COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

Thailand v. Does 1-5 of the Organization for Thai Federation

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TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

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The **Columbia Law School Human Rights Clinic** works to advance human rights around the world and to train the next generation of strategic advocates for social justice. The clinic works in partnership with civil society organizations and communities to carry out human rights investigations, legal and policy analysis, litigation, report-writing, and advocacy.

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ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The Clooney Foundation for Justice's TrialWatch initiative monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons, and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

The legal assessment and conclusions expressed in this report are those of the authors and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY

Professor Demetra Sorvatzioti, a member of the TrialWatch Experts Panel, assigned this trial a grade of D.

The trial against five individuals for their alleged membership in a "secret society"—the Organization for Thai Federation, which advocates for a republican system of government in Thailand—was marred by serious procedural violations of the right to a fair trial, starting from their military interrogation and throughout the trial proceedings. Further, four of the defendants—the fifth having absconded before the trial—were convicted for exercising their right to freedom of expression. Finally, while the Court appropriately acquitted the defendants of sedition, these defendants were convicted under a vague law whose wording and application violate the principle of legality.

Taken together, the prosecution and conviction of these individuals in a trial with serious procedural violations under human rights law, for exercising their rights to freedom of expression, and under a vague law, violated the defendants' rights and resulted in an unfair trial, as demonstrated by the monitors' notes on the proceedings and the available record. The violations of their procedural rights and the principle of legality indisputably affected the outcome of the case and caused significant harm. However, the defendants have been released on bail pending the appeal, and sentence issued by the Court was at least at the longer end of the possible range. Therefore, this trial receives a grade of "D" under the methodology set forth in the Annex to this Report.

From November 2019 to January 2020, the Human Rights Clinic at Columbia Law School monitored the trial of five individuals on charges of sedition and membership in a secret society, the latter predicated on the defendants' alleged affiliation with the Organization for Thai Federation (OTF), an organization whose political platform includes changing the existing political system from a constitutional monarchy to republicanism.[1] Specifically, the defendants were accused of a range of nonviolent activities in support of OTF, from distributing flyers and t-shirts to communicating with other supporters of OTF—all activities protected by their right to freedom of expression under human rights law. All the

[1] OTF advocates having a president as the head of state and the division of the country into ten states, for elections at all levels of government, and for a jury system. ILAW, *The ideas of "Thai Federation," the origins of 6 serious lawsuits, 17 defendants, 4 people disappeared* (Oct. 1, 2019), https://freedom.ilaw.or.th/en/blog/ideas-%E2%80%9Cthai-federation%E2%80%9D-origins-6-serious-lawsuits-17-defendants-4-people-disappeared; THAI LAWYERS FOR HUMAN RIGHTS, *A year of legal actions against the 'Organization For a Thai Federation: At least 20 charged in eleven cases* (Oct. 15, 2019), https://www.tlhr2014.com/?p=14073&lang=en; Indictment, Oct. 24, 2018, at 2 [hereinafter "Indictment"].

defendants were arrested in September 2018 and initially detained and interrogated in a military camp for several days.

On January 21, 2020, the Court convicted four of the five defendants of the charge of membership in a secret society, sentencing two defendants to three years in prison and the others to two years in prison (giving them “credit” for confessing their crimes during their detention in the military camp). The Court acquitted those four defendants of the other charge (sedition). The fifth defendant had absconded before trial.

While the Court is to be commended in this case for resisting the urging of the military witnesses to close the court to the public and for appropriately acquitting the defendants of sedition, this trial was marred by violations of the right to a fair trial, including the right to be informed of the charges, the right to counsel, the right against self-incrimination, the right to silence, and the right to a reasoned judgment. Further, the conduct of the proceedings raises substantial concerns regarding respect for the presumption of innocence and the right to be tried by an impartial court. Most notably, however, and infecting the entirety of the trial and its outcome, the case constituted a severe violation of the principle of legality and of the defendants’ right to freedom of expression. That is, the defendants’ exercise of their right to freedom of expression was penalized under a vague law—and, accordingly, pursuant to a generalized and conclusory decision—that criminalizes membership in a group without requiring that any criminal action has been taken by any individual defendant. So vague is this law that it cannot be said that the defendants could have understood which of their actions violated the law—and indeed, the judgment of the Court does not clarify which actions each defendant took that violated the law, instead apparently relying on the fact that the defendants were advocating for political reform without finding any evidence that they were aiming to commit crimes. In this way, the Court used Section 209 of the Thai Criminal Code (criminalizing membership in a secret society) as a tool to restrict the defendants’ right to freedom of expression. If the law were not so vague, the Court would not have been able to instrumentalize it to reach for such a result.

In sum, and as this report documents, the trial violated the defendants’ right to a fair trial not only because of the procedural violations in the proceedings but also because a vague law appears to have been used to punish these defendants for their protected political speech and beliefs, rather than for any criminal conduct.

BACKGROUND INFORMATION

A. POLITICAL & LEGAL CONTEXT

Thailand is a constitutional monarchy that has experienced numerous military-led coup d'états over the last century, most recently in 2014 when a military junta, known as the National Committee for Peace and Order (NCPO), came into power. Although the NCPO was formally dissolved in July 2019 following the country's first post-coup elections,[2] the ostensibly civilian but military-official-led government left many NCPO directives in place, including restrictions on freedom of expression and assembly.[3]

Thailand is a party to the International Covenant on Civil and Political Rights (ICCPR) and therefore is obligated to ensure and respect the rights to freedom of expression and peaceful assembly.[4] The Thai Constitution also recognizes the right to freedom of expression.[5] Despite these obligations, however, the Thai government has frequently used criminal laws to punish and censor speech and political activism that it views as threatening or opposing the authorities, including but not limited to the monarchy.

Since the 2014 coup d'état, numerous human rights organizations have documented a troubling decline in Thailand's record on freedom of expression and freedom of association.[6] In particular, the government has used criminal laws that limit public

[2] Panu Wongcha-um & Jiraporn Kuhakan, Reuters, *Thai prime minister declares end of military rule*, (Jul. 15, 2019), *available at* https://www.reuters.com/article/us-thailand-politics/thai-prime-minister-declares-end-of-military-rule-idUSKCN1UA1D4.

[3] HUMAN RIGHTS WATCH, TO SPEAK OUT IS DANGEROUS: CRIMINALIZATION OF PEACEFUL EXPRESSION IN THAILAND (Oct. 2019), https://www.hrw.org/report/2019/10/24/speak-out-dangerous/criminalization-peaceful-expression-thailand; ILAW, *Arrests and Imprisonment: the fate of political dissidents in Thailand* (July 23, 2019), *available at* https://freedom.ilaw.or.th/en/node/708; REPORTERS SANS FRONTIERS, *Less media freedom than ever in Thailand three years after coup* (Aug. 23, 2019), *available at* https://rsf.org/en/news/less-media-freedom-ever-thailand-three-years-after-coup; FORTIFY RIGHTS, FOLLOW-UP SUBMISSION TO THE U.N. HUMAN RIGHTS COMMITTEE ON THAILAND'S COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) (July 2018), https://www.fortifyrights.org/downloads/Follow-up_Submission_to_the_UN_Human_Rights_Committee_on_Thailands_Compliance_with_the_ICCPR_July_2018.pdf; INTERNATIONAL COMMISSION OF JURISTS & THAI LAWYERS FOR HUMAN RIGHTS, *JOINT SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS AND THAI LAWYERS FOR HUMAN RIGHTS IN ADVANCE OF THE EXAMINATION OF THE KINGDOM OF THAILAND'S SECOND PERIODIC REPORT UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (Feb. 2017) [Hereinafter ICJ TLHR ICCPR Submission], *available at* https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_CSS_THA_26602_E.pdf.

[4] United Nations International Covenant on Civil and Political Rights, Mar. 23, 1976, 14668 U.N.T.S. 172, arts. 2, 19, 21–22.

[5] *See* Constitution of the Kingdom of Thailand 2017 §§ 34-36, *available at* https://www.constituteproject.org/constitution/Thailand_2017?lang=en.

[6] HUMAN RIGHTS WATCH, TO SPEAK OUT IS DANGEROUS: CRIMINALIZATION OF PEACEFUL EXPRESSION IN THAILAND (Oct. 2019), https://www.hrw.org/report/2019/10/24/speak-out-dangerous/criminalization-peaceful-expression-thailand; ICJ TLHR ICCPR Submission; *Leading Organizations*, WORLD JUSTICE PROJECT, *available at* https://worldjusticeproject.org/resource-hub/leading-organizations?geography=213&factor=2645&name=&page=1 (last accessed Oct. 18, 2019 at 7:17 am); AMNESTY INTERNATIONAL, *Letter to Secretary Pompeo on Human Rights Concerns in Thailand* (July

assembly as well as criminal prohibitions like the Computer Crimes Act, sedition, and *lèse-majesté* to criminalize speech critical of the monarchy and governing authorities and peaceful political protests.[7]

According to several human rights observers, Thailand's law on sedition, Article 116, in particular, has been used to restrict political or dissenting speech.[8] Specifically, Article 116 criminalizes speech or words considered contrary to the Constitution that aim: "(1) To bring about a change in the Laws of the Country or the Government by the use of force or violence; (2) To raise unrest and disaffection amongst the people in a manner likely to cause disturbance in the country; or (3) To cause the people to transgress the laws of the Country."[9] Convictions can result in up to seven years imprisonment.[10]

As part of this crackdown on organized political opposition and speech, the government has also prosecuted individuals for membership in a secret society (Section 209 of the Thai Criminal Code). This law states:

> Whoever to be a member of a body of persons whose proceedings are secret and whose aim to be unlawful, is said to be a member of a secret society, shall be punished with imprisonment not exceeding seven years and fined not exceeding fourteen thousand Baht.[11]

30, 2019), *available at* https://www.amnestyusa.org/our-work/government-relations/advocacy/letter-to-sec-pompeo-on-human-rights-concerns-in-thailand-7-30-19/.

