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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 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 organized in Bangkok from March to May 2010 by the National United Front for Democracy against Dictatorship (also known as the Red Shirts). Mr. Pongsak was active mostly on Facebook and, despite his participation in several rallies organized by the Red Shirts, did not consider himself to be aligned with either side of his country'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 King Bhumibol Adulyadej, since deceased. The posting was interpreted by the authorities as a critique 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 criticizing Queen Sirikit for attending the funeral of a "Yellow Shirt" protestor 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 suggesting that King Bhumibol had been involved in the death of his brother. On 18 September, Mr. Pongsak posted a message implicating 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 suggestions that there was conflict among members of the royal family.

6. On 9 June 2014, Mr. Pongsak was summoned to appear by the ruling military junta (the National Council for Peace and Order). He failed to appear.

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 transferred to the Eleventh 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 when he was taken to Bangkok. On 7 January 2015, Mr. Pongsak was first informed of the charges against him. He was first brought before a judge on the same date, when he appeared before the Bangkok Military Court for pretrial detention. Mr. Pongsak was charged with six counts of lese-majesty 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 that allegedly defamed the monarchy. Mr. Pongsak was remanded to the custody of police from the Technology Crime Suppression Division at the Thong Song Hong police station in Bangkok.

9. The source also 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 lese-majesty 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 Military Court Act of 1955. Although 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 fell under its jurisdiction, as 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 this matter.

10. On the same day, 7 January 2015, Mr. Pongsak confessed to the crimes with which he had been charged at a televised press conference organized by the Royal Thai Police. The members of his family, who had not been notified of his detention, learned of it only 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), which Mr. Pongsak and his family could not afford. As a result, Mr. Pongsak did not attempt to post bail.

11. The source indicates 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 a second pretrial detention hearing, where, by chance, he met a volunteer lawyer, whom he appointed to act on his behalf. The lawyer then submitted a motion contesting the second pretrial detention order.

12. On 7 August 2015, the Bangkok Military Court, in a hearing closed to the public, sentenced Mr. Pongsak to 60 years' imprisonment on six counts of lese-majesty (10 years for each count). 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 his arrest 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 and falls within categories II and III.

14. In relation to category II, the source submits that the arrest and detention of Mr. Pongsak were the result of his peaceful exercise of the right to freedom of expression and were therefore contrary to article 19 of the Universal Declaration of Human Rights and article 19 (2) of the Covenant.

15. In relation to category III, the source submits that Mr. Pongsak was not afforded the right to a fair trial guaranteed by article 14 of the Covenant. 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 pretrial detention period, as well as his right not to be compelled to testify against himself or to confess his guilt. Those rights are guaranteed by article 14 (3) (a), (b), (d) and (g) of the Covenant. Furthermore, 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 Covenant. The source adds that denying people who allegedly committed lese-majesty offences between 25 May 2014 and 31 March 2015 the right to appeal a decision of the military court is also in violation of article 14.

16. More broadly, the source states that the Thai military courts are not independent of the executive branch of Government. Military courts are units of the Ministry of Defence,

and military judges are appointed by the Commander-in-Chief of the Royal Thai Army and the Minister of Defence. Military judges also lack adequate legal training. Lower military courts in Thailand consist of panels of three judges, only one of whom has legal training. The other two are commissioned military officers who sit on the panels as representatives of their commanders. According to the source, military courts routinely hear lese-majesty cases behind closed doors, denying observers from international human rights organizations and foreign diplomatic missions and members of the public entry to the courtroom. The source submits that military courts have on numerous occasions claimed that closed-door proceedings were necessary because lese-majesty 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 within 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 about the current situation of Mr. Pongsak by 21 August 2016. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention and provide details regarding the conformity of his trial with international law, particularly international human rights treaties to which 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 had always been the main pillar of Thai society and that the country's "lese-majesty 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. The Government also noted that, under the Thai Code of Criminal Procedure, due process of law was guaranteed for lese-majesty proceedings, as with other criminal offences. Throughout the legal process, defendants had the right to contest the charges and the right to a fair trial, as well as to assistance from legal counsel, if the case was brought before the court. Convicted persons had the right to appeal to higher courts, and once their cases became final, they were entitled to seek a royal pardon. The Government also reaffirmed that Thailand attached great importance to 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 to be 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 lese-

majesty laws and criminal procedure in Thailand rather than a response to the specific allegations made by the source.

24. The case again raises the issue of the compatibility of the State's lese-majesty laws with the right to freedom of opinion and expression enshrined in international human rights law, including the Universal Declaration of Human Rights and the Covenant. More specifically, article 112 of the Thai 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 3 to 15 years."

25. In its previous jurisprudence, the Working Group considered this provision (see, for example, opinions No. 35/2012, No. 41/2014 and No. 43/2015) and concurred with the Special Rapporteur on the promotion and protection of 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 country's lese-majesty laws are inconsistent with its 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 lese-majesty. Similarly, during the universal periodic review of Thailand in May 2016, restrictions on the right to freedom of opinion and expression and the lese-majesty laws were frequently raised as a matter of concern by delegations.

