

# The Implementation of Thailand's Emergency Decree in Response to Protests in 2020

A Briefing Paper  
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## ICJ LEGAL BRIEFING

### THE IMPLEMENTATION OF THAILAND'S EMERGENCY DECREE IN RESPONSE TO PROTESTS IN 2020

22 October 2020<sup>1</sup>

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#### 1. Background

On 15 July 2005, the Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 ('Emergency Decree')<sup>2</sup> was promulgated by executive authority (Annex 1). The decree entered into force on 17 July 2005, following the date of its publication in the Government Gazette.<sup>3</sup> In August 2005, the Decree was submitted and eventually enacted by the Parliament.<sup>4</sup>

Initially, the Emergency Decree was imposed in the southern border provinces of Thailand,<sup>5</sup> which has experienced varying degrees of separatist activity. In the past decade, the Decree was used as a basis of authority in action to quell political unrest and several protests in Thailand.

There are parts of the decree that provide the criteria allowing for declaration of emergency powers. Pursuant to section 5 of the Decree, the Prime Minister, upon the approval of the Council of Ministers is empowered to declare "an emergency situation", and to authorize "use the force by administrative officials or police officers, civil officials or military officers to jointly provide assistance, prevent, remedy, suppress, withhold the emergency situation, rehabilitation or provide assistance to the people". Pursuant to section 11 of the Decree, the Prime Minister upon the approval of the Council of Ministers is empowered to declare "a serious emergency situation", which applies to situations "where an emergency situation involves terrorism, use of force, harm to life, body or property, or there are reasonable grounds to believe that there exists a severe act which affects the security of state, the safety of life or property of the state or person, and there is a necessity to resolve the problem in an efficient and timely manner".

In 2005, the ICJ issued a legal memorandum expressing concerns on the enactment of the Emergency Decree and urged the Government to review the Decree, observing, among

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<sup>1</sup> The information in this Legal Briefing is accurate as of 22 October 2020.

<sup>2</sup> English translation is available at: [http://210.246.148.76/thaiquest/getFileProxy/comment.aspx?url=%2Fdata%2Fdocument%2Fext810%2F810259\\_0001.pdf](http://210.246.148.76/thaiquest/getFileProxy/comment.aspx?url=%2Fdata%2Fdocument%2Fext810%2F810259_0001.pdf)

<sup>3</sup> Published in the Government Gazette Vol. 122, Part 58a, dated 16th July 2005

<sup>4</sup> Banhan Kamla, 'Analysis on the Implementation of the Emergency Decree on Public Administration in Emergency Situation and its Constitutionality', Junlaniti Journal, November to December 2008, at 34, available at: [https://www.senate.go.th/assets/portals/93/fileups/272/files/S%E0%B9%88ub\\_Jun/3journal/b100%20jul\\_5\\_6.pdf](https://www.senate.go.th/assets/portals/93/fileups/272/files/S%E0%B9%88ub_Jun/3journal/b100%20jul_5_6.pdf) (in Thai)

<sup>5</sup> ICJ, 'Implementation Of Thailand's Emergency Decree', July 2007, available at: <https://www.icj.org/wp-content/uploads/2012/06/Thailand-emergency-decree-report-2011-eng.pdf>

other things, that the Decree provided increased power with reduced oversight.<sup>6</sup> In 2007, the ICJ issued a legal memorandum summarizing its research and analysis on implementation of the Emergency Decree in Thailand's southern border provinces in light of international law.<sup>7</sup> In these two memoranda, the ICJ expressed concerns that 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.

The ICJ has called the Thai government to amend the Emergency Decree to ensure that its implementation comply with all the human rights guaranteed under the Thai Constitution and its international human rights obligations, including under the International Covenant on Civil and Political Rights (ICCPR) to which Thailand is a party. These rights include, among others, the rights to liberty and freedom from arbitrary detention, and freedoms of expression, assembly and movement. The ICJ also called for the Government to withdraw Emergency Decree in the areas currently under them without undue delay, as the provisions in domestic law is sufficient and measures could usually be taken within the ordinary legal and institutional framework without these wide ranging and overbroad limitations on human rights.<sup>8</sup>

On 15 October 2020, Thailand's Prime Minister declared a "serious emergency situation" in all area of Bangkok until 13 November 2020.<sup>9</sup> The invocation of the Decree came after the mass protests, which took between 13 and 15 October 2020 in Bangkok, after months of intermittent youth-led anti-government protests in Thailand. The state of serious emergency situation in Bangkok was lifted on 22 October 2020.<sup>10</sup>

This Briefing Paper summarizes research and analysis undertaken by the ICJ on the content and implementation of the Emergency Decree declared on 15 October 2020 by the Thai government in response to anti-government protests, in light of international human rights law. This Briefing focuses on four main areas of concern during the course of eight days when the Decree took effect, namely: (i) the emergency powers; (ii) the limited scrutiny by the courts; (iii) legal immunity from prosecution; and (iv) emergency decree measures. The following analyses may also be useful for government agencies or civil society organizations that are seeking to advance respect for human rights during such emergency situation.

## **2. Emergency powers**

Under international human rights law and particularly the ICCPR, certain rights are must always be protected in their full scope, while other may be subject to some form of limitation or restriction in exceptional circumstances. This is provided in two possible ways. First, some, but not all rights provisions, provide expressly limitation, and the circumstances under which they may be limited. For instance, under the ICCPR, fundamental freedoms of expression, association, assembly and movement allow for

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<sup>6</sup> ICJ, 'More Power, Less Accountability: Thailand's New Emergency Decree', August 2005, at 9, available at: <https://www.icj.org/wp-content/uploads/2005/08/Thailand-accountability-advocacy-2005.pdf>.

<sup>7</sup> ICJ, Implementation of Thailand's Emergency Decree, supra note 5

<sup>8</sup> Ibid; ICJ, More Power, Less Accountability: Thailand's New Emergency Decree, supra note 6, at 9.

<sup>9</sup> The Government Public Relations Department, 'Declaration of a Serious Emergency Situation in Bangkok', 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10227&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10227&filename=index)

<sup>10</sup> The Government Public Relations Department, 'Prime Minister Lifts the State of Severe Emergency Situation in Bangkok', 22 October 2020, available at: [https://thailand.prd.go.th/mobile\\_detail.php?cid=4&nid=10280](https://thailand.prd.go.th/mobile_detail.php?cid=4&nid=10280)

restriction only where provided in law and for a limited range of purposes such as national security or public health. However even these limitations must be strictly necessary and proportionate to their purpose and be non-discrimination in purpose and effect.

The second way, pursuant to the terms of article 4 ICCPR, is where there is a public emergency so severe that it threatens the life the nation and certain rights may be derogated from but derogating measure may be taken only to the extent that they are strictly necessary to meet a specific threat. The emergency must be officially proclaimed, and any derogating measures must be notified to the State Parties through the UN Secretary General.

Article 4(1) of the ICCPR provides that:

“in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

Although this provision recognizes that States may take measures derogating from their obligations under the Covenant, it also explicitly prescribes that no derogation may be made to: Article 6 (right to life); Article 7 (prohibition of torture or ill-treatment); Article 8 (prohibition of slavery, the slave-trade and servitude); Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation); Article 15 (the principle of legality); Article 16 (the recognition of everyone as a person before the law); and Article 18 (freedom of thought, conscience and religion). Furthermore, according to the UN Human Rights Committee:

“the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.”<sup>11</sup>

A number of other rights, while not explicitly designated under conventions as non-derogable, have attained that status. In particular, the right to challenge the lawfulness of detention (*habeas corpus*) is widely regarded as non-derogable.<sup>12</sup> The UN Human Rights Committee also said that the right to be tried by an independent and impartial tribunal “is an absolute right that may suffer no exception,”<sup>13</sup> and most components of the right to a fair trial are also widely regarded as non-derogable.<sup>14</sup>

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<sup>11</sup> UN Human Rights Committee, ‘General Comment No. 29: Article 4: Derogations during a State of Emergency’, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 11, available at: <https://www.refworld.org/docid/453883fd1f.html>

<sup>12</sup> Ibid., paras. 15-16.

<sup>13</sup> UN Human Rights Committee, *M. Gonzalez del Río v. Peru*, UN Doc CCPR/C/46/D/263/1987, 2 November 1992, para. 5.2.

<sup>14</sup> UN Human Rights Committee, General Comment No. 29, para.16.

Other rights may be derogated from only in certain circumstances and providing specific requirements are met. As the UN Human Rights Committee stated, “[t]he fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists.”<sup>15</sup> Consequently, “measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.”<sup>16</sup> In addition, once a state of emergency has been validly declared, any measure that derogates from a provision of the ICCPR must not impair the essence of the relevant right. It may only reduce the scope of application of the right to the extent strictly necessary to meet a threat to the life of the nation. As the Human Rights Committee affirmed:

“the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party”.<sup>17</sup>

Importantly, Thailand does not to date appear to have notified the UN Secretary General of any derogations in connection with the October emergency Declaration.

On 3 July 2014, pursuant to its declared of martial law on 20 May 2014, the Thai government informed the UN Secretary General that Thailand would be derogating from a number of ICCPR Rights:

“[T]he Kingdom of Thailand has exercised its right of derogation under Paragraph 1 of Article 4 of the ICCPR, specifically in relation to its obligation under: Article 12 (1), by the announcement of a curfew which was lifted on 13 June 2014; Article 14 (5), only where a jurisdiction has been conferred to the Martial Court over Sections 107-112 of the Penal Code and the offences against the internal security of the Kingdom; Article 19, by the prohibition of broadcasting or publishing certain content, particularly those inciting conflict and alienation in the society, false or provoking messages, and Article 21, by the limitation of political gathering.”<sup>18</sup>

On 24 December 2019 the government informed the UN Secretary General that, effective 16 July 2019, all derogations had been removed.<sup>19</sup>

In addition, on 15 June 2020, the government informed the UN Secretary General that Thailand is derogating some of its obligations under the ICCPR, particularly article 12 (freedom of movement) pursuant to the COVID emergency pandemic.<sup>20</sup>

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<sup>15</sup> Ibid., para. 6.

