

Amicus Curiae Brief in the case of the defendant Andy Hall (Black Case Number A 517/2556)

I Introduction

1. Lawyers' Rights Watch Canada (LRWC), founded in 2000, is a Canadian organization of lawyers and other human rights defenders who promote the implementation and enforcement of international standards designed to protect the independence and security of human rights defenders around the world. LRWC produces legal analyses of national and international laws and standards relevant to human rights violations against human rights defenders. LRWC has special consultative status at the United Nations (UN) Economic and Social Council (ECOSOC).
2. The International Commission of Jurists (ICJ), composed of 60 eminent judges and lawyers from all regions of the world, works to advance respect for the rule of law and the promotion and protection of human rights globally. The ICJ holds consultative status at the Council of Europe, ECOSOC, the United Nations Educational, Scientific and Cultural Organization and the African Union. The ICJ also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Established in 1952, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
3. This brief provides submissions in the context of criminal defamation proceedings against human rights defender Andy Hall. The defamation charges have arisen in the context of research he has carried out on allegedly poor labour conditions, and the alleged use of illegal child labour employed in Thailand's tuna and fruit export industry. This brief points out that the imposition of harsh penalties such as imprisonment or large fines on a human rights defender risks have a "chilling effect" on the exercise of freedom of expression, which Thailand is bound to protect pursuant to its international legal obligations. These include international human rights treaties to which Thailand is party. This brief aims to clarify the nature and scope of these international legal obligations relating to the right of freedom of expression.
4. Under the principle of *pacta sunt servanda* and general principles governing the law of treaties, Thailand is bound to apply in good faith those international treaties to which it is a party.¹ Furthermore, Thailand may not rely on provisions of its internal law to justify a failure

¹ Human Rights Committee (the 'Committee'), General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.3, available at <http://www.refworld.org/docid/478b26ae2.html>; article 26 of the Vienna Convention on the Law of Treaties. The Committee is the body of independent experts established by the International Covenant on Civil and Political Rights (ICCPR) and mandated to monitor States Parties' implementation of the ICCPR. The interpretations of the Committee and other treaty monitoring bodies, including the Committee against Torture, which monitors implementation of the Convention against Torture (CAT), of the relevant treaty (including through general

to meet a treaty obligation.²

5. These treaties include the International Covenant on Civil and Political Rights (ICCPR), an international human rights treaty that requires States that are parties to it to guarantee a range of civil and political rights, including, under article 19, freedom of expression. Thailand acceded to the ICCPR on 29 October 1996.
6. The responsibility to ensure that the rights contained in the ICCPR are guaranteed and protected is not limited to the executive branch of government, but must also effectively be discharged by the Thai judiciary. In its authoritative General Comment 34 on the nature and scope of freedom of expression under the ICCPR, the UN Human Rights Committee (the 'Committee') has affirmed:

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.³

7. In addition to its treaty obligations, Thailand is bound to respect norms of customary international law and general principles of law recognized by UN member States ('general principles').⁴

The right to freedom of expression in international law

8. One of the first resolutions of the UN General Assembly, adopted in its first session in 1946, declared that freedom of information, which includes freedom to impart and receive information, "is a fundamental human right and ... the touch stone of all the freedoms to which the United Nations is consecrated."⁵
9. On 10 December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) which states in Article 19:

comments, recommendations to states parties following examination of their periodic reports on implementation under and jurisprudence) are authoritative.

See Judgment of the International Court of Justice (30 November 2010), paras.66-68, available at <http://www.icj-cij.org/docket/files/103/16244.pdf>

² Article 27 of the Vienna Convention on the Law of Treaties, adopted in May 1969 at the UN Conference on the Law of Treaties; see the Committee's General Comment No. 31

³ Committee General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para. 7, available at: <http://www.refworld.org/docid/4ed34b562.html>. See also Committee General Comment No. 31 at para. 4 and 8.

⁴ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, article 92 and 93, <http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html> United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38, available at: <http://www.refworld.org/docid/3deb4b9c0.html>; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 27, <http://www.refworld.org/docid/3ae6b3a10.html>. This treaty is generally considered to be customary international law. See Karl Zemanek, "Vienna Convention on the Law of Treaties" Vienna, 23 May 1969, UN Audiovisual Library of International Law, <http://legal.un.org/avl/ha/vclt/vclt.html>

⁵ UN General Assembly Resolution 59(I), 14 December 1946.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

10. The ICCPR obliges Thailand to respect and ensure to all individuals under its jurisdiction the right to freedom of expression and information. Article 19 of the ICCPR provides:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

The Committee has emphasized in General Comment No. 34 that Article 19 "includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others..." including "discussion of human rights."⁶

11. All States party to the ICCPR have the international law obligation to ensure that all people within Thailand enjoy the rights protected by the treaty, including freedom of expression. Article 2 provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

12. While in certain circumstances, a State may restrict the right to freedom of expression, any such restrictions must be strictly limited in accordance with ICCPR, Article 19(3), which provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

It is clear, from the plain language of article 19, that the conditions of proportionality and necessity must be met in order for any measure or act that would restrict or limit the exercise of freedom of expression to be lawful.

