



# General Assembly

Distr.: General  
30 May 2019

Original: English

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019

#### Opinion No. 4/2019 concerning Siraphop Kornaroot (Thailand)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 7 November 2018, the Working Group transmitted to the Government of Thailand a communication concerning Siraphop Kornaroot. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
  - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
  - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



## Submissions

### *Communication from the source*

4. Siraphop Kornaroot is a 55-year-old citizen of Thailand who usually resides in Nonthaburi Province in Thailand.

5. According to the source, Mr. Siraphop is a writer and blogger who posted his articles and poems online on his social media page and on his blog. In those posts, Mr. Siraphop often expressed his opinions about the political situation in Thailand, criticized the Thai military's involvement in political affairs, and alleged that injustice was occurring in the country as a result of the military coups d'état that took place between 2006 and 2014.

### Arrest, pretrial detention and trial

6. On 1 July 2014, Mr. Siraphop was released on bail from the Bangkok Remand Prison, where he had been held for an alleged violation of announcement No. 41/2014 of the National Council for Peace and Order (failing to comply with a summons order). Moments after his release on bail, Mr. Siraphop was rearrested by a group of police officers working with the Technology Crime Suppression Division for allegedly violating article 112 of the Criminal Code (lèse-majesté) and article 14 (3) and (5) of the Computer Crimes Act of 2007. According to the source, the Bangkok Criminal Court had issued an arrest warrant (warrant No. 1120/2014, dated 1 July 2014) for the arrest of Mr. Siraphop. It is not known whether the officers presented this warrant or any other decision by a public authority to Mr. Siraphop when he was arrested.

7. Following his arrest, Mr. Siraphop was detained at the office of the Technology Crime Suppression Division for interrogation. He was subsequently taken to the Thung Song Hong police station in the Lak Si District of Bangkok, where he remained until 3 July 2014. Since 3 July 2014, Mr. Siraphop has been detained at the Bangkok Remand Prison.

8. According to the source, from 3 July to 5 September 2014, the Bangkok Criminal Court approved police requests to detain Mr. Siraphop six times, for 12 days each. On 5 September 2014, the Bangkok Military Court approved the military prosecutor's request to detain Mr. Siraphop twice, covering a period to 24 September 2014. The source notes that Mr. Siraphop was detained for a total of 84 days, which is the maximum period of pretrial detention permitted under article 87 of the Criminal Procedure Code and article 45 of the military court organization act of 1955.

9. On 25 September 2014, the military prosecutor indicted Mr. Siraphop on charges under article 112 of the Criminal Code and article 14 (3) and (5) of the Computer Crimes Act in connection with three posts that he made online:

(a) On 7 November 2009, Mr. Siraphop posted a poem on the web forum of the online news portal Prachatai.com. The poem mentioned a blind man who passed away. This passage was interpreted as a reference to the possible demise of King Bhumibol Adulyadej, who passed away on 13 October 2016;

(b) On 15 December 2013, Mr. Siraphop posted a caricature and a caption on his social media page. The caricature portrayed an elderly man who wore glasses and a headdress. The caption could be translated as: "As an angel, how come he walks on Earth?" Both the caricature and the caption were interpreted as offensive references to King Bhumibol;

(c) On 22 January 2014, Mr. Siraphop posted another caricature and a caption on his blog. This caricature also portrayed an elderly man who wore glasses and a headdress. The caption could be translated as: "An angel who is the chief of the rebellion." Both the caricature and the caption were interpreted as offensive references to King Bhumibol because they allegedly linked the King to the 1933 "Boworadet rebellion" that sought to restore absolute monarchy in Thailand.

### Challenges to the military court's jurisdiction

10. On 12 September 2014, Mr. Siraphop's lawyer submitted a petition to the Bangkok Military Court to challenge its jurisdiction. The lawyer argued that Mr. Siraphop was not subject to the jurisdiction of a military court because his three online posts had been published in November 2009, December 2013 and January 2014, respectively. The material had therefore been posted before the issuance of National Council for Peace and Order announcement No. 37/2014 on 25 May 2014 – the day on which military tribunals assumed jurisdiction over violations of article 112 of the Criminal Code.

11. On the same day, Mr. Siraphop's petition was rejected. The Bangkok Military Court justified the rejection by arguing that the alleged *lèse-majesté* content posted by Mr. Siraphop was still online after 25 May 2014. The Court also asserted its jurisdiction over Mr. Siraphop's case because proceedings related to conflict resolution between a military and a civilian court would have delayed his trial.

12. On 11 November 2014, Mr. Siraphop's lawyer submitted another petition to the Bangkok Military Court, arguing that the trial of civilians by military courts violates article 4 of the interim Constitution of 2014, which came into effect on 22 July 2014. Article 4 stipulated that "human dignity, rights, liberties and equality previously enjoyed by the Thai people with the protection under ... Thailand's existing international obligations shall be protected under this Constitution". Mr. Siraphop's lawyer also requested that the petition be referred to the Constitutional Court for examination.

