

INTERNATIONAL COMMISSION OF JURISTS



**THAILAND:
COMMENTS ON THE
DRAFT INTERNAL SECURITY ACT**

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INTRODUCTION

The 'Draft Act on the Maintenance of National Security in the Kingdom B.E...' ('the draft Internal Security Act' or 'the Bill') would authorise the Royal Army Commander to implement national security policy and gives far-reaching powers to evaluate and stop threats to national security. He would have the power to command public servants and to issue regulations limiting fundamental rights, guaranteed under the Interim Constitution and the United Nations International Covenant on Civil and Political Rights ('ICCPR'), which Thailand has ratified and is therefore legally binding.

Many of the Bill's provisions are similar to those of the Emergency Decree on Government Administration in States of Emergency ('the Emergency Decree'), introduced and implemented by former Prime Minister Thaksin Shinawatra in the southern border provinces. In its August 2005 report, 'More Power, Less Accountability: Thailand's New Emergency Decree', the ICJ criticised the Emergency Decree for its vague definitions and sweeping powers, reduced accountability to parliament and courts, including immunity from prosecution for government officials.

The draft Internal Security Act is subject to similar criticisms, but raises even greater concerns, as, similar to the *Communist Activities Control Acts* (1952 - 1979), special powers would be given to the Royal Army Commander to use in the whole of Thailand at anytime, and not only in sensitive areas or at times of genuine emergency.

This document assesses the compatibility of the Bill with some key rule of law principles and international human rights law.

EXCEPTIONAL POWERS AND MEASURES

It is not normal for the military to be given exceptional powers on a permanent or standing basis, as envisaged by the Bill. These types of powers would only normally be given to the military in exceptional circumstances and for a temporary period, after a declaration of a state of emergency or official announcement of martial law.

A government should normally officially proclaim a state of emergency or martial law transparently and in consultation with parliament. The implementation of emergency powers should never be taken unilaterally by the military acting on its own authority. This is essential to the concept of democracy; that military authority should always be under the control of the civilian authorities.

International human rights law, in particular the ICCPR, and the Interim Constitution of Thailand (and the 1997 Constitution before it), envisage that the Government may sometimes have to take exceptional measures and suspend some rights when facing a genuine emergency that threatens the life of the nation.¹

¹ See e.g. Article 15 Interim Constitution of Thailand, Article 4 ICCPR and Article 29, 1997 Constitution of Thailand.

However, international law sets clear limits and constraints on measures the Government can take to respond to an emergency.

Under Article 4, ICCPR, a state may declare a temporary state of emergency and suspend rights only if the emergency “threatens the life of the nation”. Not every disturbance or violent act creates this level of seriousness. The situation must be of such immediate 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.² This is a stringent test. Local and isolated law and order disturbances, or perceived threats that may arise, are not enough.

In a democratic state the parliament should be able to probe and question the justification for emergency powers to respond to a specific situation. There should be parliamentary control of the declaration of a state of emergency and the use of extraordinary powers, and also the ability to periodically review such powers.³ None of these safeguards are contained in the Bill, which would give standing emergency-style powers to the military.

The Bill provides far-reaching powers, often vaguely defined, with little accountability to parliament and the courts. Internationally recognised legal standards and Thailand’s international treaty obligations, in particular, under the ICCPR,⁴ and the Interim Constitution,⁵ require the Interim Government to ensure that checks and balances on national security measures respect the rule of law and human rights. Even in an emergency, certain rights cannot be suspended.⁶ During properly declared emergencies some rights can be temporarily suspended, if necessary. However, 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 specific security threat. The state must also show that no lesser measures can meet the threat. During an emergency situation, the state must continue to protect against abuse, in particular by ensuring people can challenge the legality of measures taken.

