



INTERNATIONAL
COMMISSION
OF JURISTS

THAILAND

REPORT ON THE CRIMINAL TRIAL AND INVESTIGATION OF THE ENFORCED DISAPPEARANCE OF SOMCHAI NEELAPAICHIT

March 2009

Executive Summary

Five years since prominent Muslim lawyer Somchai Neelapaichit was allegedly abducted and killed by five police officers in central Bangkok, on 12 March 2004, his fate remains unknown and no one has been held accountable in final judgment for the crime of his enforced disappearance. The case has received widespread national and international media coverage and is seen as emblematic of the difficulty of achieving justice in cases of serious human rights violations in Thailand.

For 20 years Somchai Neelapaichit championed various human rights causes. He was well known for representing clients accused of insurgency-related violence in the deep South, where increased conflict since January 2004 has claimed over 3,300 lives. On 11 March 2004, the day before his disappearance, he submitted a complaint to government authorities alleging torture by state officials of Malay-Muslim clients who had been charged with criminal offences.

Although several former government officials, including a former Prime Minister and the Attorney General, have publicly stated that they know Mr Neelapaichit was killed, the accused police officers were charged with relatively minor offences and faced no disciplinary action. The only officer convicted has remained free pending a drawn out and ongoing appeals process, and recently disappeared himself under questionable circumstances. Successive governments have promised to bring the case to closure. On 21 January 2009, newly appointed Prime Minister Abhisit Vejjajiva announced the Government's intention to ensure swift and meaningful progress in investigating and bringing to justice the perpetrators of Mr Neelapaichit's enforced disappearance.

Between August 2005 and January 2006 an ICJ representative observed the criminal trial of the five police officers charged in relation to the disappearance. ICJ Commissioner Justice Elizabeth Evatt, a former Australian Judge and former member of the UN Human Rights Committee, was sent to observe part of the trial and the verdict on 12 January 2006. Since then, the ICJ has closely monitored the case and had regular meetings with Thai lawyers and government officials and with Angkhana Neelapaichit, wife of Somchai Neelapaichit.

The ICJ considers that the defendants received a fair and public trial, which, on the whole, was conducted by the Court in accordance with international standards. However, it found serious irregularities in the overall criminal investigation and the case presented by the prosecution, which denied the victim's family the effective remedy to which they are entitled under international law.

Failures in the administration of justice process include:

- Failure of the prosecution to charge the defendants with offences reflecting the seriousness of the crime.

- Serious questions over the independence and impartiality of the original investigation.
- Credible reports that evidence was destroyed and that state officials, in particular the police, continue to obstruct the investigation process.
- The failure of investigators to use court sanctioned powers - such as search, seizure and arrest - to overcome attempts to obstruct the case by the police and other agencies.
- Consistent reports of threats, intimidation and harassment of the family of Mr Neelapaichit and key witnesses, before, during and after the trial.
- Substantial gaps in the physical forensic evidence submitted to the court, including: failure to preserve the integrity of the victim's car before it had been subject to a full and independent forensic examination, and failure to examine some hair samples found in the victim's car against samples from three of the defendants.
- Failure to properly investigate, and prepare adequate expert evidence regarding, the mobile phone records of the five defendants, including submission of photocopies with certain records blanked-out and failure to investigate and explain a call to Government House by one of the suspects on the day of the disappearance.
- Lack of disciplinary action against the five accused police officers while under investigation, and the upholding of this decision by the Administrative Court.
- Failure of the appeals process to achieve progress three years after the initial verdict.
- Failure to monitor the whereabouts of Pol. Maj. Ngern Thongsukand, the only convicted police officer, pending the verdict of the appeal court.

In a bizarre twist, as pressure for justice has mounted, it is alleged that Pol. Maj. Thongsukand has himself disappeared in a landslide on 19 September 2008. The credibility of this report is disputed by Angkhana Neelapaichit.

The primary obstacle to justice appears to be the failure of the prosecution to penetrate the wall of silence within the police and to ensure witnesses protection. There is a gap between Government policy and the willingness of investigators to use full legal powers - such as court-sanctioned search, seizure and arrest - to obtain essential evidence. This has undermined the Government's obligations under domestic and international law to take all necessary measures to hold responsible those involved in crimes associated with the enforced disappearance.

Key Recommendations

- 1) The investigation should continue until all perpetrators, including any senior state officials, are brought to justice for crimes proportionate to the seriousness of the offence, as required by international law.
- 2) The Department of Special Investigation (DSI) should be given the necessary human and financial resources to promptly complete an independent, impartial and effective investigation.
- 3) The police should respect their duty to fully cooperate with the DSI by providing all relevant evidence and the DSI should use its full legal powers to ensure such cooperation and take disciplinary action against those who seek to obstruct justice.
- 4) The DSI should carry out a wholesale review of the mobile phone records of the five defendants and use full legal powers, including court sanctioned powers of search, seizure and arrest, to obtain any further relevant records.
- 5) The Ministry of Justice should effectively implement the Witness Protection Act, and also ensure protection of prosecutors and lawyers.
- 6) The DSI should accept offers of external assistance on the forensic evidence from credible independent experts.
- 7) The DSI and the Office of the Attorney General should bring homicide charges, including murder charges, against the alleged perpetrators, whether or not the body is located, based on international practice and precedents in Thai law.
- 8) The Royal Thai Police should formally suspend Pol. Maj. Ngern Thongsuk from duty pending the outcome of his appeal.
- 9) The Royal Thai Government should ratify the International Convention for the Protection of All Persons from Enforced Disappearance and adopt national law criminalizing enforced disappearance with penalties appropriate to the seriousness of the offence.

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1. Introduction

The ICJ sends observers all over the world to monitor whether legal proceedings comply with national and international standards. In January 2006, the ICJ's Geneva Secretariat sent an international trial observer to the criminal trial of five defendants for the alleged abduction and enforced disappearance, on 12 March 2004, of Somchai Neelapaichit, a leading human rights lawyer in Thailand.

ICJ Commissioner, Justice Elizabeth Evatt, who is also a former Australian Judge, and former member of the UN Human Rights Committee, observed part of the trial. She was assisted by an interpreter throughout. ICJ representatives observed the hearing on all days from 9 August 2005 to the final day of the hearing on 1 December 2005, including the delivery of the verdict on 12 January 2006. The ICJ did not have an observer available for two days of the hearing, 21 and 28 March 2005. The contents of this report are taken from the observations of ICJ observers, together with interviews carried out over the past two years with Angkhana Neelapaichit, trial lawyers and other Thai lawyers, relevant government agencies and reference to case documents.

The Court system in Thailand is well established. The 2007 Constitution (Section 197) provides for an independent judiciary. According to the US Department of State Human Rights Report of 2008, "The constitution provides for an independent judiciary. Although the judiciary generally was regarded as independent, it was subject to corruption and outside influences. According to human rights groups, the lack of progress in several high-profile cases involving alleged abuse by the police and military diminished the public's trust in the justice system and discouraged some victims of human rights abuses (or their families) from seeking justice."¹ In practice, save in exceptional cases, this has combined with flaws in criminal investigations to mean lack of accountability for state officials accused of serious human rights violations.

The institutional problem of impunity of state officials has become more visible again since the 'war on drugs' in 2003, in which state officials were involved in the deaths of over 2,500 people,² and the renewal of an active insurgency movement in the southern border provinces of Thailand in January 2004. In five years, almost 3,300 people have died in insurgency-related attacks and killings by state and non-state actors continue to occur on an almost daily basis.³

¹ US Department of State, Country Reports on Human Rights Practices 2008, released by the Bureau of Democracy, Human Rights and Labor, 25 February 2009, at section 1 (e).

² Independent Committee for the Investigation, Study and Analysis of the Formulation and Implementation of Narcotic suppression Policy (ICID), *Preliminary Report*, February 2008.

³ Intellectual Deep South Watch, deaths from insurgency related violence between January 2004 to December 2008 is quoted at 3,287.

The case of Somchai Neelapaichit has come to symbolise the failure of the Thai authorities to bring to justice state officials for serious human rights violations. His disappearance took place a year after the ‘war on drugs’ and just weeks after the start of a renewed insurgency movement in the deep South; between January and April 2004 there were over 200 deaths and injuries in the deep South,⁴ including lethal use of force by state officials on 28 April 2004 at Krue Se, Krong Pinang and Saba Yoi. There have been no successful prosecutions in any of these cases.

Several senior government officials, including a former Prime Minister, the Attorney General and the DSI investigators, have publicly stated that they have evidence Somchai Neelapaichit is dead.⁵ Successive governments have announced their intention to resolve the case, but have been unable to do so.

A key finding of the Government appointed National Reconciliation Commission in 2006 was the connection between lack of accountability in this case and lack of trust between the Malay-Muslim community and state authorities in the deep South:

“The violence that claimed Somchai had a direct impact on state-citizen relations. Many people, in particular the country’s minority, felt that here was someone who always put his faith in the state’s justice process, yet even he was not safe. It goes without saying how important faith in the country’s justice process is to state-citizen relations.”⁶

The ICJ hopes that its analysis of this trial and the investigation process may provide some guidance to the legal community on the application of international law and standards to the justice system in Thailand, as well as to government agencies investigating this case and other human rights violations, and those involved in the administration of justice in Thailand.

⁴ Dr. Srisombhop Chitpiromsri, 2004-2007: *Four Years of “Instable Security” in the Southern Border Provinces*, Faculty of Political Science, Prince of Songkhla University, Pattani Campus, www.deepsouthwatch.org

⁵ See e.g. *Report of the National Reconciliation Commission: Overcoming Violence through the Power of Reconciliation*, 16 May 2006 (unofficial translation), at p.45; *US Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices 2006, Thailand*, 6 March 2007; *DSI offers B500,000 reward for Somchai info*, Bangkok Post, 2 March 2007.

⁶ *Report of the National Reconciliation Commission: Overcoming Violence through the Power of Reconciliation, Prognosis of Violent Phenomenon*, at pp.45-46, 16 May 2006

Extracts from the Report of the National Reconciliation Commission: Overcoming Violence through the Power of Reconciliation, 16 May 2006 (unofficial translation)

Pursuant to the Prime Minister's Order in March 2005 a National Reconciliation Commission (NRC) was established to recommend "policies, measures, mechanisms and ways conducive to reconciliation and peace in Thai society, particularly in the 3 southern border provinces". The NRC was chaired by respected former Prime Minister Anand Panyarachun. Quoted here are extracts from its findings in the chapters titled, *Diagnosis: Understanding Violence in the Southern Border Provinces and Prognosis of Violent Phenomenon* (pages 19-20, and 45-46)

"The sentiment among some Thai Muslims of Malay descent that they do not receive justice from the state is in fact deep-rooted, having developed along with the history of the area. This sentiment intensified when the government miscalculated the situation and dissolved the SBPAC, and used the police as the main law enforcement arm, as though under normal circumstances, without the participation of other parties. The implementation of extreme measures—which were criticized as unlawful and in violation of human rights, such as the violent drug suppression policy in 2003 and the course of action in the aftermath of the rifle robbery on 4 January 2004 –has intensified the problem further.

*When combined with other instances where the state used force or extremely unjust measures to solve the problem—such as the suppression of the insurgents on 28 April 2004 at Krue Se, Krong Pinang and Saba Yoi, the Tak Bai incident on 25 October 2004, and the disappearance of **Somchai Neelapaijit**, a well-known human rights lawyer, on 12 March 2004—this further aggravated the people's distrust of the state and misgivings about the justice process to an unprecedented degree.*

These conditions created a vicious cycle in the justice process. Lack of cooperation from the public is one important reason for the inefficiency of the criminal justice process. The result is that state officials are unable to arrest the guilty parties or to find evidence for a trial. Many cases therefore never go to trial. The increasingly violent situation may create additional pressure on some state officials to resort to extra-judicial means in the gathering of evidence.

[...]

