

THE OBSERVATORY
For the Protection of Human Rights Defenders

L'Observatoire
pour la protection
des défenseurs des droits de l'Homme

El Observatorio
para la Protección
de los Defensores de los Derechos Humanos

Report

Judicial Observation Mission

Thailand

Somchai abduction trial: Justice granted or justice denied?

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fidh

International Federation
for Human Rights
17, passage de la Main d'Or
75011 Paris, France



World Organisation
Against Torture
C.P. 21 - 8, rue du Vieux Biillard
CH 1211 Genève, Suisse

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Introduction

Very much concerned about the vulnerable situation of human rights defenders in Thailand and committed to ensuring the protection of the rights of human rights defenders, the Observatory for the protection of human rights defenders (an FIDH and OMCT joint programme) gave mandate to Ms. Laurie Berg, a lawyer (Australia), to observe and report on the hearing in the trial concerning the disappearance of Thai human rights lawyer, Mr. Somchai Neelaphaijit.

The mission was carried out in Bangkok by Laurie Berg from 14 to 18 November 2005. A number of hearings had already taken place since August 9, 2005. The judgment is expected to be handed down on January 12, 2006.

The Declaration on the Right and Responsibility of Individuals,

Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms –the “Declaration on Human Rights Defenders”–adopted by the UN General Assembly on December 9, 1998, notably protects the rights of individuals and organisations to “participate in peaceful activities against violations of human rights and fundamental freedoms” (Article 12).

It is against the background of that Declaration and other international human rights instruments binding on Thailand that the representative of the Observatory observed the hearings of November 15, 2005 and the subsequent days.

The Observatory extends its thanks to Union for Civil Liberty, who facilitated the mission.

Human rights defenders in Thailand

In Thailand, human rights defenders operate within the context of national security laws, government pressure and police corruption which seriously impede their work and constantly threaten their physical integrity. The official visit to Thailand of the UN Special Representative on Human Rights Defenders, Ms. Hina Jilani, from 19 to 27 May 2003, constituted an

important opportunity for assessment of the situation of human rights defenders in Thailand and the consideration of avenues of reform. Her findings suggest that Thailand’s commitments to protect the rule of law and promote human rights must be viewed in the context of continuing reports of abuses of the rights of defenders, and frequently their disappearance.¹

The disappearance of Mr. Somchai Neelaphaijit

Mr. Somchai Neelaphaijit, a respected Thai lawyer and civil rights defender, disappeared on 12 March 2004. He was last seen at the Chaleena Hotel on Ramkhamhaeng road in Bangkok. His car was left abandoned on Kamphaeng Phet road near Mor Chit 2 bus terminal. Up to date, the whereabouts of the 53-year-old lawyer remain unknown.

Before his disappearance, Mr. Somchai had been the Chair of the Muslim Lawyers Association and the Vice-Chair of the Human Rights Committee of the Lawyers Association of Thailand (the peak representative body of lawyers in Thailand, officially renamed Lawyers Council of Thailand).²

Martial law and counter-terrorism

Mr. Somchai’s disappearance was foreshadowed by a grim trend in the Thai human rights environment. In the four Southern states of Songkhla, Pattani, Yala and Narathiwat, 2004 saw a harsh military response to unrest among Thailand’s Muslim minority. After a lull in separatist activity since the late 1980s, a new wave of violence began with a January 4, 2004 attack on an army depot. This incident was followed by the announcement of martial law in the region and a series of arrests. Mr. Somchai was the representative of several groups of men in the aftermath of this violence.

1. Report submitted by the Special Representative of the Secretary-General on the situation of human rights defenders, Ms. Hina Jilani: *Mission to Thailand*, UN Doc E/CN.4/2004/94/Add.1, 12 March 2004.

2. See Observatory annual report 2004.

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The Thai authorities have characterised the worsening conflict in southern Thailand as a product of either criminal gangs or terrorism and have justified their actions as legitimate counter-terrorism measures. Five clients of Mr. Somchai were detained in February 2004 on charges involving “national security, conspiracy to commit rebellion, to recruit people and gather arms to commit rebellion, to function as a secret society and to act as a criminal gang.”³ Those who have sought to defend apparent victims of government repression, like Mr. Somchai, have been labelled terrorist sympathisers.

