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IMPLEMENTATION OF THAILAND'S EMERGENCY DECREE

JULY 2007



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SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

This legal memorandum summarises research and analysis undertaken by the International Commission of Jurists (ICJ) on implementation of the Emergency Decree on Government Administration in States of Emergency B.E. 2548 (“the Emergency Decree”) in Thailand’s three southern provinces of Pattani, Yala and Narathiwat (“the South”), in light of international law, in particular international human rights law and best practices around the world. The majority of this research was carried out in April – June 2006, and updated with further research and interviews up to 1 February 2007.

The ICJ, in its report, *More power, less accountability: Thailand’s new Emergency Decree* of August 2005, provided a legal analysis of the Emergency Decree. The ICJ recognised the security threat the Government faces in the South, but expressed concerns that the Emergency Decree undermined the rule of law and Thailand’s binding international obligations. This memorandum now focuses on four main areas of concern, identified by the ICJ’s research, namely: (i) issues of liberty and security, in particular arrest and detention procedures; (ii) the treatment of detainees; (iii) enforced disappearances; and (iv) continued impunity for past offences by security forces.

The ICJ hopes that its analysis of key legal principles may provide some guidance to the Interim Government as it considers whether new national security legislation is required and as it develops policies to achieve a peaceful solution to the violence in the South. The analysis may also be useful for government agencies and committees or civil society organisations that are seeking to improve respect for human rights, examining allegations of human rights violations and working on reform of the justice system in Thailand, which the Interim Government has stated to be a key priority.

MAIN CONCLUSIONS AND PRINCIPAL ISSUES OF CONCERN

I. On the role of the rule of law in addressing the situation in the South

The ICJ unequivocally condemns violent attacks carried out by insurgents that are prohibited under domestic and international law. Thailand has the right and the duty to protect the security of all those under its jurisdiction. However, the ICJ strongly believes that any peaceful solution to the situation in the South will be more likely if government policies are founded on respect for human rights and the rule of law.

The ICJ does not underestimate the seriousness of the conflict in the South, the complexity of the situation, or the scale of the task faced by the security forces in protecting citizens from violence. However, these ends are best achieved by strengthening adherence to the rule of law and by convincing the population in the South that the law will be applied even-handedly – including to members of the security forces.

The combination of a lack of redress for past violations by security forces, delays in the administration of justice and long periods of detention for those awaiting the results of security trials, the lack of basic rights for detainees under the Emergency Decree,

evidence of enforced disappearances, the coercive use of “citizens’ improvement camps” all serve to weaken confidence in the justice system and undermine the rule of law.

II. On the applicability of international human rights law

Thailand is bound by international human rights law generally and in relation to the South. Of particular relevance in the context of the Emergency Decree, Thailand is a party to the International Covenant on Civil and Political Rights (ICCPR). The obligations in the ICCPR should be read together with other international standards, such as: the Standard Minimum Rules for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment; the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Code of Conduct for Law Enforcement Officials; and, the Basic Principles and Guidelines on the Right to a Remedy and Reparation.

These international laws and principles should be used to assist in interpreting and applying relevant articles of the Thai Constitution and implementing national laws.

III. On how the Emergency Decree exceeds the limits of a necessary and proportionate security response

The Emergency Decree in its current form is seriously flawed and cannot be considered a necessary and proportionate security response to the threat faced. The ICJ remains concerned that the powers conferred on the Prime Minister and delegated officials, under the Emergency Decree, go beyond the limited and proportionate response to a grave threat to the life of the nation, envisaged by Article 4, ICCPR.

The Government has a responsibility to show that every exceptional measure in the Emergency Decree is temporary, strictly necessary and proportionate to meet the specific security threat. The ICJ is concerned that the state of emergency has been in place for nearly two years, with martial law in place before that and applied again since September 2006. Further, certain provisions in the Emergency Decree, in particular Sections 4, 9, 11, 12, 16 and 17, and the practices arising from those provisions, do not comply with Thailand’s obligations under international human rights law.

IV. On the obligation to cease violations of international law

The ICJ has identified violations of ICCPR Articles 2 (1) (obligation to ensure ICCPR rights) and (3) (right to an effective remedy), 6 (right to life), 7 (prohibition of torture or other cruel, inhuman or degrading treatment), 9 (1) – (4) (rights to liberty and security),¹⁰ (right to humanity and dignity) and 14 (3) (fair trial rights). A violation of international human rights law constitutes an internationally wrongful act. Thailand is therefore obliged to cease those acts¹, offer assurances of non-repetition, and make reparation for injuries suffered².

¹ Article 2, International Law Commission, Articles on State Responsibility, 2001.

² Articles 30 and 31, International Law Commission, Articles on State Responsibility, 2001.

V. Individual rights and obligations violated

The ICJ's research identified concerns about the liberty and security of the person, treatment of detainees, enforced and involuntary disappearances, and systemic impunity in the South. Some of the areas of concern, such as arrest and detention procedures and the use of "citizens' improvement camps", are concerns specific to the South, or to the implementation of the Emergency Decree. Other concerns, such as reports of enforced disappearances and lack of accountability for government officials, while they currently have a more serious impact in the South, are of concern nationwide and are the result of systemic problems with the justice system in Thailand as a whole.

Liberty and security of the person

The ICJ is concerned about the arbitrary detention of persons under the Emergency Decree for the purpose of interrogation, and also for securing attendance at "citizens' improvement camps", as well as the inadequate judicial scrutiny of such practices, contrary to international standards and best practice around the world.

Administrative detention, the power to arrest and detain without charge (Section 12), has been widely used, often arbitrarily and almost exclusively for the purpose of interrogating suspects. A substantial proportion of those detained have been charged with criminal offences. In many cases the charges appear to be based on information contained in statements obtained in the course of their detention.

More than 1,000 people are believed to have been compelled to attend "citizens' improvement courses" at military camps. The ICJ is concerned that attendance is not voluntary, despite the authorities' claims to the contrary. In practice, "citizens' improvement camps" often amount to a form of arbitrary detention in violation of international law. Many of those attending "citizens' improvement camps" are first formally detained under the Emergency Decree, or have been threatened with arrest under the Emergency Decree if they failed to attend. People who have attended "citizens' improvement" courses also find themselves under suspicion by the authorities, their communities and insurgents, undermining the security of the person, which the Thai authorities are obliged to ensure.

There is a lack of adequate judicial scrutiny of administrative detention under the Emergency Decree and internationally recognised safeguards are not being applied. Individuals are detained on the basis of untested evidence with a low standard of proof and may be detained for up to 30 days without charge. Detained persons are not required to be brought before the court at any stage, whereas Thai law normally requires a detained person to be brought before the court within 48 hours. There is legal ambiguity as to whether the right to *habeas corpus* exists under the Emergency Decree. This, together with other factors, means that the legal basis of detention is not being challenged.

Treatment of detainees

The ICJ identified several aspects of the detention process that breach international standards for the treatment of prisoners. The ICJ has concerns about the suitability of the places of detention being used and the denial of the basic rights of detainees.

Pre-existing institutional deficiencies relating to conditions of detention and treatment of detained persons in the South has been compounded by the Emergency Decree.

Detained persons are being held in irregular places of detention, such as Yala Police School, and the army camps at Borthong and Inkayut, which has increased the risk of abuse of detainees due to the lack of regular procedures and safeguards. The ICJ received reports of detained persons being held in cells, rooms, or freight containers, with lack of adequate floor space, lack of proper ventilation, without natural light and with artificial light on 24 hours a day, preventing them from sleeping and preventing Muslims from knowing the correct hour to pray.

The ICJ received credible reports of the poor treatment of detained persons, in some cases amounting to torture or other cruel, inhuman or degrading treatment. The ICJ is deeply concerned about cases of detention under the Emergency Decree in which the detention has been used as a means to interrogate detained persons for the primary purpose of extracting confessions, in some cases by ill-treatment.

The failure to implement safeguards required by international law has contributed to the risk of ill-treatment of detainees; including, the denial of access to lawyers, denying or delaying access to family, the absence of any routine medical examination during detention, and the failure to produce detainees before a court.

Enforced Disappearances

The use of enforced disappearance has continued in the South, sustained by a systemic lack of accountability in the army and the police, a culture worsened by the Emergency Decree, which grants exceptional powers without appropriate safeguards and provides immunity from prosecution.

The practice of enforced disappearance violates multiple human rights. The Interim Government has acknowledged the existence of the problem, but not its scale. Families of those who disappear are often afraid to report to the authorities, making it impossible to estimate the true extent of the problem.

Investigation of more than 20 cases of alleged enforced disappearance in the course of the southern conflict has been inadequate. Police have displayed a lack of impartiality and interest, and the necessary techniques, such as forensic science, are not systematically deployed. Under international law Thailand is obliged to ensure a prompt, thorough, independent and impartial investigation of enforced disappearances by a competent state authority, and to ensure the perpetrators are prosecuted and tried fairly.

Impunity

The immunity clause for officials under the Emergency Decree (Section 17) has effectively reinforced an existing status quo in which officials are not prosecuted for human rights violations. Victims and their families either believe they have no remedies or that they will not get justice.

Patterns of impunity include the lack of accountability for past serious violations. The ICJ is concerned about the lack of an effective and genuinely independent investigation into the enforced disappearance of human rights lawyer Somchai Neelapaijit, despite former Prime Minister Thaksin Shinawatra saying he knew Somchai Neelapaijit was dead. Nor has there been an independent investigation into the 2,245 deaths during the 2003 'war on drugs'. The post-mortem inquest into the Krue Se killings has not yet been acted upon by the Public Prosecutor or the inquiry officials. The post-mortem inquest into the Tak Bai killings of 2004 has not yet been concluded and there has been no post-mortem inquest initiated into the deaths of seven protestors, who died as a result of the suppression of the Tak Bai protest by security forces.

The ICJ is also concerned that the reports of the government-appointed commissions of inquiry into the 2004 killings have not led to the accountability of state officials involved. Those officials, who were identified by the commissions as being responsible, have not been held accountable, including through prosecutions for any offence they may have committed. This has reinforced the sense of immunity enjoyed by the security forces and government officials.

Exceptional circumstances such as political instability or public emergencies do not justify exempting law enforcement officials from legal action. Failure to properly investigate and bring to justice perpetrators of serious human rights violations is itself a violation of international law. The ICJ is therefore deeply concerned at the continuing lack of accountability in the South.

RECOMMENDATIONS

The ICJ has welcomed the reform agenda of the Interim Government of H.E. Prime Minister Gen. Surayud Chulanont (Ret.), which includes policies to "reform the judicial system with public participation" (Policy 3.8) and to "increase the effectiveness of agencies and personnel in the judicial process" (Policy 3.9).³ The Prime Minister has also indicated that "re-establishing the rule of law" would be one of the key agendas of the Interim Government.⁴ Given this reform agenda, and the concerns outlined in this memorandum, the ICJ respectfully offers the following recommendations to the Interim Government:

³ Policy Statement of the Council of Ministers, delivered by H.E. Prime Minister General Surayud Chulanont (Ret.) to the National Legislative Assembly, 3 November 2006.

⁴ Speech of H.E. Prime Minister General Surayud Chulanont (Ret.) at the Foreign Correspondents' Club of Thailand, 7 November 2006.

EMERGENCY LAWS

- 1) The Executive Decree on Government Administration in States of Emergency should be repealed or significantly amended.

If the Government and Parliament consider it necessary to have a re-revised emergency law, some elements that should be contained in the law include:

- Parliament should play a significant role in the declaration and oversight of a state of emergency, and the situation justifying the state of emergency should correspond to the standard of an emergency that “threatens the life of the nation”, as set out in the International Covenant on Civil and Political Rights.
- There should be a procedure for notifying the United Nations of the declaration of an emergency, including any permissible derogation from international obligations.
- Any limitations on or derogation from the exercise of internationally guaranteed rights should be limited in duration, strictly are required, and proportionate to the specific threat posed. It should be clear that the rights that are “non-derogable” under international law can never be suspended, which include the right to life (Article 4, ICCPR), the right not to be tortured or otherwise ill-treated (Article 7, ICCPR), and the right to freedom of thought, conscience and religion (Article 18, ICCPR).
- It should be clearly stated which officials have responsibility for implementing the provisions of the emergency law and what their powers and responsibilities are. No official should be given any broad and undefined powers such as those contained in Sections 9 and 11 of the present Emergency Decree.
- All officials responsible for implementing the law should be explicitly stated to be under the authority of the ordinary law of Thailand, with no immunity for any criminal acts carried out in the exercise of their responsibilities.

- The decisions and actions of officials exercising powers under the emergency law should be subject to review by the courts.