The ICJ has a long history of analysing emergency laws worldwide, including in Thailand, which has a history of martial laws and states of emergencies that have sometimes led to serious human rights violations.⁷ The ICJ’s concern about this Bill is increased by credible allegations of abuses linked to the use of the Emergency Decree in the southern border provinces and recent use of martial law powers. Experience in other parts of the world shows that increasing the scope of military powers into the sphere of civilian authorities, and limiting checks and balances,

² Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, Principle 39.

³ Siracusa Principles, Principle 55.

⁴ Article 4, ICCPR.

⁵ Article 3, Interim Constitution of Thailand: “the human dignity, rights, liberties and equality, which have always been enjoyed by the Thai people in accordance with the customary practice of democratic government with the King as Head of State as well as Thailand’s existing international obligations, shall be protected”.

⁶ See UN Human Rights Committee General Comment 29, para. 7 et seq., e.g. prohibition of torture or other cruel, inhuman or degrading treatment or punishment, the right to life, right to freedom of thought, conscience and religion, and the presumption of innocence.

⁷ See e.g. International Commission of Jurists, *States of Emergency, Their Impact on Human Rights*, 1983, at 289 et seq.

usually creates an environment where abuse and arbitrary use of power is more likely.

DEMOCRATIC GOVERNANCE, OVERSIGHT AND ACCOUNTABILITY

Parliamentary control over emergency powers

The ICJ is concerned at the lack of democratic oversight and accountability in the work of the bodies the Bill would create.

Sections 1 and 2 of the Bill would establish an Internal Security Operations Committee ('ISO Committee'), dominated by public servants,⁸ with the power and duty to create policy and strategy on national security, to be implemented by the Internal Security Operation Command ('ISOC'), at the central, regional and provincial levels, and in Bangkok. The Director of ISOC would be the Royal Army Commander (Article 9), with responsibility for commanding public servants, and approving and implementing the ISO Committee's security plan (Articles 9, 10 and 11).

The Bill would also give the Director of ISOC exceptional powers to respond to threats to national security (Section 6). Like the Emergency Decree, the parliament is given no role in debating or approving the use of emergency-style powers in a particular case. The exact scope of oversight of ISOC by the National Security Council (NSC), the Cabinet and the Prime Minister is not made clear in the Bill.⁹ The only apparent check and balance on the power of the Director of ISOC is the requirement for the ISO Committee to set the policy and strategy of national security, to be implemented by ISOC and to oversee the annual report of ISOC to Cabinet (Article 7). However, the Director of ISOC is required to "approve" ISO Committee policy (Article 9), which would imply the Director will have the final decision on national security strategy. If the intention is for the ISO Committee, NSC, the Cabinet and the Prime Minister to have stronger oversight powers, then the Bill does not make this clear.

The powers of the Director of ISOC would undermine a core element of the rule of law: the relationship between the civilian and military authorities. The powers given to ISOC, such as the responsibility for commanding public servants, would put civilians under military command. UN bodies, such as the General Assembly, have consistently called upon states to strengthen the rule of law by ensuring that the military remains accountable to a democratically elected civilian government.¹⁰ The UN Human Rights Committee has urged states to ensure the primacy of civil and political authority.¹¹ The structure and powers of ISOC would undermine a key part of the 'principle of legality', which is essential for ensuring human rights; that is, the military should be subordinate to civilian authorities.

Broad definition of national security

⁸ The ISO Committee would be chaired by the Prime Minister, with the Minister of Defence and the Minister of Interior as Deputy Chairs, the other 15 members are comprised of six permanent secretaries and nine other public servants.

⁹ See e.g. Articles 5 and 11.

¹⁰ See e.g. UN Commission on Human Rights, resolution 2000/47 "Promoting and consolidating democracy" of 25 April 2005, para. 1. and UN General Assembly, resolution 56/96 "Promoting and consolidating democracy" 4 Decembre 2000, para. 1 (c) (ix).

¹¹ See e.g. Concluding Observations in Lesotho, CCPR/C/79/Add.106 of 8 April 1999, para 14, and Rumania, CCPR/C/79/Add.111).

