

Submission by the Asian Legal Resource Centre to the Human Rights Council's Universal Periodic Review concerning human rights, political crisis, and impunity in Thailand

I. SUMMARY

1. This submission, pursuant to Human Rights Council resolution 5/1, which provides for civil society to participate in the Universal Periodic Review process of United Nations Member States' human rights obligations and commitments, concentrates on the features of legal, judicial and political frameworks that enable the systematic violation of human rights and the concomitant failure to end impunity and initiate, let alone consolidate, the development of the rule of law in Thailand. Despite what appears to be an extensive normative and institutional framework for protecting human rights in Thailand – including ratification of many significant international human rights instruments, the Constitution of 2007, a National Human Rights Commission, and the recently-established Truth and Reconciliation Commission of Thailand – persistent human rights abuses are present. As political crisis has deepened, rather than resolved, in Thailand since the 19 September 2006 coup, the violation of civil and political rights of dissident citizens by state officials has become the rule, not the exception. Simultaneously, the failure of relevant state institutions to take action to redress long-standing human rights violations reflects a lack of will to end impunity and foster respect for the rule of law at the deepest levels. The negative effects of the continuing violation of citizen's rights by state officials and the subsequent failure to hold perpetrators accountable are particularly far-reaching and chilling within the context of the presence of what appear to be mechanisms to protect human rights but which fail to do so. The Council should consider how it might effectively work more effectively within and beyond the United Nations system to make the consolidation of human rights and rule of law – rather than the widespread violation of both – real in Thailand.

Key words: Rule of law, impunity, state of emergency, freedom of expression

II. BACKGROUND

2. Since Thailand's transition from absolute to constitutional monarchy on 24 June 1932, the development of democracy, institutionalization of human rights and the establishment of the rule of law has been intermittent and frequently stalled. Between 1932 and 2011, there have been 10 successful coups and 7 attempted coups. Each succeeding coup group has nullified the constitution of the prior regime in favor of promulgating a new one, not least in order to include a clause granting themselves amnesty for staging a coup. Most promising among the 17 constitutions since 1932 was the 1997, also known as the "People's Constitution," in reflection of the broadly consultative process by which it was drafted. On 19 September 2006, the Council for Democratic Reform (CDR), a coalition of members from each of Thailand's armed forces, launched a coup against the elected government of Thaksin Shinawatra and nullified the 1997 Constitution. Although the 2007 Constitution retained some of the principles of the 1997 Constitution, it was flawed in three significant ways: 1.) Rather than a consultative process, the 2007 Constitution was drafted by a junta-appointed assembly; 2.) the 2007 Constitution legalized the coup; and 3.) While the 1997

Constitution mandated that independent agencies, including the National Human Rights Commission, be selected through a process that included participation by citizens, the 2007 Constitution changed the selection process to remove all forms of citizen participation and rely solely on the recommendations of state officials.

3. Since the 19 September 2006 coup, there have been five governments, including the present government of Prime Minister Abhisit Vejjajiva. While the two governments of Thaksin Shinawatra (January 2001 – February 2005; February 2005 – September 2006) were marked by widespread violations of human rights, as extensively documented by the Asian Legal Resource Centre and including the 2003 “War on Drugs” in which over 2000 people were extrajudicially killed as alleged drug dealers, during the post-coup years the political situation in Thailand has grown even more precarious. In the gravest example of this precarity, during April-May 2010, thousands of red-shirted citizen members of the United Democratic Front Against Dictatorship (UDD) occupied the streets of Bangkok. During the two months of the occupation, the relationship between the UDD and state security forces were often contentious. Under the Emergency Decree on Government Administration in a State of Emergency (“Emergency Decree”), the government decreed a State of Emergency in Bangkok and surrounding areas on 7 April 2010. On 13 May 2010, the State of Emergency was expanded to include another 12 provinces in northern, northeastern, and central Thailand; by late May, it was expanded to be in force in a total of 24 provinces across the country. The Emergency Decree gives blanket powers to state actors to resolve the State of Emergency, including by making arrests, censoring the press, restricting movement and using armed force. In mid-May 2010, the government of PM Abhisit Vejjajiva decided to use the army and ultimately deadly force to remove the UDD protestors from the streets. At least 91 people were killed and at least 2100 were injured during the two-month period. The use of deadly and disproportionate force by Thai state security forces was a significant breach of international human rights standards. While the Asian Legal Resource Center notes that some members of UDD may have had weapons, an allegation which is still under investigation, the burden in this instance was on the state to take appropriate measures to protect the rights and lives of citizens. In addition, during and in the aftermath of the contention, at least 417 UDD protestors were arbitrarily arrested under a combination of emergency rule and criminal law in Bangkok and other provinces; at this time it is not known precisely how many people remain in state detention. While no blood was shed during the coup itself, the widespread political contention and violence in the nearly five years since the coup can be seen as the legacy of the abrogation of the rule of law.

