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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. 56/2017 concerning Thiansutham Suthijitseranee (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 the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 1 June 2017, the Working Group transmitted to the Government of Thailand a communication concerning Thiansutham Suthijitseranee. The Government replied to the communication on 12 June 2017. 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. Thiansutham Suthijitseranee is a Thai national and was a businessman prior to his detention. His usual place of residence was the city of Bangkok.

5. The source indicates that, on the morning of 18 December 2014, Mr. Thiansutham and his wife were arrested at their home in Bangkok by more than 20 police officers from the Technology Crime Suppression Division and military personnel. The police officers confiscated several of the couple's personal belongings, including laptop computers and mobile telephones. No arrest or search warrants issued by a public authority were presented at the time of the arrests. Rather, arrest warrant No. 151/2014 was issued by Bangkok Military Court on 22 December 2014 in relation to Mr. Thiansutham.

6. After the raid on their home, Mr. Thiansutham and his wife were taken for interrogation to the Infantry Battalion at the Eleventh Military Circle in Bangkok. During his interrogation, Mr. Thiansutham was ordered to provide the passwords to his email and social network accounts. While Mr. Thiansutham's wife was released the next day, Mr. Thiansutham himself was detained there until 22 December 2014.

7. The source specifies that Mr. Thiansutham was arrested in connection with having posted five messages on Facebook between 25 July and early November 2014, which the authorities deemed to be offensive to the monarchy. One of the messages contained criticism of King Bhumibol Adulyadej's efforts to promote a sufficiency economy and compared the Thai and Bhutanese monarchies. Two other messages were interpreted as a reference to the involvement of the monarchy in Thai politics and speculation about the death of King Bhumibol, respectively.

8. On 23 December 2014, Mr. Thiansutham was remanded in police custody at Thung Song Hong police station in Bangkok for two days. On 25 December 2014, Bangkok Military Court ordered Mr. Thiansutham's transfer to Bangkok Remand Prison.

9. After having been transferred there, Mr. Thiansutham petitioned Bangkok Military Court for bail on four separate occasions, on 25 December 2014 and on 5, 16 and 18 January 2015. However, the court rejected all his requests for bail, reasoning that the punishment for lese-majesty is very severe and that Mr. Thiansutham was a flight risk. The source observes that the court's argument runs counter to international human rights standards and United Nations jurisprudence. 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 the evidence or the recurrence of crime. Relevant factors should not include vague and expansive standards such as "public security". The source points out that the Committee also held that pretrial detention should not be ordered for a period based on the potential sentence for a crime charged, rather than on a determination of necessity.

10. On 31 March 2015, during a closed-door hearing, Bangkok Military Court sentenced Mr. Thiansutham to 25 years in prison on five counts of lese-majesty. The authorities evoked violations of section 112 of the Penal Code (lese-majesty) and of section 14 (1), (2) and (3) of the Computer Crimes Act as grounds for arresting and convicting Mr. Thiansutham. Section 112 of the Penal Code states that anyone who defames, insults or threatens the King, the Queen, the Heir to the throne or the Regent will be punished with imprisonment of 3 to 15 years. Section 14 (3) of the Computer Crimes Act stipulates that any person who commits any act involving importing to a computer system any computer data relating to an offence against the security of the Kingdom under the Penal Code is subject to imprisonment for not more than five years or a fine of not more than 100,000 baht or both.

11. On 2 April 2015, Mr. Thiansutham's prison sentence was reduced to 21 years and 10 months as a result of a commutation of sentence granted on the occasion of Princess Maha Chakri Sirindhorn's sixtieth birthday.

12. The source submits that Mr. Thiansutham's deprivation of liberty is arbitrary and falls within categories II and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

13. In relation to category II, the source argues that Mr. Thiansutham's ongoing deprivation of liberty is arbitrary because it results from the exercise of rights or freedoms guaranteed by the 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 party. Article 19 of the Universal Declaration of Human Rights states 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". Article 19 (2) of the Covenant states 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".

14. In relation to category III, the source argues 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 Mr. Thiansutham's deprivation of liberty an arbitrary character. The source specifies that Mr. Thiansutham did not have adequate time to prepare his defence. He was also denied the right to receive legal assistance during interrogations by the police and the military, as well as the right not to be compelled to testify against himself, or to confess his guilt. The source points out that those rights are guaranteed by article 14 (3) (b), (d) and (g) of the Covenant. In addition, the court hearing that resulted in his prison sentence was conducted behind closed doors in a military court, in violation of article 14 (1) of the Covenant.