In recent years, the Thai government has adopted counter-terrorism decrees that dramatically broaden the scope for the use of protracted detention in violation of Thailand’s obligations under the International Covenant on Civil and Political Rights. An emergency decree adopted in August 2005⁴ allows officials to detain suspects without charge for up to 30 days,⁵ grants officials immunity for misconduct committed while containing violence in the South,⁶ and allows for suspects to be detained in locations other than police stations, detention centres, penal institutions, or prisons.⁷

Mr. Somchai’s torture allegations

On March 4, 2004, Mr. Somchai sought a court order for the five men to receive a physical examination for effects of torture. His application included the following remarks:

“While under policy custody and during the interrogation conducted at the provincial police station of Tanyong sub-district, the 4th suspect was blindfolded by police officer and physically assaulted; strangled and choked, hand-tied behind his back and beaten with pieces of wood on the back and head, suffering some head wounds. In addition, he was also hanged from the toilet door with a piece of rope and was then electrocuted with a piece of fork charged with

electrical currents, on the back of his torso and right shoulder. As a result, the suspect had to make a confession.”

The Criminal Court released the five men in May 2004 after prosecutors failed to file charges against them. Investigating Mr. Somchai’s allegations, the National Human Rights Commission of Thailand (NHRC) found evidence of torture and detention without access to lawyers or family members. Nevertheless, his clients’ torturers have not been held legally accountable for these acts.

Two weeks before Mr. Somchai sought the court order mentioned above, he delivered a speech on police torture and impunity that one journalist described as “powerful, bitter, [and] outraged.”⁸ Mr. Somchai alleged torture by members of the Thai police department’s Crime Suppression Division and called for an end to martial law. On March 11, 2004, Mr. Somchai filed a formal complaint with the Ministry of Justice detailing the torture his clients received at the hands of the police. Days before Mr. Somchai’s disappearance, he was told he was on a ‘terrorist blacklist’ maintained by security forces. This suggests that he may have been targeted for his efforts to peacefully advocate against violations of the rights of Muslims in southern Thailand.

The case against the police

Following international and domestic outcry over government inaction in connection with Mr. Somchai’s disappearance, five policemen were indicted in June 2004. Serious issues immediately emerged suggesting a poor commitment to rule of law in this case. The defendants face charges, not of murder, but of gang-robbery of Mr. Somchai’s car, watch, pen and mobile phone and ‘physically forcing another person into submission’.⁹ Thai authorities claim that the absence of a body is an obstacle

3. These defendants were Makata Harong (49), Sukri Maming (37), Manase Mama (25), Sudirueman Malae (23) and Abdullah Abukaree (20).

4. See joint press release by FIDH and UCL on 16 August 2005, http://www.fidh.org/article.php3?id_article=2627.

5. This is a stark departure from the provisions of the Criminal Procedure Code, which comports with international standards by limiting detention periods to 48 hours, provides for access to legal assistance, and establishes rights to *habeas corpus*. It also prohibits torture and mistreatment of detainees.

6. Under section 17, a complainant now has the burden to prove that the officials in question did not act in “good faith, non-discriminatory, and an unreasonable” manner.

7. Section 12.

8. Kavi Chongkittavorn, “The politics of disappearance - Thai-style,” *The Nation*, 29 March 2004.

9. Section 309 of the Thai Criminal Code states, “Whoever compels the other person to do or not to do any act, or to suffer any thing, by putting him in fear of injury to life, body, liberty, reputation or property of him or another person, or commits violence so that he does or does not do such act, or suffers such thing, shall be punished with imprisonment not exceeding three years or fined not exceeding six thousand Baht or both.”

Section 309(2) states, “If the offence according to the first paragraph be committed by making the use of arms or by five persons upwards participating... the offender shall be punished with imprisonment not exceeding five years or fined not exceeding ten thousand Baht, or both.”

