

# Preliminary Report into the Situation of the Kingdom of Thailand With Regard to the Commission of Crimes Against Humanity



*Italian photojournalist Fabio Polenghi, immediately after he is killed by a bullet wound to the chest on May 19, as a man dressed in what appears to be Army-issue removes his camera.*

Presented by Amsterdam & Peroff LLP  
On Behalf of The United Front for Democracy Against Dictatorship  
and Others

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## **I. Introduction**

1. This Preliminary Report is filed by the United Front for Democracy Against Dictatorship (“UDD”) and others with the International Criminal Court (“ICC”) Prosecutor to notify the Prosecutor about the situation in The Kingdom of Thailand, regarding international crimes that have been perpetrated within its territory in 2010, in consideration of further investigations being conducted. The UDD and others are minded that Thailand is not a ratifying State Party to the ICC Statute. However, the Applicant will substantiate that:
  - (i) The situation of Thailand can be brought within the jurisdictional ambit of ICC, which will be dealt with in a separate document filed on behalf of the UDD and others in approximately eight weeks;
  - (ii) The situation gives rise to international crimes within the jurisdictional ambit of the ICC.
  - (iii) The political and military leadership of Thailand is deemed criminally liable for these offences;
  - (iv) Rather than investigate, the UDD and others believe that the Thai government is engaged in a massive cover-up, under the guise of “reconciliation,” which has involved the arbitrary arrest, detention and continued political persecution of the UDD – who are being denied the right to attend their criminal proceedings or to have independent experts examine victims’ bodies – with a concurrent military promotions who are responsible for the barbarous acts complained of herein, the most recent promotions occurring as recently as one week ago.

## II. Background facts of the case

### a. General Facts: Road to the 2006 Coup

#### *Constitutional Democracy in Thailand*

1. While Thailand has long replaced its absolute monarchy with a constitutional regime, it exhibits few of the characteristics of a true democracy. Since 1932, power has most often changed hands not through constitutionally mandated procedures, but rather through military coups. Exception made for three, short-lived interludes of “real” democracy (1946-47, 1973-76, 1988-91), all of which were brought to a close by military intervention, since 1932 Thailand has been ruled by regimes that embodied different mixtures of democracy and authoritarianism. Common to all these regimes, however, is the dominance exercised by the country’s unelected “Establishment” — a network of officials in the civilian and military bureaucracy as well as big business families and a small coterie of royal advisors — over the country’s elected officials. This arrangement was severely disrupted in May 1992, when historic, violent clashes between civilians and military forces (“Black May”) set in motion a five-year process of reform that culminated in the adoption of a new Constitution on October 11, 1997. The 1997 Constitution created unprecedented political stability, finally placing Thailand on the path to consolidating a real democracy.

#### *The Rise of Thai Rak Thai and Thaksin Shinawatra*

2. Thaksin Shinawatra entered politics in 1994, serving a brief term as Foreign Minister and then twice as Deputy Prime Minister under different governments. On July 14, 1998, Thaksin founded the political party Thai Rak Thai, which went on to win the 2001 general elections in a landslide. After completing a full term in office as Thailand’s Prime Minister, something unprecedented in the country’s history, Thaksin further consolidated Thai Rak Thai’s dominance in the 2005 elections. Running on the strength of its administration’s accomplishments, Thai Rak Thai won three quarters of the seats in the House of Representatives, resulting in Thaksin’s reappointment as Prime Minister.
3. In response to the elected administration’s attempt to assert its control over the policy-making process and place the military under civilian control, domains traditionally reserved for unelected institutions, portions of Thailand’s Establishment lent their support to a campaign

of street protests against the government, which called on the King and the military to intervene to unseat Thai Rak Thai's government. Thaksin was accused of disloyalty to the monarchy, a charge habitually made in Thailand to discredit those who pose a threat to Establishment interests. Controversy also arose over the Shinawatra family's sale of Shin Corp, by then one of Thailand's largest conglomerates. While Thaksin had divested his interest in Shin Corp before the 2001 elections, by transferring his shares to his two eldest children, in early 2006 the family sold its 49.6% stake in the company to Temasek Holdings, Singapore's sovereign fund. Critics complained that Thaksin had sold national assets to a foreign country and alleged that the transaction had exploited a loophole in the law that saved the family from paying capital gains taxes. The timing of the sale was fortuitous for the opposition's purposes, coming in advance of planned anti-Thaksin demonstrations in Bangkok. On February 4-5, 2006, fifty thousand protestors, led by activists who would later form the "People's Alliance for Democracy" (PAD), demanded Thaksin's resignation. In response, Thaksin dissolved the House of Representatives and called an election for April 2, 2006. Boycotted by the opposition, the elections yielded another comfortable victory by Thai Rak Thai, but the courts subsequently threw out the results on dubious constitutional grounds. The Constitutional Court ordered a new round of voting, which were scheduled for October. As reports of a possible coup began to emerge, a car packed with seventy kilograms of explosives was discovered near Thaksin's residence.

#### *The 2006 Coup*

4. On September 19, 2006, while Thaksin was attending a meeting of the United Nations General Assembly in New York, military forces took control of Bangkok. The junta, led by the Commander in Chief of the Army, General Sonthi Boonyaratglin, came to be known in English as the Council for Democratic Reform ("CDR"). The generals justified the illegal seizure of power by citing "disunity" among the Thai people, "signs of rampant corruption and malfeasance," and "interference" in the activities of independent state agencies.<sup>1</sup> General Sonthi took complete control of the government and laid the groundwork for the restoration of the military's long-standing political role. He abrogated the 1997 Constitution and abolished the Senate, the House of Representatives, the Council of Ministers and the Constitutional Court. He vested the duties of the Prime Minister in the leader of the CDR (i.e. himself) and

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<sup>1</sup> Announcement on the Appointment of the Leader of the Council for Democratic Reform, dated September 20, 2006.

announced that the scheduled general elections would be postponed for a year. The CDR also imposed a strict ban on any political gathering of five or more people.

*New Constitutional Order*

5. On October 1, 2006, the junta, now renamed Council for National Security (“CNS”), introduced an Interim Constitution, which declared all announcements and orders issued by the CDR in the aftermath of the coup to be “legitimate and in accordance with the Constitution.” The Interim Constitution ordered the drafting of a new permanent Constitution, a task over which the CNS exercised direct control. To secure the adoption of the Draft Constitution, the junta mounted a large-scale public relations campaign and imposed draconian restrictions designed to silence the public’s opposition to the draft. Following a consultative referendum, the Constitution was formally promulgated on August 24, 2007. In many ways, the new charter marked a radical departure from the principles enshrined in the 1997 Constitution.
  
6. In the wake of the coup, the generals disbanded the Constitutional Court and had replaced it with a handpicked Constitutional Tribunal. On May 30, 2007, the Constitutional Tribunal dissolved Thai Rak Thai and banned 111 Thai Rak Thai executives from politics for five years, based on a retroactive statute the generals had introduced a few months earlier. In August 2007, however, former Thai Rak Thai members regrouped in the People Power Party (“PPP”). The PPP subsequently went on to win the first and, to date, the only post-coup general elections, held in December 2007. The party was able to build a coalition government led by Prime Minister Samak Sundaravej. Following the electoral success of political forces that remained loyal to Thaksin, the PAD re-appeared on the streets of Bangkok. Largely peaceful demonstrations were staged on Ratchadamnern Avenue beginning in late May 2008, but as time wore on the PAD turned increasingly confrontational and violent. In late August, armed PAD guards stormed a television station in Bangkok, assaulted several ministries, and occupied the grounds of the Government House, physically preventing the government from working. At the same time, PAD supporters seized airports in the cities of Phuket, Krabi and Hat Yai and blocked major roads and highways. PAD renewed its pleas for another military coup.
  
7. On September 9, 2008, the Constitutional Court forced Prime Minister Samak to resign, on the grounds that his role as the host of a television cooking show was in breach of the

Constitution. While Samak was replaced by Somchai Wongsawat, a fellow leader of the PPP and Thaksin's brother in law, the PAD refused to disperse. Violent clashes with the police on October 7 were a prelude to the PAD's occupation of Bangkok's Suvarnabhumi International Airport and the old International Airport at Don Muang beginning on November 25, 2008. As tens of thousands of travelers were left stranded, the government imposed the Emergency Decree and called on the country's armed forces to restore order. The military, however, refused to comply. Finally, on December 2, the Constitutional Court handed down a decision dissolving the PPP as well as its coalition partners, disqualifying every member of the parties' executive committees from politics for a period of five years. Within hours, PAD ended its siege of the airports and vacated the Government House. It was only in the aftermath of the confrontation between the government and the PAD, the airport occupations, and the Constitutional Court's verdict that the Democrat Party was able to form a coalition government and install Abhisit Vejjajiva as its Prime Minister on December 18, 2008. The new coalition was brought into being thanks to the defection of one of the PPP's key factions, led by banned politician Newin Chidchob, and former PPP coalition partners. The deal was concluded on December 6, at the home of Army Chief Anupong Paochinda, following intense lobbying by the military and members of the Privy Council.

### **b. Specific Facts Pertaining to the Proceedings.**

8. On March 12 2010, members of the National United Front for Democracy against Dictatorship ("UDD"), popularly known as the Red Shirts, began to descend on Bangkok from every province around the country, vowing not to leave until Abhisit dissolved the House and called new elections. Formed in the wake of the coup by supporters of ousted Prime Minister Thaksin Shinawatra, in the intervening years the Red Shirts built an intricate organization spanning much of the country's territory. This democratic movement only went from strength to strength as the judiciary and the military overturned the results of the 2007 elections and made Abhisit the Prime Minister in late 2008.

#### *Abhisit's Assault on Democracy*

9. Immediately upon coming to power, the Abhisit administration has sought to silence its opposition through repressive legislation such as the country's draconian lèse majesté laws and the Computer Crimes Act. In 2009 alone, the courts are reported to have accepted charges

of lèse majesté (a violation of Article 112 of Thailand's Criminal Code) for 164 cases. That exceeded the previous record of 126 cases set in 2007, in the wake of the coup, and more than doubled the number of cases (seventy-seven) taken up by the judiciary during the People Power Party's administration in 2008. It should be noted that the highest number of cases prior to the coup was recorded in 2005, when thirty-three were successfully submitted to the courts. Owing to both legal restrictions and the unwillingness of major media outlets to discuss information that might damage the image of the monarchy, the vast majority of the cases have gone unreported by the local and international press.<sup>2</sup>

10. The year 2009 also marked the continued prosecution — and in some cases the conviction and harsh sentencing — of activists who had been jailed for lèse majesté the year before. Most disturbing is the case of Darunee Charnchoensilpakul (“Da Torpedo”), sentenced to eighteen years in prison for three charges of lèse majesté (one per offending comment) stemming from a speech she gave in July 2008. Her trial was held in secret, ostensibly for reasons of “national security.” Contrary to most defendants facing similar accusations and the routine denial of due process, Da Torpedo refused to plead guilty to the charges. In return, she not only received an extraordinarily severe sentence. Once convicted, she was placed in solitary confinement and was forced to wear a nametag that identified the crime for which she was convicted, exposing her to harassment.
11. The abuse of the Computer Crimes Act has complemented prosecutions of lèse majesté. Police Colonel Suchart Wongananchai, Inspector of the Ministry of Information and Communications Technology, recently admitted to blocking over fifty thousand websites found by Ministry employees to have violated the Act.
12. The two highest profile prosecutions for violations of the Computer Crimes Act are those mounted against Suwicha Thakor and Chiranuch Premchaiporn. Suwicha Thakor was arrested in January 2009 for posting on the Internet a picture deemed offensive of the King. While he was later sentenced to twenty years based on both the Computer Crimes Act and Thailand's lèse majesté statute, the sentence was commuted to ten years on account of his guilty plea.

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<sup>2</sup> Marwaan Macan-Markar, “Thailand: Lese Majeste Cases Rise but Public in the Dark,” *Inter Press Service*, May 14, 2010.  
<http://ipsnews.net/login.asp?redir=news.asp?idnews=51434>

After spending a year and a half in prison, Suwicha eventually received a royal pardon on June 28, 2010.

13. Chiranuch Premchaiporn, the web manager of independent publication Prachatai, was arrested in March 2009 and charged with ten counts of violating the Computer Crimes Act. She is being prosecuted owing to her failure to promptly remove comments on the Prachatai forum that the authorities had deemed injurious to the monarchy. She currently faces a sentence of fifty years in prison at the end of a criminal trial set to begin in February 2011. Meanwhile, the Prachatai website has been blocked repeatedly by the authorities since the beginning of the latest Red Shirts demonstrations.
14. Other notable arrests for supposed violations of the Computer Crimes Act include those of Nat Sattayapornpisut (for transmitting anti-monarchy videos), Tantawut Taweewarodomkul (for posting anti-monarchy content), Wipas Raksakulthai (for posting an offensive comment on Facebook), and four people accused of spreading “rumors” about the King’s health — at least two of them for merely translating into Thai a Bloomberg article on the subject.
15. The systematic abuse of political crimes legislation has earned the Abhisit administration harsh rebukes from the Committee to Protect Journalists and Reporters Without Borders. More generally, by the end of 2009 Thailand had slipped on virtually every available measure of freedom and democracy. In its “Freedom in the World 2010” survey, for instance, Freedom House stated that Thailand is not an “electoral democracy,” owing to the constant interference of the military in the political process as well as the Democrat Party’s insistence on governing the country in the absence of an electoral mandate. Freedom House further chastised the Democrat-led administration for its “use of the country’s lèse majesté laws to stifle freedom of expression,” particularly against “activists, scholars, students, journalists, foreign authors, and politicians who were critical of the government.”<sup>3</sup> In a report released earlier this year, similarly, Human Rights Watch lamented the “serious backsliding” observed in Thailand’s human rights record over the course of Abhisit’s first year in office, arguing that the Abhisit administration “continually undermined respect for human rights and due process of law.”<sup>4</sup>

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<sup>3</sup> Freedom House, “Freedom in the World, 2010 Edition,” <http://www.freedomhouse.org>

<sup>4</sup> Human Rights Watch: “Thailand Serious Backsliding on Human Rights,” January 20, 2010.

