

A Human Rights First White Paper

# Trial Monitoring Report

The Disappearance of Somchai Neelaphaijit

February 21, 2006

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This mission to Thailand was made possible by the generous contributions of the Dutch foundation Lawyers for Lawyers.

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Drawing by Chumpol Akkapanpanonta

# **Trial Monitoring Report**

## **The Disappearance of Somchai Neelaphaijit**

### **Bangkok, Thailand**

#### **Introduction**

The inquiry into the disappearance and apparent killing of the prominent lawyer and human rights defender, Somchai Neelaphaijit cannot be separated from problems endemic to the Thai legal system, and in particular to deteriorating human rights conditions in southern Thailand. Despite Thailand's reputation as a human rights leader in the region following the withdrawal of the military from politics in the early 1990s, its human rights record has deteriorated over the last five years. A culture of impunity for violations by state officials, increasing insecurity for human rights defenders, escalating violence in the south involving state forces and the minority Muslim population, and a loosening of rights guarantees due to overly broad anti-terrorism decrees have all undermined the rule of law.

Somchai Neelaphaijit was last seen near the Chaleena Hotel in the Ramkamhaeng area of Bangkok on March 12, 2004. His car was later found abandoned with a fresh dent in the back, suggesting it had been rammed from behind.

Somchai was a prominent Thai Muslim lawyer known for his success over two decades of defending clients accused of offenses relating to national security, terrorism, and insurgency in the troubled southern provinces of the country. He served as chair of the Muslim Lawyers Club and vice-chair of the human rights committee of the Law Society of Thailand (now the Lawyers Council).

Human Rights First decided to monitor the trial of those accused in his disappearance because of his prominence, and because his case is emblematic of an increase in both attacks on defenders and

disappearances in Thailand. The trial convened for several days every few weeks from August to December 2005. In two trips to Bangkok, a representative of Human Rights First attended six days of the trial and also interviewed Somchai's family members and colleagues, prosecutors, officials from the Ministries of Justice and Foreign Affairs, and local observers. The defense team declined to be interviewed.

Based on this information we have prepared the following report describing the events of the trial, evaluating its fairness, and making recommendations for future legal proceedings.

## Context

*It's a shame for the country that someone who works to keep the rule of law was abducted. How can ordinary people get protection when the lawyer himself wasn't spared?*

—Senator Sak Korsaeungruang<sup>1</sup>

Non-governmental organizations and United Nations bodies have extensively reported flaws in Thailand's criminal justice system. In July 2005 the U.N. Human Rights Committee cited widespread reports of torture and inhuman and degrading punishment committed by law enforcement officials and noted that few investigations result in prosecutions.<sup>2</sup>

In the south a long-dormant insurgency has reignited in new and violent ways in recent years. Violence and arbitrary arrests were not uncommon, but both reached a new level following a January 4, 2004 raid by unidentified attackers on a military arms depot. Four military guards were killed and several hundred guns were reported stolen in that attack. The same day unknown arsonists burned twenty schools.

Thai security forces faced enormous pressure to respond aggressively to the January 4 attack. The following day, martial law, which had long been in effect in districts along the border with Malaysia, was enacted in the three southern provinces of Pattani, Yala, and Narathiwat. Police investigators were sent from Bangkok to investigate the gun robbery and arson attacks; these included officers from the Central Police Division and the Crime Suppression Division (CSD). The effort was led by Kovit Whattana, who was then Deputy Police Commissioner and is now Police Commissioner.

Local lawyers told Human Rights First that these police had little understanding of local language and culture, which increased the likelihood of arbitrary arrest and abuse in detention.<sup>3</sup> The chain of arrests that followed, say lawyers active in the region, typifies the approach of the Royal Thai Police to solving crimes. With little attention to forensic evidence or credible witnesses, the police rely heavily on confessions. Especially in the context of the south, where detainees often lack access to a lawyer and other guarantees, local advocates report that confessions are obtained through torture and other forms of abuse.<sup>4</sup>

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<sup>1</sup> Supara Janchitfah, "The Case Is Not Closed," January 15, 2006.

<sup>2</sup> *Ibid.*, Section 15.

<sup>3</sup> Interview, Bangkok, December 2005.

<sup>4</sup> Interview, Bangkok, December 2005. Interestingly, Deputy Prime Minister Chavalit Yongchaiyudh later cited this problem when urging patience in the Somchai case itself: "Most Thai police are competent, and decent. [But] when bad police are pressured, they are likely to abduct witnesses." *The Nation*, "Warrants in Somchai Case Due Next Week," April 4, 2004.

Among the first to be arrested for the January 4 attack were five men accused of cutting down trees to block efforts to pursue the attackers. The suspects were arrested at different times from February 19 to 23 and charged with violations 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.” The five men—Makata Harong, Sukri Maming, Manase Mama, Sudirueman Malae, and Abdullah Abukaree—were represented by Somchai Neelaphajit.

On March 4, Somchai sought a court order for the five to receive a physical examination for effects of torture and to be moved out of CSD custody and into a prison.<sup>5</sup> The judge approved an extension of their detention but also ordered that the detainees be examined by a doctor and moved to a prison.

But Somchai also went public with his concerns. He delivered a speech on police torture and impunity that one journalist described as “a powerful, bitter, outraged speech.” On March 11, Somchai wrote a letter to government authorities detailing the torture his clients had received at the hands of police, stating in part:

I would like to present the truth to you. I truly hope that there will be further investigation into the abuse of power and torture of the suspects by inquiry officials. And finally, I sincerely hope that there will be improvement in the treatment of suspects in the future.