7 Pravit Rojanaphruk, KHAOSOD ENGLISH *Thai Federation and the Limits of Free Expression*, (Sept. 16, 2018), *available at* http://www.khaosodenglish.com/opinion/2018/09/16/opinion-thai-federation-and-the-limits-of-free-expression/; Shashank Bengali, *Arrests, Killings Strike Fear in Thailand's Dissidents: 'The Hunt Has Been Accelerated'*, LOS ANGELES TIMES (May 28, 2019), *available at* https://www.latimes.com/world/la-fg-thailand-dissidents-20190528-story.html.

8 UN Human Rights Committee, "Human Rights Committee Considers the Report of Thailand," March 14, 2017; HUMAN RIGHTS WATCH, TO SPEAK OUT IS DANGEROUS: CRIMINALIZATION OF PEACEFUL EXPRESSION IN THAILAND (Oct. 2019), *available at* https://www.hrw.org/report/2019/10/24/speak-out-dangerous/criminalization-peaceful-expression-thailand; *Sedition law political tool of the junta: iLaw* , PRACHATAI (Aug. 30, 2017), https://prachatai.com/english/node/7350*. See generally* Hannah Beech, THE NEW YORK TIMES, *Anniversary of Thai Coup Draws Uneasy Protest and Police Threats,* (May 22, 2018), *available at* https://www.nytimes.com/2018/05/22/world/asia/thailand-protest-coup-anniversary.html; Patpicha Tanakasempipat, REUTERS, *Thailand's rising political star charged with sedition*, (April 6, 2019), *available at* https://www.reuters.com/article/us-thailand-election-thanathorn/thailands-rising-political-star-charged-with-sedition-idUSKCN1RI03X; Bangkok Post, *Protect right to protest*, (Dec. 20, 2019), *available at* https://www.bangkokpost.com/opinion/opinion/1820039/protect-right-to-protest; ARTICLE19, *Thailand: Drop charges against peaceful protesters*, (Jan. 30, 2019), *available at* https://www.article19.org/resources/thailand-drop-charges-peaceful-protesters/; Prachatai, *Sedition law political tool of the junta: iLaw*, (Aug. 30, 2017), *available at* https://prachatai.com/english/node/7350. For example, Thanathorn Juangroongruangkit, leader of the (recently disbanded) Future Forward Party, and other political activists and protestors have been charged with sedition (and with violation of public assembly laws that limit public protest and assembly).

9 Thailand Criminal Code, Section 116. Instigator to violate Constitution (Sedition).

10 *Id*.

11 Thai Criminal Code, Section 209.

This 19th-century law is broad and vague on its face, leading to its application to a range of groups, from organized crime groups to non-violent protestors.[12]

B. THE CASE: ORGANIZATION FOR THAI FEDERATION

The Thai government brought this case against five individuals[13] alleging they were members of OTF, and charging them with "membership in a secret organization" under Section 209[14] and sedition for activities publicizing OTF's presence and opinions.[15] Many military leaders in Thailand have publicly denounced OTF for its anti-monarchical stance and accused the group of promoting separatism and treason.[16] Aside from prosecuting suspected followers of the OTF movement, the Thai government has also allegedly pursued OTF activists who have fled Thailand, seeking their repatriation.[17]

[12] For example, this law has been used in suspected terrorism cases. *See e.g.,* Fox News, *Thai Court Finds 9 Muslim Men Guilty in Bangkok Bomb Plot*, (Sep. 25, 2018), *available at* https://www.foxnews.com/world/thai-court-finds-9-muslim-men-guilty-in-bangkok-bomb-plot; Chularat Saengpassa, THE NATION | THAILAND, *Court Convicts Nine in 'Budu Not Bomb' Case*, (Sep. 25, 2018), *available at* https://www.nationthailand.com/national/30355203; Greg Walters, *"Sex Huntress" Who Claims to Have Insight into Russia's Election Meddling Detained in Moscow*, VICE News (Jan. 17, 2019). *See generally*, Surajit Pattanasan, *The Problems of Enforcing the Law of Secret Society Offences and Criminal Association Offences in Thailand*, CHULALONGKORN UNIVERSITY (1987), Teeranai Charuvastra, *10 Other Surprisingly Absurd Thai Laws*, KHAOSOD ENGLISH (Feb. 5, 2016), *available at* https://www.khaosodenglish.com/news/crimecourtscalamity/2016/02/05/1454677599/; *15 Revolutionary Activists Freed on Bail*, PATTAYA (Aug. 23, 2016), *available at* https://www.pattayamail.com/thailandnews/15-revolutionary-activists-freed-bail-146192;

[13] The identities of the defendants are protected. For clarity, we refer to each defendant by their number (i.e. Defendant 1).

[14] Indictment, at 2-3; Thai Criminal Code*, Section 209.*

[15] Monitor's notes. Indeed, most of the leaders of OTF are outside Thailand and have either disappeared or died in the last year. ILAW, *The ideas of "Thai Federation," the origins of 6 serious lawsuits, 17 defendants, 4 people disappeared* (Oct. 1, 2019), *available at* https://freedom.ilaw.or.th/en/blog/ideas-%E2%80%9Cthai-federation%E2%80%9D-origins-6-serious-lawsuits-17-defendants-4-people-disappeared.

[16] Teeranai Charuvastra, *Black shirt arrests part of crackdown on republicans, official says*, KHAOSOD ENGLISH (Sept. 10, 2018), *available at* http://www.khaosodenglish.com/politics/2018/09/10/black-shirt-arrest-part-of-crackdown-on-republicans-official-says/; Pravit Rojanaphruk, *Thai Federation and the Limits of Free Expression*, KHADSOOD ENGLISH (Sept. 16, 2018), *available at* http://www.khaosodenglish.com/opinion/2018/09/16/opinion-thai-federation-and-the-limits-of-free-expression/; Kas Chawanpen, THE NATION THAILAND, *Federation-emblem shirt treasonous, says Prawit*, (Sept. 12, 2018), *available at* https://www.nationthailand.com/politics/30354271.

[17] The Nation Thailand, supra n. 16; Shashank Bengali, LOS ANGELES TIMES, *Arrests, killings strike fear in Thailand's dissidents: 'The hunt has been accelerated'*, (May 28, 2019), *available at* https://www.latimes.com/world/la-fg-thailand-dissidents-20190528-story.html. Concerns have also been expressed for the physical safety of other pro-democracy activists because, in 2019, many activists disappeared or were murdered in neighboring countries, particularly Laos. Emmy Sasipornkarn, DW, *Exiled Thai activists fear for their lives in Southeast Asia*, (Aug. 12, 2019), *available at* https://www.dw.com/en/exiled-thai-activists-fear-for-their-lives-in-southeast-asia/a-49993115; Kate Lamb, THE GUARDIAN, *Thai government pressed over missing Lao activist Od Sayavong*, (Sept. 6, 2019), *available at* https://www.theguardian.com/world/2019/sep/07/thai-government-pressed-over-missing-lao-activist-od-sayavong; Letter from Nicholas Bequelin, Regional Director for Southeast Asia and the Pacific, Amnesty International, to Deputy Prime Minister Prawit Wongsuwan, Thailand (July 2, 2019), *available at* https://www.amnesty.org/download/Documents/ASA3906342019ENGLISH.pdf; Prachatai, *Human rights defenders at risk in Asia*, (May 31, 2019), *available at* https://prachatai.com/english/node/8073; Hannah Beech, *Who's attacking Thailand's Democracy Activists?*, N.Y. TIMES (July 3, 2019), https://www.nytimes.com/2019/07/03/world/asia/thailand-attacks-democracy-activists.html; REUTERS, *Thai*

Given the limitations on its activities in Thailand, where government authorities consider it an illegal dissident group, OTF primarily promotes its ideology via social media and its YouTube radio program.[18]

The defendants in this case are not accused of being leaders in the OTF movement; rather they were charged with promoting OTF and distributing symbolic affiliation black t-shirts bearing OTF's flag logo (similar to the national flag of Thailand but omitting the blue color to signify support for a change in the system of government).[19] In particular, and in addition to the distribution of the t-shirts, the prosecution alleged that they undertook a range of supportive activities in 2018, including distributing stickers and leaflets, participating in OTF through social media channels, and participating in a symbolic protest activity.[20] Notably, while other individuals have previously been arrested and prosecuted for similar activities,[21] none of the movement's leaders appear to have been prosecuted and, at this point, many are believed to have died in Laos.[22] The defendants in this case were tried together but are not accused of acting in concert.

C. PRE-TRIAL PROCEEDINGS

While their trial began in November 2019, the defendants were initially arrested and charged in 2018. Thai military authorities arrested Defendants 1 – 3 on September 5, 2018; Defendant 4 on September 11, 2018; and Defendant 5 on September 17, 2018.[23] According to the indictment:

> The five defendants – with [OTF leaders] – together brazenly acted as members of a body of persons whose proceedings are secret called "the Organization for Thai Federation", with the aim to oppose the monarchy, the government and NCPO; and to change Thailand's regime from a constitutional monarchy to a federation with the president as head of state,

anti-junta activist attacked, latest in 'pattern' of violence, (June 28, 2019), *available at* https://www.reuters.com/article/us-thailand-politics/thai-anti-junta-activist-attacked-latest-in-pattern-of-violence-idUSKCN1TT1LG; THAI LAWYERS FOR HUMAN RIGHTS, *A year of legal actions against the 'Organization For a Thai Federation: At least 20 charged in eleven cases* (Oct. 15, 2019), *available at* https://www.tlhr2014.com/?p=14073&lang=en.

[18] Shashank Bengali, supra n. 17; THAI LAWYERS FOR HUMAN RIGHTS, *A year of legal actions against the 'Organization For a Thai Federation: At least 20 charged in eleven cases* (Oct. 15, 2019), *available at* https://www.tlhr2014.com/?p=14073&lang=en; HUMAN RIGHTS WATCH, *Thailand: Critics Feared 'Disappeared'* (May 9, 2019), https://www.hrw.org/news/2019/05/09/thailand-critics-feared-disappeared.