13. On the same day, the Bangkok Military Court rejected Mr. Siraphop's petition. The Court justified its rejection on the basis that the military judicial system was independent from the executive branch, and that the rights of civilian defendants had not been violated by trying the defendants in military courts. In addition, the Bangkok Military Court ruled that it did not have the authority to refer matters for examination by the Constitutional Court because the interim Constitution did not address that specific issue.

14. On 1 April 2015, Mr. Siraphop's lawyer submitted a third petition to the Bangkok Military Court to challenge its jurisdiction for the same reasons cited in the petitions submitted in September and November 2014. The Bangkok Military Court requested the Bangkok Criminal Court to give its opinion on the issue of jurisdiction.

15. On 21 September 2015, the Bangkok Criminal Court confirmed its jurisdiction over Mr. Siraphop's case. As a result, the conflict over jurisdiction between the Bangkok Military Court and the Bangkok Criminal Court was referred to the court jurisdiction committee, a body tasked with resolving conflicts of jurisdiction between courts. On 20 January 2016, the committee ruled that the Bangkok Military Court had jurisdiction over Mr. Siraphop's case for both the *lèse-majesté* charge and the charge under article 14 (3) and (5) of the Computer Crimes Act. The Committee reasoned that the alleged *lèse-majesté* content posted by Mr. Siraphop was still online after 25 May 2014.

### Other applications submitted

16. The source reports that Mr. Siraphop's lawyer also submitted four separate petitions (on 13 November 2014, 21 January 2015, 2 April 2015 and 11 May 2016) to object to the order by which the Bangkok Military Court approved the military prosecutor's request to hold Mr. Siraphop's trial behind closed doors. In the petitions, the lawyer argued that closed hearings constituted a violation of article 14 of the Covenant, and requested the Bangkok Military Court to hold public hearings. The lawyer also argued that the online content for which Mr. Siraphop had been charged contained no vulgar or offensive language and the content could be publicly revealed. However, the Bangkok Military Court rejected all four petitions.

17. In addition, Mr. Siraphop's lawyer submitted seven bail applications to the Bangkok Military Court, most recently on 5 November 2018. The Court denied all seven applications. In a bail application submitted on 28 November 2017, Mr. Siraphop's lawyer stated that only 1 out of the 10 prosecution witnesses had been examined and that Mr. Siraphop had faced prolonged detention, since he had been taken into custody on 1 July 2014. The Court

denied the bail application, insisting that Mr. Siraphop might be a flight risk because the punishment for *lèse-majesté* was severe.

18. Mr. Siraphop remains in detention in the Bangkok Remand Prison. He has been deprived of his liberty for four years and 10 months since his arrest. The first hearing of his trial before the Bangkok Military Court took place on 13 November 2014 and is still ongoing.

#### Legal analysis

19. The source submits that Mr. Siraphop's deprivation of liberty is arbitrary under categories II and III.

20. In relation to category II, the source submits that Mr. Siraphop was arrested and charged because of content that he had posted online. His detention is therefore arbitrary under category II because it results from the exercise of his right to freedom of opinion and expression guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

21. In addition, the source notes that, in its jurisprudence regarding cases of deprivation of liberty involving individuals found guilty of *lèse-majesté*, the Working Group has recalled the Human Rights Committee's general comment No. 34 (2011) on the freedoms of opinion and expression. In paragraph 38 of that general comment, the Committee emphasizes that the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant, and that all public figures, including those exercising the highest political authority, such as Heads of State and Government, are legitimately subject to criticism and political opposition. The Committee also specifically expresses concern regarding laws on such matters as *lèse-majesté*.

22. The source makes further reference to previous opinions in which the Working Group has found the detention of seven other individuals pursuant to article 112 of the Criminal Code to be arbitrary under category II.<sup>1</sup> The source notes that the Working Group has consistently stated, in concurrence with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, that the *lèse-majesté* law encourages self-censorship and suppresses important debates on matters of public interest, thus putting in jeopardy the right to freedom of opinion and expression itself.

23. Furthermore, the source recalls that the Working Group has expressed concern about the pattern of arbitrary detention in cases involving the *lèse-majesté* laws of Thailand and that the detention of individuals for exercising their rights to freedom of opinion and expression online will continue to increase until steps are taken by the Government to bring the *lèse-majesté* laws into conformity with international human rights law.<sup>2</sup>

24. Finally, the source recalls that in 2017, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that *lèse-majesté* was incompatible with international human rights law, and urged the authorities of Thailand to repeal article 112 of the Criminal Code.<sup>3</sup>

25. In relation to category III, the source submits that Mr. Siraphop's right to a fair trial under article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant has been seriously violated.

<sup>1</sup> See opinions No. 3/2018, No. 56/2017, No. 51/2017, No. 44/2016, No. 43/2015, No. 41/2014 and No. 35/2012.

<sup>2</sup> Opinion No. 44/2016, para. 37.

<sup>3</sup> See, for example, Office of the United Nations High Commissioner for Human Rights, "Thailand: UN rights expert concerned by the continued use of *lèse-majesté* prosecutions", news release, Geneva, 7 February 2017. Available at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21149&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21149&LangID=E).