He disappeared the next day.

According to prosecutors, a possible motive for Somchai’s disappearance was that his torture complaint was interfering with the standard police practice of coerced testimony. A fellow member of the Muslim Lawyer’s Club told Human Rights First, “I know Khun Somchai very well. If Somchai knew about a torture case, he would do anything for them, including a lawsuit against police. So the plan to identify a chain of suspects would be stopped.”<sup>6</sup>

The pressure to find those responsible for violence in the south put both suspects and their advocates at risk. “The police see lawyers as unwanted people,” explained Dej-Udom Krahit, president of the Lawyers Council. “They view lawyers as an obstacle to their success of getting guilty verdicts whether through direct or indirect means.”<sup>7</sup> An alternative motive might have been his role in a petition to lift martial law, an act that presumably would have been of greater concern to the military than the police.

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<sup>5</sup> His application included the following remarks: “While under police custody and during the interrogation conducted at the provincial police station of Tanyong subdistrict, the 4th Suspect was blindfolded by police officer(s) and physically assaulted; strangled and choked, hands tied behind his back and beaten with pieces of wood on the back and head, suffering some head wounds. In addition, he was also hanged from the toilet door with a piece of rope and was then electrocuted with a fork charged with electrical currents, on the back of his torso and right shoulder. As a result, the suspect had to make a confession.” “Official Request Form for Seeking Court Order to Send the Suspect to Have Physical Examination,” March 4, 2004 (unofficial translation on file with Human Rights First).

<sup>6</sup> Interview, Bangkok, December, 2005. The five clients were in fact only one link in a chain of arrests. After the five were detained, another man was detained for murdering a police officer in Narathiwat. This arrest led to detention of a local official who in turn named Member of Parliament Najmuddin Umar as the mastermind of the January 4 attack. Only Umar and another man were tried for the gun robbery; on December 15, 2005, both were found not guilty. In court, the local official retracted his allegations against Umar, saying that police had beaten him and threatened his family to make him testify. “About-turn at Najmuddin Trial,” December 27, 2004, translation available at <http://www.seasite.niu.edu/trans/Thai/pages/TranslationProject/EnglishArticles/December2004/e13.1.htm>.

<sup>7</sup> Marwaan Macan-Markar, “Case Of ‘Disappeared’ Lawyer Raises Rights Issues,” Inter Press Service, August 10, 2005.

Two other trends provide context to this case: the killing of at least 20 human rights defenders since 2000<sup>8</sup> and an unaddressed pattern of disappearances. The Somchai case is emblematic of both these trends, and the resolution of the case may impact both.

### **The Investigation**

In Thailand, the police investigation becomes the basis for the public prosecutor's report, and prosecutors have little or no role in the investigative process. (For a discussion on the problems associated with this practice, see the evaluation of the trial's fairness below.)

Recognizing the lack of public confidence in the police, government officials made several public statements that the Justice Ministry's Department of Special Investigations (DSI) had launched a formal inquiry of Somchai's disappearance. But these statements were followed by conflicting statements that indicated that no probe was actually underway. The Asian Legal Resources Center in Hong Kong received a letter from the Minister of Justice stating that "an ad hoc committee under the responsibility of the Special Investigation Department" had been set up and had made "a lot of progress." But the Minister of Justice later claimed that no steps had been taken because no request for an inquiry had been made, despite the fact that Somchai's wife and colleagues at the Law Society of Thailand had repeatedly made just such a request.<sup>9</sup>

In a May 2005 communication to Human Rights First, an official with the Thai Government's Department of Rights and Liberties Protection stated that the case was the responsibility of the Royal Thai Police, but added – without providing any specifics – that "the Ministry of Justice has given an order to the Department of Special Investigation to take further investigation."

On July 19, as the U.N. Human Rights Committee was meeting in Geneva to consider Thailand's human rights conditions, a new DSI investigation was announced. The Deputy Prime Minister created an interagency team that included the deputy attorney general, director of the national intelligence agency, police commissioner, and other senior officials to guide DSI investigators. However, over the next six months it became clear that the team was meeting infrequently, raising fears of continued inaction.<sup>10</sup>

In January 2006, Somchai's wife, Angkhana Wongrachen, again urged action, saying the DSI team had met only once in and did not appear to be calling in witnesses to provide information. The DSI director replied that police were minimizing meetings to allow more time to solve cases.<sup>11</sup>

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<sup>8</sup> The U.N. Human Rights Committee's response to Thailand's report on the implementation of the ICCPR noted that human rights defenders were frequently targets of killings and other violations and that "any investigations have generally failed to lead to prosecutions and sentences commensurate with the gravity of the crimes committed, creating a 'culture of impunity.'" See U.N. Doc. CCPR/CO/84/THA, July 28 2005, section 10.

<sup>9</sup> Asian Legal Resource Centre, "Institutionalised Torture, Extrajudicial Killings & Uneven Application of Law in Thailand: Alternative Report to the Initial Report of Thailand to the Human Rights Committee," April 2005.

<sup>10</sup> A representative of the Ministry of Foreign Affairs confirmed in December that the team met only "once or twice" but noted that DSI investigators met frequently and were at work throughout that period. Interview, Bangkok December, 2005.

<sup>11</sup> "Speed Urged in Somchai Case," The Nation (Bangkok), December 2, 2005.

