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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session, 21-25 August 2017

Opinion No. 51/2017 concerning Sasiphimon Patomwongfangam (Thailand)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed that mandate and most recently extended it for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 31 March 2017 the Working Group transmitted to the Government of Thailand a communication concerning Sasiphimon Patomwongfangam. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Sasiphimon Patomwongfangam is a Thai national. Her usual place of residence was the city of Chiang Mai, Thailand.

5. The source reports that on 27 September 2014, a group of Facebook users in Chiang Mai filed a complaint to the police, accusing the user of a Facebook account named "Rungnapha Khamphichai" of posting messages deemed to be offensive to the Thai monarchy.

6. The source also reports that on 29 September 2014, police officers interrogated a woman named Rungnapha and concluded that she had nothing to do with the alleged posting of messages. The police officers believed that Rungnapha could have been set up by Ms. Sasiphimon, with whom she happened to have a personal conflict.

7. According to the source, on the morning of 30 September 2014, police officers dressed in plain clothes went to Ms. Sasiphimon's home in Chiang Mai with a search warrant related to a lese-majesty investigation. The officers seized her computer and two mobile phones and took her to a Chiang Mai police station. At the police station, the police showed her a computer screenshot of Facebook messages under the account name of "Rungnapha Khamphichai" and asked her to sign a paper to confirm that she had previously seen those messages. Ms. Sasiphimon believed that the paper she was signing only acknowledged that she had seen the messages and nothing more. However, the document she had signed was a confession that she had committed a lese-majesty offence, for which she would later be charged. Ms. Sasiphimon was then released. She did not have access to a lawyer and was not informed of that right by the police.

8. The source reports that in early February 2015, the police in Chiang Mai summoned Ms. Sasiphimon to the police station to sign another document. On 13 February 2015, she reported to the police station, as instructed, and the police informed her that they had charged her with lese-majesty for posting on Facebook six strongly worded messages directed at the King.

9. On the same day, the police took Ms. Sasiphimon to Chiang Mai Military Court to request a pretrial detention order. The court refused to grant her bail on the grounds that she was a flight risk. Ms. Sasiphimon had no access to a lawyer during her initial detention. After two weeks of detention at Chiang Mai Women's Correctional Institute, the police filed another lese-majesty charge in connection with one additional Facebook message allegedly posted by Ms. Sasiphimon.

10. On 9 June 2015, during a closed-door hearing when Chiang Mai Military Court formally presented the lese-majesty charges, Ms. Sasiphimon claimed her innocence. However on 7 August 2015, Ms. Sasiphimon decided to make a guilty plea, based on the advice from her legal counsel. As a result, the court immediately sentenced Ms. Sasiphimon to 28 years in prison on seven counts of lese-majesty.

11. The source adds that the relevant legislation applied when sentencing Ms. Sasiphimon was section 112 of the Penal Code, in which it is stated that whoever defames, insults or threatens the King, the Queen, the Heir Apparent or the Regent shall be punished with imprisonment of 3 to 15 years. Furthermore, the court applied section 87 (6) of the Criminal Procedure Code, in which it is stated that in the case of an offence punishable by a maximum term of imprisonment of not less than 10 years, irrespective of whether the offence is also punishable by a fine, the court shall be permitted to order several successive detentions not exceeding 12 days each and with the total period not exceeding 84 days. The source clarifies that after a formal charge and a thorough trial, depending on the readiness of the prosecution and the defence, the caseload of the court, and the nature of the evidence, detention may last for one to two years before a verdict and for up to six years before an appellate review by the Supreme Court.

12. In addition to the legislation cited above, the court cited section 14 (3) of the Computer Crimes Act, which provides that any person committing an offence involving the importing to a computer system of any computer data related to an offence against the

Kingdom's security under the Penal Code shall be subject to imprisonment for not more than five years or a fine of not more than 100,000 baht or both.

13. The source submits that Ms. Sasiphimon's deprivation of liberty is arbitrary under category II and III of the categories applicable to cases under consideration by the Working Group.

14. In relation to category II, the source argues that Ms. Sasiphimon's ongoing deprivation of liberty is arbitrary because it results from the exercise of rights or freedoms guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to which Thailand is a State party. In article 19 of the Universal Declaration of Human Rights, it is stated that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." In article 19 (2) of the Covenant, it is stated that: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

15. In relation to category III, the source submits that the non-observance of the international norms relating to the right to a fair trial guaranteed by article 14 of the Covenant is of such gravity that it gives the deprivation of liberty of Ms. Sasiphimon an arbitrary character.