### Military trial

26. According to the source, the Bangkok Criminal Court exercised its jurisdiction over Mr. Siraphop's case when the arrest warrant was issued on 1 July 2014. However, on 5 September 2014, Mr. Siraphop's case was transferred from the Bangkok Criminal Court to the Bangkok Military Court as a result of announcement No. 37/2014. Article 1 of the announcement states that cases relating to the Thai monarchy shall be tried in the military courts. The Bangkok Military Court justified its decision to assert jurisdiction over Mr. Siraphop's case by arguing that the alleged *lèse-majesté* content that he posted was still online after 25 May 2014. The decision was subsequently upheld by the court jurisdiction committee.

27. The source alleges that the Bangkok Military Court cannot be considered competent, independent or impartial. The Thai military courts are not independent from the executive branch of Government because they are units of the Ministry of Defence and military judges are appointed by the Commander-in-Chief of the army and the Minister of Defence. Furthermore, military judges lack adequate legal training. The lower military courts consist of panels of three judges and only one of them has legal training. The other two are commissioned military officers who sit on the panels as representatives of their commanders. As a result, Mr. Siraphop's right to a fair and public hearing by a competent, independent and impartial tribunal under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant was violated.

28. Moreover, as a result of the army's declaration of martial law on 20 May 2014 and the issuance of announcement No. 37/2014, military courts assumed jurisdiction over *lèse-majesté* cases for offences committed from 25 May 2014. Individuals who allegedly committed *lèse-majesté* offences between 25 May 2014 and 11 September 2016 have no right to appeal a decision made by a military court as a result of the declaration of martial law and in accordance with article 61 of the military court organization act. Given that Mr. Siraphop's case was placed under the military court's jurisdiction, he will not have the right to appeal his conviction and sentence, in violation of his right under article 14 (5) of the Covenant to the review of his conviction and sentence by a higher tribunal.

29. In paragraph 22 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee states that trials of civilians by military or special courts should be exceptional, that is, limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials. The source argues that the use of military courts to try civilians accused of *lèse-majesté* is incompatible with general comment No. 32. In Mr. Siraphop's case, the military court has failed to demonstrate that a military trial was necessary and justified by objective and serious reasons or that a civilian court was unable to undertake the trial.

30. The source also highlights that, according to the Working Group's jurisprudence and analysis, the trial of civilians by military courts is contrary to the Covenant and customary international law, and military courts are competent only to try military personnel for military offences.<sup>4</sup>

### Right to a public hearing

31. In addition, during the first hearing of Mr. Siraphop's trial, on 13 November 2014, the Bangkok Military Court ordered that all hearings in the case be closed to the public. The order was issued in response to a request by the military prosecutor, who argued that hearings in the case had to be closed out of concern that incorrect messages would spread among society and affect the peace and security of the nation. In a number of hearings, including on 13 November 2014 and on 21 January 2015, the Bangkok Military Court ordered Mr. Siraphop's family members and observers from the Office of the United Nations High Commissioner for Human Rights (OHCHR) to leave the courtroom. The

<sup>4</sup> Opinion No. 44/2016, para. 32.

source argues that this violates Mr. Siraphop's right to a public hearing under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

32. The source claims that lèse-majesté trials in military courts have been characterized by a lack of transparency, with many of these trials being closed. Military judges routinely bar the public, including observers from international human rights organizations and foreign diplomatic missions, from entry into the courtroom. On numerous occasions, military courts have claimed that closed proceedings were necessary because lèse-majesté trials were a matter of "national security" and could "affect public morale."

33. The source observes that the Human Rights Committee, in its general comment No. 32 (para. 29), states that, apart from exceptional circumstances where courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. In addition, the Working Group has found that none of the exceptions that would allow for closed proceedings under article 14 (1) of the Covenant could reasonably apply to trials of lèse-majesté defendants.<sup>5</sup>

#### Trial without undue delay

34. The source submits that Mr. Siraphop's lengthy detention is inconsistent with international human rights law. At the preliminary hearing on 21 January 2015, the military prosecutor stated that he intended to bring 10 witnesses to court in order to prove Mr. Siraphop's guilt. However, since 11 May 2016, only 3 of the 10 prosecution witnesses have been examined by the Bangkok Military Court. The delays were mainly due to the failure of witnesses to appear in court to give their testimony and be cross-examined. Witness examinations were postponed five times between 14 October 2016 and 6 August 2018.

35. Moreover, Mr. Siraphop's lengthy detention can be only partly attributed to the procedural delays related to the jurisdictional dispute between the Bangkok Military Court and the Bangkok Criminal Court. The source alleges that the delays have been exacerbated by the slow pace of proceedings, which has characterized trials of civilians by military courts in Thailand since May 2014. The source also recalls that, since July 2014, the Bangkok Military Court has rejected Mr. Siraphop's bail applications on seven occasions.

36. The source alleges that the delay violates articles 9 (3) and 14 (3) (c) of the Covenant. Pursuant to article 9 (3) of the Covenant, it should not be the general rule that persons awaiting trial are detained in custody, and release may be subject to guarantees to appear for trial. The source recalls that the Working Group has stated that the military court cannot rely on the severity of potential punishment for lèse-majesté offences to deny bail and that the near blanket rejection of bail applications from lèse-majesté offenders casts serious doubt about an individualized determination of flight risk.<sup>6</sup> The source submits that the justification for the ongoing denial of bail is also inconsistent with the provisions of article 108 (1) of the Criminal Procedure Code, which provides for the provisional release of detainees. The severity of the punishment to which Mr. Siraphop may be subjected if he were found guilty of the alleged offences is not prescribed by article 108 (1) as a ground on which temporary release from prison may be refused.