III. INSTITUTIONAL AND NORMATIVE FRAMEWORK

4. Viewed through a normative and institutional framework, the atmosphere for the protection of human rights in Thailand seems healthy. Thailand has acceded to many important international human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention to End All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention Against Torture. Many of the rights specified in these instruments are protected in the 2007 Constitution; a notable exception is the Convention Against Torture, in which

there are ongoing efforts to actualize in national law. Specialized institutions exist to monitor and protect human rights in Thailand, such as the Constitutional Court, the National Human Rights Commission and the Truth and Reconciliation Commission of Thailand, which is a truth-seeking body established in the aftermath of the violence of April-May 2010.

5. Yet in practice, the rights in these instruments have consistently failed to be realized. Instead, perniciously, a combination of the manipulation of law and the failure for state actors to take action to end impunity has worked to systematically strip citizens of basic human rights.

IV. THE MANIPULATION OF THE LAW

6. Constriction of freedom of expression through the overuse and abuse of law: In the nearly five years since the 19 September 2006 coup, there has been a tremendous rise in the use of Article 112 of the Criminal Code, which specifies the crime of lese majeste, and more recently, the 2007 Computer Crimes Act, to silence speech critical of the monarchy and dissident speech more generally. The Asian Legal Resource Centre is concerned that rather than using the standard defamation laws, there are special provisions to deal with the individuals who comprise the monarchy. In addition, Article 112 ["Whoever defames, insults or threatens the King, Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years"] is vague and therefore open to abuse. In cases tried under Article 112, the penalties have been severe, as illustrated by the case of Ms. Darunee Charnchoengsilpakul, who was convicted in August 2009 of six violations of Article 112 and sentenced to 18 years in prison for comments she made during speeches amounting to 55 minutes. While the Asian Legal Resource Centre views any constriction of speech to be of concern, a recently emergent turn has been the prosecution of webboard editors on allegations of not removing comments deemed to have lese majeste content *quickly enough* from webboards. This is well illustrated in the two cases against Ms. Chiranuch Premchaiporn, the editor of the Prachatai webboard; if convicted in both cases, she could face up to 87 years in prison for comments that she did not write and that she removed from the Prachatai webboard. Of additional concern, the precise number of individuals facing pending charges and prosecution under Article 112 and the 2007 Computer Crimes Act is not publicly known.
7. Violation of the Constitution: As noted above, Ms. Darunee Charnchoengsilpakul was sentenced to 18 years in prison in August 2009 for allegedly violating Article 112 of the Criminal Code. Her trial in June 2009 was a secret, closed trial. While the Criminal Procedure Code stipulates that a trial can be closed to the public under certain circumstances, the 2007 Constitution, in line with the International Covenant on Civil and Political Rights, stipulates that the accused have a right to an open trial. During the trial, the judge made a unilateral decision to close the trial and refused to forward the petition of Ms. Darunee Charnchoengsilpakul and her lawyer to the Constitutional Court for examination. In early 2011, the Appeal Court ruled that this refusal of the judge to forward the petition was improper and nullified the initial conviction and sentence and sent the petition to the Constitutional Court. The Asian Legal Resource Centre welcomes the referral of the petition to the Constitutional Court, but is extremely concerned that this did not occur during initial trial in June

2009 and is concerned that an individual whose sentence has been vacated remains in prison. Despite the nullification of her sentence, Ms. Darunee Charnchoengsilpakul was not granted bail in a recent appeal despite citing significant health concerns for which she needs treatment outside the prison. As of March 2011, she has been detained for 30 months since her arrest in June 2008 without being granted bail either immediately after her arrest or after her sentence was vacated; in total, only 18 of those months (September 2009 – February 2011) were those in which she had been imprisoned under a conviction.