ARREST AND DETENTION PROCEDURES AND CONDITIONS OF DETENTION

- 2) The rights of suspects and detainees provided for under the Criminal Procedure Code should be applied, whether or not the Emergency Decree has been repealed.
- 3) The procedures for arrest and detention should adhere to international human rights law and standards, including:
 - Arrests should not be made solely for the purposes of interrogation. A person should be arrested and detained if there is sufficient evidence that they may have committed a criminal offence and for the purpose of charging and prosecuting the person. A person should only be detained temporarily without charge under the Emergency Decree (preventive detention), to the extent that this power complies with international standards (including specific and clear reasons for the detention to pre-vent an offence being committed) and safeguards are in place to prevent abuse of such preventive detention powers.
 - The detained should be brought before a judge promptly. The United Nations Human Rights Committee in its Concluding Observations on Thailand stated that “any detention without external safeguards beyond 48 hours should be prohibited”.⁵ The evidence justifying detention should be authorised and regularly reviewed by a court.
 - The Government should clarify that all detainees continue to have the right to challenge the legality of their detention before a court (*habeas corpus*).
 - Any person who is detained should be given prompt access to a lawyer. They should have legal representation and the right to be present in any court proceedings.

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

- Detainees should be held in regular and legally authorised places of confinement, subject to regular inspection and supervision by the judiciary and independent expert bodies, such as the National Human Rights Commission. The conditions of detention should comply with minimum standards, including relating to size of cells and access to natural light.
 - Families should be notified promptly of the location of de-tainees, of any transfers, and the reason for the arrest and detention, and be allowed to visit and correspond with the detainees.
 - All detainees should receive a medical examination upon detention and have regular access to medical assistance.
- 4) “Citizens’ improvement programmes” should be reviewed, given the record or perception of coerced attendance. There are inherent problems in authorising the military to implement such programmes, as they are not trained in civilian education and, given their law enforcement role in the South, it creates an ambiguity as to whether attendance is voluntary or compulsory.
 - 5) All legal notifications in the southern provinces (such as arrest warrants and search warrants) should be written bilingually in Thai and Yawi and read out in Melayu for those who are unable to read.
 - 6) The Government should ensure that law enforcement officials are effectively trained in arrest and detention procedures in accordance with Thai and international standards, in collaboration with institutions such as the National Human Rights Commission and relevant civil society organisations. Information should at the same time be given to local communities on correct arrest and detention procedures and the rights of detainees.
 - 7) Melayu-speaking court interpreters should be readily available in all cases, including during interviews by the police and military.
 - 8) The Government should ratify the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol.
 - 9) The Government should ratify the United Nations International Convention for the Protection of All Persons from Enforced Disappearance.

INVESTIGATION OF SERIOUS HUMAN RIGHTS VIOLATIONS

- 10) There should be prompt, independent and thorough investigations of allegations of human rights violations, including, but not limited to, enforced disappearances, extrajudicial executions, torture and other ill-treatment, and unlawful arrest and detention.
- 11) The authorities should ensure there is no harassment or intimidation of victims, their families or their representatives reporting violations, and where necessary provide effective protection for victims reporting human rights violations and witnesses to human rights violations.
- 12) Where there are allegations of enforced disappearance, the authorities should take steps to establish what has happened to the victims and keep relatives informed, bring to justice those found responsible for the enforced disappearance, provide adequate compensation and other reparation to the disappeared person and/or their relatives as appropriate, and take action to ensure that similar violations do not occur in the future.
- 13) The post-mortem inquiries into the Tak Bai deaths and the killings at the Saba Yoi market on 28 April 2004 should proceed without unnecessary delay and the rights of witnesses, families and lawyers should be respected. An independent investigation into the Tak Bai deaths and all killings on 28 April 2004 should be opened, with any security force officials found responsible for human rights violations being brought to justice.
- 14) The Public Prosecutor should provide the record of the post-mortem inquiry into the Krue Sae deaths to police inquiry officials to investigate whether or not there is evidence of a criminal offence. The inquiry report should then be promptly submitted to the office of the Attorney General to consider whether or not to file any criminal proceedings.
- 15) The investigation into the enforced disappearance of Somchai Neelapaijit should be given high priority by the Thai Government, with a view to bringing murder and similar appropriate charges against those responsible, and an independent investigation initiated into previous impediments into the investigation and any government officials held responsible.
- 16) An independent commission of inquiry should be established to investigate the killings during the 'war on drugs'. The Department of Special Investigation should be given sufficient resources and institutional support to investigate those cases submitted to it.

INVOLVEMENT OF CIVIL SOCIETY AND INTERNATIONAL ORGANISATIONS IN THE REFORM PROCESS AND INCREASING CONFIDENCE IN THE JUSTICE SYSTEM

- 17) The Interim Government should invite the United Nations Office of the High Commissioner for Human Rights (OHCHR) and experts of the United Nations Human Rights Council (including the Working Group on enforced or involuntary disappearances, the Working Group on arbitrary detention and the Special Rapporteur on extrajudicial, summary or arbitrary executions) to visit the South and give them unhindered access to all places of detention, including “citizens’ improvement camps”, in order to show the local community in the South and the international community that the Thai Government is committed to ending impunity and providing an atmosphere of transparency and justice.
- 18) The Government should continue the process of including well-respected civil society and human rights actors in reform bodies. It should take initiatives to foster an understanding of the role of human rights defenders and civil society actors in the South, on behalf of civil and security agencies, in order to improve the safety of human rights defenders and improve the capacity of the security forces to reform themselves and halt practices which have resulted in human rights abuses in the past.
- 19) The Government should actively encourage international human rights and other relevant organisations to contribute to the process of reform and peace-building in the South, so as to integrate international standards and law into new initiatives, laws and regulations.
- 20) The Government should act on its stated commitment to utilise the recommendations of the former National Reconciliation Commission.

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THE IMPLEMENTATION OF THAILAND'S EMERGENCY DECREE

PART I : INTRODUCTION

1. OBJECT AND PURPOSE OF THE LEGAL MEMORANDUM

This legal memorandum, prepared by the International Commission of Jurists ('the ICJ'), analyses the implementation of the Emergency Decree on Government Administration in States of Emergency ('Emergency Decree') in Thailand's three southern provinces of Pattani, Yala and Narathiwat ('the south'), during the period April 2006 to February 2007 by reference to international human right law and rule of law principles.

Over 2,200 people have died in attacks in the South since early 2004. On 15 July 2005 Prime Minister Thaksin Shinawatra enacted the Emergency Decree, replacing Martial Law. Four days later he declared a state of emergency in the South and parts of Songkla, which was extended four times in the subsequent year and at the time of writing remains in place.

The ICJ in its report *'More power, less accountability: Thailand's new emergency decree'* (August 2005) provided a legal analysis of the Emergency Decree. The ICJ recognised the security threat the Government faces in the South, but expressed concerns that the Emergency Decree undermined the rule of law and Thailand's binding international obligations.

In April - June 2006, as part of a broader process of consultations and fact-finding on human rights and the rule of law in Thailand, designed to inform the ICJ's future programme of work in the country, the ICJ's Secretariat in Geneva sent a researcher to Thailand to gather information on the exercise of powers under the Emergency Decree and respect for the rule of law and administration of justice in the South. This information has been supplemented with more recent consultations with relevant stakeholders. This legal memorandum outlines concerns identified by the ICJ regarding the implementation of the Emergency Decree and the administration of justice in the South.

The situation in the South raises a wide range of human rights issues, but this memorandum focuses on four main areas of concern: (i) issues of liberty and security, in particular arrest and detention procedures; (ii) the treatment of detainees; (iii) enforced disappearances; and (iv) continued impunity⁶ for past offences by security forces.

Given the continuing and unabated violence and reports of human rights violations in the South, the ICJ considers it necessary to reiterate some basic principles regarding the scope and applicability of human rights law. The ICJ also hopes that its analysis of key legal principles applicable to the South may provide some guidance for government

⁶ The ICJ uses the United Nations definition of 'impunity': '...the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.' Definition A. Impunity P.6 Updated Set of principles for the protection and promotion of human rights through action to combat impunity E/CN.4/2005/102/Add. 18 February 2000.

agencies and committees or civil society organisations examining allegations of human rights violations and work on reform of the justice system in Thailand, which the Interim Government has stated to be a key priority.

Measures used to respond to the situation in the South should be based on respect for the rule of law and be in compliance with international human rights law. The ICJ unequivocally condemns all violent attacks by insurgents. Such acts are prohibited under domestic and international law and Thailand has the right and the duty to protect the security of all those under its jurisdiction.⁷

While the ICJ is concerned at reports of the abuse of exceptional powers under martial law in place since 19 September 2006, this is not the subject of this memorandum.

⁷ Article 2, para. 1, the International Covenant on Civil and Political Rights.

2. APPLICABLE SECURITY AND EMERGENCY LAWS IN THE SOUTH

Martial law

The initial response by the government of Prime Minister Thaksin Shinawatra to the declining security situation after January 2004⁸ was to impose martial law in the South, as well as parts of Songkla. Martial law gives the military extremely broad powers, for example:

- To search premises, people and vehicles and to intercept mail and “anything sent within the area where the martial law is officially stated”;
- To “enlist” civilians to support military activities and to commandeer vehicles, animals, food, weapons, equipment or businesses;
- To prohibit assemblies, distribution of publications, radio or television broadcasts, use of roads, possession of communications devices, weapons or chemicals, and freedom of movement;
- To confiscate items;
- To commandeer premises for its own use;
- To destroy property;
- To expel anyone from the area;
- To detain anyone for up to seven days when they “cause some actions that may be potentially harmful to the kingdom or violate any provisions of the martial law as well as the order of the army,” if the purpose of the detention was “interrogation or any actions necessary for the army’s purposes”.⁹

Under martial law power is exercised by the army, rather than the police and civil authorities. Martial law was temporarily replaced by the Emergency Decree, but reintroduced on 19 September 2006 and remains in place in the South.

Emergency Decree

The Emergency Decree, enacted on 15 July 2005, and applied in the South on 19 July 2005 in place of martial law, after a series of attacks in Yala Province, marked a shift away from military to executive control.¹⁰ The state of emergency in the South and parts of Songkla has been renewed at three-monthly intervals and is still in place.

⁸ After a coordinated series of arson attacks on schools across the three southern provinces and ambush of a military camp in Narathiwat during which weapons were stolen.

⁹ Act of Martial Law B.E. 2483

¹⁰ Press Briefing on the Promulgation of the Royal Decree on the Administration of State Affairs in the State of Emergencies by Deputy Prime Minister Wissanu Krua-Ngam, 15 July 2005 (translated summary with the ICJ).

The ICJ in its August 2005 report, *More power, less accountability: Thailand's new emergency decree*, expressed concerns about the Emergency Decree. These can be broadly summarized as concerns over increased and vaguely worded powers given to the Prime Minister, permitting the delegation of sweeping emergency powers to law enforcement officials, and reduced accountability to the parliament and the courts.

The Emergency Decree gave broad – apparently unlimited – powers to the Prime Minister, to delegate powers to “competent officials” or “a person having identical powers and duties to a competent official”. In practice, the delegated powers appear to be exercised by joint committees of police, army and civil authority at the provincial, district and sub-district level. The delegated powers cover a wide range of issues:

- The power to detain without charge for up to 30 days (Section 11).
- The power to summon any person to report to the authorities (Section 11).
- The power to enact regulations restricting the right to freedom of expression and the right to freedom of assembly and association (Section 9).
- The power to search or to remove or demolish buildings (Section 11).
- The power to inspect letters, books, print materials, telegraphic transmissions, telephone conversations or other means of communication (Section 11).
- The power to limit and suspend freedom of movement (Section 9).
- The power to evacuate populations from a given area (Section 9).
- The power to prohibit citizens from leaving the country (Section 11).
- The power to expel aliens (Section 11).

In some of these instances it is impossible to know whether these powers have been used. Instructions and decisions are not subject to review under Thai administrative law and the Emergency Decree itself contains no obligation that use of its powers be notified to the public. For example, it is perfectly possible that there has been interception of mail, electronic mail and telephone calls, but this is not publicly known. Other powers, such as the restrictions on expression, assembly and association and the evacuation of populations have apparently not been invoked.

Beyond these powers, which are relatively clear, officials are given a broad apparently ‘catch-all’ power that is open to abuse. Section 11 empowers officials :

“

to issue a notification prohibiting any action or the ordering of any action, such as is necessary to maintain the security of the state, the safety of the country, or the safety of the people.

”

The ICJ remains concerned that the powers conferred on the Prime Minister and delegated officials under this law go beyond the limited and proportional response to a grave threat to the life of the nation that is envisaged in Article 4 of the ICCPR.

This legal memorandum focuses on several of the powers that have been used frequently, notably detention and arrest without charge, and the power to summon any person to report to the authorities, as well as the immunity from prosecution of officials.¹¹

This report does not address concerns related to the dual application of martial law and the Emergency Decree in the South since the declaration of martial law on 19 September 2006. However, the ICJ shares the concern voiced by some local lawyers that the existence of the two laws simultaneously could be open to abuse by security forces. The ICJ is not aware of any research yet carried out as to the effect of martial law in the South. However, experience in other parts of the world shows that martial law usually has less safeguards against human rights abuse than the ordinary law, and there are preliminary reports to suggest that this may also be the case in Thailand.