[19] The red in the flag of Thailand symbolizes the nation and the blood of life, the white represents religion and the purity of Buddhism, and the blue signifies the monarchy. *See The World Factbook: Thailand*, CENTRAL INTELLIGENCE AGENCY, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/th.html; Associated Press, *Thai authorities see T-shirts as proof of sedition*, (Sept. 11, 2018), https://apnews.com/1b02387533c14137a430eb5866eec9b1/Thai-authorities-see-T-shirts-as-proof-of-sedition.

[20] Indictment, at 1-2.

[21] ILAW, *The ideas of "Thai Federation," the origins of 6 serious lawsuits, 17 defendants, 4 people disappeared* (Oct. 1, 2019), *available at* https://freedom.ilaw.or.th/en/blog/ideas-%E2%80%9Cthai-federation%E2%80%9D-origins-6-serious-lawsuits-17-defendants-4-people-disappeared.

[22] *Id*.

[23] Indictment, at 2.

> in transgression of the law. The five [] brazenly made appeared [sic] to the public through words; writings; and mobilization of group members and the general public on online platforms such as Facebook, LINE groups, YouTube and leaflets, encouraging group members and the general public to oppose the monarchy, the government and NCPO – which is not an act within the purpose of the Constitution or for expressing an honest opinion or criticism – in order to cause the people to transgress the laws of the country and to raise unrest and disaffection among the people in a manner likely to cause disturbance in the country, with the goal to change Thailand's regime from a constitutional monarchy to a federation with the president as head of state, in transgression of the law.[24]

Upon their arrest, the defendants were taken to a military camp and interrogated by military officers before being released or transferred to civilian custody.[25] In general, individuals subject to this kind of military detention do not have access to counsel[26]—and that was true in this case as well.[27] According to the indictment, during their interrogation and while in military custody,[28] Defendants 2, 3, and 5 confessed their crimes; Defendants 1 and 4 stated they were not guilty.[29] On October 24, 2018, the public prosecutor charged the five defendants with sedition (Article 116) and being part of a secret society (Section

[24] *Id.*, paras. 1.1-1.2
[25] *Id.* at 2.
[26] *See* Sunai Phasuk, HUMAN RIGHTS WATCH, *Unending Repression Under Thailand's Military Junta*, (May 22, 2019) ("Authorities continue to secretly detain people for up to seven days without charge and interrogate them without access to lawyers or safeguards against mistreatment."), https://www.hrw.org/news/2019/05/22/unending-repression-under-thailands-military-junta; International Commission for Jurists & Thai Lawyers for Human Rights, 'Joint Submission in advance of the examination of the Kingdom of Thailand's Second Periodic Report under Article 40 of the International Covenant On Civil And Political Rights', para 42, March 2017, https://www.icj.org/wp-content/uploads/2017/02/Thailand-ICCPRSubmission-ICJ-TLHR-Advocacy-Non-legal-submissions-2017-ENG.pdf; ILAW, *Arrests and Imprisonment: the fate of political dissidents in Thailand* (July 23, 2019), https://freedom.ilaw.or.th/en/node/708.
[27] *See infra*.
[28] The defendants were interrogated by both civilian and military officials during their time in military custody.
[29] Indictment, Oct. 24, 2018, at 2 [hereinafter "Indictment"].

209).[30] Subsequent to the defendants' arrest, high-level political figures publicly criticized the defendants in the press,[31] including calling them "traitors" and "outlaws."[32]

Defendant 1 was generally alleged to have administered the OTF Facebook page, which published OTF messages,[33] and distributed flyers.[34] The authorities alleged that Defendant 2 had also been involved in distributing flyers.[35] Defendant 3 was alleged to have invited public participation in an OTF LINE account (a messaging service).[36] Defendant 4 was alleged to have distributed OTF t-shirts.[37] And Defendant 5, who absconded before trial, was alleged to be a province-level leader of OTF.[38]

In December 2018, after the charges in this case had been filed, and while they were on bail, some of the defendants participated in a public protest OTF organized by wearing black t-shirts bearing OTF's logo.[39] According to news reports, during the protest, Defendant 3 handed out leaflets critical of the monarchy and, in January 2019, fled Thailand and sought asylum in Malaysia where she was registered as an asylum seeker by the United Nations High Commissioner for Refugees.[40] However, on April 24, 2019, at

[30] Thai Criminal Code, Sections 116, 112, and 209; Prachatai, *Four people jailed for suspected involvement in Thai Federation movement*, (Jan. 24, 2020), *available at* https://prachatai.com/english/node/8346. Each defendant had their own counsel, coordinated through the legal aid group Thai Lawyers for Human Rights. Aekarach Sattaburth, BANGKOK POST, *Woman gets bail after sedition interrogation*, (Sept. 13, 2018), *available at* https://www.bangkokpost.com/thailand/politics/1538802/woman-gets-bail-after-sedition-interrogation; *The ideas of "Thai Federation," the origins of 6 serious lawsuits, 17 defendants, 4 people disappeared*, ILAW (Oct. 1, 2019), *available at* https://freedom.ilaw.or.th/en/blog/ideas-%E2%80%9Cthai-federation%E2%80%9D-origins-6-serious-lawsuits-17-defendants-4-people-disappeared.

[31] Associated Press, *Thai authorities see T-shirts as proof of sedition* (Sept. 11, 2018), *available at* https://apnews.com/1b02387533c14137a430eb5866eec9b1/Thai-authorities-see-T-shirts-as-proof-of-sedition.

[32] *Id.*; Preeyapa T. Khunsong and Kaweewit Kaewjinda, *Thai exile's parents seek information on his disappearance*, ASSOCIATED PRESS (May 13, 2019), *available at* https://apnews.com/663d116390be4391acb6cdd54a78850a.

[33] Judgment, Public Prosecutor, the Office of the Attorney General v. [Five Defendants, names withheld], Jan. 21, 2020, at 4 [hereinafter Judgment] [Annex B].

[34] *Id* at 5.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 5-6.

[38] *Id.* at 6.

[39] Human Rights Watch, *Malaysia: Thai Asylum Seeker Forcibly Returned* (May 13, 2019), *available at* https://www.hrw.org/news/2019/05/13/malaysia-thai-asylum-seeker-forcibly-returned; ILAW, *The ideas of "Thai Federation," the origins of 6 serious lawsuits, 17 defendants, 4 people disappeared* (Oct. 1, 2019), *available at* https://freedom.ilaw.or.th/en/blog/ideas-%E2%80%9Cthai-federation%E2%80%9D-origins-6-serious-lawsuits-17-defendants-4-people-disappeared; THAI LAWYERS FOR HUMAN RIGHTS, *A year of legal actions against the 'Organization For a Thai Federation: At least 20 charged in eleven cases* (Oct. 15, 2019), *available at* https://www.tlhr2014.com/?p=14073&lang=en; Zsombor Peter, *Latest Deportation, Disappearances Rattle Thai Dissident Diaspora*, VOICE OF AMERICA (May 20, 2019), *available at* https://www.voanews.com/east-asia-pacific/latest-deportation-disappearances-rattle-thai-dissident-diaspora.

[40] THAI LAWYERS FOR HUMAN RIGHTS, *The Malaysian authorities arrested defendants of republican charged while awaiting for refugee status from UNHCR in Malaysia* (May 13, 2019), *available at* https://www.tlhr2014.com/?p=12333&lang=en; ILAW, *The ideas of "Thai Federation," the origins of 6 serious lawsuits, 17 defendants, 4 people disappeared* (Oct. 1, 2019), https://freedom.ilaw.or.th/en/blog/ideas-%E2%80%9Cthai-federation%E2%80%9D-origins-6-serious-lawsuits-17-defendants-4-people-disappeared.

the Thai authorities' request, Malaysian authorities arrested Defendant 3 and deported her back to Thailand, where Thai authorities re-arrested her for the event on December 5, 2018, and, as a result of her flight to Malaysia, Defendant 3 was held in pretrial detention throughout the trial.[41] The other three defendants remained at liberty (with the last defendant having absconded).

D. TRIAL PROCEEDINGS

The trial began November 19, 2019, at the Ratchada Criminal Court in Bangkok; hearings were held on November 19-21 and 26, 2019, and the court delivered the judgment on January 21, 2020. The four defendants present for trial were tried together. The court "temporarily dismiss[ed]" the charges against the fifth defendant, who had fled.[42] From November 19 to November 21, 2019, the trial centered on the examination of prosecution witnesses; on November 26, the defendants presented their defense. Each defendant had individual counsel retained through the Thai human rights organization, Thai Lawyers for Human Rights. The State was represented by the Public Prosecutor's office.

November 19, 2019: Prosecution Examination of Witnesses

On the first day of trial, TrialWatch monitors from the Columbia Human Rights Clinic, accompanied by two interpreters, monitored the proceedings. The main judge and two junior judges commenced the proceedings at 9:30AM.

The Prosecution began with its examination of Witness 1, Col. Burin Thongpraphai, an ISOC (military intelligence) officer who had questioned the defendants upon their arrest. At the outset of the proceedings, Witness 1 requested the court be closed to non-parties due to the sensitive nature of the trial and specifically, the charges (involving the monarchy), but the judge denied the request. According to the monitors' notes, the judge stated it was better not to close the court because the Court could be subject to criticism for inappropriate military influence. However, the judge said, if testimony contained sensitive material about the monarchy, he would exclude non-parties for that portion of the testimony. Witness 1 testified that according to evidence in the record and his interrogations, all defendants conducted anti-monarchical activities, such as running social media for OTF and distributing materials. However, in his cross-examination of the witness, defense counsel for Defendant 1 confirmed with the Witness that none of the defendants ever said anything insulting about the monarchy. Counsel for Defendant 1 also refuted Witness 1's claim that Defendant 1 was an administrator of the OTF Facebook page.

[41] *Id.* Human Rights Watch criticized Malaysia for forcibly returning Defendant 3, stating that this violated Malaysia's obligation to protect someone who faced "likely persecution for her peaceful political activities." Human Rights Watch, *Malaysia: Thai Asylum Seeker Forcibly Returned*, (May 13, 2019), *available at* https://www.hrw.org/news/2019/05/13/malaysia-thai-asylum-seeker-forcibly-returned.
[42] Judgment at 2.