*This incident is important because **Somchai Neelapaijit** was a Muslim lawyer who had long fought on behalf of Muslims accused of involvement in the violence in the three southern border provinces. His abduction and disappearance was the destruction of a man who believed in the country's justice process, and who therefore always fought for justice through legal means within the system. The violence that claimed Somchai had a direct impact on state-citizen relations. Many people, in particular the country's minority, felt that here was someone who always put his faith in the state's justice process, yet even he was not safe. It goes without saying how important faith in the country's justice process is to state-citizen relations."*

2. Legal Framework

Criminal procedure

The Thai criminal law system is adversarial without a jury. Criminal cases are heard by a single judge for less serious offences, and by two or more judges for more serious cases.⁷ Criminal proceedings are governed by the Criminal Procedure Code⁸ together with the Constitution of Thailand, which provides for a range of fair trial rights.⁹

Applicable international human rights law

Fair trial standards

Thailand is bound by international human rights law. Of particular relevance to this report is the International Covenant on Civil and Political Rights (ICCPR).¹⁰ It provides that everyone is equal before the courts¹¹ and entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹² It also establishes the presumption of innocence¹³ and minimum guarantees of rights in criminal proceedings, which include:

- the right to promptly be informed of the charge
- the right to adequate time to prepare a defence
- the right to communicate with legal counsel of own choice
- the right to be tried without undue delay
- the right to be present at trial
- the right to have a defence and legal assistance
- the right to call and examine witnesses
- the right to an interpreter if necessary
- the right not to be compelled to testify
- the right to an appeal.¹⁴

In addition, the standards contained in other international legal instruments are applicable. Of particular relevance to this report are:

- Universal Declaration of Human Rights

⁷ Section 26 of the Statute of the Judicial Court provides that at least two judges are required for trial.

⁸ E.g. Sections 7, 8, 13, 78, 87, 90, 92, 108, 134, 135, 165, 172, 173 and 174, Criminal Procedure Code.

⁹ E.g. Articles 31, 32, 75, 142, 236, 237, 238, 239, 240, 241, 243, 244, 245 and 247, Constitution of Thailand, 1997. For the relevant periods in this report the Constitution of Thailand 1997 was still in force. After the military coup on 19 September 2006 an Interim Constitution. A new Constitution was drafted under the coup-government and promulgated in 2007.

¹⁰ Thailand acceded to the International Covenant on Civil and Political Rights on 29 October 1996. It made interpretative declarations on Articles 1(1), 6(5), 9(3), and 20.

¹¹ Article 14, para. 1, ICCPR. See also article 26, ICCPR, and article 10 of the Universal Declaration of Human Rights.

¹² See also article 10 of the Universal Declaration of Human Rights.

¹³ Article 14, para. 2, ICCPR.

¹⁴ Article 14, para. 3 (a) – (g) and 5, ICCPR. The UN Human Rights Committee, which is mandated as the supervisory body for the ICCPR, has recently set out an authoritative General Comment on the obligations of states parties regarding equality before the courts and the right to a fair trial. (General Comment 32, UN Doc CCPR/C/GC/32 (2007)).

- United Nations Basic Principles on the Independence of the Judiciary
- United Nations Basic Principles on the Role of Lawyers
- Guidelines on the Role of Prosecutors
- UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

These declarations, principles and guidelines, while not treaties, have strong persuasive force, having been negotiated by governments and adopted by international bodies such as the UN General Assembly. Moreover, many of their provisions reaffirm legal principles already established by legally binding treaties.

International law is not automatically implemented into Thai national law and it is rare that court decisions refer to international human rights standards. However, whether or not measures of implementation have been undertaken, Thailand remains bound by its international obligations.

Enforced disappearance

The allegation that police officers abducted Somchai Neelapaichit invokes numerous human rights violations, in particular the prohibition against enforced disappearance. The International Convention for the Protection of All Persons from Enforced Disappearance (‘the Convention on Enforced Disappearance’) defines enforced disappearance as follows:

“For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”¹⁵

In this case, it is alleged, based on eyewitness and other evidence, that Somchai Neelapaichit was abducted by agents of the State, acting outside the law, followed by concealment of his fate or whereabouts.

The act of enforced disappearance is a violation of international law and numerous human rights, including the right to recognition as a person before the law, the right to liberty and security of the person, and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.¹⁶ It also violates or constitutes a grave threat to the right to life.¹⁷

Impunity and reparations

Under international law states are obliged to conduct a prompt, effective, impartial and independent investigation into potential human rights

¹⁵ Article 2, Convention on Enforced Disappearance.

¹⁶ Article 2, UN Declaration on Disappearances.

¹⁷ Article 2, UN Declaration on Disappearances

violations¹⁸ and to bring those responsible to justice.¹⁹ Under the ICCPR, persons whose rights are violated have a right to an effective remedy.²⁰ States are also required to provide reparations²¹ to victims of violations of human rights, especially for gross violations, such as violation of the right to life, the prohibition of torture or other cruel inhuman and degrading treatment or punishment, and enforced disappearances.²² Failure to properly investigate and bring to justice perpetrators of serious human rights violations is itself a violation of the ICCPR.²³

More specifically, under the Convention on Enforced Disappearance states are required to take appropriate measures to investigate acts of enforced disappearance and to bring those responsible to justice, including superiors who order or turn a blind eye to the act of enforced disappearance.²⁴ States are also required to ensure that enforced disappearance is a crime under its criminal law.²⁵ Thailand is not a party to this Convention. However, these provisions are also provided in the UN Declaration on the Protection of all Persons from Enforced Disappearance (‘the UN Declaration on Disappearances’),²⁶ which was adopted by the UN General Assembly, of which Thailand is a member, as well as forming part of Thailand’s general legal obligations under the ICCPR, as referred to above.

¹⁸ See e.g. Article 12, Convention on Enforced Disappearance, Report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations, E/CN.4/Sub.2/1997/20/rev.1, para. 27; General Comment No. 20 on Article 7, 13 March 1992, HRI/GEN/1/Rev.7, para. 14; Concluding Observations on Peru, 25 July 1995, CCPR/C/79/Add.62, para. 22.

¹⁹ See e.g. UN Human Rights Committee, *Bautista de Arellana v. Colombia* (563/93), para. 8.

²⁰ Article 2 (3) (a), ICCPR.

²¹ The right to ‘reparation’ includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, E/CN.4/Res/2005/35, para. 18.

²² See e.g. Article 24 Convention on Enforced Disappearance; The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, E/CN.4/Res/2005/35, para. 18 et seq.

²³ UN Human Rights Committee, General Comment 31, *The Nature of the General Obligations Imposed on State Parties to the Covenant*, CCPR/C21/Rev.1/Add.13.

²⁴ Article 6, Convention on Enforced Disappearance. “*A superior who: (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;*”

²⁵ Article 4, UN Convention on Enforced Disappearance

²⁶ Declaration on the Protection of all Persons from Enforced Disappearance, Adopted by General Assembly resolution 47/133 of 18 December 1992, Articles 4, 6, 14 and 15.

3. Enforced Disappearance

The primary allegation in this case is that Somchai Neelapaichit was abducted, most probably killed, by police officers, who then concealed his fate and whereabouts, as a consequence of his work as a lawyer in representing clients who alleged torture by the police.

Somchai Neelapaichit was 53 years old at the time of his disappearance, a husband and a father of five children. A prominent human rights lawyer in Thailand, he had practiced law for more than 20 years with Somchai Neelapaichit Law Office. He was the chairman of the Muslim Lawyer Club and Vice-Chair of the Human Rights Committee of the Law Society of Thailand (now known as the Lawyers Council of Thailand). Many of the cases he worked on were regarded as politically controversial. Since 1983 he had represented a number of clients charged with alleged terrorism-related offences, many relating to the long-standing low-level insurgency in the southern border provinces of Thailand - Pattani, Narathiwat and Yala ('the deep South').²⁷

On 4 January 2004, there was a substantial robbery of military weapons from an army camp ('the gun robbery') and school arsons in 18 locations in the deep South. In response, the Government of Prime Minister Thaksin Shinawatra declared martial law in the affected provinces. Somchai Neelapaichit played a key role in collecting names for a petition of 50,000 signatures to request that martial law be lifted.²⁸ When the police subsequently arrested 33 men accused of the gun robbery, Somchai Neelapaichit was asked to represent some of the suspects.

On 26 February 2004, Somchai Neelapaichit and other colleagues from the Muslim Lawyers Club were informed that the police were holding five suspects. Three suspects - Manaseh Mamah, Sudeerueman Maleh and Abdulah Arbukaree - were held at the Crime Suppression Division in Bangkok. Two others - Makata Harong and Sukri Maming - were detained at the Bang Khen Police School in Bangkok. They visited the five suspects and were told by their clients that they had been forced to confess.²⁹ The allegations of abuse included beatings and kicking, electrocutions and urination into the mouth.³⁰

The following day, on 27 February 2004, he gave a speech at a panel discussion at the Santichon (Peace people) Foundation in Bangkok, attended by Deputy Prime Minister Wannoo Matha. In the speech he strongly criticized the Thai police and military for ill-treatment and discrimination against

²⁷ Working Group on Justice for Peace, Fact Sheet about Somchai Neelapaichit's disappearance (undated).

²⁸ Witness testimony of Kitcha Ali-Ishak. Fact Sheet about Somchai Neelapaichit's disappearance (undated).

Section 170 of the Constitution of the kingdom of Thailand B.E.2540 (1997) provides as follows: the person having the right to vote not less than fifty thousand in number shall have a right to submit a petition to the President of the National Assembly to consider such law as prescribed in Chapter 3 (Rights and Liberties of the Thai People) and Chapter 5 (Directive Principles of Fundamental State Policies) of this Constitution.

²⁹ Witness testimony of Kitcha Ali-Ishak.

³⁰ Appeal letter by five suspects, 10 March 2004, see Annex II.

Malay-Muslims in the deep South, and referred to the torture allegations he received the day before.³¹ One journalist described it as a “powerful, bitter, outraged speech”.³²

Based on the torture allegations, Somchai Neelapaichit issued a court petition requesting the release of the five detained men. The petition was rejected. On 11 March 2004, Somchai Neelapaichit’s law office therefore submitted a petition alleging abuse, to the Ministry of Justice, the Ministry of Interior, the Royal Thai Police, the Attorney General’s Office, the National Human Rights Commission, the Prime Minister and the Office of the Senate.³³

The following day, on 12 March 2004, Somchai Neelapaichit went to work as usual in his car, a dark green Honda Civic. At 20.00 hours he went to the lobby of Chaleena Hotel, Ramkamhaeng Road, together with his assistant, Pathomphong Likit, to wait for Kitcha Ali-Ishak, another lawyer of the Muslim Lawyers Club. At 20.15 hours Somchai Neelapaichit decided not to continue waiting for Mr Kitcha because he felt tired and decided to stay overnight with his friends in nearby Ramkamhaeng Road.³⁴

Based on eyewitness evidence, it is known that he then drove his car to Ramkhamhaeng 65 Road, toward Suan Son village. At about 20.30 hours a car behind him forced him to stop outside Mae Lah Pla Phao Restaurant. He got out of the car and was seen talking with four or five men from the other car. He was last seen getting into the other car.³⁵

On 14 March 2005, his wife, Angkhana Neelapaichit, filed a complaint at Bangyeerua police station, together with San Chokphong Udomchai, a lawyer at Somchai Neelapaichit’s office, expressing her concern that it was unusual for her husband to be out of contact for so long.³⁶

On 16 March 2006, at around 13:00 hours, Pol. Gen. Sombat Amornwiwat, the Director General of the Department of Special Investigation (DSI), phoned Angkhana Neelapaichit to inform her that her husband’s car had been found at Mor Chit 2 (northeastern bus terminal), which is about a 30-40 minute drive from where he was abducted, depending on the traffic and time of day.³⁷

³¹ Working Group on Justice for Peace, Fact Sheet about Somchai Neelapaichit’s disappearance (undated).

³² Kavi Chongkittavorn, *The politics of disappearance – Thai-style*, The Nation, 29 March 2004.

