

Opinion No. 43/2015

concerning Pornthip Munkong (Thailand)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 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.
2. In accordance with its methods of work (A/HRC/30/69), on 25 September 2015 the Working Group transmitted a communication to the Government of Thailand concerning Pornthip Munkong. The Government has replied to the communication on 5 October 2015. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (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 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, that aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

4. Ms. Pornthip Munkong, born on XX August XXXX, is a Thai citizen and usually resides at Phitsanulok Province, Thailand.
5. Ms. Pornthip Munkong, a graduate of Bangkok's Ramkhamhaeng University, is a social activist and, prior to her detention, was the coordinator of the currently non-operational theatre group "Prakai Fai" ("Sparking Fire"), which organized the political play "Jao Sao Maa Paa" ("Wolf's bride") centered on a fictional monarch manipulated by his adviser. Ms. Pornthip Munkong was also the author of the above-mentioned play. The play was staged at Thammasat University on 13 October 2013 as a part of the commemoration of the 40th anniversary of the 14 October 1973 student protests against the military rule of Field Marshal Thanom Kittikachorn.
6. According to the information received, Ms. Pornthip Munkong was arbitrarily detained on 15 August 2014 by the immigration police at Hat Yai International Airport, Songkhla Province, as she was about to board a flight for Australia with a one-year working visa. Ms. Munkong was detained at the airport until the police from Bangkok arrived later that night. In the early hours of 16 August 2014, she was transferred to Chanasongkram police station in Bangkok.
7. The arrest warrant for Ms. Pornthip Munkong was for a lèse-majesté charge - the violation of article 112 of the Criminal Code, which carries the penalty of three to 15 years imprisonment for

defaming, insulting or threatening the King, the Queen, the Heir to the throne or the Regent. The warrant number 986/2557 to arrest Ms. Pornthip Munkong was allegedly issued on 6 June 2014 by the Bangkok Criminal Court.

8. The source notes that Ms. Pornthip Munkong was arrested one day after the arrest of Mr. Patiwat Saraiyaem, the play's lead actor. The source alleges that the Royal Monarch Alert Protection Network, shortly after its meeting on 30 October 2013 summoned to discuss the content of the play "Wolf's bride", has filed complaints against "Prakai Fai" theatre group with at least 13 police stations nationwide.

9. The source contends that, however, detentions of activists only started to occur after Thai Army Commander-in-chief General Prayuth Chan-ocha came to power on 22 May 2014. The source informs that in June 2014 around 10 current and former members of "Prakai Fai" theatre group were summoned and questioned by the National Council for Peace and Order (NCPO). They were later released. Many of those summoned later fled the country for fear of being arrested. On 6 June 2014 arrest warrants were issued for Ms. Pornthip Munkong and Mr. Patiwat for their alleged violation of article 112 of the Criminal Code.

10. According to the source, since her date of arrest Ms. Pornthip Munkong has been detained at the Central Women's Correctional Institution (CWCI). Since the day of her arrest, Ms. Pornthip has been allowed to contact her lawyer and family. Her lawyer filed three objections against her detention (on 16 August 2014, 20 August 2014 and 5 September 2014) as well as four requests for bail (on 16 August 2014, 27 August 2014, 19 September 2014 and 26 September 2014). The Bangkok Criminal Court rejected all bail applications, reasoning that the punishment for the alleged offense was very high and Ms. Pornthip could therefore escape. On 23 February 2015, the Bangkok Criminal Court sentenced her to two years and six months in prison under article 112 of the Criminal Code.

11. On the basis of the foregoing, the source submits that the arrest and continuous detention of Ms. Pornthip Munkong is arbitrary. The source submits that the deprivation of liberty of Ms. Pornthip falls under the Category II as classified by the Working Group because it results from the exercise of rights or freedoms guaranteed by article 19 of the Universal Declaration of Human Rights (UDHR) and article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is a state party. The abovementioned provisions concern the right of everyone to freedom of opinion and expression, which includes freedom to hold opinions without interference.

12. Additionally, the source argues that Ms. Pornthip's prolonged pre-trial detention was arbitrary because it was in violation of article 9 (3) of the ICCPR, which provides that it shall not be the general rule that persons awaiting trial shall be detained in custody.

Response from the Government

13. The Working Group addressed a communication to the Government of Thailand on 25 September 2015, requesting detailed information about the mentioned allegations as well as the current situation of Ms. Pornthip Munkong and a clarification of the legal provisions justifying her continued detention.

14. The Government has responded to the request of the Working Group on 5 October 2015. In its reply, the Government stated that the arrest of Ms. Pornthip Munkong, conducted in accordance with article 112 of the Criminal Code of Thailand, derived from her involvement in the play entitled "A Wolf's Bride", which was deemed to defame and insult the King, and not from her political activities and advocacy work for human rights.

15. The Government contended that the offense under the lèse majesté law for the case of Ms. Pornthip Munkong has been subjected to legal prosecution according to the international standards. The Government also submitted that Ms. Pornthip Munkong has been accorded due process as provided by the Code of Criminal Procedures in Thailand, including the right to fair trial, due opportunity to contest the charges, assistance from lawyer, and the right to appeal.

