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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-seventh session, 21-25 November 2016

Opinion No. 44/2016 concerning Pongsak Sriboonpeng (Thailand)

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

2. In accordance with its methods of work (A/HRC/30/69), on 22 June 2016 the Working Group transmitted a communication to the Government of Thailand concerning Pongsak Sriboonpeng. The Government replied to the communication on 27 June 2016. 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. Mr. Pongsak Sriboonpeng (hereafter Mr. Pongsak) is a 49-year-old Thai citizen who works as a tour guide and in restaurants and hotels in Bangkok. The source reports that Mr. Pongsak became politically active following the Government's response to a series of political protests that were organised in Bangkok from March to May 2010 by the National United Front of Democracy Against Dictatorship (also known as the "Red Shirts"). Mr. Pongsak was mostly active on Facebook and, despite his participation in several rallies organised by the Red Shirts, did not perceive himself as aligned to either side of Thailand's political divide.

5. According to the source, Mr. Pongsak posted a series of comments on social media regarding the King and members of the Royal Family of Thailand. On 4 September 2013, Mr. Pongsak posted a picture of the now deceased King Bhumibol Adulyadej, which was interpreted by the authorities as a claim of the King's inability to improve the well-being of the Thai people. On 10 September 2013, Mr. Pongsak posted a picture of King Bhumibol along with a strongly-worded message that criticised Queen Sirikit for attending the funeral of a "Yellow Shirt" protestor who was killed during an anti-government demonstration in October 2008. On 17 September 2013, Mr. Pongsak posted pictures of King Bhumibol and his brother, King Ananda Mahidol (Rama VIII), along with a message that suggested the involvement of King Bhumibol in the death of his brother. On 18 September 2013, Mr. Pongsak posted a message suggesting the involvement of King Bhumibol and Queen Sirikit in the 2010 political unrest. Mr. Pongsak also posted material about the Royal Family in November 2014, including criticism of King Bhumibol and suggestion of conflict between various members of the Royal Family.

6. According to the information received, on 9 June 2014, Thailand's ruling military junta (the National Council for Peace and Order or NCPO) summoned Mr. Pongsak to report himself. Mr. Pongsak failed to appear before the authorities.

7. On 30 December 2014, Mr. Pongsak was arrested at a bus station in Phitsanulok Province by military personnel and police officers from the Technology Crime Suppression Division while he was travelling from Nakhon Ratchasima to Tak Province. It is not known whether a warrant was produced at the time of arrest. Mr. Pongsak was taken to the Ekatosaros Military Camp in Phitsanulok Province where he was detained and interrogated. The source states that Mr. Pongsak was not provided with access to a lawyer.

8. On 2 January 2015, Mr. Pongsak was transported to the 11th Infantry Battalion Military Circle in Bangkok where he was further interrogated without access to a lawyer. According to the source, Mr. Pongsak was blindfolded and handcuffed while being transported to Bangkok. On 7 January 2015, Mr. Pongsak was first informed of the charges against him and brought before a judge for the first time when he appeared before the Bangkok Military Court for pre-trial detention. Mr. Pongsak was charged with six counts of lèse-majesté offences under article 112 of the Criminal Code, and six counts of violating article 14 of the Computer Crimes Act for posting six messages and pictures on Facebook between 4 September 2013 and 31 December 2014 which allegedly defamed the monarchy. Mr. Pongsak was remanded to the custody of police from the Technology Crime Suppression Division at the Thung Song Hong Police Station in Bangkok.

9. The source further reports that, on 7 January 2015, Mr. Pongsak petitioned for his release from detention. However, his petition was rejected by the Bangkok Military Court. According to the source, anyone who committed lèse-majesté offences between 25 May 2014 and 31 March 2015 has 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 1955 Military Court Act. While some of the Facebook messages deemed offensive were posted by Mr. Pongsak in 2013, the Military Court's interpretation was that Mr. Pongsak's case still falls under its jurisdiction given that the content remained available on the internet after 25 May 2014. As a result, Mr. Pongsak has not been able to bring an appeal in relation to his matter.