37. Finally, the source recalls that article 14 (3) (c) of the Covenant guarantees the right to be tried without undue delay. As the Human Rights Committee has explained, this guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal. All stages, whether in first instance or on appeal, must take place without undue delay.<sup>7</sup>

<sup>5</sup> Opinions No. 3/2018, para. 56; No. 56/2017, para. 57; No. 51/2017, para. 42; No. 44/2016, para. 31.

<sup>6</sup> Opinions No. 56/2017, para. 68; No. 51/2017, para. 53.

<sup>7</sup> General comment No. 32, para. 35.

*Communications from special procedure mandate holders*

38. Mr. Siraphop has previously been the subject of three joint urgent appeals, addressed to the Government by the Working Group and other special procedure mandate holders on 8 December 2014, 25 February 2016 and 22 December 2017.<sup>8</sup> The Working Group acknowledges the responses received from the Government on 10 December 2014, 29 February 2016 and 12 January 2018.<sup>9</sup>

39. The special procedure mandate holders requested the Government to comment upon numerous allegations, including in relation to the indictment of Mr. Siraphop on lèse-majesté charges. The mandate holders reiterated that article 112 of the Criminal Code and article 14 of the Computer Crimes Act were incompatible with the international human rights obligations of Thailand. They also expressed grave concern about the charges, detention and disproportionate sentences imposed under those provisions for acts that seemed to constitute a legitimate exercise of the right to freedom of opinion and expression. Moreover, the mandate holders expressed concern about the recurrent denial of bail in cases of lèse-majesté, and the trial of civilians by military courts in proceedings lacking transparency.

40. In its responses, the Government emphasized that it supported the freedom of expression as the basis of a democratic society. Nevertheless, the right was not absolute and must not be exercised in a manner that disrupts public order and social harmony, or infringes on others' rights, as stipulated in article 19 (3) of the Covenant. The application of the lèse-majesté law was in accordance with those objectives. The Thai monarchy had been a pillar of stability in Thailand, and the lèse-majesté law protected the rights of the monarchy in a similar manner to the slander and libel protections afforded to other citizens. The law was not aimed at curbing the right to freedom of expression. Individuals who were charged with lèse-majesté were entitled to the same due process rights, including the right to appeal, as those charged with other offences. Thai law also provided that the judge might use discretion to hold closed trials in certain cases if they were deemed to involve sensitive matters, in the interest of public order, good morals or national security, consistent with article 14 of the Covenant and not dissimilar to the practice in other countries.

*Response from the Government to the regular communication*

41. On 7 November 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 7 January 2019 about the current situation of Mr. Siraphop. It also requested the Government to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Thailand under international human rights law. Moreover, the Working Group called upon the Government to ensure Mr. Siraphop's physical and mental integrity.

42. On 8 November 2018, the Permanent Mission of Thailand to the United Nations Office and other international organizations in Geneva acknowledged receipt of the Working Group's regular communication, and noted that it had been forwarded to the relevant agencies in Thailand for their consideration and that further information would be transmitted once received. The Working Group regrets that it did not receive any further response to the regular communication. The Government did not request an extension of the time limit for its reply, as provided for in the methods of work of the Working Group. Pursuant to paragraph 23 of the methods of work, the Government is required to respond separately to the urgent action procedure and the regular procedure.

43. In accordance with paragraph 16 of its methods of work, the Working Group may render an opinion on the basis of all the information it has obtained. Although not obliged to do so, in order to give the Government every opportunity to be heard in relation to the source's allegations, the Working Group has exercised its discretion to take into account the

<sup>8</sup> THA 13/2014, THA 9/2015 and THA 7/2017. Available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

<sup>9</sup> Available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

information submitted by the Government in response to the joint urgent appeals referred to earlier in the present opinion.<sup>10</sup> In doing so, the Working Group takes note that these responses contain general arguments in support of the *lèse-majesté* law and the military courts, but no specific details as to Mr. Siraphop's case, and cannot be properly considered a reply for the purposes of paragraphs 15, 16 and 21 (c) of its methods of work.

## Discussion

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

45. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.<sup>11</sup> In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

46. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights, the Covenant and other applicable international and regional instruments. Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.<sup>12</sup> As part of this review, the Working Group considers the proceedings of a court and the law itself to determine whether they meet international standards.<sup>13</sup>

47. In the present case, Mr. Siraphop has been indicted on charges and is facing heavy penalties under the *lèse-majesté* provisions found in article 112 of the Criminal Code, as well as under article 14 (3) and (5) of the Computer Crimes Act. Pursuant to article 112 of the Criminal Code, whoever defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent is to be punished with 3 to 15 years of imprisonment. Pursuant to article 14 (3) and (5) of the Computer Crimes Act (as amended in 2017), whoever commits the following acts are to be liable to imprisonment for a term not exceeding five years or to a fine not exceeding B 100,000 or both: bringing into a computer system any computer data that constitutes a crime concerning security of the Kingdom or a crime concerning terrorism under the Criminal Code; publishing or forwarding computer data, with the knowledge that it is computer data as described under article 14 (1), (2), (3), or (4).