<sup>16</sup> Ibid., para. 2.

<sup>17</sup> Ibid., para. 4.

<sup>18</sup> Thailand: Notification under Article 4(3), C.N.479.2014.TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2014/CN.479.2014-Eng.pdf>

<sup>19</sup> Thailand’s Notification under Article 4(3), C.N.629.2019.TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2019/CN.629.2019-Eng.pdf>

<sup>20</sup> Thailand’s Notification under Article 4(3), C.N.194.2020. TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2020/CN.194.2020-Eng.pdf>

Thailand also derogated from a number of rights pursuant to the declarations of serious emergency situations to quell protests, including between 7 April and 22 December 2010,<sup>21</sup> and 22 January and 19 March 2014.<sup>22</sup>

In the absence of any notification to the UN Secretary General pursuant to the October emergency, it must be presumed that Thailand is not purporting to derogate from any ICCPR rights.

Under Thai law, the Prime Minister may declare a temporary emergency situation by invoking the Emergency Decree. Nevertheless, subject to section 4 "emergency situation" was defined in overly broad terms, i.e.:

"a situation, which (...) may affect the public order of the people or endangers the security of the State or may cause the country or any part of the country to fall into a state of difficulty (...) pursuant to which it is necessary to enact emergency measures to preserve the democratic regime of government with the King as Head of State of the Kingdom of Thailand under the Constitution of the Kingdom of Thailand, independence and territorial integrity, the interests of the nation, compliance with the law, the safety of the people, the normal living of the people, the protection of rights, liberties and public order or public interest, or the aversion or remedy of damages arising from urgent and serious public calamity."

The permissible basis for derogation under the ICCPR article 4 is an emergency to address a threat to the life of a nation. The basis under Thai law is far, far broader and inconsistent with international law.

Recently, this power is exercised by Thailand's Prime Minister. After months of protests, on 15 October 2020, the Prime Minister, General Prayuth Chan-o-cha, invoked Sections 5, 9 and 11 of the 2005 Emergency Decree to declare a "serious emergency situation" in all areas of Bangkok until 13 November 2020<sup>23</sup> in light of the mass protests that took place between 13 and 15 October 2020. The "serious emergency situation" was declared pursuant to section 11 of the Emergency Decree.<sup>24</sup> Subsequently issued Regulations containing several emergency decree measures were announced pursuant to the authority contained in section 9 and 11 of the Decree (e.g. in Annex 2 and 3).<sup>25</sup>

The mass protests have occurring intermittently over the course of months and are largely youth-led, and have generally revolved around three core demands: the resignation of Prime Minister; the amendment of the Constitution; and reforming the institution of the

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<sup>21</sup> Thailand's Notification under Article 4(3), C.N.375.2010.TREATIES-13 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2010/CN.375.2010-Eng.pdf>; Thailand's Notification under Article 4(3), C.N.105.2011.TREATIES-2 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2011/CN.105.2011-Eng.pdf>

<sup>22</sup> Thailand's Notification under Article 4(3), C.N.49.2014.TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2014/CN.49.2014-Eng.pdf>; Thailand's Notification under Article 4(3), C.N.121.2014.TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2014/CN.121.2014-Eng.pdf>

<sup>23</sup> The Government Public Relations Department, 'Declaration of a Serious Emergency Situation in Bangkok', 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10227&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10227&filename=index)

<sup>24</sup> Bangkokbiz News, 'Declaration of a Serious Emergency Situation in Bangkok (No.2)', 16 October 2020, available at: <https://www.bangkokbiznews.com/news/detail/903035>

<sup>25</sup> For example, Regulation Issued under Section 9 and Section 11 of the Emergency Decree, 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10240&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10240&filename=index) (Annex 2); and Notification Pursuant to Section 11 of the Emergency Decree, 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10241&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10241&filename=index) (Annex 3)

monarchy.<sup>26</sup> On 13 and 14 October 2020, the demonstrations involved several confrontations with police but were reportedly largely peaceful. At one point, some protesters were reported to have jeered as a motorcade passed carrying the Queen, which was later cited as one of the reasons to declare a state of emergency.<sup>27</sup> The Emergency Decree to quell the protests was declared and took effect from 4am of 15 October 2020. Immediately after the declaration, at least 22 protesters, including leading protesters, were arrested.<sup>28</sup>

The Declaration of the Serious Emergency Situation in Bangkok dated 15 October 2020 referred to the situation where “certain groups of perpetrators intended to instigate an untoward incident and movement in the Bangkok area by way of various methods (...) including causing obstruction to the royal motorcade, which is a violation of the Public Assembly Law and the Constitution of the Kingdom of Thailand and probable causes to chaos and incitement of conflict and public disorder (...) affecting national security and safety of the public and properties, COVID-19 pandemic control measures, and the nation’s vulnerable economic security”. Due to these reasons, and the Prime Minister declared a serious emergency situation as he deemed that it is “extremely necessary for an urgent measure to be implemented in order to end the situation in an efficient and prompt manner, to ensure compliance with the law, and to sustain national order and public interest”.<sup>29</sup>

As indicated, there is no indication that the government intended to derogate formally from any rights pursuant to this emergency, since they did not notify the UN Secretary General of any derogation as they had done on four occasions in the previous decade.<sup>30</sup> It is doubtful that derogation on the basis stated in the 15 October Declaration would meet the strict terms of “a threat to the life of the nation” as required under article 4 of the ICCPR as a condition for derogation. However, the language of the Declaration does invoke the terms “public order” and “national security” as bases for potentially exceptional measure that could serve to limit the exercise of human rights. In respect of a number of human rights and fundamental freedoms with limitation provisions, public order and national security both serve as an express basis for limiting human rights where necessary, proportionate and provided by law. These include limitations under ICCPR 12(3) (freedom of movement); 18(3) (freedom to manifest one’s religion or beliefs); 19(2 and 3) (freedom of expression and information);<sup>21</sup> (freedom of peaceful assembly); and 22(2) (freedom

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<sup>26</sup> Bangkok Post, ‘Protesters reiterate 3 key demands’, 9 October 2020, available at: <https://www.bangkokpost.com/thailand/politics/1998947/protesters-reiterate-3-key-demands>

<sup>27</sup> BBC, ‘Thai protests: Tens of thousands gather again in mass defiance of government’, 16 October 2020, available at: <https://www.bbc.com/news/world-asia-54548988>; Aljazeera, ‘Thai protesters clash with police, shout at king’s motorcade’, 14 October 2020, available at: <https://www.aljazeera.com/news/2020/10/14/thai-protesters-clash-with-police-call-out-kings-motorcade>; Aljazeera, ‘Clashes at Thailand anti-government protests in Bangkok’, 14 October 2020, available at: <https://www.aljazeera.com/news/2020/10/14/thailand-protesters-set-off-on-march-in-bangkok>.

<sup>28</sup> Thai PBS, ‘Who? were Arrested During 13-14 October Protest’, 15 October 2020, available at: <https://news.thaipbs.or.th/content/297402> (in Thai); Amnesty International, ‘Thailand: More arrests amid ‘drastic’ emergency order banning gatherings’, 15 October 2020, available at: <https://www.amnesty.org/en/latest/news/2020/10/thailand-more-arrests-amid-drastic-order/>

<sup>29</sup> Declaration of a Serious Emergency Situation in Bangkok, supra note 23

<sup>30</sup> Thailand: Notification under Article 4(3), C.N.479.2014.TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2014/CN.479.2014-Eng.pdf>; Thailand’s Notification under Article 4(3), C.N.194.2020.TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2020/CN.194.2020-Eng.pdf> ; Thailand’s Notification under Article 4(3), C.N.375.2010.TREATIES-13 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2010/CN.375.2010-Eng.pdf>; and Thailand’s Notification under Article 4(3), C.N.49.2014.TREATIES-IV.4 (Depositary Notification), available at: <https://treaties.un.org/doc/Publication/CN/2014/CN.49.2014-Eng.pdf>.



of association). In addition to requirements that any limitations be strictly necessary for a legitimate purpose, such as public order and national security, they must also be proportionate and adhere the principles of legality and non-discrimination.<sup>31</sup>

### 3. Limited scrutiny by the courts

Irrespective of whether emergency measure that serve to limit or otherwise interfere with the enjoyment of human rights are undertaken pursuant to formal derogations, they necessary must be subject to judicial review.<sup>32</sup> The UN Human Rights Committee has repeatedly stated that courts should have the power to examine the lawfulness of the declaration of emergency and the measures taken during an emergency.<sup>33</sup> Judicial review is especially important in the context of the present emergency because some of the special powers mentioned in Sections 9 and 11 are so broadly and vaguely described that they could easily lead to arbitrary exercise of power.

The Emergency Decree, however, explicitly excludes access to administrative courts in section 16, provides that:

“A Regulation, Notification, order or an act under this Emergency Decree shall not be subject to the law on administrative procedures and the law on the establishment of Administrative Court and Administrative Court Procedure”.

Administrative court - having jurisdiction over any act by an officials and agencies who exercise administrative power - has also interpreted the Emergency Decree as preventing them from judicially reviewing measures that have imposed pursuant to the Decree. For example, on 26 March 2020, an activist filed a petition with the Administrative Court demanding legal action against the Thai government for imposing a new border rule requiring Thai nationals to have embassy and health certificates for their flights home as a measure to cope with COVID-19, which effectively stranded many Thai citizens overseas. On 2 April 2020, the Central Administrative Court refused to admit the case because under the Emergency Decree applicable to the situation,<sup>34</sup> the imposed measures were not subject to review by the courts.<sup>35</sup> Notably, in 2010, the Constitutional Court, in its Decision No. 9/2553, also ruled that section 16 of the Emergency Decree was constitutional. It

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<sup>31</sup> See also: the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4, 1984, <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>

<sup>32</sup> ICJ, ‘Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis’, Principle 1, and Commentary, at 1-15, available at: <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>

<sup>33</sup> For example, in its concluding observations on Colombia, the UN Human Rights Committee stressed, “Constitutional and legal provisions should ensure that compliance with article 4 of the Covenant can be monitored by the Courts.” Equally, on Sri Lanka, the Committee expressed “(...) concern that courts do not have the power to examine the legality of the declaration of a state of emergency and of different measures taken during the state of emergency.” See: UN Human Rights Committee, Concluding Observations on Colombia, CCPR/C/79/Add. 76, para.38 and para. 23; UN Human Rights Committee, Concluding Observations on Sri Lanka, CCPR/C/79/Add.56, para.13.

