Public Prosecutor, Office of the Attorney General (OAG)

v

Mr Somyot Pruksakasemsuk

Written Comments

of

ARTICLE 19

ARTICLE 19
Free Word Centre
60 Farringdon Road
London EC1R 3GA
UK
Tel: +44 207 324 2500
Fax: +44 207 490 0566
www.article19.org

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I. Introduction

1. ARTICLE 19 respectfully submits this amicus brief for the benefit of the Court's consideration of the salient issues raised by the above-referenced case.

2. The present case before the Court involves the criminal prosecution of Mr Somyot Pruksakasemsuk, editor of the magazine "Voice of the Oppressed" ("Voice of Taksin"), under the *lèse-majesté* law of Thailand, specifically, Section 112 of the Thai Criminal Code on *lèse-majesté* which states: "Whoever defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent shall be punished with imprisonment of three to fifteen years". *Lèse-majesté* is also entrenched in the Thai Constitution, Section 8, which states: "The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action". Furthermore, the 2007 Computer Crimes Act has been used as a law on lèse-majesté.

3. Mr Pruksakasemsuk was arrested and charged under Section 112 of the Thai Criminal Code on *lèse-majesté* on 30 April 2011 and has remained in pre-trial detention since then despite repeated bail requests. As well as being the editor of "Voice of the Oppressed", Mr Pruksakasemsuk is a labour rights activist and is affiliated with the Democratic Alliance of Trade Unions. Indeed, he is well known for his active support of the empowerment of workers and of the right to freedom of association, both in Thailand and internationally. Mr Pruksakasemsuk's arrest and questioning on 30 April came only five days after a press conference he held to launch a campaign to collect 10,000 signatures to petition for parliamentary review and revocation of the *lèse-majesté* law in Thailand, which, he claims, contradicts democratic and human rights principles. Mr Pruksakasemsuk is alleged to have allowed two articles that make negative references to the monarchy to be published in the magazine of which he is the editor.

4. In ARTICLE 19's opinion, the Thai laws on *lèse-majesté*, as specifically embodied in the Constitution and Section 112 of the Criminal Code, violate the right to freedom of expression. This brief argues that these provisions violate the right to freedom of expression as they constitute an unnecessary and disproportionate measure to protect the reputation of members of the Thai royal family. It argues that the prosecution of anyone under these provisions, in particularly in matters of *the public interest* – such as in the case of Mr Pruksakasemsuk, whose prosecution followed soon after his collection of signatures to petition for parliamentary review and revocation of the *lèse-majesté* laws in Thailand – is a particularly serious attack on freedom of expression. In support of these arguments, ARTICLE 19 relies on the decisions and statements of international and regional courts and authorities – including the UN Human Rights Committee and the UN Special Rapporteur on Freedom of Opinion and Expression – specifically on laws of *lèse-majesté*, as well as on restrictions on freedom of expression to protect the reputation of public figures/officials more generally and in relation to "public interest" speech.

5. Whilst ARTICLE 19 is particularly concerned with the case of Mr Pruksakasemsuk, his is one of a number of cases concerning *lèse-majesté* before the Thai courts.[1] International intergovernmental and non-governmental organisations working on freedom of expression

[1] See Letter of Dr Agnès Callamard, ARTICLE 19 Executive Director to Professor Amara Pongsapich on the case of Mr Pruksakasemsuk, 18 November 2011.

issues have expressed alarm at what appears to be a surge in the number of *lèse-majesté* cases in recent years.[2] Such organisations have variously noted that the Thai *lèse-majesté* law contains no exceptions (e.g. proof of truth), contains vague language (e.g. the concept of "insult") and lacks any guidance on arrests and prosecutions. It has been used to prosecute individuals for having defamed or insulted not only the individuals mentioned in Section 112 of the Criminal Code, but also extended family members of the King, the institution of monarchy and the royal anthem. The penalties envisaged under the *lèse-majesté* provisions are very harsh (i.e. a three to fifteen year prison sentence) and greater than those contained in most criminal defamation laws. These *lèse-majesté* provisions are also particularly susceptible to political abuse and have had a particularly grave chilling effect on freedom of expression.

6. The remainder of the amicus is set out as below:

   a. The right to freedom of expression and its permissible limits;

   b. International and regional law, including judicial decisions, on the right to freedom of expression and the permissibility of laws on *lèse-majesté* and other provisions protecting public figures/officials, particularly when an issue of the public interest is involved;

   c. Relevant standards developed by non-governmental organisations.

II. Interest of ARTICLE 19

7. ARTICLE 19 is an independent, international human rights organisation which defends and promotes freedom of expression and freedom of information all over the world. ARTICLE 19 takes its name and mandate from the Universal Declaration of Human Rights, which proclaims the right to freedom of expression, including the right to receive and impart information and ideas.