Meanwhile, Thailand slipped 23 places to a ranking of 153<sup>rd</sup> in the 2010 World Press Freedom Index of Reporters Sans Frontieres (RSF).<sup>5</sup>

*The 2009 Massacre*

16. Of an altogether more serious nature is the campaign of violence to which members of the National United Front for Democracy against Dictatorship (“UDD”) have been subjected by the Abhisit administration. On April 11, 2009, hundreds of Red Shirts assembled outside the venue of an ASEAN Summit in Pattaya to protest the undemocratic manner in which Abhisit had come into office. The summit was cancelled after Red Shirt protesters entered the premises of the hotel where the talks were being held. Following the operation in Pattaya, the focus of the protests shifted to Bangkok, where the Red Shirts staged traffic blockades and demonstrations around the city. The government declared State of Emergency in Bangkok and five surrounding provinces in preparation for a more incisive crackdown. In the early morning of April 13, the military was sent in to disperse the Red Shirts, now scattered across various locations in Bangkok.
  
17. In dispersing the April 2009 demonstrations, the Royal Thai Army did not employ the crowd control measures prescribed by the United Nations. Instead — using troops from the prestigious Second Division of the First Army Region, referred to as the “Queen’s Guard” — they provoked physical confrontation with the Red Shirts, firing live ammunition at unarmed civilians in pre-dawn darkness, injuring at least 123 protesters. This excessive and overwhelming use of military force quickly prompted Red Shirt leaders to surrender and induced the demonstrators to leave the encircled Government House to avoid a bloody siege.
  
18. Although the government claimed at the time that the Army had acted in accordance with international standards, and that no one had been killed during the crackdown, witnesses reported that at least six Red Shirts were killed by the Army’s live fire, but their bodies were loaded onto military trucks and quickly carried away, preventing them from being identified. Days later, the bodies of two bound and gagged Red Shirts were fished out of the Chaophraya River, showing evident signs of torture.

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<sup>5</sup> See <http://en.rsf.org/press-freedom-index-2010,1034.html>.

19. Although three separate Parliamentary committees investigated these events and condemned the nighttime nature of the Army's operations, no Army personnel was ever investigated or charged in connection with the events.

*The 2010 Massacres*

20. In the early part of 2010, in what promised to be the culmination of their campaign against Abhisit's military-backed administration, the Red Shirts organized the most massive pro-democracy demonstration in the history of Thailand. As detailed below, the demonstrations were eventually dispersed by the Army, using methods even more brutal than those it had employed in 2009, firing live ammunition into groups of unarmed civilians in order to force Red Shirt leaders to surrender and encourage the civilian crowds to disperse.
21. On March 8, 2010, Nattawut Saikua — a well-known Red Shirt leader — issued a public announcement that the Red Shirts would attend a great demonstration in Bangkok, beginning on March 14. Although he emphasized the peaceful nature of the demonstrations, Abhisit immediately invoked the Internal Security Act.
22. On March 13, thousands of Red Shirts began to arrive in Bangkok, primarily from rural provinces. They gathered at Phan Fa Bridge and along Rachadamnoen Avenue, near the Parliament and other government buildings, where past pro-democracy movements had assembled many times before, setting up tents and preparing for a long stay. Two weeks into the demonstrations, the Red Shirts also occupied and barricaded the Ratchaprasong intersection in the heart of Bangkok's high-end shopping district, a location of great commercial significance. During this time, the Red Shirts organized massive rallies involving huge convoys of vehicles and hundreds of thousands of demonstrators — with some estimates of more than a half-million people gathered along Rachadamnoen Avenue — demanding that the government agree to hold elections. The demonstrators, while vocal, were unarmed and peaceful. No significant incidents of violence took place at any of the sites of the Red Shirt demonstrations during this period.
23. Nevertheless, on April 7, Abhisit declared a State of Emergency for Bangkok as well as five surrounding provinces in preparation for a violent crackdown. Under the decree, the

government also instituted the Center for Resolution of Emergency Situations (“CRES”), headed by Deputy Prime Minister Suthep Thaugsuban.<sup>6</sup>

24. The First Region Army of the Thai Royal Army, under the command of General Prayuth Chan-ocha, was charged with responsibility for executing the crackdown. These orders were consistent with a history of assigning the First Region Army to crowd control operations in Bangkok. The First Region Army is also regarded as the most prestigious of the regional armies, traditionally producing the Army Commander, the supreme commander of the Thai Royal Army. All officers assigned to the First Region Army are treated as potential candidates for the position of Army Commander, creating extreme competitiveness within the First Region Army and fostering an undue willingness to engage in improper conduct for the sake of achieving promotion with the ranks, including a willingness to kill innocent civilians.
25. On April 8, troops of the First Region Army silenced the public voice of the Red Shirts by taking off the air the People’s Channel (PTV) television station. In response, thousands of Red Shirts flocked to the Thaicom satellite station in Pathum Thani in attempt to restore the channel’s transmission signal. The troops dropped tear gas canisters intended for the Red Shirts, but the wind blew the gas back into the Army ranks, causing most of them to drop their weapons and retreat to an open field, whereupon the Red Shirts gathered up the weapons and provided first aid treatment to the Army troops. Negotiations ensued between Army and Red Shirt leaders, which led to a brief restoration of the People’s Channel broadcast signal, and a return of all weapons seized by the Red Shirts. (See attached report confirming return of weapons by Red Shirts; see also Statement of Mr. Bordin Vajropala.) However, as soon as the standoff had ended and the Red Shirts had dispersed, Army troops hidden on the rooftop of the Thaicom station building blocked the broadcast signal once again.
26. On April 10, the government carried out a dispersal operation in the Pan Fa Bridge area, which would eventually result in the death of numerous unarmed civilians and the injury of hundreds more. The established rules of engagement of security officers stipulated that seven steps be taken in a graduated manner in the handling of the crowd situation, namely: 1) show of force by lining up the security officers holding riot shields and batons; 2) informing and warning the protesters that the officers are about to use force; 3) use of shields; 4) use of

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<sup>6</sup> The Prime Minister’s special directive No. 1/2553 Re: The Establishment of the Center for the Resolution of the Emergency Situation, issued on 7 April B.E. 2553 (2010).

water cannon or high-powered amplifiers; 5) use of throw-type tear gas; 6) use of batons; and 7) use of rubber bullets.<sup>7</sup>

27. Abhisit also appeared on television to announce that, unlike the assembly in the Ratchaprasong area, gatherings in the Pan Fa Bridge area would be permitted. Despite these statements, however, the military commenced a dispersal operation at the Pan Fa Bridge at approximately 13:00 hours, starting from the First Army Region headquarters on Outer Rachadamnoen Avenue at the Makkawan Bridge. At this time, the Red Shirt crowds filled Outer Rachadamnoen Avenue southward for approximately two kilometers to Pan Fa Bridge, where the street turns west and becomes Central Rachadamnoen Avenue, leading to Democracy Monument, then further west to the Khok Wua intersection with Tanao Road, stopping just short of where Central Rachadamnoen Avenue crosses the Chaopraya River at Pinklao Bridge.
28. At first, the Army deployed a single water cannon, although video demonstrates that its water was not under significant pressure. Shortly thereafter, troops from the First Infantry Division — under the command of General Prayuth Chan-ocha — emerged from their headquarters on Outer Rachadamnoen Avenue, about two kilometers north of Pan Fa Bridge, and assembled in formation across Outer Rachadamnoen Avenue, armed with automatic weapons, shields and batons. As the front lines moved forward, Army troops immediately commenced firing rubber bullets from 12-gauge shotguns directly at civilians, while other Army troops fired live ammunition from M-16 and Tavo 21 automatic rifles into the air. Video of the events clearly shows the use of M-16 rifles in automatic mode, without the telltale adaptors required when shooting blanks, demonstrating the use of live ammunition. The Army made no attempt to negotiate with the crowd using loudspeakers or to use amplified sound bursts to disperse the gathering. There were no announcements that the Army intended to increase the intensity of its measures to employ rubber bullets, tear gas, or live ammunition fired into the air.
29. Using these methods, the Army moved the crowd approximately one kilometer south, down Outer Ratchadamnern Road, to its intersection with Wisut Kasat Road at an area called Jorporror. The troops stopped there at approximately 16:00 hours, holding their ground, but ceasing fire. Additional troops had also moved laterally to the west and descended south near

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<sup>7</sup> <http://www.thaiembassy.sg/announcements/backgrounder-current-political-situation-in-thailand>, at note 2.

the top of Dinso Road and Tanao Road, within blocks of where the crowds were gathered on Central Rachadamnoen Avenue, at Democracy Monument and the Khok Wua intersection. It was clear at this point that the dispersal operation could not be completed before dark, as Abhisit had publicly promised.

30. Based on unconfirmed reports, a meeting ensued at the Temporary Command Center inside the First Army Region Headquarters during this period. There, General Prayuth argued that a nighttime military operation should be carried out, while an opposing group of Army generals pointed out that Abhisit had promised the public that the dispersal would be carried out during daylight hours. However, on instructions from the Abhisit government, General Prayuth's argument prevailed, and he was left in charge of the operation. He withdrew troops that had taken up positions at the top of Dinso Road and Tanao Road and replaced them with his most loyal troops, the "Queen's Guard" of the Second Cavalry Division (First Army Region) and Second Infantry Division (First Army Region).
31. On Dinso Road, General Prayuth deployed the Second Cavalry Division (First Army Region), behind six armored personnel carriers; on Tanao Road, he deployed the Second Infantry Division (First Army Region). The Ninth Infantry Division (First Army Region) was deployed at Pinklao Bridge to prevent the Red Shirts from withdrawing across the Chaopraya River. Meanwhile, the First Infantry Division (First Army Region) held the Army's position at Jorporror, on Outer Rachadamnoen Avenue.
32. As darkness fell on April 10, 2010, the Red Shirts were effectively trapped — prevented by the First Infantry Division from moving north on Outer Rachadamnoen Avenue, and by the Ninth Infantry Division from moving west along Central Rachadamnoen Avenue across the Chaopraya River — while two separate Army divisions of the Eastern Tigers prepared to bisect the Red Shirt crowd from the north, down Dinso Road and Tanao Road.
33. No written orders were issued for this nighttime military operation. The Eastern Tigers set up a command post on upper Tanao Road, approximately 300 meters north of Central Rachadamnoen Avenue. Separate Divisions of the First Army Region deployed down Dinso Road and Tanao Road, setting up front lines where these roads intersect Central Rachadamnoen Avenue, directly in front of the vast Red Shirt crowds gathered at Democracy Monument and the Khok Wua intersection. Unarmed Red Shirt guards quickly positioned

themselves between the troops and the crowds — with their backs to the soldiers — to prevent the Red Shirts crowds from making physical contact with the Army.

34. For a short period of time, there was relative calm, as both sides played their respective anthems on loudspeakers. Then, at approximately 18:00 hours, the Army troops began shooting rubber bullets directly into the crowd, while firing live ammunition over their heads. In addition to automatic rifle fire, troops from the Second Cavalry Division (First Army Region) fired live .50 caliber rounds into the Democracy Monument structure from a machine gun fixed atop one of the armored personnel carriers. In response, the unarmed Red Shirt crowd lit firecrackers and hurled plastic water bottles at the Army troops. This activity continued for approximately seventy-five minutes, as the crowd failed to disperse.
  
35. At approximately 19:15, two separate grenades exploded behind the front lines of the Second Cavalry Division on Dinso Road, killing several soldiers. The Second Cavalry Division — which had been firing live rounds above the crowd — immediately lowered their rifles and fired thousands of rounds of live ammunition directly into the unarmed Red Shirt crowd gathered at Democracy Monument. While the source of the grenade fire has never been ascertained, beyond their attribution to “men in black” the government claims to have been affiliated with the Red Shirts, the UDD and others believe that the explosions were likely caused by forces working in concert with the First Region Army, under authorization by General Prayuth, in order to create an excuse for troops to open live fire on the Red Shirt crowd, purportedly in “self defense.” Indeed, the Thai military has a long history of employing agents provocateurs to justify its use of deadly force against unarmed civilians. “Third hands” are known to have been at play during both the 1973 and 1992 protests, when agents of the state sparked riots that provided the authorities with the pretext to crack down. This use of the “strategy of tension” will be elaborated in the next submission by the UDD and others. More recently, pro-government “Blue Shirts” led by banned politician Newin Chidchob attempted to precipitate a confrontation by attacking Red Shirts who were demonstrating in Pattaya in April 2009. Red Shirt leaders have speculated that the explosions on April 10 were the work of Army Special Forces, acting on instructions from General Prayuth, who sought to create the appearance that the Army was under attack from the Red Shirts and, therefore, manufacture a plausible excuse to use deadly force against unarmed civilians.

36. Soon thereafter, the Second Infantry Division (First Army Region), positioned on Tanao Road at the Khok Wua intersection, also opened fire, shooting thousands of rounds of live ammunition into the unarmed civilian crowd, although there had been no explosion on Tanao Road.
37. The Second Infantry Division withdrew north up Dinso Road to a position approximately 200 meters north of Central Rachadamnoen Avenue. From that position, troops continued to fire live ammunition south toward Central Rachadamnoen Avenue into the unarmed crowd, although there was no threat to the Army forces. One man who carried a prominent Red Shirt banner — posing no threat as he walked laterally across Dinso Road, approximately 50 meters north of Democracy Monument and 150 meters south of the Second Infantry Division's new position on Dinso Road — was killed by a well-placed rifle shot that opened a gaping hole in the back his skull, spilling his brains onto the street.
38. The absence of a threat to the Army troops from Red Shirt demonstrators is further evidenced by an incident on Dinso Road after the Second Cavalry Division had begun to fire live ammunition into the crowd. Although five of the Second Cavalry Division's six deployed armored personnel carriers had withdrawn north up Dinso Road, one armored personnel carrier was incapacitated and unable to withdraw, its driver and others remaining inside. These Army troops eventually exited the vehicle and were captured by the Red Shirt crowd, which did not harm them, but instead turned them over to the police.
39. Several witnesses testified to the nature of the treatment that Red Shirt protesters received near the Democracy Monument that evening. 210. Although several of the statements of the various witnesses are included in this Application as anonymous witnesses, their identity and details are known to the UDD and others and could be made available to the ICC Prosecutor if the necessary procedural safeguards are being provided in order to ensure the protection and safety of their lives and their families.
40. **Anonymous Witness 14** arrived at Tanao Rd. at approximately 18:30. There were at least a thousand Red Shirts gathered in that area. A wall of soldiers carrying shields had set up across Tanao Rd., to the north of the Red Shirts. They started to advance south along Tanao Rd., pushing the Red Shirts back. Without any warning, the troops began to shoot straight into the Red Shirt crowd, using live ammunition. Also, there were many bullet holes in the walls all

around, at eye level or below. The witness heard a gunshot and the sound of a bullet whizzing by; the bullet hit a man in the face. Later, the witness noticed that the place where the man had fallen had been roped off by Red Shirt guards, blood on the ground and a piece of paper that stated his name, age and that he had been killed. He saw two other pools of blood nearby, with similar identifying pieces of paper, indicating that two other people had been killed in the area.