The Constitution of Thailand

The leaders of the military coup of 19 September 2006 abolished the 1997 Constitution and replaced it with an interim Constitution of 1 October 2006, intended to remain in place until a new Constitution is drafted.¹² The ICJ considers that the guarantees of fundamental rights, including the rights of detained persons and defendants and the independence of the judiciary, as set out in the 1997 Constitution, are essential elements of the future Thai Constitution. Indeed, the interim Constitution was drafted with the intention to preserve the fundamental rights set out in the 1997 Constitution.¹³ For this reason, for the purposes of this memorandum Thailand's legal obligations in relation to the South are viewed in relation to the 1997 Constitution, which was the law of the land at the time the majority of the research was carried out.

¹¹ The Royal Thai Government prior to the introduction of the Emergency Decree indicated that seven legislative measures were being employed in the South, namely: the Constitution, Martial Law, the Criminal Code, the Code on Criminal Procedures, the Act on Special Investigation, the Anti-Money Laundering Act, and the Public Administration in Emergency Situation Act (Press Briefing on the Promulgation of the Royal Decree on the Administration of State Affairs in the State of Emergencies by Deputy Prime Minister Wissanu Krua-Ngam, 15 July 2005 (translated summary with the ICJ)). This memorandum, however, is focused on the Emergency Decree, which the Government indicated was intended to bring these various legislative measures together under one umbrella.

¹² Constitution of the Kingdom of Thailand (Interim), 2006, preamble.

¹³ Interview with Dr. Bowarnsak Uwanno on 24 October 2006, Chulalongkorn University, faculty of Law, <http://www.pub-law.net/publaw/View.asp?publawDs=999> Dr. Bowarnsak was the drafter of the Interim Constitution.

PART II: SOURCES AND SCOPE OF APPLICABLE INTERNATIONAL LAW

1. APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

Thailand is bound by international human rights law. It is party to core UN human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),¹⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁵ the Convention on the Elimination of all Forms of Racial Discrimination (CERD),¹⁶ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁷ and the Convention on the Rights of the Child (CRC).¹⁸

Other applicable international legal instruments include: the Universal Declaration of Human Rights; the Standard Minimum Rules for the Treatment of Prisoners ('SMR'); the Basic Principles for the Treatment of Prisoners ('UN Basic Principles'); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ('UN Body of Principles'); the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Code of Conduct of Law Enforcement Officials; the Declaration on the Protection of All Persons from Enforced Disappearance ('Declaration on Disappearances'); the Convention on the Protection of All Persons from Enforced Disappearance ('Convention on Disappearances') (which has been adopted by the UN General Assembly and is open for signature and ratification); and the Basic Principles and Guidelines on the Right to a Remedy and Reparation.

2. EFFECT OF STATE OF EMERGENCY ON INTERNATIONAL OBLIGATIONS

A state of emergency was declared in the South by former Prime Minister Thaksin Shinawatra on 19 July 2005 and has been renewed on a three-monthly basis ever since. International human rights law envisages that states may sometimes have to take exceptional measures and suspend some rights when facing an emergency that threatens the life of the nation. However, where states do take exceptional measures, they must do so within the framework of the rule of law.

As the ICJ has previously stated,¹⁹ the definition of a state of emergency contained in the Emergency Decree is extremely broad:

¹⁴ Thailand acceded to the International Covenant on Civil and Political Rights on 29 October 1996. It made interpretative declarations on Articles 1(1), 6(5), 9(3), and 20.

¹⁵ Thailand acceded to the International Covenant on Economic, Social and Cultural Rights on 5 September 1999. It made an interpretative declaration on Article 1(1).

¹⁶ Thailand acceded to the Convention on the Elimination of all Forms of Racial Discrimination on 28 January 2003.

¹⁷ Thailand acceded to the Convention on the Elimination of All Forms of Discrimination against Women on 9 August 1985.

¹⁸ Thailand acceded to the Convention on the Rights of the Child on 27 Mar 1992. It made a reservation on articles 7 and 22.

¹⁹ *More Power, Less Accountability: Thailand's New Emergency Decree*, August 2005, ICJ, p.5.

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(...) a situation, which affects or 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 or a situation resulting from an offence relating to terrorism under the Penal Code, armed conflict or war, pursuant to which it is necessary to enact emergency measures to preserve the monarchy, the democratic system of government under the constitutional monarchy, national independence and territorial integrity, the interests of the nation, compliance with the law, the safety of the people, the peaceful way of life of the people, the protection of rights, liberties and public order or public interest, or the aversion or provision of remedy for damages arising from urgent and severe public calamity.”²⁰

”

This is far broader than the threat to the “life of the nation” that is required by Article 4 ICCPR as a precondition for the declaration of a state of emergency.²¹

Article 4 permits States Parties to derogate from certain rights guaranteed in the ICCPR, but to do so the state must officially proclaim a state of emergency and communicate to the Secretary-General of the United Nations the articles it has derogated from and why. Whilst Thailand has officially proclaimed a state of emergency in the South, Thailand has made no notification under Article 4 and has not contended that the Emergency Decree is based on a derogation of human rights treaties. If Thailand intended to derogate from certain rights, then the failure to notify the Secretary-General of the extension of the emergency powers would in itself constitute a violation of the procedural obligation under Article 4, para. 3 ICCPR.²²

Any derogations from the ICCPR should, in any event, last only as long as the need continues, be “strictly required by the exigencies of the situation”²³ (Article 4, para. 1), and represent a proportionate response to the situation. In short, a heavy burden is put on a government to justify that every exceptional measure taken is temporary, necessary and proportionate to meet the specific security threat.²⁴

Derogation is not permitted from the following rights under any circumstances:

- The right not to be tortured or otherwise ill-treated (Article 7).
- The right not to be held in slavery or servitude (Article 8).
- The right not to be imprisoned because of failure to fulfil a contractual obligation (Article 11).

²⁰ Section 4, Emergency Decree on Government Administration in States of Emergency, B.E. 2548

²¹ In its General Comment on article 4, the UN Human Rights Committee stated: “The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.” General Comment No. 29, States of Emergency (Article 4), CCPR/C/21?Rev.1/Add.11, 31 August 2001.

²² UN Human Rights Committee, General Comment No. 29, “States of Emergency (art. 4)”, CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 17 – the obligation is an immediate one and covers the declaration of an emergency as well as any change in the scope of the existing derogation.

²³ UN Human Rights Committee, General Comment No. 29, para. 4.

²⁴ UN Human Rights Committee, General Comment No. 29, “States of Emergency (art. 4)”, CCPR/C/21/Rev.1/Add.11 of 31 August 2001.

- The right not to be held guilty of a criminal offence that was not an offence at the time when it was committed (Article 15).
- The right to recognition as a person before the law (Article 16).
- The right to freedom of thought, conscience and religion (Article 18).

In addition, the application of the emergency measures may not be discriminatory or inconsistent with a state's other obligations under international law (Article 4, para. 1, ICCPR). The UN Human Rights Committee also considers that various other provisions cannot be derogated from, even though they are not explicitly mentioned in Article 4,²⁵ these include:

- All prisoners should be treated with humanity and respect for the inherent dignity of the human person;
- The prohibition on hostage-taking, abduction or unacknowledged detention;
- Protection of the rights of minorities;
- Deportation or forcible transfer of population without grounds permitted under international law;
- The prohibition on propaganda for war, advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence.

The UN Human Rights Committee also considers that the ICCPR obliges States Parties to provide remedies for any violations of provisions of the ICCPR, and this cannot be derogated from in an emergency.²⁶

The ICJ is concerned at provisions in the Emergency Decree and practices that have led to an erosion of, in particular, Articles 2 (to respect and ensure rights to all individuals within Thailand), 4 (derogation of rights during states of emergencies), 6 (the right to life), 7 (prohibition against torture and other ill-treatment), 9 (the right to liberty and security), and 14 (fair trial rights) ICCPR, and Thailand's general obligations under international law.

²⁵ UN Human Rights Committee, General Comment No. 29, para. 13 (a) - (e).

²⁶ UN Human Rights Committee, General Comment No. 29, para. 14.

PART III: VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

1. LIBERTY AND SECURITY OF THE PERSON

While the Emergency Decree contains a wide variety of measures that the authorities may use to maintain security, in practice it has mainly been used to detain persons suspected of some level of involvement with the insurgency. These measures were introduced and have been implemented without due regard to the right to liberty and security of the person guaranteed in Article 9 ICCPR, and with either no or inadequate regard for the protections in other relevant international legal instruments.

1.1 Arbitrary arrest and detention

As the ICJ has previously stated:

“ Even during a state of emergency a government can not 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.²⁷ ”

According to the UN Human Rights Committee, “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. Detention must therefore not only be in accordance with the law, it must also be reasonable in all the circumstances; for example, to prevent flight, interference with evidence, or the recurrence of crime.²⁸

The ICJ has previously raised concerns that the grounds for detention under the Emergency Decree are formulated in broad and vague terms and are open to abuse.²⁹ The ICJ’s research found that the use of detention in practice was systematically being abused, in violation of the Emergency Decree and Article 9 ICCPR.

Grounds for administrative detention

The ICJ has previously noted that international law does not prohibit administrative detention, but that it is an extraordinary and temporary measure that requires stringent legal safeguards to prevent serious abuse such as arbitrary detention, torture and enforced disappearance.³⁰

Under the Emergency Decree, the Prime Minister can authorise a “competent official” to arrest and detain a person without charge for seven days initially, with the possibility of applying to court to extend the detention period by seven days at a time, provided

²⁷ *More Power, Less Accountability: Thailand's New Emergency Decree*, August 2005, ICJ, p.11.

²⁸ Views of 23 July 1990, Communication No. 305/1988, *Hugo van Alphen v. Netherlands*, para. 5.8, CCPR/C/39/D/305/1988; Views of 5 November 1999, Communication N° 631/1995, *Aage Spakmo v. Norway*, para. 6.3 (CCPR/C/67/D/631/1995); Views of 21 July 1994, Communication N° 458/1991, *Albert Womah Mukong c. Cameroon*, para. 9(8), (CCPR/C/51/D/458/1991); Views of 3 April 1997, Communication No 560/1993, *A (name deleted) vs. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.2.

²⁹ *More Power, Less Accountability: Thailand's New Emergency Decree*, August 2005, ICJ, p.11.

³⁰ *Ibid*, p.ii.

the total detention period does not exceed 30 days. The official must seek authorisation from the courts for the detention. The ICJ is, however, concerned that detainees are in practice being held for the maximum 30-day period, for arbitrary reasons, and that there are insufficient safeguards in place to prevent the abuse of this power.

In order to detain an individual under the Emergency Decree a detained person must have:

“ (...) 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 situation³¹ ”

Thus, the primary purposes of detention are to (a) prevent people from committing acts that may cause a “serious situation” or, (b) to “engender cooperation” with the authorities to end a “serious situation”. For this purpose, officials have the power 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.”³²

Evidence of abuse of detention powers

Between July 2005 and 31 May 2006, according to a senior police officer in Yala, the courts issued 1,264 detention warrants. Of those in relation to whom warrants were issued, 598 people were actually detained. Of the balance, some 664 evaded arrest and are not accounted for by police. The remaining two detention warrants were cancelled, in one instance because the person had died.³³

Of the 598 people detained, the overwhelming majority, 452, were detained by police at Yala Police School under the Emergency Decree. Of these, 73 were charged with a criminal offence at the end of their detention.³⁴

All officials interviewed by the ICJ described the primary purpose of detention in practice as being to gather information. The approach taken by the detaining authority is that someone may be detained on the basis of information or intelligence suggesting some affiliation with the insurgents. Evidence was something that would be gathered during the interrogation process, while a person was detained. This is not in accordance with the legal grounds for detention outlined in Section 11, para. I of the Emergency Decree.

³¹ Emergency Decree, Section 11(1).

³² Emergency Decree, Section 11(2).

³³ ICJ interview, police officer, Yala, 31 May 2006.

³⁴ *Ibid.*

The ICJ was told that in deciding who is to be detained, the authorities use a database of suspected persons. This is popularly known as a “blacklist”, although officials object to this label. In theory, police, military and civil authorities each maintain a separate list based on their own separate sources of intelligence. In order for an application to be made for a detention warrant, it would be necessary either for someone to appear on all three lists or, failing that, for each authority to be able to corroborate the information that caused the individual to be placed on one of the lists.