8. Over the past two decades, ARTICLE 19 has gained significant legal expertise and international experience on protection of this fundamental right. ARTICLE 19 frequently engages in litigation by providing amicus curiae briefs to international, regional or national courts, or directing and/or working with local lawyers to prepare briefs in cases before national courts. ARTICLE 19's briefs, which are based on relevant international human rights law and comparative standards, aim to assist courts to elaborate the specific meaning of freedom of expression in the context of the particular case in a manner which best protects this fundamental human right.[3]

[2] ARTICLE 19's Submission to the UN Universal Periodic Review of the Kingdom of Thailand, Twelfth Session of the Working Group of the Human Rights Council, October 2011 http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/ARTICLE%2019-eng.pdf

[3] A recent example of an ARTICLE 19 amicus brief recently submitted to the domestic courts is that which was submitted in the case of Agnès Uwimana Nkusi and Saïdati Mukabibi in the Supreme Court of Rwanda, October 2011 http://www.article19.org/data/files/medialibrary/2805/Amicus-Nkusi-and-Mukakibibi-English-submitted.pdf

III. Discussion

1. The Right to Freedom of Expression

a. The fundamental importance of freedom of expression

9. The right to freedom of expression is protected by a range of international and regional instruments and constitutional laws around the world. It is guaranteed, most notably, by the Universal Declaration of Human Rights (Article 19), the International Covenant on Civil and Political Rights (Article 19), the American Convention on Human Rights (Article 13), the European Convention on Human Rights (Article 10), as well as the African Charter on Human and Peoples' Rights (Article 9). The most important of these international and regional human rights treaties for Thailand is the International Covenant on Civil and Political Rights (ICCPR) to which Thailand acceded on 29 October 1996. Since accession has the same legal consequences as ratification, Thailand is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that treaty through national implementing measures including legislation and judicial decisions.[4]

10. The right of freedom of expression is crucial for the full development of the human person and the realisation of all other human rights. In General Comment No 34, the Human Rights Committee has stated:

> 2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.
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> 3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.[5]

11. Regional human rights courts have recognised it as an "essential [foundation] of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".[6]

12. ARTICLE 19 recognises that Section 45 of the Thai Constitution affirms "the liberty to express [one's] opinion, make speech, write, print, publicise, and make expression by other means".

b. Freedom of expression can only be restricted in limited circumstances

13. Article 19 of the ICCPR protects the right to freedom of expression in broad terms. Under that provision, States parties are required to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. Notwithstanding the importance of the right to freedom of

[4] Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.
[5] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011 paras 2 and 3.
[6] *Handyside v United Kingdom*, Eur Ct HR, Application No 5493/72, Series A No 24, Judgment of 12 December 1976, 1 EHRR 737, at para 49.

expression, it is not an absolute right and may be restricted in certain circumstances. General Comment No 34 of the UN Human Rights Committee, which was adopted in July 2011, sets out the authoritative view of Committee on Article 19:

> This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.[7]

14. Article 19(3) of the ICCPR indicates that the exercise of freedom of expression carries with it special duties and responsibilities. For this reason, restrictions on the right are permitted to ensure the respect the rights or reputations of others (Article 19(3)(a)), or the protection of national security or of public order (*ordre public*), or of public health or morals (Article 19(3)(b)). However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Human Rights Committee has indicated that the relationship between right and restriction and between norm and exception must not be reversed.[8]

15. Article 19(3) also lays down specific conditions and it is only subject to these conditions that restrictions may be imposed (the "three part test"): *first*, the restrictions must be "provided by law"; *second*, they may only be imposed for one of the grounds set out in Article 19(3)(a) or (b) of the ICCPR; and *third*, they must conform to the strict tests of necessity and proportionality.[9] Restrictions are not allowed on grounds not specified in Article 19(3) of the ICCPR, even if such grounds would justify restrictions to other rights protected in the ICCPR. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[10]

16. Thus, the need to protect the reputation of others may warrant restriction upon an individual's freedom of expression, but only if such a limitation is justified on the grounds that it is provided by law and is necessary. Restrictions must be "necessary" for a legitimate purpose, in the sense that there must be a "pressing social need" for the restriction.[11] The principle of proportionality also has to be respected in the sense that any restriction "must be the least intrusive measure to achieve the intended legitimate objective and the specific interference in any particular instance must be directly related and proportionate to the need on which they are predicated".[12] Proportionality has to be

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[7] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011.
[8] See Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, para 13.
[9] See Human Rights Committee, Communication No 1022/2001, *Velichkin v Belarus*, CCPR/C/85/D/1022/2011, Views adopted on 20 October 2005.
[10] See Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.
[11] *Handyside v United Kingdom*, Eur Ct HR, Application No 5493/72, Series A No 24, Judgment of 12 December 1976, 1 EHRR 737, at para 48.
[12] Human Rights Committee, General Comment No 22, Freedom of Thought, Conscience and Religion (Article 18), CCPR/C/21/Rev.1/Add.4, para 8.

respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.[13]

2. Laws on *lèse-majesté* violates right to freedom of expression

17. ARTICLE 19 submits that *any* law on *lèse-majesté* violates freedom of expression because it cannot meet the criteria for permissible restrictions indicated in the above section. More specifically, ARTICLE 19 submits that any law on *lèse-majesté* does not meet the specific criteria of Article 19 paragraph 3 of the ICCPR because it constitutes an unnecessary and disproportionate means of providing adequate protection for the reputation of individuals, including members of royal families and other public figures. In support of the case against *lèse-majesté* laws, ARTICLE 19 relies on the decisions and statements of international and regional courts and authorities in support the argument that laws on *lèse-majesté* are specifically in contravention with freedom of expression.

a. International human rights authorities

18. International human rights authorities – most notably the Human Rights Committee, the treaty body which authoritatively interprets the scope of states' obligations under the ICCPR – have on numerous occasions expressed their concern that laws on *lèse-majesté* do not meet the standards of Article 19 paragraph 3 of the ICCPR. Significantly, the criticisms of the laws on *lèse-majesté* in Thailand specifically have grown recently.