16. More specifically, the source points out that Ms. Sasiphimon was not informed promptly and in detail of the nature and reason of the charge brought against her and did not have adequate time for preparation of her defence. She was also denied her right to receive legal assistance during the police interrogation, and not to be compelled to testify against herself or to confess her guilt. Those rights are guaranteed by article 14 (3) (a, b and g) of the Covenant, respectively.

17. In addition, the source submits that the trial that resulted in Ms. Sasiphimon's 28-year prison sentence was conducted behind closed doors by a military court, in violation of article 14 (1) and (5) of the Covenant. As a result of the declaration of martial law on 20 May 2014 by the Royal Thai Army and of the issuance of announcement 37/2014 on 25 May 2014 by the National Council for Peace and Order, military courts assumed jurisdiction over lese-majesty cases for offences committed on or after 25 May 2014. The source advises, in that connection, that between 25 May 2014 and 25 February 2016 Thai military courts tried 24 lese-majesty defendants and sentenced them to prison terms, including Ms. Sasiphimon.

18. The source also reports that as a result of the declaration of martial law and in accordance with section 61 of the Military Court Act, of 1955, individuals who allegedly committed lese-majesty offences between 25 May 2014 and 31 March 2015 have no right to appeal the decision made by a military court. The source points out that article 14 (5) of the Covenant stipulates that everyone convicted of a crime has the right "to his conviction and sentence being reviewed by a higher tribunal".

19. The source argues that the trial of Ms. Sasiphimon in a military court is also in breach of article 14 (1) of the Covenant, in which it is stated that everyone has the right to a "fair and public hearing by a competent, independent and impartial tribunal". The source notes that Thai military courts are not independent from the executive branch of government. Military courts are units of the Ministry of Defence, and military judges are appointed by the Commander-in-Chief of the Army and the Minister of Defence. Military judges also lack adequate legal training. The lower military courts in Thailand consist of panels of three judges, only one of whom has legal training. The other two are commissioned military officers who sit on the panels as representatives of their commanders.

20. With regard to the right to a "public hearing", the source notes that lese-majesty trials in military courts have been characterized by a lack of transparency. Military courts have held many lese-majesty trials, including that of Ms. Sasiphimon, behind closed doors. The source also alleges that military judges have routinely barred the public, including

observers from international human rights organizations and foreign diplomatic missions, from entering the courtrooms. Furthermore, military courts have on numerous occasions claimed that closed-door proceedings are necessary because lese-majesty trials are a matter of national security and could affect public morale.

21. Finally, the source reports that Ms. Sasiphimon's prolonged pretrial detention and the military court's refusal to grant her bail are in violation of article 9 (3) of the Covenant. It is stated in article 9 (3) that "it shall not be the general rule that persons awaiting trial shall be detained in custody". Furthermore, the Human Rights Committee states in its general comment No. 8 (1982) that "pretrial detention should be an exception and as short as possible". In this regard, the source observes that only four of the 66 individuals (6 per cent) arrested for alleged violations of article 112 of the Penal Code after the 22 May 2014 military coup were released on bail pending trial.

22. The source notes that despite the above-mentioned principle, courts have regularly denied bail to lese-majesty defendants, including Ms. Sasiphimon, claiming that they are flight risks. In this regard, the source specifies that Chiang Mai Military Court refused the request for bail submitted by Ms. Sasiphimon on 13 February 2015, reasoning that the punishment for lese-majesty is severe and that she was a flight risk. The source asserts that the court's argument runs counter to international human rights standards. In its general comment No. 35 (2014) on liberty and security of person, the Human Rights Committee stated that detention pending trial must be based on an individualized determination that it is "reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime". The relevant factors should not include vague and expansive standards such as "public security". The Human Rights Committee also noted that pretrial detention should not be ordered on the basis of the potential sentence for a crime, rather than on a determination of necessity.

Response from the Government

23. On 31 March 2017, the Working Group transmitted the allegations from the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 30 May 2017, detailed information about the current situation of Ms. Sasiphimon and any comments on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked by the authorities to justify her arrest and continued detention, and to provide details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular with human rights treaties that it has ratified. Moreover, the Working Group called upon the Government to ensure Ms. Sasiphimon's physical and mental integrity.