³³ See Annex II.

³⁴ Facts taken from the court judgment (unofficial translation), pp. 16-19.

³⁵ Facts taken from the court judgment (unofficial translation), pp. 16-19.

³⁶ Witness testimony of Angkhana Neelapaichit.

³⁷ Witness testimony of Angkhana Neelapaichit and interviews with Angkhana Neelapaichit.

4. Criminal Charges

The alleged enforced disappearance raised public interest nationally and internationally.³⁸ On 18 March 2004, Prime Minister Thaksin Shinawatra assigned an investigation team to examine the disappearance, focusing on the connection with the case of Somchai Neelapaichit's five clients who alleged torture.

On 8 and 19 April 2004, the court issued arrest warrants against five police defendants for participation in committing robbery and compelling a person to do an act:³⁹

- Police Major Ngern Thongsukand ("Defendant 1");
- Police Major Sinchai Nimpunyakampong ("Defendant 2");
- Police Sergeant Major Chaiweng Paduang ("Defendant 3");
- Police Sergeant Rundorn Sithiket ("Defendant 4");
- Police Lieutenant Colonel Chadchai Liamsanguan ("Defendant 5).

All the defendants subsequently surrendered themselves at Phayathai Police Station in Bangkok.

Defendant 1 worked in the Crime Suppression Division (CSD) and was one of the inquiry officers investigating the weapons robbery in the army camp in Narathiwat Province on 4 January 2004. Defendant 5, also from the CSD (Unit 3), was the supervisor of Defendants 1 and 2, and also one of the inquiry officers investigating the weapons robbery. Defendant 4 was an administrative officer from CSD, working in the same unit as Defendant 2 (Unit 4). Defendant 3 served in the Tourist Police Division (Sub-Division 2) and Defendant 5 was his former commander.

The investigation team found eyewitnesses who had seen Somchai Neelapaichit, at about 20:30 - 21:00 hours on the night of his disappearance, with a group of four or five men pushing him into a car. An eyewitness identified from a photo that the person who pushed Somchai Neelapaichit into the car was Defendant 1.

The case submitted to the Criminal Court on 16 June 2005, was that on 12 March 2004 at Hua Mark District, Bangkok, the defendants along with other persons, allegedly committed robbery and coercion of Somchai Neelapaichit.⁴⁰ The whereabouts of Somchai Neelapaichit were unknown. All five defendants denied the charges and were released on bail.

³⁸ See e.g. Concern grows over Thai lawyer, BBC News online, 18 March 2004,

³⁹ Sections 309 and 340 of the Penal Code of Thailand.

⁴⁰ Extracts of the relevant sections of the Penal Code are at Annex IV to this report: offences committed by two or more persons (Section 83), coercion (Section 309) and robbery (Section 340). The possessions stolen were a personal car worth THB 600,000, one watch worth THB 277,550, a pen worth THB 7,000 and a mobile phone of THB 18,900.

5. The Trial

The Prosecution

Application to join Public Prosecutor

On 12 July 2005, the first day the case was presented before the Court, Angkhana Neelapaichit, the wife of Somchai Neelapaichit, submitted a motion to join cause with the Public Prosecutor. The motion was opposed by the Public Prosecutor, but was granted by the judge on the ground that the injured party, Somchai Neelapaichit, was unable to act by himself and that Angkhana Neelapaichit was his wife. On 9 August 2004, Sudprattana Neelapaichit, Pratabjit Neelapaichit, Kobkusol Neelapaichit and Krongtum Neelapaichit, the daughters of Somchai Neelapaichit, also made a motion to join with the Public Prosecutor, which was granted for similar reasons.

At the same hearing, the court read out and explained the charges contained in the complaint to the five accused, and asked how they pleaded.⁴¹ The five defendants entered a plea of not guilty. The Public Prosecutor proceeded to present the evidence for the prosecution.

Eye-witness evidence

There were 43 witnesses presented before the court, including seven eye-witnesses. In court, three eye-witnesses positively confirmed that the person who pushed Somchai Neelapaichit into the car on the date of incident was Defendant 1.⁴² Significantly, Ms Chaweewan Yuthahan during police interview confirmed three times that Defendant 1 pushed Somchai Neelapaichit into the car, which was consistent with her testimony before the court.

Forensic evidence

Somchai Neelapaichit's car, a dark green Honda Civic (license Por Ngor 6786), about four years old in 2004, was found on 16 March 2004 at Kampaengphet 2 behind Morchit 2 Transportation Terminus. It was sent from there to the Scientific Crime Detection Division of the Royal Thai Police for examination. The prosecution adduced witness testimony from the commander of the Scientific Crime Detection Division (Major General Chuan Worawanich) on forensic tests carried out on the car. Some, but not all, of the supporting test documentation was disclosed to the court.

⁴¹ Section 172 of the Criminal Procedure Code provides as follows: “Unless otherwise provided, the trial and the taking of evidence shall be conducted in open Court and in the presence of the accused. When the prosecutor or his counsel and the accused are before the Court, and, after the Court has been satisfied as to identity of the accused, the charge shall be read out and explained to the accused and he shall then be asked whether or not he has committed the offence and what will be his defence. The statement made by the accused shall be written down. If the accused refused to make a statement, this fact shall be written down in the memorandum and the trial shall then proceed.”

⁴² Mr Sean Eamsamang, Ms Chaweewan Yutthahan and Mr Adirak Yimwadee.

- *Fingerprints*
According to the Scientific Crime Detection Division examination report, the car was examined at the bus terminal, *in situ*, at 15:00 hours for latent fingerprints and then later at 16:30 hours after having been moved.⁴³ Major General Chuan Worawanich gave testimony that, “It was found that none of the latent fingerprints in the car matches those of the five defendants”. To the best of ICJ’s knowledge, the report stating that the fingerprints of the five defendants were taken, or the report that reached this conclusion, were not disclosed to the Court. The witness testimony states that the witness referred to his own notes, which were also not disclosed to the Court.
- *Hair samples*
During the examination of the car, 20 strands of human hair were found: 12 strands were found to belong to persons who were not suspects (these were compared with hair samples taken from Somchai Neelapaichit’s close family, friends and colleagues who might have been in the car at some time) and 8 other strands were left unidentified and not tested against samples from the five defendants.
- *Physical damage to the car*
According to eyewitness testimony, the car containing the five defendants rammed Mr Somchai’s car, causing him to stop on Ramkhamhaeng 65 Road. This is a very busy main road with shops and restaurants and many pedestrians. The eyewitnesses testified that he was forced into the ramming car, identified as a black Toyota Artis, by Defendant 1, and Somchai Neelapaichit’s car was driven away by Defendant 2.

The report of the Scientific Crime Detection Division described damage to the rear bumper of Somchai Neelapaichit’s car, a 65 cm long dent and a scratch under the right tail-light.⁴⁴ It reported the presence of a black stain on the rear bumper under the right tail-light and damage to two plastic pins attaching the bumper to the trunk. The testimony of the Commander of the Scientific Crime Detection Division referred to white and red thread found stuck to the rear bumper. To the best of ICJ’s knowledge, a copy of the examination report in which this is mentioned was not disclosed to the Court.⁴⁵

Mobile phone records

Evidence of the mobile phone records of the five defendants was adduced as evidence of the movements and communications between the five defendants, and their location at the crime scene at the relevant time.

Pol. Maj. Thinnakorn Kesornbun gave testimony of his analysis of the mobile phone records. He asserted that the telephone records showed that during the

⁴³ *Examination Report 418/2547 at pages 6-8.*

⁴⁴ *Examination Report 844/2547 at pages 10-11.*

⁴⁵ Whilst this was not mentioned in Court, according to Angkhana Neelapaichit, the car was fully serviced one week before, including touching up of the body-work, making her reasonably certain that the dent and the scratch was as a result of the collision on 12 March 2004.

period 6 to 11 March 2004 (the days leading up to the disappearance) the defendants had very little contact with each other. However, on 12 March 2004 there were 75 phone calls between them. From 13 to 15 March 2005, again the group had little contact with each other, but on 16 to 17 March 2005, after Somchai Neelapaichit's car was found, the group contacted one another more than 30 times.

On the morning of 12 March 2004, the witness alleged that Defendant 5 called Defendant 1. After that, it was alleged that Defendant 1 called Defendants 2 and 3, and that Defendant 2 contacted Defendant 4. The prosecution argued that the phone records showed the group had followed Somchai Neelapaichit since morning until his disappearance. After the abduction, Defendant 5 was alleged to have made calls to other police colleagues including Police Colonel Pisit Phisuthisak and Police Major Noppadol Pankaew.

On the night of 12 March 2004, the telephone record of Defendant 5 showed he called Police Region 7 at Ratchaburi Province three times until after midnight. On 12 March 2004, the phone record of one of the defendants, who remained unidentified, indicated a call to a person in the Prime Minister's Office. Some telephone records after 20:35 hours, the time of the abduction, were blacked out. The evidence of the telephone records was limited to the five defendants only.

Mr Surajit Tipprom from the Communication Authority of Thailand (CAT) Telecom Public Company Limited was also called to give evidence on mobile phone systems and the ability to identify the time of the call and location of the caller from cell-site analysis.

Motive

The prosecution presented evidence concerning the motivation of the defendants, which focused on Somchai Neelapaichit's assistance to cases involving human rights violations, including acting for the five gun robbery suspects who alleged torture by police.

The investigators found that on 5 and 7 March 2004, there was a letter issued by the Royal Thai Police assigning 133 police to investigate the gun robbery and school arsons cases in the South on 4 January 2004. Police General Kowit Wattana, a Deputy Police Commissioner, was the head of the police investigation. The name of Defendant 5 was included in the letter. The five suspects testified that Defendant 5 had visited them two times while in detention. The name of Defendant 1 appeared in the arrest record of the gun robbery and all five suspects testified that Defendant 1 was one of their abusers.

The Defence

Alibi evidence

The five defendants claimed that on the date of the incident they were not in the places indicated by the telephone records or the eye-witness evidence. Defendant 1 asserted that he was arguing with his wife in the early morning of 12 March 2004. He then went to the CSD office in the morning and placed his two mobile phones in the office, before going out of Bangkok to calm down. Defendants 2 and 4 had been working together. On the date of the incident both of them claimed they rented their phones to Defendant 2's deputy commander, in order to arrest a suspect in another case at the same time and place as Somchai Neelapaichit's disappearance. Defendant 5 claimed that after work he went shopping at a department store near the CSD office. Defendant 3 testified that he was investigating in the Bang Rak area of Bangkok, returned to the CSD office at about 20:00 hours, then returned home where he looked after his daughter who was unwell.

Rejection of phone records

The telephone records submitted by the Public Prosecutor were objected to on grounds of confidentiality. The defence also argued that the documents were copies and not originals and should therefore be excluded. The third line of argument advanced was that the documents were unreliable; many lines had been blanked-out and there were some inconsistencies in the user information between the different records.

Denial of motive

The five defendants denied working together in relation to the disappearance of Somchai Neelapaichit. The defendants denied the prosecution allegations that the five gun robbery suspects had been tortured. Defendant 1 said that he went to the deep South in order to guard Pol. Gen Kowit Wattana after the suspects of the gun robbery were arrested, but that he was not the person who arrested and allegedly tortured the suspects. Defendant 5 claimed that although there was a letter assigning him to work as the police investigator on the gun robbery case, he did not do so because he was sent to attend a Police Superintendent course from November 2003 to March 2004.

The defence alleged that there was an internal police conflict between the Metropolitan Police investigating the case and the police from the CSD. Defendant 5 gave many examples of conflicts between the police from the CSD and the Metropolitan Police to show that the defendants had been targeted because of this conflict.

6. Judgment and sentence

Judgment was given on 12 January 2006. The Court found that there was evidence linking Defendant 1 with Somchai Neelapaichit's disappearance. This evidence included three eyewitnesses who had seen between three and five men forcing another man into a car, and driving off with him. One member of the group drove away a car similar to that of Somchai Neelapaichit and a witness said that the man forced into the car was similar to a photo of Somchai Neelapaichit.

