



General Assembly

Distr.: General
13 February 2015

Original: English

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-first session (17–21 November 2014)

No. 41/2014 (Thailand)

Communication addressed to the Government on 18 September 2014

concerning Patiwat Saraiyaem

The Government has not replied to the communication.

The State is a party to the International Covenant on Civil and Political Rights, by accession on 29 October 1996.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in

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the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Patiwat Saraiyaem is a 23-year old male Thai citizen. Mr. Saraiyaem is a student of the Fine and Applied Arts Faculty at Khon Kaen University and received a national outstanding youth award in the field of art and culture in 2010.

4. According to the source, Mr. Saraiyaem is also an activist who has participated in political activities and has been advocating for human rights through activities organized by various student groups. He is the secretary-general of the Student Federation of Northeast Thailand and a member of the now defunct Prakai Fai theatre troupe, a branch of the Prakai Fai group (Iskra activist group).

5. The source reports that on 6 and 13 October 2013, the activist group staged a play entitled “A Wolf’s Bride”, which focused on a fictional monarch who was manipulated by his adviser. Mr. Saraiyaem played the role of the King’s advisor. The play was performed at Thammasat University Auditorium, in commemoration of the fortieth anniversary of the 14 October pro-democracy protest.

6. In June 2014, around 10 current and former members of the Iskra Group were reportedly summoned and questioned by the National Council for Peace and Order, a governing body established after the coup d’état of 22 May 2014. They were later released.

7. The source reports that on 13 August 2014, Lieutenant Pithakpol Choosri came to Khon Kaen University looking for Mr. Saraiyaem. Lieutenant Choosri told Mr. Saraiyaem to meet him the following day. He said that he only wanted to help Mr. Saraiyaem and that there would be no charges against him. He told Mr. Saraiyaem to come alone.

8. On 14 August 2014, Mr. Saraiyaem went to the meeting point inside Kon Kaen University. He was reportedly accompanied by his teacher, who was quite sceptical about the arrangement and insisted on going with him. However, they found two police officers from Khon Kaen province at the meeting point. The police officers showed them a wanted poster with a picture of Mr. Saraiyaem on it and asked Mr. Saraiyaem whether he was the man in the picture. Mr. Saraiyaem confirmed that he was and the police officers then arrested him, presenting a warrant for his arrest which referred to a violation of article 112 of the Criminal Code B.E 2477 (lèse-majesté). The warrant had reportedly been issued on 6 June 2014 by the Ratchadapisek Criminal Court and carried the number Jor (๑) 988/2557.

9. On the same day, the police officers transferred Mr. Saraiyaem to Chana Songkhram police station in Bangkok, where the complaint against him was filed. According to the source, Mr. Saraiyaem is currently detained at Bangkok Remand Prison and is awaiting trial.

10. On 15 August 2014, Mr. Saraiyaem was brought before the Ratchadapisek Criminal Court. His bail request was denied on the grounds that he posed a flight risk and that he had acted in the play in front of many people in a way that was believed to have defamed the monarchy. On 27 August 2014, the Criminal Court examined the second objection to Mr. Saraiyaem's detention, which had been filed by the Thai Human Rights Lawyers Association. The request for bail was again denied.

11. According to the source, the *lèse-majesté* law in Thailand has been primarily used to target political opponents. Article 112 of the Criminal Code prescribes that "whoever defames, insults or threatens the King, Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years". Cases are reportedly often filed by State authorities and by individuals, and anyone may take action against anyone else.

12. The source reports that, following the coup d'état on 22 May 2014, the number of *lèse-majesté* cases has significantly increased. At least 24 individuals are now being investigated and/or prosecuted under *lèse-majesté* offences. The source also reports that, once the alleged *lèse-majesté* offenders are arrested, they are held in prolonged detention awaiting trial, as the Thai courts have systematically denied them bail.