19. In September 2011, in General Comment No 34, the Human Rights Committee indicated generally its concern about that laws on *lèse-majesté* provide for harsher penalties simply on the basis of the identity of the person claiming defamation.

> [T]he Committee expresses concern regarding laws on such matters as, lese majesty,[14] desacato,[15] disrespect for authority,[16] disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials,[17] and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.[18]

20. In its jurisprudence, the Human Rights Committee has held that there were violations of Article 19 of the ICCPR in the joint cases of a number of individuals who were directly charged with the offence of *lèse-majesté* in Togo.[19] The Committee in the case of *Aduayom, Diasso and Dobou v Togo* stated:

> The Committee observes that the freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies

[13] Human Rights Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, paras 14 and 15. See also Human Rights Committee, Communications No 1128/2002, *Marques v Angola* CCPR/C/83/D/1128/2002, Views adopted on 29 March 2005; Human Rights Committee, Communication No 1157/2003, *Coleman v Australia* CCPR/C/87/D/1157/2003, Views adopted 17 July 2006.
[14] See communications Nos. 422-424/1990, *Aduayom et al v Togo*, Views adopted on 30 June 1994.
[15] Concluding observations on the Dominican Republic (CCPR/CO/71/DOM).
[16] Concluding observations on Honduras (CCPR/C/HND/CO/1).
[17] See concluding observations on Costa Rica (CCPR/C/CRI/CO/5), para 11.
[18] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011 para 38.
[19] Communication No 422-424/1990 *Aduayom, Diasso and Doubou v Togo*, Views adopted on 12 July 1996.

> that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3. On the basis of the information before the Committee, it appears that the authors were not reinstated in the posts they had occupied prior to their arrest, because of such activities. The State party implicitly supports this conclusion by qualifying the authors' activities as "political offences", which came within the scope of application of the Amnesty Law of 11 April 1991; there is no indication that the authors' activities represented a threat to the rights and the reputation of others, or to national security or public order (article 19, paragraph 3). In the circumstances, the Committee concludes that there has been a violation of article 19 of the Covenant.[20]

21. On 10 October 2011, the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression urged Thailand to urgent amend the laws on *lèse-majesté*. The UN Special Rapporteur stated:

> I urge Thailand to hold broad-based public consultations to amend section 112 of the penal code and the 2007 Computer Crimes Act so that they are in conformity with the country's international human rights obligations... The recent spike in lèse majesté cases pursued by the police and the courts shows the urgency to amend them... The threat of a long prison sentence and vagueness of what kinds of expression constitute defamation, insult, or threat to the monarchy, encourage self-censorship and stifle important debates on matters of public interest, thus putting in jeopardy the right to freedom of opinion and expression... This is exacerbated by the fact that the charges can be brought by private individuals and trials are often closed to the public... The Thai penal code and the Computer Crimes Act do not meet [the] criteria [of Article 19 paragraph 3 of the ICCPR]. The laws are vague and overly broad, and the harsh criminal sanctions are neither necessary nor proportionate to protect the monarchy or national security.[21]

22. This statement echoes the Special Rapporteur's earlier comments about the problematic nature of the Thai provisions on *lèse-majesté*.[22] In an Addendum to his annual report to the UN Human Rights Council in 2011, the Special Rapporteur stated:

> 2155. The Special Rapporteur would like to express his ongoing concerns regarding restrictions to the right to freedom of opinion and expression in Thailand, mainly through the Emergency Decree, the *lese majesté* law (as set out in article 112 of the Penal Code), and Computer-related Crimes Act of 2007. Despite his concerns raised in his communication of 16 April 2010, he regrets that access to tens of thousands of websites continues to be blocked on the grounds of national security and breaches of

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[20] Ibid at para 7.4.

[21] OHCHR Press Release, "Thailand / Freedom of expression: UN expert recommends amendment of lèse majesté laws" 10 October 2011 http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11478&LangID=E

[22] On 1 October 2010, the Special Rapporteur had together with the Special Rapporteur on the situation of human rights defenders, sent a letter of allegation concerning numerous arrests and charges against Ms Chiranuch Premchairporn, editor of Prachatai, an online news media portal and advocate for freedom of expression and freedom of the media and actively involved in the "Citizen Net" network. On 6 March 2009, Ms Premchairporn was arrested under the Computer Crimes Act for having allowed readers to post comments on Prachatai's online discussion forum that allegedly defamed the King of Thailand. On 31 March 2010, she was arrested again for the same offence but with the additional charge of violating the *lèse-majesté* provision in the Criminal Code, Section 112. The Special Rapporteurs expressed concerning regarding the law on *lèse-majesté* which "unduly limits the right of all individuals to peaceful freedom of expression". Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Addendum, Summary of cases transmitted to Governments and replies received, A/HRC/17/27/Add.1, 27 May 2011 paras 2146-2150.