<sup>34</sup> The Rule was initially imposed by the Civil Aviation Authority of Thailand in their Notification dated 19 March 2020, available at: <http://www.mfa.go.th/main/contents/files/news3-20200329-164122-910029.pdf>. On 20 March 2020, the Emergency Decree also imposed measure with the same requirements.

<sup>35</sup> BangkokbizNews, ‘Central Administrative Court Rejected the Petition about Fit to Fly Announcement to Combat COVID-19’ (in Thai), 21 April 2020, available at: <https://www.bangkokbiznews.com/news/detail/874190>. (in Thai)

further noted that while complaints could not be judicially reviewed by the Administrative Court, they could be submitted to other courts of justice.<sup>36</sup>

Due to this, the activist had to seek an alternate route and submitted the case to the Civil Court. However, on 5 April 2020, the Bangkok Civil Court also dismissed the case on the basis that the Order had been issued by the Prime Minister with whom such power under the Emergency Decree is vested.<sup>37</sup> This decision of the Civil Court did not seem to follow a previous decision the Court made from 2014. In the case between the government and the People's Democratic Reform Committee (PDRC) protesters, the Civil Court ruled that while the government has the authority to enforce the Emergency Decree, the court can bar the government from enforcing some of the regulations it had earlier issued under the Decree against the anti-government protesters because they were in violation of demonstrators' rights. These included a ban on gatherings of five or more people and on the use of certain roads by demonstrators. The Court also instructed the government not to order the use of force or weapons to forcibly disperse a peaceful protest.<sup>38</sup>

On 20 and 21 October 2020, some politicians and protesters submitted petitions to the Civil Court, asking the Court to revoke the serious emergency situation in Bangkok and seeking temporary protection order for the protests.<sup>39</sup> On 22 October 2020, the Civil Court accepted to hear the cases, noting section 16 of the Emergency Decree and its power to try and adjudicate all cases except those within the jurisdiction of other Courts as specified by the Constitution.<sup>40</sup> However, the serious state of emergency was lifted before the Court held its inquiry session. Nevertheless, lawyers who represented the protesters in the above noted cases indicated that they would pursue further a petition to the Court regarding the revocation of the results of the emergency situation and seeking remedies to human rights violations arose during the implementation of measures under the Emergency Decree.<sup>41</sup>

The right to an effective and accessible remedy for any violation of human rights is a general principle of law and provided for under article 2(3) of the ICCPR. Access to an effective remedy must be available at all times, even in states of emergency.<sup>42</sup> As the ICJ affirmed in its Geneva Declaration and as provided in international standards,

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<sup>36</sup> Constitutional Court Decision No. 9/2553, available at: [https://english.constitutionalcourt.or.th/occ\\_web/download/article/file\\_import/center-law9\\_53.pdf](https://english.constitutionalcourt.or.th/occ_web/download/article/file_import/center-law9_53.pdf) (in Thai).

<sup>37</sup> Thai Post, 'Civil Court Dismissed Case, State can Asked for Fit to Fly' (in Thai), 5 April 2020, available at: <https://www.thaipost.net/main/detail/62089>. (in Thai)

<sup>38</sup> Bangkok Post, 'Court rules to protect protesters', 20 February 2014, available at: <https://www.bangkokpost.com/thailand/politics/395975/court-rules-to-protect-protesters>

<sup>39</sup> Voice Online, 'Phue Thai Submitted a Petition to Court, Hoping to Revoke the Emergency Decree Which Is Not Legitimate and Violate the Protesters' Rights', 20 October 2020, available at: <http://www.voicetv.co.th/read/e-2nAURQQ>

<sup>40</sup> Civil Court, Black Case No. Por 5363/2563, 22 October 2020.

<sup>41</sup> Bangkok Post, 'Prayut lifts state of emergency', 23 October 2020, available at: <https://www.bangkokpost.com/thailand/general/2006623/prayut-lifts-state-of-emergency>; The Active, 'Lawyers of the Students Confirmed that They Will Submitted Complaints Despite the Lifting of the Emergency Situation', 22 October 2020, available at: [https://theactive.net/news/20201022-5/?fbclid=IwAR2l47k22F5Tx-uK7vNJHTqb1\\_4g3oIa2-JvsFqPev9AdCuLqYHgXE\\_nhQs](https://theactive.net/news/20201022-5/?fbclid=IwAR2l47k22F5Tx-uK7vNJHTqb1_4g3oIa2-JvsFqPev9AdCuLqYHgXE_nhQs)

<sup>42</sup> See the ICJ, 'Practitioners Guide no. 2: the Right to Remedy and Reparation, available at: <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/>; 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, principles 1-3; UN Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 2001, para. 14.

"[t]he executive, legislative and judicial branches should under no circumstance invoke a situation of crisis to deprive victims of human rights violations and/or their relatives of their rights to effective access to justice, effective judicial remedies and full reparation. The adoption of measures to remove jurisdiction or the judicial remedies for human rights violations from the ordinary courts constitutes a serious attack against the independence of the judiciary and basic principles of the Rule of Law."<sup>43</sup>

The UN Human Rights Committee noted in its General Comment No. 29 on States of Emergency that:

"Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."<sup>44</sup>

#### **4. Legal Impunity from Prosecution**

In respect of human rights violations amounting to gross human rights violations or crimes under international law, States have an obligation to conduct prompt, thorough and impartial investigations and bring those responsible to justice in fair trials.<sup>45</sup> This obligation is provided for in the ICCPR,<sup>46</sup> the Convention against Torture (article 7), and is detailed in the UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity.<sup>47</sup> It applies particularly to torture and other ill-treatment, enforced disappearance, extrajudicial killings, among other serious crimes. In line with the Impunity Principles, the UN Human Rights Committee makes clear:

"Where the investigations (...) reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). (...) Accordingly, where public officials or State agents have committed violations of the Covenant rights referred

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<sup>43</sup> ICJ, Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principle 11, and Commentary at 181-196, <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>

<sup>44</sup> UN Human Rights Committee, General Comment No. 29, para 14.

<sup>45</sup> For a detailed exposition of the law on impunity and sources, see: ICJ Practitioners Guide Number 7, 'International Law and the Fight against Impunity', 2015, available at: <https://www.icj.org/international-law-and-the-fight-against-impunity-icj-practitioners-guide-no-7-now-available-in-english/>

<sup>46</sup> ICCPR's Article 2(3), as clarified by UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Obligations Imposed on State Parties to the Covenant', CCPR/C/21/Rev.1/Add.13, May 2004, para. 18, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en)

<sup>47</sup> Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, UN DOC E/CN.4/2005/102/add 1, 8 February 2005, recommended by the UN Commission on Human Rights, Resolution 2005/81, available at: <https://undocs.org/E/CN.4/2005/102/Add.1>.

to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (...) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable (...)"<sup>48</sup>

Thailand's Emergency Decree purports to severely limit the accountability of any civilian or military authorities exercising powers during an emergency. Section 17 of the Emergency Decree provides that:

"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 if such act was performed in good faith, non-discriminatory, and was not unreasonable in the circumstances or exceed the extent of necessity, but this does not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful act of officials."

While the right to compensation for wrongful acts by governmental agencies is reaffirms in part the right to an effective remedy and reparation, section 17 clearly seeks to limit the accountability of those carrying out responsibilities under the emergency laws and regulations by providing a form of legal immunity.

To the ICJ's knowledge, in most cases, including cases where victims and/or their families have received some the form of monetary compensation from governmental agencies, public officials accused of having committed violations of human rights have not been brought to justice.<sup>49</sup> In 2005, the UN Human Rights Committee, during the examination of Thailand's first periodic report under Article 40 of the ICCPR, indicated that it was "especially concerned that the Decree provides for officials enforcing the state of emergency to be exempt from legal and disciplinary actions, thus exacerbating the

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<sup>48</sup> UN Human Rights Committee, General Comment No. 31, para. 18. With respect to extrajudicial killings, see also Principle 8, United Nations Basic Principles on the Use of Force and Firearms: "Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.", available at: <https://www.un.org/ruleoflaw/files/BASICP~3.PDF>

<sup>49</sup> For example, in the region of southern border provinces where the serious state of emergency was declared since 2005, on 19 October 2016, the Supreme Administrative Court ordered the Royal Thai Army and the Defence Ministry to compensate two plaintiffs: Mr. Ismael Tae and Mr. Amisi Manak, after it found they had been tortured and illegally detained for nine days - exceeding the limit of seven days permitted under Martial Law. In 2008, the pair were arrested pursuant to Martial Law and allegedly tortured in order to extract a forced confession in relation to a national security case. To date, no perpetrators have been brought to justice. See: Prachatai, 'Supreme Administrative Court Ruled that Students from Yala are eligible for compensation', 19 October 2016, available at: <http://prachatai.com/journal/2016/10/68437>. In another case, the Administrative Court ordered the Prime Minister's Office to pay the family of Mr. Ashari Samaae, 500,000 Thai Baht after he was reportedly tortured and killed while in the custody of the military in July 2007. However, to date, no military officer or anybody else has been prosecuted in connection with his death. See: Prachatai, 'Compensation but no prosecution over death of Deep South torture victim', 22 August 2015, available at: [http://prachatai.org/english/node/5408?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+prachataienglish+%28Prachatai+in+English%29](http://prachatai.org/english/node/5408?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+prachataienglish+%28Prachatai+in+English%29)

problem of impunity.”<sup>50</sup> In 2017, the Committee expressed concern at “the slow progress in investigating (...) including cases of the shooting of civilians during the political violence of 2010”, in the area where a state of emergency was declared.<sup>51</sup>