*Other efforts to investigate*

Government officials have also failed to cooperate with efforts by Thai legislators to investigate the case. A Senate committee announced in May 2004 that it had little hope of solving Somchai's disappearance due to poor cooperation from the police and government officials. The Committee's final report, completed in November 2004 concluded the disappearance may have been linked Somchai's representation of the five Muslim suspects, but that it could not obtain conclusive information. Senior officials including the Prime Minister and the Police Commissioner ignored requests to appear before the committee; those that did appear gave very limited information.<sup>12</sup>

The National Human Rights Commission began an independent investigation of Somchai's disappearance in late 2005. Although an official body, the Commission is generally marginalized by the government, and Commission members have even received death threats after raising the spate of killings tied to anti-drug measures in 2003, and again for addressing the violence in the southern provinces the following year.<sup>13</sup>

**The Charges**

In April 2004 five police officers were detained in connection with Somchai's disappearance the previous month:

- |                 |  |
|-----------------|--|
| Defendant No. 1 | Major Ngern Thongsuk, Crime Suppression Division |
| Defendant No. 2 | Lt. Col. Sinchai Nimbunkampong, CSD              |
| Defendant No. 3 | Lance Corporal Chaiweng Phaduang, Tourist Police |
| Defendant No. 4 | Corporal Randorn Sithikhet, CSD                  |
| Defendant No. 5 | Lt. Col. Chadchai Leiamsa-ngoun, CSD             |

In the absence of a body or sufficient forensic evidence, the charges did not rise to the level of the crime: the five police officers were charged only with coercion<sup>14</sup> and gang robbery.<sup>15</sup> Under the first charge the officers faced up to five years in prison; under the second they faced up to 20 years in prison, though such sentences would be unlikely for members of the police force. They were released on bail, and one was even allowed to remain in his job throughout the trial that followed.

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<sup>12</sup> Senate Committee Report of the Study of the Disappearance of Mr. Somchai Neelaphaijit, November 10 2004. Summary translation on file with Human Rights First.

<sup>13</sup> National Human Rights Institutions Forum, "Thailand Human Rights Commissioner Under Threat," March 10, 2003; U.S. Department of State, "Country Reports on Human Rights Practices - 2004: Thailand," February 28, 2005.

<sup>14</sup> Article 309 of the Criminal Code reads, "Whoever compels the other person to do or not do any act, or to suffer anything 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 suffers such a thing, shall be punished with imprisonment not exceeding three years or fined not exceeding six thousand Baht, or both." The sentence increases to five years if either firearms or five or more persons are involved.

<sup>15</sup> Article 340 of the Criminal Code reads "Whoever with three persons upwards participates in committing robbery, such persons are said to commit gang-robbery, and shall be punished with imprisonment of ten to fifteen years and fined of twenty thousand to thirty thousand Baht." The sentence increases to twenty years if any of the perpetrators carries arms, if the victim suffers grievous bodily harm, and "If the gang-robbery causes death to the other person, the offender shall be punished with death."

The weakness of the charges was due in part to the absence of a specific criminal offense of “forced disappearance” under Thai law.<sup>16</sup> However it was primarily the lack of evidence, due to the half-hearted investigation, that made it difficult to bring more serious charges. The Reply of the Kingdom of Thailand on a List of Issues to be taken up by the U.N. Human Rights Committee acknowledged the lack of evidence, noting “police officers have not been charged with a more serious offence because there is no substantial evidence to prove that Mr. Somchai was dead.” Somchai’s wife also emphasized the failure to collect evidence: “If only the investigators had paid more serious attention and did not rush to finalise their findings, if only they interrogated more witnesses, the charges would not be this weak.”<sup>17</sup>

## **The Judges**

Under the Thai legal system a panel of up to three judges plays a crucial role in the conduct and outcome of a trial.<sup>18</sup> In addition to guiding the trial process, the chief judge is also responsible for dictating the trial record each day, and deciding the verdict and sentence. As representatives of the King, the judges authority cannot be questioned lightly.<sup>19</sup>

Given this role and authority, the selection of the respected Judge Suwit Pornpanich to lead the judges’ panel in the Somchai case was welcome. For the same reason, it was cause for alarm when he announced in November 2005 that he would be leaving the trial for a position on the Supreme Court with just one month left to go in the trial.<sup>20</sup> Human Rights First joined local and international organizations in expressing concern, and the judge remained in his position through the end of the trial and the rendering of the verdict.

## **The Trial**

The trial was originally scheduled for 2006 but was moved forward to August 9, 2005. While this speed indicates some recognition of the importance and international attention to the case, it also may have exacerbated the problems with the investigation, encouraging investigators to omit important steps such as checking alibis and following other leads.

Pretrial hearings in March 2005 implicated one of the defendants in the abuse of Somchai’s clients, an important element in the alleged motive.<sup>21</sup> Police documents cited at trial further indicated that both Major Ngern Thongsuk and Lt. Col. Chadchai Leiamsa-ngoun were assigned to the gun robbery investigation, although Lt. Col. Chadchai denied he was in the south at that time.

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<sup>16</sup> The crime of kidnapping carries a heavier sentence than coercion, but requires that a ransom be demanded. Section 313 of the Criminal Code (in the chapter on offences against liberty) states that if someone restrains or detains any person to obtain a ransom, he or she shall be punished with imprisonment for 15 to 20 years and fined or imprisoned for life or executed if it causes death.