41. **Anonymous Witness No. 16** testified that at one point the Red Shirts tried to use an image of the King to hold the soldiers back. Soldiers shot protesters, hunted them down and hit them, and used teargas. While washing his eyes in the water of the Democracy Monument, the witness was shot in his eye, which the witness lost.
42. **Anonymous Witness 2** confirmed that tear gas was dropped from helicopters somewhere between 19:00 and 20:00 hours. Without any warning, the troops began to open fire on the crowd of demonstrators. He saw at least five people injured by gunfire.
43. **Anonymous Witness 5** is a journalist who testified to being near the Democracy Monument on April 10 at approximately 19:00 hours. The witness saw soldiers shooting their M16 magazines into the air. He picked up the casings and took pictures. As the convoy of soldiers drove away, an explosion went off near him. The witness stated that a Red Shirt with a stick came running in the street shouting: "You killed my friend, you killed my friend." At this point, the convoy's last truck was at a distance of about 150 meters from the man. Without warning, about five shots were fired at him from the direction of the convoy. The man was hit, fell to the ground and was later taken away by a civilian assistance foundation.
44. **Anonymous Witness No. 17** states that, at approximately 19:00 hours, there were more than a thousand Red Shirts around the Democracy Monument. Without warning, the Army soldiers began firing their weapons into the air. As the troops retreated up to Dinso Rd., they began to shoot live fire directly at the Red Shirts. None of the Red Shirts had any weapons. The witness saw a man who was shot in the head. The witness saw the brains fall out of the man's skull and took a photograph. Shortly thereafter, the witness came across a wounded soldier on Dinso Rd. The witness videotaped a Red Shirt who tried to help that soldier, while troops continued to fire at the witness and the man who was helping. They kept shooting. The Red Shirt who was helping was hit in the foot; the witness was hit by a bullet in the stomach.

45. **Anonymous Witness No. 15**, a certified volunteer medic present at Democracy Monument during these shootings, testified that he was called to assist a soldier who had been wounded on Dinso Road. When the medic arrived at the soldier's side, approximately sixty meters north of Democracy Monument, the medic found a Red Shirt tending to his wounds. However, troops from the Second Cavalry Division continued to shoot at them from their position about 140 meters north on Dinso Road — ignoring the red cross displayed prominently on the medic's supply kit — wounding the medic in the foot.
46. Sometime after 20:15 on April 10, government authorities contacted the Red Shirt leaders by mobile phone. To avoid further bloodshed, the Red Shirt leaders quickly agreed to encourage the crowd to retreat from the sites of the clashes. By then, however, the Army had killed twenty-one civilians and wounded more than six hundred.
47. Numerous photojournalists were embedded with the Army troops on April 10 capturing footage of the Army's excessive use of force. The UDD and others believe that most of this video evidence was intentionally destroyed by the Army and/or media organizations supportive of the Establishment, in order to cover up the true nature of the events.
48. The failed dispersal operation gave way to a tense standoff. The government re-grouped, looking for alternative means to resolve the crisis. The Red Shirts hunkered down, concentrating their forces at Ratchaprasong.
49. On May 3, the Prime Minister unilaterally announced a plan for reconciliation that among other things included the possibility of an early, November election — provided that the Red Shirts agreed to voluntarily disperse. But Abhisit's offer to dissolve the House of Representatives did not come with genuine guarantees. The government did nothing to suggest that the stringent censorship regime it had imposed during the demonstrations would be relaxed in advance of the election, nor did it commit to a proper independent investigation into the violence that had taken place on April 10. The Red Shirts embraced the Prime Minister's call for reconciliation but refused to disperse absent these basic guarantees.
50. On May 13, one day after the government withdrew its offer to hold early elections, Major-General Khattiya Sawasdipol, a renegade Army officer better known as Seh Daeng — the purported leader of the movement's extreme faction — was shot in the head by a sniper while

he stood before cameras and microphones, right before the eyes of a Western reporter, at the southwestern edge of Lumpini Park.<sup>8</sup> The shot that took Seh Daeng’s life (he died a few days later) was only a precursor to the thousands of live rounds that the military would fire on unarmed protesters, innocent by-standers, emergency medical workers, and journalists over the ensuing week. While the Red Shirts repeatedly called for international assistance to establish a dialogue that might lead to a political solution to the crisis, the government had opted to crush them militarily, dispatching armored personnel carriers and thousands of soldiers to the streets of Bangkok.

51. In the days that followed Seh Daeng’s assassination — the government denies any involvement in the incident, even though it had earlier promised it would shoot “terrorists” and had previously identified Seh Daeng as a “terrorist” — the massacre unfolded to the north and south of the Ratchaprasong encampment, in the Din Daeng and Lumpini area, as the army moved in to seal off the site of the Red Shirt protests.
52. Some locations like Ratchaprarop Road to the north and Rama IV Road to the south were declared by the military to be “live fire zones.”



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<sup>8</sup> Seh Daeng was shot in the head in front of Thomas Fuller of the *New York Times*. See Thomas Fuller and Seth Mydans, “Thai General Shot; Army Moves to Face Protesters, *New York Times*, May 13, 2010.  
<http://www.nytimes.com/2010/05/14/world/asia/14thai.html>



53. The official government position was that the rules of engagement had been revised to permit live fire only against “clearly identified elements armed with weapons.”<sup>9</sup> The reality, however, was that the First Region Army was given the authority to shoot the mostly unarmed demonstrators on sight, as documented in a wealth of detailed eyewitness accounts like the one written by photojournalist Nick Nostitz.<sup>10</sup> A number of passers-by were injured or killed by military fire, among them a ten-year old boy shot in the stomach near the Makkasan Airport Link station and later pronounced dead at the hospital. Journalists also appeared to have been intentionally targeted. France 24 reporter Nelson Rand was shot three times on May 14, on the southeastern edge of Lumpini Park, while Italian photographer Fabio Polenghi died from a bullet wound to the chest on May 19. A man believed to be an Army

<sup>9</sup> <http://www.thaiembassy.sg/announcements/backgrounder-current-political-situation-in-thailand>, note 3.

<sup>10</sup> Nick Nostitz, “Nick Nostitz in the Killing Zone,” *New Mandala*, May 16, 2010. <http://asiapacific.anu.edu.au/newmandala/2010/05/16/nick-nostitz-in-the-killing-zone/> For an update on the fate of some of the Red Shirt protesters who were at the scene described in the report, see “Daughter of a Slain Red Shirt Hears Story of Father from Nick Nostitz,” *Prachatai*, June 21, 2010. <http://www.prachatai.com/english/node/1899>

officer in plain clothes was photographed removing his camera. One eyewitness behind Army lines at Rama IV Road reports a soldier asking a commanding officer: “Is it OK to shoot foreigners and journalists?”<sup>11</sup>

54. Most disturbingly, the military closed off the “red zones” to emergency medical staff<sup>12</sup> and repeatedly opened fire on medics as they attempted to assist injured demonstrators,<sup>13</sup> complicating rescue operations for the scores of wounded protesters.
55. Once again, a number of witness statements testified to the behavior of the Royal Thai Army during the May 13-19 crackdown.
56. On May 14, 2010, **Anonymous Witness No. 18**, a Red Shirt, went to Lumpini Park to investigate a report that soldiers were assembling there and planning an attack on the Red Shirts. The witness was unarmed. The witness saw numerous soldiers outside the park fence, aiming their rifles into the park, and soldiers inside the park, carrying shotguns. As soon as the witness saw the soldiers, the witness stopped. At that point the witness heard a single shot that hit the witness in the foot and then saw another soldier, holding an M-16 rifle with a scope, shooting at the witness. The witness was hit in the right lower leg. The witness drove off, but the soldiers continued to shoot after the witness, thirty or forty times. The witness’ right calf and ankle were completely shattered.
57. **Anonymous Witness No. 19** described a similar scene, on May 14 at Lumpini Park. As the witness entered the park, the witness noticed fifty or sixty soldiers lined up outside the fence surrounding the park, aiming their rifles through the fence. One of the soldiers opened fire with a shotgun, hitting the witness in the left shoulder. The witness ran towards a tree, while the shooting continued. The soldiers fired at the witness at least a hundred times. The witness was hit again, with a rifle bullet. The witness jumped into a pond to hide and swam

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<sup>11</sup> Jack Picone, “Is it OK to Shoot Foreigners and Journalists?,” *Sydney Morning Herald*, May 22, 2010.

<http://www.smh.com.au/world/is-it-ok-to-shoot-foreigners-and-journalists-20100521-w1ur.html>

<sup>12</sup> “Medics Banned from Entering ‘Red Zones’,” *The Nation*, May 16, 2010.

<http://www.nationmultimedia.com/home/2010/05/16/national/Medics-banned-from-entering-red-zones-30129456.html>

<sup>13</sup> Bill Schiller, “Why Did So Many Civilians Die in Bangkok Violence?,” *The Star*, May 23, 2010.

<http://www.thestar.com/news/world/article/813547--why-did-so-many-civilians-die-in-bangkok-violence>

underwater. Upon re-emerging, the witness saw three soldiers standing in the pond, looking for the witness, shooting into the water, trying to hit the witness. The witness jumped out of the pond, ran away, and was hit a third time, in the left thigh, by a rifle bullet. After being treated in a hospital, the witness was placed in a jail cell and chained to a bed, under arrest for violating the emergency decree. The witness was chained to the bed twenty-four hours a day, and released to a regular room after a month. The witness has not been formally charged with any crime. The witness was summoned at the District Attorney's office to provide testimony twice, but the date was postponed in both instances.

58. **Anonymous Witness No. 20** reported having spotted soldiers near Soi Ngam Duplee on May 14. The soldiers shot at the witness with live bullets. The witness saw a female merchant, about fifty years of age, shot to death. One man, aged about thirty, was shot in the cheek. A young man with a tattoo was shot in his backbone. In total, the witness saw six people shot; four of them were killed, including the merchant woman. The sixth man was recording a video with his mobile phone when he was shot. The witness and about thirty other people took shelter in a blind alley to the Lumpini Boxing stadium. They were violently forced out. Soldiers in command were violent and forced the people to crouch, while they kicked them and hit them with guns and pointed guns at them. The witness received a reduced sentence for violating the Emergency Decree after the witness provided a confession.
59. Meanwhile, to the north of Ratchaprasong, at the corner of Ratchatewi Rd. near the Din Daeng triangle, **Anonymous Witness 8** testified to have seen soldiers shoot with live ammunition, without any warning, towards a crowd which he was part. People started running to flee the gunfire. The witness was shot in the right upper arm.
60. **Anonymous Witness No. 21** is a member of Red Ayutthaya. On May 14, the witness was in the Ratchaprarop Rd. area, where the witness saw soldiers preparing for a crackdown against protesters. The soldiers blocked the area and tried to put up a fence. They seemed very well prepared, as if they had been practicing this before. They started to fire into the crowd. The witness ran around the corner near the Century Hotel, but was shot as he tried to escape.
61. **Anonymous Witness 12** is a volunteer police officer in Bangkok. On May 14, in the Ratchaprarop area in front of the Indra Hotel, he and his wife were forced to stop because soldiers were preventing people from crossing the road. This was at 18:30. In total, thirty

people had gathered in that location; none carried weapons. Across the street there was a pedestrian bridge crossing Ratchaprarop Rd., guarded by eight soldiers. The soldiers were shooting at anything that moved, in any direction. He saw them shoot at least fifty times. Soldiers also shot towards the hotel, preventing the group from leaving. At approximately 19:00 hours, a woman tried to cross Ratchaprarop Rd., but before she could get onto the road she was shot by one of the soldiers, falling to the ground. At approximately 20:00 hrs, the witness saw two motorcycles, each with a single driver. The soldiers on the pedestrian bridge shot at these motorcycles and both riders fell. Minutes later, there was an explosion in front of the Indra Hotel. Prior to the explosion, the witness saw a red laser pointed in their area, moving around apparently at random. Then it stopped, but a green laser appeared next to it. Immediately thereafter, the blast occurred. Moments later he saw the red and green laser lights again and there was a second explosion, three meters away from him. Three people were injured, including him. He suffered a shrapnel wound in his back.

62. **Anonymous Witness No. 22** described events that took place on May 14-15, at Ratchaprarop Rd., between the Din Deang intersection and Soi Rangnam. The witness watched what happened from the witness' balcony. The witness saw heavily armed soldiers open fire on unarmed local people. On May 14, the Army opened fire at around 18:00 hours, first with rubber bullets, then with live ammunition. The Army shot without distinction to the heads or legs. The victims were curious onlookers, mostly local unarmed people. The next day, around 8:15, the witness saw about fifteen local people walking down the road, carrying only the Thai National flag. Suddenly, the men were shot by direct fire from an assault rifle, without any warning. Two people were immediately killed. The Army continued to shoot for thirty minutes more, including at anyone who tried to assist the wounded. The witness said, "It was amazing, the Royal Thai Army opening fire at unarmed local people!"
63. Between May 15 and May 18, **Anonymous Witness No. 23** joined the protest at Din Daeng. In this area, the witness saw soldiers shooting a woman in the head on May 18. She was a trash collector carrying a white bag. She was not even protesting. The soldiers were very young and shot at everyone in that area, including motorcycle drivers and local people.
64. A last-ditch diplomatic effort, which was still on the table as of May 18, was snubbed by the Abhisit government. Finally, on May 19 the Army broke through the Red Shirts barricades. Shortly thereafter, the Red Shirt leaders at Ratchaprasong announced their surrender to the

police in an effort to avoid more bloodshed. While May 19, 2010 already marks one of the darkest days in the history of Thailand — the culmination of the country’s worst-ever massacre of pro-democracy demonstrators — the death toll would likely have been far greater were it not for the UDD leaders’ eleventh-hour surrender.

