

The Supreme Court of Thailand

**Black Case No. Aor 3011/2561, Aor 3054/2561 and Red
Case No. Aor 1128/2563, Aor 1129/2563**

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**BRIEF OF AMICUS CURIAE, INTERNATIONAL
JUSTICE CLINIC, UNIVERSITY OF CALIFORNIA,
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I. INTRODUCTION AND INTEREST OF THE AMICUS.	2
II. THE EXPRESSION AT ISSUE IN THE PRESENT CASE IS AT THE HEART OF FREEDOMS THAT THE ICCPR PROTECTS.	3
A. The centrality of public debate and human rights defense in Article 19.	3
B. States have only limited grounds upon which to restrict freedom of expression, while at the same time they must promote it.	4
III. THE ICCPR PRECLUDES CRIMINAL LIABILITY FOR DEFAMATION.	5
A. Criminal defamation cannot be necessary or proportionate to the protection of others' reputation.	5
B. There is a steady global trend to abolish criminal defamation.	6
C. States must, at minimum, establish and robustly apply necessary defenses.	8
IV. HUMAN RIGHTS DEFENDERS DESERVE PROTECTION AGAINST SLAPPS TO ENSURE THAILAND'S COMPLIANCE WITH THE ICCPR.	8
A. SLAPPs are inconsistent with international human rights norms.	9
B. States should be vigilant against SLAPP suits and disallow them in order to comply with their international obligations.	10
C. Thailand's 2019 National Action Plan on Business and Human Rights provides a roadmap from which this Court may draw in developing a response to this case.	12
V. CONCLUSION	13

I. INTRODUCTION AND INTEREST OF THE AMICUS.

The International Justice Clinic (“IJC”) at the University of California, Irvine School of Law, directed by former United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Professor David Kaye, respectfully submits this brief as amicus curiae to the Supreme Court of Thailand. The case before this court, Black Case No. Aor 3011/2561, Aor 3054/2561 and Red Case No. Aor 1128/2563, Aor 1129/2563, involves criminal defamation charges brought against Nan Win and Sutharee Wannasiri by Thammakaset Company Limited.

The International Covenant on Civil and Political Rights (“ICCPR”), which Thailand ratified on October 29, 1996, establishes the obligations of State parties to respect and ensure *inter alia* the rights to freedom of opinion (Article 19(1)) and freedom of expression (Article 19(2)). The Human Rights Council, the central human rights institution of the UN, has affirmed that freedom of opinion and expression is “essential for the enjoyment of other human rights and freedoms and constitutes a fundamental pillar for building a democratic society and strengthening democracy.”¹ As a State party, Thailand is bound to uphold these obligations “in good faith” and may not invoke “the provisions of its internal law as justification for its failure to perform a treaty.”²

IJC promotes international human rights law at national, regional, international, and corporate levels, in the United States and globally. Professor Kaye has written extensively on the enjoyment and protection of human rights, while IJC has extensive experience with legal issues surrounding freedom of expression, especially in addressing threats to human rights in the digital realm.

The laws and practices at issue in this case raise critical issues concerning their compatibility with international human rights law and the degree to which they infringe upon the fundamental rights to freedom of opinion and expression. In the present case, expression of the kind given the highest value under the ICCPR is being threatened by a private party through what is widely known as a Strategic Lawsuit Against Public Participation (“SLAPP”), an abusive use of litigation to stifle dissent or criticism. Moreover, the defendants are facing criminal liability, which has, if imposed, a chilling effect over public debate in Thailand.

¹ Human Rights Council Res. 23/L.5, para. 2, U.N. Doc. A/HRC/23/L.5 (April 9, 2014).

² Vienna Convention on the Law of Treaties, arts. 26-27, 1155 U.N.T.S. 331 (May 23, 1969).

II. THE EXPRESSION AT ISSUE IN THE PRESENT CASE IS AT THE HEART OF FREEDOMS THAT THE ICCPR PROTECTS.

A. The centrality of public debate and human rights defense in Article 19.

Article 19 of the ICCPR guarantees everyone the right 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.”³ The Human Rights Committee, the expert monitoring body for the ICCPR, stated in its highly regarded interpretation of Article 19, General Comment No. 34, that the right to freedom of expression includes “all forms of audio-visual as well as electronic and internet-based modes of expression.”⁴

Human rights defenders like the two defendants, who advocate the promotion and protection of labor, civil, political and other rights, play a special role in the global framework for international human rights.⁵ They investigate, gather information regarding, and report on human rights violations. Many human rights defenders work to secure accountability in the face of violations of fundamental legal standards.⁶ Some work to support rights-respecting government policy and contribute to the implementation of human rights treaties. In Resolution 17/4 (2011), the Human Rights Council recognized the valuable role played by independent civil society organizations and human rights defenders in protecting fundamental freedoms.⁷

The Human Rights Council also recognizes the importance of expression that communicates information and ideas about political issues or matters of importance to the public.⁸ Because the rights embodied in the ICCPR are interrelated, the right to freedom of expression exercised by human rights defenders is crucial for protecting other rights. In explaining this connection between freedom of expression and the other rights in the ICCPR, the Human Rights Committee has emphasized that “freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”⁹ Similarly, UNESCO has stated, “[w]ithout a free flow of information, and the help of the media in this effort, most cases of malpractice, corruption and human rights violations would remain hidden.”¹⁰ An attempt to censor a human rights defender notifying the public about labor violations would implicate not only the right to

³ U.N. General Assembly, International Covenant on Civil and Political Rights, (Dec. 16, 1966).