The definition of “maintenance of security in the Kingdom”, which is the stated purpose of the Bill, is defined in overly broad terms. Article 3 defines national security to include ensuring a “normal and happy way of life, pride in their Thainess, love and concern for Thai culture and the Land of the Thais”. What constitutes happiness or “Thainess” (*kwam pen Thai*) or concern for Thai culture, are legally vague terms.

Article 3 defines “an act which is a danger to the security of the Kingdom”. The definition appears to suggest that this will include “any act” intended to destroy or damage lives, bodies or property with the intention to cause unrest or damage to national security. It gives very broad examples of such acts; from an “act of terrorism”, to “propaganda”, to “an attack”: none of these terms are defined.

Only a very limited range of acts intended to destroy or damages lives, bodies or property would amount to a threat to the life of the nation justifying the type of emergency-style powers in the Bill. Moreover, an act intending to “cause unrest in the lives of the people” would be insufficient to justify emergency powers. Forms of unrest that do not amount to a grave and imminent threat to the life of the nation cannot justify derogation from human rights provided under the ICCPR.¹²

The combination of these wordings is so broad in scope and meaning it could easily encompass situations that do not “threaten the life of the nation”, as required by the ICCPR to justify use of emergency powers. Problems of public order should usually be dealt with by the ordinary legal and institutional framework, without the need to grant extraordinary powers or to limit rights. If extraordinary powers are to be used, this must only be after proper parliamentary scrutiny and with the protection of appropriate checks and balances.

Limited scrutiny by the courts

The ICJ welcomes the spirit behind Article 4, which provides there should be “checks and balances” on the exercise of power under the Act, and Article 32, which provides that measures taken should only impact on individual freedoms in the “most minimal manner”, being mindful of the protection of rights and liberties. However, these provisions are vague and have no recognised legal meaning. Moreover, there is no guiding principles or mechanism that would assist in turning these good intentions into real safeguards in practice.

The ICCPR, for example, specifies the circumstances in which particular freedoms may be restricted outside a state of emergency,¹³ such as: the precise conditions under which the freedom may be limited must be prescribed by law, restrictions may only be imposed for one of the purposes set out in the ICCPR, the restriction must be necessary for the purpose in a democratic society, the restriction must not jeopardise the right itself and must be consistent with all other rights recognized in the ICCPR or other international instruments, and the restriction must be proportionate to the interest to be protected. The Bill takes none of these criteria into account.

¹² Siracusa Principles, Principle 40.

¹³ See Articles 5, 18 (3), 19 (3), 21 and 22 (3) ICCPR.

Even in situations that may threaten national security, the authorities must ensure that extraordinary powers do not lead to arbitrary exercise of power or weakening of accountability. By ratifying the ICCPR Thailand has reaffirmed that it will deal with security threats without abandoning basic notions of the rule of law. People whose rights are limited because of the draft Internal Security Act should always be able to challenge the legality of measures taken against them; for example, if they are prohibited from travelling (Article 25(2)), prohibited from attending public gatherings (Article 25(3)), or prohibited from leaving home (Article 25(4)).

The Bill does not provide individuals effective ways to challenge any interference with their rights. This is especially important because some of the special powers mentioned in Articles 25, 26, 31 and 34 are so broadly and vaguely described that they could easily be exercised arbitrarily. The lack of access to effective remedies would itself constitute a violation of the ICCPR (Articles 2(3) and 14 (1)).

Impunity

The ICJ is concerned that, like the Emergency Decree, Articles 36 and 37 of the Bill would expressly exclude actions taken under the Bill from legal review in the courts. The ICCPR and other international standards require states to bring to trial and punish those guilty of human rights violations.¹⁴ The UN Human Rights Committee considers that amnesty laws, or other similar measures, help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law, in breach of the ICCPR.¹⁵ The Interim Government has stated its commitment to ending the culture of impunity in Thailand, but these provisions would do the opposite.

VAGUE DEFINITIONS AND SWEEPING POWERS

Vague definitions and powers

The draft Internal Security Act contains several provisions that are so vague and broad that they would grant almost unlimited powers to the Director of ISOC.