65. The surrender of Red Shirt leaders, however, failed to halt the carnage. Hours after the Red Shirts were dispersed, six more people died in an assault staged on Wat Pathumwanaram, the spot designated as a safe haven for Red Shirt demonstrators who wished to escape the violence. A foreign journalist injured at the scene describes military snipers firing from elevated train rails into groups of unarmed civilians claiming sanctuary in the Buddhist temple. Three of the four nurses who were manning a temporary first aid station inside the temple grounds – all clearly identifiable as medical workers – were shot to death by snipers positioned from the elevated BTS railway among the civilians shot to death.<sup>14</sup>

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<sup>14</sup> Andrew Buncombe, “Eyewitness: Under Fire in Thailand,” *The Independent*, May 20, 2010. <http://www.independent.co.uk/news/world/asia/eyewitness-under-fire-in-thailand-1977647.html>  
See also: Bangkok Pundit (pseud.), “What Happened at Wat Pathum Wanaram?,” *Bangkok Pundit*, May 31, 2010; see also statements by Anonymous Witness Nos. 6 and 9 <http://asiancorrespondent.com/bangkok-pundit-blog/what-happened-at-wat-pathum-wanaram>



66. **Anonymous Witness 6** and **Anonymous Witness 9** were present at the demonstration near the Ratchaprasong intersection on May 19. At approximately 13:00 hours, the Red Shirt leaders surrendered and advised everyone to go to the Pathumwanaran temple complex for safe refuge. In the temple, the witnesses report everyone was peaceful. As it was not safe outside, people could not go home yet. Between 16:00 and 17:00, witnesses reported seeing five soldiers on the lower train track of the BTS platform in front of the entrance to the temple, many meters above street level, from where they could see directly into the temple area. Inside the temple, the first aid tent was clearly marked with a red cross. At about 18:30 the soldiers started to shoot into the temple area, without warning. At that time, the first aid tent and medical volunteers also came under fire. Three nurses were shot, Kamibked Akhard,

Mongkol Kemthong, and Akkharadej Khankaew, who slowly died. These soldiers from the First Region Army shot at everything that moved, preventing anyone to reach the first aid tent to help. At 19:00 hours, a group of soldiers came shouting obscenities at the people assembled inside the temple. When some tried to drag the bodies of the nurses to safer area into the temple ground, the soldiers targeted them again. The shooting stopped at approximately 20:00 hours. The next morning, six dead bodies were lined up in the rear garden of the temple area. Several other witnesses that provided statements corroborate this account.

67. Officially, an additional sixty civilians died during the weeklong crackdown that resulted in the Red Shirts' dispersal on May 19. Despite repeated accusations of "terrorism" leveled at the UDD, no security forces died during the operations, while none of the people gunned down by the authorities proved to have been carrying weapons.
68. Once again, in crushing the Red Shirts the Abhisit administration and Royal Thai Army appear to have ignored crowd control principles altogether. Contrary to "international standards such as the "United Nations Basic Principles on the Use of Force and Fire Arms by Law Enforcement Officials," its dispersal operations made little use of "non-lethal incapacitating weapons." No care whatsoever appears to have been taken to "minimize the risk of endangering uninvolved persons" and to "preserve human life." Its shoot-to-kill policy for demonstrators burning tires and setting off firecrackers does not appear to constitute a response undertaken "in proportion to the seriousness of the offense." Attacks on medical workers were not ordered in the interest of ensuring that "assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment." Even if the Red Shirts demonstrations could be regarded as "violent" and "unlawful" — if only because the State of Emergency declared them to be illegal — the wealth of eyewitness accounts that emerged from the government's live fire zones strongly suggests that the use of force was not limited to the "minimum extent necessary."
69. Major international human rights organizations concur with the assessment of the crackdown offered in this document. On May 15, Human Rights Watch called on the government to revoke the "live fire zones" and slammed the government for failing to abide by the "United Nations Basic Principles on the Use of Force and Fire Arms by Law Enforcement Officials."<sup>15</sup>

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<sup>15</sup> Human Rights Watch, "Thailand: Revoke 'Live Fire Zones' in Bangkok," May 15, 2010.

A few days thereafter, Amnesty International, an organization whose Thailand chapter has long been criticized for its cozy relationship with the country's ultra-conservative Establishment, called on the government to "halt the reckless use of lethal force."<sup>16</sup> Some time after the rallies were dispersed, organizations like Reporters Without Borders (RSF)<sup>17</sup> and the International Crisis Group (ICG)<sup>18</sup> issued detailed reports that sharply condemned the indiscriminate killings committed by the Thai armed forces. Reporters Without Borders rebuked the government for giving the Royal Thai Army a "license to kill" Red Shirt demonstrators and accused the Royal Thai Army of "taking advantage of the state of emergency to run roughshod over international law and Thai legislation protecting civilians."

#### *Abuse of Emergency Provisions*

70. The imposition of the Emergency Decree provided the government with the legal foundation upon which it based the crackdown of the Red Shirts on April 10 and May 13-19. Pursuant to Section 9 of the Emergency Decree on Public Administration in Emergency Situation, the government proscribed any assembly or gathering of five or more persons as well as any act that could incite unrest. Pursuant to Section 11, the government further issued regulations that conferred upon the administration extraordinarily expansive powers, as the government would now be empowered to "arrest and detain a person suspected in taking part in instigating the emergency situation or a person who advertises or supports the commission of such act," "summon an individual to report to the officers or give evidence pertaining to the emergency situation."<sup>19</sup>
  
71. On May 13, 2010, the State of Emergency was expanded to include fifteen provinces in northern, northeastern and central Thailand. By late May, it was expanded to twenty-four provinces across the country. On July 7, 2010, the government renewed the decree in nineteen provinces for an additional three months. Though the size of the territory covered by the

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<http://www.hrw.org/en/news/2010/05/15/thailand-revoke-live-fire-zones-bangkok>

<sup>16</sup> Amnesty International, "Thai Military Must Halt Reckless Use of Lethal Force," May 18, 2010.

<http://www.amnestyusa.org/document.php?id=ENGNAU2010051816851&lang=e>

<sup>17</sup> Reporters Without Borders, "Thailand: Licence to Kill," July 2010.

[http://en.rsf.org/IMG/pdf/REPORT\\_RSF\\_THAILAND\\_Eng.pdf](http://en.rsf.org/IMG/pdf/REPORT_RSF_THAILAND_Eng.pdf)

<sup>18</sup> International Crisis Group, "Bridging Thailand's Deep Divide," ICG Asia Report 192, July 5, 2010, p. 18.

[http://www.crisisgroup.org/~media/Files/asia/south-east-asia/thailand/192\\_Bridging%20Thailands%20Deep%20Divide.ashx](http://www.crisisgroup.org/~media/Files/asia/south-east-asia/thailand/192_Bridging%20Thailands%20Deep%20Divide.ashx)

<sup>19</sup> Announcement pursuant to Section 11 of the Emergency Decree on Public Administration on Emergency Situation B.E. 2548 (2005).

decree was gradually scaled back, the latest extension on October 10 leaves the State of Emergency in place for Bangkok and three other provinces.

72. Aside from the UDD's core leaders, who remain in custody and face a possible death sentence stemming from the trumped up charges of terrorism, as of June 10 the government had arrested 417 people associated with the Red Shirts, mostly for violations of the Emergency Decree. Several were tried and convicted within hours of their arrest. On June 26, activist Sombat Boongarmanong was apprehended for violating the Emergency Decree while attempting to tie a red ribbon at Ratchaprasong in remembrance of those killed by the state a month earlier.
73. It is now clear that the Emergency Decree remains in force not for the purpose of confronting an emergency, but rather to give the government the dictatorial powers it needs to stamp out its opposition and attempt to consolidate its hold on political power. As such, the continued enforcement of the Emergency Decree itself constitutes a violation of the International Covenant on Civil and Political Rights (ICCPR). Article 4 permits the suspension of certain ICCPR rights, such as the right to demonstrate, only in instances where a public emergency "threatens the life of the nation" and only "to the extent strictly required by the exigencies of the situation" — in any event, under no circumstances can a State of Emergency be used to "undermine the rule of law or democratic institutions." According to the International Commission of Jurists, Human Rights Watch, the International Crisis Group, Amnesty International, and virtually every other human rights organization around the world, the Thai government's recourse to emergency powers fails this crucial test.
74. In a submission to the Human Rights Council, the Asian Legal Resource Centre ("ALRC") described the systematic human rights violations that are taking place under the cover of the Emergency Decree.<sup>20</sup> The ALRC called upon the Human Rights Council to condemn the application of the Emergency Decree as a breach of the State party's obligations under the International Covenant on Civil and Political Rights, and as a cause for further violations under international law. In its report, the ALRC draws the attention to the one case of arbitrary detention and one of harassment of a minor, who was forced to undergo psychiatric

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<sup>20</sup> Thailand: Arbitrary Detention and Harassment under the Emergency Decree in Thailand, Asian Legal Resource Centre, 31 August 2010.

evaluation and treatment for protesting against the government in the northern province of Chiang Rai.<sup>21</sup>

*Political Persecution*

75. By the time the Red Shirts began setting up their encampments in Bangkok on March 13, 2010, the campaign of political persecution against the opponents of the current regime had been underway for years. With the abrogation of the 1997 Constitution, and its replacement with a new constitutional framework, the generals aimed to establish a legal base upon which Thai Rak Thai could be disbanded and its leaders could be denied their individual right to seek and hold elected office. Throughout the time the generals were in power (September 2006 – December 2007), the junta had recourse to almost every available form of political persecution, including the denial of citizens’ basic right to free speech and assembly as well as the selective criminal prosecutions initiated against Thai Rak Thai leaders. Based on the generals’ statements at the time, which referred openly to the need to eradicate Thaksin’s “regime,” it can be concluded that these measures were taken explicitly to discriminate on account of political affiliation.
  
76. From January through December 2008, the persecution by the Establishment continued, albeit in a different form. The 2007 Constitution enshrined into law the right of the courts to subvert the results of competitive elections by ordering the disbandment of lawfully registered political parties and by stripping the executives of such parties (even those who were not found guilty of any offenses) of their right to hold public office. These measures constitute violations of several individual rights sanctioned in the ICCPR.
  
77. Perhaps the strongest evidence of political persecution, however, are the massive restrictions that have been placed upon freedom of expression, both in emergency and non-emergency situations, through the imposition of the strictest censorship regime Thailand has witnessed in thirty years, as well as the prosecution of an unprecedented number of people for crimes of conscience. In and of themselves, the Computer Crimes Act and Article 112 of the Criminal Code (sanctioning the crime of *lèse-majesté*) unduly restrict the Thai people’s right to free expression and the freedom to “seek, receive, and impart information and ideas of all kinds”

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<sup>21</sup> Thailand: Arbitrary Detention and Harassment under the Emergency Decree in Thailand. Asian Legal Resource Centre, 31 August 2010.

under the ICCPR. Even though government officials have justified the arrests made under the laws with the need to protect “national security,” the freedom to criticize the institutions of the state is precisely what the ICCPR is designed to protect. A measure of the erosion observed in the rights of the Thai opposition over the past several years is offered by Reporters Without Borders, whose “World Press Freedom” index now ranks Thailand in 153<sup>rd</sup> place. Right before the 2006 coup, Thailand was ranked 66<sup>th</sup>.

78. More recently, the Internal Security Act and the Emergency Decree were enacted, enforced and maintained for the purpose of restricting the Thai people’s constitutionally sanctioned right to free assembly. Only anti-government demonstrators, however, have been subjected to prosecution, indefinite detention, and the denial of due process for violating regulations issued pursuant to the Emergency Decree. Meanwhile, pro-government demonstrators have been repeatedly allowed to stage demonstrations without incurring any such penalty. This constitutes an unacceptable double standard.
79. Whereas the amount of deadly force that the Thai Government has unleashed on Red Shirt demonstrators, at the cost of dozens of civilian lives, should be considered disproportionate, the systematic deprivation of individual political rights and civil liberties of those opposed to the government, as well as the arbitrary detention and harassment of hundreds among them, amounts in this situation to political persecution. Given the scale and gravity of the abuses, as well as their protracted nature, it is imperative that those responsible face full accountability. This is unlikely to happen in Thailand, where the perpetrators of similar massacres in 1973, 1976, and 1992 have never been investigated, much less punished, for the killings. Therefore, the UDD and others request that the Prosecutor take notice of this Preliminary Report, in light of continuing investigations, as further explained below.

### **III. Jurisdiction of the ICC**

80. Considering the continuing investigations, the UDD and others are submitting this Preliminary Report to provide the ICC Prosecutor with notice of the crimes against humanity committed in Thailand. The UDD and others will submit a separate document concerning jurisdictional merits in approximately eight weeks.

## **IV. Admissibility according to Article 17 of the Rome Statute**

### **a. The Law on Issues of Admissibility**

81. The issue of admissibility relates to the question of whether matters over which the ICC has jurisdiction should be litigated before the ICC. The admissibility procedure applies to all cases that come before the ICC, even those resulting from a referral by the Security Council.<sup>22</sup> The Trial Chamber has ruled that in relation to admissibility, Article 53(1)(b) of the ICC Statute must be construed in its context, and accordingly an assessment on admissibility during the Article 53(1) stage should in principle be related to “a situation” (instead of referring to a full case).<sup>23</sup>
82. In relation to the determination of admissibility, there are two conditions which need to be satisfied:
- a) An assessment must be made about whether the national justice system has “remained inactive” or is “unwilling or unable to prosecute.” This is the issue of “complementarity” as mentioned in the preamble of the Statute;
  - b) The “gravity” threshold must be met.<sup>24</sup>

### **i. Complementarity**

83. The issue of unwillingness arises whenever a national justice system is starting an investigation but lacks the will to see the proceedings through, or there are indications that it may perform a “sham trial.” The Statute requires the Court to consider these issues with regard to the principles of due process recognized by international law.<sup>25</sup>
84. The ability to carry out an investigation is often severely limited by situational factors. In the situation of the Democratic Republic of Congo and Uganda before the ICC, the states were in fact willing to investigate and prosecute. In these cases, the states met the complementarity

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<sup>22</sup> *Ibid*, p. 173.