15. The source adds that, as a result of the declaration of martial law on 20 May 2014 by the Royal Thai Army and the issuance of announcement No. 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 from 25 May 2014 onwards. The source thus notes that between 25 May 2014 and 25 February 2016, Thai military courts have tried and sentenced 24 lese-majesty defendants, including Mr. Thiansutham.

16. Individuals who allegedly committed lese-majesty offences between 25 May 2014 and 31 March 2015 have no right to appeal a decision made by a military court as a result of the declaration of martial law and in accordance with section 61 of the 1955 Military Court Act. Article 14 (5) of the Covenant provides that everyone convicted of a crime has the right "to his conviction and sentence being reviewed by a higher tribunal". The source argues that the trial of Mr. Thiansutham in a military court is also in breach of article 14 (1) of the Covenant, which states that everyone has the right to a "fair and public hearing by a competent, independent and impartial tribunal".

17. The source claims that Thai military courts are not independent from the executive branch of the Government. Military courts are units of the Ministry of Defence, and military judges are appointed by the Army Commander-in-Chief and the Minister of Defence. It is also alleged that military judges lack adequate legal training. Thai lower military courts 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.

18. With regard to the right to a "public hearing", the source states that lese-majesty trials in military courts have been characterized by a lack of transparency. Military courts have held many lese-majesty trials behind closed doors. Military judges have routinely barred the public, including observers from international human rights organizations and foreign diplomatic missions, from entry into courtrooms. On numerous occasions, military courts claimed that closed-door proceedings were necessary because lese-majesty trials were a matter of "national security" and could "affect public morale".

19. The source argues that Mr. Thiansutham's pretrial detention and the military court's refusal to grant him bail is in violation of article 9 (3) of the Covenant, which states that "it shall not be the general rule that persons awaiting trial shall be detained in custody". In its general comment No. 8, the Human Rights Committee also stated that pretrial detention

should be an exception and as short as possible. In that regard, the source observes that only 4 of the 66 individuals (6 per cent) arrested for alleged violations of section 112 of the Penal Code after the 22 May 2014 military coup were released on bail pending trial.

20. The source notes that despite that principle, Thai courts have regularly denied bail to lese-majesty defendants, including Mr. Thiansutham, by claiming that they were flight risks. In that regard, the source specifies that Bangkok Military Court refused the requests for bail submitted on 25 December 2014 and on 5, 16 and 18 January 2015 by Mr. Thiansutham, reasoning that the punishment for lese-majesty is severe and that he was a flight risk. The court's argument runs counter to international human rights standards.

Response from the Government

21. On 1 June 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 detailed information by 1 August 2017 about Mr. Thiansutham's current situation and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying Mr. Thiansutham's continued detention and to provide details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular the norms of international human rights law that bind Thailand. Moreover, the Working Group called upon the Government to ensure Mr. Thiansutham's physical and mental integrity.

22. In its response dated 12 June 2017, the Government informed the Working Group that its communication had been duly forwarded to the relevant agencies for their consideration and provided "initial clarifications" on the use of the lese-majesty law and the Military Court.

23. The Government stated that it supports and values freedom of expression, which is the basis of a democratic society. People can freely exercise the right to freedom of expression. Nevertheless, that right is not absolute and must be exercised within the boundary of the law and not in a manner that disrupts public order and social harmony or that infringes on others' rights or reputations, as stipulated in article 19 (3) of the Covenant.

24. According to the Government, the application of the lese-majesty law is in accordance with the above-mentioned objectives. It is important to understand that the Thai monarchy has been a pillar of stability in Thailand. The Thai sense of identity is closely linked to the monarchy. The lese-majesty law is aimed at protecting the rights or reputation of the King, the Queen and the Heir-apparent or the Regent in a similar way that libel law does for commoners. It is not aimed at curbing people's right to freedom of expression.

25. The Working Group did not receive any additional response to the present communication from the Government. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Additional comments from the source

26. The source replied that the Government's response repeated verbatim many of its previous responses to communications sent by United Nations special procedures, to considerations of reports conducted by treaty bodies and to the universal periodic review of May 2016 on the issue of lese-majesty, including the use of military courts for trials of civilians accused of violating section 112 of the Penal Code.

27. According to the source, the responses of the Government have consistently failed to provide detailed reasoning as to why it believes the actions that have been regularly punished with arrest, detention and lengthy jail terms comply with article 19 of the Covenant. The Government has also repeatedly failed to specifically address the use of military courts to try lese-majesty defendants, which contravenes article 14 of the Covenant.