A senior military intelligence officer told the ICJ that the list is divided into four categories. The most serious level is those who have actually carried out terrorist acts. These individuals would be arrested and charged with a criminal offence. The second level is those who have conspired with people who have committed terrorist acts. These would be initially detained and questioned under the Emergency Decree. The likelihood is that they would also be charged. The third level is those with knowledge of the insurgency, who would also be detained under the Emergency Decree. The fourth level is those at risk of being influenced by the insurgents. The fourth group would be invited to attend a “citizens’ improvement” course, using powers under the Emergency Decree. In practice the police are largely responsible for the first two groups and the army for the latter two.³⁵

The view of one senior army officer was typical:

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There are many levels of involvement. Some of them have just attended a meeting. It is good for the military to get information from them, but we will release them because they did not do anything wrong.

For example an *ulama* came to a mosque and preached on separatism. The people who came and listened were not insurgents, but it was useful for the military to question them.³⁶

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This represents a misunderstanding of the grounds of detention under the Emergency Decree, which only allows detainees to be arrested and detained to prevent a “serious situation” or “engender cooperation” towards ending a “serious situation”.³⁷ There is therefore no express basis under the Emergency Decree to hold individuals for the purpose of interrogation. If detainees are held under the stated purposes in Section 11, para. (1), then they should be released as soon as those purposes have been achieved, or, alternatively, charged with a criminal offence. This does not normally appear to have been the case and detainees were often held until the end of the maximum 30-day period. This does not normally appear to have been the case and detainees were often held until the end of the maximum 30-day period.

³⁵ ICJ interview, Southern Border Peace-building Command, Yala, 31 May 2006.

³⁶ ICJ interview, Southern Border Peace-building Command, Yala, 29 April 2006.

³⁷ Section 11, para. (1), Emergency Decree. Section 11, para. (2) permits a competent official to summon a person to report to give “an oral statement or submit any documents or evidence relevant to the emergency situation”, but it does not envisage arrest and detention for this purpose.

In many instances, teachers and students at private Muslim schools appear to have been targeted. In one case in March 2006, 19 religious teachers, or *ustazs*, from the Thammawitthaya Foundation School in Yala were detained after attending a retreat on the island of Ko Sam and detained for 14 days at the Yala Police School. They were released without charge. The 19 *ustazs* voluntarily responded to a request to attend the Yala Police Station, only to be detained. It is not clear why it was necessary to detain these individuals under the Emergency Decree in order to question them when they attended voluntarily.

Thammawitthaya Foundation School is a private Muslim school, or *pondok*. Its director, Sapa-ing Basoe, has been wanted by the security forces since late 2004 as a suspected insurgent leader.³⁸ Teachers and students at the school have been frequently harassed and detained, apparently on the basis of their association with the school rather than any actual evidence against them. Prime Minister Surayud Chulanont, during a visit to the school in November 2006 announced that he had ordered the army to destroy blacklists, which had contained the names of over 90 per cent of the school's personnel.³⁹

One of the 19 *ustazs* was detained unlawfully because he was outside the area affected by the state of emergency when he was arrested, although he was subsequently detained in Yala. Lawyers for the detainees were aware of the irregularity but told the ICJ that they feared to challenge the legality of the detention because of the danger of threats to their own security.⁴⁰

Army officers also acknowledged to the ICJ that names are sometimes added to the list of individuals to be detained as the result of personal vendettas or for other reasons unconnected with the security situation. It is apparent that very often those identified for detention are detained for arbitrary reasons, on grounds not meeting the legal criteria of Article 11, para. 2 of the Emergency Decree.

Police officers interviewed by the ICJ regarded the relatively high proportion of detainees who were subsequently charged with criminal offences as a vindication of the detention process. The Emergency Decree provides that after the expiration of the detention period under the Emergency Decree, if detention is still required, the Criminal Procedure Code applies (Section 12, para. 1). Yet the use of initial administrative detention for the purpose of assembling evidence for criminal cases, without appropriate and essential human rights guarantees, is not only contrary to the stated purposes in the Emergency Decree, but is also an inappropriate use of such powers. Detainees are held for the purposes of questioning that may lead to criminal charges being brought, but they are not protected by the normal legal safeguards of a criminal investigation, such as access to a lawyer throughout the period of detention (see Part III, paragraph 2.3 below).

The remark by the army officer quoted above is indicative that some individuals are detained arbitrarily without suspicion that they are responsible for any wrongdoing, or that they present a threat to security; but rather because they have information that may be of interest to the authorities. The ICJ learned of a number of such examples.

³⁸ See : <http://www.nationmultimedia.com/2005/01/25/national/index.php?news=national16180735.html>

³⁹ *No more black-listing: Surayud*, The Nation, 9 November 2006.

⁴⁰ ICJ interview, Pattani, 30 April 2006.

In one case the owner of a shop selling SIM cards was detained after selling a card that was used in a mobile phone used to detonate a bomb.⁴¹ There was no suggestion that the individual was himself involved in the explosion, merely that he might have information of use to the investigating authorities.

In another case reported to the ICJ, in May 2006 Hahseng Awa from Narathiwat was detained after a search of his house and garden allegedly uncovered bomb-making equipment. Hahseng Awa was taken to the district police station. The same night he was transferred to Yala Police School. He was held for 16 days in a two metre by two metre room, with no natural light and for periods with the air-conditioning on high. He was interrogated on most days of his detention and then charged relating to alleged possession of bombs and weapons. At no point during his detention was he given access to a lawyer or his family.

While the ICJ is unable to evaluate the substance of the allegations against Hahseng Awa, it is questionable whether the Emergency Decree, rather than the normal arrest procedure under the Criminal Procedure Code, should have been used in this case if there was physical evidence of a criminal offence.

In another case, seven men were detained in Jarago village, Saiburi, Pattani in December 2005. In the course of interrogation one of the men made a statement incriminating himself and the others detained with him as well as three other people from Kohnbong, Mai Kaen district, also in Pattani, who were themselves later detained. All were charged with conspiring to support the insurgency.

The ICJ's concern in such cases is that confessional evidence is being obtained from detainees, which may later be used in support of criminal charges, without allowing the detainee the normal protections contained in the Criminal Procedure Code. The Emergency Decree should not be used as a tool to avoid these protections. Where individuals are detained for the purposes of a criminal investigation they should be detained under the provisions of the Criminal Procedure Code. Under any circumstances a detained person must be afforded the minimum guarantees in accordance with Thailand's obligations under Article 9, paras. 2 and 3, and Article 14, para. 3, ICCPR, which include, *inter alia*:

- the right of access to legal counsel;
- the right to be informed promptly of the charges, in a language that is understood by the detainee;
- the right to be brought promptly before a judge or other judicial authority;
- the right against self-incrimination.

These rights are guaranteed even in a state of emergency.⁴²

⁴¹ Vendors of SIM cards are obliged to collect identification data from people buying the cards and submit this to the authorities as mobile phones are frequently used to detonate explosives.

⁴² UN Human Rights Committee, General Comment No. 29, para. 11.

1.2 “Citizens’ improvement programmes”

The use by the Thai authorities of “citizens’ improvement programmes” or “peace-building schools” – often referred to in the English-language press as “re-education camps” – in the South, raises concerns relating to the right to liberty and security of the person guaranteed by Article 9, para. 1, ICCPR.

The programme of “citizens’ improvement” involves people, whose names are often on an official list, being “invited” to attend a course under military supervision. The courses last seven, 15 or 30 days. It is not known exactly how many people have attended such courses, although the number is likely to be over 1,000.⁴³

The programme, designed to encourage loyalty to the Kingdom and discourage ideas of separatism, was described by former Interior Minister Kongsak Wantana, who oversaw the programme under the Thaksin Shinawatra government, as encouraging local “youngsters to prove their innocence in order to clear their names and pledge that they have not and will not become involved in terrorist activities (...).”⁴⁴

The programme largely takes place outside the southern provinces. Many of the citizens improvement courses are run at military facilities at locations in central Thailand, such as Lopburi, Ratchaburi and Saraburi. One senior military officer told the ICJ that the content of the courses was “mostly about democracy”.⁴⁵ Another military officer stated that the problem was that villagers in the South did not have a wide enough perspective on the world, and that “[we] want them to see a different life.”⁴⁶

The ICJ interviewed several people who were able to give first-hand accounts of “citizens’ improvement” courses. The activities ranged from performing army training exercise, such as assault courses and parachute jumps, receiving training and carrying out role plays on how to respond to the presence of insurgents in their village, to visits to Buddhist and historic sights such as the temples at Ayutthaya (whilst wearing t-shirts bearing the camp logo), and courses including HIV-AIDS prevention, giving up smoking, organic farming and candle-making.

⁴³ The ICJ asked local security officials and civilian officials for an official figure, but were told that none existed. It was, however, reported to the ICJ that there were 200 individuals in one group who attended the programme and that such groups attended camps on a monthly basis. As the programme had been running for about 18 months at the time, the ICJ estimates that at least 1,000 individuals are likely to have attended such programmes by the end of 2006.

⁴⁴ *Surrender Ceremonies: Southern youths shun re-education*, The Nation, 12 December 2005, <http://www.nationmultimedia.com/specials/south2-years/dec1205.php>

⁴⁵ ICJ interview, Southern Border Peace-building Command, Yala, 31 May 2006.

⁴⁶ *Ibid.*

EXAMPLE OF A "CITIZENS' IMPROVEMENT" COURSE

A, a village headman in Pattani province was arrested in mid-2005. The army came to his house and searched it, taking away bank account books and ammunition. (His two guns had been issued by the government and he was allowed to retain these.) The soldiers did not present a warrant for the search. That night the police came to his house and asked him to go with them to an army special unit at a nearby monastery, where he was questioned for two hours. Two days later the army came again to his house and took him to a military camp, where he was again questioned.

Seven months later, in January 2006, he was invited to report to his district office, under the Emergency Decree. He was forced to sign a document to attend a "peace-building school"⁴⁷ and then allowed to return home. His three brothers also report being invited to report to the district office and told to sign a document, which some said were arrest warrants and other said were agreements that if they did not report for the "peace-building school" they would be arrested. One of his brothers does not read Thai but was told to sign anyway.

After returning home, a soldier from a nearby Special Unit called him and told him to report himself to the same military camp. He was told that if he did not report himself, soldiers would come to his house and arrest him under the Emergency Decree, and that they were ready with the arrest warrant. Believing that to be true, he then informed the district office he was ready to clarify that he was innocent as requested by the soldier.

On 5 January 2006, the district officer and a lieutenant colonel from the army special unit accompanied him, his three brothers and a man from his village to a military camp in Pattani. They were told they needed to report for three days and then they could go home. After reaching the camp they were held in a container, in a narrow compartment with no windows. He was held with three other men he did not know. His brothers and the man from his village were held in different containers. They were held in these containers for three days and interrogated for five hours each day. Their relatives were allowed to visit them but only under observation by soldiers.

⁴⁷ Citizens improvement camps have previously been called "peace-building camps or schools".

The village headman reports that during interrogation, officials pounded on the table, slapped his face, and threatened to lock him up in a secret jail behind the military camp if he did not confess to being involved with the various violent incidents which had occurred in his village. He was then repeatedly asked the same questions related to the on-going conflict and security in the South.

He and his brothers were then transferred to a military camp in Songkla, where he was interrogated for six days, two hours a day. He was asked the same questions, related to the on-going conflict and security in the South. They also took part in activities such as role plays about how to defend the village from attacks by insurgents and what role each person in the village should take. In Ingkayut and Songkla military camps none of the brothers were allowed to make phone calls. When the brothers were in Songkla they said there were about 200 people in the camp waiting to be sent to various military camps in other provinces for “peace-building schools”.

The village headman was then sent to Lop Buri to a “peace-building camp” where participants took part in physical exercises, and were taken on field trips under military guard to see Buddhist and Muslim villages and historical sites. When they were taken out they had to wear “Peace-building School” T-shirts which he believed were to make people identify them easily as southern insurgents as a form of punishment. He was allowed to use a public phone at night with a soldier supervising. He was in Lopburi for one month.

His brother who has a chicken farm found all his chickens had died by the time he could call from the Saraburi camp. After being transferred to Songkla and then to a military camp in Saraburi for a “peace-building camp”, his younger brother asked to go home, saying he was only told he had to report for three days and that he needed to go back to tend to his farm, although he knew his chickens had already died. He was told he could not return before one month was up, that it was a regulation that he had to complete the course so he could receive his certificate.

When the village headman returned to his factory, all his customers had deserted him, he believes due to not wanting to do business with a suspected insurgent.

Subsequently he has had several visits from and complained of harassment by the police and army, who on one occasion confiscated his passport and bank book. He continues to be afraid and has sent his son away from the area to study because he fears for his safety.

Arbitrary detention

The ICJ considers that the programme of “citizens’ improvement” violates Article 9, para. 1 ICCPR, being a form of arbitrary detention amounting to the deprivation of liberty for “educational purposes”. Article 9(1) provides that: “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.” Two relevant guarantees arise from this.