⁴ Human Rights Committee, General Comment 34: Article 19: Freedom of Opinion and Expression, CCPR/C/GC/34, para. 12, (Sept. 12, 2011) (hereinafter General Comment 34).

⁵ Special Rapporteur on Human Rights Defenders, *About Human Rights Defenders*, OHCHR, <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/about-human-rights-defenders>.

⁶ *Id.*

⁷ H.R.C. Res. 17/4 (Jul. 6, 2011).

⁸ General Comment 34, *supra* note 4, at para. 13.

⁹ *Id.* at para. 3.

¹⁰ UNESCO, *World Press Freedom Day 2023, Shaping a Future of Rights: Freedom of expression as a driver for all other human rights*; draft concept note, CI-2023/FEJ/WPFD/1, (2023).

freedom of expression, but the interdependent issues of labor rights and the public's right to receive information.

B. States have only limited grounds upon which to restrict freedom of expression, while at the same time they must promote it.

Under Article 2 of the ICCPR, the obligations under the ICCPR are binding on every State party and on every branch of the State's government, including executive, legislative and judicial branches.¹¹ States Parties are required by Article 2(1) to *refrain* from violating individuals' rights by itself or its agencies and to *ensure* the enjoyment of the rights guaranteed. Specifically, a state must not restrict individual rights to freedom of expression, unless it demonstrates that the restriction falls under the narrow circumstances which Article 19(3) specifies. Any restriction of freedom of expression must satisfy the three-part test of legality, legitimacy, and necessity.

- The first requirement, legality, requires that a restriction be "provided by law." Any such restriction on freedom of expression must be based on law that is itself accessible and understandable to the public, so that individuals can comply with it and "regulate [their] conduct accordingly."¹²
- The second prong, legitimacy, requires that any restriction address one of the needs enumerated in Article 19(3): for respect of the rights or reputations of others, for the protection of national security or of public order (*ordre public*), or of public health or morals.
- The third and final prong that a restriction must satisfy is the necessity requirement, intertwined with the requirement of proportionality. Necessity dictates that states only take measures strictly necessary to accomplish the legitimate interest, in order not to render void the underlying right. A restrictive measure must also constitute the least intrusive means of achieving the legitimate interest, and must be directly related to the specific need of the state.¹³

The positive obligation embedded in the ICCPR 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"¹⁴ This responsibility to ensure and protect also requires States parties to prevent any abuse of the legal system to curtail the freedom of expression of human rights defenders and others. A State party "permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the

¹¹ Human Rights Committee, General comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, Para. 4(May 26, 2004) (hereinafter General Comment 31).

¹² *Id.*

¹³ *Id.*

¹⁴ General Comment 34. *See also* Human Rights Committee, communication No. 633/1995, Gauthier v. Canada, Views adopted on April 7, 1999.

harm” caused by “acts committed by private persons or entities that would impair the enjoyment of Covenant rights” would thus also constitute a violation of the ICCPR.¹⁵

Human Rights Council Resolution 17/4 further notes that States must protect against threats to and interference with human rights defenders by third parties, including business enterprises.¹⁶ Resolution 22/6 (2013) further emphasizes that domestic law should create a safe and enabling environment for the work of human rights defenders.¹⁷ Principles 18 and 26 of the U.N. Guiding Principles of Business and Human Rights, the Human Rights Council-endorsed principles applicable in the context of business interference with the enjoyment of human rights, recognize the importance of human rights defenders and state that legitimate activities of human rights defenders should not be obstructed.¹⁸

III. THE ICCPR PRECLUDES CRIMINAL LIABILITY FOR DEFAMATION.

A. Criminal defamation cannot be necessary or proportionate to the protection of others’ reputation.

Defamation has been defined as “an intentional false communication that injures another person’s reputation . . . without the consent of the allegedly defamed person.”¹⁹ While civil defamation laws are common around the world to protect the “rights or reputations of others”, overbroad, vague or punitive defamation claims risk infringing the right to freedom of expression, and have accordingly come under increasing scrutiny by the Human Rights Committee, international and domestic courts, and human rights legal experts.