48. In considering whether these provisions meet international standards, particularly the right to freedom of opinion and expression, the Working Group has taken into account relevant analysis of *lèse-majesté* offences in Thailand undertaken by the Working Group and other international human rights mechanisms in recent years.<sup>14</sup> Briefly, this includes the following:

(a) In its jurisprudence relating to Thailand, the Working Group has consistently found the detention of individuals under article 112 of the Criminal Code and article 14 of

<sup>10</sup> See opinions No. 83/2018, No. 19/2018, No. 79/2017 and No. 48/2016, in which the Working Group took a similar approach.

<sup>11</sup> A/HRC/19/57, para. 68.

<sup>12</sup> See, for example, opinions No. 3/2018, para. 39; No. 94/2017, para. 47; No. 79/2017, para. 51; No. 76/2017, para. 49; No. 58/2017, para. 35; No. 27/2017, para. 33; No. 48/2016, para. 41; No. 28/2015, para. 41; No. 41/2014, para. 24.

<sup>13</sup> See, for example, opinions No. 88/2017, para. 24; No. 83/2017, para. 60; No. 33/2015, para. 80.

<sup>14</sup> Relevant examples of this analysis are also given in opinions No. 56/2017, paras. 36 and 42–55; and No. 51/2017, paras. 28–40.



the Computer Crimes Act to be arbitrary under category II when it resulted from the peaceful exercise of the freedom of expression;<sup>15</sup>

(b) In numerous communications to the Government, special procedure mandate holders have expressed concern about the *lèse-majesté* provisions of the Criminal Code and the provisions of the Computer Crimes Act, including their use in restricting the freedom of expression and their incompatibility with article 19 of the Covenant.<sup>16</sup> The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that *lèse-majesté* provisions “have no place in a democratic country” and are incompatible with the freedom of expression under international human rights law.<sup>17</sup> OHCHR has expressed similar concerns;<sup>18</sup>

(c) In its concluding observations on the second periodic report of Thailand, the Human Rights Committee expressed its concern that criticism and dissention regarding the royal family was punishable with a sentence of 3 to 15 years’ imprisonment. The Committee also expressed concern about reports of a sharp increase in the number of people detained and prosecuted for the crime of *lèse-majesté* since the military coup, and about extreme sentencing practices, which had resulted in extensive periods of imprisonment in some cases. The Committee explicitly urged the review of article 112 of the Criminal Code to bring it into line with article 19 of the Covenant, reiterating that the imprisonment of persons for exercising their freedom of expression violated article 19;<sup>19</sup>

(d) During the most recent consideration of Thailand under the universal periodic review mechanism of the Human Rights Council, in May 2016, the *lèse-majesté* laws and restrictions on the right to freedom of opinion and expression were frequently raised as matters of concern. Delegations urged the Government to bring its *lèse-majesté* laws into conformity with its international commitments.<sup>20</sup>

49. Given this considerable body of findings in relation to the *lèse-majesté* provisions in article 112 of the Criminal Code and the provisions of article 14 of the Computer Crimes Act, the Working Group is convinced that Mr. Siraphop is being detained pursuant to legislation that expressly violates international human rights law. As a result, there is no legal basis for his detention. This is not the first time that the Working Group has found that detention pursuant to a law that is inconsistent with international human rights law lacks legal basis and is therefore arbitrary.<sup>21</sup> The Working Group has decided to take this approach in *lèse-majesté* cases, having previously expressed its concern to the Government about the *lèse-majesté* laws on numerous occasions. In the view of the Working Group,

<sup>15</sup> See opinions No. 3/2018, No. 56/2017, No. 51/2017, No. 44/2016, No. 43/2015, No. 41/2014 and No. 35/2012. The Working Group has also made similar findings in relation to *lèse-majesté* laws in other countries: see, for example, opinions No. 20/2017, No. 48/2016 and No. 28/2015.

<sup>16</sup> See THA 7/2017, THA 1/2017, THA 9/2015, THA 13/2014, THA 3/2014, THA 1/2014, THA 13/2012, THA 10/2011, THA 9/2011, THA 5/2011. Available at: <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

<sup>17</sup> See, for example, “UN rights expert urges Thailand to loosen restrictions around monarchy defamation law”, UN News, 7 February 2017. Available at <https://news.un.org/en/story/2017/02/550962-un-rights-expert-urges-thailand-loosen-restrictions-around-monarchy-defamation>. See also A/HRC/29/25/Add.3, para. 366; A/HRC/14/23/Add.1, paras. 2361–2410.

<sup>18</sup> See, for example, press briefing note on Thailand, Geneva, 13 June 2017. Available at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21734&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21734&LangID=E). See also OHCHR Regional Office for South-East Asia, press release dated 28 March 2017. Available at <https://bangkok.ohchr.org/news/press/Thailand%20Arbitrary%20Arrests.aspx>.