The court found Defendant 1 guilty of coercively abducting Somchai Neelapaichit and sentenced him to three years imprisonment. He was released on bail pending appeal. His conviction was based on eyewitness evidence of persons who identified him as having forced Somchai Neelapaichit into a car. The charge of robbery was not made out, as there was no evidence that the accused had taken any valuables.

Defendants 2, 3, 4 and 5 were found not guilty. Whilst there was some eyewitness testimony connecting defendants 2 and 4 to the crime scene, it was deemed inconclusive. There was no eyewitness evidence to connect Defendants 3 and 5 to the crime scene. The prosecution case primarily rested on the evidence in telephone records alleged to show that Defendant 5 had masterminded the whole operation via telephone calls made among the other four Defendants. The telephone evidence was not accepted for technical reasons, as original copies had not been disclosed and the court had doubts as to the overall reliability of the evidence.

Reaction of Angkhana Neelapaichit

Angkhana Neelaphaijit was disappointed at the outcome, in view of the acquittal of four officers and because the only conviction related only to coercion. She was herself subjected to threats and intimidation during the course of the trial. On the day of the verdict, a light on her car, parked in the court compound, was smashed.⁴⁶

Reaction of Prime Minister and Government

On the day the verdict was given, Prime Minister Thaksin Shinawatra made a statement acknowledging that Somchai Neelapaichit was dead and that government officials caused his death.⁴⁷ He said that a new case would be filed by prosecutors, possibly the following month and that murder charges were being considered. In July 2005 the DSI was asked by Prime Minister Thaksin Shinawatra to undertake further investigation of the case.

⁴⁶ Interviews with Angkhana Neelapaichit.

⁴⁷ See Annex III.

Appeal

The first defendant filed an appeal on 12 April 2006 and the co-prosecutor, on behalf of Angkhana Neelapaichit, filed a cross-appeal on 30 April 2006. Normally the Appeal Court can only review the documentary evidence of the Court of First Instance and does not hear oral arguments from the parties. However, it has discretion to take additional evidence if it thinks fit; it may either take such evidence itself, or direct the Court of First Instance to do so.⁴⁸ At the time of writing there is no publicly available information on when the appeal decision will be given.

⁴⁸ Section 208 of the Criminal Procedure Code.

7. Other legal proceedings

Administrative Court

On 12 March 2007, the third anniversary of the enforced disappearance, Angkhana Neelapaichit lodged a complaint with the Administrative Court against the Royal Thai Police for failure to take disciplinary action against Defendant 1 for his conviction and the four others who were acquitted. On 4 April 2007, the Central Administrative Court rejected the complaint, finding that the re-appointment of the five police officers was within the power of the chief of police. The Court also held that Angkhana Neelaphaijit was not an “aggrieved” party and had no right to sue the Royal Thai Police. On appeal, on 21 August 2007, the Supreme Administrative Court upheld the decision, holding that these were internal police affairs.

National Counter Corruption Commission

The ICJ understands that the National Counter Corruption Commission (NCCC) are investigating the allegations of physical abuse made by Somchai Neelapaichit’s five clients, immediately prior to his disappearance, but has no further information on the progress of this investigation.

Declaration of death

Under Thai law an interested party, such as a family member, may apply to court for a declaration of death when a person has been missing for five years or more and it is unknown whether they are living or dead.⁴⁹ Angkhana Neelapaichit has stated her intention to apply for such a declaration if no physical evidence is found.⁵⁰ This declaration might be used as additional circumstantial evidence of homicide in any future criminal prosecution, even if no body is actually found.

⁴⁹ Sections 61-62 Civil and Commercial Code.

⁵⁰ *Bid to find new evidence to confirm death of missing human rights lawyer - Bones may be Somchai's*, Bangkok Post, 8 February 2009.

8. The Investigation: Post-trial

Successive governments have publicly declared their intention to resolve this case and to bring the perpetrators to justice. After meeting with Angkhana Neelapaichit and human rights campaigners, on 21 January 2009, the new Government of Prime Minister Abhisit Vejjajiva announced its intention to progress the investigation in this case.⁵¹ The governments of Prime Minister Thaksin Shinawatra and Prime Minister Surayud Chulanont have previously taken similar initiatives or made similar statements.⁵²

The DSI have continued to investigate the case. There is little information in the public domain on the substance of the investigations. However, it is known that the DSI intelligence indicates that his body was destroyed by burning in an oil drum/barrel and the remains thrown into a river.⁵³ The main focus of the DSI's forensic investigations has been locations in Ratchaburi Province, about two hours drive from Bangkok. The DSI and Central Institute of Forensic Science (CIFS) have carried out archaeological excavations in this area at least three times since November 2006, starting under the government of Prime Minister Gen. Surayud Chulanont Ret., which gained power under a military coup on 19 September 2006.

There appear to be two main reasons why this particular area is being searched; one, the telephone records of Defendant 5 show that on the night of the disappearance he called Police Region 7 at Ratchaburi Province, and, two, private intelligence that this area is well-known for the disposal of bodies by unlawful means.⁵⁴

The most recent search was carried out on 7 February 2009; two weeks after Prime Minister Abhisit Vejjajiva publicly stated his government's intention to make progress in the case.⁵⁵ Pol. Gen. Thanee, who is currently leading the DSI investigation, invited Angkhana Neelapaichit, together with Justice Minister Pirapan Salirathavibhaga, and members of the media, to observe the search.⁵⁶ A search was carried out at the military-owned *Khao Pong E-Kerng* bomb-disposal site, which is a large piece of wasteland with restricted access, and also by Navy divers in the *Mae Klong* river.

⁵¹ Anucha Charoenpo, *PM orders answers to old killings*, Bangkok Post, 22 January 2009

⁵² PM Thaksin Shinawatra set up a fact-finding committee chaired by the Director of the DSI, 18 March 2004; PM Surayud Chulanont signed an order for the Ministry of Justice to set up a special committee to investigate human rights violations in the period 2001 – 2006, including the case of Somchai Neelapaichit.

⁵³ *Bid to find new evidence to confirm death of missing human rights lawyer – Bones may be Somchai's*, Bangkok Post, 8 February 2009; *Break in missing-lawyer case; oil barrel found*, Bangkok Post, 6 June 2008.

⁵⁴ Interviews with government official and Angkhana Neelapaichit.

⁵⁵ Anucha Charoenpo, *PM orders answers to old killings*, Bangkok Post, 22 January 2009. In January 2009 the Deputy national police chief, Pol Gen Thanee Somboonsap, was re-appointed to lead the DSI investigation and met with the Prime Minister on 21 January 2009 to report on progress in the case. It is reported that on 27 January 2009, Pol. Gen. Thanee called a meeting of the DSI investigation team saying, "Previously, the sky was cloudy and sometime thunder. But, currently the sky is opened.", PM called Deputy Commissioner-General to follow up Somchai Neelapaichit case, Matichon online, 28 January 2009.

⁵⁶ *Bid to find new evidence to confirm death of missing human rights lawyer – Bones may be Somchai's*, Bangkok Post, 8 February 2009.

Bone fragments were found at the two separate sites, but DNA testing is reported to show they do not belong to Somchai Neelapaichit.⁵⁷ According to the Bangkok Post newspaper, “A total of 200 bones, both human and animal, have been sent to the institute’s [Central Institute of Forensic Science] laboratory for examination. Twenty samples had been examined and found to belong to unknown men.” The ICJ has no information on whether the police or DSI are investigating the human remains that have been discovered.

No information is publicly available as to what other actions the DSI may or may not have taken to progress other aspects of the investigation; such as, the eyewitness evidence, the mobile phone evidence, the other physical forensic evidence, the motive of the perpetrators or the identity of the ring-leaders.

It was reported by Wat Bot police station in Phitsanulok on 19 September 2008, the day after Prime Minister Somchai Wongsawat was appointed, that Defendant 1, the only convicted police officer, had died in a landslide.⁵⁸ However, his body has not been found. Angkhana Neelapaichit and others have questioned the credibility of this report.⁵⁹

⁵⁷ *Missing Lawyer, Bones aren't Somchai's*, Bangkok Post, 14 February 2009.

⁵⁸ *Bid to find new evidence to confirm death of missing human rights lawyer – Bones may be Somchai's*, Bangkok Post, 8 February 2009.

⁵⁹ *Bid to find new evidence to confirm death of missing human rights lawyer – Bones may be Somchai's*, Bangkok Post, 8 February 2009.

9. Assessment of the trial and investigation

General observations

The ICJ considers that the defendants received a fair and public trial, which, on the whole, was conducted by the Court in accordance with international standards. However, the ICJ found serious irregularities in the overall criminal investigation, in contravention of international standards, which has denied the victim's family an effective remedy under international law.

The most important aspect of the verdict is that a senior police officer was convicted of an offence related to the enforced disappearance of Somchai Neelapaichit. This conviction is an indication that the Thai criminal courts are willing to make findings against the police if the standard of proof is met. However, the offence did not reflect the extreme seriousness of the crime of enforced disappearance, as this is not provided for under Thai law and the Public Prosecutor did not feel able to bring stronger charges of kidnap or homicide.

In general, the ICJ considers that the right to be tried by an independent and impartial tribunal established by law was respected in this case.⁶⁰ The judgment was full and detailed and examined each aspect of the evidence, and the case was heard in the appropriate court.

The ICJ considers that the defendants had a fair and public trial.⁶¹ The defendants were present at the hearing,⁶² the presumption of innocence was respected,⁶³ and the defendants had access to and were represented by diligent counsel.⁶⁴ To the best of ICJ's knowledge counsel had adequate access to the documents and the evidence. Defence counsel was able to present and examine witnesses, and had the opportunity to put their clients' cases.⁶⁵

Judge Suwit Phornphanit sat with two assistant judges. In general, there was a somewhat casual approach to time; the court often sat late and rose early. The presiding judge sometimes absented himself for a short period, and at least once for a whole day. The judge was not inclined to intervene to any great extent in the taking of evidence. The lawyers seldom asked him to rule on a point of evidence. They did not object to each other's questions. The whole of the evidence was dictated by the judge on to a tape for transcription as each question was answered, as is the practice in Thai courts. This prolonged the procedure, but in principle allowed for corrections on the spot.

⁶⁰ Article 14, para. 1, ICCPR.

⁶¹ Article 14, para. 1, ICCPR.

⁶² Article 14, para. 3 (d), ICCPR: "to be tried in his presence".

⁶³ Article 14, para. 2, ICCPR: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

⁶⁴ Article 14, para. 3 (b), ICCPR: "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;" and, (d): "to defend himself in person or through legal assistance of his own choosing".

⁶⁵ Article 14, para. (e), ICCPR: "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

A problem arose when the judge announced in October 2005 that he would be leaving the case.⁶⁶ A petition by Angkhana Neelaphaijit to the President of the Supreme Court was followed by a further announcement that the judge would continue with the case. No explanation was given.

However, the section below outlines in detail the ICJ's serious concerns at aspects of the overall legal process that have contributed to the failure to bring the perpetrators to justice, which can be summarised as:

- excessive delay in the appeal process
- flaws in the preparation and use of evidence by the prosecution
- failure to adequately protect witnesses
- failure to secure convictions for offences that reflect the extreme seriousness of the offence
- serious flaws in the investigation process
- failure to take disciplinary action against the defendant police officers

Right to Appeal

The ICJ is concerned about the right to an appeal without undue delay.⁶⁷ The offence took place on 12 March 2004, the defendants were arrested in April 2004, and the criminal case was submitted to the court on 16 June 2005. The trial started on 9 August 2005 and continued until 1 December 2005. Judgment was given on 12 January 2006. There was therefore a period of 22 months between the criminal charges and the verdict. Given the political sensitivity of a case involving police defendants and the relative complex nature of the forensic evidence and the mobile phone evidence, this period is probably not unreasonable in the circumstances of the case.⁶⁸

However, after nearly three years the appeal case is still pending. The defendants have therefore been subject to a criminal charge for almost five years without a final verdict. Similarly, the family of Somchai Neelapaichit have been waiting for finality in the legal proceedings. No substantive reason has been given for the need for this delay and the defendants have the right to an appeal without further delay.⁶⁹ It is in the public interest and the interests of justice that this important trial is concluded.