> the lese majesté law. The Special Rapporteur also expresses his serious concern regarding recent increase in the number of lese majesté cases reportedly being investigating by the police and accepted by the courts, leading to a broader chilling effect on the right to freedom of expression.
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> 2156. While the Special Rapporteur appreciates the replies received from the Government of Thailand to justify the necessity of the lese majesté law, he remained concerned that there are insufficient guarantees to ensure that the right to freedom of expression is not unduly and arbitrarily restricted, and that there are disproportionate penalties imposed, both of which leads to a broader chilling effect on the right to freedom of expression in the country, including in the academia. The Special Rapporteur thus urges the Government to consider repealing or amending the problematic provisions to bring them into conformity with international human rights standards on the right to freedom of opinion and expression.[23]

23. Thailand's provisions on *lèse-majesté* were specifically criticised during the recent universal periodic review of Thailand at the Human Rights Council.[24] Indeed, there were eight specific recommendations concerning these provisions in the review of Thailand.[25] In its response to the review, the Thai government indicated that the recommendations on the *lèse-majesté* laws "did not enjoy [its] support." More specifically, the government stated that the *lèse-majesté* law is "a highly sensitive issue that concerns the security and unity of the nation", a "matter regarded as part of our domestic affairs, for which the Thai people will find an appropriate approach".[26] It stated that the "Thai Government has already stated that it would not take the initiative on review or amendment of the *lèse-majesté* law as the law does not aim to restrict the legitimate right of all persons to freedom of opinion and expression".[27] Furthermore, "the existence of the provisions on *lèse-majesté* law is indispensable for Thailand as it aims to protect the King as the Head of State, which is normal practice for any country under constitutional monarchy. Thailand is therefore unable to accept such recommendation to repeal the law".[28]

24. Beyond these specific statements on laws on *lèse-majesté* and the law in Thailand in particular, international human rights authorities have emphasised that speech concerning public figures (including heads of state) attracts a high level of protection. Notably, in General Comment No 34, the Human Rights Committee

> observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.[29] Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant.[30] Moreover, all public figures, including those exercising the highest political authority such

[23] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Addendum, Summary of cases transmitted to Governments and replies received, A/HRC/17/27/Add.1, 27 May 2011 paras 2155-2156.
[24] Report of the Working Group on the Universal Periodic Review, Thailand, A/HRC/19/8, 8 December 2011.
[25] United Kingdom, France (two), Norway (two), Slovenia, Spain, Canada.
[26] Report of the Working Group on the Universal Periodic Review, Thailand, A/HRC/19/8/Add.1, 6 March 2012, paras 89.51.
[27] Ibid paras 89.52, 89.57, 89.59.
[28] Ibid para 89.58.
[29] See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.
[30] Ibid.

as heads of state and government, are legitimately subject to criticism and political opposition.[31]

25. Significantly, the Committee goes on state that public interest should present a defence to defamation actions and in doing so affirms that speech concerning public figures which is of public interest enjoys the very highest protection. The Committee also warns against harsh penalties, recommends the decriminalisations of defamation and states that imprisonment is never appropriate as a penalty. The Committee states:

> Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression...At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties...States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.[32]

26. The UN Special Rapporteur on Freedom of Opinion and Freedom of Expression has long emphasised the importance of protecting "public interest speech". For instance, in his 2001 report, the Special Rapporteur stated:

> 47. In the light of the cases received this year, the Special Rapporteur would like to reiterate the recommendations made in his previous report (E/CN.4/2000/63 para. 52) and to urge Governments to:
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> a. Repeal criminal defamation laws in favour of civil laws;
> b. Limit sanctions for defamation to ensure that they do not exert a chilling effect on freedom of opinion and expression and the right to information;
> c. Prohibit government bodies and public authorities from bringing defamation suits with the explicit purpose of preventing criticism of the Government or even of maintaining public order;
> d. Ensure that defamation laws reflect the importance of open debate on matters of public interest and the principle that public figures are required to tolerate a greater degree of criticism than private citizens...[33]

b. Regional human rights authorities

i. Inter-American Commission and Court on Human Rights

27. The Inter-American legal framework arguably provides the greatest scope of regional protection for freedom of expression. Although the issue of *lèse-majesté* has not been addressed as such by the Inter-American Commission or Inter-American Court on Human Rights, these institutions have adopted highly relevant jurisprudence on the issue. It is

[31] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011 para 38.
[32] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011 para 47.
[33] 13 February 2001, E/CN.4/2001/64.

recalled that Article 13(1) of the ACHR guarantees the right which includes the right to "seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." Article 13(2) prohibits prior censorship, but provides that the right may be limited if it is "established by law" and "to the extent necessary to ensure (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals".

28. The Inter-American Commission on Human Rights in support of the Special Rapporteur on Freedom of Expression adopted a "Declaration of Principles on Freedom of Expression".[34] This included the following statement:

> 10...The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated or acted with gross negligence in efforts to determine the truth or falsity of such news.
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> 11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "desacato laws", restrict freedom of expression and the right to information.