Section 340 states, “Whoever with three persons upwards participate in committing robbery, such persons are said to commit gang-robbery, and shall be punished with imprisonment of ten to fifteen years and fined twenty-four thousand to forty thousand Baht.”

Section 340 ter states, “Whoever, committing the offence under Section 340, by wearing the soldier or police uniform... shall be subjected to heavier punishment than that as prescribed, by half.”

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to a murder charge and that a charge of kidnapping can only be brought where there are efforts to obtain a ransom.

Yet a more serious obstacle to appropriate charges seems to be a stark lack of evidence due to poor police investigations. Indeed, in response to questions of the United Nations Human Rights Committee in July 2005 regarding this case, the Government of Thailand stated that the:

“police officers have not been charged with a more serious offence because there is no substantial evidence to prove that Mr. Somchai Neelapaijit was dead...”¹⁰

The Observatory considers that the Thai legislature should take legislative measures to prevent and terminate acts of enforced disappearance in Thailand, in conformity with Article 3 of the UN Declaration on the Protection of all Persons from Enforced Disappearance of 1992. The Thai authorities should immediately comply with Article 4 of the Draft International Convention for the Protection of All Persons from Enforced Disappearance, which states that “Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.”

Thai human rights organisations have sensibly expressed doubt as to the propriety of the police force investigating its own members. Indeed, a Senate committee announced in May 2004 that it had little hope of solving the lawyer’s disappearance due to poor cooperation from the police.

The police officers, Police Major Ngern Thongsuk, officer attached to the Internal Security Operations Command on temporary duty at the Crime Suppression Division (CSD), Police Lieutenant-Colonel Sinchai Nimpunyakampong, investigator of the CSD’s 4th sub-division, Police Sergeant-Major Chaiweng Phaduang, attached to the Tourist Police Division, Police Sergeant Rundorn Sitthiket of the CSD’s 4th sub-division and Police Lieutenant-Colonel Chadchai Liamsanguan, deputy superintendent of CSD’s sub-division 3, all pleaded not guilty. All were subsequently released on bail.

Mr. Somchai’s wife, Mrs. Angkana Wongrachen, informed the trial observer that she and her family members, including her 80-year-old mother, have received many threats from anonymous callers and through anonymous letters since her husband’s disappearance.

Media outlets have reported that Mrs. Angkana was telephoned on the morning of April 18, 2005 by a man she identified as an intelligence official she had previously met. The caller asked her about her activities related to the United Nations. Several weeks earlier an unidentified man reportedly visited her, warning her not to advocate too publicly for justice in her husband’s case. On April 20, 2005, the Justice Minister, Mr. Suwat Liptapanlop, ordered official protection for Mrs. Angkana on the grounds that a ‘third hand’ might harm her in order to tarnish the country’s reputation. Mrs. Angkana refused this protection, fearing the presence of security officials at her private residence.

Other investigations

A Senate Committee was set up to investigate the disappearance of Mr. Somchai. The Committee’s head, Mr. Sak Korsangruang, quoted Prime Minister Thaksin Shinawatra as telling a security agency meeting on March 28, 2004: *“I know from my intelligence sources that a group of officials took Somchai to Mae Hong Son.”¹¹* In March 2005, the Prime Minister and Gen. Chavalit were invited to respond to requests for information, but they declined, citing a lack of time. In its final report the Senate Committee found that Mr. Somchai’s disappearance was the work of certain state officials. However, it concludes that the weak charges brought against the five sus-

pects were inevitably the result of the investigators’ rush to finalise their findings without expanding their investigations to other parties, or seeking more witnesses. The Committee has concluded that it has little hope of solving the lawyer’s disappearance due to poor cooperation from the police and government officers.

In October 2004, the Law Society of Thailand¹² joined Mr. Somchai’s wife in calling for the Justice Ministry’s Department of Special Investigation (DSI) to launch an inquiry into the lawyer’s disappearance. Responding perhaps to public pressure, government officials quickly announced the launch of a formal

10. Reply of the Kingdom of Thailand on the List of Issues to be taken up by the Human Rights Committee in connection with the consideration of the initial report of Thailand under Article 40 of the International Covenant on Civil and Political Rights, July 2005.

