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Commission
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4 February 2014

Dear Sir,

Re: Investigation into Enforced Disappearance of Somchai Neelapaijit

The International Commission of Jurists (ICJ) continues to follow closely the case of lawyer Somchai Neelapaijit since his enforced disappearance in central Bangkok on 12 March 2004. The ICJ notes that since 19 July 2005, the Department of Special Investigation (DSI), under the Ministry of Justice (MOJ), has been responsible for investigating the matter. The case has received widespread national and international media coverage and is emblematic of the challenges of achieving justice in cases of serious human rights violations in Thailand. We write to you today to ensure that the investigation into this case remains open.

The fact that 2014 marks the 10th anniversary of Somchai Neelapaijit's enforced disappearance, and nine years since the commencement of the DSI investigation, underscores the need for the DSI to remove the obstacles that have impeded the investigation in the past and to pursue it with renewed commitment and vigour.

Continue the investigation

The ICJ is concerned by the DSI's statement to the media on 20 December 2013 that it is contemplating closing the investigation into Somchai Neelapaijit's enforced disappearance.¹ We were also alarmed by an earlier report, on 11 December 2013, that the DSI claimed the investigation files had been stolen,² a claim that was later declared to be unfounded.³

The ICJ urges the DSI not to close the investigation into Somchai Neelapaijit's enforced disappearance. Under international human rights law, enforced disappearance is considered to be a continuing crime until the fate and whereabouts of a disappeared

¹ Statement of Pol. Gen. Niran Adulayasak, Director of the Department of Special Investigation Bureau of Special Crime 1, to the Thai Public Broadcasting Service, 20 December 2013: <https://www.youtube.com/watch?v=w1k6WQkvNF8>

² Statement of Pol. Gen. Niran Adulayasak, Director of the Department of Special Investigation Bureau of Special Crime 1, to the Thai Public Broadcasting Service, 11 December 2013: <https://www.youtube.com/watch?v=q4m1V2x5RTU>

³ Statement of Mrs. Suwana Suwanjuta, Deputy Permanent Secretary for Justice, Ministry of Justice, as reported in the Bangkok Post, 20 December 2013: <http://www.bangkokpost.com/news/security/385747/justice-ministry-denies-report-somchai-files-were-removed>

person are disclosed. Accordingly, a decision to close the investigation before Somchai Neelapaijit's fate or whereabouts has been determined, and those responsible are brought to justice, would violate Thailand's obligations under the international treaties to which it is a party. These include the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention against Torture).

A decision to close the investigation would also be inconsistent with the statements of a number of Prime Ministers and various government officials over the years, including to the UN Human Rights Committee in 2005, committing themselves to ensuring an effective investigation.

The effective investigation of the enforced disappearance of Somchai Neelapaijit is not only imperative to ensure respect for the rule of law and Thailand's international treaty obligations, but also to dispel concerns of state collusion in, or tolerance of, unlawful acts, and in particular, Somchai Neelapaijit's enforced disappearance.

Background

On 12 March 2004, Somchai Neelapaijit, a leading human rights lawyer in Thailand, was subjected to enforced disappearance. On 8 and 19 April 2004, the Criminal Court issued arrest warrants for five police officers for their alleged participation in robbing Somchai Neelapaijit and forcing him into a vehicle (charging them with coercion⁴ and gang-robbery⁵). The trial of the officers commenced on 12 July 2005 and the verdict was issued on 12 January 2006. One of the accused, Police Major Ngern Thongsuk, was convicted of the relatively minor charge of coercion and sentenced to three years in prison, but was released on bail pending appeal. An eyewitness gave evidence that she had seen him force Somchai Neelapaijit into a vehicle in central Bangkok. The other accused were acquitted. All of the accused, as well as the Public Prosecutor, and Angkhana Neelapaijit, Somchai Neelapaijit's wife, and her family appealed the verdict.