13. The Committee has clarified the operative implications of article 19(3), explaining that any

⁶ Committee General Comment no. 34, para. 11

such restriction on freedom of expression must meet a strict three-part test:⁷

- a. The restriction imposed must be provided by law, which is clear and accessible to everyone;⁸ in particular, the law must be “formulated with sufficient precision to enable the citizen to regulate his conduct” (emphasis added);
- b. The restriction must be proven as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals (emphasis added);⁹ and
- c. The restriction must be proven as the least restrictive and proportionate means to achieve the purported aim (emphasis added).¹⁰

The restriction on freedom of expression contemplated in article 19(3) (“for the respect of rights and reputations of others”) may be engaged in justifying laws and other measures on defamation. Such measures, however, will be strictly subject to the test set out by the Committee.

14. In this connection, the Committee has assessed the propriety of criminal defamation – as opposed to civil defamation - liability as a necessary and proportionate measure and its compatibility with article 19. The Committee affirmed in 2005 that criminal sanctions are inappropriate in cases of defamation, stating that “the use of criminal rather than civil penalties ... constitutes a disproportionate means of protecting the reputation of others”.¹¹ The Committee, in General Comment 34, called on States parties to decriminalize defamation and stressed that “imprisonment is never an appropriate penalty” for defamation.
15. The UN Special Rapporteur on Freedom of Opinion and Expression¹² has expressed concern about the potential for criminal defamation laws to be abused, especially when issues affecting the public interest are involved. The Special Rapporteur wrote in 1999 that: “Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied” (emphasis added).¹³

⁷ Committee General Comment no. 34, especially paras. 30-36

⁸ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17 at para. 64, <http://www.refworld.org/docid/5008134b2.html>

⁹ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17 at para. 81, <http://www.refworld.org/docid/5008134b2.html>

¹⁰ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17 at para. 81, <http://www.refworld.org/docid/5008134b2.html>

¹¹ Committee, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), paras. 3.9 and 6.8, <https://www1.umn.edu/humanrts/undocs/1128-2002.html>

¹² UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17, <http://www.refworld.org/docid/5008134b2.html>

¹³ UN Human Rights Council, Report of the Special Rapporteur on the Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28(h), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/107/66/PDF/G9910766.pdf?OpenElement>

International human rights analysis of Thailand's Penal Code¹⁴ sections 326, 328, 329, 330 (Crime of Defamation)

16. Thailand's Crime of Defamation, Sections 326 and 328 of the Penal Code, states:

[326] Whoever, imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit defamation, and shall be punished with imprisonment not exceeding one year or fined not exceeding twenty thousand Baht, or both.

[328] If the offence of defamation be committed by means of publication of a document, drawing, painting, cinematography film, picture or letters made visible by any means, gramophone record or another recording instruments, recording picture or letters, or by broadcasting or spreading picture, or by propagation by any other means, the offender shall be punished with imprisonment not exceeding two years and fined not exceeding two hundred thousand Baht.

17. The Penal Code provides defences to the Crime of Defamation, including:

- a. Section 329, which includes a defence for statements made for the protection of a legitimate interest; and
- b. Section 330, which provides a defence in the case of statements that are both true and for the benefit of the public.

18. It is submitted that the Crime of Defamation as set out in Thailand's Penal Code (sections 326, 328, 329 and 330) does not accord with Thailand's international human rights law obligations under article 19 of the ICCPR, on the grounds that the sections:

- a. are vague and overbroad¹⁵ so that reasonable persons cannot know in advance how to regulate their conduct to avoid criminal liability for breaching the law, in contravention of the principle of legality: The wording of section 326 allows 'anything' to constitute a defamatory statement, as long as it 'impairs' a person's reputation or 'expose[s]' them to hate or scorn, giving rise to extremely wide and unlimited interpretations;
- b. impose disproportionately harsh sanctions by applying criminal sanctions when civil remedies are sufficient¹⁶: Section 328 allows for punishment by way of imprisonment, as well as a fine. This threat of incarceration has a far greater chilling effect on freedom of expression than monetary damages;
- c. inappropriately repress and criminalize the legitimate work of journalists and human rights defenders in informing the public and advocating for protection of human rights¹⁷: The wide drafting of Section 326 allows for the unfettered targeting of

¹⁴ Thailand Penal Code, English language translation of the Penal Code as amended 2011 available at <http://www.thailandlawonline.com/table-of-contents/criminal-law-translation-thailand-penal-code>. Relevant sections of the Penal Code have not been amended since that time.