28. The source remains concerned at the ongoing abuse of section 112 of the Penal Code to subject individuals to arbitrary deprivation of liberty for the exercise of their right to freedom of expression. Between 22 May 2014 and 2 July 2017, 112 individuals were arrested under section 112.

29. The source also remains gravely concerned at the very long prison sentences that Thai courts have continued to hand down to lese-majesty defendants. The source provides an example of one such instance, when in June 2017, Bangkok Military Court sentenced one individual to 70 years in prison after finding him guilty on 10 counts of lese-majesty. The court halved his sentence to 35 years in consideration of his guilty plea. That is the harshest prison sentence ever handed down in a lese-majesty trial.

30. The source notes that the United Nations treaty bodies have, in recent concluding observations concerning the periodic reports of Thailand, continued to underscore the human rights violations linked to the enforcement of section 112 of the Penal Code.

31. In particular, the source notes that, following its review of the second periodic report of Thailand under the Covenant in March 2017, the Human Rights Committee noted its concern about the clause in section 112 that imposed prison terms for "criticism and dissention regarding the royal family" and about "extreme sentencing practices" in connection with lese-majesty trials. The Committee recommended that Thailand review section 112 in order to bring it into line with article 19 of the Covenant. It also reiterated that the imprisonment of persons for exercising their freedom of expression violated article 19 of the Covenant (see CCPR/C/THA/CO/2, paras. 37-38).

32. According to the source, over the past year, an increasing number of lese-majesty defendants have been released on bail pending their investigation and trial. The source welcomed that development, which reverses a trend that previously saw, between May 2014 and February 2016, the release of a mere 6 per cent of lese-majesty defendants on bail.

Discussion

33. 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 of breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest with the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

34. The Working Group recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.[1]

35. 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 Covenant 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.[2] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[3]

36. 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.[4] The number of lese-majesty cases has significantly increased 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

[1] See the ruling of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, pp. 660-661, para. 55. See also opinions No. 41/2013, para. 27, and No. 59/2016, para. 61.

[2] See opinions No. 20/2017, para. 37, and No. 28/2015, para. 41.

[3] See opinion No. 33/2015, para. 80.

[4] See opinions No. 44/2016; No. 43/2015; No. 41/2014; and No. 35/2012.

2014-2016. The ratio of those charged with the lese-majesty offence who walked free had also fallen sharply from 24 per cent in 2011-2013 to just 4 per cent in 2016.[5] 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 (see A/HRC/33/16).

Category I

37. The Working Group will examine the relevant categories applicable to its consideration of the present case, including category I, which concerns deprivation of liberty without invoking any legal basis.

38. In the present case, the Working Group notes that, on 18 December 2014, Mr. Thiansutham was arrested with his wife at home by police officers from the Technology Crime Suppression Division and military personnel. The police arrested the couple and confiscated some of their personal belongings, including laptop computers and mobile telephones, without a warrant. The arrest warrant for Mr. Thiansutham was issued by Bangkok Military Court four days later, on 22 December 2014.

39. Mr. Thiansutham was held and interrogated at the Infantry Battalion at the Eleventh Military Circle, a military barracks in Bangkok, where he had no access to his family or a lawyer between 18 and 22 December 2014. He was remanded to Thung Song Hong police station on 23 December 2014 and brought before the court only on 25 December 2014. The Government has failed to provide any legal basis for Mr. Thiansutham's initial arrest and detention.

40. The Working Group notes that, on 8 July 2014, the Government made article 4 notification of its derogation from certain provisions of the Covenant, but that no derogation has been notified with regard to article 9 of the Covenant.[6]

41. Given the above observations, the Working Group determines that Mr. Thiansutham's initial arrest and incommunicado detention lack a legal basis in violation of article 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, thus falling within category I.

Category II

42. The Working Group recalls that the right to hold and express opinions, including those that are not in accordance with official government policy, is protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.[7] In that regard, in its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee stated 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 (para. 38).

43. With regard to the application of section 112 of the Penal Code and section 14 (3) of the Computer Crimes Act, the Working Group recalls that it has found the lese-majesty charge and conviction 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.

44. 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

[5] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21734&LangID=E.

[6] See depositary notification C.N.479.2014.TREATIES-IV.4. Available at https://treaties.un.org/doc/Publication/CN/2014/CN.479.2014-Eng.pdf.

[7] See also Human Rights Declaration of the Association of Southeast Asian Nations, art. 23.