13. According to the source, the authorities are now expediting the investigation of cases that have been pending at the police level to bring *lèse-majesté* suspects to prosecution. Mr. Saraiyaem's case is reportedly an example of those cases which were pending at the police level for a while, and are now being processed more quickly after the coup d'état.

14. The source underlines that, on various occasions in the past several years, the Office of the United Nations High Commissioner for Human Rights and the United Nations special procedures have expressed concerns about the cases of *lèse-majesté* and the prolonged detentions.

15. The source also refers to article 87 of the Code of Criminal Procedure, which indicates that in the case of a criminal offence liable to the maximum imprisonment of a term of not less than 10 years, irrespective of whether the offence is also liable to a fine of any amount, the Court is empowered to order several successive detentions not exceeding 12 days each, but the total detention period must not exceed 84 days.

16. In that regard, the source submits that Mr. Saraiyaem's prolonged pretrial detention is in violation of article 9, paragraph 3, of the International Covenant on Civil and Political Rights, to which Thailand is a State party. Article 9, paragraph 3, states that "it shall not be the general rule that persons awaiting trial shall be detained in custody". The source also refers to general comment No. 8 (1982) on article 9 (right to liberty and security of persons) of the Human Rights Committee, which indicates that pretrial detention should be an exception and should be as short as possible, and that it should not be used as a form of punishment.

Response from the Government

17. The Working Group addressed a communication to the Government of Thailand on 18 September 2014, requesting detailed information about the current situation of Mr. Saraiyaem and a clarification of the legal provisions justifying his continued detention. The Working Group regrets that the Government has not responded to the allegations transmitted to it.

18. According to paragraph 15 of the Working Group's revised methods of work, a Government is requested to reply to a communication within 60 days from the date of its transmittal. However, in accordance with paragraph 16, the Working Group may grant a Government a further period of a maximum of one month in which to reply.

Discussion

19. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render an opinion on the case on the basis of the submissions that have been made in conformity with paragraph 16 of its revised methods of work.¹

20. In the present case, the Government has chosen not to rebut the prima facie reliable allegations submitted by the source. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues.² If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the given allegations. Hence, the Working Group should base its opinion on the prima facie case made by the source.

21. Mr. Saraiyaem was arrested on 14 August 2014, allegedly in violation of article 112 of the Criminal Code B.E 2477 (lèse-majesté). According to the source, Mr. Saraiyaem's arrest and subsequent detention were prompted by his participation in October 2013 in a play entitled "A Wolf's Bride", which focused on a fictional monarch who was manipulated by his adviser.

22. The Working Group is concerned at the fact that Mr. Saraiyaem was arrested owing to his political activities and advocacy work for human rights while serving as the secretary-general of the Student Federation of Northeast Thailand and a member of the now defunct Prakai Fai theatre troupe, a branch of the Prakai Fai group (Iskra activist group).

23. The Working Group wishes to refer to its jurisprudence in which it has adopted a position on the laws of Thailand on lèse-majesté, namely section 112 of the Criminal Code.³ In that regard, the Working Group has previously concurred with the Special Rapporteur on the right to freedom of opinion and expression, who found that the lèse-majesté laws suppressed important debates on matters of public interest, thus putting in jeopardy the right to freedom of opinion and expression.⁴

24. With regard to violations of national legislation, the Working Group reiterates that, in conformity with its mandate, it must ensure that national law is consistent with the relevant international provisions set forth in the Universal Declaration of Human Rights and in the relevant international legal instruments to which the State concerned has acceded. Consequently, even if the detention is in conformity with national legislation, the Working Group must ensure that it is also consistent with the relevant provisions of international human rights law.

25. The Working Group recalls that the right to hold and express opinions, including those that are not in line with official government policy, is protected by article 19 of the Universal Declaration of Human Rights and article 19, paragraph 2, of the International Covenant on Civil and Political Rights. In its general comment No. 34 (2011) on freedoms of opinion and expression, the Human Rights Committee emphasized that "the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the

¹ See, for instance, opinion No. 5/2014 (Iraq), paras. 15–16.