Witness 1 alleged that Defendant 4 was an OTF member based on the fact that she obtained hundreds of OTF t-shirts from her mother, whom he claimed was an OTF supporter. On cross-examination, counsel for Defendant 4 argued her client was unaware of the significance of the t-shirts and distributed them in exchange for money because she was very poor, not for political reasons.

Witness 2 was Pol. Maj. Gen. Surasak Khunnarong, a lieutenant general who interrogated Defendants 1, 2, and 3 during their detention in the military camp. On cross-examination, the Witness admitted that he did not inform defendants that their testimony could be used in court. Witness 2 further testified that during the interrogation, Defendant 1 confessed he was the administrator of two OTF Facebook pages. Counsel for Defendant 1 disputed this claim during cross-examination and suggested that military officers had manufactured the evidence against his client.

November 20, 2019: Prosecution Examination of Witnesses

On the second day, the prosecution questioned Witness 3, a police officer for the Special Branch of the Thai police who had raided Defendant 4's apartment and participated in her arrest. Witness 3 testified that during the raid, the military seized 454 black t-shirts bearing OTF's symbol and the defendant's electronics.

Witness 4 was scheduled to take the stand after the lunch break but failed to present himself in court. The judge granted the prosecution's request to reschedule Witness 4's testimony to the following day.

November 21, 2019: Prosecution Examination of Witnesses

At the hearing on November 21, 2019, the prosecution presented two witnesses. Witness 4, Khanchit Siharot, who was a police officer for the Special Branch, Bureau 2 Royal Thai Police in Bangkok, and who was present during the raids on the defendants' houses; he testified about OTF digital communications, including reviewing Defendant 1's Facebook page. On cross-examination, Defendant 1's attorney questioned the witness about his absence on November 20 and accused the witness of having concocted new evidence to present in court that the defendants' counsel could not review before the hearing. (The witness denied these allegations.)

Next, Witness 5, Lt. Col. Sawek Booncha, testified that he filed the complaints against the defendants and interrogated them during their detention in the military camp. Under cross-examination by Defendant 3's counsel, Witness 5 stated that the defendants' seized OTF materials were not in themselves illegal but that it was illegal to distribute them. Similarly, under cross-examination by Defendant 4's counsel, Witness 5 conceded that the seized t-shirts only had the OTF symbol and no text, and thus the general public would not know what the shirt represented. Also on cross-examination, Witness 5 agreed with assertions made by Defendant 1's counsel that OTF leaders had issued a statement indicating that the defendants in this case were not OTF members and not guilty of the

crimes charged; he further testified that the government's initial investigation centered around OTF leaders then located in Laos.

November 26, 2019: Defense Examination of Witnesses

The defense examined its only witness, Defendant 4, on November 26, 2019. Defendant 4 testified that her mother had asked her to sell t-shirts; Defendant 4 stated that she did not know what kind of t-shirts they were until she was informed by the military officer who questioned her. According to the monitor's notes, Defendant 4 testified:

> To me these were merely two sacks of black shirts with white red flags but I did not know what they meant. I thought these were ordinary black shirts and my mother did not tell me how they were wrong. She simply suggested me to sell these to her people where these people were to remain anonymous and my mother would receive compensation.[43]

Defendant 4 testified that, while in detention upon her arrest, a soldier asked her to sign a document stating that she was aware selling the t-shirts was wrong, and that she only signed the document without reading because she wanted to go home (based on earlier testimony, it appears that her two young children had been left alone upon her arrest and been requesting permission to see her).[44]

January 21, 2020: Judgment

Local partners monitored the delivery of the judgment on January 21, 2020, at 10:00 AM. The presiding judge orally delivered the court's judgment finding Defendants 1 – 4 guilty of violating the public peace under Section 209(1) in connection with Article 83 of the Thai Criminal Code;[45] the Court found the defendants not guilty under Article 116 of the Criminal Code (sedition) because their acts were not an offense to national security within the Kingdom.[46] Pursuant to Article 78 of the Criminal Code, the Court reduced Defendants 2 and 3's sentences from three years to two years of imprisonment for confessing.[47] Defendants 1 and 4 did not receive a reduction of punishment and were sentenced to three years of imprisonment.[48]

According to the monitor's notes, the Court found that OTF was "contrary to the…[Constitution] and deemed a violation of public peace and order by means of spoken and written, leading to the disruption of public peace and public order of the country" because it advocated for the "destruction" of the monarchy.[49] In its written decision, made

[43] Monitor's Notes, November 26, 2019.
[44] Monitors' Notes, November 20, 2020.
[45] Judgment, at 15.
[46] *Id*. at 14.
[47] *Id.* at 15—16.
[48] *Id.*
[49] Monitor's notes, January 21, 2020.

available several weeks later, the Court began by first examining "whether the acts of the founding members [of OTF] exist and are illegal."[50] The Court explained the role of the leaders in fomenting chaos and advocating the abolition of the monarchy and then acknowledged these individuals had fled to Laos.[51] Before turning to the specific defendants and their actions in this case, the Court noted the testimony of the prosecution's witnesses was reliable because:

> All witnesses of the plaintiff are officials acting in according with their duty, without any personal agenda against the Defendants. There shall be no doubt that the witness would give a fake statement to frame such people including the Defendants without truth.[52]

The Court then discussed the individual defendants' activities, specifically distributing materials. The Court found that the statements in the materials Defendants 1 and 2 distributed were non-violent and "only provid[ed] knowledge regarding federal state regime,"[53] and as such did not cause public unrest.[54] The Court found Defendants 3 and 4 were not involved in the operation of the OTF YouTube channel—the Court noted that Defendant 3 only invited individuals to join an OTF group on Line (a messaging application) and that Defendant 4 only distributed materials unlikely to cause violence of "chaos or disobedience."[55]

However, the Court did find that all four Defendants "were involved by supporting or aiding" OTF, which clearly espoused ideology contrary to the Constitution and operated as a secret membership organization.[56] The Court also noted that Defendants 1 — 3 did not testify during the trial and the Court "found that suspicious and not acceptable."[57] The Court further held that Defendant 4 was aware her mother was a "person of interest" and was unconvinced by Defendant 4's testimony otherwise.[58]

[50] Judgment, at 8.
[51] *Id*. 8—9.
[52] *Id*.
[53] Judgment, at 12.
[54] *Id*.
[55] *Id*.
[56] *Id.* at 14—15.
[57] *Id.* 15.
[58] *Id.*

METHODOLOGY

A. The Monitoring Phase

This case was monitored by monitors from TrialWatch partner the Columbia Law School Human Rights Clinic, along with local Thai monitors. In advance of the monitoring mission, the Clinic informed the defense attorneys of its intention to monitor the case. The Clinic prepared a background memorandum for the monitors outlining key information on human rights and freedom of expression in Thailand, the judicial system, the right to a fair trial under Thai law, and laws in Thailand regarding freedom of expression. This report also included information on the trial, including the charges against the defendants and the facts of the case.

None of the monitors experienced any impediments to their entry into the courtroom. All trial monitors provided letters of introduction to the court informing the court of their presence and intention to monitor the proceedings. Local Thai translators accompanied the monitors from Columbia Law School.

All monitors used a standardized CFJ TrialWatch questionnaire to record and track what transpired in court and the degree to which the defendants' fair trial rights were respected in the proceedings. These questions requested factual information about all stages of the proceedings (pretrial through sentencing).

B. The Assessment Phase

1. Grading Methodology

To evaluate the trial's fairness and arrive at a grade, Dr. Demetra Sorvatzioti, the member of the TrialWatch Experts Panel responsible for evaluating the fairness of the trial, reviewed materials provided by the trial monitors, including answers to a standard set of questions (collected via the CFJ TrialWatch App), notes taken during the proceedings and related meetings, and court documents related to the case. She also had available to her notes from one monitor's meetings with defense counsel and other local contacts.

These materials provided the expert with a factual record to review in order to evaluate the trial's fairness under human rights law. The expert then evaluated the trial against the following components of the right to a fair trial: the right to be presumed innocent; right to be informed of the charges; fitness to plead; the right to interpretation; the right against double jeopardy; the right to a speedy trial; the right to be tried by a competent, independent and impartial tribunal established by law; the right to counsel; the right to adequate time and facilities to prepare a defense; the right to a public hearing; the right to be tried in one's presence; the right not to be compelled to testify against oneself or to confess guilt; the right to call and examine witnesses; the right to fairness; and the right to appeal, including the right to a public, reasoned judgment.

A grade was then assigned using the methodology in the Annex to this report.

2. Fair Trial Analysis

Thailand ratified the International Covenant on Civil and Political Rights (ICCPR) in 1996.[59] Article 14 of the ICCPR protects the right to a fair trial. Similarly, the Constitution[60] of Thailand provides for the right to a fair trial in Sections 29[61] of Chapter III 188[62] of Chapter X. Moreover, the Thai Criminal Procedure Code (herewith TCPC) in Sections 7[63] and 8[64] provides for the right to a fair trial.

Thailand could be considered a hybrid legal system that has incorporated both common law and continental features.[65] With respect to criminal procedure, it seems that the continental approach prevails.[66] Given the nature of Thailand's legal system, this report therefore also considers precedents from the European Court of Human Rights (ECtHR), which decides cases alleging violations of the European Convention on Human Rights (herewith ECtHR) by members of the Council of Europe.[67] While Thailand has not ratified

[59] United Nations, International Covenant on Civil and Political Rights (accessed May 21, 2020), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec

[60] Constitution of the Kingdom of Thailand (2017),

[61] Section 29 of the Thai Constitution requires respect for the principle of legality. "No person shall be subject to a criminal punishment unless he or she has committed an act which the law in force at the time of commission provides to be an offence and prescribe a punishment therefor, and the punishment to be imposed on such person shall not be of greater severity than that provided by law in force at the time of the commission of the offence." It also guarantees the presumption of innocence by stating that "a suspect or defendant in a criminal case shall be presumed innocent, and before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict." Furthermore, it provides for a right against self-incrimination: In a criminal case, a person shall not be forced to make a statement incriminating himself or herself.