<sup>19</sup> CCPR/C/THA/CO/2, paras. 37–38.

<sup>20</sup> See A/HRC/33/16, for example paras. 158.130–158.138, 158.141–158.142, 159.18, 159.50–159.63. The next review of the human rights record of Thailand under the universal periodic review (third cycle) will be held in 2021.

<sup>21</sup> See, for example, opinions No. 69/2018, para. 21; No. 40/2018, para. 45; No. 43/2017, para. 34 (detention pursuant to a law that criminalized conscientious objection to military service). See also opinion No. 14/2017, para. 49 (detention pursuant to a law that criminalized consensual same-sex relations between adults). In all of those cases, the Working Group found that the detention lacked a legal basis and was therefore arbitrary under category I.

such an approach reflects the fact that the freedom of expression is a core tenet of a democratic society, and a growing consensus regarding the serious harm to society when *lèse-majesté* laws exist and are enforced in a manner that may lead to individuals refraining from debates on matters of public interest in order to avoid prosecution.<sup>22</sup>

50. Accordingly, the Working Group finds that there is no legal basis for Mr. Siraphop's detention. His deprivation of liberty is arbitrary under category I.

51. In addition, the source alleges that Mr. Siraphop was arrested and charged because of content that he had posted online, and that his detention resulted from the exercise of his right to freedom of opinion and expression guaranteed under the Universal Declaration of Human Rights and the Covenant.

52. According to the source, Mr. Siraphop posted a poem, caricatures of an elderly man and captions on various online sites in 2009, 2013 and 2014. The posts have been interpreted as references to the late King Bhumibol. The Government offered no explanation of how those posts, which make no specific reference to King Bhumibol and do not appear to contain any offensive language, could be considered as defamatory, insulting or threatening under article 112 of the Criminal Code, nor how the posts amount to a crime concerning the security of Thailand under article 14 of the Computer Crimes Act. Importantly, there is nothing to suggest that Mr. Siraphop or his posts incited violence of any kind that might have given cause to restrict his behaviour.<sup>23</sup>

53. The Working Group considers that Mr. Siraphop's posts fall within the boundaries of the exercise of the right to freedom of expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. This right includes the expression of every form of idea and opinion capable of transmission to others, including political discourse, commentary on public affairs, and cultural and artistic expression.<sup>24</sup> The mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties. 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, and laws should not provide for more severe penalties solely on the basis of the identity of the person who may have been impugned.<sup>25</sup>

54. The Working Group takes note of the Government's argument in its responses to the joint urgent appeals (referred to above) that the *lèse-majesté* provisions protect public order and social harmony and prevent the infringement of others' rights, and are therefore consistent with permitted restrictions on the freedom of expression under article 19 (3) of the Covenant. However, the Government did not present any argument to invoke any of these restrictions in the present case, nor did it demonstrate why prosecuting Mr. Siraphop was a necessary and proportionate response to his posting of a poem, caricatures and captions. The Working Group does not consider it plausible that these posts could threaten the rights or reputations of others, national security, public order, public health or morals.

55. Furthermore, the Working Group considers that the provisions under which Mr. Siraphop is being prosecuted are vague and overly broad. Article 112 of the Criminal Code does not define what kinds of expression constitute defamation, insult or threat to the monarchy, and leaves the determination of whether an offence has been committed entirely to the discretion of the authorities. Similarly, article 14 of the Computer Crimes Act (as amended in 2017) does not define what conduct constitutes a crime concerning the security of the Kingdom. As the Working Group has stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and

<sup>22</sup> See also Human Rights Committee, general comment No. 34, paras. 2 and 21 (noting that freedom of expression is an essential foundation of every free and democratic society and that any restrictions on freedom of expression must not put in jeopardy the right itself).

<sup>23</sup> *Ibid.*, paras. 21–36. There is no evidence to indicate, for example, that restrictions might have been legitimately imposed under article 19 (3) of the Covenant for the protection of national security or public order.

<sup>24</sup> *Ibid.*, para. 11.

<sup>25</sup> *Ibid.*, para. 38.

understand the law, and regulate his or her conduct accordingly.<sup>26</sup> The Working Group considers that those provisions are so vague as to be inconsistent with international human rights law, and calls upon the Government to repeal them or bring them into line with its obligations under the Covenant.

56. The Working Group concludes that Mr. Siraphop's deprivation of liberty resulted from his peaceful exercise of the right to freedom of expression. His deprivation of liberty is arbitrary and falls within category II. The Working Group refers this matter to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

57. Given its finding that the deprivation of liberty of Mr. Siraphop was arbitrary under category II, the Working Group emphasizes that Mr. Siraphop should not be subject to prosecution. However, the matter is currently proceeding before the Bangkok Military Court. The Working Group considers that his right to a fair trial was violated prior to and during the trial proceedings to date.