Articles 25 and 26 would allow the Director of ISOC to use extraordinary law enforcement powers and limit fundamental freedoms to prevent “an act” which is a threat to national security. As mentioned already, Article 3 defines threats to national security very broadly to include “any act” intended to destroy or damage lives, bodies or property with the intention to cause unrest or damage to national security. This definition is too broad and confusing to be interpreted with any certainty by law enforcement officials, or to be properly understood by the general public.

¹⁴ Decision dated 13 November 1995, Communication N° 563/1993, *Case of Nydia Erika Bautista* (Colombia), CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision dated 29 July 1997, Communication N° 612/1995, *Case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8; *Maria Fanny Suarez de Guerrero v. Colombia*, Communication 45/1979, para 13.3, UN Doc. CCPR/C/15/D/45/1979 of 31 March 1982). See also Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, para. 60.

¹⁵ See e.g. CCPR/C/79/Add.67, paragraph 10.

The ICJ is also concerned about Article 26(2), which would allow the Director of ISOC to give government officials power to “suppress individuals, groups of individuals or organisations causing an action which may be a danger to national security”.¹⁶ This provision is extremely vague. The word “suppress” has no recognised legal meaning, leaving it open to interpretation. To grant military powers based on such an undefined and broad word as “suppress” would create the risk of arbitrary interpretation and abuse of such powers.

Role of the military

The ICJ is concerned at the breadth of powers that would be given to the military. As mentioned already, several provisions would allow military personnel, in particular the Director of ISOC, to have authority over the civil administration. Sections 3, 4 and 5 of the Bill envisage the setting up of a Regional-ISOC in each military region under the direction of the regional military commander in chief, to perform ISOC work at the regional level. Meaning ISOC’s powers will extend to functions normally controlled by the local civilian administration.

Article 12 (2) of the Bill would give the Director of ISOC power to command and oversee the operation of government agencies concerned in keeping security; it does not indicate the relevant government agencies or under what circumstances they would fall under the command of ISOC. Where there is a threat to national security, Article 24 would give ISOC the power to “command state agencies” and the power to appoint Government Officials or advisors to Government Officials.

Article 34 of the Bill would allow Regional and Provincial Directors of ISOC, with the approval of the Director of ISOC, to order state officials to leave an area or to cease their functions if they are considered to “exhibit conduct and behaviour that can become a threat to national security”. Most extraordinarily, Article 24 of the Bill provides that, “State agencies, Government Officers and local people must give their assistance and support to do anything when requested by Government Officials.” These provisions are so vague and broad that they will almost inevitably lead to abuse of power and the encroachment of military powers over the civilian administration.

The ICJ is also concerned at Article 25 (8) of the Bill, which would allow the Director of ISOC to order the use of military force to assist administrative officials to “end violent incidents or control a situation to achieve peace quickly”. This would give very broad discretion to the Director of ISOC in the use of military force in situations normally controlled by the ordinary law enforcement authorities, and would seriously undermine civilian control of the use of military force.

Various provisions in the Bill would also give the Director of ISOC powers similar to the powers of criminal investigations (Articles 8, 12(1), 14, 26, 30). The UN Human Rights Committee has consistently expressed its concerns about military bodies having powers to carry out criminal investigations.¹⁷ Whilst the authorities

¹⁶ See also Article 3 (2) which refers to carrying out “protection and suppression in order to be able to control a situation arising from an act which is a danger to security in the Kingdom”.

¹⁷ HRC Concluding observations (Colombia), CCPR/C/79/Add.76, Bolivia (CCPR/C/79/Add.74); France (CCPR/C/79/Add.80.) UN Committee against Torture (Ecuador, A/49/44, para. 105), UN Special Rapporteurs on extra-judicial executions (E/CN.4/1990/22/Add.1) torture (E/CN.4/1995/111) independence of judges and lawyers (E/CN.4/1998/39/Add.2); UN Working Group on Enforced or Involuntary Disappearances (E/CN.4/1994/26, par. 86; E/CN.4/1990/13, par.

may have a legitimate interest in seeking cooperation in relation to criminal investigations, those powers are already laid down, with safeguards, in the Criminal Procedure Code and are restricted to the ordinary law enforcement and judicial authorities.