8. Overuse of martial law and emergency powers: There has been a persistent overuse of martial law and other forms of emergency regulations in Thailand since the time of former PM Thaksin Shinawatra. Since January 2004, martial law has been in use in the three southern-most provinces of Thailand (Yala, Pattani, and Narathiwat); in July 2005, the Emergency Decree was declared. The Emergency Decree was decreed on 7 April 2010 in Bangkok and surrounding provinces and on 13 May 2010 in many provinces in northern and northeastern Thailand. In late 2010, the Emergency Decree was lifted in all provinces where it had been decreed in April-May 2010 but left in place in all but one district in southern Thailand; throughout southern Thailand and the remainder of the country, the Internal Security Act (ISA) has been used selectively. All of these instruments give the authorities wide-ranging powers to arbitrarily interrogate, detain, and otherwise restrict the rights and liberties of Thai citizens. The Asian Legal Resource Centre is further concerned that the use of extraordinary legal measures has consistently been associated with broader patterns of extrajudicial violence in Thailand, such as the Krue Se and Tak Bai massacres in southern Thailand, which took place while martial law was in place. It is imperative that the state both justify the precise need for these measures and also ensure that mechanisms for the careful monitoring of state officials for excessive use of power under the measures are in place.

V. FAILURE TO USE THE JUDICIAL SYSTEM AND OTHER HUMAN RIGHTS INSTITUTIONS TO END IMPUNITY

9. Persistent impunity for torture, massacre, and disappearance: In numerous cases since the declaration of martial law in southern Thailand in early 2004, there has been a persistent failure to secure accountability in instances where state officials have violated the rights of citizens. Of particular concern to the Asian Legal Resource Centre, securing accountability has been difficult across a range of institutions and processes mandated to deal with state wrongdoing. The state officials responsible for the 12 March 2004 disappearance of Mr. Somchai Neelaphaijit have still not been held to account for their actions. Although disappearance is not yet a crime specified in Thai law, five police officers were prosecuted for crimes committed in relation to his disappearance; one police officer was convicted and remained out on bail pending appeal. While waiting for the appeal verdict, this police officer went missing under conditions which suggest he fled; in late 2010, the appeal verdict was returned but as of March 2011 has still not been read as the police officer has not yet appeared. In the cases of the Krue Se massacre, in which 117 people were killed on 28 April 2004, the Tak Bai massacre, in which 86 people were killed on 25 October 2004, and the torture and murder of Imam Yapa Kaseng on 21 March 2008, while the inquests have ruled that the deaths occurred while the individuals involved were in state custody, the

responsible state officials have not been held to account. Although the National Counter Corruption Commission's mandate includes the examination of cases such as these, they have not yet taken action. Of additional concern, in cases in which witnesses are involved in testifying about state violence, reports indicate that the witness protection program is deeply flawed and marred by a lack of adherence to basic norms of professional behavior as well as what may be a willful decision *not* to protect witnesses.

10. Failure to move towards accountability amidst ongoing political crisis: As noted above, the difficulty of securing human rights, ending impunity, and fostering the rule of law in Thailand has been complicated by the political crisis engendered by the 19 September 2006 coup. Amidst the changes in government and nearly-constant political contention, the importance of the protection of human rights has often been ignored. During the events of April-May 2010, the rights of citizens to peacefully protest were violated and the state's responsibility to use emergency powers and force was not upheld. While the Asian Legal Resource Centre welcomed the establishment of the Truth and Reconciliation Commission of Thailand (TRCT) in the aftermath of the violence, early indications suggest that the TRCT is hampered by its own limited mandate and the failure of all certain state agencies to cooperate. If the TRCT fails to secure accountability, despite the appearance of being able to do so, impunity will be further entrenched in Thailand.

VI. RECOMMENDATIONS

11. In order to end impunity and begin initiating the development of the rule of law, the Asian Legal Resource Centre calls on the Thai government to undertake the following:
 - a. Cease prosecutions for alleged cases of *lesè majesté* under Article 112 of the Criminal Code and the 2007 Computer Crimes Act. Immediately publicly disclose the full number of cases under investigation. The abuse of both of these laws has led to the severe constriction of freedom of speech.
 - b. Immediately release Darunee Charnchoengsilpakul on bail pending the review of her case by the Constitutional Court. Carefully consider the wide-ranging effects on liberty and the promotion of rights by closing trials to the public.
 - c. Re-evaluate all uses of martial law, the Emergency Decree, and the Internal Act in light of Thailand's obligations under the ICCPR.
 - d. Secure accountability by engaging in meaningful judicial processes in the cases of the disappearance of Mr. Somchai Neelaphaijit, the murder of Imam Yapa Kaseng, the Krue Se and Tak Bai massacres and other cases in which state officials have violated the rights of citizens.
 - e. Finally, use the Truth and Reconciliation Commission of Thailand to both secure justice and accountability with respect to the violence of April-May 2010, as well as demonstrate to the Thai public that it is possible to hold state actors to account.