<sup>17</sup> Supara Janchitfah, “Rule of Law on Trial,” January 15, 2006.

<sup>18</sup> The full panel of judges is not always present on any given day. During most of the days observed, the chief judge and one of the other more junior judges was present.

<sup>19</sup> Human rights advocates have tried for decades to change the system so that testimony is recorded verbatim, rather than subject to the decision of the judge as to what is relevant and credible. Interview with Senator Thongbai Thongpao, Bangkok, December 2005.

<sup>20</sup> Such a transfer, while not unprecedented, appears to be inconsistent with section 236 of the 1997 Constitution, which states that “any judge not sitting at the hearing of a case shall not give judgment or a decision of such case, except for the case of force majeure or any other unavoidable necessity as provided by law.” See Human Rights First letter to the Permanent Secretary of the Criminal Court, November 20, 2005 (on file at Human Rights First).

<sup>21</sup> Asian Legal Resource Centre, “Institutionalised Torture, Extrajudicial Killings & Uneven Application of Law in Thailand: Alternative Report to the Initial Report of Thailand to the Human Rights Committee,” April 2005.

### *The prosecution*

Somchai's wife Angkhana Wongrachen successfully applied to be a co-plaintiff in the case, a right of victims or their families in the Thai legal system.<sup>22</sup> Her right to be represented by a team of co-prosecutors potentially increased the effectiveness of the prosecution, as the team would be less dependent on the police investigation than the public prosecutors, and could have recruited seasoned human rights lawyers.

The co-prosecution was assigned to the Law Society of Thailand (now the Lawyers Council), a government-sanctioned body to which all lawyers belong. However, most of the lawyers selected by the Society came from the legal aid division, rather than the human rights committee, and were not so familiar with human rights cases or prosecution. Their work may also have been hampered, especially in the early days of the trial, by lack of cooperation with the public prosecutors, who had objected to the naming of a co-plaintiff in the first place.

The prosecution was based on two main pieces of evidence: 1) eyewitness testimony that Somchai had been last seen being forced into a car by men who resembled the defendants, and 2) mobile phone records showing 75 calls among the five men made from locations near where Somchai disappeared on March 12. (There was another round of more than 30 calls made among the five after Somchai's car was found on March 16.)

### *The defense*

The defense team consisted of private lawyers who seemed well-prepared and forceful in representing their clients' interests. From the first days of the trial the defense lawyers tried to raise alternative theories to explain the disappearance, suggesting that Somchai might have been having an affair, was involved in misappropriation of funds raised for a Muslim burial society, or had been targeted by someone with a grudge. They pointed to everyone from the family members of soldiers killed in the south to the governments of the United States and Israel, noting that Somchai had successfully defended clients accused of planning embassy bombings.

The defense lawyers also sought to undermine the main prosecution evidence. Defense lawyers questioned eyewitnesses aggressively and challenged the authenticity and accuracy of the mobile phone records. They also called witnesses who testified that they had borrowed the phones in question on March 12 while carrying out operations in Ramkamhaeng, where Somchai was last seen. For example, a witness who was a friend and colleague of defendant Ngern Thongsuk testified that the defendant gave him his mobile phone on the morning of March 12 and asked him to answer it if their boss called. The witness testified that he then went out to execute arrest warrants in the vicinity of Somchai's last known whereabouts.

Many of the defense witnesses were policemen, including current and former subordinates of the defendants, and other colleagues who had worked with the defendants for a decade or more. One defense

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<sup>22</sup> Section 30 of the Criminal Procedure Code states that "the injured person may apply by a motion to associate oneself as the prosecutor at any stage of the proceedings before the pronouncement of judgment of the Court of First Instance."

witness had been identified by Somchai's clients as having been involved their torture in 2004.<sup>23</sup> Several defense witnesses testified that they did not see any evidence that the gun robbery suspects had ever been tortured, calling into question the motive put forward by the prosecution.<sup>24</sup>

## The Verdict

Court proceedings ended on December 2, after which the prosecutors and defense teams each submitted final written arguments in anticipation of a verdict. On January 12, 2006, the court found Defendant No. 1, Police Major Ngern Thongsuk, guilty of coercion and sentenced him to three years. The other four defendants were acquitted due to lack of evidence. Thongsuk is free on bail of 1.5 million baht (US\$38,200), and both sides will appeal the verdict.

In announcing the verdict, Judge Suwit Pornpanich said he believed that phone records indicated that the five defendants had followed the victim beginning the morning of March 12. But the judge also found that the records included some photocopies and contained omissions and other discrepancies. Most damagingly, he doubted the expertise of a police investigator who had described the records in court. In the opinion of the court, these factors undermined the documents' evidentiary value. Furthermore, the judge accepted the defense argument that the records could not prove the defendants' location, as mobile phones can be used by anyone.<sup>25</sup>

The judge cited the eye-witness testimony that a second car had hit Somchai's from the rear, that he was then forced into that car, and that Major Thongsuk had been observed at the scene. The court found a key eyewitness credible despite the difference in her testimony compared to the police investigation, and specifically noted that she appeared afraid and intimidated.<sup>26</sup>

The judge found Major Thongsuk guilty under Section 309 of the Thai criminal code concerning coercion, but did not apply the longer five-year sentence provided for in the second paragraph of that provision because he could not conclude that arms were used or that five or more persons were involved. The defendant was found not guilty on the robbery charge because it was not clear to the court that the intention had been to take property.<sup>27</sup>

The three most junior defendants were acquitted due to lack of convincing testimony they were at the scene of the crime. Lt. Col. Chadchai Leiamsa-ngoun, the senior officer alleged to have been a mastermind who was never present at the scene, was acquitted due to the lack of weight given to the phone records and the lack of any eyewitnesses linking him to the crime.<sup>28</sup>

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<sup>23</sup> Asked about it on the stand he claimed that the man had simply named him after seeing his face in the paper and noted that an internal investigation found no evidence of torture. Personal observation, Bangkok Criminal Court, November 29, 2005.