First, “arbitrary detention” is prohibited: meaning, detention without good reason. The UN Human Rights Committee has stated that the right not to be subjected to arbitrary detention applies to all deprivations of liberty, including where detention is for “educational purposes”.⁴⁸ The ICJ is concerned that contrary to government assurances, attendance at “citizens’ improvement” courses is not entirely voluntary. In practice, programmes of “citizens’ improvement” operate in parallel to the use of the detention powers in the Emergency Decree or, alternatively, might be seen as an extension of it.

In December 2006, several young men who attended a much publicized “peace-building course” in Songkla, publicly complained they had been forced to “surrender”, and international human rights organisations report being told by local officials that people are often threatened with arrest under the Emergency Decree if they do not surrender to attend these camps.⁴⁹

Some people, usually those in military custody, are moved from detention into “citizens’ improvement” courses. According to testimonies gathered by the ICJ, they are given no choice in the matter.

Others are simply “invited” to attend “citizens’ improvement” courses. In some cases the village headman will receive an official letter from the district office requesting him to go to the district office and sign up. More commonly, the village headman was told verbally, or by way of an official letter, to get men from his village to sign up. Although the authorities insisted that invitees were free to refuse to attend, they were unable to supply the names of any who had done so. One Chief District Officer told the ICJ that people attended voluntarily “to show that they are innocent”.⁵⁰ It was also alleged to the ICJ that village headmen were threatened with arrest if they failed to supply young men to attend citizens improvement programmes”.⁵¹

⁴⁸ See UN Human Rights Committee, General Comment 8, para. 1.

⁴⁹ Human Rights Watch Thailand: Blacklists Create Climate of Fear, 16 December 2005.

<http://hrw.org/english/docs/2005/12/16/thai12317.htm> also, Human Rights First Losing Ground, Human Rights Defenders and Counter-terrorism in Thailand 2005 p.13 <http://www.humanrightsfirst.info/pdf/06713-hrd-thailand-rep-web.pdf>

⁵⁰ ICJ interview, 23 May 2006.

⁵¹ ICJ Interview with Village Headman, Pattani, December 2006.

Secondly, Article 9, para. 1, of the ICCPR, provides that an individual should not be deprived of liberty, except in accordance with grounds and procedures established by law. The law must therefore state the permissible grounds for detention clearly. Neither the Emergency Decree, nor any regulations or laws arising from it, give express legal powers to the authorities to compel someone to attend these programmes. No legal basis has been given by the Thai authorities for requiring individuals to attend.

In interviews with the ICJ's researcher, people who had attended "citizens' improvement" courses and local civic activists referred to the power under Section 11 (6) of the Emergency Decree, under which a designated official may:

“ (...) 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.⁵² ”

The authorities themselves did not refer to it, maintaining that those who attended "citizens' improvement" did so voluntarily.

A notification under Section 11 (6) is not subject to the administrative law of Thailand, according to Section 17 of the Emergency Decree. In an earlier report the ICJ stated that Section 11 (6) "is so vague and broad that it will almost inevitably lead to abuse of power".⁵³ ICJ considers that Section 11 (6) cannot be considered as a proper basis to justify detention for "educational purposes" at "citizens' improvement camps".

In summary, the ICJ considers that arbitrary detention exists in these cases, in violation of Article 9(1) ICCPR, in particular: there are no pre-established, legal and reasonable grounds on which the person is, in effect, detained for "educational purposes"; selection is based upon the authorities' own database of suspects and those selected have no practical option to refuse to attend – nor can they challenge their selection; and individuals are deprived of their liberty for the period of the programme.

Security of the person

The practical consequences for those who have attended the programmes also undermines the security of the person, which the Thai authorities are obliged to ensure under Article 9 (1) ICCPR.⁵⁴

There appears to be a widespread perception that those who have undergone "citizens' improvement" are government informants. People who have complete "citizens improvement programmes", are, by definition, under suspicion from the government; that being the reason why they were selected to attend. On completion, they are also under suspicion from the

⁵² Emergency Decree, Section 11(6).

⁵³ *More Power, Less Accountability: Thailand's New Emergency Decree*, August 2005, ICJ, p9.

⁵⁴ See e.g. *Delgado Pérez v. Colombia* (CCPR 195/85) and *Dias v. Angola* (CCPR 711/96).

insurgents, who may believe that they have been placed back in their communities to act on behalf of the security forces. Although it is unclear if this is so, it is hardly surprising that this perception is held. Individuals clearly continue to remain under suspicion from the authorities too. People who had attended “citizens’ improvement” courses reported continuing to receive visits from the security forces – visits that they regarded as threatening and that could easily be misconstrued by the insurgents and accordingly undermine personal security.

1.3 Lack of adequate judicial supervision and delay in presentation before a judge or judicial authority

The ICJ has previously expressed its concern that the courts should have the power to examine the legality of measures taken during the emergency.⁵⁵ In the context of the right to liberty, international law is clear that anyone arrested or detained on a criminal charge must be brought “promptly” before a judge or other judicial authority (Article 9, para. 3, ICCPR).

In the case of administrative or preventive detention, as envisaged by Section 11 (1) of the Emergency Decree, the UN Human Rights Committee considers that Article 9 safe-guards also apply⁵⁶ and that detainees should be brought promptly before a judge, and, are entitled to trial within a reasonable time, or, to release.⁵⁷ The Emergency Decree, specifically Section 12, does not comply with Article 9 ICCPR.

The Emergency Decree offers some protection on the arrest and detention of an individual, in that Section 12 requires the leave of the court, in accordance with the normal provisions of the Criminal Procedure Code,⁵⁸ before an arrest warrant can be issued and an individual detained. Persons may then be detained for a period of up to seven days, renewable three times, plus an additional two days, making 30 days in total (Section 12).

However, Section 12 allows a judicial decision to reject or to grant a warrant application on the basis of untested evidence. The detained person is not required to be produced before the court at any stage. The requirement of a detained person to physically appear before the court is not only a requirement of international law, but also provides an important protection of the physical safety of the detained person by providing an opportunity for the detained person to raise any incident of ill-treatment with the court.

The ICJ is also concerned that although each application for renewal of detention must be approved by the court, again, there is no express requirement that the detained person be produced before the court. The ICJ is only aware of one case in which an application for the extension was challenged by legal counsel on behalf of detained persons. In that case, the lawyer, acting on behalf of 19 detained *ustazs*, opposed the first application for an extension of detention. The court granted the extension, but

⁵⁵ *More Power, Less Accountability: Thailand's New Emergency Decree*, August 2005, ICJ, pp.6-7.

⁵⁶ See e.g. UN Human Rights Committee, General Comment No. 8, para. 4 and Concluding Observations of the Human Rights Committee: Norway, CCPR/C/79/Add.112, para. 11.

⁵⁷ Concluding Observations of the Human Rights Committee: Jordan, CCPR/C/79/Add.35; A/49/40, paras.226-244; Observations finales du Comité des droits de l'homme : Maroc, CCPR/C/79/Add.44, paragraphe 21; Concluding observations of the Human Rights Committee: Viet Nam, CCPR/CO/75/VNM, para. 8; Concluding observations of the Human Rights Committee: Cameroon, CCPR/C/79/Add.116, para. 19.

⁵⁸ The wording of Section 12 expressly states that the Criminal Procedure Code applies to the issue of a warrant and the application for leave of the Court, and that after the expiry of the maximum detention period allowed under Section 12 any further detention is governed by the Criminal Procedure Code. Whilst Section 12 does not expressly state that the Criminal Procedure Code does not apply during detention under the Emergency Decree, the wording of Section 12 makes the application of the Criminal Procedure Code exceptional in the circumstances specified implying that it is not normally to apply.

stated that any further application for an extension would require the police to show evidence of the progress of interrogation and also that the detained persons would be required to attend court. The 19 *ustazs* were subsequently released.⁵⁹

While the ICJ is encouraged to see that the court recognises the right of detained persons to challenge an application for extension of detention, the majority of detained persons do not have contact with lawyers until they are charged with criminal offences and enter the criminal court system, or they or their families are too afraid to bring legal challenges against the authorities.⁶⁰

The ICJ is also encouraged to see that the court required the attendance of the detained persons at a second application for an extension. However, that would mean the detained persons would already have been held for 14 days. The United Nations Special Rapporteur on Torture has said that “promptly” should mean no more than 24 hours and that fourteen days is too long and would amount to a violation of Article 9 (3) ICCPR. More specifically, the UN Human Rights Committee has indicated to Thailand that detained persons should be brought before a judicial authority within 48 hours,⁶¹ as provided for by the ordinary criminal law of Thailand (1997 Constitution, Section 237).

In general, the ICJ was unable to find any data as to how many applications for arrest warrants have been made, and how many of those have been granted or rejected. Such applications are made *ex parte*, therefore, the content of the applications, including the hearing transcripts and the basis of the court’s decision, are not publicly available. There is therefore no accurate information available as to the practice of the judiciary in reviewing applications for arrest warrants under the Emergency Decree. From interviews with lawyers acting on behalf of those detained, the ICJ was told that the tendency is for applications to be granted rather than rejected.

Whilst the ICJ is unable to comment on judicial practice, because of the absence of data, it does have concerns at the legal basis for the granting of leave. Section 12 provides that the Criminal Procedure Code applies to applications for arrest and detention. Section 66 of the Criminal Procedure Code provides that an arrest warrant shall be issued where there is reasonable evidence that the person “likely” committed the offence. This compares to Section 11 (1) of the Emergency Decree that allows a competent official to arrest and detain a person “suspected” as having a role in causing the emergency situation or to “engender cooperation”. The only additional assistance offered by the Criminal Procedure Code is Section 59, which provides that the court “must first make the inquiry till the reason appears expedient to issue the warrant”.

How exactly the court is interpreting these provisions in practice is not publicly known. Key questions are: what inquiries is the court actually making as to whether arrest warrants are expedient, and what standard of proof is being applied? In the absence of clarification of these points, the ICJ is concerned that the combination of the words “likely” and “suspected”, might lead to a person being detained for up to 30 days on the basis of being a ‘likely suspect’, rather than the normal and higher criminal standard, which requires a person to have ‘likely committed the criminal offence’. Moreover, the ICJ is deeply concerned

⁵⁹ ICJ interview with senior lawyer, January 2007.

⁶⁰ *Ibid.*

⁶¹ Concluding Observations on Thailand, CCPR/CO/84/THA (13), 28 July 2005 (Advanced Unedited Version): “In any detention without external safeguards beyond 48 hours should be prohibited”.

at the broad and vague term “engender cooperation” (Section 11(i)), which might imply that an arrest warrant can be granted simply on the basis that it is ‘likely’ the detention of an individual might lead to “cooperation” with the authorities.

Of further concern, in an interview with one lawyer, the ICJ was told that his clients had been *de facto* arrested and detained without a warrant. His clients were ‘invited’ to attend interviews, which they did. The individuals were then detained and interrogated, and the information obtained was subsequently presented to the court as part of an application for an arrest warrant. The ICJ is deeply concerned by this case, which is evidence of a serious and blatant violation of Thai law and Article 9 ICCPR.

Habeas corpus

Article 9 (4) of the ICCPR guarantees the right to *habeas corpus*. This is reflected in Section 240 of the 1997 Constitution and Section 90 of the Criminal Procedure Code, which allows the detained person, or any other person on their behalf, to apply to court to be either tried or released.

Section 12 of the Emergency Decree appears to exclude the provisions of the Criminal Procedure Code during the period of detention. However, as a constitutional right, the right to *habeas corpus* should apply regardless of Section 12 and the existence of a state of emergency. This is certainly the position in international law, where the remedy of *habeas corpus* is considered a non-derogable right.⁶²

To the ICJ’s knowledge, the courts have not been required to adjudicate on such an application in the case of someone detained under the Emergency Decree. The right to *habeas corpus* has therefore been untested. The reasons for this, given to the ICJ by one lawyer, was that lawyers in general may lack knowledge of how to bring such a case, or advise their clients against bringing such a case for legal reasons, or that relatives of detained persons may, in any event, be too afraid of “making trouble” with the authorities.

In summary, the ICJ is concerned at the arbitrary detention of persons for the purpose of interrogation and also for securing attendance at “citizens’ improvement camps”, and at the lack of the judicial scrutiny of such practices, in violation of Article 9, ICCPR.

⁶² See e.g. UN Human Rights Committee, General Comments No.s 8 and 29, para. 14 and 16, UN Working Group on Arbitrary Detention (UN Doc E/CN.4/2003/8 at 19-21), *Vuolanne v Finland*, CCPR/C/35/265/1987 at para. 9.3, the Report of the Special Rapporteur on Torture to the 59th Session, E/CN.4/2003/68, para. 26(i), *Coard et al. v. the United States*, IACHR Report No. 109/99 at para. 39, and *Ocalan v Turkey*, Application no. 46221/99, European Court, 12 March 2003.