## 5. Emergency Decree Measures

Pursuant to section 9 of the Emergency Decree, the Prime Minister is given the power to issue certain regulations in the case of necessity “in order to remedy and promptly resolve an emergency situation or to prevent the worsening of [the emergency] situation”. In response to the protests, the restrictions that were issued pursuant to section 9 include: prohibition of gatherings of five or more people; prohibition of the dissemination of publications or any means of communication containing texts which may instigate fear amongst the people or is intended to distort information; and prohibition of the use of certain transportation routes or vehicles.<sup>52</sup>

Upon the invocation of “serious emergency situation” to quell protests, the Prime Minister and his designated competent officials<sup>53</sup> are also granted with even greater power to impose emergency decree measures - as described in section 11 and 12, in addition to the above noted measures that are described in section 9. The restrictions that were issued by virtue of section 11 and 12 include, among other things: the authority to arrest and detain of persons suspected of having a role in causing the emergency situation, or being an instigator, a propagator, a supporter of such act or concealing relevant information relating to the act which caused the emergency situation; the authority to summon any person to report to the competent official; the authority to seize or attach of arms, goods, consumer products, chemical products, and other materials; and the authority to prohibit any person from committing any act or giving an instruction to perform an act to the extent that is necessary for maintaining the security of the state, the safety of the country or the safety of the people.<sup>54</sup>

According to Thai Lawyers for Human Rights, during the period between 13 and 22 October 2020, at least 90 protesters were arrested, mostly for violating the ban of gathering. Six of them were released without charge.<sup>55</sup>

Notably, any persons who violates the Regulations, Notifications or orders issued under the Emergency Decree can be prosecuted under section 18 and the violation may incur imprisonment for a term not exceeding two years or a fine of no more than 40,000 baht (approximately 1,277 US Dollars), or both.

In this regard, the ICJ reiterates below a number of its concerns and recommendations it has made repeatedly since 2005 regarding the Emergency Decree, particularly in respect to section 9, 11 and 12 regarding the emergency decree measures, which can be used by the Prime Minister during the “serious emergency situation”.

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<sup>50</sup> UN Human Rights Committee, ‘Concluding observations of the Human Rights Committee: Thailand’, CCPR/CO/84/THA, 8 July 2005, para 13.

<sup>51</sup> UN Human Rights Committee, ‘Concluding observations on the second periodic report of Thailand’, 25 April 2017, para. 21.

<sup>52</sup> Regulation Issued under Section 9 and Section 11 of the Emergency Decree, 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10240&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10240&filename=index)

<sup>53</sup> Section 7, para 3-6, Emergency Decree

<sup>54</sup> Notification Pursuant to Section 11 of the Emergency Decree, 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10241&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10241&filename=index)

<sup>55</sup> Thai Lawyers for Human Rights, ‘Statistics of those who were arrested and prosecuted since the gathering of #People Party from 13 October’, accessed on 22 October 2020, available at: <https://www.thr2014.com/?p=22156> (in Thai)

### 5.1 Vague Definition and Sweeping Powers

The principle of legality is inherently a basic general principle of law and the rule of law, applicable to all legal systems of the world. The principle entails the several sub-principles: legal certainty and clarity (*lex certa*); non-retroactivity, meaning an offence must be clearly established and defined in law before one can be subjected to sanction or punishment (*lex praevia*); and the strict application and construction of criminal law (*lex stricta*). The principle is reflected in article 15 of the ICCPR, among other sources. Without respect for the principle of legality, people to whom the law applies are not capable of conforming their behaviour to rules that are not clearly spelled out and lawyers and other stakeholders may not be able to evaluate them to ensure they are conformity with the wider law.

The Emergency Powers potentially fall afoul of the Principle in all of its forms.

The Emergency Decree contains several provisions that are excessively vague and overbroad, granting seemingly unrestricted powers in some areas to the Prime Minister. Section 11 (6) gives the Prime Minister the power to "(...) issue a notification not to perform any act or to perform an act to the extent that this is necessary for maintaining the security of the state, the safety of the country or the safety of the people." As the kinds of acts that this would cover are not specified and therefore could include acts that would necessarily be beyond the authority of a Prime minister, the provision is on its face vague and overbroad, violating the principle of legality. Because criminal liability is attached, its application may effectively constitute prosecution of an offence not previously provided for law, in violation of ICCPR article 15.

Subject to the Notification dated 15 October 2020 (Annex 3), the responsible Chief Official – the Commissioner General of the Royal Thai Police, could exercise the above noted power during the serious emergency situation to quell the protests in Bangkok.<sup>56</sup>

### 5.2 Arbitrary Arrest and Detention

The right to liberty and freedom from arbitrary detention is protected under article 9 of the ICCPR, which provides that no one shall be subject to arbitrary arrest or detention.

Section 11 and 12 of the Emergency Decree and the Notification of the Prime Minister Pursuant to section 11 of the Emergency Decree dated 15 October 2020 (Annex 3)<sup>57</sup> authorize a competent official to arrest and detain people 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 the total detention period does not exceed 30 days.

Detention without charge is administrative detention and, with only narrow exceptions, is generally prohibited under international law. Administrative detention is an extraordinary measure that displaces the usual criminal justice system. In the experience of the ICJ, administrative detention often results in other abuses, such as torture, cruel, inhuman, and degrading treatment and enforced disappearance, because it does not provide the usual legal safeguards that protect detainees. The ICJ considers that the use of administrative detention will only be lawful if undertaken as a temporary measure pursuant to a lawful derogation in a declared State of emergency, and only then being strictly necessary to meet a specific threat, in line with article 4 ICCPR. This means that the ordinary criminal law and procedures are incapable of responding to a real and imperative

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<sup>56</sup> Clause 5, Notification Pursuant to Section 11 of the Emergency Decree, 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10241&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10241&filename=index) (Annex 3)

<sup>57</sup> Ibid, Clause 1.

security threat. In the vast majority of cases, ordinary criminal offences, such as attempting or conspiring to commit a crime, will be adequate to protect security.

The UN Human Rights Committee, in its General Comment No. 35 on the right liberty, in the context of administrative detention, stated that:

“To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.”<sup>58</sup>

In addition, the UN Human Rights Committee also reaffirmed that:

“Arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (art. 19), freedom of assembly (art. 21) (...).”<sup>59</sup>

#### *Grounds for Arrest and Detention*

Pursuant to Section 11(1) of the Emergency Decree, any person “suspected of having a role” or is an “instigator, a propagator, a supporter of such act or concealing relevant information relating to the act” which caused “the emergency situation” could be detained, provided that the detention is deemed necessary to prevent a “serious situation” or to “foster cooperation in the termination of the serious situation”.

The ICJ is concerned that these grounds are formulated in broad and vague terms open to abuse. This language could result in persons who are only remotely connected to the immediate security threat facing arrest and detention on spurious grounds. It could also be used to suppress the legitimate right to freedom of expression, association and assembly.

Indeed, apart from protest leaders and peaceful protesters, those who were arrested in Bangkok for violating the Emergency Decree also include persons who were only remotely connected to the immediate “security threat” such as employees of the sound rental company and a journalist.

On 15 October 2020, six employees of the sound rental company that reportedly rent the sound equipment to the protest organizers were arrested for violating the ban on gathering under the Emergency Decree. They were taken to Border Patrol Police Region 1 Headquarters in Pathum Thani province, a designated place of detention under the Emergency Decree, where other protesters were also detained.

On 16 October 2020, a reporter from Prachatai – an online newspaper, wearing a Thai media armband issued by the Thai Journalist Association, was arrested while he was engaged in a “Facebook Live” covering the police crackdown of protest in Bangkok. The

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<sup>58</sup> UN Human Rights Committee, ‘General Comment No. 35: Article 9 (Liberty and security of person)’, CCPR/C/GC/35, 16 December 2014, para. 15

<sup>59</sup> Ibid, para. 17

footage shows that he was asking police where he could stand to cover the news, before he was arrested. He was taken to Border Patrol Police Region 1 Headquarters in Pathum Thani province, a designated place of detention under the Emergency Decree. However, he was released a few hours after his arrest after paying a 300 baht fine (9.5 US Dollars), apparently for “defying an order of the authorities” under section 368 of the Criminal Code.<sup>60</sup>

### *Judicial Supervision*

The ICCPR requires the judicial supervision of detainees both following arrest (article 9(3)) and at any other time requested by the detainee through habeas corpus or similar procedures (article 9(4)).

The wording of section 12 suggests that for an arrest under the Decree to be lawful the competent official must make a written submission to the court. The Decree itself does not make clear whether or not the arrested person must be brought physically before a judge. In practice, at least in the area of southern border provinces of Thailand – which have been under the Emergency Decree since 2005, the court supervises each stage of the detention process, including the extension of detention periods. However, according to the Internal Security Operations Command (ISOC) Region 4 Regulation, it is considered not necessary to bring a person held in custody to the court unless the court requests it.<sup>61</sup> This constitutes the violation of the right of a detainee to be brought promptly before a judge as guaranteed under article 9(3) of the ICCPR. As the UN Human Rights Committee explains:

“The individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power. The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody and facilitates immediate transfer to a remand detention centre if continued detention is ordered. It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment. In the hearing that ensues, and in subsequent hearings at which the judge assesses the legality or necessity of the detention, the individual is entitled to legal assistance, which should in principle be by counsel of choice”.<sup>62</sup>

The right of a detainee to be brought promptly before a judge helps to ensure that the detention is lawful and necessary. Only in the most extreme situation when it is physically impossible to access a court, such as when the judiciary collapses because of an emergency, could it ever be justified not to bring detainees promptly before a judge, and this condition does not apply in Thailand.