10. On the same day, 7 January 2015, Mr. Pongsak confessed to the crimes for which he had been charged at a televised press conference organised by the Royal Thai Police. His family had not been notified of his detention, but learned about it when they saw him on television at the press conference. The source states that bail was set at 400,000 baht (equivalent to 11,350 USD) but Mr. Pongsak and his family could not afford to pay this amount. As a result, Mr. Pongsak did not attempt to post bail.

11. The source informs that Mr. Pongsak had his first opportunity to speak to a lawyer on 16 January 2015 when he was taken to the Bangkok Military Court for his second pre-trial detention order. At that time, Mr. Pongsak randomly met a volunteer lawyer who he appointed to act for him. The lawyer then submitted an objection to the second pre-trial detention request.

12. On 7 August 2015, the Bangkok Military Court sentenced Mr. Pongsak to 60 years' imprisonment on six counts of lèse-majesté offences (ten years for each count) in a hearing closed to the public. However, in consideration of Mr. Pongsak's guilty plea, the Court halved the sentence to 30 years' imprisonment. Mr. Pongsak has now been in detention for nearly two years since he was arrested on 30 December 2014 and is serving his 30-year sentence at Klong Prem Prison in Bangkok.

Submissions regarding arbitrary detention

13. The source submits that the deprivation of liberty of Mr. Pongsak is arbitrary in accordance with categories II and III of the categories applied by the Working Group.

14. In relation to category II, the source submits that the arrest and detention of Mr. Pongsak is the result of his peaceful exercise of the right to freedom of expression, contrary to article 19 of the UDHR and article 19(2) of the ICCPR.

15. In relation to category III, the source submits that Mr. Pongsak has not been afforded the right to a fair trial guaranteed by article 14 of the ICCPR. In particular, Mr. Pongsak was not informed, promptly and in detail, of the nature and cause of the charges brought against him and did not have adequate time for the preparation of his defence. Mr. Pongsak was also denied his right to receive legal assistance during military and police interrogation and during his initial pre-trial detention period, as well as his right not to be compelled to testify against himself or to confess his guilt. These rights are guaranteed by article 14(3) (a), (b), (d) and (g) of the ICCPR. Further, the source submits that the court hearing that resulted in Mr. Pongsak's prison sentence was conducted behind closed doors in a military court, in violation of article 14(1) and (5) of the ICCPR. The source adds that a further violation of article 14 of the ICCPR occurred because individuals who have allegedly committed lèse-majesté offences between 25 May 2014 and 31 March 2015 have no right to appeal a decision of the military court.

16. More broadly, the source states that the Thai military courts are not independent from the executive branch of government. Military courts are units of the Ministry of Defence, and military judges are appointed by the Army Commander-in-Chief and the Minister of Defence. Military judges also lack adequate legal training. Thai 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. According to the source, military courts routinely hold lèse-majesté trials behind closed doors, barring observers from international human rights organisations, foreign diplomatic missions, and members of the public from entry into the courtroom. The source submits that military courts have on numerous occasions claimed that closed-door proceedings were necessary because lèse-majesté trials are a matter of "national security" and could "affect public morale".

17. The source submits that the non-observance of the international norms of the right to fair trial is of such gravity that Mr. Pongsak's deprivation of liberty falls under category III.

Response from the Government

18. On 22 June 2016, 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 21 August 2016 about the current situation of Mr. Pongsak. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention, and to provide details regarding the conformity of his trial with international law, particularly international human rights treaties to which the Kingdom of Thailand is a party.

19. The Government's response was submitted by its Ambassador and Permanent Representative at the Permanent Mission of Thailand in Geneva and received by the Working Group on 27 June 2016. In its response, the Government reiterated that the Thai Monarchy has always been the main pillar of Thai society, noting that "Our lèse-majesté law provides protection to the rights or reputation of the King, the Queen and the Heir apparent or the Regent in a similar way libel law does for commoners."