⁶⁶ Section 236 of the Constitution of the Kingdom of Thailand B.E.2540 (1997): “The hearing of a case requires a full quorum of judges. Any judge not sitting at the hearing of a case shall not give judgement or a decision of such case, except for the case of force majeure or any other unavoidable necessity as provided by law.”

⁶⁷ Article 14, para. 3 (c) and 5, ICCPR. See also UN Human Rights Committee, General Comment No. 13, *Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, UN Doc. 13/04/84, at para. 10: “all stages [of judicial proceedings] should take place without undue delay, and that in order to make this right effective, a procedure must be available to ensure that the trial will proceed without undue delay, both in first instance and on appeal.”

⁶⁸ See e.g. *Sextus v. Trinidad and Tobago* (CCPR 818/98), where the factual evidence was straightforward and apparently required little police investigation, substantial reasons must be shown to justify a 22-month delay between charge and trial.

⁶⁹ See e.g. *Smith and Stewart v. Jamaica* (CCPR 668/95), a period of 25 months between conviction and dismissal of appeal was a violation of article 14(3)(c) and 5, ICCPR, and *Sextus v. Trinidad and Tobago* (CCPR 818/98), the rights contained in article 14(3) (c) and 5, read together, confer a right to a review of a decision at trial without delay.

Use of evidence by the prosecution

There were some substantial gaps in the evidence submitted to the court by the Public Prosecutor, particularly concerning the forensic evidence and the mobile phone records of the suspects.

Fingerprints

Pol. Gen. Sombat Amornwiwat (Director General of the DSI) informed Angkhana Neelapaichit at about 13:00 hours, on 16 March 2006, that her husband's car had been found by police and he requested the spare key. She agreed to give the key, expecting the car to be transferred and examined at the CIFS, an independent forensic institute under the Ministry of Justice. However, whilst on the way to the place where the car was found, Pol. Gen Sombat called again to inform her that the car had already been moved to the Scientific Crime Detection Division, of the Royal Thai Police. The police therefore carried out the first forensic examination of the car.

Forensic tests were subsequently carried out on the car by Dr Porntip Rojanasunan, the Deputy Director of the CIFS, but only four days after its discovery. The results of her tests were not adduced in evidence and she did not give evidence in court.

The eyewitness testimony heard by the court was that Defendant 2 drove away the car. However, the forensic examination report submitted to the court by the Scientific Crime Detection Division makes no reference to whether or not fingerprints were found on the steering wheel.

Hair samples

The ICJ understands that all five suspects refused to give hair samples. Documents disclosed to the court indicate that hair samples from Defendant 1 and Defendant 4 were obtained from the floors of their homes. There is, however, no reference to samples having been obtained from Defendants 2, 3 and 5, or why this was not done. The forensic evidence before the court showed that 8 strands of hair could not be identified. These hair strands should have been compared with hair samples from Defendants 2, 3 and 5. In particular, the ICJ understands that, other than fingerprints, no physical samples have been taken from Defendant 2, who is alleged to have driven away Somchai Neelapaichit's car, which was subsequently recovered.

Mobile phones

The records of the defendants' mobile phones provided potentially crucial evidence to establish the relationship between the five suspects and their locations at the relevant times. According to the Thai Criminal Procedure Code,⁷⁰ documentary evidence can be used in court, unless it is obtained through unlawful means. The court considered that the telephone evidence

⁷⁰ Section 226, Criminal Procedure Code: "Any material, documentary or oral evidence likely to prove the guilt or the innocence of the accused is admissible, provided it be not obtained through any inducement, promise, threat, deception or other unlawful means; such evidence shall be produced in accordance with the provisions of this Code or other laws governing production of evidence."

was not obtained by unlawful means, as the defence had argued. However, the court found that an important phone record was a photocopy and not the original. The document also included some marks, evidence of erased areas, some records were missing and others were inconsistent. On examination in the witness box, Pol. Maj. Thinnakorn Kesornbua and the expert evidence of Mr Surajit Tipprom were unable to clarify these issues. As a result, doubt was cast on the reliability of the telephone records.

The Court also considered that the mobile phones corresponding to the phone numbers could have been used by anyone and were therefore not reliable evidence. The prosecution failed to establish a nexus between the mobile phones and their users at the relevant times.

Whilst it is a complicated area of evidence, the use of mobile phone evidence in criminal cases is now well established in other legal jurisdictions and it should not have been difficult to find a suitably qualified expert to deal with these issues.⁷¹ The prosecution, together with those responsible for the investigation, showed inexperience in dealing with this kind of evidence and did not adequately prepare the expert and documentary evidence on the use of the defendants' mobile telephones. This contributed to the rejection of this evidence by the court and the acquittal of four of the defendants.

Another flaw in the investigation, and the evidence submitted by the prosecution, was that the evidence of the telephone records was limited to the five defendants only. Phone calls alleged to have been made by Defendant 5 after the abduction were of significance. Police Colonel Pisit Phisuthisak and Police Major Noppadol Pankaew were recipients of phone calls from Defendant 5. Pol. Col. Pisit was the deputy commander of the CSD and handling the gun robbery case in the deep South. Pol. Col. Noppadol Pankaew worked for Police Division 7 (Nakhon Pathom), covering Ratchaburi province,⁷² and formally worked for the CSD. The timing of these calls and the location from which they were made, if correct, raises questions about the nature of the phone calls and the knowledge of superior officers. These leads should have been thoroughly investigated.

The Court also received evidence that the phone record of one of the defendants, who remained unidentified, showed a call on the date of Somchai Neelapaichit's disappearance to a person in the Prime Minister's Office. Some telephone records after 20:35 hours, the time of his abduction, were blacked out. Again, this lead should have been thoroughly investigated.

Intimidation of witnesses

Underlying the case were threats and intimidation of the family of Somchai Neelapaichit and other witnesses. Angkhana Neelapaichit received many phone calls warning and intimidating her, usually as a response to her

⁷¹ For a more detailed discussion see *The Disappearance of a Person and the Defects of a System*, by the Asian Human Rights Commission, October 2006, at Appendix 1: Issues concerning mobile phone evidence.

⁷² DSI intelligence, which is now in the public domain, indicates that Ratchaburi Province is where Somchai Neelapaichit's body was most likely disposed of and DSI have been carrying out searches for human remains in this province.

participation in activities or campaigning about the disappearance of her husband. She also reported people forcing open her car. Since 2005, Angkhana Neelapaichit has continued to receive protection from civilian DSI officials.

In the courtroom itself, the witnesses sat between the defence and the prosecution, and were situated close to the accused. The ICJ observed that some of the eyewitnesses were scared and not willing to look directly at and identify the defendants, and lost confidence to respond openly to questions. In one instance, the court reminded the lawyer of the accused to stand back from the witness when the judge could not see the witness while giving testimony.

One eyewitness, Ms Chaweewan Yuthahan, was called to identify images of the defendants played on VCD (the pictures were of the defendants and their houses). Before the trial, she had pointed out the suspects to the investigating officers and the Public Prosecutor, but in court she initially refused to watch the VCD until she was required to do so by the court. Whenever the Public Prosecutor asked her to look at the defendants and point to the persons she recognized, she appeared afraid to look at them, until she finally denied that she could recognize them. After her testimony in the morning, the court asked the Public Prosecutor to take care of the witness until the afternoon session. After the afternoon session started, the court brought another senior female judge into the courtroom in an effort to make the witness more comfortable. The eyewitness' demeanour improved in response to this.⁷³

State officials were also subject to intimidation and harassment. Police Major Tinnakorn Kesornbua, who gave testimony concerning the mobile phone evidence, was an important witness for the prosecution. During the trial, he said that he had been threatened during the investigation process. When he started to explain this to the court, the judge stopped him and told him to prepare a written complaint and submit it to the court after his testimony, which he did. Another police investigator alleged that someone threatened to cut the break lines in his car.

Interference with witnesses is a violation of the fundamental principles of the right to a fair trial. In cases involving enforced disappearance, States have the express duty to ensure that the complainant, relatives of the disappeared person, legal counsel, witnesses and those conducting the investigation, are protected against ill treatment, intimidation or reprisal.⁷⁴ Article 12 (4) of the UN Disappearances Convention 12 (4) states:

“Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.”

⁷³ More details on the experience of witnesses at the trial is contained in *Protecting witnesses or perverting justice in Thailand*, article 2, vol. 5, no. 3, Asian Legal Resource Centre, June 2006, available at www.article2.org.

⁷⁴ Article 13 (3), UN Declaration on Disappearances and Article 12 (1), Convention on Enforced Disappearance.

This obligation is recognised in Thai law by the Witness Protection Act, B.E. 2546 (2003), which establishes measures to protect witnesses where, among other things, their physical security is threatened.

Taking into account all these incidents, the ICJ considers that the witness protection before and during the trial was not adequate, given the political sensitivity of the case and that it involved a serious allegation against police officers.

Lack of appropriate criminal offence

Under Thai law there is no criminal offence that encompasses the range of acts that constitute the crime of enforced disappearance or appropriate penalty to take into account its extreme seriousness.⁷⁵ The charges brought against the five defendants, and the penalty received by first defendant, were minor in comparison to the alleged offence. The case highlights the need for reform of the Thai Penal Code to introduce a crime of enforced disappearance.

Nonetheless, there is now strong circumstantial evidence that Somchai Neelapaichit is almost certainly dead and that he appears to have been killed due to actions by state officials. Numerous government agencies and senior government officials have publicly stated knowledge of his death. As early as 25 March 2004, Deputy Prime Minister Gen. Chavalit Yongchaiyudh, in response to a query in the House of Representatives, said, “I have information about who Mr. Somchai talked to before he died...”.⁷⁶ On 13 January 2006, Prime Minister Thaksin Shinawatra, told the Thai press that, “...we have learned from circumstantial evidence that he is dead.”⁷⁷ On 2 March 2007, the DSI reported it had enough evidence to indicate that Somchai Neelapaichit was dead, but had been unable to locate his body.⁷⁸ The Attorney General’s Office had earlier, on 3 November 2006, also announced that it had evidence of his death.⁷⁹

There is no principle in Thai law or in international law that would prevent a prosecution for homicide, including murder, based on compelling circumstantial evidence, whether or not the body of Somchai Neelapaichit is found. On the contrary, there is an established line of international comparative case law where courts have convicted for homicide even where no human remains have been found.⁸⁰

⁷⁵ Article 7 (1), Convention on Enforced Disappearance: “Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.”

⁷⁶ Report of the National Reconciliation Commission: *Overcoming Violence through the Power of Reconciliation*, 16 May 2006 (unofficial translation), at p.45.

⁷⁷ Report of the National Reconciliation Commission: *Overcoming Violence through the Power of Reconciliation*, 16 May 2006 (unofficial translation), at p.45.

⁷⁸ *DSI offers B500,000 reward for Somchai info*, *Bangkok Post*, 2 March 2007.

⁷⁹ US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices 2006, Thailand*, 6 March 2007.

⁸⁰ See e.g. *R v Onufrejczyk* [1955] 1 QB 388, [1955] 1 All ER 247, [1955] 2 WLR 273, 39 Cr App Rep. 1; *People v. Scott*, 1 Cal. Rptr. 600 (Ct. App 1959).

Investigation process

In cases of enforced disappearance or where unlawful killing by state officials is suspected, the State must ensure that the investigation is thorough, prompt, independent and impartial.⁸¹ The pre-trial investigation was flawed, not least because those who conducted it, the Metropolitan Police, were too close to the defendants, who were also police officers. Despite (or perhaps because of) the alleged involvement of police in the enforced disappearance, no concrete progress has been made in finding the body or any of the victim's possessions, apart from his car. No verifiable evidence of his fate or whereabouts has been publicly revealed.