[62] Section 188 of the Constitution provides that cases should be tried according to law and "in a swift and fair manner, and without any partiality."

[63] Section 7 protects the rights of the arrested person to meet and talk with a lawyer, the right to request that the arresting officer inform his or her relatives, the embassy, or a trusted person that he or she is under arrest and the place of detention, the right to be nursed without delay when ill, and the right to hear by the authorities his/her rights upon being arrested.

[64] Section 8 protects the rights of the person when a charge is formally registered: The right to an expeditious, continuous, and fair trial; the right to hire a lawyer to represent him/her in a court hearing or trial; the right to have private meetings with his/her lawyer; the right to have access to the file to the entire evidence and make copies upon payment of the fees; and the right to examine and make a copy of his/her plea after the inquiry.

[65] Thailand has "a civil law system with common law influences." Thai Laws, http://www.thailaws.com/ (accessed June 15, 2020). Pawat Satayanurug & Nattaporn Nakornin argue that Thailand during the period of King Rama V adopted a civil system because it was convenient for cultural reasons and today the legal system has a generally civil-law orientation. Pawat Satayanurug & Nattaporn Nakornin, *Courts in Thailand: Progressive Development as the Country's Pillar of Justice*, in ASIAN COURTS IN CONTEXT (Jiunn-Rong Yeh & Wen-Chen Change, eds. 2015), at 407, 416, 432.

[66] That this is so is clear from the procedures applied in this case. For instance, the absence of a meticulous transcript is common in continental legal systems. Further, the prosecution was not clearly asked to bear the burden of proof, there was no separation of trial with respect to conviction and sentencing, and the judge exercised a dominant role in seeking the truth. *See infra.*

[67] The Council of Europe was founded in 1949 and has 47 members. https://www.coe.int/en/web/about-us/our-member-states. It is important to distinguish between the ECHR and the Charter of Fundamental Rights of the European Union. The Charter includes all the personal, civic, political, economic, and social

the ECtHR, the jurisprudence of the ECtHR is relevant insofar as in some cases it describes how international fair trial standards reflected also in the ICCPR have been applied to a variety of legal systems, including those that are 'continental' in nature (as is the case with many states of the Council of Europe). The ECtHR, when it considers the diverse legal systems of Contracting States and from which tradition each case emanates, has stressed that, regardless of the tradition of the systems, there are fundamental aspects of a fair trial according to international norms which must be applied.[68]

Further, reference is also made to EU Directives on topics such as the presumption of innocence. While these are again not directly applicable to Thailand, they reflect ECtHR jurisprudence, which in some cases reflects and interprets international standards applicable to Thailand by virtue of their inclusion in the ICCPR; and these Directives have been promulgated as an effort to codify those standards in the face of resistance by some continental systems to adopt procedures required by the ECtHR but less familiar to continental systems as robustly as their common law counterparts.[69] The Directives, therefore, provide potentially helpful guidance with respect to the minimum standards that even continental systems must meet in order to comply with their international fair trial obligations.

Investigation and Pretrial Stage

A. Right to be Informed of the Charges and Right to Access to Legal Assistance

The defendants in this case were not informed of the charges nor were they permitted to communicate with counsel after their arrest in violation of the ICCPR and Thai law. Article 9(2) of the ICCPR provides that anyone arrested must be informed, at the time of arrest, of the reasons for their arrest and must be promptly informed of any charges against them. Article 9(2) requires that the authorities explain not only the "general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act."[70] Further, Article 14(3)(d) provides for the right to legal

rights enjoyed by people within the European Union. The ECHR is an international convention that protects the human rights of people in countries that belong to the Council of Europe.

[68] Case of Al-Khawaja and Tahery v. the United Kingdom, ECtHR [Grand Chamber], Dec. 15, 2011, § 130; Schatschaschwili v. Germany, ECtHR [GC], § 108 ("while it is important for it (the Court) to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review" under Articles 6 §§ 1 and 3 (d) irrespective of the legal system from which a case emanates.).

[69] Council of Europe, *Interpretative mechanisms of ECHR case-law: the concept of European consensus*, *available at* https://www.coe.int/en/web/help/article-echr-case-law (accessed June 15, 2020). *See also* Bayatyan v. Armenia (GC), 23459/03, 7 July 2011, §§ 102]: ("in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention and the interpretation of such elements by competent organs. The consensus emerging from specialised international instruments may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.") (and also analysis of the ECtHR in relation to the ICCPR and the Universal Declaration of Human Rights).

[70] Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 25.

assistance, including at the pre-trial stage. Indeed, the UN Working Group on Arbitrary Detention has clarified that persons "deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention."[71] Likewise, the UN Human Rights Committee has previously found a violation of Article 14 where "the author [was denied] access to legal counsel after he had requested such access and [where the authorities] interrogat[ed] him during that time."[72]

The TCPC likewise protects the right to be informed of the charges and the right to legal assistance. The TCPC contemplates both an "investigation" stage (conducted by the police) and an "inquiry" stage,[73] similar to the investigative judge stage of proceedings in many continental systems. In particular, Article 84 provides for notification of the cause for arrest, and Article 134 requires notification of the potential charges during the inquiry. Likewise, Article 7/1(1) and (2) provide for the right to counsel.[74]

In this case, the testimony at trial suggests the defendants were not all informed of the specific charges they faced. For example, Defendant 4 testified that during her seven days of detention by the military, she was only asked if she knew what she had done wrong and what the OTF was. She testified that she only learned what OTF was from the investigating officer and signed her confession because she had been told that selling the (OTF) t-shirts was wrong. [75]

Further, consistent with NCPO handling of interrogations during military detention at that time,[76] the defendants were not, according to defense counsel, permitted access to counsel while detained by the military and subject to interrogation.[77] Indeed, according to the monitors' notes, during cross-examination by defense counsel for the fourth defendant, the first witness (W1), an NCPO officer, concurred that regulations prohibited the defendants from receiving visits from lawyers or relatives while in military detention.[78]

[71] UN Working Group on Arbitrary Detention, 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, May 4, 2015, Principle 9, Guideline 8.
[72] Human Rights Committee, Gridin v. Russian Federation, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.5.
[73] Thailand Criminal Procedure Code (TCPC), Title I, Section 2(10), (11), *available at* https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/93536/109383/F203580879/THA93536%20EngTha.pdf
[74] *Id*. Article 7/1.
[75] Whenever a police officer or other authority arrests someone and brings him in for interrogation, questions about the crime being investigated without prior detailed information about the alleged charges precludes the person from the exercise of the rights of defence. *See* Directive 2012/13/EU at 28.
[76] *See* Sunai Phasuk, *Unending Repression Under Thailand's Military Junta*, HUMAN RIGHTS WATCH (May 22, 2019) ("Authorities continue to secretly detain people for up to seven days without charge and interrogate them without access to lawyers or safeguards against mistreatment."), https://www.hrw.org/news/2019/05/22/unending-repression-under-thailands-military-junta; International Commission for Jurists & Thai Lawyers for Human Rights, 'Joint Submission in advance of the examination of the Kingdom of Thailand's Second Periodic Report under Article 40 of the International Covenant On Civil And Political Rights', para 42, March 2017, *available at* https://www.icj.org/wp-content/uploads/2017/02/Thailand-ICCPRSubmission-ICJ-TLHR-Advocacy-Non-legal-submissions-2017-ENG.pdf
[77] Monitors' Notes, November 19-21, 2019.
[78] *Id*.

The second witness (W2), also an NCPO military officer, also stated on cross-examination by counsel for Defendant 1 (D1) that during D1's interrogation, no lawyers were present, and the accused was not told his statements could be used in court.[79]

This constituted a violation of their right to counsel under both domestic and international law. It was also one with profound consequences. According to the Court's judgment in this case, three of the defendants confessed while in detention, but at trial, two of them (the third being the one who had absconded) stated that they were not guilty.[80] When these defendants confessed, they did not have legal assistance, and they asserted that they were not guilty at a time when they had legal assistance. It thus appears that the violation of the right to access to legal assistance had exactly the consequence that has concerned the UN Human Rights Committee—the possibility that the trial will be profoundly affected by decisions defendants make without the benefit of legal advice.[81] .

B. <u>The Right Against Self-Incrimination and the Right to Silence</u>

The authorities also violated the defendants' rights against self-incrimination and to silence in this case. The right to not incriminate oneself and the right to remain silent, though distinct, share a common historical and philosophical core: the accused "has no obligation to give evidence against himself, that he or she has the right to choose."[82] These rights are protected by the ICCPR (art.14(3)(g)) and are also reflected in the Universal Declaration of Human Rights (art.11). (While, Article 14 of the ICCPR does not refer explicitly to a right to silence, the UN Human Rights Committee has previously found a violation of Article (14(3)(g) where a defendant was not informed of their right to silence.[83]) They apply at the pre-trial stage, just as much as at the trial stage.[84]

These interrelated rights[85] require that defendants be cautioned that what they say can be used at trial[86] and informed that they are permitted not to speak at all.[87] Likewise,

[79] *Id*.
[80] Judgment, Public Prosecutor, the Office of the Attorney General v. [Five Defendants, names withheld], Jan. 21, 2020.
[81] *See also* Human Rights Committee, Lyashkevich v. Uzbekistan, U.N. Doc. CCPR/C/98/D/1552/2007, May 11, 2010, para. 9.4.
[82] *See e.g.*, Supreme Court of Canada, R. v. Hebert, [1990] 2 S.C.R. 157, at para. 144.
[83] Human Rights Committee, Khoroshenko v. Russian Federation, U.N. Doc. CCPR/C/101/D/1304/2004, April 29, 2011, para 9.8
[84] *See, e.g.*, Human Rights Committee, Concluding Observations on the Netherlands, UN Doc. CCPR/C/NLD/CO/4, August 25, 2009, para 11.
[85] These are distinctive rights. The right to remain silent requires that the accused be afforded the choice to speak or remain silent. The right not to self-incriminate does not preclude the right of the person to make a voluntary statement but not a compelled incriminating statement.
[86] *Odillo et al v. Malawi*, UN Working Group on Arbitrary Detention, Opinion No 15/2012, U.N. Doc. A/HRC/WGAD/2012/15, July 13, 2020, para 52.
[87] *Alufisha v. Malawi*, UN Working Group on Arbitrary Detention, Opinion No 55/2012, U.N Doc. A/HRC/WGAD/2012/55, February 12, 2013, para 23; *Cf.* EU Directive 2013/48/EU, Recital 31 (stipulating that even in cases of derogation defendants must be "informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination").

according to the TCPC, a suspect must be informed that what they say can be used at court and that they are also entitled to remain silent.[88]

Further, international standards require that any waiver of these rights be informed and voluntary.[89] This is true even in civil law systems, where the concept of waiver is less familiar. For instance, the EU Directives on the right of access to a lawyer and right of the accused to be present at trial, both of which apply to continental systems, stipulate the same standard for waivers.[90]

In this case, it appears that the authorities failed to caution the defendants and did not inform them of their right to remain silent. In particular, according to the monitors' transcript of the trial, the second witness (W2) testified that the defendants were not informed that their testimony could be used in court. Further, based on the record, there is no evidence that they were advised that they were entitled to remain entirely silent. Finally, there is no evidence that they effectively waived their rights. This violated their rights.