<sup>23</sup> Kenyan Decision on Article 15, para. 45.

<sup>24</sup> *Ibid*, p.174.

<sup>25</sup> *Ibid*, p. 184.

test owing to their genuine inability to prosecute. In the case of *The Prosecutor v. Lubanga*, Pre Trial Chamber I held that: “For a case arising from the investigation of a situation to be admissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court.”<sup>26</sup>

85. In the case of Darfur, the Independent Commission of Inquiry proposed that the Security Council refer the situation to the ICC. In particular, the Commission held that: “There may be instances where a domestic system operates in an effective manner and is able to deal appropriately with atrocities committed within its jurisdiction. However, the very nature of most international crimes [is], as a general rule, that they are committed by State officials or with their complicity; often their prosecution is therefore better left to other mechanisms.”<sup>27</sup>
86. The Commission of Inquiry concerning the Sudanese system concluded that: “The system has been significantly weakened during the past decade. Restrictive laws that grant broad powers to the executive particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in Sudan today contravene basic human rights standards.”<sup>28</sup>

## ii. Gravity

87. The threshold of gravity is laid down in Article 17(1)(d) of the Rome Statute. In the Lubanga case, the Pre-Trial Chamber held that the gravity threshold was in addition to the drafters’ careful selection of the crimes included in Articles 6-8 of the Statute, a selection based on gravity and directed at confining the material jurisdiction of the Court to “the most serious crimes of international concern.”<sup>29</sup> As a result, “the relevant conduct must present particular features which render it especially grave.”<sup>30</sup> The Pre-Trial Chamber held that there are four elements which must be considered:

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<sup>26</sup>*Prosecutor v. Lubanga*, (ICC-01/04-01/06-8) Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 35. See and Schabas, p. 180.

<sup>27</sup> Schabas, p.176, and Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para. 568.

<sup>28</sup> Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para. 569.

<sup>29</sup> Schabas, p. 186.

<sup>30</sup> *Ibid*, p. 187 see also *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 45.

- (i) “The conduct which is the subject of the case must be either systematic (patterns of incidents) or large-scale;
- (ii) The nature of the unlawful behavior of the crimes (i.e. the manner of their commission);
- (iii) The employed means for the execution of the crimes;
- (iv) The impact of the crimes and the harm caused to victims and their families. In this respect the victims’ representations will be of significant guidance for the Chamber’s Assessment.”<sup>31</sup>

### ***iii. Ne bis in idem***

88. In the event that a case has already been tried by a domestic justice system, the admissibility provision in the Statute points to Article 20. If a domestic trial has already been completed, the judgment bars prosecution by the Court except in the case of “sham proceedings.” These are defined as trials designed to shield an offender from criminal responsibility or trials that were otherwise not conducted independently or impartially and were held in a manner inconsistent with the intent to bring the person to justice.<sup>32</sup>

## **b. Implications on Admissibility for the Present Case**

### **i. Thai situation in relation to the Complementarity requirement**

89. Publicly, the Thai government has acknowledged the need for an investigation into the abuses. Nothing in its history or in the steps it has taken since the dispersal of the Red Shirt rallies appears to suggest that any serious, independent inquiry is forthcoming. The Abhisit administration has instead taken measures more indicative of an incipient cover-up. Independent observers have wondered how a full investigation can take place when the Emergency Decree remains in effect — allowing the government to suppress information it considers damaging and detain anyone it deems a threat to “national security.” Several factors

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<sup>31</sup> Kenyan Decision on Article 15, para. 62. See also Rule 145 (10 and 2(b) (iv) of the RPE ICC.

<sup>32</sup>W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2008, p. 192.

demonstrates that the Thai government is “unwilling” or at least “unable to genuinely carry out” investigations into the Bangkok massacres.

*Lack of Judicial Independence*

90. It is widely recognized among academics and observers that the past several years have witnessed an increased “judicialization” of politics and, at the same time, the increased politicization of Thailand’s judicial branch. On the one hand, since 2006 the courts have intervened repeatedly in the country’s politics, through a string of highly dubious decisions that annulled an election (April 2006), dissolved the Thai Rak Thai party (May 2007), removed Prime Minister Samak over a cooking show (September 2008), and then gutted the House of Representatives by dissolving three governing parties (December 2008). On the other hand, while seemingly eager to intervene in the country’s politics, the courts have consistently acted in an entirely one-sided manner. Contrary to the Red Shirt protesters, whom the judiciary has thus far dealt with harshly, no sanction has yet been imposed on leaders of the People’s Alliance for Democracy responsible for a string of violent incidents and other illegal acts in 2008, above all the occupation of Suvarnabhumi International Airport.
  
91. Aside from suffering from the same lack of credibility and corruption that plagues most government institutions in Thailand, time and time again the courts have shown themselves highly susceptible to external pressure from Establishment figures. In April 2006, Constitutional Court judges were caught on tape in a telephone conversation where the decision to annul the election was described in entirely political terms.<sup>33</sup> New video evidence has surfaced in mid-October 2010. In a series of videos posted on YouTube, members of the Democrat Party’s legal team are seen lobbying Constitutional Court judges to render a favorable decision on the party’s own dissolution case. Not only, in those tapes, are the judges heard discussing the potential that clearing the Democrat Party might have to reinforce the Red Shirts’ claims about “double standards;” the justices themselves consistently refer to opposition politicians by using the pronoun “*mun*” (it), which generally refers to animals.
  
92. Given the politicization of Thailand’s judicial branch, it is virtually certain that the judiciary will not investigate the abuses committed by the state or treat Red Shirt demonstrators accused of serious crimes with the appropriate measure of fairness.

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<sup>33</sup> Pasuk Phongpaichit and Chris Baker, *Thaksin* (Chiang Mai: Silkworm, 2009), p. 276.

*The Department of Special Investigations*

93. On April 20, 2010, the authority to investigate the Bangkok killings was placed in the Department of Special Investigations (“DSI”) by CRES. This transfer of investigative authority away from the police department put an immediate stop to the investigations by the Royal Thai Police, which were in progress. While DSI was set up to investigate the facts, several circumstances contribute to the appearance that the Thai government cannot be trusted to conduct independent and impartial investigations.
94. In late August 2010, after having announced that it would update the public about the progress of the investigations and disclose the results of autopsies conducted on the bodies of ninety-one people, the Department of Special Investigations held a press conference where officials steadfastly refused to provide any new information. While DSI Director-General Tharit Pengdit had previously stated that all autopsies had been completed, Thai authorities reversed themselves, claiming to have performed only forty-two autopsies up to that point. While he announced that no disclosure will be made until the entire investigation is completed, the DSI spokesman hastened to add that the reports whose contents he could not disclose confirm that "not all" ninety-one people were shot by the authorities. Although the DSI has since offered to provide copies of the autopsy results to the families of the victims, they have not been provided to the UDD defendants.
95. Department of Special Investigations Deputy Head, Pol. Lt. Col. Seksan Sritulakarn recently stated that routine external pressure is turning the DSI into an increasingly “political tool.”<sup>34</sup>

*Investigative Fact-Finding Committee*

96. In the wake of the dispersal of the Red Shirt rallies at the Ratchaprasong intersection, the Abhisit administration agreed to impanel a “fact-finding” committee tasked with investigating the violence. The committee is led by former Attorney-General Khanit na Nakhon. The committee has already come under sharp criticism for its apparent lack of independence as well as the opaqueness of its mandate. Mr. Khanit himself is reported to have stated that the “fact finding committee” is less interested in “finding fact or identifying who was right and

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<sup>34</sup> *Matichon*, 12 July 2010.

who was wrong” than it is in “promoting forgiveness.”<sup>35</sup> Therefore it is submitted that this inquiry is not likely to result in any prosecutions, or bring forth clear allegations of wrongdoing against top military men. Khanit, moreover, was appointed by the Prime Minister, who himself stands accused of gross human rights violations. Unsurprisingly, the committee was stacked with people whose loyalty to Thailand’s Establishment is unquestioned.

#### *Other “Reconciliation” Committees*

97. The government’s choice of figures to head other new bodies it has set up in the wake of the crackdown is consistent with this pattern. Its “Reconciliation Committee” is led by Anand Panyarachun, who served as Prime Minister after the 1991 military coup and is currently the Chairman of Siam Commercial Bank, which is controlled by the Crown Property Bureau. Its “Reform Assembly,” charged with examining the issues of public participation and social justice, is led by Prawet Wasi, the key proponent of the idea of “elite civil society.” And its nineteen-member “Committee for Constitutional Reform” is filled with PAD sympathizers — one of its members, Prof. Banjerd Singkaneti, once argued that Thaksin Shinawatra was “worse than Hitler.”

#### *Nature of the Investigation*

98. It should be added that the current government has an abysmal record of “independent investigations.” Previous investigations into the human rights abuses it has been accused of having perpetrated over its tenure in office, such as the death of five hundred Rohingya refugees the Royal Thai Navy towed out to the high seas in January 2009, provide important clues about what to expect from its investigations into the violence of April and May 2010.
99. Especially illustrative of the government’s approach to investigating its own activities is the track record of “famed” pathologist and Director of the Central Institute of Forensic Science (CIFS) Dr. Khunying Pornthip Rojanasunand, who has been involved in all of the most controversial cases. The government’s extensive reliance on Dr. Pornthip is no doubt owed to the fact that, as most of the other “experts” the government typically calls upon when controversial cases are brought to the fore, Dr. Pornthip can be counted on to produce findings that invariably square with the theory offered by the government.

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<sup>35</sup> Atiya Achakulwisut, “Reconciliation Will Have Its Price,” *Bangkok Post*, June 15, 2010. <http://www.bangkokpost.com/opinion/opinion/38778/reconciliation-will-have-its-price>

100. During the most recent Red Shirts demonstrations, Dr. Pornthip produced multiple findings that favored Abhisit's administration. Her investigation into the shooting of a soldier shown on video to have been killed by friendly fire during a Red Shirt march to the northern outskirts of Bangkok on April 28 concluded that the fatal shot was fired from a building nearby.<sup>36</sup> Her investigation into Seh Daeng's assassination has thus far produced no results.<sup>37</sup> And her investigation into the shootings that claimed the lives of six protesters who had taken shelter inside Wat Pathumwanaram on May 19 raised the possibility that the dead had been "executed" at close range,<sup>38</sup> in contrast to the account offered by eyewitnesses who left little doubt that the shots were fired by military officers outside the temple. Indeed, according to Anonymous Witness No. \_\_, Dr. Pornthip arrived at the Pathumwanaram temple on May 20, ostensibly to examine the civilians killed the prior evening, but she promptly halted her examination, claiming to have seen a red laser, which she took as an indication of an imminent grenade attack, although nobody else saw anything of the sort.
101. Dr. Pornthip was appointed to the Center for the Resolution of the Emergency Situation (CRES) on April 20 and is likely to continue to play a pivotal role in future probes of the incidents that have resulted in the death of almost a hundred protesters in April and May.<sup>39</sup> Her case exemplifies the lack of transparency and objectivity that plagues investigations with important political implications in Thailand.

#### *Requests for Independent Investigations*

102. Though the government has had ample opportunity to independently investigate the events in question, it has clearly shown itself unwilling or unable to conduct such an investigation.

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<sup>36</sup> "Porntip: Troop Killed in Don Muang Clash Not Killed by Friendly Fire," *The Nation*, May 4, 2010. <http://www.nationmultimedia.com/home/Porntip-Troop-killed-in-Don-Muang-clash-not-killed-30128559.html>

<sup>37</sup> "Khunying Pornthip to Gather Evidence on Seh Daeng's Assassination Attempt," National New Bureau of Thailand Public Relations Department, May 14, 2010. <http://thainews.prd.go.th/en/news.php?id=255305140044>

<sup>38</sup> "Six Bodies Found in Safe-Zone Temple Show Signs of Execution," National New Bureau of Thailand Public Relations Department, May 21, 2010. <http://thainews.prd.go.th/en/news.php?id=255305210020>

<sup>39</sup> "DSI to Deliberate 153 UDD Cases," *Bangkok Post*, June 14, 2010.

<http://www.bangkokpost.com/breakingnews/181227/dsi-to-deliberate-on-153-udd-cases>

103. On June 28, 2010, counsel to former Prime Minister Thaksin Shinawatra and advisors to Thai counsel for members of the United Front for Democracy against Dictatorship, who stand accused of terrorism, sent a letter on behalf of their clients to several members of the Thai Government.<sup>40</sup> The purpose of this letter was to assert the rights to fair treatment under international law in the investigation and prosecution of charges stemming from the Red Shirt protests, as well as to request an investigation into the violent events of April-May 2010.<sup>41</sup>
104. Aside from failing to initiate a fair and complete investigation into the violence, the Thai government has steadfastly refused to grant the UDD leaders currently on trial access to all forensic, documentary and audio/video evidence pertaining to their prosecution. In addition, it has refused to acknowledge the right of the accused to use their own military and forensic experts to review any reports issued by the DSI, CRES, the Independent Committee to Investigate Violence, or any other governmental investigative body. In particular, on August 27, 2010, the court denied a formal request by the UDD defendants to conduct independent autopsies of the bodies of nine victims, whose families have postponed traditional Thai cremation ceremonies in order to allow for a proper investigation, in the interest of achieving justice. The court denied the UDD defendants' request despite the knowledge that the bodies would ultimately be cremated, thereby destroying the evidence and creating an irreparable violation of the UDD defendants' rights to a fair trial under the ICCPR and Thai law.
105. Further, in addition to other due process violations, the court has refused to permit the UDD defendants to attend the criminal proceedings against them, thereby depriving them of the ability to confer with their counsel concerning the evidence and prepare a proper defense against the charges. The stated basis for denying the UDD defendants their right to attend the proceedings is that the courtroom is too small. Although larger courtrooms are available, the court has denied requests to move the proceedings to larger facilities that can accommodate all those who are entitled to participate.

