

Amicus Curiae Brief in the case of the defendant Mr. Nan Win (Black Case Number Aor.3011/2561) and Ms. Sutharee Wannasiri (Black Case Number Aor. 3054/2561)

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 Economic and Social Council.
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, the United Nations Economic and Social Council, 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 defenders, Mr. Nan Win and Ms. Sutharee Wannasiri, for bringing attention to alleged labor rights violations at Thammakaset Company Limited (hereinafter "Thammakaset"). The defamation charges relate to a 107-second film, produced by the non-governmental organization Fortify Rights, which documents previous defamation complaints brought by Thammakaset against 14 of its former migrant workers from Myanmar (hereinafter "the film"). Mr. Nan Win was one of the migrant workers featured in the film. Ms. Sutharee Wannasiri, former Human Rights Specialist with Fortify Rights, was charged in connection with making three Twitter posts relating to the film.
4. This brief points out that the imposition of harsh penalties such as imprisonment or large fines on a human rights defender has 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 international legal obligations relating to the right of freedom of expression.
5. Under the principle of *pacta sunt servanda* and general principles governing the law of treaties, Thailand is bound to apply in good faith all international treaties to which it is a party.¹

¹ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 26, available at: <https://www.refworld.org/docid/3ae6b3a10.html>; Human Rights 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: <https://www.refworld.org/docid/478b26ae2.html>. The Human Rights 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 Human Rights 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 comments, recommendations to states parties following examination of their periodic

Furthermore, Thailand may not rely on provisions of its internal law to justify a failure to meet a treaty obligation.²

6. These treaties include the *International Covenant on Civil and Political Rights* (ICCPR), a 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. The United Nations (UN) Human Rights Committee is the supervisory body of independent experts established by the ICCPR to review periodic reports of States to assess compliance with the ICCPR and to issue General Comments that address specific rights and provisions of the ICCPR. General Comments are authoritative interpretations of the ICCPR.³
7. The responsibility to ensure that the rights contained in the ICCPR are guaranteed and protected is not limited to the legislative and executive branches of government, but must also effectively be discharged by Thailand's judiciary. In its authoritative General Comment No. 34 on the nature and scope of freedom of expression under the ICCPR, the UN Human Rights 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.⁴

8. 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").⁵

reports on implementation under and jurisprudence) are authoritative. See *infra* note 3.

² Articles 26 and 27 of the *Vienna Convention on the Law of Treaties*, *supra* note 1; Human Rights Committee, General Comment No. 31, *supra* note 1, para. 4.

³ Pursuant to Article 40(4) of the ICCPR, States Parties agreed to establish the UN Human Rights Committee and grant it the power, among others, to formulate general comments as it considers appropriate. Consequently, since it was created, the UN Human Rights Committee has built up a considerable body of interpretative jurisprudence through the review of periodic reports, adjudication of individual communications, and in the form of its General Comments. It is widely accepted that, in the exercise of its judicial functions, judicial bodies should ascribe "great weight" to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. This principle has been affirmed by the International Court of Justice. See International Court of Justice, *Ahmadou Sadio Diallo Case (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, paras. 66-68, available at: <https://www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>.

⁴ Human Rights 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 Human Rights Committee, General Comment No. 31, *supra* note 1, para 4.

⁵ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, article 92 and 93, available at: <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*, *supra* note 1, which 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, available at: <http://legal.un.org/avl/ha/vclt/vclt.html>.

The right to freedom of expression in international law

9. 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 is the touchstone of all the freedoms to which the United Nations is consecrated."⁶

10. On 10 December 1948, The UN General Assembly adopted the *Universal Declaration of Human Rights* (UDHR) which states in article 19:

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.

11. 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 hold opinions without interference.
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 UN Human Rights 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 "commentary on one's own and on public affairs" and "discussion of human rights,"⁷ as well as "all forms of audio-visual as well as electronic and internet-based modes of expression."⁸

12. All States Parties to the ICCPR have the obligation to ensure that all people subject to their jurisdiction 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.

13. 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:

⁶ UN General Assembly Resolution 59(I), 14 December 1946, available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59\(I\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59(I)).

⁷ General comment no. 34, *supra* note 4, para. 11.

⁸ *Ibid*, para. 12.

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 two 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.