While some precedents—in particular in the European context—have suggested that the question of whether evidence obtained in violation of the privilege against self-incrimination and the right to silence may be admitted in court depends on the facts and circumstances of the particular case,[91] here, if we combine the violation of the right to be informed of the charges and the right to legal assistance with the violation of the rights not to self-incriminate and to remain silent the court should clearly have declined to admit the statements of the defendants—and the admission of their statements constituted a further violation of the defendants' rights.

Trial

The defendants' rights were also violated at trial. While the judgment shows that the principle of a public hearing was applied, and the defendants were able to exercise their right to defense, the proceedings did not respect their right to remain silent or their right to the presumption of innocence. Further, the behavior of the court, while perhaps

88 *See* TCPC, Title I, Sections 83, 84.
89 *Cf. Blake v The United Kingdom* App no 68890/01 (ECtHR, 26 September 2006); *Sejdovic v. Italy* [GC], 56581/00, ECHR 2006-II para 87. *See also Korponay v. Canada* (Attorney General), [1982] 1 S.C.R. 41, 65 C.C.C. (2d) 65, at p. 49 S.C.R., p. 74 C.C.C.: "the validity of any waiver "is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process" and Brady v. United States,397 U.S. 742, 748 (1970): "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."
90 DIRECTIVE 2013/48/EU of the European Parliament and of the Council, art 9 (Oct. 22, 2013); DIRECTIVE 2016/343 of the European Parliament and of the Council, Recital 35 (March 9, 2016).
91 Jalloh v. Germany, ECtHR, 11 July 2006 Grand Chamber; O'Hallloran & Francis v. The United Kingdom Grand Chamber, Judgment 29 June (2007).

consistent with Thai procedure, breached the right to be presumed innocent and gives rise to concern regarding the right to be tried by an impartial court.

A. The Right to Remain Silent

First, the court violated the defendants' right to remain silent. The UN Human Rights Committee has previously made clear that negative inferences may not be drawn from silence.[92] While there had been some limited contrary precedent in the European Court of Human Rights, the EU has recently made clear that even in continental systems, the drawing of inferences from silence is a violation of a defendant's rights.[93]

Here, the judgment states: "The Defendants No. 1 to 3 did not testify to the Court proving their innocence, but merely deny. The Court found that suspicious and not acceptable."[94] This statement demonstrates that the exercise of the defendants' right to remain silent was used against them for proving their guilt.[95]

B. The Right to the Presumption of Innocence

In this case, the procedures used to convict the defendants did not seem to require the prosecution to bear the burden of proof—taken together with the violations of the right to silence, this is sufficient to find a breach of the presumption of innocence.

Here, it appeared that the judge was free simply to decide on the basis of the evidence.[96] While this is broadly consistent with the continental tradition of 'free evaluation of the evidence,'[97] it is not consistent with more recent developments in fair trial standards, and as such raises concerns.

The UN Human Rights Committee has made clear that "[t]he presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge."[98] Further, the European Court of Human Rights has likewise made clear that respect for the presumption of innocence requires that the prosecution bear the burden of proof.[99] Thus, for example, even though the majority of

[92] HRC Concluding observations of the human rights committee united kingdom 6 December 2001 CCPR/CP/73/UKOT, para 17; *See* Directive 343/2016/EU of the European Parliament and of the Council, (March 9, 2016), art.7 para 5: "The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned."
[93] *Id*. Article 7(5), Recital 28.
[94] Judgment, at 15
[95] Another example that bears on the lack of respect for the right to remain silent is the use by the Court of defendant's (D4) denial of guilt as a reason to preclude any mitigation of sentence.
[96] For example, in a few instances, the Judge stopped the defense counsel from asking witnesses about the evidence, stating it was up to the Judge to evaluate it (and so preventing the defense attorneys from challenging its credibility or application in this case).
[97] See the investigating role of the judge at trial in continental systems in Demetra F. Sorvatzioti, D.F. & Allan Manson, *Burden of Proof and L'intime conviction: Is the Continental Criminal Trial Moving to the Common Law?*. CAN. L.REV. 1, 108 (2018).
[98] GC32, para 30.
[99] *Id*. at 123-24; *see, e.g.*, ECtHR, *Telfner v. Austria* (33501/96), 20/03/2001, § 15

European states follow the continental legal tradition, the 2016 EU Directive on the presumption of innocence requires national legislators to incorporate in the wording of their legislation that "the burden of proof for establishing the guilt is on the prosecution."[100]

Here, the TCPC explicitly states that "the Court must hear the witness for the prosecution until it is satisfied that the accused is guilty."[101] However, satisfaction by the Court does not mean that there is any burden on the prosecution.[102] This gives rise to concern on its face. Moreover, those concerns were manifested in this case, for instance, by the treatment of Defendant 4's statement that she did not know the meaning of the t-shirts she had in her apartment. The Court dismissed this defense argument without requiring the prosecution to produce any evidence of knowledge, instead simply assuming that it was the case given Defendant 4's ostensible knowledge that her mother was a person of interest to the military.[103] Likewise, with respect to the other three defendants who did not testify but pled not guilty, the Court said that they had not testified to "prov[e] their innocence" but merely den[ied]."[104] This statement shows that there was a reversal of the burden of proof. Moreover, the Court found the failure to testify "suspicious and not acceptable."[105] This statement shows that: there was a reversal of the burden of proof. This statement shows that the Court negatively criticized the defendants for exercising the right to remain silent

Those concerns regarding the burden of proof are exacerbated by the way in which the judge, in the judgment, accepted the government's presentation of evidence as credible because the witnesses were government officers[106]—and at the same time, stated in court that D4's defense that she didn't know of OTF was "unhearable."[107]This is inconsistent with the approach taken by the European Court of Human Rights to the application of the presumption of innocence in continental systems. For instance, the ECtHR has stated that where the case rests on the testimony of police witnesses, "it [is] indispensable for the [court] to exhaust every reasonable possibility of verifying their incriminating statements. The failure to do so [runs] contrary to the basic requirement that

[100] See article 6 of the Directive 343/2016 which applies to both continental and common law jurisdictions: "1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law. 2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted. The Directive at para.23 states that those of the Member States which do not have an adversarial system should be able to maintain their current system provided that it complies with the need to incorporate the burden of proof on the prosecution.
[101] Section 176 of TCPC.
[102] *Id*.
[103] Judgment at 15 ("The testimony of the Defendant No. 4 is therefore not accepted."); Monitors' Notes, Jan. 21, 2020.
[104] Judgment at 15.
[105] *Id*.
[106] *Id*. at 10 ("The performance of duty of the officials are with the aim to bring the wrongdoers for prosecution. There is no benefit that the official would create fake evidences.")
[107] Monitors' Notes, January 21, 2020.

the prosecution has to prove its case and one of the fundamental principles of criminal law, namely, *in dubio pro reo*."[108]

In particular, the judgment states:

> All witnesses of the plaintiff are officials acting in accordance with their duty, without any personal agenda against the Defendants. There shall be no doubt that the witness would give a fake statement to frame such people including the Defendants without truth. The testimony of the witnesses is, therefore, reliable" [...] "The performance of duty of the officials are with the aim to bring the wrongdoers for prosecution. There is no benefit that the official would create fake evidences.[109]

Taken together, these facts give rise to a concern as to whether the Court properly gave the defendants the benefit of the doubt--as the UN Human Rights Committee has clarified that "[a] criminal court may convict a person only when there is no reasonable doubt of his or her guilt, *and it is for the prosecution to dispel any such doubt*."[110] Both because of the functional reversal of the burden of proof and the apparent failure to give the defendants the benefit of the doubt, the proceedings breached the presumption of innocence.

C. The Right to an Impartial Tribunal

Finally, under the ICCPR judges must be impartial.[111] The UN Human Rights Committee has made clear that where a judge "effectively replace[s]" the prosecutor, a violation will be found.[112] Likewise, where a judge does not allow the defense to present their case, that may give rise to objectively justified doubts as to the judge's impartiality.[113] Further, defendants must not be precluded from questioning witnesses, while the prosecution is permitted to present its case without limitation.[114]

[108] European Court of Human Rights, Navalnyy and Yashin v. Russia, App. No. 76204/11, December 4, 2014, para. 83 (internal citation omitted).
[109] Judgment, Public Prosecutor, the Office of the Attorney General v. [Five Defendants, names withheld], Jan. 21, 2020, at 9 and 10
[110] Human Rights Committee, Larranaga v. Philippines, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.4 (emphasis added).
[111] Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, Aug. 23, 2007, para 21 [hereinafter "GC 32"] ("The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.").
[112] Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, paras. 2.8, 6.6.
[113] Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. CCPR/C/97/D/1519/2006, December 3, 2009, paras. 7.2-7.3.
[114] Mohamed Nasheed v. Maldives, Working Group on Arbitrary Detention, No. 33/2015, May 12, 2015, paras 82, 103(iii).