24. The Working Group regrets that it did not receive a response from the Government to that communication, and nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

25. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

26. The Working Group has, in its jurisprudence, established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

27. The Working Group wishes to reaffirm that any national law allowing deprivation of liberty should be made and implemented in compliance with the relevant international provisions set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other relevant international legal instruments. Consequently, even if the detention is in conformity with national legislation, the Working Group must assess whether such detention is also consistent with the relevant provisions of

international human rights law.[1] The Working Group also considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[2]

28. The Working Group notes with concern a series of cases in recent years in which the Government has used its lese-majesty laws to deprive its citizens of their liberty.[3] The number of lese-majesty cases has increased significantly since the coup d'état on 22 May 2014. The Office of the United Nations High Commissioner for Human Rights, for its part, noted in a press release in June 2017 that the number of persons under investigation for insulting the monarchy had more than doubled, from 119 in 2011-2013 to at least 285 in 2014-2016. The ratio of those charged with the lese-majesty offence who walked free fell sharply, from 24 per cent in 2011-2013 to just 4 per cent in 2016.[4] During the universal periodic review of Thailand, in May 2016, restrictions on the right to freedom of opinion and expression and the lese-majesty laws were frequently raised as a matter of concern by delegations.[5]

Category II

29. The Working Group recalls that holding and expressing opinions, including those that are not in accordance with official government policy, is protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.[6] In that regard, the Human Rights Committee stated, in its general comment No. 34 (2011) on the freedoms of opinion and expression, that 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, adding that all public figures, including those exercising the highest political authority such as Heads of State and Government, are legitimately subject to criticism and political opposition. The Committee specifically expressed concern regarding laws on such matters as lese-majesty.[7]

30. With regard to section 112 of the Penal Code and section 14 (3) of the Computer Crimes Act, and their application, the Working Group recalls that it has found the lese-majesty charge and convictions in Thailand[8] and in other countries[9] to be in violation of article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

31. The Working Group also notes that the Human Rights Committee, in its concluding observations on the second periodic report of Thailand, expressed its concerns "about reports of a sharp increase in the number of people detained and prosecuted for the crime of lese-majesty since the military coup and about extreme sentencing practices, which result in dozens of years of imprisonment in some cases", and explicitly urged the review of "article 112 of the Criminal Code, on publicly offending the royal family, to bring it into line with article 19 of the Covenant", reiterating that "the imprisonment of persons for exercising their freedom of expression violates article 19".[10]

32. The Working Group also expresses its concern about the vague, broad and open-ended definition of "insult" as used in section 112 of the Penal Code. The Working Group is mindful of the chilling effect on freedom of expression that such vaguely and broadly worded regulations resulting in unjustified criminalization may have.[11] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and

[1] See opinions No. 20/2017, para. 37; and No. 28/2015, para. 41.
[2] See opinion No. 33/2015, para. 80.
[3] See opinions No. 44/2016; No. 43/2015; No. 41/2014; and No. 35/2012.
[4] Office of the United Nations High Commissioner for Human Rights, press briefing note on Thailand, 13 June 2017. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21734&LangID=E.
[5] See A/HRC/33/16.
[6] See also article 23 of the ASEAN Human Rights Declaration.
[7] See Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 38.
[8] See opinions No. 44/2016; No. 43/2015; No. 41/2014; and No. 35/2012.
[9] See opinions No. 20/2017; No. 48/2016; and No. 28/2015.
[10] See CCPR/C/THA/CO/2, paras. 37-38.
[11] See opinion No. 20/2017, paras. 35 and 40.

expression has warned that threat of a long prison sentence and vagueness about what kinds of expression constitute defamation, insult, or threat to the monarchy encourage self-censorship and stifle important debates on matters of public interest.[12]

33. According to article 19 (3) of the Covenant, freedom of expression may be subject to restrictions, when provided by law and necessary (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. Furthermore, it is stated in article 29 (2) of the Universal Declaration of Human Rights that: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

34. In this regard, the Working Group has stated, in its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, that "the notion of 'arbitrary' *stricto sensu* includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary" (see A/HRC/22/44, para. 61).