<sup>24</sup> For example, on November 29, a fellow member of the Crime Suppression Division testified he saw no signs of torture. Under cross examination he acknowledged that he had not seen the condition of the men's bodies under their long-sleeved prison uniforms or at close distance. Personal observation, Bangkok Criminal Court, November 29, 2005.

<sup>25</sup> Local observer's notes on the reading of the verdict, electronic communication, January 25, 2006.

<sup>26</sup> Local observer's notes on the reading of the verdict, electronic communication, January 25, 2006.

<sup>27</sup> The defendant was also found to have committed an offense under section 391, a petty offense involving violence that does not lead to bodily harm, although this did not affect his three year sentence under section 209. Local observer's notes on the reading of the verdict, electronic communication, January 25, 2006.

<sup>28</sup> Local observer's notes on the reading of the verdict, electronic communication, January 25, 2006.

There are indications, however, that the case will not end with this verdict. Within days Prime Minister Thaksin Shinawatra said of the missing lawyer, “We know that he is dead, as we have found some evidence . . . . Government officials were definitely involved in this, and there were more than four, but whether the evidence will lead to punishment in court is another thing.” The Prime Minister, the head of the DSI, and a Deputy Prime Minister all indicated that new charges were forthcoming, and might be brought before the end of February 2006.<sup>29</sup> These remarkable statements should be attributed the persistence of Somchai’s family and Thai human rights organizations, recognition of the way injustice has fueled the violence in the south, and international pressure, including the presence of at least four international NGOs and occasional embassy officials at the trial.

A new investigation and trial will be welcome, but only if it is able to avoid the flaws that undermined the credibility of the first trial. Human Rights First therefore recommends careful consideration of the following assessment.

### **Assessment of the Fairness of the Trial<sup>30</sup>**

Human Rights First believes that this trial did not conclusively address the disappearance of Somchai Neelaphaijit, primarily because the charges never reflected the gravity of the crime to which Somchai fell victim.<sup>31</sup> The charges of gang robbery and coercion simply do not encompass the disappearance and apparent killing of Somchai. The root of the problem in this case seems to be the absence of evidence due to a half-hearted investigation.

The weak inquiry, including inadequate forensic investigation and the failure to follow key leads, was due primarily to the problem of the police force being trusted to investigate its own members.<sup>32</sup> Additional concerns include inadequate protection of witnesses (a responsibility also entrusted to the police), and rules of evidence that interfered with the effective presentation of the case.

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<sup>29</sup> “Speed Urged in Somchai Case,” *The Nation* (Bangkok), December 2, 2005; “DSI Prepared Murder Charges against Perpetrators,” *Matichon*, January 24, 2006.

<sup>30</sup> In addition to the provisions in Article 10 of the Universal Declaration of Human Rights and Article 14 of the ICCPR concerning fair trials, we also evaluate this trial in with reference to international instruments relating to human rights defenders, disappearances, and the right to an effective remedy. For example, Article 12 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) protect the rights of individuals and organizations to “participate in peaceful activities against violations of human rights and fundamental freedoms.” There is also an emerging body of international law governing disappearances. The Declaration and the Draft Convention on the Protection of all Persons from Enforced Disappearances includes the right to complain to authorities, including the power to compel and protect witnesses. Finally, the repeated failure of the police to conduct proper investigations and the failure of the Thai government to provide a more independent investigative body is a breach of Article 2 (3)(a) of the International Covenant on Civil and Political Rights which states that “any person whose rights or freedoms . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

<sup>31</sup> The U.S. Department of State issued a statement that underscored the shortcomings of the case: “We are deeply concerned that no one has been brought to justice for the disappearance of this respected attorney and urge the government to conduct a serious and competent investigation.” Press Statement, Sean McCormack, Spokesman, Department of State, January 13, 2006.

<sup>32</sup> It should be noted that different divisions of the police were represented: Crime Suppression Division, Metropolitan Police Bureau, and Tourist Police. One defense argument claimed that evidence had been manipulated due to interdepartmental rivalries.

*Inadequate investigation*

*In this case, actually the investigation should have been extended to cover who took him and to where, and whether he is alive or dead. Who ordered the abduction, who is the mastermind?*

—Supreme Court judge Wicha Mahakhun<sup>33</sup>

The failure of the Royal Thai Police to investigate its own members effectively is a systemic problem in the Thai legal system. Thongbai Thongpao, one of Asia's senior human rights lawyers who is now a senator, explained:

“I’ve received some complaints, including from observers: Why doesn’t the public prosecutor ask more questions? You should know in Thailand police are the first to investigate, to make a report, to interview witnesses. The report goes to the public prosecutor, but the story comes from the police and the public prosecutor must follow this. . . . Since police are the investigators and compile all evidence and make the report, and since the accused are police and still in their posts you can consider what will happen.”<sup>34</sup>

The United States Department of State, in its 2004 human rights report on Thailand, also noted that this is a widespread problem. The report cited Thai prosecutors that the police often have been an obstacle to the prosecution of members of the force, leading to a “climate of impunity that persisted in preventing any major change in police behavior.”<sup>35</sup>

The reliance on the police is not absolute. Public prosecutors are able to participate in investigations where a death occurs under the supervision of an official<sup>36</sup> or where the suspect is under 18.<sup>37</sup> As noted above, the Department of Special Investigation will conduct inquiries in some cases. And co-prosecutors have some flexibility in securing new evidence and interviewing witnesses. The failure to effectively invoke these provisions in the Somchai investigation and trial can be attributed largely to institutional competition and above all a lack of political will.