11. Chanravee Tansubhapol and Manop Thip-Osod, “A Year On, and Still No News on Somchai”, *The Bangkok Post*, 11 March 2005.

12. The professional society of Thai lawyers, which later changed its name to the Lawyers Council of Thailand.

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inquiry. The Asian Human Rights Commission, a regional NGO based in Hong Kong, received a letter from the Minister of Justice stating that an “*ad hoc* committee under the responsibility of the Special Investigation Department” had been established and had made “a lot of progress.” However, the Minister of Justice later claimed that no steps had been taken because no entreaty to his ministry had been made, overlooking Mrs. Angkana’s and the Law Society’s request.¹³

Again, on July 18, 2005 the DSI officially announced the commencement of investigations of Mr. Somchai’s disappearance.¹⁴ The new panel reportedly includes representatives from the State Prosecutor Office, the National Human Rights Commission and the National Intelligence Agency. Promisingly, the former DSI chief, Mr. Sombat Amornwivat, has publicly stated that evidence links several higher ranking police officials to the crime. However, there have been no further arrests in connection with the case.¹⁵

Commissioners from the National Human Rights Commission of Thailand (NHRC) told the trial observer that it had formally embarked upon an independent investigation of this case in November 2005. Constituted in July 2001 under the Human Rights Protection Act of 1999, the NHRC comprises eleven full-time Commissioners, who are elected by the Senate and may serve for a single term of office of six years. The NHRC has the power to examine and report to Parliament on the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties to which Thailand is a party.¹⁶ However, the NHRC does not have the authority to pass judgment or impose penalties based on its findings. Nor does it have power to compel persons and institutions to take action. The Special Representative to the Secretary General on the situation of human rights defenders found in her 2004 report that the Thai government and parliament fail to take seriously concerns raised by the NHRC.¹⁷ The UN Human Rights Committee has concurred with this finding.¹⁸

The trial

At a court hearing on July 12, 2005, Mrs. Angkana Wongrachen was named as a co-plaintiff over the objections of the public prosecutor. This decision was made in accordance with section 30 of the Criminal Procedure Code which states that in a criminal prosecution, the injured person (or a family member if he is unable) may apply by motion to associate himself as prosecutor at any stage of the proceedings.

The trial began in the Bangkok Criminal Court on August 9, 2005 and continued until 1 December 2005.¹⁹ Judgment is expected to be handed down on 12 January 2006.

On 21 October 2005, the principal judge, Mr. Suwit Pornpanich, announced that he would not continue to hear the case. The prospect of the hearing continuing before a replacement judge appeared to conflict with the Thai Constitution of 1997 which requires, in section 236, that “any judge not sitting at the

hearing of a case shall not give judgment or a decision of such case, except for the case of *force majeure* or any other unavoidable necessity as provided by law.” Mrs. Angkana immediately petitioned the President of the Supreme Court, requesting that the presiding judge not be replaced while these proceedings were on foot.²⁰ On 1 November 2005, Mr. Suwit Pornpanich declared his decision to continue to hear the matter through to its conclusion, without further comment.

The prosecution has not produced any physical evidence linking the five suspects to the crime scene. The main evidence linking the defendants to Mr. Somchai’s disappearance is records of 75 phone calls between the five men, on the date of his disappearance, some made near the areas where Mr. Somchai was last seen alive, where records show very few little phone contact between the defendants during the preceding week. The defendants all deny having any contact with each other

13. Asian Human Rights Commission, “Institutionalised Torture, Extrajudicial Killings & Uneven Application of Law in Thailand: An Alternative Report to the Initial Report of Thailand to the Human Rights Committee,” April 2005.

14. This investigation runs parallel to the DSI investigations of two cases: the assassination of activist monk Phra Supoj Suwajano in Chiang Mai in June 2005 and the attempted murder of Matichon newspaper reporter Manop Rattanajaronporn following his exposure of illegal forest encroachment in Phang Nga province.

15. “DSI Pushed to Speed Cases of Slain Activists, Missing Lawyer” *Bangkok Post*, 2 December 2005.