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<sup>40</sup> The letter was sent to resp. the Chairman of Independent Committee to Investigate Violence, The Permanent Secretary of Justice of the Thai Ministry of Justice, The Director General of Department of Special Investigation, The Deputy Prime Minister and The Prime Minister of Thailand.

<sup>41</sup> See Letter of Mr. Robert R Amsterdam, Geert-Jan Alexander Knoops and Mr. Pichit Chuenban to Mr. Khanit na Nakhon, Dr. Kittipong Kittayarak, Mr. Tharit Pengdit, Mr. Suthep Thaugsuban and Mr. Hon. Abhisit Vejjajiva, concerning Investigation Into Violent Events of April-May 2010 – Bangkok, Thailand, 28 June 2010

106. The request to conduct a full and complete inquiry is supported by all major international human rights organizations, most of which have criticized the lack of independence of investigative bodies, the denial of the due process rights for detained Red Shirt protesters, and the government's failure to include the opposition in its "reconciliation" efforts. The Asian Legal Resource Centre wrote: "The government of Thailand must extend an invitation to the Special Rapporteur on the situation of extrajudicial, summary or arbitrary executions for a formal visit to the country that would include an investigation of the recent killings in Bangkok."<sup>42</sup> In its letter to the Prime Minister, the Committee to Protect Journalists requested to start independent investigations into the April May attacks and to bring the perpetrators to justice.<sup>43</sup>
107. Faced with the government's lack of responsiveness, counsel for Dr. Thaksin wrote another letter to Prime Minister Abhisit Vejjajiva on August 6, 2010, to notify him of Thailand's obligations under the ICCPR to perform a "fair and complete" investigation into the death of more than eighty civilians. A third letter was sent to the Prime Minister on September 23, stressing that the failure to investigate would itself amount to a violation under customary International Law.<sup>44</sup> Neither Prime Minister Abhisit nor any other official responded to the aforementioned letters.
108. Indeed, rather than investigate the conduct of the First Region Army, General Prayuth – the commanding officer responsible for the crackdown operations – was promoted to the rank of Army Commander, the highest position in the Thai Royal Army.<sup>45</sup> Further, on October 18, 2010, General Prayuth promoted dozens of Army officers who participated in the crackdown.<sup>46</sup>

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<sup>42</sup> Human Rights Council, Fifteenth Session Agenda Item 4, A Written Statement by the Asian Legal Resource Centre, a Non- Governmental Organization with a general consultative status "Thailand: Arbitrary detention and harassment under the Emergency Decree in Thailand, 31 August 2010.

<sup>43</sup> Letter of Committee to Protect Journalist, send by Excecutive Director Joel Simon, "CPJ Calls for Thailand to investigate journalist killings, 7 June 2010.

<sup>44</sup> See letter of Robert Amsterdam, Counsel for Mr. Thaksin, *Thailand's violation of International Law*, 23 September 2010..

<sup>45</sup> <http://www.siamdailynews.com/2010/09/25/pm-hopes-gen-prayut-to-strengthen-army-operations>.

<sup>46</sup> <http://www.prachatai.com/english/node/2098>.

*Duty for states to independently investigate infringements of right to life under article 14 of the ICCPR based upon an analogy with the case law with the ECHR*

109. The duty to investigate serious violations of human rights is now so pervasive in international human rights law that it may be said to be a rule of customary International Law. Authoritative interpretations of all widely ratified international and regional human rights treaties recognize the duty. Thailand has an obligation to investigate the extrajudicial killings of civilians, as the country has acceded to the International Covenant on Civil and Political Rights (“ICCPR”).
110. Article 6 ensures the Right to Life: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”
111. In its General Comment on the Right to Life as guaranteed by Article 6 of the ICCPR, the Human Rights Committee of the United Nations, which supervises and authoritatively interprets the ICCPR, states: “States parties should take measures [...] to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”<sup>47</sup>
112. It is highly significant that the ICCPR requires state parties to be both complete and fair in the investigation and, if applicable, in the prosecution of persons responsible within its own governmental structure: “Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”<sup>48</sup>
113. According to the Human Rights Committee of the United Nations: “[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, [...] against violations of Covenant rights by its agents [...] There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting

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<sup>47</sup> ICCPR, General Comment 6, par. 3, April 30, 1982.

<sup>48</sup> Comment 31, Paragraph 15 (emphasis added)

or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts [...]. States are reminded of the interrelationship between the positive obligations imposed under Article 2 and the need to provide effective remedies in the event of breach under Article 2, paragraph 3.”<sup>49</sup>

114. In particular, a state party’s failure to bring perpetrators to justice can constitute a separate treaty violation, particularly in cases involving serious crimes such as arbitrary killing: “Where the investigations referred to in paragraph 15 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), [and] summary and arbitrary killing (Article 6) Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility”.<sup>50</sup>
115. Thailand is therefore bound by international treaty law to hold a complete and fair investigation conducted by “independent and impartial bodies.”
116. In addition, other sources of customary international law laid down in international conventions such as European Convention on Human Rights (ECHR) provide for similar guarantees. The ECHR contains a similar provision in Article 2: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Based on this provision, a state is under the obligation to genuinely investigate the use of force by the police or military, in case of a potential breach of Article 2.
117. This is also illustrated by the ECHR’s case law. In the case of *Budayeva and others v. Russia*, the ECHR held that: “The obligations deriving from Article 2 do not end there. Where lives have been lost in circumstances potentially engaging the responsibility of the State, that

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<sup>49</sup> U.N. Human Rights Committee General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, issued 29 March 2004 (“Comment 31”), Paragraph 8

<sup>50</sup> Comment 31, Paragraph 18.

provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.”<sup>51</sup> Recently, the ECHR held that: “Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in a case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring to provide a satisfactory and convincing explanation.”<sup>52</sup>

118. It should be stressed that Article 2 Section 2 of the European Convention allows for the use of force with the risk of deprivation of life in the event it is *no more than absolutely necessary*:
- a) in defense of any person from unlawful violence;
  - b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
  - c) in action lawfully taken for the purpose of quelling a riot or insurrection.

However, as described in Chapter II of this Application, the events in Bangkok go far beyond the “quelling” of a riot. Now that the administration of Thailand has failed to comply with these basic human rights standards, the jurisdiction of the ICC on the basis of complementarity is triggered.

### *Conclusion*

119. It is clear that the government of Abhisit Vejjajiva will never carry out a fair and complete investigation into the situation. The government, in particular, is unlikely to compromise its tenuous grasp on political power by exposing its military and civilian leaders to prosecution for international crimes. The prolonged detention and the disregard for the due process rights of hundreds of Red Shirts, whom the government prejudged as “terrorists,” calls into question the fairness of its probe. Finally, the corruption and politicization of Thailand’s judicial branch, the lack of independence plaguing the investigations conducted so far by DSI as well as Mr. Kanit’s fact-finding committee, and the government’s reliance on investigators chosen for their partisanship rather than their expertise taints the entire inquiry. The Thai government, in other words, appears to be both unwilling and unable to conduct a fair and complete investigation, in accordance with its obligations under international law. This is in keeping

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<sup>51</sup> ECHR, Case of Budayeva and others v. Russia, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, at 138.

<sup>52</sup> ECHR, Carabulea v Romania, 13 July 2010, appl. No. 45661/99, para. 109.

with previous massacres of pro-democracy demonstrators that the Thai state perpetrated in 1973, 1976, and 1992. In all those instances, blanket amnesties guaranteed complete impunity for those who killed hundreds of demonstrators.

## **ii. Thai situation in relation to the Gravity requirement**

120. In relation to the requirement of gravity, it is submitted that there is a pattern of incidents that were carried out on a substantive scale. The extra-judicial killings were carried out not in the “heat of battle,” but rather by military snipers who targeted unarmed civilians from a distance. Moreover, the power to arrest and detain hundreds of opposition supporters, as well as the power to restrict a host of other rights sanctioned in the ICCPR, was conferred upon the government by the Emergency Decree. Now indefinitely in force in Bangkok and other provinces, the Emergency Decree was imposed arbitrarily and for the sole purpose of providing the government a pseudo-legal basis to violate the constitutional rights of its citizens. As stressed in this Application, there is no justification for any of the crimes committed. Moreover, the harm caused to the victims and their families is severe. This is set out in chapter II.

## **c. Conclusion**

121. *De facto* Prime Minister Abhisit Vejjajiva is violating his duty to investigate under international law. Although Thailand has an obligation under the ICCPR and customary international law to carry out independent investigations, the “investigations” launched by *de facto* government of Thailand are far from impartial and are virtually guaranteed to result in a complete whitewash of the entire incident, just as previous instances of large-scale state violence that have occurred in Thailand over the past four decades. In other words, by all accounts the government of Thailand is unwilling to carry out proper investigations into the Bangkok Massacres. Even if the civilian administration had the will to investigate, its ability to do so would be limited by the absence of civilian control over the military. As a result, the Thai situation qualifies for ICC jurisdiction based on the principle of complementarity.

122. In relation to the gravity of the situation, it is submitted that aforementioned analysis clearly demonstrates that the situation is especially severe and grave. In conclusion, it is submitted that the Bangkok Massacres meet all the requirements for a situation to be deemed admissible under the ICC statute.

## **V. Reasonable basis to believe that a crime falls within the jurisdiction of the court and has been or is being committed**

123. The reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed is one of the most important standards considered by the Prosecutor when deciding whether to undertake a preliminary investigation. There are two requirements that need to be fulfilled in this regard. First, the Prosecutor will decide whether there is a reasonable basis to believe that a crime has been committed; second, it must be determined whether the crime in question falls within the jurisdiction of the court.

124. In the Kenyan situation, the Pre-Trial Chamber recognized that the “reasonable basis to believe” test as set out in Article 53(1) of the Statute is subsumed under the “reasonable basis to proceed” standard referred to in the opening clause of Article 53(1) of the Statute.”<sup>53</sup> Jurisprudence shows that the standard should be construed and applied against the underlying purpose of the procedure in Article 15(4) of the Statute, which is to prevent the court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility.<sup>54</sup> The Appeals Chamber previously ruled that this standard be read in the context of Article 58 of the Statute; in other words, it is sufficient at this stage to show that a reasonable conclusion that a crime has been committed may be supported on the basis of the evidence and information available.<sup>55</sup>

125. In order to decide whether the crime falls within the jurisdiction of the court, it has to satisfy three conditions:

(i) The crime must fall within the category of crimes referred to in Article 5 and defined in

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<sup>53</sup> *Prosecutor v. Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.

<sup>54</sup> Kenyan Decision on Article 15, para. 32.

<sup>55</sup> Appeals Chamber, Judgement on the appeal of the prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar, Hassan Ahmad Al Bashir”, 3 February 2010, para. 33.

- Articles 6, 7, and 8 of the Statute (jurisdiction *ratione materiae*);
- (ii) The crime must fulfill the temporal requirements specified in Article 11 of the Statute (jurisdiction *ratione temporis*)
  - (iii) The crime must meet one of the two alternative requirements contained in Article 12 of the Statute (jurisdiction *ratione loci* or *ratione personae*).<sup>56</sup> The latter entails either that the crimes have occurred within the territory of a state party to the Statute or a state that has lodged a declaration on the basis of Article 12(3) of the Statute, or to have been committed by a national of such state.<sup>57</sup>

126. In the Thai situation, there is strong evidence that there is, indeed, a reasonable basis to believe that a crime within the jurisdiction of the court has been committed. This will be discussed further in Chapters VII, VIII and IX below.

## VI. Crimes Against Humanity: General Requirements

### a. Contextual elements of Crimes Against humanity

127. Crimes Against Humanity are defined in Article 7(1) of the ICC Statute. In addition, Crimes Against Humanity are specified in greater detail in another important document of the ICC — the Elements of Crimes. Those criteria are:

- (i) The attack had to be directed **against a civilian population;**
- (ii) **A State or Organizational policy;**
- (iii) The specific conduct was part of **either a widespread or systematic nature of the attack;**
- (iv) **A nexus between the individual act and the Attack;**
- (v) The perpetrator had to have at the least **knowledge or intent** that the conduct was part of such a widespread or systematic attack.<sup>58</sup>

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<sup>56</sup> Pre Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05/01/09-3, para. 36.

<sup>57</sup> Kenyan Decision on Article 15, para. 39.

<sup>58</sup> See Article 7 (2) Rome Statute and Kenyan Decision on Article 15, para. 79.

## **b. An Attack Directed Against Any Civilian Population**

128. The meaning of the term “attack,” although not addressed in the Statute, is clarified by the Elements of Crimes, which states that for the purposes of Article 7(1) of the Statute, an attack is not restricted to “a military attack.”<sup>59</sup> Moreover, the Pre-Trial Chamber, in the case of *Jean Pierre Bemba Gomba*, held that: “ [a]n attack consists of a course of conduct involving the multiple commission of acts referred to in Article 7(1).”<sup>60</sup>
129. In the Kenyan situation, the Pre-Trial Chamber considered that “[t]he potential civilian victims of a crime under Article 7 of the Statute are groups distinguished by nationality, ethnicity, or other distinguishing features.”<sup>61</sup> The Prosecutor will need to demonstrate that the attack was “[d]irected against civilian population as a whole and not merely against randomly selected individuals.”<sup>62</sup> In addition, the civilian population must be the primary object of the attack in question and cannot merely be an incidental victim.<sup>63</sup> The term “civilian population” refers to persons who are civilians, as opposed to members of armed forces and other legitimate combatants.<sup>64</sup>

## **c. State or Organizational Policy**

130. In Paragraph 3 of the Elements of Crimes, it is stated that a “policy to commit such an attack” requires the existence of a state or organizational policy that actively promoted or encouraged the attack against a civilian population. Besides, it is stated that: “[a] policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a

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<sup>59</sup> Kenyan Decision on Article 15, para. 80 and Elements of Crimes, Introduction to Article 7 of the Statute para. 3.