For the most part, however, the police are in charge of the investigation, even where a member of the police force is the accused. There is no effective, independent body that an aggrieved person can go to that is capable of investigating human rights abuses committed by police, or that can even monitor the way in which investigations are conducted. Despite the efforts of its members, the National Human Rights Commission does not currently have the independence or authority to effectively play this role.

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<sup>33</sup> Supara Janchitfah, “The Case Is Not Closed,” January 15, 2006.

<sup>34</sup> Interview with Senator Thongbai Thongpao, Bangkok, December 2005.

<sup>35</sup> U.S. Department of State, “Country Reports on Human Rights Practices - 2004: Thailand,” February 28, 2005.

<sup>36</sup> Under the Criminal Procedure Code of Thailand, when there is a death in custody, there must be an investigation into the cause of death. Under section 150, three agencies must be involved: the forensic doctor, investigating officer, and public prosecutor. Thailand Country Report, The Eleventh United Nations Congress on Crime Prevention and Criminal Justice, April 18-25, 2005, Bangkok, available at [http://www.inter.ago.go.th/UN/english\\_language.pdf](http://www.inter.ago.go.th/UN/english_language.pdf), page 266.

<sup>37</sup> If the suspect is not over 18, it is necessary that a psychologist or a social worker be present and any other person requested by the alleged offender. A public prosecutor must participate in the interrogation. *Ibid.*, page 266. The Thailand Law Reform Office reported on May 24, 2005 that the Attorney-General's office was seeking an amendment to the Criminal Procedure Code to let prosecutors participate in the whole investigative process. Available at <http://www.thailawforum.com/news2.html>.

Throughout the trial there was also a pattern of inconsistencies and omissions in police paperwork. For instance, although one defendant was named on the arrest report in the gun robbery case, a police witness testified that this defendant had not been present and was only added so that he could be credited for the arrest. At the same time, an alibi witness was *not* named on the arrest record of a man he said he had helped to apprehend on March 12 in Ramkamhaeng. One witness, who claimed to have borrowed a defendant's mobile phone before going out to investigate Filipino gangs in Ramkamhaeng, explained the absence of any written record of his assignment by saying that "I just go out and investigate"<sup>38</sup>

### *Inadequate forensic investigation*

After Somchai's car was found on March 12, it was turned over to the Royal Thai Police's forensic division. According to Senate testimony by the director of the Central Institute of Forensic Science, the evidence from the car was not properly collected, and the police did not wear gloves when they brought the car to the police station.<sup>39</sup> Police investigators collected hairs from only two of the five suspects, so no comprehensive comparison could be made to the hairs found in the car.<sup>40</sup> Major-General Chuan Vorawanich, commander of the forensics division, acknowledged that evidence may have been destroyed.<sup>41</sup>

The Central Institute of Forensic Science, which is under the Ministry of Justice, conducted a parallel investigation. The Institute was created due in part to the public loss of faith in the impartiality of police forensic investigations.<sup>42</sup> However, the government has failed to provide adequate funds and staff. The Institute has also had to deal with apparent efforts by the police to undermine its work, including defamation suits and other forms of intimidation.<sup>43</sup> It is likely that this rivalry contributed to the inadequate forensic investigation in the Somchai case. Its director, Dr. Pornthip Rojanasunant, said the public prosecutors never requested the evidence she collected, and no one from the Institute was called to testify in court.<sup>44</sup>

### *Unexplored leads*

Based on the gaps in the prosecution's case, and in some cases according to direct testimony in court, it is clear that the police failed to fully investigate:

- the whereabouts of the car used to abduct Somchai;

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<sup>38</sup> Personal observation, Bangkok Criminal Court, December 1, 2005.

<sup>39</sup> Senate Committee Report of the Study of the Disappearance of Mr. Somchai Neelaphaijit, November 10, 2004, Summary translation on file with Human Rights First.

<sup>40</sup> Police Forensic Report, summary translation on file with Human Rights First.

<sup>41</sup> Asian Human Rights Commission, Letter to Pol. Gen. Amonwiwat (Director-general of DSI), November 28, 2005.

<sup>42</sup> The Director General of the Department of Probation of the Ministry of Justice wrote that "During recent years, there have been many incidents which have made the public lose faith in the forensic tests conducted mainly by the Police by its Forensic Division, the Police Hospital, an organ attached with the Police. The lack of accountability and the non-transparent procedures are among the major causes for such distrust. Due to the common agreement that there should be improvement of the forensic science in Thailand, the new Ministry of Justice will include the Institute of Forensic Science as a new agency under its purview." Kittipong Kittayarak, "The Thai Constitution of 1997 and its Implication on Criminal Justice Reform," available at [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no60/ch06.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no60/ch06.pdf).