The UN Human Rights Committee has consistently made clear that 48 hours is the maximum amount of time of detention without judicial supervision. In this regard in 2005 the UN Human Rights Committee in its Concluding Observations on Thailand, while examining the Emergency Decree, also stated that “detention without external safeguards beyond 48 hours should be prohibited”.<sup>63</sup>

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<sup>60</sup> Prachatai, ‘Prachatai reporter arrested while covering police crackdown’, 16 October 2020, available at: <https://prachatai.com/english/node/8848>

<sup>61</sup> Clause 6.3, Regulation of ISOC Region 4 Concerning Guidelines of Practice for Competent Official as per Section 11 Of the Emergency Decree on Government Administration in States of Emergency B.E. 2548 (2005), 17 January 2019.

<sup>62</sup> UN Human Rights Committee, General Comment No. 35, paras 34 and 15.

<sup>63</sup> UN Human Rights Committee, ‘Concluding observations of the Human Rights Committee: Thailand’, CCPR/CO/84/THA, 8 July 2005, para 13. Notably, in its General Comment No. 35, the Committee was of the view that “48 hours is ordinarily sufficient to transport the individual and to



To the ICJ's knowledge, unlike the situation in the southern border provinces, the right to be brought promptly before a judge had been respected in the context of the protests in Bangkok. However, the ICJ obtained information from lawyers that, apart from those with active arrest warrants whose cases are subject to the normal criminal procedures, several others were arrested when the offences said to be flagrant, without warrant and/or without being informed of the charge, before they were forwarded to the Court to review the legality of the arrest in no more than 48 hours. Nevertheless, the ICJ urges the government to ensure that any arrest under the Emergency Decree the person must be brought promptly before a judge, including in the southern border provinces where the Regulation of the ISOC Region 4 allow them not to do so.<sup>64</sup>

In addition to the automatic requirement that detainees be brought to court following arrest, all detainees have the right to access to judicial proceedings at all times in order to challenge the lawfulness of their detention through habeas corpus or similar proceedings under article 9(4) of the ICCPR.<sup>65</sup> The right applies to all detention by official action or pursuant to official authorization, including detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests.<sup>66</sup> This remedy must be provided even in times of a public emergency threatening the life of the nation.<sup>67</sup> This right is reflected in section 90 of the Criminal Procedure Code and should apply *mutatis mutandis* to the application of the Emergency Decree.

However, the right is not explicitly guaranteed under section 12 of the Emergency Decree. To the ICJ's knowledge, section 90 has been tested in southern border provinces of Thailand. But in most cases, it was reported that, when petitions have been submitted to the courts asking for the review of the lawfulness of detentions under the Emergency Decree or Martial Law, the authorities responsible for the arrest and detention will typically immediately release the detainees. The Courts therefore had to suspend the process and dismissed the case because the person was no longer under the custody.<sup>68</sup> However, the exercise right had not been tested in the context of the current round of protests in Bangkok.

#### *Place of Detention*

Section 12 of the Emergency Decree expressly stipulates that persons deprived of their liberty under this Decree will not be detained in a regular "police station, detention centre, penal institution or prison". This is an extraordinary provision, and increases the risk of human rights violations when detainees are held in locations that are not recognized places of detention, without regularized procedures and safeguards to protect detainees. It also

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prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances"

<sup>64</sup> Regulation of ISOC Region 4, *supra* note 61.

<sup>65</sup> UN Human Rights Committee, General Comment No. 35, para. 40.

<sup>66</sup> *Ibid.*

<sup>67</sup> UN Human Rights Committee, General Comment No.29, para 14 and 16: "(...) In order to protect non-derogable rights, the right to take proceedings before a court to enable a court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."

<sup>68</sup> Taweeporn Kummaetha, '10 Years with Torture, 10 Years of Injustice', Prachatai, 8 January 2015, available at: <https://prachatai.com/journal/2015/01/57307> (in Thai); Prachatai, 'Court Dismissed the Habeas Corpus Petition Regarding the Illegally Arrested of Myanmar Migrant Worker By Border Polices', 24 August 2018, available at: <https://prachatai.com/journal/2018/08/78418> (in Thai)

is inconsistent with Thailand's obligations under articles 7 and 10 of the ICCPR, the Convention against Torture, and the standards contained in the Standard Minimum Rules on the Treatment of Prisoners (Mandela Rules), adopted by the UN General Assembly 2015.<sup>69</sup>

On 16 and 17 October 2020, the Commissioner General of the Royal Thai Police acting as the Chief Official Responsible for Remediating the Serious Emergency Situation issued announcements determining the places of detention for persons suspected of having a role in the protests, namely: (i) Border Patrol Police Region 1 Headquarters in Pathum Thani province; (ii) 21st Infantry Regiment Queen's Guard in Chonburi province; and (iii) 1<sup>st</sup> Army Support Command, Phanatdi Sri Uthai Camp in Chonburi province.<sup>70</sup>

In at least one occasion, it was reported that the right to immediately access a lawyer of their choice, guaranteed under ICCPR articles 9 and 14, and to receive visits from their family was not respected in the above places of detention. According to Internet Law Reform Dialogue (iLaw) - a Thai NGO that works on monitoring protests and legal reform in Thailand, on 17 October 2020, after the crackdown at Pathumwan intersection in Bangkok's central shopping district on 16 October 2020, several protesters were arrested and brought to Border Patrol Police Region 1 Headquarters. The authorities at the place of detention did not allow the lawyers and relatives to meet with the detainees. In this case, after some negotiation, the lawyers were allowed to meet with their client, but the families were reportedly only allowed to visit during working hours.<sup>71</sup>

#### *Power to Summon any Person to Report*

Section 11 (2) authorizes a competent officer "to summon any person to report to the competent official or to give an oral statement or submit any documents or evidence relevant to the emergency situation." The ICJ had expressed concern that the summoning of persons must be based on reasonable grounds and must not lead to a general state of suspicion. Indeed, only ordinary law enforcement and judicial authorities should be able to summon people for questioning.

Notably, on 16 October 2020, the Commissioner General of the Royal Thai Police acting as the Chief Official Responsible for Remediating the Serious Emergency Situation issued an announcement authorizing military officials, police or administrative officials at certain ranks with the power to summon any person to report to them or to give an oral statement.<sup>72</sup> As a result, during the serious emergency situation in Bangkok, military and administrative officials, who were not trained law enforcement or judicial authorities, were able to summon people for questioning.

#### 5.3 Freedom of Expression and Assembly

The Emergency Decree authorizes competent officials to enact regulations restricting the right to freedom of expression, including the right to seek, receive and impart information

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<sup>69</sup> Resolution 70/175, 17 December 2015, available at: <https://undocs.org/A/RES/70/175>. Rule 122 makes clear that most of the protections of the Mandela Rules apply to persons arrested or imprisoned without charge.

<sup>70</sup> Announcement of the Chief Official Responsible for Remediating the Serious Emergency Situation No. 1/2563, dated 16 October 2020; Announcement of the Chief Official Responsible for Remediating the Serious Emergency Situation No. 6/2563, dated 17 October 2020

<sup>71</sup> iLaw, Public Post on Twitter, 17 October 2020, available at: <https://twitter.com/iLawFX/status/1317167762578366466> (in Thai) [accessed on 22 October 2020]

<sup>72</sup> Announcement of the Chief Official Responsible for Remediating the Serious Emergency Situation No. 5/2563, dated 16 October 2020.

and ideas of all kinds, under article 19 of the ICCPR, and the right to freedom of assembly as guaranteed under article 21 of the ICCPR.

### *Freedom of Expression*

Article 19 of the ICCPR protects freedom of expression and information. The grounds for limiting this right under article 19(3) are narrow: any restriction must be strictly necessary and proportionate either for the respect of the rights of others, or for national security, public order, or public health or morals.<sup>73</sup> Even then, “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.”<sup>74</sup> The presumption must be that the right to freedom of expression continues unless there is a direct causal link between the words spoken or written and the legitimate security concern and that no other means short of restricting the right are adequate.

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

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

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence;”<sup>75</sup>

Section 9(3) of the Emergency Decree allows the Government:

“to prohibit the press release, distribution or dissemination of letters, publications or any means of communication containing texts which may instigate fear amongst the people or is intended to distort information which misleads understanding of the emergency situation to the extent of affecting the security of state or public order or good moral of the people both in the area or locality where an emergency situation has been declared or the entire Kingdom”

In response to the protests, on 16 October 2020, the Commissioner General of the Royal Thai Police acting as the Chief Official Responsible for Remediating the Serious Emergency Situation issued an announcement banning “audio transmitters, mobile phones, communication devices, electronic devices, or other devices that can present news, or distribute pictures, sounds or messages which may instigate fear amongst the people or is intended to distort information which misleads understanding of the emergency situation to the extent of affecting the security or state or public order or good moral of the people

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<sup>73</sup> Article 19 of the ICCPR: “The exercise of the rights (...) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.” See also: UN Human Rights Committee, ‘General Comment No. 34: Article 19: Freedoms of opinion and expression’, CCPR/C/GC/34, 12 September 2011, para 34.

<sup>74</sup> UN Human Rights Committee, General Comment 34, para 21.

<sup>75</sup> Principle 5, Johannesburg Principles on National Security, Freedom of Expression and Access to Information. See also the definition of Principle 2: “A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s territorial integrity against the use or threat of force, or its capacity to respond to the use of threat of force whether from an external source, such as a military threat or an internal source, such as incitement to violent overthrow of government.”

throughout the Kingdom".<sup>76</sup> If convicted, the violators could be subject to prison sentences. This is a clear violation of the requirement that any restrictions be necessary and proportionate to the purpose of public order, as it may use to effectively prevents the transmission of all information and expression, irrespective of content. There must not be a summary prohibition of all instrumentalities of communication.