58. The source alleges, and the Government has not denied, that the Thai military courts are not independent of the executive branch because military judges are appointed by the Commander-in-Chief of the army and the Minister of Defence and lack adequate legal training, and two of the three judges are commissioned military officers who sit on panels as representatives of their commanders. In this case, the actions of the Bangkok Military Court do not suggest that the Court will treat the State and Mr. Siraphop in an impartial manner, having rejected 13 of the applications made by Mr. Siraphop's lawyers with what appears to be very limited reasoning in support of its rulings and, in some cases, delivering the ruling on the same day the petition was submitted.<sup>27</sup> The Working Group has previously found that the Thai military courts cannot be considered competent, independent or impartial as required under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant,<sup>28</sup> and it considers that this finding continues to be applicable in the present case.

59. Moreover, the trial of civilians by military courts is contrary to the Covenant and customary international law, as confirmed by the jurisprudence of the Working Group. Military courts should only be competent to try military personnel for military offences. The intervention of a military judge who is neither professionally nor culturally independent is likely to produce an effect contrary to the enjoyment of human rights and to a fair trial with due guarantees.<sup>29</sup> Mr. Siraphop's lawyer has filed several petitions challenging the Bangkok Military Court's jurisdiction and arguing that military courts should not try civilians, but they have been rejected. In the view of the Working Group, the continuous and systematic refusal by the Bangkok Military Court to acknowledge all the objections against detention and the requests for bail poses a significant obstacle to the exercise of the basic rights of the accused, including the fundamental right to liberty and the right to a fair trial.<sup>30</sup> In these circumstances, the Working Group has decided to refer the case to the Special Rapporteur on the independence of judges and lawyers.

60. The source also alleges that the Bangkok Military Court has ordered that all hearings in Mr. Siraphop's case be closed to the public and, in a number of hearings, ordered Mr. Siraphop's family members and OHCHR observers to leave the courtroom. According to the source, the trial is closed due to concern that the proceedings would affect the peace and

<sup>26</sup> See, for example, opinion No. 41/2017, paras. 98–101. See also Human Rights Committee, general comment No. 34, paras. 24–26 (noting that any restriction on the freedom of expression must be provided for by law with sufficient precision to enable an individual to regulate his or her conduct, and that such law must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution).

<sup>27</sup> According to the source, the Bangkok Military Court has rejected two of Mr. Siraphop's petitions challenging the Court's jurisdiction, four applications seeking to open the proceedings to the public, and seven bail applications.

<sup>28</sup> Opinions No. 3/2018, para. 57; No. 56/2017, para. 58; No. 51/2017, para. 43; No. 44/2016, para. 32.

<sup>29</sup> A/HRC/27/48, paras. 66–71 and 85–86. See also opinions No. 3/2018, No. 56/2017 and No. 44/2016.

<sup>30</sup> See Opinion No. 43/2015, para. 25, in which a similar finding was made by the Working Group.

security of the nation. The source also reports that Mr. Siraphop's lawyer filed four petitions between 2014 and 2016 seeking to overturn the ruling that the proceedings be held behind closed doors, but the Bangkok Military Court rejected all of the petitions. In its responses to the joint urgent appeals, the Government notes that, under Thai law, judges have discretion to hold closed trials if they are deemed to involve sensitive matters, in the interest of public order, good morals or national security, consistent with article 14 of the Covenant and not dissimilar to the practice in other countries.

61. As the Human Rights Committee has stated, criminal trials are to be conducted in public unless one of the exceptional circumstances outlined in article 14 (1) justifies the closure of a trial.<sup>31</sup> In the present case, the Government did not provide any information or evidence to demonstrate how the proceedings against Mr. Siraphop presented any threat to morals, public order or national security to warrant the exceptional step of holding a closed trial. In addition, the Working Group has found that none of the exceptions that would allow for closed proceedings under article 14 (1) of the Covenant could reasonably apply to trials of *lèse-majesté* defendants.<sup>32</sup> Accordingly, the Working Group finds that Mr. Siraphop has not received a public hearing during his proceedings to date, in violation of articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

62. Furthermore, the source alleges that, as a result of the army's declaration of martial law on 20 May 2014 and the issuance of announcement No. 37/2014 of the National Council for Peace and Order, military courts assumed jurisdiction over *lèse-majesté* cases for offences committed from 25 May 2014. Individuals who allegedly committed *lèse-majesté* offences between 25 May 2014 and 11 September 2016 have no right to appeal a decision made by a military court, pursuant to article 61 of the military court organization act. In its response to the joint urgent appeals, the Government states that individuals who are charged with *lèse-majesté* are entitled to the same due process rights, including the right to appeal, as those charged with other offences.

63. The Working Group considers that the source's allegations in relation to the lack of a right to appeal are credible, particularly given the previous findings in its jurisprudence that article 14 (5) of the Covenant was violated in *lèse-majesté* cases as a result of restrictions placed on the right to appeal against convictions and sentences imposed by military courts.<sup>33</sup> However, in this case, the proceedings against Mr. Siraphop are ongoing in the Bangkok Military Court and he has not been convicted and sentenced. At this stage, it would not be appropriate for the Working Group to reach any conclusion on this issue, but it urges the Government to ensure that all defendants before military courts are afforded due process, including the right to appeal to a higher tribunal. While cognizant of the fact that military courts should not be trying civilians, the Working Group takes this opportunity to reiterate its view that all sentences issued by military courts in relation to civilians should be reviewed by a civil court, even if they have not been appealed.<sup>34</sup>

64. Finally, the source alleges that Mr. Siraphop has now been held in detention for more than four years with no final determination in his matter, and that such prolonged detention does not meet international standards. According to the source, this delay has been caused by several factors, including the failure of prosecution witnesses to appear in court, the jurisdictional dispute between the Bangkok Military Court and the Bangkok Criminal Court, and the slow pace of proceedings, which has characterized trials of civilians by military courts in Thailand since May 2014. The source also points out that, since July 2014, the Bangkok Military Court has rejected Mr. Siraphop's bail applications on seven occasions.