² See, for example, the 2011 annual report of the Working Group (A/HRC/19/57), para. 68.

³ See, for example, opinion No. 35/2012 (Thailand).

⁴ See "Thailand/Freedom of expression: UN expert recommends amendment of lèse-majesté laws".

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www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11478&LangID=E.

highest political authority such as heads of State and government, are legitimately subject to criticism and political opposition” (para. 38). The Committee specifically expressed concern regarding laws on such matters as *lèse-majesté*.

26. Irrespective of the incident that actually prompted Mr. Saraiyaem’s detention, whether it was his participation in the play or, more generally, his political activities and human rights advocacy work, in the Working Group’s view, both actions fall within the boundaries of the expression of opinions, as protected by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. It follows that Mr. Saraiyaem has been detained for his peaceful exercise of his right to freedom of opinion and expression provided for in the aforementioned international instruments.

27. According to the source, the number of *lèse-majesté* cases has significantly increased following the coup d’état on 22 May 2014, and once the alleged *lèse-majesté* offenders are arrested, they are held in prolonged pretrial detention, as the Thai courts have systematically denied them bail.

28. In the case of Mr. Saraiyaem, the requests for bail were denied on 15 and 27 August 2014 on the grounds that he posed a flight risk and that he had performed in the above-mentioned play, which allegedly defamed the monarchy. In that regard, the source submits that Mr. Saraiyaem’s prolonged pretrial detention is in violation of article 9, paragraph 3, of the International Covenant on Civil and Political Rights, to which Thailand is a party, and article 87 of the Code of Criminal Procedure of Thailand.

29. It is part of the well-established international jurisprudence on detention that pretrial detention should be an exception and should be as short as possible.⁵ In its 2011 annual report (A/HRC/19/57, paras. 48–58), the Working Group also underlined the fact that pretrial detention should be an exceptional measure. Article 9, paragraph 3, of the International Covenant on Civil and Political Rights sets forth two cumulative obligations, namely that anyone arrested or detained on a criminal charge shall be brought promptly before a judge within the first days of the deprivation of liberty and shall be entitled to trial within a reasonable time or to release.

30. That provision is supplemented by the second part of article 9, paragraph 3, which provides that “it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement”. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice (A/HRC/19/57, para. 54).

31. The provisions contained in article 9, paragraph 3, of the Covenant can be summarized as follows: any detention must be exceptional and of short duration and a release may be accompanied by measures intended only to ensure representation of the defendant in judicial proceedings (A/HRC/19/57, para. 56).

32. The Working Group also wishes to refer to general comment No. 35 (2014) of the Human Rights Committee on article 9: liberty and security of person, which states that “it should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law, and

⁵ See, for example, Human Rights Committee, communication No. 1787/2008 (CCPR/C/107/D/1787/2008), paras. 7.3–7.4.

should not include vague and expansive standards such as ‘public security’. Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances” (para. 38).

33. Against that backdrop, the Working Group considers that the arrest and detention of Mr. Saraiyaem are in contravention of articles 9 and 19 of the Universal Declaration of Human Rights and article 9, paragraph 3, and article 19, paragraph 2, of the International Covenant on Civil and Political Rights. Accordingly, his deprivation of liberty falls within category II of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

Disposition

34. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. Saraiyaem, being in contravention of articles 9 and 19 of the Universal Declaration of Human Rights and article 9, paragraph 3, and article 19, paragraph 2, of the International Covenant on Civil and Political Rights, is arbitrary and falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

35. Consequent upon the opinion rendered, the Working Group requests the Government of Thailand to take the necessary steps to remedy the situation of Mr. Saraiyaem without delay and bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights.

36. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to immediately release Mr. Saraiyaem and accord him an enforceable right to reparation in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

[Adopted on 19 November 2014]