¹⁵ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17, <http://www.refworld.org/docid/5008134b2.html>

¹⁶ UN Human Rights Council, Report of the Special Rapporteur on the Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/107/66/PDF/G9910766.pdf?OpenElement>

¹⁷ UN Human Rights Council, Report of the Special Rapporteur on the Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/107/66/PDF/G9910766.pdf?OpenElement>

individuals or organizations working under a genuine mandate to raise awareness on public interest issues. The Special Rapporteur on Freedom of Opinion and Expression has previously stated that "it is critical to raise the public conscience to ensure that criminal laws are not used (or abused) to stifle public awareness and suppress discussion of matters of general or specific interest;"

- d. may violate the presumption of innocence (enshrined by Article 14(2) of the ICCPR),¹⁸ if the prosecution is not required to prove all elements of the offence, forcing the defendant to prove innocence. The Special Rapporteur on Freedom of Opinion and Expression stated that "the onus of proof of all elements [of criminal defamation] should be on those claiming to have been defamed rather than on the defendant; where truth is an issue, the burden of proof should lie with the plaintiff" (emphasis added): Section 330 should not be interpreted in a manner which places the burden on the defendant to prove the truthfulness of allegedly defamatory statements;¹⁹ and
- e. fail to establish truth as a defence in accordance with international standards. Under the Penal Code, a defendant cannot successfully raise the defense of truth if the statement concerns personal matters or will not benefit the public.²⁰ The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that: "To require truth in the context of publications relating to matters of public interest is excessive; it should be sufficient if reasonable efforts have been made to ascertain the truth" (emphasis added).²¹

International human rights law and Thailand's Computer Crime Act²² section 14(1)

19. The Computer Crime Act, Section 14 (1) states:

If any person commits any offence of the following acts shall be subject to imprisonment for not more than five years or a fine of not more than one hundred thousand baht or both: that involves import to a computer system of forged computer data, either in whole or in part, or false computer data, in a manner that is likely to cause damage to a third party or the public (emphasis added);

20. The Computer Crime Act Section 14(1) is not in accordance with international human rights law and standards and rule of law principles on the following grounds:

- a. Section 14(1) is vaguely and broadly worded, so that a reasonable person cannot know in advance what behaviours are prohibited, in contravention of the principle of legality, a general principle of international law that "it must be possible for an individual to know, beforehand, whether his acts are lawful or liable to punishment."²³

¹⁸ Article 14(2) of the ICCPR. According to the Committee's General Comment 13: "By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt." Committee General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, para. 7, available at: <http://www.refworld.org/docid/453883f90.html>

¹⁹ UN Human Rights Council, Report of the Special Rapporteur on the Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28(f), <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>

²⁰ Penal Code, section 330.

²¹ UN Human Rights Council, Report of the Special Rapporteur on the Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28(d), <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>

²² Computer Crime Act B.E 2550 (2007), English language translation available at <http://www.thailawforum.com/database1/thailand-computer-crime-law.html>

²³ Permanent Court of International Justice, Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City [Advisory Opinion of 4 December 1935], page 57, available at: <http://www.icj->

- There is no definition of “false computer data” and no explication of the phrase “in a manner that is likely to cause damage to that third party” sufficient to allow a person to regulate his or her conduct. Section 14(1) is worded so broadly as potentially to include the legitimate expression of facts and opinions by human rights defenders exposing human rights violations committed by individuals, state actors or non-state actors such as corporations or criminal syndicates.
- b. Section 14(1) may lead to disproportionate punishment, as it provides for harsher punishment than is allowed in the Penal Code for the same conduct.
 - c. When used to charge persons for criminal defamation, Section 14(1), is subject to the same concerns submitted above in respect of against the Crime of Defamation, set out in paragraph 23 above.
21. It is submitted that the ruling in a previous criminal defamation case, which found that the Computer Crime Act was not intended for use in online defamation cases, should guide the court in its considerations in this case. Convergent legal rulings can serve the administration of justice by establishing legal predictability in respect of jurisprudence: In December 2013, the Royal Thai Navy lodged a criminal complaint against the editors of a Thai news website, Phuketwan, accusing them of criminal defamation and of violating the Computer Crime Act for reproducing portions of a Pulitzer Prize-winning article written by the Reuters news agency concerning the alleged smuggling and trafficking of Rohingya people, an ethnic minority group in Myanmar facing systemic discrimination and violence. On 1 September 2015, the Phuket Provincial Court found that the Computer Crime Act was not intended to cover allegations of defamation²⁴ and acquitted the defendants in that case.