65. The Working Group recalls that, pursuant to article 9 (3) of the Covenant, it should not be the general rule that persons awaiting trial are detained in custody. Detention pending trial must be based on an individualized determination that it is reasonable and

<sup>31</sup> General comment No. 32, para. 29.

<sup>32</sup> Opinions No. 3/2018, para. 56; No. 56/2017, para. 57; No. 51/2017, para. 42; No. 44/2016, para. 31.

<sup>33</sup> See, for example, opinions No. 56/2017, para. 62; No. 51/2017, para. 47; No. 44/2016, para. 35.

<sup>34</sup> A/HRC/27/48, para. 86.

necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as “public security”. Detention should not be ordered based on the potential sentence for the crime, but should be based on a determination of its necessity. Courts must examine whether alternatives to pretrial detention, such as bail, would render detention unnecessary in the particular case.<sup>35</sup>

66. In this case, the Bangkok Military Court has not met these standards. As the source alleges, and the Government did not deny, the Court has denied bail on the basis that Mr. Siraphop may be a flight risk because the punishment for *lèse-majesté* is severe. The Working Group has previously stated in its jurisprudence relating to Thailand that military courts cannot rely on the severity of potential punishment for *lèse-majesté* offences to deny bail and that the near blanket rejection of bail applications from *lèse-majesté* offenders casts serious doubt about an individualized determination of flight risk.<sup>36</sup> The Working Group considers that the Government has not met the burden of demonstrating that Mr. Siraphop’s detention was reasonable and necessary.

67. Moreover, as the Human Rights Committee has stated, the right to be tried without undue delay is designed to avoid keeping persons in a state of uncertainty about their fate for too long. If the accused is denied bail by the court, he or she must be tried as expeditiously as possible. This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal. All stages, whether in first instance or on appeal, must take place without undue delay.<sup>37</sup> The Working Group considers that the period of Mr. Siraphop’s detention from the time of his arrest on 1 July 2014 to the present – almost five years – without a final determination in his matter is unacceptably long. Accordingly, the Working Group finds that Mr. Siraphop’s right to be tried within a reasonable time and without undue delay under articles 9 (3) and 14 (3) (c) of the Covenant has been violated.

68. For these reasons, the Working Group concludes that the violations of the right to a fair trial are of such gravity as to give Mr. Siraphop’s deprivation of liberty an arbitrary character under category III.

69. The present case is one of several cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Thailand. The Working Group notes that many of the cases involving Thailand, particularly in *lèse-majesté* cases, follow a familiar pattern of lengthy pretrial detention with no individualized consideration of non-custodial alternatives such as bail; charges and prosecution under vaguely worded criminal offences that typically attract heavy penalties and lack a legal basis; and a closed trial before a military court with a limited right to appeal and at which basic due process has not been observed.

70. The Working Group would like to reiterate that it would welcome the opportunity to conduct a country visit to Thailand, in accordance with its most recent request made on 6 April 2017, so that it can engage with the Government constructively and offer assistance to address its serious concerns relating to the arbitrary deprivation of liberty. In this regard, the Working Group notes that Thailand issued a standing invitation to all special procedure mandate holders on 4 November 2011 and committed during its universal periodic review in May 2016 to reaffirm the standing invitation.

### Disposition

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

The deprivation of liberty of Siraphop Kornaroot, being in contravention of articles 9, 10, 11 (1) and 19 of the Universal Declaration of Human Rights and articles 9, 14

<sup>35</sup> Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 38.

<sup>36</sup> Opinions No. 3/2018, para. 62; No. 56/2017, para. 68; No. 51/2017, para. 53.

<sup>37</sup> Human Rights Committee, general comment No. 32, para. 35.

and 19 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

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

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

74. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Siraphop and to take appropriate measures against those responsible for the violation of his rights.

75. The Working Group requests the Government to bring its laws, particularly the *lèse-majesté* provision under article 112 of the Criminal Code and article 14 (3) and (5) of the Computer Crimes Act (as amended in 2017), into conformity with the recommendations made in the present opinion and with the commitments made by Thailand under international human rights law.

76. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

77. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

#### **Follow-up procedure**

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

- (a) Whether Mr. Siraphop has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Siraphop;
- (c) Whether an investigation has been conducted into the violation of Mr. Siraphop's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Thailand with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

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

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

81. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>38</sup>

*[Adopted on 24 April 2019]*

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<sup>38</sup> Human Rights Council resolution 33/30, paras. 3 and 7.