16. As stipulated by section 15 of the National Human Rights Commission Act in accordance with Article 200(1) of the Constitution.

17. Report submitted by the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani: *Mission to Thailand*, UN Doc E/CN.4/2004/94/Add.1, 12 March 2004, para 12.

18. See UN Document, CCPR/CO/84/THA, 28 July 2005, para. 9.

19. See Observatory Open letter to the President of the Lawyers Council of Thailand, November 24, 2005.

20. See Observatory Open letter to the President of the Criminal Court of Thailand, October 20, 2005.

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prior to the charges being laid. They claim that the Metropolitan Police Bureau's investigation team brought these charges as a result of ongoing tensions between it and the Crime Suppression Division. They also claim that these charges were hastily brought by investigators in the context of public pressure to resolve the case.

The defence also challenges the phone records as fabricated documents. Bizarrely, during the period of the trial observation, sworn allegations of forgery were made not by experts in verifying the authenticity of documents but by the fifth defendant himself, the most senior of the accused. Apparently, unlike other common law jurisdictions, Thai rules of evidence do not restrict lay witnesses from making oral statements of hearsay and opinion.²¹ While such a defence strategy is entirely predictable, this testimony passed entirely without remark by the prosecution. Such deference shown by the prosecutors to the accused characterised all of the cross-examination during the period of the trial observed. The failure of the prosecuting lawyers to challenge the accused's version of events compares very unfavourably with the almost five and a half days of strident cross-examination of one witness by defence lawyers. One can

only hope that the defendants' opinions, other than where supported by a basis in fact, are not considered as relevant evidence by the judge in determining their guilt or innocence in this case.

Of still graver concern was the frequent circulation of prosecuting lawyers in the case. The Observatory has been informed that no single prosecutor has been regularly present for the duration of the hearings in this proceeding.

Indeed, on one occasion, during the period observed, there was no prosecutor whatsoever present in the court for fifteen minutes while witnesses for the defence gave evidence in chief. There is no question that the ability to effectively cross-examine witness is impeded by such irregularities. There are reports that prosecuting lawyers have openly confessed that they were unable to undertake cross-examination because of their scant knowledge of the evidence led in this case. One observer reports that on 3 November 2005, prosecutors requested a postponement of the hearing in order to prepare more fully for cross-examination and yet the presiding judge refused their request and granted merely a 20 minute adjournment.²²

International human rights norms

The Observatory recalls that the 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), adopted by the General Assembly, affirms the right to promote and to strive for the protection and realisation of human rights.

Most pertinent to this case, Article 9.5 echoes the customary obligation of States to conduct a prompt and impartial investigation into allegations of human rights violations, in order to identify and bring to justice the perpetrators.²³ Article 12 of the Declaration protects the rights of individuals and organizations

to "participate in peaceful activities against violations of human rights and fundamental freedoms." Furthermore, it reiterates the obligation of the State to adopt all necessary measures to ensure that human rights defenders are fully protected against attacks, violence, threats, and discrimination, both by law and in practice.²⁴

The Observatory recalls that Article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance states that relatives of the 'disappeared' have the right to complain to a "competent and independent State authority" which should have the powers and resources to conduct an effective

21. Section 226 of the Thai Code of Criminal Procedure states that, "Any material, documentary or oral evidence likely to prove the guilt or the innocence of the accused is admissible" and section 227 permits the Court to "exercise its discretion in considering and weighing all the evidence taken."

22. Asian Human Rights Commission, Update "Constant Changes of Prosecuting Attorneys in Somchai's Case Undermines Judicial Process," page 2.

23. This norm of customary international law is set out, in similar terms in article 12 of the Convention Against Torture, articles 9-17 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, article 22 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and general comments and decisions of the Human Rights Committee reiterating the duty of States parties to investigate all human rights violations, in particular those affecting the physical integrity of the victim (HRI/GEN/1/Rev.3).