<sup>43</sup> "Police, government block forensic work – expert," The Nation (Bangkok), December 19, 2002, available at <http://www.nationmultimedia.com/search/page.arcview.php?clid=3&id=71114&usrssess=>

<sup>44</sup> Supara Janchitfah, "The Case Is Not Closed," Bangkok Post, January 15, 2006.

- the alibis claimed by the defendants (and the use of their mobile phones);<sup>45</sup> and
- rumors that Somchai was taken to specific locations outside Bangkok.<sup>46</sup>

### *Inadequate witness protection*

Witnesses, including the victim's family and the eyewitnesses to the crime, were subjected to threats and intimidation. Somchai's wife was telephoned on the morning of April 18, 2005 by a man she identified as an intelligence official she had previously met. The caller asked her about her activities at the United Nations. Several weeks earlier an unidentified man had visited and warned her not to advocate too publicly for justice in her husband's case. Angkhana told Human Rights First:

We are always threatened, for a long time. An intelligence official called me and asked if I was going to the UN. Are you planning to go to UN? Are you sending a letter? Then a man came to my house, said he was working with detainees and that I wasn't safe anymore, I could be shot. I told friends, who told the newspaper. The Minister of Justice contacted me, said he wants to meet me, and has a duty to protect me. But the problem was surveillance. They were in our house, they asked for our phone numbers. I signed a two month protection contract, but did not extend it.<sup>47</sup>

The headlight of Angkhana's car was smashed while she was listening to the reading of the verdict on January 12. As Angkhana is a co-plaintiff in the case, these threats are a direct interference in the legal process.

In 2003 the Office of Witness Protection was created under the Witness Protection in Criminal Cases Act, which put into operation guarantees set out in the 1997 Constitution.<sup>48</sup> The program is housed in the Department of Rights and Liberties Protection in the Ministry of Justice, and coordinates the work of seven agencies. However the staff and budget of the program is limited, and it plays a primarily coordinating role, such that in 90% of cases the protection is carried out by the police.<sup>49</sup>

When police are alleged to be involved in the crime, the witness protection program tries to bring in police from different regions or departments. However, the fact that the defendants in this case were from the Crime Suppression Division, which has a presence throughout country, makes this solution especially difficult. Angkhana's unease with having police monitor her activities is a common complaint.

With perhaps even more implications for the outcome of the trial, eyewitnesses gave courtroom testimony that departed from their initial statements to the police. One witness watched a video of defendants

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<sup>45</sup> Lt. Col Phakorn Samukiri testified that investigators traced the steps of the victim but not the defendants, and that there was not enough detail in their investigation. Supara Janchitfah, "Rule of Law on Trial," Bangkok Post, January 15, 2006.

<sup>46</sup> Senator Sak Korsangruang quoted the Prime Minister as telling a security agency meeting on March 28, 2004: "I know from my intelligence sources that a group of officials took Somchai to Mae Hong Son." Chanravee Tansubhapol and Manop Thip-Osod, "A Year on, and Still no News on Somchai," Bangkok Post, March 11, 2005. Angkhana also reported that the Prime Minister had told her Somchai was taken to Ratchaburi province, though he later claimed he was only repeating a rumor.

<sup>47</sup> Interview, Bangkok, November 2005.

<sup>48</sup> Section 244 states: "In a criminal case, a witness has the right to protection, proper treatment, necessary and appropriate remuneration from the State as provided by law."

<sup>49</sup> Interview, Department of Rights and Liberties Protection, Bangkok, December 2005.

during the investigation and identified them as resembling the perpetrators. In court, the witness appeared hesitant and could not identify the defendants. Three other witnesses similarly changed their earlier testimony.<sup>50</sup> All identified Somchai as the victim but immediately said they could not identify the perpetrators. The change in testimony has raised concerns that the witnesses were somehow coerced into changing their testimony. As noted above, in the verdict the court noted the change in testimony and described the witness as appearing afraid.<sup>51</sup>

In the end, since the judge did not consider the phone records as evidence, the eyewitness testimony was the heart of the case. The lone conviction was based on such testimony, but the lack of consistent witness testimony fatally undermined the case against the other defendants.

There were indications as well that even police investigators and prosecutors were intimidated. Two policemen involved in the investigation reported threats and intimidation from their fellow officers.<sup>52</sup> There were also reports that the co-prosecutors' poor attendance was due in part to intimidation.<sup>53</sup> Thai trial observers also reported receiving threatening phone calls during the course of the trial.<sup>54</sup>

Lt. Col. Chadchai Leiamsa-ngoun, the most senior of the defendants, remained an active member of the police force throughout the trial. In fact, he was named policeman of the year by the Crime Suppression Division.<sup>55</sup> He appeared to enjoy significant authority, coming and going from the room and moving up to sit with the defense lawyers. The other four were suspended from duty but reportedly requested reinstatement even before the verdict of not guilty.

### *Prosecution performance*

The prosecutors reportedly did not talk to the eyewitnesses beforehand or visit the scene with them, which made it easier to undermine witness credibility on the stand. Both the public prosecutors and co-prosecutors suffered from heavy turnover and frequent absences. On the days that a Human Rights First observer attended, there was one member on each team who attended regularly and prepared diligently, with one or two others rotating in and out. One trial observer noted a gap of 15 minutes in which no prosecutors were present at all while a defense witness gave evidence,<sup>56</sup> and one co-prosecutor failed to show up throughout the proceedings.