More generally, the ICJ notes the limited role of the prosecution in the investigation process. In Thailand, if prosecution counsel requires further investigation to be done they are reliant on the police to carry it out.⁸² Whilst international standards do not always require the prosecution to perform an active role in the investigation of crime, prosecutors are expected to at least perform an active role in the criminal proceedings as a whole, including the institution of proceedings.⁸³ The questions from the prosecution in court were therefore limited to the material provided by the inquiry officers, who were the police.

The DSI, an independent investigating body under the Ministry of Justice, now have primary responsibility for the investigation, which they have had since 2005. Between 2005 and 2009, the DSI had three different Director Generals, due to changes of government, and the investigation team has been changed several times.⁸⁴

On 9 May 2006, Angkhana Neelapaichit lodged a complaint to the Permanent Secretary of the Ministry of Justice requesting a change of the DSI head of investigation, Pol. Gen. Sombat Amornwiwat, the Director General of the DSI, on grounds that he lacked independence, having formerly held a senior police position. The Director General of the DSI was subsequently changed to Sunai Manomaiudom, who appointed a new chief investigator, Pol Lt-Gen Tanee Somboonsup. In February 2008, the newly elected government of Prime Minister Samak Sundaravej appointed Police Col. Thawee Sodsong as the new Director General. Angkhana Neelapaichit raised objections to this appointment on grounds that he was a former CSD officer and the superior of

⁸¹ Article 12 (1), Convention on Enforced Disappearance; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Recommended by Economic and Social Council resolution 1989/65, 24 May 1989, Principle 9; *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005, recommended by Commission on Human Rights resolution E/CN.4/RES/2005/81, 21 April 2005, Principle 19.

⁸² Section 131 of the Criminal Procedure Code: “*The inquiry official (police officer) shall, as far as possible, collect every kind of evidence in order to know the facts and circumstances relating to the alleged offence and to ascertain the offender and to prove his guilt.*”

⁸³ Guideline 11, *Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990: “*Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.*”

⁸⁴ DSI Director Generals: Pol. Lt. Gen. Noppadol Somboonsub (2003-04), Pol. Gen. Sombat Amornwiwat (2004-06), Kraisor Barrameauychai (2006 - temporary after the military coup), Sunai Manomaiudom (2007-08), Pol. Gen. Tawee Sodsong (Feb 2008-09).

police officers on trial in relation to Somchai's disappearance. In January 2009, under the newly appointed government of Prime Minister Abhisit Vejjajiva Pol. Gen. Thane Somboonsup has been re-instated as the lead investigator in the case.

The ICJ is concerned at credible reports that the DSI is being undermined in its attempts to gather evidence from the police. Most recently, Pol. Lt-Gen Thane Somboonsup was reported in the Bangkok Post as saying the case was hard to solve mainly because evidence had been destroyed.⁸⁵ This follows a consistent pattern in this investigation, starting with the Senate Committee in 2005 that reported poor cooperation from the police.

The fact that a senior police officer has been convicted of the abduction of Somchai Neelapaichit, but that five years after his disappearance his whereabouts are still unknown (at least publicly), brings into question the thoroughness and impartiality of an investigation that must centre on the activity of the police when the original investigation was carried out by the police. Whilst the DSI is an independent institution, it is a relatively new institution, established in 2002, and many staff are former police officers. Moreover, the ICJ understands that the current investigation team is constituted of both DSI staff and working police officers.⁸⁶

It is clear that the investigation has not reached completion because it involves a serious allegation against the police and that effectively a 'wall of silence' within the police has obstructed progress. The wall of silence is built around an internal institutional culture and the unwillingness of other government agencies, including the DSI, to make serious and concerted attempts to break down that wall using their full legal powers, such as search, seizure and arrest. In this regard, the UN Disappearances Convention provides that, "Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation."⁸⁷

The ICJ is particularly concerned that the DSI does not appear willing to use its full legal powers to obtain necessary evidence. International standards require the investigating authority to have the power to obtain all the information and access to documentation necessary to the inquiry, and the necessary budgetary and technical resources to carry out an effective investigation.⁸⁸ In particular, the UN Disappearances Convention provides that the investigating authority has the necessary powers and resources to compel the attendance of witnesses, order production of relevant documents and to make immediate on-site visits.⁸⁹ The DSI has these powers and should use them.

In suspected cases of extra-legal executions where the established investigation procedures are inadequate or impartial, international standards require Governments to pursue investigations through an independent

⁸⁵ *Bones may be Somchai's*, Bangkok Post, 8 February 2009.

⁸⁶ Interview with government official.

⁸⁷ Article 4, UN Disappearances Convention.

⁸⁸ See e.g. Article 12 (3) (a) and (b), Convention on Enforced Disappearances; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 10.

⁸⁹ Article 13 (2), UN Declaration on Disappearances.

commission of inquiry or similar procedure.⁹⁰ Such commissions should have legal authority to obtain all relevant information. Prime Minister Thaksin Shinawatra set up a Senate Commission on 18 March 2004 to investigate this case. However, the Commission lacked the powers and mandate to carry out a thorough investigation of the case, and was unable to reach a conclusion as to the cause of the disappearance or the victim's whereabouts. The ICJ believes that the Thai criminal justice system is sufficiently robust to bring the perpetrators to justice in this case, provided the investigating authorities use the full legal powers delegated to them.

Disciplinary action

Pol. Maj. Ngern Thongsuk has been convicted of a serious criminal offence relating to the enforced disappearance of Somchai Neelapaichit, but he has not been subject to any disciplinary action and is yet to serve the sentence given by the court. On 12 March 2007, the third anniversary of the disappearance, Angkhana Neelapaichit lodged a complaint with the Administrative Court for the failure of the Royal Thai Police to take disciplinary action against Pol. Maj. Ngern Thongsuk. By order of the Administrative Court on 4 April 2007, the complaint was rejected.⁹¹ In accordance with the UN Declaration on Enforced Disappearance, Pol. Maj. Ngern Thongsuk should be formally suspended from duty pending the appeal of his case,⁹² regardless of his current whereabouts.

⁹⁰ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 11.

⁹¹ *Angkhana Neelapaichit v. the Royal Thai Police and the Police Commissioner*, Black case number 475/2550, Red case number 533/2550

⁹² Article 16 (1), UN Declaration on Disappearances, those alleged to have committed the act of enforced disappearance shall be suspended from official duties whilst investigations are on-going.

10. UN complaints bodies

The enforced disappearance of Somchai Neelapaichit has been reported to several United Nations human rights bodies and independent experts:

- UN Working Group on Enforced and Involuntary Disappearances⁹³
- UN Special Rapporteur on Extrajudicial, summary or arbitrary executions⁹⁴
- UN Special Representative on Human Rights Defenders⁹⁵
- UN Special Rapporteur on the Independence of Judges and Lawyers⁹⁶
- UN Special Rapporteur on Torture⁹⁷
- UN Special Rapporteur on Freedom of Expression⁹⁸

On 17 March 2004 the UN experts on the independence of judges and lawyers, freedom of expression, human rights defenders and extrajudicial executions sent a joint urgent appeal to the Government. The Government replied expressing its concern and that Prime Minister Thaksin Shinawatra “had made it clear to all Thai agencies concerned that all necessary means must be taken to resolve this case as soon as possible and bring those responsible for the disappearance to justice without exception and delay”.⁹⁹

The UN Working Group on Enforced and Involuntary Disappearances (‘UN Working Group’) has 55 outstanding cases of enforced disappearances concerning Thailand, including the case of Somchai Neelapaichit.¹⁰⁰ The UN Working Group has not received sufficient information from the Thai Government to establish the fate or whereabouts of any of these persons. In its 2007 annual report to the UN Human Rights Council, the UN Working Group said it was “gravely concerned” about increased reports of disappearance of human rights defenders, including legal counsel, and identified Thailand as one of six countries of particular concern.¹⁰¹

The ICJ has raised concerns about this case and other cases of enforced disappearance with the Royal Thai Government, the international community and relevant UN bodies. At the UN Human Rights Council in March 2008 the

⁹³ Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/2006/56, 27 December 2005, para. 526.

⁹⁴ Philip Alston, Special Rapporteur on Extrajudicial, summary or arbitrary executions, *Summary of cases transmitted to Governments and replies received*, E/CN.4/2005/7/Add.1, 17 March 2005, pp266-267.

⁹⁵ Hina Jilani, Special Representative of the Secretary-General, *Summary of cases transmitted to Governments and replies received*, E/CN.4/2005/101/Add.1, 16 March 2005, paras. 518 – 529.

⁹⁶ Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, *Situations in specific countries or territories*, E/CN.4/2005/60/Add.118 March 2005, paras. 138 – 141.

⁹⁷ Theo van Boven, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2005/62/Add.1, 30 March 2005, paras. 1731 – 1734.

⁹⁸ Ambeyi Ligabo, Special Rapporteur on the right to freedom of opinion and expression, *Summary of cases transmitted to Governments and replies received*, E/CN.4/2005/64/Add.1, 29 March 2005.

⁹⁹ Hina Jilani, Special Representative of the Secretary-General, *Summary of cases transmitted to Governments and replies received*, E/CN.4/2005/101/Add.1, 16 March 2005, para. 524

¹⁰⁰ Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/10/9, 6 February 2009, pp 72-74.

¹⁰¹ Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/4/41, 25 January 2007, para. 26. The other countries mentioned were Algeria, Argentina, Colombia, Guatemala and the Russian Federation.

ICJ made an oral statement expressing concern that there have been no successful prosecutions in the Somchai Neelapaichit case, or in any other cases of enforced disappearance in Thailand, and called on the Thai Government to comply with its obligations under the UN Declaration on the Protection of all Persons from Enforced Disappearance.¹⁰² In its reply, the Government stated:

“My delegation appreciates the concern raised by the representatives of the ICJ. However, we would like to point out as follows:

The Royal Thai Government attaches great importance to the case of Mr Somchai Neelapaichit, Chairman of the Muslim Lawyers Association, which is currently under investigation of the Department of Special Investigations (DSI), Ministry of Justice. To date, there have been some important developments in which certain authorities have been implicated and more revelations should be forthcoming as the investigation proceeds. The government is determined to do its utmost and will leave no stone unturned in order to bring to justice the case of Mr Somchai.”¹⁰³

¹⁰² International Commission of Jurists, *Intervention in the Interactive Dialogue with the Chairperson of the Working Group on Enforced or Involuntary Disappearances*, Mr Santiago Corcuera, A/HRC/7/2, 10 March 2008, para. 5.

¹⁰³ Royal Thai Government, *Right of Reply in the Interactive Dialogue with the Chairperson of the Working Group on Enforced or Involuntary Disappearances*, Mr Santiago Corcuera, A/HRC/7/2, 11 March 2008, paras. 2-3.

11. Conclusions and recommendations

Conclusions

The defendants received a fair and public trial, which, on the whole, was conducted by the Court in accordance with international standards. However, the ICJ found serious irregularities in the overall criminal investigation, in contravention of international standards, which has denied the victim's family an effective remedy under international law.

The main concern in this case is the continued inability of the state to hold those responsible accountable for the crime of enforced disappearance, which is a serious human rights violation under international law. Failure to properly investigate and bring to justice perpetrators of serious human rights violations, such as enforced disappearance, is itself a violation of international law.

Progress in the judicial proceedings has been excessively slow. A senior police officer was convicted and sentenced to three years imprisonment for the coercive abduction of Somchai Neelapaichit, but he was freed pending appeal, which has been outstanding for almost three years. It was reported by Wat Bot police station in Phitsanulok that he is now missing, allegedly killed in a landslide on 19 September 2009. However, his body has not been recovered and Angkhana Neelapaichit has questioned the alleged disappearance and the lack of effort made to recover his body.