<sup>60</sup> Pre-Trial Chamber II, ICC-01/05-01/08-424, *Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor on against Jean Pierre Bemba Gomba*, June 15, 2009, para 75.

<sup>61</sup> Kenyan Decision on Article 15, para. 81 and JP Bemba Gomba Decision, para. 76.

<sup>62</sup> Kenyan Decision on Article 15, para. 81 and JP Bemba Gomba Decision, para. 76.

<sup>63</sup> Kenyan Decision on Article 15, para 82.

<sup>64</sup> Kenyan Decision on Article 15, para 82.

deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”

131. The Statute does not provide definitions of the terms “policy” and “State or organizational.” The Pre-Trial Chamber in the Kenyan situation and in the case against Katanga and Ngudjolo Chui found that this requirement: “[...]must still be thoroughly organized and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organizational group. Indeed, an attack which is planned, directed or organized — as opposed to spontaneous or isolated acts of violence — will satisfy this criterion.”<sup>65</sup>
132. In the ICTY case of the *Prosecutor v. Tadic*, the Trial Chamber held that CAH could also be committed “on behalf of entities exercising *de facto* control over a particular territory, but without international recognition or a formal status of a *de jure* government, or by a terrorist group or organization.”<sup>66</sup>

#### *Policy*

133. With regard to the term State or organizational policy, the Trial Chamber in the *Blaskic case* held that: “This policy does not necessarily need to have been conceived at the highest level of the State Machinery.” In the Kenyan decision, the Pre-trial Chamber referred to this decision and noted that “*a policy adopted by a regional or even local organs of the State could satisfy the requirement of a State policy*”.<sup>67</sup>

#### *Organizational*

134. With regard to the term “organizational,” the Statute is quite unclear. In the Kenyan decision, the Trial Chamber referred to the International Law Commission, which held that: “The article does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass

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<sup>65</sup> Pre-Trial Chamber II, ICC-01/04-01/07-717, Decision on the Confirmation of the Charges, para 396.

<sup>66</sup> Also, *Prosecutor v. Tadic*, Case No. IT-84-1-T, Judgement 7 May 1997, para. 653.

<sup>67</sup> Kenyan Decision on Article 15, para. 89.

violations of human rights.”<sup>68</sup> The Trial Chamber held that “the determination of whether a given organization group qualifies as an organization under the statute must be made on a case by case basis.”<sup>69</sup> It set out six considerations:

- (i) *“Whether the group is under a responsible command, or has an established hierarchy;*
- (ii) *Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against the civilian population;*
- (iii) *Whether the group exercises control over part of the territory of the state;*
- (iv) *Whether the group has criminal activities against the civilian population as a primary purpose;*
- (v) *Whether the group articulates, explicitly or implicitly an intention to attack a civilian population;*
- (vi) *Whether the group is part of a larger group, which fulfills some or all of the abovementioned criteria.”*

The Trial Chamber noted that these considerations may assist, but need not be exhaustively fulfilled.<sup>70</sup>

#### **d. Widespread or Systematic Nature of the Attack**

135. An act constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population. The Trial Chamber recently held that “the alleged acts must be either widespread or systematic to warrant classification as crimes against humanity.”<sup>71</sup> In addition, a widespread attack may be the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”<sup>72</sup>

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<sup>68</sup> Kenyan Decision on Article 15, para. 93.

<sup>69</sup> Kenyan Decision on Article 15, para. 93.

<sup>70</sup> Kenyan Decision on Article 15, para. 93.

<sup>71</sup> Kenyan Decision on Art. 15, para. 94. See also Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 412; ICTY, *Prosecutor v. Kunarac et al.* Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 97.

<sup>72</sup> Kenyan Decision on Article 15, para. 95, ICTY, *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Judgment 17 January 2005, para. 545. See also Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05- 01/08-424, para. 83, ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T,

136. The term systematic refers to the “organized nature of the acts of violence and the improbability of their random occurrence.”<sup>73</sup> In the Kenyan Decision, the Trial Chamber referred to ICTY and held that the “systematic” element could be defined as follows:

- (i) being thoroughly organized;
- (ii) following a regular pattern;
- (iii) on the basis of a common policy;
- (iv) and involving substantial public or private resources.<sup>74</sup>

### **e. Nexus Between the Individual Acts and the Attack**

137. It can be derived from previous case law that “the nexus between such acts and the attack against a civilian population is one of the requirements that must be satisfied in order for the commission of crimes against humanity to be established.”<sup>75</sup> In addition, when determining whether an act falling within the scope of Article (7)(1) of the ICC Statute forms part of an attack, the Chamber must consider the nature, aims and consequences of such act.<sup>76</sup>

### **f. Knowledge – Criminal Intent**

138. All crimes require *mens rea*, or criminal intent, which is defined in Article 30 of the Statute.<sup>77</sup> According to ICC jurisprudence, Article 30 of the Statute encompasses two forms of *dolus*,

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Judgement, 3 March 2000, para. 206; ICTY, Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, para. 101.

<sup>73</sup> ICTY, Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 545. See also Pre-Trial Chamber II, JP Bemba Gomba Decision, para. 83, ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 206; ICTY, Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, para. 101; R. Dixon, C. K. Hall, “Article 7, in O. Triffterer (ed.).

<sup>74</sup> ICTR, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 580.

<sup>75</sup> See Elements of Crimes, Article 7(1)(a)(2); 7(1)(d)(4); 7(1) (g)-1 (3); (2), 7 (1)(g)-6 (4); 7(1) (k)(4); JP Bemba Gomba Decision, para. 85.

<sup>76</sup> JP Bemba Gomba Decision, para.86. See also ICTR, Prosecutor v. Kalelijeli, Case No. ICTR-98-44A-T, Judgement, 1 December 2003, para. 866; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement, 15 May 2003, para.326.

<sup>77</sup> The general objective (material) elements of a crime are referred to in article 30(2) and (3) of the

namely *dolus directus* in the first degree and *dolus directus* in the second degree.<sup>78</sup> As stated in Article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. The ICTY Appeals Chamber in *Prosecutor v. Tadic* held that: “a perpetrator needs to know that an attack occurs on the civil population and that his acts are part of this attack, besides knowing being aware of the risk that his/her actions comport and willfully taking this risk.”<sup>79</sup> However, it is not required that the perpetrator know all the details of the attack.<sup>80</sup>

### **g. Potential Individual Criminal Responsibility**

139. According to the Elements of Crimes, Crimes Against Humanity warrant and entail individual criminal responsibility and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.<sup>81</sup> Article 28(b) (iii) holds a superior criminally responsible if he/she knowingly or consciously disregarded information that clearly indicated the commission of crimes by subordinates in activities within the superior’s effective responsibility and control.
140. Although it is not a requirement at this stage of the proceedings that the UDD and others identify perpetrators or other individuals responsible for the crimes set out in the Application, it is reasonable to conclude that potential criminal responsibilities extend to the highest levels of both the civilian and military leadership of the Thai government. The use of force against civilians was effectuated by military forces of the Royal Thai Army at the direction of officials in the Center for the Resolution of the Emergency Situation (CRES), which was established concurrently with the imposition of the State of Emergency on April 7, 2010 and has served as a command and control center for the state’s response to the Red Shirt protests. A preliminary list of key government officials and military officers, most of them high-ranking members of CRES, who are known to have participated in the formulation of the policy under which the crimes described in this document took place includes:

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Statute as conduct, consequence and circumstance.

<sup>78</sup> JP Bemba Gomba Decision, See the elaboration on the forms of *dolus* in part VI of the decision, paragraphs 357 to 359.

<sup>79</sup> ICTY, *Prosecutor v. Blaskic*, Judgement 3 March 2000, Case No. IT-95-14-T, at 247, 251.

<sup>80</sup> ICTY, *Prosecutor v. Kunarac and others*, Judgement, February 2001, Case No. IT-96-23-T, at 434.

<sup>81</sup> Elements of Crimes Introduction under (1).

- a. Abhisit Vejjajiva, Prime Minister.
- b. Suthep Thaugsuban, former Deputy Prime Minister and former Director of CRES.
- c. General Anupong Paochinda, former Commander in Chief of the Royal Thai Army and former “chief officer in charge of the emergency situation.”
- d. General Prawit Wongsuwan, Minister of Defense and former Assistant Director of CRES (currently CRES Director).
- e. General Prayut Chan-ocha, current Commander in Chief of the Royal Thai Army and current “chief officer in charge of the emergency situation” (served as Deputy Chief of the Army during the crackdowns).
- f. General Kittipong Ketkowitz, Permanent Secretary of Defense and Assistant Director of CRES.
- g. General Songkitti Jaggabatara, Supreme Commander of the Royal Thai Armed Forces and Assistant Director of CRES.
- h. Admiral Kamthon Phumhiran, Commander of the Royal Thai Navy and Assistant Director of CRES.
- i. Air Chief Marshal Ithiporn , Commander of the Royal Thai Air Force and Assistant Director of CRES.
- j. Police General Patheep Tanprasert, Acting National Police Chief and former Assistant Director of CRES at the time of the crackdowns.
- k. Tarit Pengdit, Director-General of the Department of Special Investigations and member of CRES.
- l. General Piroon Paewpolsong, former Chief of Staff of the Royal Thai Army.
- m. General Wit Thephadsadin Na Ayutthaya, Assistant Commander-in-Chief of the Royal Thai Army at the time of the crackdowns (currently Army Chief Advisor).
- n. General Teerawat Boonyapradap, Assistant Commander-in-Chief of the Royal Thai Army at the time of the crackdowns (currently Deputy Commander-in-Chief).
- o. General Daopong Rattanasuwan, Deputy Chief of Staff of the Royal Thai Army at the time of the crackdowns (currently Chief of Staff).

## **VII. Underlying Acts Constituting Potential Crimes Against Humanity; Situation at Hand**

### **a. Possible Crimes Against Humanity**

141. Four potential Crimes Against Humanity stand out from the events described in this Application:

- Article 7(1)(a) Crime Against Humanity of “murder;”
- Article 7(1)(e) Crime Against Humanity of “imprisonment and other severe deprivation of physical liberty;”
- Article 7(1)(h) Crime Against Humanity of “persecution;”
- Article 7(1)(k) Crime Against Humanity of “other inhumane acts.”

142. In general, this Application describes the repression of Red Shirt demonstrators carried out by the military — civilians belonging to the group of Red Shirt protesters were shot by men in military uniforms, leading to ninety dead civilians and at least 1800 injured. Furthermore, the “White Paper” describes the imposition of new rules, regulations and decrees allowing for the arrest and incarceration of civilians attempting to disseminate alternative political viewpoints, protesting, or participating in a small gatherings and demonstrations. These rules specifically target the broad “Red Shirt movement,” as the administration has made no attempt to enforce the rules on pro-government groups.

### **b. Crimes Against Humanity: Murder (Article 7 (1) (a) Rome Statute)**

143. According to the Elements of Crimes, in order to establish that the crime of murder has been committed, the Trial Chamber must be satisfied that that a “perpetrator killed one or more persons.”<sup>82</sup> In the Case of *JP Pierre Bemba Gomba*, the Trial Chamber recalled that for a crime to be committed, two essential and distinct elements must be established: the *actus reus*

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<sup>82</sup> See Elements of Crimes, Article 7 (1) (a) (1). the term 'killed' is interchangeable with the term 'caused death'.

element (material or objective element) and the *mens rea* element (mental or subjective element).<sup>83</sup>

#### *Actus Reus Element*

144. As recognized by the Court's jurisprudence, for the act of murder to be committed the victim has to be dead and the death must result from the act of murder.<sup>84</sup> The act itself may be committed through action or omission.<sup>85</sup> The Chamber stresses that the death of the victim can be inferred from factual circumstances,<sup>86</sup> and that the Prosecutor must prove the causal link between the act of murder and the victim's death.<sup>87</sup>
145. In this respect, it is not necessary for the Prosecutor to demonstrate, for each individual killing, the identity of the victim and the direct perpetrator. Nor is it necessary that the precise number of victims be known.<sup>88</sup> This allows the Chamber to consider evidence referring to “many” killings or “hundreds” of killings without indicating a specific number.<sup>89</sup>

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<sup>83</sup> JP Bemba Gomba Decision, para.134.

<sup>84</sup> Pre-Trial Chamber I, Katanga decision, ICC-01/04-01/07-717, para. 421; see also ICTR, The Prosecutor v Akayesu, Case No. ICTR-96-4-T, “Judgment”, 2 September 1998, para. 589; ICTR, The Prosecutor v Rutaganda, Case No. ICTR-96-3-T, “Judgment”, 6 December 1999, para. 80; ICTY, Prosecutor v. Blaskic, Case No. IT-35-14, “Judgment”, 3 March 2000, paras 216-217; ICTY, Prosecutor v Delalic, et al, Case No. IT-96-21, “Judgment”, 16 November 1998, para. 424.

<sup>85</sup> See also for the same finding in Pre-Trial Chamber I, Katanga decision, ICC-01/04-01/07-717, para. 287.

<sup>86</sup> See also ICTY, Prosecutor v Kojelac, Case No. IT-97-25, “Judgment”, 15 March 2002, paras 326-327.

<sup>87</sup> P. Currat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*, (Bruylant, 2006),

p. 146; ICTY, Prosecutor v Krnojelac, Case No. IT-97-25, “Judgment”, 15 March 2002, para. 329.

<sup>88</sup> For a similar approach, see ICTY, Prosecutor v. Stokte, Case No. IT-97-24-T, “Judgment”, 31 July 2003, para. 201.

<sup>89</sup> This approach was also taken in ICTR, The Prosecutor v Akayesu, Case No. ICTR-96-40-T, “Judgment”, 2 September 1998, para. 282: Pursuant to a question from the Chamber as to the killing of teachers, witness K stated she was unsure how many were killed, but that she knew the names of some of them; ICTR, The Prosecutor v Kamuhanda, Case No. ICTR-95-54A-T, “Judgment”, 22 January 2004, para. 345: “Prosecution Witness GEA testified that he could not say how many people had died at that location, because “that day there were very many.” (...); ICTR, The Prosecutor v Ntakirutimana, Case No. ICTR-96-10 & TCTR-96-17-T, “Judgment and Sentence”, 21 February 2003, para. 631: the witness specified that “many people were killed as a result of this attack.”

