of studying the legal and human rights framework for the protection of all persons against unforced or involuntary disappearances (E/CN.4/2002/71) and the Inter-American Commission of Human Rights and the Inter-American Court on Human Rights (Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and (8) American Convention on Human Rights), para. 38).

⁴¹ See Section 12.

⁴² See Section 12.

⁴³ For example as contained in Articles 237 and 243 of the Constitution.

⁴⁴ See Human Rights Committee, *Arzuaga Giboa versus Uruguay*, CCPR/C/OP/2, par.14.

⁴⁵ See ICJ *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, Principle 6: "States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of liberty, wherever they are detained, prompt access to lawyers, family members and medical personal. (...)".

⁴⁶ Concluding Observations of the Human Rights Committee on Thailand CCPR/CO/84/THA (15), 28 July 2005, paragraph 15 (Advanced Unedited Version), Annex I.

⁴⁷ See Special Rapporteur on Torture, UN Doc. A/56/156, par. 39 (f).

⁴⁸ See in particular article 36 (1) (b) of the Vienna Convention on Consular Relations; See also Principle 16 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, GA/Res/43/173.

⁴⁹ See Article 14, paragraph 3 (g) ICCPR. The right not to self-incrimination constitutes part of the fundamental principles of justice applicable at any time. It is closely linked to the presumption of innocence and the absolute prohibition of torture, cruel and inhuman treatment. It is also contained in Article 243 of the Constitution.

⁵⁰ Articles 19, 21 and 22 ICCPR.

⁵¹ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 5. See also the definition of Principle 2: "A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's territorial integrity against the use or threat of force, or its capacity to respond to the use of threat of force whether from an external source, such as a military threat or an internal source, such as incitement to violent overthrow of government."

⁵² *Ibid*, Principle 5.

⁵³ See also Report of the Special Rapporteur on Freedom of Expression, E/Cn.4/1995/32, 14. December 1995.

⁵⁴ Concluding Observations of the Human Rights Committee on Thailand CCPR/CO/84/THA (18), 28 July 2005 (Advanced Unedited Version)

⁵⁵ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle 55.

⁵⁶ See for example European Court of Human Rights, *Sürek v Turkey* (No 2), Judgment of July 8, 1999, Application 2452 22 /94, para.29; See also Johannesburg Principles, *supra*, Principle 2(b) in particular a restriction sought to be justified on the grounds of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including for example, to protect a government from embarrassment or exposure or wrongdoings (...)".

⁵⁷ See Article 239.

⁵⁸ See above III, 2.

⁵⁹ See Article 12 of the ICCPR. Prohibition of movement may for example affect the right to access of education, to health services or to work to mention only a few implications.

⁶⁰ See also UN Human Rights Committee, General Comment 29, par. 13.

⁶¹ See also ICJ, *Berlin Declaration on Upholding the Rule of Law and Human Rights while Combating Terrorism*, Principle 6.

⁶² See UN Human Rights Committee, General Comment 29, par.