29. The OAS Special Rapporteur's report on " 'Desacato' Laws and Criminal Defamation" also states:

> 17. In its previous reports the Office of the Special Rapporteur has mentioned its concern over the use of laws on criminal defamation, including slander and libel, for the same purpose as *desacato* laws. Generally speaking, these defamation classifications refer to the false imputation of criminal offences or of expressions that damage the honor of the person. In the Hemisphere, practice has shown that many public officials resort to the use of such norms as a mechanism to deter criticism. As the Office of the Special Rapporteur has said in previous reports, "the possibility of abuse of such laws by public officials to silence critical opinions is as great with this type of law as with *desacato* laws...
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> 20. The intention here is not to deny that persons in public office have honor, but that its possible injury is outweighed by another right – in this case freedom of expression to which society gives precedence. At all events, attacks on the honor and reputation of persons can be protected by means of civil sanctions, provided they are proportional and take actual malice into consideration.[35]

30. In a series of cases the Inter-American Court on Human Rights (IACtHR) has found that criminal sanctions and criminal proceedings constitute an unjustified violation of freedom of expression, notably in cases where the defamed party was a public official. Members of the IACtHR have been extremely critical of the impact of criminal defamation laws on the exercise of freedom of expression. The IACtHR has consistently held that criminal defamation suits and the sanctions resulting from a conviction for criminal defamation are unnecessary and disproportionate, and are, therefore, an illegal

[34] Approved by the Inter-Am Comm HR at its 108th regular session of 19 October 2000 http://www.iachr.org/declaration.htm
[35] See http://cidh.oas.org/relatoria/showarticle.asp?artID=442&IID=1

restriction on freedom of expression particularly when the statement concerns a person engaged in public activities.[36]

31. In *Kimel v Argentina*, the IACtHR emphasised that:

> Criminal Law is the most restrictive and harshest means to establish liability for an illegal conduct. The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary, appropriate, and last resort or ultima ratio intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them.[37]

32. According to the IACtHR, statements on matters of *public interest*, particularly those that hold a public institution accountable, deserve special protection because they are essential to enabling democracy. The IACtHR has indicated that a greater margin of tolerance should be shown towards statements and opinions on matters of the public interest on numerous occasions. In *Canese v Paraguay*, the IACtHR reiterated the need for greater tolerance and latitude towards statements and opinions concerning public officials stating:

> Democratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration for which there should be a reduced margin for any restriction on political debates or debates on matters of public interest.[38]

33. The different threshold is because the activities of these figures are a matter of public interest and debate which is crucial to the functioning of a democratic state. The IACtHR stated in *Canese v Paraguay* that:

> in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest ... is essential for the functioning of a truly democratic system. The same principle applies to opinions and statements of public interest made with regard to an individual who stands as candidate for the presidency of the Republic, thereby voluntarily laying himself open to public scrutiny, and to matters of public interest about which society has a legitimate interest to keep itself informed and to know what influences the functioning of the State, affects general interests or rights, or entails important consequences.[39]

34. In *Canese v Paraguay*, the IACtHR found not only that the criminal conviction was unjustified, but also that the criminal proceedings were an unjustified restriction on Mr Canese's right to freedom of expression. They constituted "unnecessary and excessive punishment" and limited "the open debate on topics of public interest or concern". It was observed that:

> [T]here was no imperative social interest that justified the punitive measure, because the freedom of thought and expression of the alleged victim was restricted

[36] Case of *Palamara Iribarne v Chile*, Inter-Am Ct HR, Judgment of 22 November 2005, Ser C No 135.
[37] Case of *Case of Kimel v Argentina (Merits, Reparations and Costs),* Inter-Am Ct HR, Judgment of 2 May 2008 Series C No 177, para 76.
[38] Case of *Canese v Paraguay supra* note 16, para 97. See also Case of *Palamara Iribane v Chile, supra* note 36, para 83; Case of *Herrera-Ulloa v Costa Rica*, Inter-Am CtHR, Judgment of 2 July 2004, Series C No 107, para 127.
[39] Case of *Canese v Paraguay supra* note 38, para 98.

> disproportionately, without taking into consideration that his statements referred to matters of public interest.[40]

35. In *Kimel*, the IACtHR actually ordered the state to amend its criminal defamation laws. Although it left open the possibility of criminal sanctions, the Court emphasised that such sanctions could only be used in the narrowest circumstances possible.

> The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary and appropriate, and last resort or ultima ratio intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State.[41]

36. The IACtHR emphasised the importance of confining the application of criminal laws to "serious" infringements of another fundamental right and of ensuring proportionality "to the seriousness of the damage caused".[42] Although not entirely ruling out any criminal sanction entirely, it made clear that this was only to be used exceptionally. The possibility of criminal sanctions should be "carefully analysed" considering:

> The extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception.[43]

37. In *Donoso v Panama*, the IACtHR found that Panama had violated the right to freedom of expression in imposing a criminal sanction. The IACtHR stated that "greater protection" must be awarded to speech that relates to public officials, because of the public interest in their activities. Whilst the IACtHR did not reject criminal sanctions altogether, it noted that the imposition of day fines unnecessary.[44]

ii. European Court on Human Rights

38. In 2011, the ECtHR delivered a particularly relevant judgment in the case of *Otegi Mondragon v Spain* on freedom of expression and the protection of the reputation of the monarch. In this case, the ECtHR held that an elected representative's conviction for causing serious insult to the King of Spain was contrary to his freedom of expression. The remarks had not been a gratuitous personal attack against the King, nor did they concern his private life. Although the ECtHR acknowledged that Otegi Mondragon's comments may have been considered provocative, it reiterated that that it was permitted, in the context of a debate of general interest, to have recourse to a degree of exaggeration or even provocation. The ECtHR held that the King, being a symbol of the State, cannot be shielded from legitimate criticism as this would amount to an over-protection of Heads of State in a monarchical system. It observed that the comments of Otegi Mondragon only concerned the King's institutional responsibility as Head of State and a symbol of the State apparatus as well as of the forces which, according to Otegi Mondragon, had tortured the editors of a local newspaper. These comments had been