In sum, the use of military forces to perform roles usually carried out by civilian authorities, in particular, if there are no clear limits, gravely increases the risk of human rights violations, as armed forces are not trained to perform such acts. The military should not replace civilian authorities unless strictly necessary in a public emergency that genuinely threatens the life of the nation; for example, where civilian authorities become incapable of performing their ordinary functions. Even then it should be limited to the extent strictly required by the exigencies of the situation and for a limited period of time.¹⁸

ARREST AND DETENTION

Article 26 of the Bill would allow the Director of ISOC to give officials the power to arrest and detain a person, on the basis of a court warrant, for seven days initially, with possible seven day extensions up to a maximum 30 days in total.

Normally, people should only be arrested if suspected of having committed a criminal offence. The Bill, like the Emergency Decree, would allow arrest and detention as a preventive measure. This is known as administrative or preventive detention. It is not prohibited under international law, but it is an exceptional measure only to be used with appropriate safeguards, if the normal criminal law and procedure are inadequate to respond to the situation. The Bill, however, envisages the use of administrative detention on broad grounds even when a state of emergency has not been declared.

Grounds for arrest and detention

The arrest and detention provisions described in Article 26 (1) of the Bill are similar to those in the Emergency Decree and raise similar concerns. A government cannot arbitrarily detain people; meaning, detention must be prescribed by law and be reasonable in all the circumstances. The law must state the permissible grounds for detention clearly, so people know exactly what acts could lead to detention. Article 26 (1) defines the grounds for detention as follows:

“any person suspected of involvement in an act which causes an act which is a danger to security of the Kingdom, uses others to act, advertises or supports that act or conceals information on the act as necessary in order to prevent that individual from acting or cooperating with any act which will cause an act which is a danger to the security of the Kingdom or in order to ensure cooperation in preventing that same act.” (unofficial translation)

The ICJ is concerned that these grounds are too broad and vague, making them open to arbitrary use and potential abuse. The words “suspected of involvement” and “in order to ensure cooperation”, combined with the broad definition of a “danger to the security of the Kingdom”, could result in persons facing arrest and detention who are only remotely connected to a security threat. Experience in other

22; E/CN.4/1992/18, par. 367), E/CN.4/1989/18/Add.1, par. 133).

¹⁸ See e.g. Article 4 (1), ICCPR.

parts of the world also suggests that such broad powers of arrest and detention may be used arbitrarily to suppress legitimate freedoms, such as freedom of expression, association and assembly.

Judicial supervision and *habeas corpus*

Where administrative detention is used it must comply with the protections in the ICCPR (Articles 2, 7, 9 and 16).¹⁹ The ICJ welcomes the inclusion of some judicial supervision in Article 27 of the Bill, which would require the relevant Government Official to request Court permission prior to arrest and detention. However, there is no requirement that the detained person be brought promptly before a judge, which is required by Article 9 (3) ICCPR and would help safeguard against torture and enforced disappearance, as the judge is able to physically see the detainee. In this context, the UN Human Rights Committee has previously stated, in relation to Thailand, that “[a]ny detention without external safeguards beyond 48 hours should be prohibited”.²⁰

Nor does the Bill affirm the right of a detainee to take proceedings before a court without delay on the lawfulness of detention (*habeas corpus*), as required by Article 9 (4) ICCPR. The UN Human Rights Committee has consistently maintained that the ICCPR requires states to ensure the right to *habeas corpus*, in all circumstances.