2. TREATMENT OF DETAINEES

The ICJ is concerned by the conditions of detention and the treatment of detainees in the South arising from existing institutional deficiencies, compounded by measures introduced by the Emergency Decree. The ICJ found credible evidence of violations of ICCPR Article 7 (the prohibition against torture and other cruel, inhuman or degrading treatment) and Article 10 (the right of detainees to be treated with humanity and with respect for their inherent dignity).

2.1 Place of detention

Under the Emergency Decree, detainees are to be held “in a designated place which is not a police station, detention centre, penal institution, or jail, and not be treated as criminals.”⁶³ The rationale for the use of irregular places of detention, as with the denial of access to a lawyer (see paragraph 2.3 below), is that those being held are not to be treated as criminals. The clear implication is that this should enhance and not reduce the standard of treatment during detention. However, it is not specified where detainees will be held or under whose authority (e.g. civilian, military or special agencies).

The ICJ has previously stated its concern that: “Detaining people in irregular places of detention, without regularised procedures and safeguards will significantly increase the risk of serious abuse of detainees”.⁶⁴ The UN Human Rights Committee has also emphasised the importance of ensuring official places of detention.⁶⁵

All those detained by the police, with a handful of exceptions, are detained at the Yala Police School. Detainees held by the military are held in a number of army camps, including Borthong and Inkayut. Former detainees at Borthong described being held in freight containers. Several were held in one container, although they were allowed out to the bathroom. The ICJ has a number of concerns about such reports.

First, as a general rule, civilian detainees ought not to be held in military custody. Second, Principle 10 of the UN Standard Minimum Rules for the Treatment of Prisoners (“the SMR”) states:⁶⁶

“

All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

”

⁶³ Emergency Decree, Section 12.

⁶⁴ *More Power, Less Accountability: Thailand's New Emergency Decree*, August 2005, ICJ, p.ii.

⁶⁵ UN Human Rights Committee, General Comment No 20: concerning prohibition of torture and cruel treatment or punishment, para 11.

⁶⁶ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXI) of 13 May 1977.

The UN Human Rights Committee has stated that these minimum standards must always be observed.⁶⁷

The ICJ considers that under no circumstances can an unmodified freight container be considered to be suitable accommodation for detainees; in particular, lacking natural light⁶⁸ and lacking regard for climatic conditions or adequate ventilation – in this regard, the South has a tropical climate, which is a significant aggravating factor to such detention conditions. The place of detention should be suitable to the climate.⁶⁹ The ICJ considers that holding detainees under such conditions may, depending on the specific circumstances of the case, amount to cruel, inhuman or degrading treatment, in violation of ICCPR Articles 7 and 10.

Many detainees held in Yala Police School describe being held for the early part of their detention in a block of wooden construction where the cells have no windows or other form of natural light, and permanently lit by artificial light. This is contrary to the SMR, which requires that:

“ [t]he windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;⁷⁰

”

Although detainees are allowed out to visit the bathroom or to receive visits from relatives, they take their meals in their cells and remain in them for more than 23 hours a day. Cells in this particular block are approximately two metres square and house only one prisoner. Detainees should have “at least one hour of suitable exercise in the open air daily” (Rule 21, para. 1, SMR) and there should be “minimum floor space” (Rule 10, SMR).

Further, without a timepiece or natural light male Muslim detainees cannot tell what time of day it is and are unable to observe prayer times, nor do they know in which direction to pray. The SMR (Rule 42) requires detainees to be allowed to satisfy the needs of religious life, so far as practicable.⁷¹

When the ICJ put these reports to the police responsible for the Yala Police School, they confirmed that prisoners had been held in such conditions in the past, but denied that this particular detention block was still in use. The explanation given was that the police were unprepared to house detainees when the Emergency Decree was enacted, but had subsequently developed better facilities. While it does seem to be true that detention facilities at the school have been expanded in recent months, the claim that the block without natural light is no longer in use is not accurate based on reports received by the ICJ. The ICJ received a number of first-hand accounts of its use in the period after the police stated that it had been closed down.

⁶⁷ UN Human Rights Committee, *Mukong v. Cameroon* (CCPR 458/91).

⁶⁸ See also Rule 11 (a), SMR.

⁶⁹ Penal Reform International, *Making Standards Work – an international handbook on good prison practice*, 2nd edition, 2001, Rule 10, para. 15, p.58.

⁷⁰ UN Standard Minimum Rules for the Treatment of Prisoners, Rule 11(a).

⁷¹ This includes allowing attendance at services provided in the institution and having possession of religious works, Rule 42, SMR.

The ICJ is concerned at these reported conditions of detention, in particular the lack of minimum floor space, lack of natural light and practical restrictions on the ability to pray, which may depending on the circumstances of the individual case amount to cruel, inhuman or degrading treatment. The right not to be subjected to inhuman or degrading treatment (Article 7, ICCPR) is non-derogable (Article 4, para. 2, ICCPR) and is therefore applicable in spite of the existence of the Emergency Decree. Similarly, whilst Article 10 ICCPR is not listed as non-derogable, the UN Human Rights Committee considers it to represent a general international norm not subject to derogation.⁷²

2.2 Ill-treatment of detainees

The ICJ is concerned at evidence strongly indicating that detention under emergency powers is being used to interrogate detainees for the primary purpose of extracting confessions, in some cases by ill-treatment. The ICJ is also concerned at the lack of proper internationally recognised safeguards to prevent such ill-treatment.

Article 14(3)(g) of the ICCPR states that a person shall “not be compelled to testify against himself or to confess guilt.” Further, Principle 21 of the UN Body of Principles states:

“ It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

”

These guarantees are recognized in Section 243 of the Thai 1997 Constitution:

“ A person has the right not to make a statement incriminating himself or herself which may result in a criminal prosecution being made against him or her.

”

The ICJ is concerned at evidence that suggests the interrogation process used under the Emergency Decree contravenes these guarantees.

⁷² UN Human Rights Committee, General Comment No. 29 (States of Emergency), para. 13 (a).

During the earlier period covered by this memorandum, interrogation of detainees generally took place at the Yala Police School, though not in the cells, and was generally conducted in the early days after arrest. Detainees reported sometimes being questioned for periods of several hours at a time, often in the early hours of the morning. There seems to be a pattern that detainees were moved to better accommodation – a more modern block, constructed out of concrete – after their interrogation was completed. In this second block the cells were reported to be slightly larger, with their own washbasin and lavatory. This might suggest the use of cells without natural light during the period of interrogation was a deliberate and systematic part of the effort to break resistance of detainees.

The ICJ received credible reports of ill-treatment of detainees, in some cases amounting to torture or other cruel, inhuman and degrading treatment; an example is described in the box below:

CASE OF TORTURE OR OTHER ILL-TREATMENT

A was arrested by soldiers in late 2006. His head was covered and he was taken to a military camp, where he was held for eight nights.

During detention, he was kicked in the face whilst sitting in a chair with his hands tied behind his back. He was beaten with a steel bar (described as a piece of building equipment of about 30 cm x 2 cm) on his head. He was punched in the nose and burnt on his neck, chest, ears and genitals, and beaten on his legs with beer bottles until they broke and he was unconscious on his chair.

When he regained consciousness, officials put ice on his wounds. His legs were then bound with chains. One of his hands was handcuffed, the other was bound to a dog overnight – a dog is a taboo animal for Muslims.

He was subsequently transferred to a police station and charged with murder. He was released on bail in December 2006.

There are various steps States can and should take to effectively protect detained persons from ill-treatment. According to the UN Human Rights Committee:

“

To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognised as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.⁷³

”

⁷³ UN Human Rights Committee, General Comment No 20: concerning prohibition of torture and cruel treatment or punishment, para 11.

The fact that the Emergency Decree provides for persons to be detained in places not officially recognised as places of detention, has led to *ad hoc* detention facilities, like Yala Police School, which are less likely to be equipped to meet international standards and safeguards and is likely to contribute to the risk of ill-treatment.

2.3 Denial of access to legal counsel, family and medical treatment

The ICJ is concerned that those detained under the Emergency Decree are not being granted any or any proper access to legal counsel, family and medical care in accordance with international standards. This is of particular concern during the early days of detention when experience shows that the risk of ill-treatment is often the greatest.

Access to legal counsel

The ICJ is concerned that in violation of Article 14, ICCPR, detained persons are being denied access to legal counsel as a matter of official policy, according to officials interviewed by the ICJ.⁷⁴

The ICCPR guarantees everyone charged with a criminal offence the right of access to legal counsel of their own choosing (Article 14, para. 3 (b) and (d)), and to be as-signed legal assistance out of public funds if the accused cannot afford to pay (Article 14, para. 3 (d)).

The 1997 Constitution and the Criminal Procedure Code guarantee the right of a suspect during the inquiry stage to have a lawyer present during interrogation.⁷⁵ Detention under the Emergency Decree is not, formally speaking, the inquiry stage of a criminal investigation. However, where the *de facto* purpose of detention is to gather information for use in criminal prosecutions, the Criminal Procedure Code and the 1997 Constitution guarantees should be applied.⁷⁶

In interviews with the ICJ, the Thai authorities argued that the 1997 Constitutional guarantee of a right of access to a lawyer only applies to persons accused of a crime and not those detained under the Emergency Decree, as it specifies that those detained are not to be “treated like criminals”. The ICJ considers that this cannot be a correct reading of the Emergency Decree, when the legislative intention behind this wording was clearly to preserve or enhance the rights of detainees, not the opposite.

⁷⁴ Interviews at Southern Border Peace-building Command, Yala, 29 April 2006, Yala Police School, 31 May 2006, and with Ministry of Justice officials, various dates.

⁷⁵ Sections 7/1, 8, 134, 173/1 Criminal Procedure Code, also Section 241 of the 1997 Constitution: “at the inquiry stage of a criminal case, the suspect has the right to a lawyer attending the interrogation.”

⁷⁶ E.g. The European Court of Human Rights has adopted an “autonomous” approach to construction of legislation to prevent states from avoiding due process guarantees by the reclassification of proceedings as falling outside the scope of domestic criminal law: see *Engel v Netherlands* (1979-80) EHRR 647 at para 81; *Ozturk v Turkey* (1984) 6 EHRR 409 at para. 49.

In any event, whatever the purpose of detention, the UN Body of Principles provides that the authorities shall inform the detained person of the right to assistance from legal counsel “promptly after arrest” (Principle 17), and that the detainee shall be provided with reasonable facilities to exercise the right (Principles 17 and 18). Further, a detained person is to be allowed to communicate and consult confidentially with their chosen legal counsel (Principle 18). Moreover, the UN Human Rights Committee considers that the fundamental principles of fair trial, which include the right to communicate with legal counsel, represents a peremptory norm of international law.⁷⁷ This position is also supported by the Inter-American Commission on Human Rights.⁷⁸

In sum, the right to legal counsel is non-derogable and cannot be deprived to a detainee by the operation of the Emergency Decree. The exercise of this right provides an important safeguard to help protect the detained person against unlawful detention and ill-treatment.

Access to family

The UN Body of Principles provides that a detained person is entitled to inform his family “promptly” of arrest and the place of detention (Principle 16, para. 1), and have the right to be visited by, and to correspond with, family members (Principle 19).

The ICJ found that as a matter of policy, access to family was not granted until the fourth day of detention. However, there was also no systematic procedure for informing the relatives of detainees of their whereabouts, so even where access was possible in theory it was not always possible in practice. A number of family members also reported to the ICJ that they had been refused access to their detained relatives. In other cases, family visits appeared to be fairly frequent, but the decision to grant visits appeared arbitrary and it was not possible to challenge refusals.

Under Section 12 of the Emergency Decree, where “suspected persons” are detained, the “competent official” must file a report on the arrest and detention for the court. A copy of that report is then required to be available at the office of the competent official and be available for access by the relatives of the detained person. The ICJ was informed that in general the competent official did file such a report. However, in practice it did not appear that relatives were aware of this. More significantly, often families simply had difficulty in obtaining accurate information about the fact of detention, or place of detention, from the relevant authorities. However, the ICJ was told that more recently this situation has improved, and that relatives were been given access to the detained person on the fourth day of detention.⁷⁹

⁷⁷ UN Human Rights Committee, General Comment No. 29 (States of Emergency), para. 11.

⁷⁸ Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 261 and Chapter IV, “Recommendations”, point E, 10.

⁷⁹ [CJ] interview with the Centre for the Rule of Law and Reconciliation, January 2007.

Access to medical treatment

The UN Body of Principles provides that a detained person shall be offered a proper medical examination “as promptly as possible” after arrival, and that medical care and treatment be provided, free of charge, whenever necessary (Principle 24).