[40] Case of *Canese v Paraguay supra* note 38, para 106.
[41] Case of *Kimel v Argentina*, *supra* note 37, para 76.
[42] Case of *Kimel v Argentina*, *supra* note 37, para 77.
[43] Case of *Kimel v Argentina*, *supra* note 37, para 78.
[44] Case of *Tristán Donoso v Panama* (Preliminary Objection, Merits, Reparations and Costs), Inter-Am Ct HR, Judgement of 27 January 2009 Series C No 193, paras 115 and 129.

made in a public and political context that was outside the "essential core of individual dignity" of the King. The ECtHR emphasized that a prison sentence imposed for an offence committed in the area of political discussion was compatible with freedom of expression only in extreme cases, such as the incitement to violence, and nothing in Otegi Mondragon's case justified such a sentence. His conviction and sentence were held to be disproportionate.[45]

39. Significantly, in delivering its judgment, the ECtHR affirmed that the principles of its earlier case-law on the issue of over-protection of Heads of State were valid for a monarchical system such as Spain's where the sovereign held a unique institutional position.[46]

40. The ECtHR has also developed a more general "public status doctrine" through its jurisprudence on defamation proceedings brought by public officials, which include but are not limited to, politicians. The jurisprudence of the ECtHR suggests that the Strasbourg court will apply an especially high level of scrutiny of any restriction or penalty imposed through criminal sanction for defamation, particularly where a public figure or public official complains that he or she has been defamed. Persons involved in activities that fall within the domain of public interest should have a greater tolerance and openness to criticism. This reflects the principle of the ECtHR that a public official who "lays himself open to close scrutiny of his every word and deed" must show a "greater degree of tolerance".[47]

41. In *Lingens v Austria*, the applicant was convicted of criminal defamation when he accused the Austrian Chancellor of "the basest opportunism" and of acting in an "immoral" and "undignified" manner. The ECtHR held unanimously that the conviction was a disproportionate restriction on freedom of expression, relying on the principle that politicians must tolerate a greater extent of criticism than private individuals.[48] Moreover, the criminal sanction was all the more disproportionate because the applicant was required to prove the truth of his value-judgments in relation to matters of political concern. In doing so, the ECtHR emphasised that the impugned "articles dealt with political issues of public interest in Austria which had given rise to many heated discussions concerning the attitude of Austrians in general - and the Chancellor in particular - to National Socialism and to the participation of former Nazis in the governance of the country".[49]

42. The ECtHR noted that the conviction:

> amounted to a kind of censure which would be likely to discourage him from making criticisms of this kind again in the future ... In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[50]

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[45] *Affaire Otegi Mondragon v Spain*, Eur Ct HR, App No 2034/07, Judgment (in French only) of 15 March 2011. See also press release No 214 of 15.03.2011 of Registrar of European Court of Human Rights.
[46] *Colombani and Others v France*, Eur Ct HR, App No 51279/99, Judgment of 25 June 2002; *Pakdemirli v Turkey*, Eur Ct HR, App No 35839/97, Judgment of 22 February 2005.
[47] *Dichand et al v Austria*, Eur Ct HR, App No 29271/95, Judgment of 26 February 2002, para 39.
[48] *Oberschlick v Austria* (No 2) Eur Ct HR, App No 20834/92 (1997) 25 EHRR para 33.
[49] *Lingens v Austria*, Eur Ct HR, App No 9815/82, (1986) 8 EHRR 407, para 43.
[50] *Lingens v Austria*, Eur Ct HR, App No 9815/82, (1986) 8 EHRR 407, para 44.

43. In *Dabrowski v Poland*, a journalist was convicted of defamation after publishing newspaper articles reporting criminal proceedings against a local politician, a mayor. In finding a violation of Article 10 on freedom of expression, the ECtHR gave special weight to the journalist's entitlement to a certain degree of exaggeration, and to the expectation that that the mayor, as a public figure, should have displayed a greater degree of tolerance to critical comments, some of which were classified as value-judgments not devoid of a factual basis.[51]

44. In *Raichinov v Bulgaria*, the ECtHR noted that the victim of the insult was a high-ranking public official, the "bounds of acceptable criticism" geared toward him were wider than in relation to a private individual (although they were not "limitless"). The ECtHR accepted that he "needed to enjoy confidence in conditions free of undue perturbation when on duty" but the "need to ensure that civil servants enjoy public confidence in such conditions can justify an interference with the freedom of expression only where there is a real threat in this respect" (emphasis added). In the circumstances the ECtHR found that there were "no sufficient reasons" for the interference with the right to freedom of expression and the restriction "failed to answer any pressing social need and could not be considered necessary in a democratic society.[52]

45. In the case of *Plon Society v France*, the ECtHR ruled that a book publishing medical information of the French President which revealed that he had been hiding his terminal medical condition from the public was in the public interest. The ECtHR stated:

> The Court considers that the book was published in the context of a wide-ranging debate in France on a matter of public interest, in particular the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office. Furthermore, the secrecy which President Mitterrand imposed, according to the book, with regard to his condition and its development, from the moment he became ill and at least until the point at which when the public was informed (more than ten years afterwards), raised the public-interest issue of the transparency of political life.[53]

46. In the case of *Mamere v France* the ECtHR considered that "the eminent value of freedom of expression, especially in debates on subjects of general concern, cannot take precedence in all circumstances over the need to protect the honour and reputation of others, be they ordinary citizens or public officials."[54]

3. Advocacy of non-governmental organisations

a. ARTICLE 19

47. As noted earlier, non-governmental organisations working on freedom of expression issues have been alert to and have increasingly expressed their alarm in relation to the growing number of *lèse-majesté* cases in Thailand over recent years.