24. In his 1998 report, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Commission on Human Rights explained the content of this obligation in the following terms: "In circumstances where certain State authorities or sectors of the civil society perceive political dissent, social protest or the defence of human rights as a threat to their authority, the central government authorities should take action to create a climate more favourable to the exercise of those rights and thus reduce the risk of violations on the right to life. The Special Rapporteur encourages Governments to recognize publicly the legitimacy of and contribution made by human rights defenders" (E/CN.4/1998/68, Section D).

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investigation. This includes the power to compel attendance of witnesses, to protect witnesses, to compel the production of relevant documents and that the findings of such an investigation be made available on request to persons concerned. The UN Declaration on the Protection of All Persons from Enforced Disappearances recommends that authorities carry out prompt, thorough and impartial investigations into every report of disappearances.

The Observatory also stresses that under the International Covenant on Civil and Political Rights (ICCPR), ratified by Thailand in 1997, each State Party “undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity” (Article 2, para. 3). The UN Human Rights Committee, when it considered the initial state report of Thailand, noted that “Human rights defenders (...) continue to

be targets of such actions [extrajudicial killings], and any investigations have generally failed to lead to prosecutions and sentences commensurate with the gravity of the crimes committed, creating a “culture of impunity.” It made a specific recommendation in that regard to the Thai authorities, in order to ensure an effective remedy to the victims of human rights violations.²⁵

The Committee also noted violations of freedom of expression, assembly and association in relation to human rights defenders, and recommended that Thai authorities take measures to immediately halt and protect against the harassment and attacks against human rights defenders and community leaders.

The State party must systematically investigate all reported instances of intimidation, harassment and attacks and guarantee effective remedies to victims and their families.²⁶

25. See UN Document, CCPR/CO/84/THA, 28 July 2005, para. 10.

26. *Ibid.*, para. 19.

Conclusions and recommendations

Conclusions

In the case of disappearances, legal remedies play an even more significant role than for other kinds of human rights violations, by enabling the relatives of the missing person not only to ensure the violation is recognised and receive reparation but also to help them to know what really happened to the person who disappeared.

Regardless of the determinations of guilt or innocence when the judgment is handed down in this case, this trial in no way brings to justice the individuals responsible for the actual enforced disappearance of Mr. Somchai. The charges do not reflect the seriousness of the crime. A new legal framework on forced disappearances would go some way to ensuring accountability for this crime, and would constitute a first step towards bringing Thailand into conformity with Principles articulated in the UN Declaration on the Protection of all Persons from Enforced Disappearance as well as in the Draft International Convention for the Protection of All Persons from Enforced Disappearance.

The real barrier to appropriate conviction in this case appears to be insufficient evidence due to a weak investigation. The police, including members of the same unit as the defendants, were entrusted to investigate the crime scene. They reportedly interfered with important evidence, for instance by sitting in Mr. Somchai's vehicle before it could be examined by forensic experts. The failure to support a truly independent investigation raises serious concerns about the ability of the Thai police force to investigate itself, and means that those responsible for the crime are almost certain to escape findings of culpability, notwithstanding efforts by the Senate or NHRC.

Several months after Mr. Somchai's disappearance, on November 17, 2004, while the Senate inquiry was under way, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions publicly stated that he was seeking to visit Thailand to assess reports of killings and disappearances in the south. His efforts to carry out an inquiry were rebuffed by Prime Minister Thaksin, who has notoriously responded to UN criticism by stating that *"the UN is not my father."* In June 2005, the UN Working Group on enforced or involuntary disappearances took up Mr. Somchai's case.

The failure of Thailand to call its police officers to account for grave human rights abuses is widely seen as systematic. The March 2004 report on Thailand by the Special Representative of the Secretary General on Human Rights Defenders, Ms. Hina Jilani, tells of her alarm over statements by government officials regarding human rights advocates. Ms. Jilani expressed concern over the persecution of defenders and community leaders, and urged the government to ensure the prompt investigation of all violations against defenders. In July 2005, the UN Human Rights Committee decried "the persistent allegations of serious human rights violations, including widespread instances of extrajudicial killings and ill-treatment by the police and members of armed forces... Human rights defenders, community leaders, demonstrators and other members of civil society continue to be targets of such actions, and any investigations have generally failed to lead to prosecutions and sentences commensurate with the gravity of the crimes committed, creating a culture of impunity," in violation of Articles 19, 21 and 22 of the International Covenant on Civil and Political Rights.²⁷