The ICJ was unable to gather first-hand evidence on the availability of medical treatment for detainees. However, it was clear that detainees were not given a medical examination at the time of their detention or release to determine if they had been ill-treated or otherwise developed medical problems in the course of their detention. The lack of medical treatment whilst in detention may, depending on the circumstances, amount to inhuman and degrading treatment and a violation of Article 10, para. 1, ICCPR.⁸⁰

In summary, the ICJ has serious concerns that several aspects of the detention process violate international standards for the treatment of prisoners and may constitute cruel, inhuman or degrading treatment:

- **The practice of holding prisoners in cells without natural light and with artificial light 24 hours a day;**
- **Lack of minimum floor space;**
- **Lack of proper ventilation.**

In addition, there are a number of factors, integral to the detention process, which seriously increases the risk of torture or other ill-treatment:

- **The holding of detainees in irregular places of detention, which are not subject to the normal laws and regulations governing prisons, police stations and other places of imprisonment. This means there are inadequate facilities for prisoners and, most seriously, no regular system of inspection to protect their interests;**
- **The denial of access to lawyers;**
- **The three-day delay in allowing access to family;**
- **The absence of any routine medical examination in the course of detention, particularly at the beginning and end;**
- **The failure to produce detainees physically before a court.**

⁸⁰ See e.g. UN Human Rights Committee in *Lewis v. Jamaica* (CCPR 527/93), *Bennett v. Jamaica* (CCPR 590/94), *Morrison v. Jamaica* (CCPR 663/95), *Levy v. Jamaica* (CCPR 719/96) & *Marshall v. Jamaica* (CCPR 730/96).

3. ENFORCED DISAPPEARANCES

The ICJ is deeply concerned by continued reports of enforced disappearances in the South. The ICJ was informed of cases of enforced disappearances both prior to and after the introduction of the Emergency Decree. The problem was not therefore created by the Emergency Decree; its causes are primarily institutional.

However, the institutional culture that has allowed enforced disappearances to take place, and remain unpunished, has to some extent been sustained by the provisions of the Emergency Decree, in particular: the granting of exceptional powers to security forces over a long period of time, the widening of arrest and detention provisions without appropriate international safeguards, the absence of proper judicial supervision of arrest and detention, the provision for *ad hoc* detention facilities, and the general exclusion from criminal liability granted to state officials.

Right not be subjected to enforced disappearance

Enforced disappearance is one of the most serious human rights violations.⁸¹ An absolute prohibition on enforced disappearance is now contained in the International Convention for the Protection of All Persons from Enforced Disappearances ('the Disappearances Convention').⁸² The Disappearances Convention confirms that where the practice of enforced disappearance is "widespread" or "systematic", it constitutes a crime against humanity.⁸³ Whilst this treaty is not yet in force, it was unanimously adopted by the United Nations General Assembly and many of its provisions reflect existing international obligations already found in other treaties, as well as reflecting recognised international norms.

The UN Human Rights Committee considers that enforced disappearances invoke multiple ICCPR rights, such as Articles 6 (right to life), 7 (prohibition of torture and other cruel, inhuman or degrading treatment), 9 (right to liberty and security) and 10 (inhuman and degrading treatment).⁸⁴

As already stated, Thailand has not formally derogated from any of its international obligations in relation to the South. The presumption must be therefore that these rights are guaranteed and must be respected. Regardless of the derogation of any rights, Article 7 of the Declaration on the Protection of all Persons from Enforced Disappearance ('Declaration on Enforced Disappearances'),⁸⁵ states that no circumstances, including internal political instability or a public emergency, can justify enforced disappearances. This position is also reflected in the Disappearances Convention (Article 1, para. 2). Further, Articles 6 and 7 ICCPR are, in any event, expressly non-derogable (Article 4, para. 2, ICCPR). Whilst Articles 9, para. 1, and 10 are not listed in the ICCPR as non-derogable, the UN Human Rights Committee considers that the rights contained in those articles should be treated as non-derogable.⁸⁶

⁸¹ See e.g. Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71 8 January 2002, para. 95.

⁸² UN General Assembly, A/RES/61/177, adopted on 20 December 2006 without a vote, Article 1. The Convention will enter into force after ratification of 20 states. As of 19 April 2007, 59 states were signatories.

⁸³ Article 5, Disappearances Convention. See also Article 7(1)(i), Rome Statute of the International Court 1998.

⁸⁴ See e.g. UN Human Rights Committee *Celis Laureano v. Peru*, CCPR 540/93 and *Sarma v Sri Lanka*, CCPR 950/00. See also the Commission on Human Rights Working Group on 'disappearances', UN doc. ECN.4/1983/14, para. 133.

⁸⁵ Declaration on the Protection of all Persons from Enforced Disappearance, adopted by General Assembly resolution 47/133 of 18 December 1992.

⁸⁶ UN Human Rights Committee, General Comment No. 29, para. 13 (a) and (b).

In short, where enforced disappearances are perpetrated by Thai officials, either directly or indirectly, Thailand is in violation of its international obligations.

Evidence of enforced disappearances

The ICJ is not aware of any official figures for enforced disappearances. The ICJ therefore found it difficult to assess the precise impact of the Emergency Decree in this regard. The difficulty in obtaining systematic and reliable data on this issue was compounded by the unwillingness of people to report enforced disappearances to authorities for the fear of repercussions and lack of confidence in the relevant authorities.

However, based on interviews carried out by the ICJ's researcher with local lawyers and some families of the disappeared, the picture is one of the continued use of enforced involuntary disappearances by the security forces in the South.⁸⁷ The ICJ's researcher was given information concerning cases from 2002 up to February 2007. In several of the cases reported to the ICJ, or to other human rights organisations, the victim had either last been seen in the company of security forces or had been informed their names were on blacklists, or that they were wanted for questioning.⁸⁸ The government of Prime Minister Thaksin Shinawatra indicated that they were aware of the problem,⁸⁹ but no individuals have been held accountable and there is no systematic investigation of cases. The impression given by this failure to act is, rightly or wrongly, that the Thai authorities either condone the use of the practice or turn a blind eye to it.

Although the government of former Prime Minister Thaksin Shinawatra acknowledged the existence of the problem of enforced disappearances, there is no agreement on its scale. In a televised discussion with Anand Panyarachun, the chairperson of the National Reconciliation Commission (NRC), then Prime Minister Thaksin Shinawatra admitted that there had been 20 "disappearance" cases in the South, when responding to Anand Panyarachun's claim that there were 200-300 such cases.⁹⁰

Anand Panyarachun's view that there may have been hundreds of enforced disappearances is widely shared among civic activists and NGOs in the South, although no verifiable figures are publicly available. It seems clear that there are more cases than the 21 acknowledged by the previous government. The ICJ received indications of cases that were simply not reported to the authorities, because the families had no confidence in their readiness to investigate.

The former government set up the Committee for Policy and Administration of Healing for Those Affected by the Unrest in the Southern Border Provinces, by a Prime Minister's Office Order in May 2005, with Chaturon Chaisang as Chairman at the time. It gave 100,000 Baht to families of victims of violent incidents in the South. The Committee acknowledged 21 families of 'disappeared' people as being eligible for one-off payments of 100,000 Baht,⁹¹ although the government has not accepted responsibility for the fate of the individuals, or

⁸⁷ This picture is also supported by the recent report, "It Was Like Suddenly My Son No Longer Existed", Enforced Disappearances in Thailand's Southern Border Provinces, Human Rights Watch, Volume 19, No. 5(C), March 2007.

⁸⁸ Thailand Country Report January 2007, Human Rights Watch, p.3, available at www.hrw.org.

⁸⁹ Prime Minister Thaksin Shinawatra, Modernine TV, 28 July 2005.

⁹⁰ Modernine TV, 28 July 2005.

⁹¹ Approximately USD2, 775.

given information as to their whereabouts. A number of cases from the South have also been submitted to the United Nations Working Group on Enforced and Involuntary Disappearances.

Some examples of cases of enforced disappearances in the South are given in the boxes below.

CASE 1

Two police officers from the Crime Suppression Division Bangkok came to A's house in early 2002 and asked him to meet them at a hotel in town the next day to provide them with information about the bombing of a police post in the same province.

The next day, A, along with his friend and neighbour, B, borrowed a motorbike from a friend to drive into town to meet the police. They never returned. C, another rubber farmer from another village also went to the meeting, following in his own car.

The day after the meeting with the police, C called at A's house expecting to find A, and told A's family, what had happened the previous day. According to C, the police had questioned the three men, along with two others from another province, in a room at the hotel about various violent incidents, but all had denied any knowledge of the incident.

After about an hour, the policemen invited the five men to eat with them at another hotel in the same town. After dinner the other two men from the other province were allowed to go home, but C, A and B returned to the original hotel with the police.

After being at the hotel for a short time, the police invited the three men to drink tea with them at a shop in another hotel again, about 300m from the hotel where they were, saying one of the police would pay.

After drinking tea, the policeman said he had not brought money with him, and told A and B to go back to their hotel and fetch the money, telling C to stay with them. After waiting for the men to return for some time, they went back to the first hotel, but the men were not there. C thought they must have gone home. He stayed the night in the hotel, not wanting to brave travelling home at night.

A's and B's families reported the apparent abduction to the provincial police, naming the officers with whom they had eaten, but the police failed to trace them, despite the presence of witnesses who saw them and their motorcycle being put in a van and the subsequent discovery of the motorcycle in a neighbouring province.

CASE 2

C, who was able to name the police officers involved, was shot dead a year later — no perpetrators have been identified. The families of A and B have been paid financial assistance offered by the Thai government to the families of victims of violence in the South.

The ICJ was informed of another recent “disappearance” in the same area af-ter the disappearance of A and B. This has not been reported to the authorities because the family of the young man who “disappeared” had no confidence in the police to investigate after the earlier cases.

On the morning of a day in early 2004, D’s neighbour, E, borrowed 60 Baht from D’s wife, saying he wanted to buy petrol for his motorbike and go in to town. He went in to town with a man known as ‘X’. E never returned.

At 02.00 hours ‘X’ came to D’s house and called out for him to come out so he could return the money borrowed by his neighbour. When D opened the door there was a white and green pickup truck parked outside with over ten men in the back, and they took D into the truck. When his wife asked where they were taking him, one of them answered they were taking D to investigate and would bring him back.

E’s mother and father reported the incident to the district police station, then followed it up with the provincial police station, the District Office and the Central Provincial Court but had no response from any of the officials.

D’s family reported the incident to the police, the National Human Rights Commission, the Rule of Law Centre and the National Reconciliation Commis-sion.

CASE 3

F’s family became alarmed when the motorcycle taxi driver failed to come home for lunch as usual in mid-2005. They called his mobile phone but were unable to contact him. Friends said that he was last seen with a passenger on his motorbike. The police were unable to help in tracing him. His family has received a payment from the government due to families of victims of violence in the South.

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CASE 4

G, a teacher's college student, failed to return to his family home in a neighbouring province for the weekend in mid-2005, two days after multiple insurgent attacks in the province in which he was studying. His family have had no further word from him. Police from the province where he was studying came to his house to advise his parents to fill out a missing persons report, taking, among other things, all photographs of him. His parents had not informed the police of their son's disappearance and also found it strange that police from that province, rather than their own province, visited them. Both police and military denied holding G, who has not been in touch with his family since his failure to return home. His family, however, received compensation payments from the Thai Government due to families of victims of violence in the South.

CASE 5

H, an Islamic kindergarten teacher "disappeared" in late 2005. He had travelled with his sick nephew to the town hospital. He was last seen on the hospital closed circuit television awaiting the results of his nephew's X-ray. His family was unable to contact him on his mobile phone and he has not been seen since. Local officials told the ICJ in early 2006 that H's name had been on a list of suspects thought to have been involved in cases of vandalism of state property in the district, and that he received regular visits from people from other provinces in the South, making him suspicious. Other teachers from his school reportedly had their houses searched by police and military. His family has received a payment from the government due to families of victims of violence in the South.

Legal obligation to prevent

The Declaration on Enforced Disappearances sets out State obligations to prevent enforced disappearances, including: a requirement that people be detained only in officially recognised and supervised facilities that maintain records of all detainees (Article 10, paras. 1 and 3); a requirement that the State ensure that all detainees are brought before a judicial authority promptly after detention (Article 10, para. 1); and the right of family members, legal counsel and others with a legitimate interest to obtain accurate information on detainees (Article 10, paras. 2 and 3). These guarantees are also contained and elaborated upon in the Disappearances Convention, which explicitly adds that "no one shall be held in secret detention" (Article 17, para. 1). The UN Human Rights Committee also considers that the State "should also take specific and effective measures to prevent the disappearance of individuals".⁹²

⁹² UN Human Rights Committee, General Comment No. 6, para. 4.

The ICJ is concerned that the grounds and conditions of detention outlined in the Emergency Decree (see Part III, Sections 1 and 2 of this memorandum) seriously undermine the effectiveness of the measures Thailand is required to implement to prevent enforced disappearances.