Of course, the Judge's role during the trial in continental systems is authoritative and dominant. Judges have access to the case dossier before the trial and have the duty to seek the truth.[115] For that reason, it can be difficult to draw a line between an objective lack of impartiality and continental style truth-seeking.

Here, the Judge came perilously close to the line. For instance, as discussed above, he interfered when the defense was examining witnesses and stopped continuous questions that may have discomforted the witnesses. Likewise, he also summarily discounted the testimony of Defendant 4 regarding her lack of knowledge of the import of the t-shirts. By contrast, the court treated the "good and honest" intention of prosecution witnesses as unquestionable.[116]

While state officials are usually considered neutral and objective by definition in continental systems,[117] that does not mean that that the judge can credit their testimony over that of defendants or their witnesses without reason—to do so would be to "improperly promote[] the interests of one of the parties to the detriment of the other."[118]

Taken together, even accounting for the role of the judge in a continental system, the court's behaviour raises substantial concerns regarding the right to be tried by an impartial tribunal.

The Court's violations of the defendants' rights are mutually reinforcing and are encapsulated by the statement that the Court found the defendants' choice not to testify "suspicious and not acceptable." This shows that: (a) the exercise of the right to remain silent was used against the defendants for proving their guilt; (b) on the basis that there was a reversal of the burden of proof, i.e., that they were expected to prove their innocence, which (c) they were hampered in doing by restrictions on their ability to put on a defense, and which (d) gives rise to substantial concern that the Court was prejudiced against the defendants.

Judgment

In this case, the Court delivered an oral judgment, acquitting all four defendants of sedition while convicting them of membership in a secret society. This was followed later by a

[115] *See* the investigating role of the judge at trial in continental systems in Sorvatzioti, & Manson, supra n. 97, at p. 117-119.
See also Directive 343/2016 which at para 23 states that "In various Member States not only the prosecution, but also judges and competent courts are charged with seeking both inculpatory and exculpatory evidence."
[116] Judgment at 9 and 10 ("All witnesses of the plaintiff are officials acting in accordance with their duty, without any personal agenda against the Defendants. There shall be no doubt that the witness would give a fake statement to frame such people including the Defendants without truth. The testimony of the witnesses is, therefore, reliable" [...] "The performance of duty of the officials are with the aim to bring the wrongdoers for prosecution. There is no benefit that the official would create fake evidences.").
[117] *See* the qualitative research regarding the continental criminal justice system of Greece in Sorvatzioti Demetra, *The Poverty of Justice*, Kapsimi Publications, Athens 2011(in Greek).
[118] GC 32 para 21.

written judgment dated January 21, 2020. This sequence is consistent with the continental tradition.[119] But the written decision of the Court lacks the necessary reasoning to support the conviction of the four defendants. Even if in the continental tradition there is not a detailed analysis of every piece of evidence examined but rather an overall evaluation of the evidence at trial,[120] the judgment still has to meet a minimum standard of legal deductive reasoning.

Indeed, Article 14(5) of the ICCPR provides a right to appeal, which the UN Rights Committee has explained requires a "duly reasoned" written judgment (as without that, a defendant could not effectively challenge their conviction).[121] The decision of the Court seems to reflect the view of the prosecution witnesses, which was adopted without question and led to an unreasoned judgment under international standards.

In this case, the Court omitted to explain how the elements (mens rea and actus reus) of the offense of which the defendants were convicted were met for each of the defendants. Instead, the Court focused heavily on the role of OTF leadership who had fled the country. Rather, with respect to mens rea, for instance, the judgment simply said that "[The Court] believes that the Defendants knew about such organization and contributed in the operation of such organization to continue by various acts as testified by the Plaintiff."[122] This is insufficient and infringed upon the defendants' right to a reasoned judgment.

3. Principle of Legality and Freedom of Expression

A. The Principle of Legality as Applied to Section 209

The principle of legality which is known as the maxim "nullum crimen nulla poena sine lege" is a core constitutional provision which in criminal law requires that crimes be clearly defined and prohibits retroactive application. In this case, section 209 of the Thai criminal code violates the principle of legality because it is vague, and its vagueness was used by the Court for unjustified restrictions of the freedom of speech of the defendants.

1. Section 209 of the Criminal Code of Thailand

Section 209 of the Criminal Code of Thailand (herewith TCC) reads:

> Whoever to be a member of a body of persons whose proceedings are secret and whose aim to be unlawful, is said to be a member of a secret

[119] Continental criminal trials usually happen in one continuous hearing session. The oral decision of the Court is delivered the same day.
[120] Demetra F. Sorvatzioti, D.F. & Allan Manson, *Burden of Proof and L'intime conviction: Is the Continental Criminal Trial Moving to the Common Law?*. Can. L.Rev. 1, 107-129 (2018).
[121] GC 32, para 49. Similarly, the ECtHR has stressed that the court must sufficiently clarify the reasons for its decision (*see* Moreira Ferreira v. Portugal (no. 2),2017, [GC], para 84,) so that the defendant can exercise any available appeal right. (Hadjianastassiou v. Greece, para 33, 16 December 1992, Series A no. 252). Moreover, the reasoning of the decision of the court should show that the essential issues of the case have been addressed *See* Lobzhanidze and Peradze v. Georgia, para 66, nos. 21447/11 and 35839/11, 27 February 2020.
[122] Judgment at 15.

> society, shall be punished with imprisonment not exceeding seven years and fined not exceeding fourteen thousand Baht. […]

From a criminal law perspective, the offense contains three elements that must be proven for a conviction:

1. The existence of a body “whose proceedings are secret”;
2. The body’s aim must be “unlawful”; and
3. The accused must be a member of this “secret society”.

While the elements of the offense of s. 209 may seem clear, what is fatally unclear is the definition or requirements needed to satisfy these elements. It is this elastic nature of the s. 209 offense that permitted the Court in this case to convict the defendants based on its own conception of the requisite elements for the crime of membership to a secret society, thus violating the principle of legality.

2. The principle of legality and Section 209

Section 209 is not consistent with the principle of legality reflected in Thai law and the ICCPR. Chapter two, section 2 of the Thai Criminal Code requires that:

> An act may only be punished if criminal liability had been established and penalty had been determined by the law which is in force at the time of the act. The penalty to be inflicted must be that which had been prescribed by such law.[123]

As discussed above, the Constitution of Thailand also the principle of legality.

The legality principle is also provided by the ICCPR in Article 15. It also has a long lineage in international law. In an important international case regarding the Penal Code of Danzig (1935)[124] the Permanent Court of International Justice said:

> Constitutional provisions on freedoms occur in most of the constitutions drawn up since the beginning of the XIXth century. They are designed to fix the position of the individual in the community, and to give him the safeguards which are considered necessary for his protection against the State. It is in that sense that the words "fundamental rights" (Grundrechte) have always been understood.[125]

In *Danzig* the paragraph below defines the rule of law as it should apply in every state with a Constitution (as in Thailand):

[123] TCC, Chapter 2, Section 2.
[124] Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4), *available at* http://www.worldcourts.com/pcij/eng/decisions/1935.12.04_danzig.htm
[125] *Id*.

> The problem of the repression of crime may be approached from two different standpoints, that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim Nulla poena sine lege. From the second standpoint, the object is to protect the community against the criminal, the basic principle being the notion Nullum crimen sine poena. [..] For this Constitution takes as its starting-point the fundamental rights of the individual; these rights may indeed be restricted, as already pointed out, in the general public interest, but only in virtue of a law which must itself specify the conditions of such restriction, and, in particular, determine the limit beyond which an act can no longer be: justified as an exercise of a fundamental liberty and becomes a punishable offence. *It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.* (emphasis added)[126]

Further, and in particular, the UN Human Rights Committee has made clear in the context of freedom of expression that legislation must be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly … [and] may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."[127]

Section 209 includes the phrases "secret society," "secret proceedings" and "unlawful aim" but no definition of the terms is available in the relevant chapter one, section one of TCC. First, the meaning of "unlawful aim" is not clear. Does that require an underlying unlawful act? The answer is not clear. Further, unlawful in what respect? While Section 209 is among several 'crimes against public order,'[128] and thus one might assume that the unlawful aim must likewise be 'against public order,' this too is unclear. Finally, even 'public order' is susceptible to multiple meanings.[129]

[126] Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4) at pg 56-57.
[127] Human Rights Committee, General Comment 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, Sept. 12, 2011 para 25 [hereinafter "GC 34"], *available at* https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf; see also Paul Daudin Clavaud, Toby Mendel & Ian Lafrenière, UNESCO, FREEDOM OF EXPRESSION AND PUBLIC ORDER: TRAINING MANUAL, at 23(2015), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000231305 ("To give effect to these rationales, the rule goes beyond just requiring there to be a law: The law must be clear; ambiguity in the law effectively gives discretion to officials in terms of application, and so voids the idea that only parliament can impose restrictions. The law must also be accessible; if the law is secret or hidden, it will not serve the rationales noted above. The law also cannot allocate too much discretion to officials, because this also effectively takes the power to develop the restriction away from parliament and gives it to officials.").
[128] The chapter of TCC which provides the public order crimes includes among others the following: s. 209. Member of a secret society, s.211. Attending meeting of a secret society, s. 212. Secret members, 213 Participants in an illegal secret society.
[129] No definition of public order is found in Thai criminal law code. *See* DAVID STRECKFUSS, TRUTH ON TRIAL IN THAILAND: DEFAMATION, TREASON, AND LÈSE-MAJESTÉ (, at 114-120 (2010) (on absence of case law and vagueness of the notion public order when used as legal term.)

By contrast, the European Court of Human Rights has made clear that both the criteria for defining proscribed organizations and the acts necessary to deem an individual a member must be clear.