[8] See opinions No. 44/2016; 43/2015; No. 41/2014; and No. 35/2012.

[9] See opinions No. 20/2017; No. 48/2016; and No. 28/2015.

of a sharp increase in the number of people who had been detained and prosecuted for the crime of lese-majesty since the military coup and about extreme sentencing practices, which resulted in dozens of years of imprisonment in some cases. The Committee explicitly urged Thailand to review article 112 of the Penal 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 violated article 19 of the Covenant (see CCPR/C/THA/CO/2, paras. 37-38).

45. The Working Group expresses its concern about the vague, broad and open-ended definition of "insult" 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 may have, resulting in unjustified criminalization.[10] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has warned that the threat of a long prison sentence and the 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 (see A/HRC/20/17, para. 20).

46. 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; and (b) for the protection of national security or of public order (ordre public), or of public health or morals. Furthermore, article 29 (2) of the Universal Declaration of Human Rights states 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".

47. In that 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" sensu stricto 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 (para. 61).

48. The Working Group 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 the freedom of expression (paras. 45 and 47).

49. In addition, the Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression indicated that the right to freedom of expression includes expression of views and opinions that offend, shock or disturb. Reiterating principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, he stated 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 (see A/HRC/17/27, paras. 36-37).

50. In the present case, the Working Group considers that Mr. Thiansutham's posts fall within the boundaries of opinions and expression protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Furthermore, the Working Group has been unable to find Mr. Thiansutham'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.

[10] See opinion No. 20/2017, paras. 35 and 40.

51. In its jurisprudence, with regard to the application of the principle of proportionality, the Working Group has applied the test of (a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.[11]

52. The Working Group notes that, in its universal periodic review in May 2016, the Government stated that freedom of expression could be restricted only as necessary to maintain public order and prevent further polarization in society. The challenge was to maintain a balance when enforcing relevant laws, so as not to undermine rights and freedoms, especially when exercised in good faith and with good intentions (see A/HRC/33/16, para. 16). In view of the standard set out above, it is difficult for the Working Group to consider that Mr. Thiansutham's posts could plausibly threaten national security or public order, let alone public health or morals.

53. 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.[12] If Mr. Thiansutham's postings defamed any individuals, the remedy would lie in a civil libel claim rather than in criminal sanctions (see A/HRC/4/27, para. 81). That would have been a less intrusive measure sufficient to achieve respect of the rights or reputations of others.

54. Therefore, the Working Group considers that Mr. Thiansutham's deprivation of liberty for the lese-majesty charge relating to his postings resulted from the exercise of the right to freedom of expression guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

55. The Working Group notes that the Government has made article 4 notification of its derogation from article 19 of the Covenant by prohibiting the broadcasting or publication of certain content, particularly that inciting conflict and alienation in society, false or provocative messages. [13] However, the Working Group expresses its concern at the vague, broad and open-ended definition of terms used by the Government and cannot but consider that the lese-majesty legislation and prosecution are not necessary or proportional to the Government's stated purpose of affording vital national security protection in declaring martial law on 20 May 2014.

Category III

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

57. The Working Group considers that Bangkok Military Court did not provide a public hearing, as required under article 14 (1) of the Covenant, given that the hearing at which Mr. Thiansutham was sentenced was held in closed session, excluding observers from international human rights organizations and foreign diplomatic missions. None of the exceptions to that rule stipulated in article 14 (1), such as national security or public order, that would allow a trial to be closed to the public, can reasonably apply to his trial.[14]

58. In addition, the Working Group considers that Bangkok Military Court 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.[15] Thai military

[11] See opinion No. 54/2015, para. 89.
[12] See Human Rights Committee, general comment No. 34, para. 38.
[13] See depositary notification C.N.479.2014.TREATIES-IV.4. Available at https://treaties.un.org/doc/Publication/CN/2014/CN.479.2014-Eng.pdf.
[14] See opinion No. 44/2016, para. 31.
[15] See also Human Rights Declaration of the Association of Southeast Asian Nations, art. 20 (1).

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. Moreover, they lack sufficient legal training and sit in closed sessions as representatives of their commanders.

59. 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 (see A/HRC/27/48, para. 68).