16. The Government explains that if the case has been finalized, she is entitled to seek a royal pardon from the King.

Discussion

17. With regard to violations of national legislation, the Working Group wishes to reaffirm that any national law touching upon the arrest and detention should be made and implemented consistent

with the relevant international provisions set forth in the Universal Declaration of Human Rights or 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 such detention is also consistent with the relevant provisions of international human rights law.

18. In this regard, the Working Group once again wishes to refer to its past jurisprudence where it has pronounced itself on Thailand's laws on *lèse majesté*, namely article 112 of the criminal code (see, for example, Opinions No. 35/2012 (Thailand) and No. 41/2014 (Thailand)). In this respect, 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 suppress important debates on matters of public interest, thus putting in jeopardy the right to freedom of opinion and expression (see press release, "Thailand/Freedom of expression: UN expert recommends amendment of *lèse majesté* laws," Geneva, 10 October 2011).

19. The Working Group is deeply concerned by the fact that Ms. Pornthip Munkong was arrested and has been so far detained based upon the law on *lèse majesté* and that it was her involvement in the play entitled "Jao Sao Maa Paa" ("Wolf's bride") that led to her detention.

20. Irrespective of the incident that actually prompted Ms. Pornthip Munkong's detention, whether it was her involvement in the play or, more generally, her political activities and human rights advocacy work, in the Working Group's view, both actions fall within the boundaries of opinions and expressions protected by article 19 of the Universal Declaration of Human Rights as well as article 19 of the International Covenant on Civil and Political Rights. It thus follows that Ms. Pornthip Munkong has been detained for her peaceful exercise of her right to freedom of opinion and expression provided for in the aforementioned articles of the Declaration and the Covenant.

21. The Working Group recalls that holding and expressing opinions, including those that are not in line with official government policy, are 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 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*.

22. The Working Group considers that the deprivation of liberty of Ms. Pornthip Munkong falls under the Category II as classified by the Working Group because it results from the exercise of rights or freedoms guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to which Thailand is a state party.

23. According to the source, the number of *lèse majesté* cases has been significantly increased following the coup d'état on 22 May 2014. Once the alleged *lèse-majesté* offenders are arrested, they are held in prolonged detention awaiting trials as Thai courts have systematically denied bail to them.

24. In the case of Ms. Pornthip Munkong, her lawyer filed three objections against her detention (on 16 August 2014, 20 August 2014 and 5 September 2014) as well as four requests for bail (on 16 August 2014, 27 August 2014, 19 September 2014 and 26 September 2014) to no avail. The Bangkok Criminal Court rejected all bail applications, reasoning that the punishment for the alleged offense was very high and Ms. Pornthip Munkong could therefore escape. On 23 February 2015, the Bangkok Criminal Court sentenced her to two years and six months in prison under article 112 of the Criminal Code.

25. In the view of the Working Group, the continuous and systematic refusal to acknowledge by the Court all the objections against detention and the requests for bail poses a significant obstacle to the exercise of the basic rights of the accused, including the fundamental right to liberty and the right to a fair trial.

26. It is part of the well-established international law on detention that pretrial detention should be an exception and should be as short as possible.¹ In its 2011 annual report (A/HRC/19/57, paras. 48-58), the Working Group also underlined 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 to be brought promptly before a judge within the first days of the deprivation of liberty and to have a judicial decision rendered without undue delays, in the absence of which the person is to be released.²

27. This provision is completed by the second part of paragraph 3 of article 9 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.³

28. 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.⁴

29. The Working Group further wishes to refer to general comment No. 35 (2014) of the United Nations Human Rights Committee⁵ whereby “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 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.”

30. In its annual report for 2013 (A/HRC/27/48), the Working Group restated that the prohibition of arbitrariness in the deprivation of liberty requires a strict review of the lawfulness, necessity and proportionality of any measure depriving anyone of their liberty; this standard of review is applicable at all stages of legal proceedings.

31. Against this backdrop, the Working Group considers that the arrest and detention of Ms. Pornthip Munkong are in contravention of article 9 of the Universal Declaration of Human Rights and article 9, paragraph 3 of the International Covenant on Civil and Political Rights. Accordingly, her deprivation of liberty falls within category III of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

Disposition

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

The deprivation of liberty of Ms. Pornthip Munkong, being in contravention of articles 9 and 19 of the Universal Declaration of Human Rights and articles 9, paragraph 3 and 19, paragraph 2 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category II and III of the categories applicable to the consideration of cases submitted to the Working Group.

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

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

[Adopted on 2 December 2015]

¹See, for example, Human Rights Committee, Communication No. 1787/2008, CCPR/C/107/D/1787/2008, paras. 7.3-4.

²Report of the Working Group, A/HRC/19/57, para. 53.

³Ibid, para. 54.

⁴Ibid, para. 56.

⁵General Comment No. 35 of the Human Rights Committee, para. 38.