27. According to the source, the number of lese-majesty cases has increased significantly since the coup d'état on 22 May 2014. The Office of the United Nations High Commissioner for Human Rights (OHCHR), for its part, noted in a press release in 2015 that there had been a sharp increase in lese-majesty prosecutions. Since the May 2014 military coup in Thailand, at least 40 individuals have either been convicted or remain in pretrial detention for lese-majesty offences, under both article 112 of the Criminal Code and the Computer Crimes Act of 2007. Early in May 2014, before the coup, there were fewer people in prison for convictions related to lese-majesty.[2]

28. Given the continuing international concern regarding the country's lese-majesty laws, as well as the apparent inability of those laws to discourage criticism of the royal family, the Government may consider it to be an appropriate time to work with international human rights mechanisms to bring these laws into conformity with its international obligations under the Universal Declaration of Human Rights and the Covenant. The Working Group would welcome the opportunity to conduct a country visit to constructively assist in this process. In this regard, the Working Group notes the commitment made by the Government during its universal periodic review in May 2016 to reaffirm its standing invitation to all the special procedures of the Human Rights Council.

[1] Office of the United Nations High Commissioner for Human Rights (OHCHR), news release, "Thailand/freedom of expression: United Nations expert recommends amendment of lèse-majesté laws", Geneva, 10 October 2011. See also A/HRC/20/17, para. 20.

[2] OHCHR, press briefing note on Thailand and Mali, 11 August 2015. Available from www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16310&LangID=E.

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 Universal Declaration of Human Rights and article 19 of the Covenant. As the Working Group noted in its deliberation No. 8,[3] 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 Government in its response that any of the permitted restrictions on the freedom of expression found in article 19 (3) of the Covenant applied in this case, such as restrictions that are necessary for respect of the rights or reputation of others. Indeed, in its recent universal periodic review 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" (see A/HRC/33/16, para. 16). In the present 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 in criminal sanctions (see A/HRC/4/27, para. 81).

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.

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

32. In addition, the Working Group considers that the Bangkok Military Court that sentenced Mr. Pongsak does not meet the standard established in article 14 (1) of the Covenant, namely, that "everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal". As the source stated — a statement not contested by the Government — Thai military courts are not independent of the executive branch of Government because military judges are appointed by the Commander-in-Chief of the Army and the Minister of Defence, 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 is contrary to the Covenant and customary international law and that military courts are competent only 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.

[3] Available from http://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf.

> 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.[4]

33. In addition, as the Human Rights Committee stated in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the guarantees of a fair trial under article 14 of the Covenant cannot be limited or modified because of the military nature of a court (para. 22). In the present 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 Covenant. Nine days passed between Mr. Pongsak's arrest on 30 December 2014 and 7 January 2015, when he was first informed of the charges. Moreover, Mr. Pongsak did not have access to a lawyer when he was being interrogated at the Ekatosaros military camp and at the Eleventh Infantry Battalion Military Circle in Bangkok or during his first hearing for pretrial detention before the Bangkok Military Court on 7 January 2015, in breach of article 14 (3) (b) and (d) of the Covenant.[5] Indeed, if Mr. Pongsak had not by chance 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 organized 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 Covenant. The burden is on the Government to demonstrate that Mr. Pongsak's confession was made of his own free will, but it demonstrated no such thing in its response to the Working Group.

35. The Working Group notes that Mr. Pongsak was initially sentenced to 60 years of imprisonment, a sentence reduced to 30 years in consideration of his guilty plea. Mr. Pongsak should have had the right to appeal this conviction and excessive sentence, but it was denied him. According to the source, as a result of the Royal Thai Army's declaration of martial law on 20 May 2014 and the National Council for Peace and Order's issuance of announcement No. 37/2014 on 25 May 2014, military courts assumed jurisdiction over lese-majesty cases for offences committed from 25 May 2014. Individuals who committed such offences between 25 May 2014 and 31 March 2015[6] have no right to appeal decisions made by military courts. The source states that this was the result of the declaration of martial law and is in accordance with article 61 of the Military Court Act of 1955. 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 Covenant 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 the deprivation of liberty of Mr. Pongsak's an arbitrary character that falls within category III. The Human Rights Committee stated in its general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency that the fundamental requirements of a fair trial must be respected during a state of

[4] See A/HRC/27/48, paras. 67 and 68.

[5] See also A/HRC/30/37, 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 and 17-19.

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

emergency (para. 16). The Working Group finds that Mr. Pongsak's right to a fair trial has not been respected either during or after the period of martial law.

37. Finally, the Working Group wishes to express its grave concern about the pattern of arbitrary detention in cases involving the lese-majesty laws of Thailand. This case is only one of several brought to the Working Group in recent years concerning arbitrary deprivation of liberty in 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 (see, for example, opinion No. 47/2012, para. 22). Given the increased usage of the Internet and social media as a means of communication, it is likely that the detention of individuals for exercising their rights to freedom of opinion and expression online will continue to increase until steps are taken by the Government to bring the lese-majesty laws into conformity with international human rights law.

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 of 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 Universal Declaration of Human Rights and the Covenant.

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 Covenant.

41. The Working Group urges the Government to bring relevant legislation, particularly laws that have been used to restrict the right to freedom of expression, such as article 112 of the Criminal Code, as well as other laws that allow civilians to be tried in military courts, into conformity with the recommendations made in the present opinion and with the commitments of Thailand 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 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.[7]

[*Adopted on 21 November 2016*]

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