60. 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 (para. 38). In the present case, Mr. Thiansutham did not have access to a lawyer when he was being interrogated by the police and was not informed of his right to legal assistance, in breach of article 14 (3) (b) and (d) of the Covenant.[16]

61. The police arrested Mr. Thiansutham with his wife at home on 18 December 2014 without a warrant, which was issued by Bangkok Military Court only on 22 December 2014. During the pretrial detention and interrogation at a military barracks in Bangkok, Mr. Thiansutham, without access to a lawyer, was ordered to provide the passwords to his email and social network accounts. Given those circumstances, the Working Group considers it unlikely that he was afforded the right not to be compelled to confess guilt, contrary to article 14 (3) (g) of the Covenant. The burden is on the Government to demonstrate that Mr. Thiansutham's confession was made of his own free will, but the Government failed to respond to the allegation.

62. The Working Group also notes that Mr. Thiansutham'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 issuance by the National Council for Peace and Order of 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,[17] and section 61 of the 1955 Military Court Act proscribes the offenders' right to appeal military court decisions. The absence of a right to appeal is a clear violation of article 14 (5) of the Covenant.

63. The Working Group notes that, on 8 July 2014, the Government made article 4 notification of its derogation from article 14 (5) of the Covenant only where a jurisdiction had been conferred to the Martial Court over sections 107-112 of the Penal Code and the offences against the internal security of the Kingdom.[18]

64. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4 (1), is that such measures are 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.[19]

[16] See also 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 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 10, 11 (1), 15 and 17-19.

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

[18] See depositary notification C.N.479.2014.TREATIES-IV.4. Available at https://treaties.un.org/doc/Publication/CN/2014/CN.479.2014-Eng.pdf.

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

65. For instance, in its jurisprudence the Working Group 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 derogation from article 9 of the Covenant in force.[20]

66. The Working Group concurs with the opinion of the Human Rights Committee 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.[21] The right to have one's conviction and sentence reviewed by a higher tribunal according to law is doubtless one such requirement.

67. The Working Group considered the military court's refusal to grant Mr. Thiansutham bail. Article 9 (3) of the Covenant requires that detention in custody of persons awaiting trial should 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.[22]

68. 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 22 May 2014 military coup were released on bail pending trial. In Mr. Thiansutham'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. It also considers that the near blanket rejection of bail applications by lese-majesty offenders casts serious doubt about the individualized determination of Mr. Thiansutham's flight risk. The Working Group therefore determines that the Government has not met the burden of demonstrating the necessity for Mr. Thiansutham's pretrial detention.

69. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give Mr. Thiansutham's deprivation of liberty an arbitrary character that falls within category III.

Laws on lese-majesty

70. Elaborating 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,[23] the Working Group notes that one of the fundamental guarantees of due process is the principle of legality, including the principle of *nullum crimen sine lege*, which is particularly relevant in the case of Mr. Thiansutham. 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, and 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.

71. 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 it makes it unlikely or impossible

[20] See opinion No. 9/2010, para. 25.
[21] See Human Rights Committee, general comment No. 29, para. 16.
[22] See Human Rights Committee, general comment No. 35, para. 38.
[23] See opinion No. 20/2017, paras. 49-52.

for the accused to have a fair trial.[24] In that regard, the Working Group notes that in 2016, the Human Rights Committee urged the Government of Kuwait to clarify the vague, broad and open-ended definition of key terms in the relevant provisions (see CCPR/C/KWT/CO/3, para. 41). Furthermore, detention pursuant to proceedings that are incompatible with article 15 are necessarily arbitrary within the meaning of article 9 (1) of the Covenant.[25]

72. 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 international law may constitute crimes against humanity.[26] 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.

73. 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 international human rights mechanisms to bring those 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 that process. In that 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 (see A/HRC/33/16, para. 161 (g)).

74. The Working Group notes the initial detention of Mr. Thiansutham's wife by the Government in a possible case of "guilt by association" and reiterates the principle that any measure treating family members of a suspect also as potential suspects should not exist in a democratic society, even during a state of emergency.[27]

Disposition

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

> The deprivation of liberty of Thiansutham Suthijitseranee, 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 I, II and III.

76. The Working Group requests the Government of Thailand to take the steps necessary to remedy the situation of Thiansutham Suthijitseranee 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.

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

[24] See also Human Rights Declaration of the Association of Southeast Asian Nations, art. 20 (2).

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

[26] 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. 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. 38/2012, para. 33; 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.

[27] See opinion No. 1/2017, paras. 58-59.

78. 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

79. 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 Mr. Thiansutham has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Thiansutham;

(c) Whether an investigation has been conducted into the violation of Mr. Thiansutham'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;

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

80. 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.

81. 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.

82. 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.[28]

[*Adopted on 24 August 2017*]

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