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[51] *Dabrowski v Poland*, Eur Ct HR, App No 18235/02, Judgment of 19 December 2006.
[52] *Raichinov v Bulgaria*, Eur Ct HR, App No 47579/99, (2008) 46 EHRR 28, para 52.
[53] *Edition Plon v France*, Eur Ct HR, App No 58148/00, Judgment of 18 May 2004 at para 44.
[54] *Mamere v France*, Eur Ct HR, App No 12697/03, para 27.

48. ARTICLE 19 has long campaigned against the provisions on *lèse-majesté* in Thai law. In its submission to the UN Human Rights Council's universal periodic review of Thailand, ARTICLE 19 criticised the use of *lèse-majesté* laws to silence critics in Thailand.[55] ARTICLE 19 stated:

> 10. Since the military coup in 2006, there has been a sharp increase in *lèse-majesté* charges, frequently used to silence oppositional voices in the name of protecting the royalty. The *lèse-majesté* law is often used in conjunction with the 2007 Computer Crime Act to restrict expression on the internet. Examples include:
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> - Daranee Charnchoengsilpakul was convicted for making anti-royalty speeches at UDD rallies in 2008. She petitioned against the judge's decision to hold her case behind closed doors for national security reason, claiming it contravened the constitutional provision for an open trial. The Criminal Court declined to forward her petition to the Constitution Court and sentenced her to 18 years in prison on 28 August 2009. Daranee then took the case to the Appeals Court, which ruled in her favour and annulled the jail sentence on 9 February 2011. The case is pending the Constitution Court's ruling.
>
> - In the Prachatai case mentioned in the previous section, its editor is also separately charged for violating *lèse-majesté* in addition to the CCA.
>
> - Suwicha Thakhor, a Thai blogger, was sentenced to ten years in jail on 3 April 2009 for posting an image on the internet that was deemed to have insulted the royal family. He was found guilty of violating both the lèse majesté law and the CCA. He was eventually released on 28 June 2010 on royal pardon.
>
> - A number of foreign writers have also been accused of *lèse-majesté*, including Australian writer Harry Nicolaides, Thai-British academic Giles Ji Ungpakorn, and BBC Southeast Asia correspondent Jonathan Head.[56]

49. More generally, ARTICLE 19 has argued against defamation laws providing "special protection" for public figures or officials on the basis of *Defining Defamation: Principles on Freedom of Expression and the Protection of Reputation*.[57] Principle 8 of those principles states:

> Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status. This Principle embraces the manner in which complaints are lodged and processed, the standards which are applied in determining whether a defendant is liable and the penalties which may be imposed.

50. These *Principles* also propose the following definition of the "public interest" which broadly encompasses information about public officials and public figures which is important to matters of public concern.

> ... "matters of public concern" is defined expansively to include all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of

[55] ARTICLE 19's Submission to the UN Universal Periodic Review of the Kingdom of Thailand, Twelfth Session of the Working Group of the Human Rights Council, October 2011 http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/ARTICLE%2019-eng.pdf

[56] Ibid.

[57] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London, July, 2000).

power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.[58]

51. These principles have been supported by a diversity of actors, including the UN Special Rapporteur.[59]

b. Other non-governmental organisations

52. A diversity of other international non-governmental organisations have also strongly criticised the *lèse-majesté* law in Thailand, including in its application to Mr Pruksakasemsuk, through a range of advocacy statements and releases.

53. On 15 November 2011, a coalition of organisations issued a letter calling on the Thai authorities to immediately drop all charges against Mr Pruksakasemsuk.[60] This coalition encompassed Front Line Defenders, Protection International, Clean Clothes Campaign, Asian Forum on Human Rights and Development (FORUM-ASIA), International Federation for Human Rights (FIDH), World Organisation against Torture (OMCT), Lawyers' Rights Watch – Canada (LRWC) and Southeast Asia Press Alliance (SEAPA). In the letter, the organisations expressed their alarm at "the escalating cases of using lèse majesté law against human rights defenders and dissidents in the years following the military coup d'etat in 2006". The letter called on all the Thai authorities

> 1. Immediately drop all charges against Somyot Prueksakasemsuk, or else, grant him the right to bail in accordance with fair trial standards under domestic and international law;
>
> 2. Review the lèse majesté law to ensure its conformity with Thailand's international human rights obligations, as recommended by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and immediately drop all charges against human rights defenders based on these laws;
>
> 3. Guarantee in all circumstances that all human rights defenders in Thailand, especially those working on freedom of expression, are able to carry out their legitimate human rights activities without fear of reprisals and free of all restrictions, including judicial harassment.