35. The Working Group also points out that it has affirmed, in its deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the Internet, that freedom of expression constitutes one of the basic conditions of the development of every individual without which there is no social progress and that peaceful, non-violent expression or manifestation of one's opinion, or dissemination or reception of information, even via the Internet, if it does not constitute incitement to national, racial or religious hatred or violence, remains within the boundaries of freedom of expression (see E/CN.4/2006/7, paras. 44-47).

36. The Working Group also wishes to note the statement by the Special Rapporteur on the right to freedom of opinion and expression that "the right to freedom of expression includes expression of views and opinions that offend, shock or disturb".[13] The Special Rapporteur reiterated that:

> Protection of national security or countering terrorism cannot be used to justify restricting the right to expression unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[14]

37. The Working Group notes that in its recent universal periodic review, in May 2016, the Government of Thailand stated that "freedom of expression may be restricted only as necessary to maintain public order and prevent further polarization in society. The challenge is to maintain a balance when enforcing relevant laws, so as not to undermine rights and freedoms, especially when exercised in good faith and intentions."[15] In view of the standard as shown above, it is difficult for the Working Group to consider that Ms. Sasiphimon's postings could plausibly threaten national security or public order, let alone public health or morals. In the present case, the Working Group therefore considers that Ms. Sasiphimon's postings fall within the boundaries of opinions and expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Furthermore, the Working Group has been unable to find Ms. Sasiphimon's deprivation of liberty for the lese-majesty offence, under section 112 of the Penal Code and section 14 (3) of the Computer Crimes Act, and the criminal provisions per se, necessary or proportional for the purposes set out in article 19 (3) of the Covenant.

[12] See A/HRC/20/17, para. 20.
[13] See A/HRC/17/27, para. 37.
[14] Ibid., para. 36.
[15] See A/HRC/33/16, para. 16.

38. The Working Group concurs with the assessment of the Human Rights Committee with specific reference to lese-majesty that "laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned".[16] If Ms. Sasiphimon's postings defamed any individuals, the remedy would lie in a civil libel claim rather than in criminal sanctions.[17] This would have been a less intrusive measure sufficient to achieve respect for the rights or reputations of others.

39. Therefore, the Working Group considers that Ms. Sasiphimon's deprivation of liberty for the lese-majesty charge related to her postings resulted from the exercise of her right to freedom of expression guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

40. The Working Group notes that the Government has made article 4 notification of its derogation from article 19 of the Covenant "by the prohibition of broadcasting or publishing certain content, particularly those inciting conflict and alienation in the society, false or provoking messages".[18] However, the Working Group expresses its concern at the vague, broad and open-ended definition of terms used by the Government and considers that the lese-majesty legislation and prosecutions are not necessary or proportional for the Government's stated purpose of "affording vital national security protection" in declaring martial law on 20 May 2014.

Category III

41. The Working Group has also considered whether the violations of the right to a fair trial and due process suffered by Ms. Sasiphimon were grave enough to give her deprivation of liberty an arbitrary character falling within category III.

42. The Working Group considers that Chiang Mai Military Court did not provide a "public hearing" as required by article 14 (1) of the Covenant, as the hearing at which Ms. Sasiphimon was sentenced was held in closed session, excluding the observers from international human rights organizations and foreign diplomatic missions. None of the exceptions to this rule stipulated in article 14 (1), such as national security or public order, which would allow a trial to be closed to the public, can reasonably apply to this trial.[19]

43. In addition, the Working Group considers that Chiang Mai Military Court, which sentenced Ms. Sasiphimon, does not meet the standard established in article 14 (1) of the Covenant that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal.[20] Thai military courts are not independent of the executive branch of government because military judges are appointed by the Commander-in-Chief of the Army and the Minister of Defence, lack sufficient legal training and sit in closed sessions as representatives of their commanders.