Place of detention and access to the outside world

Similar to the Emergency Decree, the draft Internal Security Act states that a detained person should not be held in police stations, penal institutions or prisons and should not be treated as a wrongdoer. It does not state where they would be held and under whose authority (civilian or military). The risk of ill-treatment in detention or enforced disappearance is significantly increased when detainees are held in irregular places of detention, without the normal procedures and safeguards. In the southern border provinces, the ICJ is already aware of allegations linking detention in military custody, under the Emergency Decree, with ill-treatment of detainees. Last month, the National Human Rights Commission was sufficiently concerned by such allegations to send a fact-finding mission to examine detention conditions in one military camp.

The ICJ welcomes the inclusion of some safeguards against abuse, such as a written record of the arrest and detention to be submitted to the court and made available to the family (Article 27). However, the ICJ is concerned that other important rights - such as the right to be notified of the reasons for arrest, to be able to immediately inform relatives, the right to a lawyer and medical attention - are not included in the Bill. In fact, the rights of suspects are less than those of defendants to ordinary criminal proceedings in Thailand, which appears contrary to the intended spirit of Article 27; not to treat detained persons as wrongdoers.

Nor does it expressly state that detainees will be permitted access to the outside world. International law prohibits prolonged *incommunicado* detention²¹ and secret

¹⁹ See e.g. *Concluding Observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93, para. 21; *Concluding observations of the Human Rights Committee: Colombia*, CCPR/CO/80/COL., para. 9.

²⁰ *Concluding Observations of the Human Rights Committee on Thailand*, CCPR/CO/84/THA (13), 28 July 2005.

²¹ Human Rights Committee, General Comment No 20: *Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, para. 6; Committee against Torture (Reports A/54/44,

detention.²² According to the UN Special Rapporteur on torture, *incommunicado* detention is the most important determining factor as to whether an individual is at risk of torture.²³ UN treaty bodies have recommended that states should make provisions against *incommunicado* detention and prohibit this practice by law.²⁴ The Bill should therefore contain express provision for detainees to have access to a judge, a lawyer, family and medical care.²⁵ Access to legal counsel should be expressly given within 24 hours of arrest.²⁶

Detention for “training”

Article 31 of the Bill would give discretion to an Inquiry Official and the Director of ISOC to have an “offender”, who committed wrongdoing due to being “misguided or misinformed”, to attend “training” for up to six months and to report to the authorities thereafter for a period up to one year, provided the alleged offender gives consent. The ICJ is concerned that in practice agreement to attend such training programmes may not be entirely voluntary. Reports from the implementation of “citizens improvement programmes” in the southern border provinces indicate that whilst attendance is officially voluntary those invited to attend feel they have no choice.

Article 9 (1) ICCPR provides that no one shall be arbitrarily detained. The UN Human Rights Committee considers that this applies to all deprivations of liberty, including where detention is for “educational purposes”,²⁷ which would include training. Article 31 would give the Inquiry Official and the Director of ISOC the power to decide whether a person was a danger to national security, applying very broad grounds, and then to recommend detention, without the need for any judicial scrutiny of the lawfulness of detention. In the ICJ’s experience this provision would almost certainly be open to abuse, and is likely to lead to arbitrary detention.

RESTRICTIONS ON FREEDOMS

Article 25 of the Bill would give the Director of ISOC power to issue various regulations restricting rights to freedom of expression, freedom of assembly, freedom of movement and the right to privacy.²⁸ The timeframe for these

paras. 121 and 146; A/53/44, para. 135; and A/55/44, para. 182). See also Inter-American Court of Human Rights, Judgment 29 July 1988, *Velasquez Rodriguez Case* (para. 156) and Judgment of 12 November 1997, *Suarez Rosero Case* (paras. 90-91) and Inter-American Commission on Human Rights (*Report on Terrorism and Human Rights*, paras. 211 and 213)

²² *Ibidem*, para. 13 (b). See also the European Court on Human Rights, Judgment of 25 May 1998, *Kurt vs. Turkey*, paras. 123 and 124, Article 17 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance, *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 12.