Thailand’s international human rights obligations to protect human rights defenders

22. Human Rights defenders, like all persons, enjoy the full protection of the ICCPR and other human rights instruments. Of particular importance to the protection of human rights defenders are the guarantees of the right to privacy (article 17); freedom of opinion and expression, including the right to seek, receive and impart information (article 19); freedom of peaceful assembly (article 21); freedom of association (article 22); the right to take part in the conduct of public affairs (article 25); and the right to non-discrimination and equal protection of the law (article 26).
23. In order to better protect these and other rights as they pertain to human rights defenders, States have adopted a number of international human rights instruments recognizing the special role of human rights defenders in the promotion, protection and implementation of international human rights. In particular, the UN 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)²⁵ affirms the right to engage in human rights education and advocacy and the corollary State duties to ensure the protection of human rights defenders. The Declaration on Human Rights Defenders aims to set out standards enshrined in binding international law, including the ICCPR and the Charter of the United Nations as well as the UDHR. The Declaration on Human Rights Defenders was adopted in 1999 by consensus of the General Assembly and thus represents a unanimous commitment by all UN member States to its implementation. The Declaration affirms, among other things, that:
- a. “everyone has the right, individually and in association with others, to promote and to

[cij.org/pcij/serie_AB/AB_65/01_Decrets-lois_dantzikois_Avis_consultatif.pdf](http://www.icj.org/pcij/serie_AB/AB_65/01_Decrets-lois_dantzikois_Avis_consultatif.pdf)

²⁴ ICJ Press Release: End prosecution of Phuketwan journalists and repeal criminal defamation laws, 1 September 2015, available at: <http://www.icj.org/thailand-end-prosecution-of-phuketwan-journalists-and-repeal-criminal-defamation-laws/>

strive for the protection and realization of human rights and fundamental freedoms at the national and international levels” (Article 1, emphasis added); and

- b. “the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration” (Article 12.2, emphasis added).

24. On 17 December 2015, Thailand voted in favour of Resolution A/RES/70/161, adopted by the UN General Assembly, entitled “Human rights defenders in the context 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.”²⁶ This resolution affirms the Declaration on Human Rights Defenders, expresses grave concern “about incidents of human rights defenders being subjected to attacks, threats and other abuses by non-State actors, and underlines the need for the human rights and fundamental freedoms of all persons, including human rights defenders, to be respected and protected” (preamble, emphasis added). In paragraph 2, the Resolution directs all States “to take all measures necessary to ensure the rights and safety of human rights defenders who exercise the rights to freedom of opinion, expression, peaceful assembly and association, which are essential for the promotion and protection of human rights.” All States are further directed by paragraph 10:

to create and maintain a safe and enabling environment for the realization of human rights and specifically to ensure that:(a) The promotion and protection of human rights are not criminalized or met with limitations in contravention of the obligations and commitments of States under international human rights law (emphasis added).

VII Submissions

25. It is respectfully submitted that to ensure good-faith adherence to Thailand’s international human rights obligations, Thailand’s Penal Code and Computer Crime Act must be interpreted in ways that ensure conformity with international human rights law, including the ICCPR, and principles as summarized above. It is incumbent of all branches of government, including the judiciary, to ensure respect for these obligations.
26. The presumption of innocence must be carefully guarded, including by ensuring that no criminal conviction occurs without the prosecution proving beyond a reasonable doubt each elements of the offence, including proving beyond a reasonable doubt that the defendant failed to make reasonable efforts to ascertain the truth of the statements.
27. Criminal sanctions for defamation are to be avoided, as they contravene international human rights law guarantees of the right to freedom of expression. In particular, no form of imprisonment or detention is permissible under the ICCPR in cases of criminal defamation. In such cases, civil remedies are the available and proportionate means to achieve the lawful aim of protection of reputations from damaging statements that are false. Civil actions against defamation and any other measures that may chill or otherwise restrict or limit the exercise of freedom of expression must be proportionate and strictly necessary to protect the reputation of others.

²⁵ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: resolution / adopted by the General Assembly, 8 March 1999, A/RES/53/144, available at: <http://www.refworld.org/docid/3b00f54c14.html>.

²⁶ UN General Assembly, A/RES/70/161, 17 December 2015, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/161

28. Laws restricting freedom of expression must not be interpreted and applied to prevent or sanction the exercise of the right of human rights defenders to act to protect the public interest by informing the public about possible human rights violations and advocating for improved protection of internationally protected rights.
29. No convictions should be entered pursuant to the Computer Crime Act, section 14(1) in criminal defamation cases, because Section 14(1) is too broad and vague to enable pre-knowledge of what constitutes an offence, and the penalties are disproportionate in that they are harsher than those allowed in the Penal Code.
30. It is respectfully submitted that the Court follow the precedent set in the *Phuketwan* case which found that Section 14 of the Computer Crime Act should not be used to cover the offence of criminal defamation.