The years immediately prior to the events which are the subject of this report saw the imposition of martial law, evidence of torture of criminal suspects and the enactment of counter-terrorism decrees in 2003 that broaden the scope for the use of protracted detention without charge or trial. These actions amount to a response which is disproportionate to any alleged threat to public order and inconsistent with Thailand's commitment to comply with the international human rights framework by which it is bound. While the government of Thailand has the right to respond appropriately to acts of violence in its territory, these measures violate Thailand's obligations under the International Covenant on Civil and Political Rights.

Especially relevant to this case, the August 2005 Emergency Decree permits the use of secret, undisclosed, or inaccessible places of detention. The provisions fall far short of appropriate judicial and administrative checks on police and government officials, and are widely seen as alienating the public and creating a more permissive environment for abuses. This is likely to deepen the "climate of impunity" described by the United Nations Human Rights Committee in its report of July 28,

27. Concluding observations of the Human Rights Committee: Thailand, 08/07/2005, CCPR/CO/84/THA, para. 10.

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2005. Even in a state of emergency, victims of human rights violations must have an effective way to challenge limitations of their fundamental human rights and freedoms before an independent judicial authority.

In Thailand's report to the UN Human Rights Committee, it is claimed that "Thailand has become a party to the Covenant on Civil and Political Rights 1966 without making any reservations and is legally bound by it since 29 January 1997. Thailand has considered and found that under the present political legal and

governmental system of Thailand, it can follow the Covenant without any obstacle."²⁵

The backdrop to the abduction of Mr. Somchai and this trial belies this confidence. And, in contrast to the view of the Thai government, the Observatory considers that systematic police torture, extrajudicial killings and a few shaky prosecutions pose significant obstacles to the proper implementation of Thailand's human rights obligations.

Recommendations

The Observatory calls upon the Thai authorities to:

Regarding Mr. Somchai Neelaphaijit's disappearance:

1. Ensure that the authors of his disappearance receive the sanctions provided by law and proportional to the gravity of their crimes;
2. Guarantee the physical and psychological integrity of Mr. Somchai Neelaphaijit's relatives.

Regarding human rights defenders in Thailand:

1. End all forms of harassment and ill-treatment of human rights defenders in Thailand, and guarantee in all circumstances that human rights defenders and organisations are able to carry out their work without any hindrance;
2. Ensure the implementation of the provisions of the Declaration on Human Rights Defenders adopted by the UN General Assembly on December 9, 1998, in particular article 1, which states that "everyone has the right, individually or in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels," as well as article 12.2, which provides that "the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually or in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any

other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration";

More generally:

1. Independent inquiries by the Justice Ministry's Department of Special Investigations and the National Human Rights Commission must occur as quickly as possible, and conclusions must be reported in a timely manner.
2. The Attorney-General, Mr. Pachara Yutidhammadamrong, should ensure the continuity of prosecuting lawyers in criminal matters, especially those with the profile of this proceeding.
3. Parliament should ensure that enforced disappearance constitutes a specific offence under Thai criminal law in conformity with the UN Declaration on the Protection of all Persons from Enforced Disappearance as well as with the Draft International Convention for the Protection of All Persons from Enforced Disappearance.
4. Thailand should ratify the Convention against Torture without delay. In implementing the Convention against Torture in domestic law, the Thai Parliament should be particularly mindful of establishing an independent agency to receive, investigate and prosecute complaints of torture, especially against police officials.

25. Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Thailand, UN Doc CCPR/C/THA/2004/1, 2 August 2004, para. 2.

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5. Thailand should immediately issue a standing invitation to all the Commission on Human Rights special procedures, and in particular to the UN Working Group on Enforced or Involuntary Disappearances, and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to visit Thailand to assess reports of killings and disappearances in the south, and the incidence of such violations as a result of the increased police powers brought by the Emergency Decrees.

6. Thai authorities should fully implement the recommendations

issued in July 2005 by the UN Human Rights Committee with regard to the respect of the International Covenant on Civil and Political Rights.