54. The world's biggest and most influential human rights organisations have also taken a strong stance against the *lèse-majesté* law in Thailand.

55. Notably, Human Rights Watch has produced a number of very critical statements on the *lèse majesté* laws of Thailand.[61] Two recent releases indicated the harshness of the application of *lèse majesté* provisions by highlighting the Thai courts' regular refusal of bail for people charged with *lèse-majesté*[62] and misuse of the *lèse-majesté* law for political reasons.[63] In an August 2011 letter to Prime Minister Yingluck Shinawatra, the Executive Director of the Asia Division, Brad Adams, noted:

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[58] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* July 2000 (London) http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf

[59] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 13 February 2001, E/CN.4/2001/64.

[60] http://www.frontlinedefenders.org/files/ua_-_thailand_-_somyot_prueksakasemsuk_-_pm_-_15.11.2011.pdf

[61] http://www.hrw.org/asia/thailand

[62] Human Rights Watch, "Courts denying bail in *lese majeste* cases" 24 February 2012 http://www.hrw.org/news/2012/02/24/thailand-courts-denying-bail-lese-majeste-cases

[63] Human Rights Watch, "Thailand: End Harsh Punishments for *Lese Majeste* Offences" 3 December 2011 http://www.hrw.org/news/2011/12/02/thailand-end-harsh-punishments-lese-majeste-offenses

> Thai authorities use the Computer Crimes Act and article 112 of the penal code on *lese majeste* (insulting the monarchy) to enforce online censorship and persecute dissidents, particularly those connected with the UDD, accusing them of threatening national security. The National Human Rights Commission estimates that there were more than 400 *lese majeste* cases in 2010, nearly a threefold increase from the 164 cases in the previous year.
>
> Often those charged with *lese majeste* offenses are denied bail and remain in prison for several months awaiting trial. In a number of cases, these trials have been closed to the public. Particularly harsh punishments have been delivered by the court in several instances, such as the cases of Darunee Charnchoensilpakul, who was sentenced to 18 years' imprisonment, and Tanthawut Taweewarodomkul, who received a 13-year prison term.

56. The letter went on to urge the Thai authorities to:

> End all restrictions on the media that violate the right to freedom of expression, and announce a concrete plan to revoke such laws such as the Emergency Decree on Public Administration in Emergency Situation, the Computer Crimes Act, and the laws regarding *lese majeste*.[64]

57. Amnesty International's *Annual Report for 2011 on the State of the World's Human Rights* highlighted the following in relation to Thailand:

> The Ministry of Information, Communication and Technology announced in June that it had blocked access in Thailand to 43,908 websites on grounds that they violated the lèse majesté law and national security.
>
> At least five cases were brought under the Computer-related Crimes Act for content deemed offensive to the monarchy and/or a threat to national security, bringing the total to 15 since the Act was promulgated in 2007.[65]

58. In its influential *Freedom in the World Report 2011*, Freedom House strongly criticised the increasing application of *lèse-majesté* provisions in Thailand.[66] The report stated:

> The past two years have featured a surge in use of the country's *lèse-majesté* laws to stifle freedom of expression. The laws prohibit defamation of the monarchy, but the authorities have increasingly used them to target activists, scholars, students, journalists, foreign authors, and politicians who are critical of the government, exacerbating self-censorship. Some of the accused face decades in prison for multiple counts, while others have fled the country. The CRES, the Defense Ministry, and the Ministry of Information and Communication Technology were the prime enforcers of *lèse-majesté* laws in 2010.[67]

59. The application of provisions on *lèse-majesté* was one of principal reasons why Thailand's standing in the world had fallen according to Freedom House. The organisation stated:

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[64] Human Rights Watch letter to Prime Minister Yingluck Regarding Your Government's Human Rights Agenda, 15 August 2011 http://www.hrw.org/news/2011/08/15/human-rights-watch-letter-prime-minister-yingluck-regarding-your-governments-human-r See also Human Rights Watch, World Report 2012: Thailand http://www.hrw.org/world-report-2012/world-report-2012-thailand

[65] http://www.amnesty.org/en/region/thailand/report-2011

[66] Freedom House has also issued a number of "Freedom Alerts" in relation to the application of the *lèse-majesté* law in specific cases, namely Joe Gordon, Surapak Puchaieseng and Lerpong Wichaikhammat. See http://www.freedomhouse.org/country/thailand

[67] http://www.freedomhouse.org/report/freedom-world/2011/thailand

Thailand received a downward trend arrow due to the use of violence in putting down street protests in April and May 2010, and the coercive use of *lèse-majesté* laws and emergency powers to limit freedom of expression and personal autonomy.

IV. Conclusions

60. **On the basis of the above arguments, we respectfully submit that the Court should dismiss all charges against Mr Pruksakasemsuk and order his unconditional release from detention. In doing so, the Court should recommend that all *lèse-majesté* provisions should be constitutionally reviewed by the Thai Constitutional Court and repealed by the Thai legislature.**

Dated: 24 April 2012

Respectfully submitted,

For ARTICLE 19

Sejal Parmar

Senior Legal Officer

ARTICLE 19

The person to contact about this amicus curiae brief is Dr Sejal Parmar, Senior Legal Officer, ARTICLE 19 at +44 20 7324 2500 or email: sejal@article19.org.