*Mens Rea Element*

146. As to the element of *mens rea*, the “existence of intent and knowledge can be inferred from relevant facts and circumstances.” Taking into account that no mental element is specified in Article 7(l)(a) of the Statute, the Chamber applies Article 30 of the Statute.<sup>90</sup> The Prosecutor must demonstrate the nexus existing between the acts of murder and the attack.<sup>91</sup>

**c. Crimes Against Humanity: Imprisonment and Other Severe Deprivation of Physical Liberty (Article 7 (1) (e) ICC Statute).**

147. According to the Elements of Crimes, in order to establish that the crime of imprisonment or severe deprivation of physical liberty has been committed, the Trial Chamber must be satisfied that the perpetrator unlawfully deprived one or more persons of physical liberty.

**d. Crimes Against Humanity: Persecution (Article 7 (1) (h) ICC Statute)**

148. According to the Elements of Crimes, in order to establish that the crime of persecution has been committed, the Trial Chamber must be satisfied that in the act of persecution, the perpetrator severely deprived, contrary to international law, one or more persons of their fundamental rights.<sup>92</sup> In the ICTY case *Prosecutor v. Kupreskic*, the Trial Chamber held that the Crime Against Humanity of Persecution “derives its unique character from the requirement of its specific discriminatory intent.”<sup>93</sup> Moreover, the Trial Chamber held that persecution is “an act or omission that discriminates in fact that and that denies or infringes on a fundamental right laid down in international customary law or treaty law.”<sup>94</sup>

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<sup>90</sup>ICC, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mattieu Ngudjolo Chui, ICC-01/04-01/07 Decision on the Confirmation of the Charges 30 September 2008, (Pre-Trial Chamber I, Katanga decision, ICC-01/04-01/07-717), para. 423.

<sup>91</sup> Elements of Crimes, article 7(l)(a) of the Statute, para. 2

<sup>92</sup> See Elements of Crimes, Article 7 (1) (h) (1).

<sup>93</sup> ICTY, Krnojelac, Case No. IT-95-16-T, Judgment 15 March 2002, para.436.

<sup>94</sup> ICTY, Krnojelac, Case No. IT-95-16-T, Judgment 15 March 2002, para.436.

### **e. Crimes Against Humanity: Other Inhumane Acts (Article 7 (1) (k) ICC Statute)**

149. According to the Elements of Crimes, in order to establish that other inhumane acts have been committed, it must be satisfied that a “perpetrator inflicted great suffering, or serious injury to body or to mental or physical health by means of an inhumane act.”<sup>95</sup> It is not clear what exactly falls under the scope of the scope of an “inhumane act” according to the ICC.
150. The ICC Pre-Trial Chamber noted that the Statute has given to “other inhumane acts” a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived “other inhumane acts” as a “catch-all provision,”<sup>96</sup> leaving a broad margin for the jurisprudence to determine its limits.
151. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action.<sup>97</sup> According to Article 7(1)(k)(2) of the Elements of Crimes, “other inhumane acts” must be of a similar character to any other act referred to in Article 7(1) of the Statute. Footnote 30 of the Elements of Crimes states that “character” shall be understood as referring to the nature and gravity of the act.<sup>98</sup>
152. Although this similarity is required, Article 7(1)(k) of the Statute defines the conduct as “other” inhumane acts, which indicates that none of the acts constituting crimes against humanity according to Article 7(1)(a) to (j) can be simultaneously considered as other inhumane act under Article 7(1)(k) of the Statute.<sup>99</sup> For example, to establish bodily injury as a crime against humanity, the ICTY Appeals Chamber in *The Prosecutor v. Kordic and Cerkez* found that the following conditions should be met:

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<sup>95</sup> See Elements of Crimes, Article 7 (1) (k) (1).

<sup>96</sup> Boot, M. revised by C.K. Hall, C. K., “Article 7 - Crimes against Humanity”, in Triffener, O.(Ed.), Commentary on the Rome Statute of the International Criminal Court, 2nd ed., München, C.H.Beck, 2008, p.230, para. 79.

<sup>97</sup> Pre-Trial Chamber I, Katanga decision, ICC-01/04-01/07-717, para. 450.

<sup>98</sup> Pre-Trial Chamber I, Katanga decision, ICC-01/04-01/07-717, para. 451.

<sup>99</sup> Pre-Trial Chamber I, Katanga decision, ICC-01/04-01/07-717, para. 452.

- (a) “the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances;
- (b) the suffering must be the result of an act or omission of the accused or his subordinate; and
- (c) when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.”<sup>100</sup>

153. With respect to the subjective element, the Chamber notes that in addition to the requirement that the objective elements were committed with intent and knowledge pursuant to Article 30 of the Statute, Article 7(1)(k)(3) of the Elements of Crimes establishes that the “perpetrator must also [have been] aware of the factual circumstances that established the character of the act.” This offense encompasses, first and foremost, cases of *dolus directus* of the first and second degree.<sup>101</sup>

## **VIII. Reasonable Basis to Believe that the Crime Falls Within the Jurisdiction of the Court and Has Been Committed**

### **a. Jurisdiction Ratione Materiae**

#### **i. General elements of Crimes Against Humanity according to Article 5 (1) (B)**

##### ***Attack against a civilian population***

154. It is submitted that the extreme violence unleashed on Red Shirt demonstrators in April and May 2010 must be considered a military attack that took place at the direction of the Thai Government.

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<sup>100</sup> ICTY The Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 117.

<sup>101</sup> Pre-Trial Chamber I, Katanga decision, ICC-01/04-01/07-717, para. 461.

155. Although the government claims it has only applied deadly force against violent elements among the Red Shirts, there is no evidence suggesting that any of those killed on April 10 as well as during the weeklong crackdown between May 13-19 posed any threat to the security forces. In fact, dozens of video clips, photographs, and eyewitness accounts point to several instances in which those killed manifestly *did not* pose any danger, but were rather shot through the head while holding slingshots, flags, cameras, or medical equipment.
156. The government has chosen to explain the danger posed by each of the persons killed or injured as a result of the military's actions collectively as opposed to individually — specifically, based on the victims' participation in the activities of a group the government has described as a “terrorist” organization. Whether or not there is any factual basis to conclude that either the UDD or the broader Red Shirt movement could be characterized as “terrorist,” the government's actions amount to targeting a “civilian population” based on “distinguishing features” (such as their red clothing) that identify them as members of a particular civilian group regardless of whether the individuals themselves actually committed any acts of violence or intimidation against the security forces. In conclusion, it can be said that the civilian population identified on the basis of “distinguishing features” connoting opposition to the government was not only the primary object of the attack; it is the Red Shirt movement as a whole that was the target of the attack.

### ***State or Organizational Policy***

157. The killings of April-May 2010 were not isolated or sporadic incidents, but were rather the result of coordinated plans in response to the Red Shirts demonstrations. Armed forces were repeatedly mobilized and the instructions were conveyed along a chain of command, including civilian links within the Abhisit government. Shortly preceding the military clearing operation on April 10, 2010, for example, the government declared a State of Emergency, giving the troops what Reporters Without Borders calls “a license to kill” — that is, *carte blanche* to use whatever force was deemed necessary to clear the areas. It seems clear, therefore, that the highest levels of the Abhisit regime either knew or tacitly approved of the operations, without consideration for the likelihood that they would result in unnecessary loss of human life. In conclusion, the armed forces of the military, instructed by the *de facto* government, carried out an attack against the Red Shirt civilian population according to a “state or organizational policy” devised and approved at the highest levels of the country's civilian and military leadership.

### ***Widespread or Systematic Nature of the Attack***

158. In Bangkok, the scale and the duration of the killings, together with manner in which they were conducted, suggests that both criteria may have been met. On the one hand, an aggregate casualty toll of ninety civilians killed and approximately two thousand injured over a forty-day period attests to the “widespread” nature of the attack. On the other hand, the repeated occurrence of similar incidents across time and space demonstrates the “systematic,” non-random nature of the offenses. This is explained by the fact that the armed forces were following the rules of engagement set on the basis of a common policy; the attack, which had been thoroughly planned, involved substantial public resources of the government.

### ***A Nexus between the Individual Act and the Attack***

159. At this stage of the proceedings the UDD and others are not yet in a position to specify in detail the relevant witness materials showing a link between the acts and the attack. The government has denied the UDD and others access to the documentation that might demonstrate such a direct link. Nevertheless, based on a general analysis of the situation in this Application, it appears to be safe to say that the individual acts of murder, persecution, imprisonment and other inhumane acts that have occurred during the forty-day period in question are the direct consequence of the widespread and systematic attack launched by the Thai government against a civilian population.

### ***Perpetrator Had to Have at Least Knowledge or Intent that the Conduct Was Part of Such Widespread Systematic Attack***

160. Eyewitnesses on both sides of the Army lines claim to have observed both the intent to cause serious injury and the utter disregard for human life and dignity on the part of the Thai security forces. The May crackdown spanned an entire week, and unfolded in a similar manner in different parts of the city assigned to different units of the armed forces. This pattern indicates that those involved in the crackdown operated under precise rules of engagement.

161. Once confronted with reports of widespread and systematic abuses perpetrated by the armed forces, the civilian and military leadership failed to either suspend the operations or reshape them in a way consistent with international standards.
162. On May 17, 2010, the Thai-language daily *Matichon* reported that officials in the “war room” set up by the Democrat Party were satisfied with the fact that “only” thirty-five people had died up to that point — much lower than the two to five hundred casualties they had expected.<sup>102</sup> That number itself is consistent with the purportedly leaked internal government report that UDD leader Jatuporn Prompan revealed to the press on April 19, 2010, indicating that the military planned to carry out the crackdown over a one-week period, setting the acceptable death toll of the operations at five hundred.<sup>103</sup> Taken together, there is strong indication that the perpetrators acted with both intent and knowledge of the attack in the commission of potential Crimes Against Humanity.

## **ii. Underlying Acts Constituting Potential Crimes Against Humanity According to Article 7 of the Statute**

### **b. Murder**

163. The events in Spring 2010 took the lives of many people. On April 10, 2010, units had carried out a failed attempt to disperse a Red Shirt gathering at the Phan Fa Bridge, resulting in the death of twenty-seven people. In addition, at least fifty-five more people died in the dispersal of the Ratchaprasong rally between May 13 and May 19. By the time the site of the demonstrations was cleared, more than eighty people had died in total. It is submitted that the loss of more than eighty civilians at the hands of the Thai Army during April-May 2010 was a result of the act of murder, an act where the intention of the alleged perpetrators was “to cause the victim serious injury with reckless disregard for human life.”

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<sup>102</sup> *Matichon*, May 17, 2010.

[http://www.matichon.co.th/news\\_detail.php?newsid=1274104360&catid=01](http://www.matichon.co.th/news_detail.php?newsid=1274104360&catid=01).

<sup>103</sup> “Sansern: 500 Terrorists Infiltrating Reds,” *Bangkok Post*, May 14, 2010.

### **c. Imprisonment and Other Severe Deprivation of Physical Liberty**

164. The prolonged detention and the disregard for the due process rights of hundreds of Red Shirts whom the Government prejudged as “terrorists” calls into question the fairness of its probe. Five months since the dispersal of the rallies, hundreds of protesters remain in prolonged arbitrary detention in harsh conditions for violating the Internal Security Act and the Emergency Decree, which the Thai authorities wield in an effort to criminalize legitimate political protest. Furthermore, there are indications that in this situation opponents of the government have been subjected to disappearance even after the end of the demonstrations. In addition, Mr. Abhisit’s investigative committee has no clear mandate to investigate or prosecute the government, while its ability to uncover the truth is hindered by regulations issued under an Emergency Decree that seems likely to remain in effect for much of the duration of the committee’s activities. In conclusion, it is submitted that an indefinite amount of people are being subjected to prolonged arbitrary detention and severe deprivation of physical liberty.

### **d. Political Persecution**

165. It is submitted that supporters of Thaksin Shinawatra and opponents of Thailand’s conservative Establishment have been subjected to political persecution since the 2006 coup. As described in Chapter II, upon seizing power the Thai Generals dissolved the Thai Rak Thai party through retroactive legislation and deprived Thai Rak Thai politicians of their right to seek and hold elected office by disqualifying them from politics for a period of five years. In addition, some leaders of this political party were subjected to selective criminal persecutions. Since then, the Thai people’s basic right to free speech has been aggressively curtailed, while freedom of association and the right to vote have been systematically undermined by the Establishment’s continued reliance on the courts to dissolve legally constituted political parties and overturn the results of competitive elections. These acts clearly amount to political persecution.

166. In addition, the systematic and targeted enforcement of these restrictions against citizens who remain loyal to Dr. Thaksin, who stood in opposition to the coup, and who call for a reduction in the extra-constitutional authority of unelected institutions constitutes discrimination on the basis of political affiliation. Massive restrictions have been placed upon freedom of expression, both in emergency and non-emergency situations, through the imposition of the strictest censorship regime Thailand has witnessed in thirty years. Most recently, the Internal Security Act and the Emergency Decree were enacted, enforced, and maintained in effect for no other purpose than to strip —on purely political grounds — the Abhisit administration’s opponents (but notably not its supporters) of their constitutionally sanctioned right to free speech and free assembly.

#### **e. Conclusion**

167. For the reasons mentioned above, the UDD and others submit that the aforementioned crimes fall within the category of crimes referred to in Article 5 and defined in Articles 6, 7, and 8 of the ICC Statute. Therefore, the UDD and others hold that there is reasonable basis to believe that the requirement of jurisdiction *rationae materiae* has been fulfilled.

### **IX. Conclusion**

168. On the basis of the foregoing, the UDD and others submit that there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed. Therefore, the UDD and others request that the Prosecutor take notice of this Preliminary Investigation into the situation in Thailand in view of a potential future investigation/prosecution on behalf of the ICC. The UDD and others will present a follow-up report to the Prosecutor in approximately eight weeks.