20. Further, the Government noted that, under the Thai Criminal Procedure Code, due process of law is guaranteed for proceedings on lèse-majesté cases, as with other criminal offences. Throughout the legal process, the defendant has the right to contest the charges and the right to a fair trial, as well as assistance from legal counsel, if the case is brought before the court. Convicted persons have the right to appeal to higher courts, and once their cases become final, they are entitled to seek a royal pardon. The Government also reaffirmed that Thailand attaches great importance to the freedom of expression.

21. Finally, the Government noted in its response that the Working Group's communication had been forwarded to the relevant authorities in Thailand for further consideration. However, the Working Group did not receive any further information from the Government.

Further comments from the source

22. The Government's response was sent to the source on 30 June 2016 for comment. However, the Working Group did not receive any further information from the source.

Discussion

23. The Working Group welcomes the prompt response of the Government to its communication and considers such cooperation as a sound basis for continuing its dialogue with the Government on issues of arbitrary detention. The Working Group notes, however, that the Government's response contained a general description of the lèse-majesté laws and criminal procedure in Thailand, rather than responding to the specific allegations made by the source.

24. This case again raises the issue of the compatibility of Thailand's lèse-majesté laws with the right to freedom of opinion and expression enshrined in international human rights law,

including the UDHR and ICCPR. More specifically, article 112 of Thailand's Criminal Code states: "Whoever defames, insults or threatens the King, the Queen, the Heir to the throne or the Regent shall be punished with imprisonment of three to fifteen years."

25. In its previous jurisprudence, the Working Group considered this provision (see, for example, Opinion Nos. 35/2012, 41/2014 and 43/2015) and concurred with the Special Rapporteur on the right to freedom of opinion and expression, who found that this 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.[1]

26. Other experts and observers also consider that the lèse-majesté laws are inconsistent with Thailand's international human rights commitments. In its General Comment No. 34 (2011) on freedoms of opinion and expression, the Human Rights Committee emphasized 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. Moreover, 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" (para. 38). The Committee specifically expressed concern regarding laws on such matters as lèse-majesté. Similarly, during Thailand's Universal Periodic Review (UPR) in May 2016, restrictions placed on the right to freedom of opinion and expression and the lèse-majesté laws were frequently raised as a matter of concern by delegations.

27. According to the source, the number of lèse-majesté cases has significantly increased following the coup d'état on 22 May 2014. The Office of the UN High Commissioner for Human Rights (OHCHR) has confirmed this, noting in a press release last year that there has been a sharp increase in lèse-majesté prosecutions. Since the May 2014 military coup in Thailand, at least 40 individuals have either been convicted or remain in pre-trial detention for lèse-majesté offences, both under article 112 of the Criminal Code and under the 2007 Computer Crimes Act. In early May 2014, prior to the coup, there were fewer people in prison for lèse-majesté related convictions.[2]

28. Given the continuing international concern regarding Thailand's lèse-majesté laws, as well as the apparent lack of effectiveness of those laws in deterring criticism of the Royal Family, the Government may consider it an appropriate time to work with international human rights mechanisms to bring these laws into conformity with its international obligations under the UDHR and ICCPR. The Working Group would welcome the opportunity to conduct a country visit to constructively assist in this process. In this regard, the Working Group notes the commitment made by the Government during its UPR in May 2016 to reaffirm its standing invitation to all of the Special Procedures of the Human Rights Council.

29. In the present case, the Working Group considers that Mr. Pongsak's comments on social media regarding members of the Thai Royal Family fall within the boundaries of opinions and expression protected by article 19 of the UDHR and article 19 of the ICCPR. As the Working Group noted in its Deliberation No. 8, these provisions protect peaceful political discourse and commentary on public affairs via the internet, including the expression of ideas that may be regarded as offensive (paras. 44-47). There was no suggestion by the

[1] Office of the UN High Commissioner for Human Rights, News Release, "Thailand/Freedom of expression: UN expert recommends amendment of lèse-majesté laws," Geneva, 10 October 2011. See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/20/17, 4 June 2012, paragraph 20.