Indeed, the authorities warned protesters that using social media to convince others to join the protests, taking selfies at the marches or check-in and posting them on social media would breach the rules under the state of emergency. Many people have in fact been posting photos of the protests or themselves on social media as a way of spreading their views.<sup>77</sup> On 16 October 2020, the Chief Official Responsible for Remediating the Serious Emergency Situation issued an order instructing the National Broadcasting and Telecommunications Commission and the Ministry of Digital Economy and Society to scrutinize the four news agencies and "stop their broadcast, halt their publication, or delete their computer data" in case of any Emergency Decree's violations.<sup>78</sup> On 19 October 2020, the Minister of Digital Economy and Society said to the media representatives that the Ministry would submit complaints to the police against social media users who violated orders under the state of emergency, including news agencies. He said that almost 300,000 URL had violated the Decree.<sup>79</sup> On 20 October 2020, it was reported that Thailand's Criminal Court had ordered the closure of all online platforms belonging to Voice TV, on the grounds that the platforms had disseminated false information about the protests, in violation of the Emergency Decree.<sup>80</sup> However, on 21 October 2020, this order was revoked by the same Court, which ruled that the complaint filed by the Ministry of Digital Economy and Society did not specifically requested for the entire channel to shut down but only contain specific content or messages that were deemed illegal, the Court therefore rejected such request.<sup>81</sup>

The ICJ notes that such regulation is non-compliant with article 19 of the ICCPR, because it is clearly disproportionate and it could easily be used to curtail legitimate and protected expression, media discussion and journalism.

### *Freedom of Peaceful Assembly*

Freedom to participate to peaceful assembly is protected under article of 21 of the ICCPR, and the bases for limiting the right are identical to those mentioned in respect of article 19 above. In its General Comment on the right to peaceful assembly, the UN Human Rights Committee emphasized:

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<sup>76</sup> Announcement of the Chief Official Responsible for Remediating the Serious Emergency Situation No. 4/2563, dated 16 October 2020. See also: Clause 2, Regulation Issued under Section 9 and Section 11 of the Emergency Decree, 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10240&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10240&filename=index).

<sup>77</sup> Nikkei Asia, 'Thailand imposes 'selfie rules' to discourage young protesters', 18 October 2020, available at: <https://asia.nikkei.com/Politics/Turbulent-Thailand/Thailand-imposes-selfie-rules-to-discourage-young-protesters>

<sup>78</sup> Khaosod English, 'Gov't Orders Censorship Of 4 Media Sites, Reports Say', 19 October 2020, available at: <https://www.khaosodenglish.com/politics/2020/10/19/govt-orders-censorship-of-4-media-sites-reports-say/>

<sup>79</sup> Nation, 'Social media users violating emergency orders will be reported to police: ministry', 19 October 2020, available at: <https://www.nationthailand.com/news/30396428>

<sup>80</sup> Thai PBS, 'Court orders Voice TV shut down', 20 October 2020, available at: <https://www.thaipbsworld.com/court-orders-voice-tv-shut-down/>

<sup>81</sup> Benar News, 'Thai Court Revokes Order to Shut Down Voice TV: Lawyer', 21 October 2020, available at: <https://www.benarnews.org/english/news/thai/more-protest-10212020180758.html>

"While the right of peaceful assembly may in certain cases be limited, the onus is on the authorities to justify any restrictions. Authorities must be able to show that any restrictions meet the requirement of legality, and are also both necessary for and proportionate to at least one of the permissible grounds for restrictions enumerated in article 21 (...). Where this onus is not met, article 21 is violated. The imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations on it. Restrictions must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect."<sup>82</sup>

In addition,

"Any restrictions on participation in peaceful assemblies should be based on a differentiated or individualized assessment of the conduct of the participants and the assembly concerned. Blanket restrictions on peaceful assemblies are presumptively disproportionate".<sup>83</sup>

Where a State declares derogations pursuant to is a lawful state of emergency, which, as indicated, Thailand has not done:

"States parties must not rely on derogation from the right of peaceful assembly if they can attain their objectives by imposing restrictions in terms of article 21. If States derogate from the Covenant in response, for instance, to mass demonstrations that include acts of violence, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all measures derogating from their obligations under the Covenant are strictly required by the exigencies of the situation and comply with the conditions in article 4".<sup>84</sup>

Section 9(2) of the Decree grants the responsible authorities the power to prohibit the assembly or gathering of persons at any place or any conduct, which may incite or lead to unrest. In exercising such power, a clear distinction should be drawn between legitimate, peaceful assemblies and those that could incite violence or threaten security. However, in practice, this section has been used to impose a blanket restriction on freedom of assembly by ordering a general ban on peaceful, public demonstrations, particularly against those in which people express controversial ideas or criticize the government.

In response to the anti-government protests, the assembly or gathering of five or more people at any place or the commission of any act which instigates unrest is prohibited.<sup>85</sup> Subject to the Announcement of the Chief Official Responsible for Remediating the Serious Emergency Situation, such wrongdoings shall include the gathering which block the traffic, block the entrances of any buildings or structures, use violence, defy an order of the authorities regarding the assembly, or use sound systems.<sup>86</sup>

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<sup>82</sup> UN Human Rights Committee, 'General Comment No. 37: Article 21: right of peaceful assembly', CCPR/C/GC/37, 17 September 2020, para. 36. Article 21 of the ICCPR: "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

<sup>83</sup> Ibid, para. 38

<sup>84</sup> Ibid, para. 96.

<sup>85</sup> Clause 1, Regulation Issued under Section 9 and Section 11 of the Emergency Decree, 15 October 2020, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10240&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10240&filename=index)

<sup>86</sup> Announcement of the Chief Official Responsible for Remediating the Serious Emergency Situation No. 4/2563, dated 16 October 2020.

This regulation appears on its face to be non-compliant with article 21 of the ICCPR, which protects peaceful assemblies wherever they take place, including those that “pursue contentious ideas or goals” and assemblies that “their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity”.<sup>87</sup>

Nevertheless, protests in Thailand have continued despite government ban and authorities' attempts to stop them. Several emergency decree orders have issued to prohibit the use of certain roads, an entire electric rail system, certain BTS and MRT stations (subways), piers and Skywalks (overhead walkways) in the areas where protesters were planning to converge, in violation of Thailand's obligations to facilitate the exercise of the right to peaceful assembly.<sup>88</sup> The Commissioner General of the Royal Thai Police also issued an announcement banning vehicles carrying stages, loudspeakers, toilets and consumer goods from entering protest areas.<sup>89</sup>

The UN Human Rights Committee explains that State parties have positive obligations to facilitate the exercise of the right to peaceful assembly not only at the site where the assemblies take place, but also the associated activities of the assemblies. It states that:

“The obligations of States parties thus extend to actions such as participants' or organizers' mobilization of resources; planning; dissemination of information about an upcoming event; preparation for and travelling to the event; communication between participants leading up to and during the assembly; broadcasting of or from the assembly; and leaving the assembly afterwards”<sup>90</sup>

During the period between 13 and 22 October 2020, at least 90 protesters were arrested, mostly for violating the banning of gathering.<sup>91</sup> On 16 October 2020, police forcibly dispersed peaceful protesters at the Pathumwan intersection in Bangkok in which thousands of people, including many students, took part, by using water cannon laced with blue dye and an undisclosed chemical irritant to drive back protesters.<sup>92</sup>

#### 5.4 Privacy and Freedom of Movement

The right to privacy is protected under article 17 of the ICCPR. Freedom of Movement is protected under article 12.

Section 11(4) enables a competent official “to issue a warrant for the search, removal, withdrawal or demolition of buildings, structures or obstructions as necessary in the exercise of functions in order to promptly terminate a serious situation where a delay may render the situation beyond control”. On 15 October 2020, the Chief Official Responsible for Remediating the Serious Emergency Situation issued an announcement granting

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<sup>87</sup> UN Human Rights Committee, General Comment No. 37, para. 6-7

<sup>88</sup> For example, Order of the Chief Official Responsible for Remediating the Serious Emergency Situation No. 2/2563 and 3/2563, dated 16 October 2020.

<sup>89</sup> Announcement of the Chief Official Responsible for Remediating the Serious Emergency Situation No. 2/2563, dated 16 October 2020.

<sup>90</sup> UN Human Rights Committee, 'General Comment No. 37: Article 21: right of peaceful assembly', CCPR/C/GC/37, 17 September 2020, para. 33.

<sup>91</sup> Thai Lawyers for Human Rights, 'Statistics of those who were arrested and prosecuted since the gathering of #People Party from 13 October', accessed on 22 October 2020, available at: <https://www.tlhr2014.com/?p=22156>

<sup>92</sup> Human Rights Watch, 'Thailand: Water Cannon Used Against Peaceful Activists', 17 October 2020, available at: <https://www.hrw.org/news/2020/10/17/thailand-water-cannon-used-against-peaceful-activists>

commissioned officers, both civilian and military authorities, the power to “search buildings, structures or obstructions as necessary for the exercise of their functions”.<sup>93</sup>

Section 11(5) expands these powers to issue an order to inspect letters, books, print materials, telegraphic transmissions, telephone conversations or any other means of communication.

Some of these powers, such as the search and seizure powers, the demolition of homes and the monitoring of communications are highly intrusive interferences into the right to privacy, including family, home or correspondence contained in article 17 ICCPR. These interferences do not require judicial authorization, as is usually required under the Constitution, or the authorization of another independent authority.

The Emergency Decree confers considerable powers in sections 9 and 11 to competent officials to limit aspects of the right to freedom of movement. It allows the Government to evacuate population, gives the Prime Minister the power to prevent a Thai citizen from leaving his or her own country, and allow for the expulsion and deportation of foreigners. This is a clear violation of article 12(2) ICCPR that guarantees everyone’s right to leave their own country. There will be a particularly heavy burden on the state to justify such limitation by imminent and pertinent security considerations subject to effective ways to challenge such a decision.