On 19 September 2008, the Police reported that Police Major Ngern Thongsuk had gone missing in a landslide. To date, his whereabouts or the location of his remains has not been established.

On 11 March 2011, the Appeal Court overturned Police Major Ngern Thongsuk's conviction and ruled that there was not enough evidence to convict any of the five accused. It also ruled that Somchai Neelapaijit's family were not injured parties in the case, and therefore had no standing to appeal the verdict, as no evidence had been brought to establish that Somchai Neelapaijit had been killed or incapacitated. On 10 May 2011, Somchai Neelapaijit's wife appealed both the decision on her family's standing and the substantive issues in the case to the Supreme Court. The Supreme Court has not yet rendered a decision.

Enforced Disappearance: Offence of "Extreme Seriousness"

Enforced disappearance is a serious violation of human rights and a crime under international law. The Royal Thai Government recognized the gravity of the crime and committed itself to combating it when it signed the International Convention for the Protection of All Persons from Enforced Disappearance (Convention against Enforced

⁴ Section 309 of the Thai Criminal Code B.E. 2551 (2009): "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 of property of him or another person, or commits violence so that he does or does not do such act, or suffers such thing, shall be punished with imprisonment not exceeding three years or fined not exceeding six thousand Baht, or both." (Official translation)

⁵ Section 340 of the Thai Criminal Code B.E. 2551 (2009): "Whoever with three persons upwards participate in committing robbery, such persons are said as offenders of gang-robbery, and shall be punished with imprisonment of ten years to fifteen years and fined of twenty thousand to thirty thousand Baht." (Official translation)

Disappearance) on 9 January 2012. The Royal Thai Government's signing of the Convention against Enforced Disappearance obliges the authorities to ensure that state officials do not act in a manner that is contrary to the object and purpose of the Treaty. Even before its formal ratification, the signature of this Treaty represents an intention on the part of the Government that all its agencies, including the DSI, will adhere to the Convention against Enforced Disappearance's provisions.

In accordance with its obligations under international law, as well as the Convention against Enforced Disappearance, the authorities must take the necessary measures to hold criminally responsible those who committed, ordered, solicited, or induced or participated in the enforced disappearance of Somchai Neelapaijit. Furthermore, Article 7 of the Convention against Enforced Disappearance states that all State Parties must ensure that those found to be responsible are subject to punishment by the imposition of penalties that take into account the "*extreme seriousness*" of the offence.

The authorities must also ensure that the victims, including the relatives of Somchai Neelapaijit, have access to an effective remedy and receive adequate reparation. This is required by the ICCPR and the Convention against Torture; and these requirements are also reflected in Articles 8 and 24 of the Convention against Enforced Disappearance.

A thorough and impartial investigation

Under international law, the DSI must conduct a thorough and impartial investigation into the enforced disappearance of Somchai Neelapaijit, which should remain open until all perpetrators, including any state officials, are brought to justice for crimes proportionate to the extreme seriousness of the offence. As a party to both the ICCPR and the Convention against Torture, and signatory to the Convention against Enforced Disappearance, the authorities in Thailand are obligated to ensure that a thorough, independent and impartial investigation is conducted into all cases of alleged enforced disappearance, that those responsible are brought to justice and punished in a manner that is consistent with the gravity of the crime, and that the victims of the crime, including surviving family members, have access to effective redress, and receive adequate reparation.

Article 12 of the Convention against Enforced Disappearance requires the authorities to ensure impartial and thorough investigations are undertaken without delay when the authorities have reasonable grounds to believe a person has been subjected to enforced disappearance, and when necessary after a prompt and impartial examination of a complaint.

Article 12 also places an obligation on State Parties to ensure that the authorities have the necessary powers and resources to conduct the investigation effectively, and have access to documents and other relevant information. The authorities must also take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. In particular, they must take measures to protect complainants, witnesses, lawyers and others who participate in the investigation and ensure 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.