Consider, for instance, the recent European Court of Human Rights case of *Parmak and Bakir v. Turkey* (2020).[130] In that case, the applicants had been prosecuted for membership in a terrorist organization on the basis of documents they had prepared on the organization's behalf. The Turkish courts had reasoned that the documents exercised "moral coercion" over others, which was a form of violence, rendering the organization susceptible of being classified as terrorist. The ECtHR found, however, that Turkey had breached the principle of legality because the law was not clear, and the court's interpretation had exceeded accepted limits. In its decision, the EctHR stated:

> The domestic courts must exercise special diligence to clarify the elements of an offence in terms that make it foreseeable and compatible with its essence. […] they therefore infringed the reasonable limits of acceptable judicial clarification contrary to the guarantees of Article 7 of the Convention.[131]

The UN Human Rights Committee has expressed a similar view, finding grounds for concern that Turkey's anti-terrorism legislation, which is used to prosecute individuals for membership in terrorist organizations, does not clearly define what acts could give rise to the classification of an organization a 'terrorist.'[132]

Further, the European Court of Human Rights has clarified that prosecution of an individual for a membership offense, where the evidence of membership is expressive activity, violates the requirement that an interference with expression be prescribed by law.[133]

But the ambiguity does not stop at the questions of what organizations have 'unlawful aims' and how to show that an individual is a 'member.' There are further questions regarding the meaning of "proceedings in secret." Does it simply mean not public? Or does it connote some form of concealment? Would a private religious gathering come within the ambit of this provision? Of course, Section 209 also includes the term "secret society." But secret societies and associations are very old institutions.[134] They vary

[130] *Case of Parmak & Bakir v. Turkey*, Applications nos. 22429/07 and 25195/07, EtCHR, Final Decision 03.03.2020, *available at* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-199075%22.
[131] *Id.* at. paras. 76 and 77.
[132] Human Rights Committee, Concluding Observations on the Initial Report of Turkey, CCPR/C/TUR/CO/1, para. 16.
[133] European Court of Human Rights, *Yılmaz and Kılıç v Turkey*, App. No. 68514/01, July 17, 2018, para. 58 ("Constatant que les seuls éléments de preuve fondant la condamnation sont des formes d'expression, la Cour conclut qu'il y a eu ingérence dans le droit à la liberté d'expression des requérants.")
[134] *See* for example a number of secret societies, their claims, and their aims in JOHN MICHAEL GREER, THE ELEMENT ENCYCLOPEDIA OF SECRET SOCIETIES (2006).

widely with respect to their aims.[135] This reference, therefore, does not contribute to clarifying the terms used in the law.

Putting this all together, the scope of application of the law is fundamentally unclear. For instance, if a person is a member of a declared social media society that advocates political change but one with no public proceedings, can they be prosecuted for a crime under Section 209 of the TCC?

Hypothetical replies leave room for moral, political, social, or other perceptions. When a criminal provision permits different subjective interpretations[136] it can violate the principle of legality.

While in common law jurisdictions, case law often clarifies and refines legal terms,[137] the continental tradition does not emphasize precedent law and Appeal Courts' decisions have no binding effect. (Thus, of instance, the decision of the Court in this case makes no reference to precedents regarding the interpretation of the terms included in Section 209 of TCC.) In the continental tradition, clarity is not connected to precedents. Therefore, when the law is not clear but the court decides to apply it without specification of the elements of the crime, the violation of legality is indisputable.

Here, however, Section 209 (TCC) fails this test—and the defendants' prosecution and conviction pursuant to this law violated the principle of legality.

3. Section 209 and the Judgment in this case

The Court committed a number of errors in addressing the evidence in this case, both reflecting and taking advantage of the elasticity and vagueness of Section 209. The Court, in an unsystematic way of evidence evaluation, used some facts which related to one element of the crime to prove another without regard to the evidence's relevance or

[135] DAVID OWNBY, & MARY SOMERS HEIDHUES, "SECRET SOCIETIES" RECONSIDERED: PERSPECTIVES ON THE SOCIAL HISTORY OF MODERN SOUTH CHINA AND SOUTHEAST ASIA (1993)*;* See also the history of secret Chinese societies and their appearance in Thailand in ARNAUD LEVEAU, INVESTIGATING THE GREY AREAS OF THE CHINESE COMMUNITIES IN SOUTHEAST ASIA (2007); CHRIS BAKER & PASUK PHONGPAICHIT, A HISTORY OF THAILAND (2014).

[136] *See Grayned v. City of Rockford*, 408 U.S. 104 (1972) (in relation to vagueness: "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms, it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "*steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."*)

[137] *See* Gralewicz et al. v. R., 2 S.C.R. 493 (1980) (Canada) (conspiracy "to effect an unlawful purpose" requires a proposed violation of federal or provisional law.)

materiality, the serious criminal nature of the offense, or whether what was at stake was a constitutional right like freedom of speech.

Rather than examining the evidence to consider the three elements of s. 209 outlined above, it conflated the questions and applied the evidence regardless of relevance to the element in question.

For example, the judgment states that leaders of OTF "collected weapons and had used weapons to attack the protestors" and had been prosecuted (and subsequently pardoned) for lese majeste.[138] But the Court does not consider whether these actions of alleged leaders of the OTF can be attributed as a goal of the OTF.

Moreover, even though the Court dissociated the speech of the leaders from the defendants, it did not justify how the unlawful aims of the alleged secret society were found. The expressive activity of the defendants which did not incite violence was perceived by the Court sufficient evidence for conviction for membership to a 'secret society.'[139] But the real question should have been whether the alleged "secret society" had an unlawful aim. How can lawful and indeed protected conduct be evidence of illegality? The judgment does not explain what particular acts were required to be attributed to the defendants in order to deem them members of OTF. The Court found the defendants guilty of membership in a secret society because it "believes that the Defendants knew about such organization and contributed in the operation of such organization to continue by various acts as testified"[140] referring to selling T-shirts and distributing flyers. The "various acts," which were expressive in nature, were listed without any effort to define whether and which of them were unlawful and why or what action sufficed to prove membership.

It is because of the vague and undefined elements of s.209 that the Thai court was able to conflate the questions and confuse the evidence to produce convictions without being satisfied that the requisite elements had been proven.

B. Violations of the Right to Freedom of Expression

The defendants' prosecution and conviction also violated their right to freedom of expression. Freedom of expression is protected by the Constitution of Thailand (s. 34)[141] and by Article 19 of the ICCPR.

[138] Judgment at 8.
[139] *Id.* at 9 (discussing OTF programming the content of which "is framing the King, to dethrone the King and change the regime of the country, inviting the members to act in important events . . . ."); id at 10 ("Since the content of Lung Sanam Luang programs on YouTube is the discussion of the objectives and aim of the Sahapantarath Tai to change the country regime . . . .").
[140] *Id.* at 15.
[141] Constitution of Thailand, Section 34 ("A person shall enjoy the liberty to express opinions, make speeches, write, print, publicise and express by other means. The restriction of such liberty shall not be imposed, except by virtue of the provisions of law specifically enacted for the purpose of maintaining the security of the State, protecting the rights or liberties of other persons, maintaining public order or good

The UN Human Rights Committee has stressed the importance of free communication of ideas through media in a political context, stating:

> The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[142]

Defining the right to freedom of expression, the Committee has clarified that Article 19 covers: "all forms of expression and the means of their dissemination." Describing the types of expression entitled to protection, the Human Rights Committee has also noted:

> Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.[143]

Here, the defendants' alleged forms of support of OTF fall squarely within the ambit of this definition. They are alleged to have distributed pamphlets and used symbolic "dress." Further, even to the extent that their activities could be deemed critical of the Thai authorities, the UN Human Rights Committee has been clear 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."[144]

Any restriction on the exercise of the right to freedom of expression must be necessary, proportionate, according to the law, and for a limited set of reasons,[145] both on its face and as applied. Here, both the law and its application fail this test.

In practice, this means that, because of the significance of permitting a law to violate a protected constitutional right, the law must be carefully-tailored to achieve its legislative objective. In this case, while national security and public order are offered as the legislative purpose, s. 209 is not "carefully tailored" to achieve this goal but rather is broad,

morals, or protecting the health of the people. Academic freedom shall be protected. However, the exercise of such freedom shall not be contrary to the duties of the Thai people or good morals, and shall respect and not obstruct the different views of another person.")

142 GC 34 para 13. *See also* Paul Daudin Clavaud, Toby Mendel & Ian Lafrenière, UNESCO, FREEDOM OF EXPRESSION AND PUBLIC ORDER: TRAINING MANUAL, at 15 (2015), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000231305.

143 GC 34, para 12; *see also* FREEDOM OF EXPRESSION AND PUBLIC ORDER, supra. n. 142 at 21.

144 GC 34 para 38.

145 Article 19 of ICCPR reads: 1. Everyone shall have the right to hold opinions without interference. 2. 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. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

elastic, and open to expansive manipulation. It does not meet the international standards required to validate a law that restricts freedom of expression.

First, the law's vagueness causes it to fail the test of necessity and proportionality on its face.[146] Second, while public order is a potential reason to restrict speech, the Court's decision here found no evidence that these defendants were aiming to commit crimes. Thus, there was no basis to restrict these defendants' exercise of their right to freedom of expression. Finally, convicting these defendants and sentencing them to significant terms of imprisonment was not the least intrusive (proportionate) means of achieving the goal of protecting public order.[147]

[146] GC 34 para 34.
[147] *Id*.

CONCLUSION AND GRADE

This case entailed several significant violations of the right to a fair trial, including the right against self-incrimination and the right to silence, the right to legal assistance, the right to be informed of the charges, and the right to a reasoned decision. The law under which the defendants were prosecuted also violates the principle of legality. Moreover, in convicting the defendants of membership in a group because of the political beliefs it espoused and not because of any violent or illegal action, and on the basis of expressive conduct by the individual defendants, the judgment in this case abrogated the right to freedom of expression without valid legal justification. Taken together, these factors—the significant procedural violations in the trial; the criminalization of protected speech; and the use of and conviction by a vague law—demonstrate that the defendants were denied a fair trial. As a result, this trial merits a grade of D.

GRADE: D

ANNEX

A. Grading Methodology

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"[148] and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant's reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

B. Judgment

[148] ICCPR, Article 26.