Deficiencies in the conduct of the investigation and the prosecution have contributed to the continued failure to secure convictions for offences proportionate to the crime in this case, including: serious questions over the independence and impartiality of the original investigation, poor standards of investigation, intimidation and harassment of witnesses and lawyers and failure to provide adequate protection, failure to take adequate steps to preserve evidence, poor preparation of expert evidence, and excessive delays in the appeal process.

The most serious obstacle to the investigation appears to be access to key witnesses and documentary evidence, which appears to be protected by a wall of silence by elements in the police, and failure to ensure adequate witness protection. The Senate-Special Commission created in 2004 to investigate the disappearance of Somchai Neelapaichit was unable to find the cause of his disappearance and observed that it was difficult to access documentary evidence and witnesses because of poor cooperation from the relevant state agencies. It is clear that this has continued and has not been effectively addressed by the investigating authorities.

The investigating and prosecuting authorities appear unable or unwilling to exercise their full legal powers – such as search, seizure, arrest and subpoena – to ensure that state officials responsible for serious human rights violations are prosecuted and convicted. The Government, as a whole, has therefore

been unable to clarify the fate or whereabouts of the victim in this case, or in any of the 55 outstanding cases of enforced disappearance reported to the UN Working Group, and has so far been unable to secure any convictions after final judgment.

This case highlights what the UN Human Rights Committee has described as a “culture of impunity” in Thailand.¹⁰⁴ Successive governments have expressed their intention to bring to justice those responsible for enforced disappearances, including in the case of Somchai Neelapaichit. Newly appointed Prime Minister Abhisit Vejjajiva has recognised the impact of this case, and other similar cases, on Thailand’s international reputation: “If the cases remain unsolved, it will affect the country’s image regarding justice.”¹⁰⁵

Under international law victims of enforced disappearance and their family members have a right to an effective remedy.¹⁰⁶ Thailand should take all necessary measures to ensure that those responsible are prosecuted, tried and duly punished.¹⁰⁷ A prompt and effective response by authorities investigating allegations of enforced disappearance or extra-judicial killing is essential, not only to meet international legal obligations, but to maintain public confidence in adherence to the rule of law and to prevent any appearance of state collusion in or tolerance of unlawful acts.¹⁰⁸

Key recommendations

The ICJ makes the following specific and general recommendations, based on its overall assessment of the criminal trial and the investigation process:

Accountability

1. The investigation should continue until all perpetrators, including any senior state officials, are brought to justice for crimes proportionate to the extreme seriousness of the offence, as required by international law.
2. The DSI and the Office of the Attorney General should bring homicide charges, including murder charges, against the alleged perpetrators, whether or not the body is located, based on international practice and precedents in Thai law.

¹⁰⁴ UN Human Rights Committee, Concluding Observations, Thailand, UN Doc. CCPR/CO/84/THA, 8 July 2005, at para. 10: “persistent allegations of serious human rights violations, including widespread instances of extrajudicial killings and ill-treatment by the police and members of the 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 [...]”.

¹⁰⁵ Anucha Chareonpa, *PM orders answers to old killings*, Bangkok Post, 22 January 2009.

¹⁰⁶ Article 2(3), ICCPR.

¹⁰⁷ Diane Orentlicher, *Report of the independent expert to update the Set of principles to combat impunity, Addendum, Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005, Principle 32.

¹⁰⁸ See the comments by the European Court of Justice in *McShane v UK* [2002] ECHR 43290/98, para. 97.

3. The Royal Thai Police should formally suspend Pol. Maj. Ngern Thongsuk from duty pending the outcome of his appeal.
4. Security personnel found to have been involved in the commission of serious human violations, such as extra judicial killings, torture or cruel, inhuman or degrading treatment of detainees, or enforced disappearance, should not be allowed to resume their duties, and should be prosecuted, tried and punished in accordance with Thai law.
5. Ratification of the International Convention for the Protection of All Persons from Enforced Disappearance and the adoption of a national law making the practice of enforced disappearance a criminal offence with penalties appropriate to the seriousness of the offence.

Protection of lawyers and witnesses

6. In cases of political sensitivity or involving national security, or in any other situation where witnesses may be at enhanced risk, trial judges, in conjunction with the Public Prosecutor, defence lawyers and the Ministry of Justice, should take steps to ensure that witnesses are given witness protection in accordance with the Witness Protection Act until all risk of threat has ended. In cases involving criminal allegations against the security forces, witness protection should be independent of the police and military.
7. The Ministry of Justice should effectively implement the Witness Protection Act, and also ensure protection of prosecutors and lawyers.
8. Ensure a thorough and impartial investigation into the allegations of witness harassment and intimidation in this case and other cases where such allegations are made. If government officials are identified as responsible, prompt disciplinary action should be taken. Where the evidence shows criminal conduct prosecutions should take place.

Appeal without delay

9. The appeal decision should be given without further delay, unless the court indicates its intention to receive further evidence or submissions from the parties.

Investigation procedures

10. The Department for Special Investigations (DSI) should be given the necessary human and financial resources for the investigation to be completed promptly, independently and impartially.
11. The police should respect their duty to fully cooperate with the DSI by providing all relevant documentation and other information relevant to the investigation. The DSI should use its full legal powers to ensure cooperation with DSI investigators and disciplinary action must be taken against those who seek to obstruct the investigation.

12. The DSI and the CIFS should accept offers of external assistance on the forensic evidence from credible independent experts.
13. The DSI should carry out a wholesale review of the mobile phone records of the five defendants and use its full legal powers, including court orders for search, seizure and arrest, to obtain any further phone records that are relevant to the investigation. The investigation of phone records should be extended to include all those contacted by the five defendants in and around 12 March 2004, including government officials; however, senior they may be.
14. In future cases involving serious allegations against the police, the DSI should take responsibility from the outset to ensure the investigation is independent from the police.

Annex I: Chronology

4 January 2004	Large gun robbery at military base in southern border provinces, and school arson attacks in 18 locations, widely considered to mark the beginning of a renewed insurgency movement.
26 February 2004	Somchai informed that five suspects being held, since 21 February 2004, on suspicion of connection with the attacks on 4 January 2004.
27 February 2004	Somchai gave a speech at a panel discussion at the Santichon (Peace people) Foundation in Bangkok, attended by Deputy Prime Minister Wanno Matha.
10 March 2004	Somchai's law office sent a letter to several government authorities detailing torture suffered by five clients.
12 March 2004	Disappearance: Eyewitnesses saw Somchai being forced into a car at about 20:30 hours in central Bangkok. He has not been seen again.
14 March 2004	Angkhana Neelapaichit (wife of Somchai) made formal complaint to the police that her husband was missing
16 March 2004	Police found Somchai's car behind Bangkok's north-eastern bus terminal (Mor-Chit 2)
18 March 2004	Prime Minister Thaksin Shinawatra ordered a fact-finding committee to look into the disappearance of Somchai - chaired by Sombat Amorn Wiwat, head of the Department for Special Investigations (DSI) – and 3 fact-finding sub-committees: <ul style="list-style-type: none">• Sub-Committee on fact finding and analysis of evidence, chaired by Atapol Yaisawang (Director of Public Prosecutor on Special cases);• Sub-Committee on following Somchai (chaired by Sirichai Chotirat, Deputy Chief of National Intelligence Agency);• Sub-Committee on forensic evidence (chaired by Khunying Pornthip - Thailand's leading forensic expert).
19 March 2004	The office of Royal Thai Police ordered to set up three Fact-finding committees.
20 March 2004	Senate office set up ad-hoc committee to investigate
8 April 2004	4 police officers arrested
29 April 2004	5 th policeman arrested
16 June 2004	Five police suspects charged in court for 'coercion' and 'robbery'
20 June 2004	Senator Sak Koesangrueng, chairman of the senate investigation committee, said: "The Prime Minister said he knew that Somchai had been abducted and taken to Mae Hong Son. The Senate committee has twice invited him to give more details but [he] has not come."
Oct/Nov 2004	Angkhana requested the DSI to take over the case from the police.
15 April 2005	Communication submitted to UN Working Group on Enforced or Involuntary Disappearances.
18 July 2005	The DSI officially announced commencement of investigation into the enforced disappearance.

- 9 Aug – 10 Dec 2005** Trial of 5 defendants – all police officers
- 2 December 2005** The Bangkok Post reported DSI chief, Pol. Gen. Sombat Amornwiwat, stated that evidence linked several high ranking police officials to the crime.
- 12 January 2006** **Judgment:** one senior police officer (Police Major Ngern Tongasuk) found guilty on eye-witness testimony of coercing Somchai into a car – 3 year prison sentence. **Note: As of March 2009, the case is still on appeal.**
- After meeting with Prime Minister Thaksin Shinawatra, Angkhana said that he had said Somchai was dead
- 9 May 2006** Angkhana lodged a complaint with Permanent Secretary of the Ministry of Justice requesting DSI head (Pol. Gen. Sombat Amornwiwat) to be removed due to lack of independence. New DSI head appointed (Sunai Manomaiudom), who appointed new chief investigator, Pol. Lt.-Gen Tanee Somboonsup.
- 19 September 2006** Military coup, led by Army Chief Sonthi Boonyaratglin, overthrew government of Prime Minister Thaksin Shinawatra and installed General Surayud Chulanont Ret. as Prime Minister.
- 3 November 2006** The Attorney-General's Office announced that it had evidence of Somchai's death.
- 11 November 2006** Coup-leader and Army chief, Sonthi Boonyaratglin, told news reporters in Bangkok: "I have received information from investigators that some individuals close to former prime minister Thaksin were behind the disappearance of Somchai."
- 23 February 2007** Prime Minister Surayud Chulanont signed an order for the Ministry of Justice to set up a special committee to investigate human rights violations in the period 2001 – 2006, including the case of Somchai Neelapaichit.
- 2 March 2007** DSI reported it had enough evidence to show Somchai was dead, but had been unable to locate the body. DSI announced cash reward of 500,000 baht (about US\$15,000) for information leading to finding his body.
- 12 March 2007** Angkhana lodged a complaint with the Administrative Court against the Royal Thai Police for failure to take disciplinary action against the convicted police officer and the four other defendants. (The Chief of Police, Police General Seripisuth Temiyavej, publicly criticized Angkhana for taking this step.)
- 4 April 2007** After a preliminary inquiry into the petition, the Central Administrative Court rejected the complaint. Angkhana appealed to the Supreme Administrative Court.
- 3 May 2007** Supreme Administrative Court upheld the rejection of the petition.
- 23 December 2007** Prime Minister Surayud Chulanont resigned after General Election.
- 29 January 2008** Newly elected government of Prime Minister Samak Sundravej.
- 22 February 2008** Police Col. Thawee Sodsong appointed as the new Director General of the DSI. Angkhana objected on grounds that he was the superior of police officers on trial in relation to Somchai's disappearance.

- February 2008** The Ministry of Justice restructured DSI leading to Angkhana's DSI assigned civilian protection officers being proposed to be changed to police protection. After objections were raised by Angkhana, national and international NGOs, and the UN Working Group on Enforced and Involuntary Disappearance, the Government re-instated the DSI civilian protection indefinitely.
- 12 March 2008** Angkhana made submissions to the UN Working Group on Enforced and Involuntary Disappearance.
- 8 September 2008** Prime Minister Samak Sundaravej removed by order of the Constitutional Court.
- 18 September 2008** Prime Minister Somchai Wongsawat appointed.
- 19 September 2008** Wat Bot police station in Phitsanulok reported that the only defendant to be convicted in relation to Somchai's disappearance, Pol. Maj. Ngern Thongsuk, had gone missing after a landslide. However, his body has not been found. Angkhana was reported in the Bangkok Post questioning alleged death, in particular as the police did not appear to be searching for his body.
- 2 December 2008** Prime Minister Somchai Wongsawat removed by order of the Constitutional Court.
- 17 December 2008** Prime Minister Abhisit Vejjajiva appointed.
- 22 January 2009** Prime Minister Abhisit Vejjajiva ordered the police to increase their efforts to investigate a number of key cases, including the disappearance of Somchai Neelapaichit: "If the cases remain unsolved, it will affect the country's image regarding justice," he told the Bangkok Post. DSI investigator, Pol. Gen. Thanee Somboonsap, was reported in the Bangkok Post as saying, "The success of the case of human rights lawyer Somchai will help bring confidence back to solving problems in the deep South." (Pol. Gen. Thanee Somboonsap had previously been the lead DSI investigator in May 2006)
- 7 February 2009** Justice Minister Pirapan Salirathavibhaga led a team of government officials and Angkhana to inspect suspected human remains (bone fragments) found at a military-owned bomb disposal area and also near Sirilak bridge across the Mae Klong river in Ratchaburi province. The river site has been inspected three times in the past five years. According to the Bangkok Post, "Mr Pirapan said he did not expect much from the inspection, but said he would do his best to solve the case. He said the Somchai case was a top priority for the Justice Ministry and the government.", Bangkok Post, 8 February 2009.
- 14 February 2009** The Bangkok Post reported that the bone fragments found on 7 February 2009 did not belong to Somchai. According to the Bangkok Post, "A total of 200 bones, both human and animal, have been sent to the institute's [Central Institute for Forensic Science] laboratory for examination. Twenty samples had been examined and found to belong to unknown men."