Right to truth and reparation

The Disappearances Convention reaffirms the right of victims to truth and to reparation for them and their relatives (Article 24), which is also contained in the Declaration on Enforced Disappearances (Articles 9 and 19). This reflects a general principle of international human rights law that everyone has a right to an effective remedy. This right is widely reflected in international human rights treaties and instruments,⁹³ including those that Thailand is party to, such as the ICCPR (Article 2, para. 3) and the Convention against Torture (Article 13).

While immediate financial assistance for the families of victims is essential and provided for, the Committee for Policy and Administration of Healing for Those Affected by the Unrest in the Southern Border Provinces has failed to provide answers about the whereabouts of the disappeared or who was responsible. There has not been any kind of independent investigation into enforced disappearances, even for those 21 individuals the government has tacitly admitted, and nor is there a mechanism to monitor police investigations or to provide legal assistance for families to access the justice system.

Under general international law, Thailand is also obliged to ensure a prompt, thorough, independent and impartial investigation of human rights violations by a competent and independent State authority,⁹⁴ and to ensure that perpetrators of serious human rights violations are prosecuted and tried.⁹⁵ In the context of enforced disappearances, this is specifically reflected in the Disappearances Convention (Articles 3 and 6) and the Declaration on Enforced Disappearance (Articles 13 and 14).

⁹³ See also: Article 8 UDHR, Principles 4 and 16 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions, Principles 4-7 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 27 of the Vienna Declaration and Programme of Action, Article 9 of the Declaration on Human Rights Defenders, Article 13 ECHR, Article 47 of the Charter of Fundamental Rights of the European Union, Article 7 (1) (a) 25 ACHR, Article XVIII of the American Declaration of the Rights and Duties of Man, Article III (1) of the Inter-American Convention on Forced Disappearance of Persons, Article 8 (1) of the Inter-American Convention to Prevent and Punish Torture, Article 7 (a) AfrCHPR, Article 9 Arab Charter on Human Rights.

⁹⁴ Article 12 CAT; UN Principles on Investigation of Torture, recommended by the General Assembly in December 2000; Article 62 of the Vienna Declaration and Programme of Action of 1993; Principle 9 of the UN Principles on Extra-Legal Executions; Human Rights Committee: *General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 15; Inter-American Court of Human Rights: *Velásquez Rodríguez v Honduras*, Judgment of July 29, 1988, Series C No. 4, para 174; European Court of Human Rights: *McCann v the United Kingdom*, Judgment of 27 September 1995, Series A No 324, para 161; African Commission on Human and Peoples' Rights: *Malawi African Association et al. v Mauritania*, Communications 54/91 et al. (27th Ordinary Session, May 2000), recommendations, lit. 1.

⁹⁵ *General Comment No 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 21 May 2004, CCPR/C/74/CRP.4/Rev.6, para 18.

What is clearly and urgently needed in the South is an effective and independent investigation of serious human rights violations including enforced disappearances to:

- **Establish what has happened to the victims;**
- **Bring to justice those found responsible for the death, 'disappearance' or ill-treatment;**
- **Pay adequate compensation;**
- **Ensure that similar violations do not occur in the future.⁹⁶**

⁹⁶ See *Bleir v Uruguay* (30/1978) Report of the UN Human Rights Committee, Annex X, and *Quinteros v Uruguay* (107/1981), Report of the UN Human Rights Committee, GAOR, 38th Session, Supplement No. 40 (1983), Annex XXII, cited in Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, 2nd Edition, Oxford University Press, p.264.

4. LACK OF ACCOUNTABILITY AND IMPUNITY

4.1 Immunity under the Emergency Decree

The ICJ stated in its August 2005 report that under international law states are obliged to conduct a “prompt, effective, impartial and independent investigation” into potential human rights violations and to bring those responsible to justice.⁹⁷ States are also required to provide reparations⁹⁸ to victims of violations of human rights, especially for gross violations, such as of the right to life, the prohibition of torture and other cruel, inhuman and degrading treatment, and enforced disappearances.⁹⁹

The ICJ also stated that, “Exceptional circumstances such as political instability or public emergency do not justify exempting law enforcement officials from possible criminal or civil liability for harm caused during emergency operations.”¹⁰⁰ Moreover, failure to properly investigate and bring to justice perpetrators of serious human rights violations is itself a violation of the ICCPR.¹⁰¹

In this regard, the ICJ remains concerned that Section 17 of the Emergency Decree “severely limits the accountability of any civilian or military authorities exercising powers during an emergency”.¹⁰² Section 17 provides specific immunity from civil, criminal or disciplinary liability for certain officials implementing powers and duties under the Emergency Decree, where those acts are performed in good faith, are non-discriminatory and not unreasonable or exceeding the necessity of circumstances.¹⁰³ Section 17 explicitly allows the possibility that victims of wrongful acts under the Decree might petition the authorities for compensation. However, Section 16 purports to make “Regulations, notifications, orders, or actions under this decree” not subject to Thai administrative law, so it is unclear how it might be determined that an act has been wrongful.

⁹⁷ *More Power, Less Accountability: Thailand's New Emergency Decree*, ICJ, August 2005, p.7.

⁹⁸ The right to ‘reparation’ includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, 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, para. 18.

⁹⁹ *More Power, Less Accountability: Thailand's New Emergency Decree*, ICJ, August 2005, p.7, citing the 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, para. 18 et seq.

¹⁰⁰ *More Power, Less Accountability: Thailand's New Emergency Decree*, ICJ, August 2005, p.8, citing CCPR/CO/Rus, para. 13 and the UN Basic Principles on the Use of Force and Firearms, Principle 8.

¹⁰¹ *More Power, Less Accountability: Thailand's New Emergency Decree*, ICJ, August 2005, p.8, citing 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.

¹⁰² *More Power, Less Accountability: Thailand's New Emergency Decree*, ICJ, August 2005, p.8.

¹⁰³ “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.”, Article 17, Emergency Decree.

Sections 16 and 17 have not been tested in the Thai courts. Given the evidence of human rights violations in the South since the inception of the Emergency Decree in July 2005, this is somewhat surprising. The ICJ was told that some lawyers would like to bring civil, criminal or disciplinary cases or claims for compensation against the relevant authorities. However, the existence of these provisions is contributing to the reluctance of victims' lawyers to do so, because of a belief that the Emergency Decree makes such claims very difficult or impossible. Victims and their families are also deterred from bringing claims due to lack of faith in the justice system and the lack of witness protection during legal proceedings.¹⁰⁴

Section 17 is not the origin of the problem of impunity in the South, rather as the UN Human Rights Committee observed, it “exacerbates” the problem of impunity.¹⁰⁵ The immunity clause in the Emergency Decree has therefore effectively reinforced an existing status quo whereby victims of human rights violations and their families either have, or believe they have, no effective remedy, and the officials responsible are allowed to remain in positions of responsibility where they can potentially repeat their actions.

**EXAMPLE OF
LACK OF
ACCOUNTABILITY
- EXCESSIVE USE
OF FORCE &
VIOLATION OF
RIGHT TO LIFE**

An 80 year-old man was praying with others at his village Mosque in one of the three southern border provinces when he heard a bomb blast. He and the others with him were afraid but began to make their way home. He was walking home with three elderly women when he heard gunshot from nearby. Two minutes later a police pick-up truck drove past with 3-4 police sitting in the back and he heard gunshots coming from the truck. One of the women walking behind him was shot dead and another one was shot in the leg, and the truck drove away at high speed. After the truck drove away he heard other gunshots.

J, the sixty year-old woman who was shot in the leg, was taken by her neighbour to the hospital for treatment. When she was in the hospital, a district official came and gave her 4,000 Baht, which is more than a standard 1,000 - 2,000 Baht monetary gift an official would give when visiting a person in hospital.

K, the daughter of the elderly woman who was killed, told the ICJ that police from the local police station took her mother's dead body at 22.00 hours to examine, but returned the body after thirty minutes without telling the family anything. The dead woman's family received 5,000 Baht from the district office shortly after the shooting, and the day after the shooting, when they were preparing to bury the body, the family received 20,000 Baht from the official who told them it was

¹⁰⁴ Interview with a representative of the Lawyers Council of Thailand, January 2007.

¹⁰⁵ Concluding Observations of the Human Rights Committee, CCPR/CO/84/THA(13), 28 July 2005 (Advanced Unedited Version).

‘assistance’ from the provincial governor. Normally victims of daily shootings would have to send letters requesting financial assistance from the provincial offices and there would be a lengthy process before the money was granted.¹⁰⁶

When the local sub-district chief asked the police about the shooting the police denied police involvement, saying it was a gunman hiding in a nearby forest who had ambushed the group. A map of the village and accounts of human rights researchers who have been to the site shows no forest in the vicinity of the shooting.

4.2 Accountability for past violations

In the case of the most widely known incidents involving killings by the security forces and enforced disappearances, which took place before the enactment of the Emergency Decree, there have been no successful prosecutions for the serious violations committed.

Somchai Neelapaijit

The case of missing Muslim human rights lawyer Somchai Neelapaijit remains unsolved. Despite statements from former Prime Minister Thaksin Shinawatra, saying that he knew Somchai Neelapaijit was dead, and from the head of the Council for National Security, General Sonthi Boonyarakalin, saying that senior officials related to the former Prime Minister’s office were likely to have been involved, there has been no visible progress in the investigation. The one police officer found guilty of a lesser offence of coercion, in relation to the disappearance, remains on active duty while the case is on appeal.

‘War on drugs’

In November 2006, the newly appointed interim Minister of Justice acknowledged the high numbers of deaths during the Thai government’s crackdown on drugs, known as the ‘war on drugs’, in 2003 under former Prime Minister Thaksin Shinawatra. He cited police statistics, reporting 2,596 people killed, and that after investigation it was found that of those people, 1,432 were not concerned with drugs (considered innocent), while the other 1,164 were concerned with drugs.¹⁰⁷

¹⁰⁶ [C] interview with local human rights defender, January 2007.

¹⁰⁷ See: <http://www.prachatai.com/05web/th/home/page2.php?mod=modptcms&ContentID=6143&SystemModuleKey=HighlightNews&SystemLanguage=Thai>

In 2004, the UN Human Rights Committee asked the Government for “information on steps taken by the State party to investigate the large number of alleged killings during the ‘war on drugs’”.¹⁰⁸ No independent commission of inquiry has been established to investigate the killings, a large number of which appear to have been inflicted by the security forces.¹⁰⁹ In December 2006, the Minister for Justice said four of the cases had been submitted to the Department of Special Investigation (DSI).¹¹⁰ The ICJ considers it is vital that the large number of deaths be investigated and action taken where there is evidence that the killings were unlawful.

‘Krue Se’ and ‘Tak Bai’ incidents

Following much international criticism, the Thaksin Government launched commissions of inquiry into the 32 killings at the Krue Sae mosque, on 28 April 2004, and the six deaths during the suppression of the Tak Bai demonstration, on 25 October 2004, including the mass transportation of persons detained from Tak Bai to Ingkayuthaborihaan Army Camp in Pattani, during which 78 people died. The commissions were critical of the behaviour of the security forces. However, no state officials have been held accountable in relation to the deaths caused at these incidents. Commissions of inquiry should supplement, and not substitute, the investigation of criminal responsibility and the accountability of officials.¹¹¹

In all of the above cases, the facts *raise prima facie* violations of ICCPR Articles 2 (1), 6, 7, 9 and 10. The failure to properly investigate and hold anyone accountable for the disappearance of Somchai Neelapaijit and any violations found in relation to the killings at Krue Sae, Tak Bai and during the ‘war on drugs’, gives the impression that the use of excess force or unlawful conduct by security forces is either sanctioned or condoned from the highest levels, and that those responsible for serious abuses will not be punished.

Specifically, in relation to the allegations of serious human rights violations concerning the ‘War on Drugs’, the Tak Bai incident and the Krue Se Mosque incident, the UN Human Rights Committee recommended the following:

“ [Thailand] 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.¹¹²

”

The UN Human Rights Committee added that victims and their families should receive “adequate redress” and efforts to train law enforcement officials to “scrupulously respect” international standards should be continued.¹¹³ The ICJ shares these views and is therefore deeply concerned that no government officials have been held accountable for any serious violations of human rights in relation to these incidents.

¹⁰⁸ Para 11., List of issues to be taken up in connection with the consideration of the initial report of THAILAND (CCPR/C/THA/2004/1), UN Human Rights Committee.

¹⁰⁹ Amnesty International, *Thailand: Memorandum on Human Rights Concerns*, October 2004.

¹¹⁰ See <http://www.prachatai.com/05web/th/home/page2.php?mod=modptcms&ContentID=6143&SystemModuleKey=HighlightNews&SystemLanguage=Thai>

¹¹¹ Principle 8, Impunity Principles.

¹¹² Concluding Observations of the UN Human Rights Committee, CCPR/CO/84/THA (13), 28 July 2005 (Advanced Unedited Version).

¹¹³ *Ibid*

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