14. In the General Comment No. 34 and in the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the UN Human Rights Committee and the Special Rapporteur have clarified the operative implications of article 19(3), explaining that any such restriction on freedom of expression must meet a strict three-part test:⁹

- a. The restriction imposed must be provided by law, which is clear and accessible to everyone;¹⁰ in particular, the law must be “formulated with sufficient precision to enable an individual to regulate his or her conduct” (emphasis added);¹¹ and,
- 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);¹² and,
- c. The restriction must be proven as the least restrictive and proportionate means to achieve the purported aim (emphasis added).¹³

Restrictions on freedom of expression contemplated in article 19(3)(a) “for the respect of rights and reputations of others” may be engaged to justify certain laws and other measures on defamation. Such measures, however, must be narrowly construed and are strictly subject to the necessity and proportionality test set out by the Committee.

15. In this regard, the Human Rights Committee has assessed whether criminal defamation liability – as opposed to liability for civil defamation – is compatible with the requirements of necessity and proportionality set out in 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”.¹⁴ The Committee, in General Comment No. 34, called on States parties to decriminalize defamation and stressed that “imprisonment is never an appropriate penalty” for defamation.¹⁵

16. The UN Special Rapporteur on Freedom of Opinion and Expression has expressed concern about

⁹ *Ibid*, especially paras. 21-36; 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, para. 64 and 81, available at: <http://www.refworld.org/docid/5008134b2.html>.

¹⁰ *Report of the Special Rapporteur*, 2012, *supra* note 9.

¹¹ General Comment No. 34, *supra* note 4, at para 25.

¹² *Report of the Special Rapporteur*, 2012, *supra* note 9.

¹³ *Ibid*.

¹⁴ UN Human Rights Committee. *Rafael Marques de Morais v. Angola*, *Communication No. 1128/2002*, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), para. 3.9, <https://www1.umn.edu/humanrts/undocs/1128-2002.html>.

¹⁵ General Comment No. 34, *supra* note 4, at para. 47.

the potential for criminal defamation laws to be abused, especially when issues affecting the public interest are involved.¹⁶ 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).¹⁷

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

17. Thailand’s Crime of Defamation, Section 326 and 328 of the *Penal Code*¹⁸ 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.

18. 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.

19. It is respectfully 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 articles 14 and 19 of the ICCPR on the grounds that the sections:

- a. are vague and overbroad so that reasonable persons cannot know in advance how to regulate their conduct to avoid criminal liability for breaching the law.¹⁹ Such vague and overbroad sections contravene the general principle of legality: The wording of section 326 allows any “imputation” to constitute a defamatory statement, as long as it “impairs” a person’s reputation or “expose[s]” them to hate or scorn. This wording gives rise to extremely wide and unlimited interpretations;
- b. impose disproportionately harsh sanctions by applying criminal sanctions when civil remedies are sufficient: Section 326 and 328 allow for punishment by way of imprisonment, as well as a fine. This threat of incarceration has a far greater chilling

¹⁶ Report of the Special Rapporteur, 2012, *supra* note 9, Paras. 78-88 and 97.

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

¹⁸ *Thailand Penal Code*, unofficial English language translation of the *Penal Code* as amended 2011, available at <http://library.siam-legal.com/thai-law/criminal-code-defamation-sections-326-333/>. Relevant sections of the Penal Code have not been amended since that time. The phrase in Section 326 translated as “imputes anything” is better translated as “makes an imputation” or “makes any imputation.”

¹⁹ General Comment No. 34, *supra* note 4, para 25.

effect on freedom of expression than monetary damages;²⁰

- c. inappropriately repress and criminalize the legitimate work of journalists and human rights defenders in informing the public and advocating for protection of human rights: The wide drafting of Section 326 allows for the unfettered targeting of individuals or organizations working under a genuine mandate to raise awareness of 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;”²¹
- d. may violate the presumption of innocence (enshrined by article 14(2) of the ICCPR),²² 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”²³ (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;
- 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 unless the statement is of benefit to the broader public.²⁴ 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).²⁵

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

20. 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).

21. 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*

²⁰ Report of the Special Rapporteur, 1999, *supra* note 17, para. 28.

²¹ *Ibid.*

²² Article 14(2) of the ICCPR. According to the UN Human Rights 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.” UN Human Rights 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>

²³ Report of the Special Rapporteur, 1999, *supra* note 17, para. 28(f).