²³ *Report of the Special Rapporteur*, E/CN.4/2004/56, para. 37, and *Report of the Special Rapporteur*, A/57/173, 2 July 2002, para. 16.

²⁴ See, among others, the Human Rights Committee, General Comment No 20, *op. cit.*; Report of the Human Rights Committee, A/54/40, *Concluding Observations on Chile* (para. 209); Report of the Human Rights Committee, A/53/40, *Concluding Observations on Tanzania* (para. 393) and *Uruguay* (242); *Preliminary Observations on Peru*, CCPR/C/79/Add.67, para. 23, and the Committee against Torture (*Concluding observations on Georgia and Ukraine*, in 1997; *Spain* (1998); *Libyan Arab Jamahiriya* (1999) and *Finland*, A/51/44, para.127).

²⁵ See e.g. Articles 9 (4) and 14 (3) ICCPR, and Principles 4, 11, 15, 16, 17, 18, 19 and 24 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

²⁶ See e.g. *Report of the Special Rapporteur*, A/57/173, 2 July 2002, para. 18. See also: E/CN.4/2004/56, para. 32.

²⁷ See UN Human Rights Committee, General Comment 8, para. 1.

²⁸ Articles 12, 17, 19, 21.

restrictions “may be stipulated”, to avoid causing any unreasonably suffering, but no specific time limitations are stated; save that restrictions should be lifted speedily when the threat to security has ended. Exceptional restrictions, such as these, should be limited to specific time periods and subject to regular review, to avoid their continued use after the threat has ended.

Freedom of expression and assembly

Article 25 (3) of the Bill would authorise regulations to “prohibit gatherings or assembly, public showing of corpses, or advertising if there is cause to believe it is intended to invite or encourage others to commit an illegal act”. Both freedom of expression and assembly can be limited, but any limitations must be prescribed by law and strictly necessary and proportionate to protect, among other things, national security or public order. The law must draw a clear distinction between peaceful use of expression or assemblies and those intended and likely to incite immediate violence.²⁹ Only in exceptional cases will national security justify interfering with freedom of expression or freedom of assembly. The Bill as drafted would allow for vague, broad and arbitrary restrictions.

Privacy

Article 26 (4), (5) and (6) of the Bill would allow the Director of ISOC to give “officials” wide powers of search and seizure, including the power to search residences and vehicles, and to seize documents and freeze assets. The Bill envisages that military personnel may have these powers. Some of these powers, such as power to enter any residence, are highly intrusive interferences with the right to privacy, which is protected by Article 17 ICCPR.

The ICJ welcomes the attempt to provide for safeguards, in particular that searches must be carried out according to the Criminal Procedure Code, at least when carried out by civilian officials. However, in many cases search warrants would not be required and in other cases the draft Bill is unclear.

Searches of individuals, vehicles and residences, under Article 26 (4), for objects that may be intended to be used against national security, would not require a search warrant. On the other hand, Article 26 (5) envisages a court warrant being required for the power to enter a residence, to search for suspects or objects, where prompt action is required. However, the article is confusing and contradictory as it goes on to state that a warrant is not necessary when immediate action is required, which would imply that a warrant will not normally be required; unless the courts are able to make a fine distinction between the words “prompt” and “immediate”.

Under the Criminal Procedure Code and the former 1997 Constitution (Article 239), search and seizure powers usually require court authorisation. The draft Bill does not provide sufficiently clear and effective safeguards to avoid abuse of these powers.

Freedom of movement

²⁹ See e.g. Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 5.

Article 25 (2) of the Bill would give the Director of ISOC the power to “prohibit the use of route of transportation or vehicles or put conditions on the use of transportation and vehicles” and to “prohibit any person from leaving their residence during a designated time period without permission from a Government Official”. The right to freedom of movement is a fundamental freedom ensured by Article 12 ICCPR. Although freedom of movement can be limited, any limitation must be strictly necessary and proportionate to protect, among other things, national security or public order. The Act as drafted would allow for vague, broad and arbitrary restrictions on freedom of movement.