**Recommendations:**

1. The regulations, notifications, decisions and actions of officials exercising powers under the emergency law during the “serious emergency situation” should be subject to review by the courts, including administrative courts, and ensure the affected persons’ right to access to an effective remedy;
2. All officials responsible for implementing the law should not enjoy unqualified legal immunity for any criminal acts carried out in the exercise of their responsibilities;
3. To remove from the threat or execution of criminal liability the protesters who are prosecuted or at risk of prosecution under the Emergency Decree simply for exercising their rights to freedom of expression and assembly as guaranteed under international and Thai law;
4. Repeal or Amend provisions of the Emergency Decree to ensure its compliance with Thailand’s international legal obligations, including:
  - to ensure that the invocation of the Decree is confined to situations that give rise to a threat to the life of the nation;
  - to ensure that any limitations or restrictions on the exercise of internationally guaranteed rights must be non-discriminatory, limited in duration, strictly necessary, and proportionate to the specific threat posed;
  - to avoid exercising power under the open-ended and vague section 11(6) that grants the Prime Minister the power to order any person to do anything;
  - to fully respect the protections of article 9 of the ICCPR, and to refrain from the use of any form of administrative detention;

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<sup>93</sup> Announcement of the Chief Official Responsible for Remediating the Serious Emergency Situation No. 3/2563, dated 16 October 2020.

- to reaffirm that any person arrested must be brought promptly before a judge and that all detainees and their representatives at all times are able to enjoy their right to challenge the legality of the detention before an ordinary court (habeas corpus);
- To ensure that detainees only be held in recognized places of detention with regularized procedures and safeguards to protect detainees, consistent with articles 7 and 10 of the ICCPR and the Mandela Rules;
- to ensure that detainees have the right to immediately access a lawyer of their choice, to inform their family of the arrest and to receive medical assistance and visits from their family;
- to ensure that only law enforcement agencies are competent to summon persons under the decree with full respect for the right to remain silent;
- to avoid exercising the power under the provisions allowing vague and broad restrictions on the right to freedom of expression and assembly; and
- to review the special powers affecting freedom of movement, the right to privacy and property.



## ANNEX 1

(Translation)<sup>94</sup>

### **EMERGENCY DECREE ON PUBLIC ADMINISTRATION IN EMERGENCY SITUATION, B.E. 2548 (2005)**

BHUMIBOL ADULYADEJ, REX;

Given on the 16th Day of July B.E. 2548;

Being the 60th Year of the Present Reign

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His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:

Whereas it is expedient to revise the law on public administration in emergency situations;

This Act contains certain provisions in relation to the restriction of right and liberty of person, in respect of which section 29 in conjunction with section 31, section 35, section 36, section 37, section 39, section 44, section 48 and section 50 of the Constitution of the Kingdom of Thailand so permit by virtue of law;

By virtue of section 218 of the Constitution of the Kingdom of Thailand, an Emergency Decree is hereby enacted, as follows:

**Section 1.** This Emergency Decree is called "Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 (2005)".

**Section 2.** This Emergency Decree shall come into force as from the day following the date of its publication in the Government Gazette.<sup>1</sup>

**Section 3.** The Act on Public Administration in Emergency Situation, B.E. 2495 (1952) shall be repealed.

**Section 4.** In this Emergency Decree:

"Emergency situation" means a situation, which affects or may affect the public order of the people or endangers the security of the State or may cause the country or any part of the country to fall into a state of difficulty or contains an offence relating to terrorism under the Penal Code, a battle or war, pursuant to which it is necessary to enact emergency measures to preserve the democratic regime of government with the King as Head of State of the Kingdom of Thailand under the Constitution of the Kingdom of Thailand, independence and territorial integrity, the interests of the nation, compliance with the law, the safety of the people, the normal living of the people, the protection of rights, liberties and public order or public interest, or the aversion or remedy of damages arising from urgent and serious public calamity.

"Competent official" means a person appointed by the Prime Minister to perform an act under this Emergency Decree.

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<sup>94</sup> Provided by the Office of the Council of State, available at:  
[http://web.krisdika.go.th/data/document/ext810/810259\\_0001.pdf](http://web.krisdika.go.th/data/document/ext810/810259_0001.pdf)

**Section 5.** In the event of the occurrence of an emergency situation and the Prime Minister considers that it is appropriate to use the force of administrative officials or police officers, civil officials or military officers to jointly provide assistance, prevent, remedy, suppress, withhold the emergency situation, rehabilitation or provide assistance to the people, the Prime Minister upon the approval of the Council of Ministers is empowered to declare an emergency situation applicable to the whole Kingdom or in some area or locality as necessary for the situation. In the case where the approval of the Council of Ministers cannot be obtained in a timely manner, the Prime Minister may declare the emergency situation immediately and shall subsequently seek the approval of the Council of Ministers within three days. If approval of the Council of Ministers is not obtained within the time prescribed, or the Council of Minister refuses approval, such declaration of emergency situation shall cease to be in force.

The declaration of emergency situation under paragraph one shall be in force for the duration prescribed by the Prime Minister, but shall not exceed three months from the date of declaration. In the case where it is necessary to extend such period, the Prime Minister upon the approval of the Council of Ministers shall have the power to declare the extension of duration of enforcement provided that each extension shall not exceed three months.

At the end of the emergency situation or upon the disapproval of the Council of Ministers or upon the lapse of the period under paragraph two, the Prime Minister shall declare the annulment of such emergency situation.

**Section 6.** There shall be a Public Administration in Emergency Situation Committee consisting of a Deputy Prime Minister assigned by the Prime Minister as Chairperson, Minister of Defence, Minister of Interior and Minister of Justice as Vice Chairpersons, Permanent Secretary for Defense, Permanent Secretary for Interior, Permanent Secretary for Social Development and Human Security, Permanent Secretary for Justice, Director-General of the National Security Council, Attorney-General, Supreme Commander, Commander in Chief of the Royal Thai Army, Commander in Chief of the Royal Thai Navy, Commander in Chief of the Royal Thai Air Force, Commissioner-General of the Royal Thai Police, DirectorGeneral of the Department of Provincial Administration and Director-General of the Department Disaster Prevention and Mitigation as members, and National Security Council as member and secretary, having the powers and duties to monitor and inspect domestic and international situations which may arise from the emergency situation in order to advise the Prime Minister in the case where it is necessary to declare an emergency situation under section 5 or in the case of a serious situation under section 11 and for the implementation of appropriate measures under this Emergency Decree in order to prevent , remedy and withhold such emergency situation.

The provisions of this section shall not prejudice the exercise powers of the Prime Minister under section 5 in the declaration of emergency situation when there is a necessary and urgent situation which may endanger the country or the people.

**Section 7.** In an area or locality prescribed in a Declaration of Emergency Situation under section 5, powers and duties of a Minister, Ministry or several Ministries or having charge and control of the execution of any law or is empowered under any law, only in relation to the provisions on the issue of a permission, approval, order, command or aid in the prevention, remedy, suppression or withholding in an emergency situation or rehabilitation or provision of assistance to the people, shall be temporarily transferred as powers and duties of the Prime Minister in order that instructions and remedies during the situation can achieve in an integral, expedient and efficient manner.

The prescription of all or part of powers and duties of Ministers under paragraph one as powers and duties of the Prime Minister shall be in accordance with a Notification issued by the Council of Ministers.

The Prime Minister shall have the power to appoint competent officials to perform duties under this Emergency Decree and to carry out functions under laws which have been transferred to the powers and duties of the Prime Minister under paragraph one. A person appointed as a competent official shall be deemed to have the powers under such law. In this regard, the Prime Minister may authorize any governmental agency or competent official under such law to continue to exercise existing functions, provided that the exercise of functions shall be in accordance with the rules laid down by the Prime Minister.

In a case where the Prime Minister appoints a civil servant, a police officer or a military officer holding a position not lower than Director-General, Police Commander in Chief, Commander General or the equivalent thereof as a competent official and prescribed as a Chief Official responsible for remedying the emergency situation in an area and to have charge and control over other officials and competent officials in this regard, the exercise of functions by relevant governmental agencies and officials, including competent official, shall comply with instructions of the Chief Official, except for the exercise of military functions, which must be in accordance with by-laws, rules and Regulations concerning the use of military force, provided that this must be consistent with guidelines stipulated by the Chief Official.

In the case of necessity, the Council of Ministers may set up an ad hoc Special Task Force to provisionally exercise functions under this Emergency Decree until the Declaration of Emergency Situation has been annulled.

The Prime Minister may authorise a Deputy Prime Minister or one or more Ministers to exercise powers under paragraph one, paragraph three or paragraph four on his/her behalf or may entrust such persons as supervisors for the exercise of functions by the relevant governmental agencies, competent official under paragraph three, Chief Official under paragraph four and the agency under paragraph five and shall be deemed to be the superior official of the Chief Official, government officials and relevant competent officials.

**Section 8.** For the benefit of coordinating the exercise of functions in an appropriate manner and consistent with the circumstances of the situation and wellbeing of the people in the area which an Emergency Situation has been declared, the Prime Minister or the designated Minister may issue an order appointing a group of persons or a person as an advisor for the exercise of functions of the competent official or as an assistant to the competent official in the exercise of functions under this Emergency Decree.

A person appointed under paragraph one shall acquire protection to the same extent as in the exercise of functions by a competent official within the scope of the appointed functions.

**Section 9.** In the case of necessity in order to remedy and promptly resolve an emergency situation or to prevent the worsening of such situation, the Prime Minister shall have the power to issue the following Regulations:

(1) to prohibit any person from departing from a dwelling place during the prescribed period, except with the permission of a competent official or being an exempted person;

(2) to prohibit the assembly or gathering of persons at any place or the commission of any act which may cause unrest;

(3) to prohibit the press release, distribution or dissemination of letters, publications or any means of communication containing texts which may instigate fear amongst the people or is intended to distort information which misleads understanding of the emergency situation to the extent of affecting the security of state or public order or good

moral of the people both in the area or locality where an emergency situation has been declared or the entire Kingdom;

(4) to prohibit the use of routes or vehicles or prescribe conditions on the use of routes or vehicle;

(5) to prohibit the use of buildings or enter into or stay in any place;

(6) to evacuate people out of a designated area for the safety of such people or to prohibit any person from entering a designated area.

Regulations under paragraph one may prescribe a time condition for the compliance of Regulations or conditions for the exercise of functions by the competent official, or authorize a competent official to designate an area and additional details, so as not to perform any act which causes unreasonable hardship to the people.