ANNEX II: Appeal letter by five suspects

Bangkok Special Prison
March 10, 2004

Subject: Appeal for Justice
To: H.E. Minister of interior

We, the undersigned, are

1. Mr.Makata Ha-Rong, residence of House No.103/1, Moo 6, Tambon Kaluwoh, Muang District of Narathiwat Province.
2. Mr.Sukree Mah-Ming, Residence of House No. 106, Moo 4, Tambol Kaluwoh, Muang District of Narathiwat Province.
3. Mr.Abdullah alias “Pah-lah” Abukari, Residence of House No. 32, Moo 6, Tambon Kaluwoh, Muang District of Narathiwat Province.
4. Mr.Mana-Sae Mah-Ma, Residence of House No. 191, Moo 7, Tambol Prai-Wal, Tak Bai District of Narathiwat Province.
5. Mr.Sudi-Rueman alias “Di-Mung” Mah-Lae, Residence of Tambon Kaluwoh, Muang District of Narathiwat Province.

We are being detained as suspects on charges involving national security, conspiracy to commit rebellion, to recruit people and gather arms to commit rebellion, to function as secret society and to act as criminal gang, as a subsequence of the disturbances occurred in the three southern border provinces on January 4th 2004.

We, the 5 aforementioned suspects, were arrested and detained by the police authority at the Provincial Police Station of Tambon Tanyong of Narathiwat Province. While being under the police custody, a police officer, whom we could not identified by name but recognize as one of the arresting unit, subjected all five (5) of us to physical abuses as we hereby describe categorically as follows:-

Mr.Makata Ha-Rong:

- was kicked at upper part of body including mouth, and
- was electrocuted at upper parts of body, and
- was stumped upon the chest and urinated into mouth.

Mr.Sukree Mah-Ming:

- was kicked at upper part of body, and
- was slapped on face, and
- was urinated into mouth.

Mr.Abdullah alias “ Pah-Lah” Abukari:

- was kicked at upper part of body, and
- was slapped on ear(s), and
- was electrocuted at upper part of body while hands and feet being tied up.

Mr.Mana-Sae Mah-Ma:

- was neck-strangled and was hanged with the WC door, and

- was beaten with a piece of wood at head and back while hands tied behind the back, and
- was electrocuted at upper part of body.

Mr.Sudi-Rueman alias “Di-Mung” Mah-Lae:

- was kicked at mouth, and
- was slapped at ear (s), and
- was electrocuted at upper part of body

Having been subject to the physical abuses as described above, we were forced into a situation where we had to comply with the demand of the interrogating officer to make confession. This included being threatened and forced to admit that we had committed the alleged offenses and also to act as instructed in the reenactment of the alleged crimes as part of confession. In fact, we all five (5) of us, never committed any offenses as charged by the interrogating officer. The said confessions and reenactment of the alleged crimes documented as evidences have thus been obtained through illegal means.

Since we, all five (5) of us, are no longer under the custody of the interrogating officer, we hereby submit this formal appeal for justice to Your Excellency to investigate into the facts concerning the conducts of the interrogating office involved in this case. At the same, we now wish to change our previous statements being forced confessions, in to total denial of all charges filed against the five (5) of us.

We thus file this formal appeal to Your Excellency in hope that justice shall prevail

Respectfully,

(signed) _____
(Mr.Makata Ha-Rong)

(signed) _____
(Mr.Sukree Mah-Ming)

(signed) _____
(Mr.Abdullah Abukari)

(signed) _____
(Mr.Mana-Sae Mah-Ma)

(signed) _____
(Mr.Sudi-Rueman Mah-Lae)

ANNEX III: Somchai is dead, says Thaksin

Prime Minister Thaksin Shinawatra has for the first time admitted publicly that Somchai Neelaphaichit, the human rights lawyer who disappeared defending Muslim separatist suspects, is dead.

Mr Thaksin revealed that certain circumstantial evidence the Department of Special Investigation (DSI) had obtained confirms the lawyer is no longer alive.

“Yes, to our knowledge, [Mr Somchai] has died,” the prime minister said. Mr Somchai's wife, Angkhana, however, said Mr Thaksin's admission about her husband's fate was nothing new. Mr Thaksin told her in person last year that he had died and had pledged to act against those responsible for the crime.

He told her if they could not be prosecuted criminally, he would see to it that they were disciplined.

“It [the prime minister's public admission of Mr Somchai's death] might be new to the people, but to me it's not,” she said.

The DSI stepped in to handle the Somchai case in July 2005 because several policemen were accused of being involved in his disappearance.

Before he vanished, Mr Somchai had lodged an appeal with the Bangkok Criminal Court for five suspects _ accused of looting weapons from an armoury and killing soldiers guarding the installation in Narathiwat on Jan 4, 2004 _ to be treated fairly.

On Thursday, the Criminal Court sentenced Pol Maj Ngern Thongsuk, of the Crime Suppression Division, to three years in jail in connection with the lawyer's disappearance and acquitted four other defendants, also policemen, on the same charge citing flimsy evidence.

Formally charged with robbery and illegal use of force to coerce others into submission, they were indicted in the middle of 2004 after a complaint was filed by Mrs Angkhana.

Mr Thaksin said the DSI must first establish with compelling evidence that Mr Somchai was dead in order to press murder charges against a suspect.

The prime minister made a New Year pledge to wrap up the case and end the missing lawyer mystery for good. Normally, a dead body must be found before a murder charge can be formalised.

The DSI, under the Justice Ministry, is now compiling an investigation summary solid enough to justify a murder charge with the proviso that it must know for certain that Mr Somchai is dead.

The department was expected to conclude its probe next month, Mr Thaksin said, adding other state officials were implicated in Mr Somchai's death.

He insisted an investigation into such a complex crime was no piece of cake, especially when state officials who are suspects themselves may have tampered with the evidence. Mr Thaksin declined to elaborate, citing legal sensitivities.

Deputy police chief Prieupan Damapong said the guilty verdict for Pol Maj Ngern in connection with the disappearance may have convinced Mr Thaksin that Mr Somchai was dead.

Meanwhile, human rights activists bombarded the prime minister with questions about who took Mr Somchai's life.

Human Rights Defenders, Human Rights Watch, Amnesty International Thailand, the Civil Liberty Union and the International Commission of Jurists said Mr Thaksin must not lose any more time in bringing the killers to justice.

“Now that Prime Minister Thaksin has announced Mr Somchai is dead, he must find answers as to who killed him. He must bring the murderers to justice within two months,” said Somchai Homlaor, chairman of the NGOs Coalition for the protection of Human Rights Defenders.

He slammed the DSI for not updating the public on the progress of its work. Mr Thaksin must give assurances that no DSI investigators were linked to any of the five policemen who were involved in the court case.

He said the DSI's operations could be meddled with if the prime minister did not monitor the probe himself. He also wondered if any of the evidence in Mr Somchai's abandoned car had been destroyed.

Pairoj Polpetch, secretary-general of the Civil Liberty Union, said Thursday's court verdict was an indication Mr Somchai had really been kidnapped and that several people were likely to have perpetrated the alleged abduction.

Mr Pairoj said the government must not allow the four acquitted policemen to return to work in the police force. He said the advocates would keep watch on the policemen and the DSI.

Sunai Pasuk, of Human Rights Watch, expressed deep concern with witness protection measures. Witnesses in the DSI investigation might end up being threatened by influential figures. Mr Sunai said the court verdict was “a wake-up call” for the authorities. The government should quickly get to the bottom of other disappearance cases, particularly those which took place in the insurgency-ravaged deep South.

“I want Mr Thaksin to get back to these abandoned cases as well as restart the investigation,” he said.

http://www.bangkokpost.com/breaking_news/breakingnews.php?id=72988

ANNEX IV: Applicable criminal law

Section 83 of the Thai Penal Code provides as follows:

“whenever any offence is committed by two persons upwards, those participating in the commission of the offence are said to be principle, and shall be liable to the punishment provided by the law for such offence.”

Section 309 of the Penal Code provides as follows:

“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 suffer thing, shall be punished with imprisonment not exceeding three years of fine not exceeding six thousand, or both.

If the offence according to the first paragraph be committed by making use of arms or by five person upwards participating, or it be committed in order that the compelled be punished with imprisonment not exceeding five years or fine not exceeding ten thousand baht, or both.

If the offence be committed by alluding to the power of the secret society or criminal association. Whether it be existent or not, the offender shall be punished within imprisonment of one to seven years and fine of two thousand to fourteen thousand baht.”

Section 340 of the Penal Code provides as follows:

“Whoever three persons upwards participate in committing robbery, such person are said to commit gang-robbery, and shall be punished with imprisonment of ten to fifteen years and fine of twenty thousand to thirty thousand baht.

If in the commission of the gang-robbery, even one of the offenders carries arms, the offender shall be punished with imprisonment of twenty years and fine of twenty four thousand to forty thousand baht.

If the gang-robbery causes grievous bodily harm to the other person, the offender shall be punished with imprisonment for life or imprisonment fifteen to twenty years.

If the gang-robbery is committed by acts of cruelty so as to cause bodily or mental harm to the other person, by shooting with a gun, by using explosive or by acts of torture, the offender shall be punished with imprisonment for life or imprisonment of fifteen to twenty years.

If the gang-robbery causes death to the other person, the offender shall be punished with death”

Section 340 ter. of the Penal Code provides as follows:

“Whoever commits the offence according to the Section 339, 339 bis, 340 or 340 bis, by wearing the soldier or police uniform, by dressing in order to mistake for the soldier or police, or by carrying or using guns or explosive, or by using conveyance in order to commit the offence, to take such thing away or to escape from arrest, shall be liable to heavier punishment than that as provided in such Section by one half.”

Section 2 of the Criminal Procedure Code B.E. 2477 provides as follows:

“In this Code:

(4) “Injured Person” means a person who has received injury through the commission of any offence. This includes any other person who has the power to act on his behalf as provided in section 4, 5 and 6;”

Section 5 of the Criminal Procedure Code B.E. 2477 provides as follows:

“The following persons may act on behalf of the injured person:

(1) the legal representative or custodian in respect only of offences committed against the minor or incompetent person under his charge:

(2) the ascendant or descendant, the husband or wife, in respect only of criminal offences in which the injured person is so injured that he dies or is unable to act by himself;

(3) the manager or other representative of a juristic person in request of any offence committed against such juristic person”

Section 28 of the Criminal Procedure Code B.E. 2477 provides as follows:

“The following persons are entitled to institute criminal prosecution in Court

(1) the Public Prosecutor

(2) the injured person”

Section 30 of the Criminal Procedure Code B.E. 2477 provides as follows:

“In a criminal prosecution instituted by the Public Prosecutor, the injured person apply by motion to associate himself as prosecutor at any stage of the proceedings before the pronouncement of judgment by the Court of First Instance.”