²⁴ *Penal Code*, section 330.

²⁵ Report of the Special Rapporteur, 1999, *supra* note 17, para. 28(d).

*Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders)*²⁶ 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* sets 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 strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" (article 1, emphasis added);
- 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).

22. On 24 December 2017, Thailand joined the consensus resolution adopted by the UN General Assembly, entitled *Twentieth anniversary and promotion 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*.²⁷ This Resolution "reaffirm[s] the importance of the Declaration [on Human Rights Defenders] and its implementation." It also expresses grave concern about the considerable and increasing number of allegations on the "threats, risks and dangers faced by human rights defenders [...] through restrictions on, inter alia, the rights to freedom of opinion, expression, association or peaceful assembly, and the right to privacy, or through abuse of criminal or civil proceedings." The Resolution underlines that "domestic law and administrative provisions and their application should not hinder but enable the work of human rights defenders, including by avoiding any criminalization, stigmatization, impediments, obstructions or restrictions thereof contrary to the obligations and commitments of States under international human rights law." In paragraph 2, the Resolution directs all States "to take all measures necessary to ensure the rights and safety of all persons, including human rights defenders, who exercise, inter alia, the rights to freedom of opinion, expression, peaceful assembly and association, which are essential for the promotion and protection of human rights." In paragraph 7, the Resolution directs all States "to strongly condemn the violence against and the targeting, criminalization, [...] of any individuals, including human rights defenders, for reporting and seeking information on human rights violations and abuses."

VII Submissions

23. It is respectfully submitted that to ensure good-faith adherence to Thailand's international human rights obligations, Thailand's *Penal Code* must be interpreted in ways that ensure conformity with international human rights law, including the ICCPR, and principles as

²⁶ 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>.

²⁷ UN General Assembly, *Twentieth anniversary and promotion 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 Freedom*, A/RES/72/247, 24 December 2017, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/247

summarized above. It is incumbent of all branches of government, including the judiciary, to ensure respect for these obligations.

24. 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 element of the offence, including proving beyond a reasonable doubt that the defendant failed to make reasonable efforts to ascertain the truth of the statements.
25. Criminal sanctions for defamation are to be avoided, as they contravene the right to freedom of expression guaranteed by international human rights law. In particular, no form of imprisonment or detention is permissible under the ICCPR in cases of criminal defamation. In cases of defamation, civil remedies are the available and proportionate means to achieve the lawful aim of protection of reputation 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.
26. Laws restricting freedom of expression must not be interpreted or applied in ways that prevent or punish the exercise of the right of human rights defenders to protect the public interest by informing the public about possible human rights violations and advocating for improved protection of internationally protected rights.
27. It is submitted that the Court ensure that its interpretation of the law is consistent with the recommendations of the UN Human Rights Committee in its 2017 concluding observations on the second periodic report of Thailand. The Committee expressed concern about "criminal proceedings, especially criminal defamation charges, brought against human rights defenders, activists, journalists and other individuals" and among other things, recommended that Thailand:

"should take all measures necessary to guarantee the enjoyment of freedom of opinion and expression in all their forms, in accordance with article 19 of the Covenant. Any restriction should comply with the strict requirements of article 19 (3), as further developed in the Committee's general comment No. 34 (2011) on the freedoms of opinion and expression, including the strict tests of necessity and proportionality. It should also consider decriminalizing defamation and, in any case, countenance the application of criminal law only in the most serious of cases, bearing in mind that imprisonment is never an appropriate penalty for defamation. The State party should also refrain from using its criminal provisions [...] as tools to suppress the expression of critical and dissenting opinions."²⁸

VIII Conclusion

28. For the reasons stated above, this submission respectfully requests that the Court interpret Thailand's laws in ways that ensure conformity with international human rights law. In particular, we submit that no person should be held criminally liable for defamation, and that individuals should be protected from abusive litigation aimed at curtailing the rights to freedom of expression and access to information and other activities of human rights defenders.

²⁸ UN Human Rights Committee, *Concluding Observations on the Second Periodic Report of Thailand*, 25 April 2017, CCPR/C/THA/CO/2, paras. 35-36, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fTHA%2fCO%2f2&Lang=en.