7. The Thai authorities should guarantee the respect of human rights and fundamental freedoms in accordance with the Universal Declaration on Human Rights and other international human rights instruments ratified by Thailand.

8. Thailand should ratify the Statute of the ICC, which Thailand signed in 2000.

Annex - Persons met by the mission

Ms. Laurie Berg attended the court on 15-18 November.

While in Bangkok, Ms. Berg had formal meetings with:

- Mrs. Angkana Wongrachen, Mr. Somchai's wife
- Mr. Danthong Breen, President of the Union for Civil Liberty
- Mr. Vasant Panich, Commissioner at the National Human Rights Commission of Thailand
- Assistant Professor Jaran Ditapichai, Commissioner at the National Human Rights Commission of Thailand
- Mr. Thongbai Thongpao, human rights lawyer
- Mr. Sitipong, Legal Representative for the co-plaintiff
- Mr. Fergus Auld, Second Secretary (Political Section) at the British Embassy in Bangkok
- Ms. Pornpen Khongkachonkiet, Thai NGO Coalition on the Protection of Human Rights Defenders
- Ms. Diana Sarosi, Nonviolence International

THE OBSERVATORY

For the Protection of Human Rights Defenders

L'Observatoire

pour la protection
des défenseurs des droits de l'Homme

El Observatorio

para la Protección
de los Defensores de los Derechos Humanos

The Emergency Line La Ligne d'Urgence La Línea de Urgencia

e-mail

appeals@fidh-omct.org

fax

33 (0) 1 43 55 18 80

telephone

direct FIDH

33 (0) 1 43 55 55 05

direct OMCT

41 (0) 22 809 49 39

Director of publication: Sidiki Kaba
Editor-in-chief: Antoine Bernard
Author: Laurie Berg
Assistant of publication: Stéphanie Geel
Printed by FIDH - ISSN en cours - N° 436/2
Dépôt légal January 2006
Commission paritaire N° 0904P11341
Fichier informatique conforme à la loi
du 6 janvier 1978 (Déclaration N° 330 675)

Activities of the Observatory

The Observatory is an action programme, based on the conviction that strengthened co-operation and solidarity among defenders and their organisations will contribute to break the isolation of the victims of violations. It is also based on the necessity to establish a systematic response from NGOs and the international community to the repression against defenders.

With this aim, the priorities of the Observatory are:

- a) a system of systematic alert on violations of rights and freedoms of human rights defenders, particularly when they require an urgent intervention;
- b) the observation of judicial proceedings, and whenever necessary, direct legal assistance;
- c) personalised and direct assistance, including material support, with the aim of ensuring the security of the defenders victims of serious violations;
- d) the preparation, publication and diffusion of a world-wide level of reports on violations of human rights and of individuals, or their organisations, that work for human rights around the world;
- e) sustained lobby with different regional and international intergovernmental institutions, particularly the United Nations, the Organisation of American States, the Organisation of African Union, the ASEAN, the Council of Europe and the European Union.

The activities of the Observatory are based on the consultation and the co-operation with national, regional and international non-governmental organisations.

With efficiency as its primary objective, the Observatory has adopted flexible criteria for the examination and admissibility of cases that are communicated to it. It also targets action based interpretations of the definition of "Human Rights Defenders" applied by OMCT and FIDH.

The competence of the Observatory embraces the cases which correspond to the following "operational definition:" "Each person victim or risking to be the victim of reprisals, harassment or violations, due to its compromise exercised individually or in association with others, in conformity with international instruments of protection of human rights, in favour of the promotion and realisation of rights recognised by the Universal Declaration of Human Rights and guaranteed by several international instruments."

An FIDH and OMCT venture - Un programme de la FIDH et de l'OMCT - Un programa de la FIDH y de la OMCT

fidh

International Federation
for Human Rights
17, passage de la Main d'Or
75011 Paris, France

OMCT
OPERATING THE SOS-TORTURE NETWORK

World Organisation
Against Torture
C.P. 21 - 8, rue du Vieux Biillard
CH 1211 Genève, Suisse