On November 3, the first day the defendants took the stand, two new public prosecutors took over the case. Acknowledging they had no familiarity with the case, they requested a delay to study the evidence presented so far. They were granted 20 minutes.<sup>57</sup>

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<sup>50</sup> Asian Human Rights Commission, Letter to Police General Amonwiwat (Director-general of DSI), November 28, 2005.

<sup>51</sup> Local observer's notes on the reading of the verdict, electronic communication, January 25, 2006.

<sup>52</sup> Electronic communication from local observer, February 17, 2005; Supara Janchitfah, "Rule of Law on Trial," Bangkok Post, January 15, 2006.

<sup>53</sup> Supara Janchitfah, "Rule of Law on Trial," Bangkok Post, January 15, 2006.

<sup>54</sup> Electronic communication from local observer, February 14, 2005.

<sup>55</sup> "Speed urged in Somchai case," The Nation (Bangkok), December 2, 2005.

<sup>56</sup> FIDH/OMCT, "Somchai Abduction Trial: Justice Granted or Justice Denied?" (Judicial Observation Mission report) No. 437/2, January 2006, p.7.

<sup>57</sup> Interview, Somchai Homlaor, Bangkok, December 4, 2005. See also Asian Human Rights Commission: "Constant Changes of Prosecuting Attorneys in Somchai's Case Undermines Judicial Process," November 4, 2005.

This event led to appeals from domestic and international monitors, which led to more consistent attendance. However, the damage had been done, as the crucial opportunity to cross-examine the defendants about their alibis and other elements of the defense was lost.

### *Rules of evidence*

The trial operated under rules of evidence in which lawyers are not given access to documents and other exhibits in advance of their introduction in court, making cross-examination of witnesses difficult. At least 10 documents were introduced in the last week of the trial alone, making a total of some 300 documents from the defense and prosecution.

One member of the prosecution team told Human Rights First that he first saw the police investigation report “the day the witnesses came. One minute before the cross examination! I was reading and listening at the same time!”<sup>58</sup>

In civil cases, all evidence is introduced at the start of the proceedings, and legislators and advocates have tried for many years to make this practice apply in criminal cases as well. In 2004, the Criminal Amendment Act slightly improved the rules of evidence. Under new sections 173/1 and 173/2 of the Criminal Procedure Code, each side must present a list of documents that will be introduced in court. Nevertheless, lawyers do not get access to the actual documents until they are presented in court. The Somchai trial operated under the old rules, and a subsequent trial might be marginally better, but would still face many of the same problems. Further amendments are being studied in the legislature.<sup>59</sup>

In theory, this problem is equally disadvantageous to both prosecution and defense, though one prosecutor noted that in his prior experience as a defense lawyer information was more readily available. Furthermore, observers and a member of the prosecution team told Human Rights First that defense lawyers seemed able to go directly to relevant statements buried in lengthy documents that had just been introduced. This created the impression that defense lawyers might have had advance access to police investigation reports or other documents through contacts in the police department, although we cannot confirm this.

### *Allegations prejudicial to defendants*

It is in the interests of justice that the proceedings be fair to all parties. While Human Rights First was unable to interview defense lawyers or their clients to learn more about these allegations, one defendant accused the Metropolitan Police of altering the warrant used to search his house.<sup>60</sup> Defendants also claimed they had been framed due to rivalry between the Crime Suppression Division and the Metropolitan Police Bureau. Such allegations of misconduct should be part of a thorough review of the police investigation in this case.

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<sup>58</sup> Interview with member of the co-prosecution team, Bangkok, December 2005.

<sup>59</sup> Interview with Senator Thongbai Thongpao, Bangkok, December 2005.

<sup>60</sup> Asian Human Rights Commission, Letter to Pol. Gen Amonwivat (Director-general of DSI), November 28, 2005.

## **Conclusion**

The trial of the five policemen charged in connection with the disappearance of Somchai Neelaphaijit did not meet international standards. It did not provide an effective remedy to the family of the victim due to an inadequate investigation, charges that did not rise to the seriousness of the crime, and inadequate witness protection, as well as rules of evidence that interfere with the effective cross examination of witnesses and defendants. Many of these problems were caused by the reliance on the Royal Thai Police to investigate members of the force and to protect witnesses. Turnover on the prosecution teams (and very nearly the panel of judges) may also indicate a failure by authorities to treat the case as seriously as it deserves.

## **Recommendations to the Royal Thai Government**

1. A credible investigation by the Department of Special Investigations is a prerequisite for any effective trial on appropriate charges. Because the DSI itself is largely staffed by former policemen and has proven ineffective in some other cases, this investigation must be backed by the full support of the Minister of Justice and the Prime Minister. Any other efforts to uncover the truth, such as the inquiries of the Senate and the National Human Rights Commission, should receive the full cooperation and support of government officials.
2. The Royal Thai Government should establish an independent body that will investigate complaints against the police for serious human rights abuses and misconduct during investigations.
3. The Royal Thai Government should provide the resources and autonomy necessary to allow an effective witness protection program that does not rely on police protection in cases where police are implicated in the crime.
4. In the event of a new trial of the same or other defendants on new charges, the public prosecution and co-prosecution teams must ensure adequate attendance and preparation by all members.
5. The Thai Parliament should ensure that enforced disappearances are recognized in the Criminal Code as a specific offense under Criminal law, in conformity with the UN Declaration and the Draft International Convention on the Protection of all Persons from Enforced Disappearances.