44. The trial of civilians and decisions placing civilians in preventive detention by military courts are in violation of the Covenant and customary international law, as confirmed by the constant jurisprudence of the Working Group. The intervention of a military judge who is neither professionally nor culturally independent is likely to produce an effect contrary to the enjoyment of the human rights and to a fair trial with due guarantees.[21]

45. In addition, as the Human Rights Committee stated in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the guarantees of a fair trial under article 14 of the Covenant cannot be limited or modified because of the military or special nature of a court.[22] In the present case, Ms. Sasiphimon did not have

[16] See Human Rights Committee, general comment No. 34, para. 38.
[17] See A/HRC/4/27, para. 81.
[18] Depositary notification C.N.479.2014.TREATIES-IV.4 of 17 July 2014 (Thailand: notification under article 4 (3)), 8 July 2014. See https://treaties.un.org/doc/Publication/CN/2014/CN.479.2014-Eng.pdf.
[19] See opinion No. 44/2016, para. 31.
[20] See also article 20 (1) of the ASEAN Human Rights Declaration.
[21] See A/HRC/27/48, para. 68.
[22] See para. 22.

access to a lawyer when she was being interrogated by the police or during her hearing for pretrial detention before Chiang Mai Military Court on 13 February 2015 and was not informed of her right to legal assistance, in breach of article 14 (3) (b) and (d) of the Covenant.[23]

46. The police also had Ms. Sasiphimon sign a confession on 30 September 2014 which she was misled into believing was mere acknowledgement that she had previously seen the allegedly lese-majesty postings, without the benefit of legal counsel. Although she had legal counsel during her trial, the Working Group considers that she was not afforded the right to legal counsel and the right not to be compelled to confess guilt during the crucial interrogation and pretrial detention, contrary to article 14 (3) (g) of the Covenant. The burden is on the Government to demonstrate that Ms. Sasiphimon's confession was made of her own free will, but it failed to respond to the allegation.

47. The Working Group also notes that Ms. Sasiphimon's conviction and sentence by the military court were not subject to appeal. As a result of the declaration of martial law on 20 May 2014 and the junta (the National Council for Peace and Order) issuing announcement No. 37/2014 on 25 May 2014, military courts assumed jurisdiction over lese-majesty offences committed between 25 May 2014 and 31 March 2015;[24] and section 61 of the Military Court Act, of 1955, proscribes the right of offenders to appeal military court decisions. The absence of a right to appeal is a clear violation of article 14 (5) of the Covenant.

48. The Working Group notes that the Government made article 4 notification of its derogation from article 14 (5) of the Covenant "only where a jurisdiction has been conferred to the Martial Court over sections 107-112 of the Penal Code and the offences against the internal security of the Kingdom", on 8 July 2014.[25]

49. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4 (1), is that such measures be limited to the extent strictly required by the exigencies of the situation. The obligation to limit any derogation to those strictly required by the exigencies of the situation reflects the principle of proportionality. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation.[26]

50. For instance, the Working Group in its jurisprudence has considered that the detention of a teenager for two years based simply on accusations of having participated in demonstrations by an organization banned by the occupation authorities is disproportionate in relation to any public emergency, despite any derogation from article 9 of the Covenant that may be in force.[27]

51. The Working Group concurs with the Human Rights Committee's opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.[28] The right to have one's conviction and sentence reviewed by a higher tribunal according to law is no doubt one of such requirements.

[23] See also the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9; and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 10, 11 (1), 15 and 17-19.

[24] The ruling junta lifted martial law on 1 April 2015.

[25] Depositary notification C.N.479.2014.TREATIES-IV.4 of 17 July 2014 (Thailand: notification under article 4 (3)), 8 July 2014. See https://treaties.un.org/doc/Publication/CN/2014/CN.479.2014-Eng.pdf.

[26] See Human Rights Committee, general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 4.

[27] See opinion No. 9/2010, para. 25.

[28] See Human Rights Committee, general comment No. 29, para. 16.

52. Lastly, the Working Group considers the military court's refusal to grant Ms. Sasiphimon bail. Article 9 (3) of the Covenant requires that detention in custody of persons awaiting trial shall be the exception rather than the rule, subject to guarantees of appearance, including appearance for trial, appearance at any other stage of the judicial proceedings and (should the occasion arise) appearance for execution of the judgment. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime, and the relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Nor should pretrial detention be mandatory for all defendants charged with a particular crime, without regard to individual circumstances, or ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity.[29]

53. The Working Group notes with particular concern that only 4 of the 66 individuals (6 per cent) arrested for alleged violations of section 112 of the Penal Code after the military coup of 22 May 2014 were released on bail pending trial. In Ms. Sasiphimon's case, the Working Group considers that the military court cannot rely on the severity of potential punishment for lese-majesty offences to deny bail and that the near-blanket rejection of bail applications from lese-majesty offenders casts serious doubt about an individualized determination of her flight risk. The Working Group therefore determines that the Government has not met the burden that would demonstrate the necessity of Ms. Sasiphimon's pretrial detention.