[2] Office of the UN High Commissioner for Human Rights, Press Briefing on Thailand and Mali, Geneva, 11 August 2015, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16310&LangID=E.

Government in its response that any of the permitted restrictions on the freedom of expression found in article 19(3) of the ICCPR apply in this case, such as restrictions that are necessary for respect of the rights or reputation of others. Indeed, in its recent UPR in May 2016, the Government stated that "Freedom of expression may be restricted only as necessary to maintain public order and prevent further polarization in society. The challenge is to maintain a balance when enforcing relevant laws, so as not to undermine rights and freedoms, especially when exercised in good faith and intentions."[3] In this case, the Government has not struck the appropriate balance. If Mr. Pongsak's postings defamed any individuals, the remedy would lie in a civil libel claim, rather than criminal sanctions.[4]

30. Accordingly, the Working Group finds that Mr. Pongsak was detained solely for the peaceful exercise of his rights to freedom of opinion and expression, and that his case falls within category II of the categories applied by the Working Group.

31. The Working Group also finds several serious violations of the international norms relating to the right to a fair trial. Firstly, the Bangkok Military Court did not provide a "public hearing" as required by article 14(1) of the ICCPR, as the hearing at which Mr. Pongsak was sentenced was held in closed session. Although the source referred to the fact that closed-door lèse-majesté trials are often justified on the basis of national security, the Government did not advance any argument as to why this trial would fall within any of the exceptions in article 14(1) (such as national security or public order) which would allow it to be closed to the public.

32. Further, the Working Group considers that the Bangkok Military Court which sentenced Mr. Pongsak does not meet the standard established in article 14(1) of the ICCPR, namely "a competent, independent and impartial tribunal". As the source submitted, and the Government did not contest, Thai military courts are not independent from the executive branch of government because military judges are appointed by the Army Commander-in-Chief and Minister of Defence, lack sufficient legal training, and sit in closed sessions as representatives of their commanders. The Working Group has stated that the trial of civilians by military courts violates the ICCPR and customary international law, and that military courts can only be competent to try military personnel for military offences. The Working Group explained its reasoning as follows:

> "In the Working Group's view, there is an irreconcilable contradiction of values in the make-up of military courts... One of the core values of a civilian judge is his or her independence, while the most appreciated value in a military official is exactly the opposite: his or her obedience to his or her superiors. Therefore the intervention of a military judge who is neither professionally nor culturally independent is likely to produce an effect contrary to the enjoyment of the human rights and to a fair trial with due guarantees."[5]

33. Further, as the Human Rights Committee stated in its General Comment No. 32 (2007), the guarantees of a fair trial under article 14 of the ICCPR cannot be limited or modified because of the military nature of a court (para. 22). In this case, the Working Group considers that Mr. Pongsak was not informed promptly of the nature and cause of the charges against him, contrary to article 14(3)(a) of the ICCPR. Nine days passed between Mr.

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[3] Report of the Working Group on the Universal Periodic Review (Thailand), A/HRC/33/16, 15 July 2016, paragraph 16.

[4] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/4/27, 2 January 2007, paragraph 81.

[5] Report of the Working Group on Arbitrary Detention, A/HRC/27/48, 30 June 2014, paragraphs 66-71, 85. See also Report of the Special Rapporteur on the independence of judges and lawyers, A/68/285, 7 August 2013, paragraphs 46-56.

Pongsak's arrest on 30 December 2014 and 7 January 2015, when he was first informed of the charges. Further, Mr. Pongsak did not have access to a lawyer when he was being interrogated at the Ekatosaros Military Camp and at the 11th Infantry Battalion Military Circle in Bangkok, and during his first hearing for pre-trial detention before the Bangkok Military Court on 7 January 2015, contrary to article 14(3)(b) and (d) of the ICCPR.[6] Indeed, if Mr. Pongsak had not randomly met a volunteer lawyer at the court on 16 January 2015, he might not have had legal representation for the entire proceedings.