The investigation into such crimes must continue until the fate or whereabouts of the disappeared person are disclosed and must seek to identify those responsible, who must be brought to justice and punished in a manner commensurate with the gravity of the crime. These are duties owed to the public as a whole, as well as part of ensuring effective redress and reparation for the victim.

A body is not required

On the day the verdict in the criminal trial was handed down, then Prime Minister Thaksin Shinawatra made a statement acknowledging that Somchai Neelapaijit was dead and that government officials caused his death. Since then, the DSI has carried out its investigation on this premise. However, the fact that Somchai Neelapaijit or his remains has not been located should not prevent those responsible for his enforced disappearance from being brought to justice and punished with penalties proportional to the extreme seriousness of the offence.

Indeed, it is the very essence of the crime of enforced disappearance that agents of the state refuse to acknowledge the deprivation of liberty or conceal the fate or whereabouts of a disappeared person, which places such a person outside the protection of the law.

In the past, the fact that Somchai Neelapaijit or his remains has not been located has been given as a justification for charging those suspected of involvement in his enforced disappearance only with minor crimes. This fact was also a contributing factor in the Appeal Court's ruling that Somchai Neelapaijit's family are not injured parties in the criminal proceedings. This reasoning, however, is inconsistent with international law.

While the ICJ appreciates the DSI's efforts to locate Somchai Neelapaijit or his remains, it must be emphasized that locating the body is not necessary for charging those involved with serious crimes in relation to his enforced disappearance.

There is no principle in Thai law that would prevent a prosecution for unlawful killing, based on compelling circumstantial evidence, whether or not the body of Somchai Neelapaijit is found. Furthermore, there is an established line of international comparative case law where courts have convicted for unlawful killing even when no human remains had been found.

Right to know the truth

The DSI has an obligation to provide Angkhana Neelapaijit and the other members of Somchai Neelapaijit's family with regular updates on the progress of the investigation.

As victims of an enforced disappearance, they have a right to this information. It is part of their right to redress and reparation.

This right is reflected in a number of international standards, including in Article 24 of the Convention against Enforced Disappearance, which confers an obligation on the authorities to provide the family with the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person.

Recommendations

In light of the above, and against the backdrop of the up-coming 10th anniversary of the enforced disappearance of Somchai Neelapaijit, the ICJ and the undersigned Commissioners urge the DSI to:

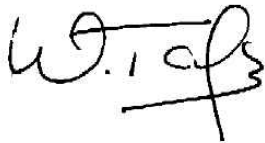
- (a) continue the investigation into the enforced disappearance of Somchai Neelapaijit until his fate and whereabouts are disclosed and those responsible, including any state officials, are identified;
- (b) request such human and financial resources as are required for the DSI to ensure the investigation is thoroughly and impartially carried out and to be completed without delay, including assistance from the international community;
- (c) work with the MoJ and the Cabinet to ensure that persons under investigation are not in a position to influence the progress of the investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses,

relatives of Somchai Neelapaijit or their lawyers, or at persons participating in the investigation;

- (d) provide the family of Somchai Neelapaijit and the public with regular updates on the status of the investigation;
- (e) continue to provide effective DSI civilian protection to Angkhana Neelapaijit; and
- (f) take all measures necessary, including in cooperation with the Office of the Attorney General, to ensure that those responsible for Somchai Neelapaijit's enforced disappearance are brought to justice, whether or not Somchai Neelapaijit's body is located.

The ICJ urges the DSI to take into consideration the above recommendations to comply with Thailand's obligations under international human rights law.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'W. Tayler', with a stylized flourish at the end.

Wilder Tayler
Secretary General
International Commission of Jurists

Cc:

1. Ms Yingluck Shinawatra, Prime Minister, Thailand
2. Mr. Chaikasem Nitisiri, Minister of Justice, Thailand
3. Mr. Surapong Tovichakchaikul, Minister of Foreign Affairs, Thailand