54. The Working Group concludes that these violations of the right to a fair trial and to due process are of such gravity as to give Ms. Sasiphimon's deprivation of liberty an arbitrary character that falls within category III.

Laws on lese-majesty

55. The Working Group will elaborate further on the propriety of the lese-majesty law, in view of the principle of legality and its effect on the right to a fair trial.[30] One of the fundamental guarantees of due process is the principle of legality, including the principle of *nullum crimen sine lege certa*, which is particularly relevant in the case of Ms. Sasiphimon. The principle of legality, in general, ensures that no defendant may be punished arbitrarily or retroactively by the State. That means that a person cannot be convicted of a crime that was not publicly accessible; nor can they be charged under a law that is excessively unclear or convicted under a penal law that is passed retroactively to criminalize a previous act or omission.

56. Laws that are vaguely and broadly worded may have a chilling effect on the exercise of the right to freedom of expression, as they have potential for abuse. They also violate the principle of legality under article 15 of the Covenant, as they make it unlikely or impossible for the accused to have a fair trial.[31] In that regard, the Working Group notes that the Human Rights Committee is of the view that detention pursuant to proceedings that are incompatible with article 15 are necessarily arbitrary within the meaning of article 9 (1) of the Covenant.[32]

57. The Working Group wishes to express its grave concern about the pattern of arbitrary detention in cases involving the lese-majesty laws of Thailand. The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of

[29] See Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 38.

[30] See opinion No. 20/2017, paras. 49-52.

[31] See also article 20 (2) of the ASEAN Human Rights Declaration.

[32] See Human Rights Committee, communication No. 1629/2007, *Fardon v. Australia*, Views adopted on 18 March 2010, para. 7.4 (2).

international law may constitute crimes against humanity.[33] Given the increased usage of the Internet and social media as a means of communication, it is likely that the detention of individuals for exercising their rights to freedom of opinion and expression online will continue to increase until steps are taken by the Government to bring the lese-majesty laws into conformity with international human rights law.

58. Given the continuing international concern regarding the country's lese-majesty laws, the Government may consider it to be an appropriate time to work with human rights mechanisms to bring these laws into conformity with its international obligations under the Universal Declaration of Human Rights and the Covenant. The Working Group would welcome the opportunity to conduct a country visit to constructively assist in this process. In this regard, the Working Group notes the commitment made by the Government during its universal periodic review in May 2016 to reaffirm its standing invitation to all the special procedures of the Human Rights Council.[34]

Disposition

59. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Sasiphimon Patomwongfangam, being in contravention of articles 7, 9, 10, 11 and 19 of the Universal Declaration of Human Rights and of articles 9, 14, 15, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II and III.

60. The Working Group requests the Government to take the steps necessary to remedy the situation of Sasiphimon Patomwongfangam without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

61. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Sasiphimon Patomwongfangam immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law.

62. The Working Group urges the Government to bring the relevant legislation, particularly section 112 of the Penal Code and section 14 (3) of the Computer Crimes Act, which has been used to restrict the right to freedom of expression, into conformity with the commitments of Thailand under international human rights law.

Follow-up procedure

63. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Ms. Sasiphimon has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. Sasiphimon;

(c) Whether an investigation has been conducted into the violation of Ms. Sasiphimon's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Thailand with its international obligations in line with the present opinion;

[33] See article 7 (1) (e) of the Rome Statute of the International Criminal Court. See also opinions No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 38/2012, para. 33; No. 47/2012, paras. 19 and 22; No. 34/2013, paras. 31, 33 and 35; No. 35/2013, paras. 33, 35 and 37; No. 36/2013, paras. 32, 34 and 36; No. 48/2013, para. 14; No. 22/2014, para. 25; No. 27/2014, para. 32; No. 34/2014, para. 34; No. 35/2014, para. 19; No. 44/2016, para. 37; No. 32/2017, para. 40; No. 33/2017, para. 102; and No. 36/2017, para. 110.

[34] See opinion No. 44/2016, para. 28.

(e) Whether any other action has been taken to implement the present opinion.

64. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

65. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

66. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[35]

[*Adopted on 23 August 2017*]

[35] See Human Rights Council resolution 33/30, paras. 3 and 7.