34. In addition, at the time of his televised confession to the alleged offences which was organised by the police, Mr. Pongsak had no access to a lawyer, his family was not aware of his arrest and detention, and he had been under interrogation at military bases for nine days. In these circumstances, the Working Group considers it unlikely that he was afforded the right not to be compelled to confess guilt, contrary to article 14(3)(g) of the ICCPR. The burden is on the Government to demonstrate that Mr. Pongsak's confession was made of his own free will, and the Government has not done so in its response to the Working Group.

35. The Working Group notes that Mr. Pongsak was initially sentenced to 60 years of imprisonment, but that this was reduced to a 30-year sentence in consideration of his guilty plea. Mr. Pongsak should have, but did not, have the right to appeal this conviction and excessive sentence. According to the source, as a result of the Thai Army's declaration of martial law on 20 May 2014 and the NCPO's issuance of Announcement 37/2014 on 25 May 2014, military courts assumed jurisdiction over lèse-majesté cases for offences committed from 25 May 2014. Individuals who committed lèse-majesté offences between 25 May 2014 and 31 March 2015[7] have no right to appeal a decision made by a military court. The source states that this was the result of the declaration of martial law and is in accordance with article 61 of the 1955 Military Court Act. The absence of a right to appeal is a clear violation of Mr. Pongsak's right to a review of his conviction and sentence by a higher tribunal under article 14(5) of the ICCPR, and appears to have negatively influenced the outcome in this case. If Mr. Pongsak's case had been reviewed on appeal by a civilian court, he may have had a valid argument that the Bangkok Military Court had no jurisdiction over most of the messages that he posted on social media in 2013, before the declaration of martial law.

36. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give Mr. Pongsak's deprivation of liberty an arbitrary character according to category III of the categories applied by the Working Group. The Human Rights Committee stated in its General Comment No. 29 (2001) that the fundamental requirements of a fair trial must be respected during a state of emergency (para. 16). The Working Group finds that Mr. Pongsak's right to a fair trial has not been respected during and after the period of martial law.

37. Finally, the Working Group wishes to record its grave concern about the pattern of arbitrary detention in cases involving Thailand's lèse-majesté laws. This case is one of several cases brought to the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in the Kingdom of Thailand. The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law, may constitute crimes against humanity.[8] Given the increased usage of the internet and social media as a means of communication, the detention of individuals for exercising their rights to freedom of opinion

[6] See also UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, 6 July 2015, Principle 9; and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 10, 11(1), 15, 17-19.

[7] Martial law was lifted on 1 April 2015.

[8] See e.g. Opinion No. 47/2012, para. 22.

and expression online will likely continue to increase until steps are taken by the Government to bring the lèse-majesté laws into conformity with international human rights law.

Disposition

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

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

39. The Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Pongsak without delay and bring it into conformity with the standards and principles in the UDHR and ICCPR.

40. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to release Mr. Pongsak immediately, and accord him an enforceable right to compensation in accordance with article 9(5) of the ICCPR.

41. The Working Group urges the Government to bring relevant legislation, particularly laws such as article 112 of the Criminal Code which have been used to restrict the right to freedom of expression, as well as other laws which allow civilians to be tried in military courts, into conformity with the recommendations made in this Opinion and with Thailand's commitments under international human rights law.

42. In accordance with paragraph 33(a) of its methods of work, the Working Group refers Mr. Pongsak's case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action. Given the issues identified in this Opinion regarding the trial of Mr. Pongsak by a military court, the Working Group also refers the case to the Special Rapporteur on the independence of judges and lawyers.

Follow-up procedure

43. 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. Pongsak has been released and, if so, on what date;

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

(c) Whether an investigation has been conducted into the violation of Mr. Pongsak'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 the Government with its international obligations in line with the present opinion;

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

44. The Government is further 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.

45. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would

enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

46. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken. [9]

Adopted on 21 November 2016

[9] See Human Rights Council resolution 24/7, paras. 3 and 7.