**Section 10.** For the benefit of promptly resolving the problems in the emergency situation area, the Prime Minister may authorize a competent official appointed as a Chief Official under section 7 paragraph four to exercise the powers to issue the Regulations under section 9 on his or her behalf. However, upon the exercise of such powers, a report shall forthwith be submitted to the Prime Minister and if the Prime Minister does not issue Regulations on the same subject matter within forty-eight hours as from the issue of such Regulations by the competent official, such Regulations shall be cease to be in force.

**Section 11.** In the case where an emergency situation involves terrorism, use of force, harm to life, body or property, or there are reasonable grounds to believe that there exists a severe act which affects the security of state, the safety of life or property of the state or person, and there is a necessity to resolve the problem in an efficient and timely manner, the Prime Minister, upon the approval of the Council of Ministers, shall have the power to declare that such emergency situation is a serious situation, and the provisions of section 5 and section 6 paragraph two shall apply mutatis mutandis.

Upon a declaration under paragraph one, in addition to powers section 9 and section 10, the Prime Minister shall also have the following powers:

(1) to issue a Notification that a competent official shall have the power of arrest and detention over persons suspected of having a role in causing the emergency situation, or being an instigator, a propagator, a supporter of such act or concealing relevant information relating to the act which caused the emergency situation, provided that this should be done to the extent that 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 foster cooperation in the termination of the serious situation;

(2) to issue a Notification that a competent official shall 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 relating to the emergency situation;

(3) to issue a Notification that a competent official shall have the power to seize or attach arms, goods, consumer products, chemical products or any other materials in the case where there are reasonable grounds to suspect that such objects have been used or will be used to commit or support an act which causes an emergency situation;

(4) to issue a Notification that a competent officials shall have the power to issue a warrant for the search, removal, withdrawal or demolition of buildings, structures or obstructions as necessary for the exercise of functions in order to promptly terminate a serious situation where a delay might render the situation beyond control;

(5) to issue a Notification that a competent official shall have the power to issue an order to inspect letters, books, printed matters, telegraphic transmissions, telephone communications or any other means of communication as well as to cancel or suspend any contact or communication in order to prevent or terminate the serious incident provided that the rules prescribed in the law on special investigation are complied with *mutatis mutandis*;

(6) to issue a Notification the prohibition of any act or any instruction to perform an act to the extent that is necessary for maintaining the security of the state, the safety of the country or the safety of the people;

(7) to issue a Notification that a competent official shall have the power to issue an order to prohibit any person from leaving the Kingdom where there are reasonable grounds to believe that the departure from the Kingdom will affect the security of the state or the safety of the country;

(8) to issue a Notification that a competent official shall have the power to instruct an alien to leave the Kingdom in the case where there are reasonable grounds to believe that such person is a supporter in causing the emergency situation, provided that the law on immigration shall apply *mutatis mutandis*;

(9) to issue a Notification that the purchase, sale, use or possession of any arms, goods, medical products, consumer products, chemical products or any equipment which may be used for causing unrest or terrorism shall be reported to or permitted by the competent official or comply with any conditions set by the Prime Minister;

(10) to order the use of military force in order to assist administrative officials or police officers in terminating the serious situation or controlling the situation so as to promptly secure order, provided that the performance of functions by military officers shall be made pursuant to identical powers and duties of a competent official under this Emergency Decree, whereas the scope of the use of such powers and duties of the military shall be in accordance with the conditions and time condition prescribed by the Prime Minister but shall not exceed the powers under martial laws in the case where martial laws apply.

Upon the termination of the serious situation under paragraph one, the Prime Minister shall issue a Notification to annul the Notification under this section forthwith.

**Section 12.** In arresting and taking suspected persons into custody under section 11 (1), the competent official shall apply for leave of a court of competent jurisdiction or the Criminal Court. Upon obtaining leave of the court, the competent official shall be empowered to arrest and take the suspected persons into custody for a period not exceeding seven days. The suspected persons shall be taken into custody at a designated place which is not a police station, detention centre, penal institution or prisons and shall not be treated as a convict. In case where it is necessary to continue the detention in order to remedy the emergency situation, the competent official shall apply for the leave of the court to extend such detention period by seven days at a time, provided that the total period shall not exceed thirty days. Upon the expiration of such period, if the detention is still required, the competent official shall proceed under the Criminal Procedure Code.

In proceeding under paragraph one, the competent officials shall file a report on the arrest and detention of such suspected persons for submission to the court issuing the order under paragraph one. A copy of such report shall be deposited at the office of the competent official so that relatives of the suspected persons may access such reports for the entire duration of such detention.

The provisions on the procedures governing the issue of a warrant under the Criminal Procedure Code shall apply mutatis mutandis to the application for leave of the Court under paragraph one.

**Section 13.** If an object or equipment stipulated in a Notification under section 11 (9) is a communication device or a part thereof, the Prime Minister may issue a Notification to implement such measure throughout the Kingdom or in any other areas not prescribed in a Declaration of Emergency Situation.

**Section 14.** A Regulation, Notification and order issued under section 5, section 7, section 8, section 9, section 11 and section 15 shall also be published in the Government Gazette upon coming into force.

**Section 15.** A competent official or a person having identical powers and duties to a competent official under this Emergency Decree shall be a competent official under the Penal Code and shall have the powers and duties of an administrative official or police officer under the Criminal Procedure Code as prescribed by the Prime Minister.

**Section 16.** A Regulation, Notification, order or an act under this Emergency Decree shall not be subject to the law on administrative procedures and the law on the establishment of Administrative Court and Administrative Court Procedure.

**Section 17.** 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 if such act was performed in good faith, non-discriminatory, and was not unreasonable in the circumstances or exceed the extent of necessity, but this does not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful act of officials.

**Section 18.** Any person who violates a Regulation, Notification or order issued under section 9, section 10, section 11 or section 13 shall be liable to imprisonment for a term not exceeding two years or to a fine not more than fortythousand baht, or to both. Section 19. The Prime Minister shall have charge and control of the execution of this Emergency Decree.

Countersigned by:

Police Lieutenant Colonel Thaksin Shinawatra

Prime Minister

## **ANNEX 2**

(Unofficial Translation)<sup>95</sup>

### **Regulation**

Issued under Section 9 and Section 11 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005)

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Pursuant to the Declaration of a Serious Emergency Situation in the area of Bangkok issued on 15 October B.E. 2563 (2020),

In order to remedy and promptly resolve this serious emergency situation and to prevent the worsening of such situation, by virtue of Section 9 and Section 11 paragraph two of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), the Prime Minister hereby issues a Regulation as follows:

1. It is prohibited to assemble or gather five or more persons at any place or to commit any act which instigates unrest;
2. It is prohibited to present news, distribute or disseminate letters, publications or any other means of communication, including all electronic data, containing text which may instigate fear amongst the people or is intended to distort information which misleads understanding of the emergency situation to the extent of affecting the security or state or public order or good morals of the people throughout the Kingdom;
3. The use of transportation routes or vehicles may be prohibited or allowed with conditions, as prescribed by the responsible Chief Official;
4. The use of, the entry into or the staying in any buildings or places may be prohibited, and the exit from any buildings or places may be ordered, as prescribed by the responsible Chief Official;
5. In the implementation of Clause 1 to Clause 4, the responsible Chief Official may prescribe timeframes for the compliance with Regulations or conditions for the exercise of functions by competent officials as deemed appropriate, so as not to perform any act which causes unreasonable hardship to the people.

This Regulation shall come into effect immediately.

Issued on 15 October B.E. 2563 (2020)

(General Prayut Chan-o-cha)

Prime Minister

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<sup>95</sup> Provided by the Government Public Relations Department, available at: [https://thailand.prd.go.th/ewt\\_news.php?nid=10240&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10240&filename=index)

## **ANNEX 3**

(Unofficial Translation)<sup>96</sup>

### **Notification**

Pursuant to Section 11 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005)

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Pursuant to the Declaration of a Serious Emergency Situation in the area of Bangkok issued on 15 October B.E. 2563 (2020);

By virtue of Section 11 paragraph 2 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), the Prime Minister hereby issues a Notification as follows:

1. A competent official shall have the power of arrest and detention over persons suspected of having a role in causing the emergency situation, or being an instigator, a propagator, a supporter of such act or concealing relevant information relating to the act which caused the emergency situation, provided that this should be done to the extent that 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 foster cooperation in the termination of the serious situation, in compliance with Section 12 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005);
2. A competent official shall 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 relating to the emergency situation;
3. A competent official shall have the power to seize or attach equipment or tools used for communication or electronic data transfer, arms, goods, consumer products, chemical products or any other materials in the case where there are reasonable grounds to suspect that such objects have been used or will be used to commit or support an act which causes an emergency situation;
4. A competent official shall have the power to issue a warrant for the search, removal, withdrawal or demolition of buildings, structures or obstructions as necessary for the exercise of functions in order to promptly terminate a serious situation where a delay might render the situation beyond control;
5. A responsible Chief Official shall have the power to prohibit any person from committing any act or giving an instruction to perform an act to the extent that is necessary for maintaining the security of the state, the safety of the country or the safety of the people;
6. A competent official shall have the power to prohibit the commission of any act which closes traffic or transportation routes, or the commission of any other act which prevents the normal usage of transportation routes in the area where the emergency situation has been declared;
7. A competent official carrying out tasks under this Notification shall apply measures as necessary and appropriate, while being careful not to cause unreasonable hardship to the people.

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<sup>96</sup> Provided by the Government Public Relations Department, available at:  
[https://thailand.prd.go.th/ewt\\_news.php?nid=10241&filename=index](https://thailand.prd.go.th/ewt_news.php?nid=10241&filename=index)



The responsible Chief Official shall have the power to prescribe conditions or timeframes for the exercise of power by competent officials under this Notification as deemed appropriate.

This Notification shall come into effect immediately.

Issued on 15 October B.E. 2563 (2020)

(General Prayut Chan-o-cha)

Prime Minister

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March 2021 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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