It is important to note that *criminal* defamation is widely understood not to satisfy the tests of necessity and proportionality under Article 19(3). Because civil defamation suits still remain available to claimants even in the absence of criminal defamation claims, criminal sanction could never be the “least intrusive means” of accomplishing a legitimate end and is furthermore a disproportionate measure. The Human Rights Committee has urged States to “consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and,” the Committee adds, “imprisonment is never an appropriate penalty.”²⁰ These recommendations are informed by the danger of defamation becoming weaponized as a pretext to silence participation in public discourse.

¹⁵ General Comment 31, *supra* note 11, at para. 8.

¹⁶ H.R.C. Res. 17/4 (Jul. 6, 2011).

¹⁷ H.R.C. Res. 22/6 (Apr. 12, 2013).

¹⁸ Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/7/31, Guiding Principle 18 and 26 (Mar. 21, 2011), https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁹ Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Ambeyi Ligabo, Civil and Political Rights, Including the Question of Freedom of Expression, UN. Doc. E/CN.4/2006/55, para. 45, (Dec. 30, 2005).

²⁰ General Comment 34, *supra* note 4, at para. 47.

B. There is a steady global trend to abolish criminal defamation.

Since 1992, at least 30 states have decriminalized defamation.²¹ Many others have abolished imprisonment as a penalty, or decriminalized defamation on matters of public interest.²² However, the trend against criminal defamation goes beyond legislative actions, and courts have taken measures to combat the practice around the world. To give examples, the African Court of Human and People's Rights,²³ European Court of Human Rights,²⁴ and Inter-American Court of Human Rights²⁵ have all issued rulings limiting criminal defamation or deeming it inconsistent with the right to freedom of expression. In *Federation of African Journalists (FAJ) and others v. The Gambia*, the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) held that the offense of criminal defamation in The Gambia's Criminal Code violated the right to freedom of expression under Article 19 of the ICCPR, and the Court ordered The Gambia to decriminalize the offense of defamation in its legislation.²⁶ The ECOWAS Court stated that "[t]he practice of imposing criminal sanctions on ... defamation ... has a chilling effect that may unduly restrict the exercise of freedom of expression" and further found that "the application of these laws will amount to a continued violation of ... internationally guaranteed rights."²⁷ The Gambian Supreme Court subsequently declared criminal defamation unconstitutional.²⁸

The landmark decision from the European Court of Human Rights (ECtHR) of *Lingens v. Austria* held that a privately filed defamation prosecution violated the right to freedom of expression.²⁹ While *Lingens*, like other ECtHR cases, relied on Article 10 of the European Convention on Human Rights rather than the ICCPR,³⁰ that case also applied the three-part test of legality, legitimacy, and necessity, similar to the one found in Article 19(3) of ICCPR. In evaluating the verifiability of a journalist's claims, the *Lingens* court found that that criminal defamation suit was not "necessary ... for the protection of the reputation ... of others" and disproportionate to any legitimate aim.

²¹ Article 19, *Truth Be Told: criminal defamation in Thai law and the case for reform*, (Mar. 2021).

²² *Id.*

²³ AfCHPR, *Lohé Issa Konaté v. The Republic of Burkina Faso*, App. No. 004/2013 (2014).

²⁴ ECtHR, *Castells v. Spain*, App. No. 11798/85 (1992).

²⁵ IACtHR, *Kimel v. Argentina*, ser. C No. 177 (2008).

²⁶ ECOWAS, *Federation of African Journalists v. The Gambia*, ECW/CCJ/APP/36/15 (2018).

²⁷ *Id.*

²⁸ Johnson, Hawley, *Lohé Issa Konaté v. Burkina Faso: A Tipping Point for Decriminalization of Defamation in Africa, Regardless of Frontiers: Global Freedom of Expression in a Troubled World*, edited by Agnes Callamard and Lee Bollinger, New York Chichester, West Sussex: Columbia University Press, 2021, pp. 357-368, <https://doi.org/10.7312/boll19698-021>.

²⁹ ECtHR, *Lingens v. Austria*, App. No. 9815/82 (1986).

³⁰ Article 10 of the Convention echoes much of the ICCPR's language. It establishes the right to "to receive and impart information and ideas without interference by public authority and regardless of frontiers." Article 10(2) similarly establishes the narrow circumstances of permissible restrictions, in much the same language as the ICCPR.

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, ETS 5 (Nov. 4, 1950).

Courts in domestic settings have adopted similar approaches. For instance, in *Madanhire v. Attorney General*,³¹ the Constitutional Court of Zimbabwe declared the offense of criminal defamation as unconstitutional and inconsistent with the protection of freedom of expression in a case where a journalist made public criticisms of a private company. That court was relying on national constitutional law, but reasoned that the existence of civil suits made the use of criminal defamation “unnecessary, disproportionate, and therefore excessive.”³² This reasoning also animated the U.K. case of *Gleaves v. Deakin*, where one justice suggested that “the civil action for damages for libel and on injunction provides protection for the reputation of the private citizen without the necessity for any interference by public authority with the alleged defamer’s right to freedom of expression.”³³

This body of law demonstrates the emerging consensus that criminal defamation is incompatible with a state’s obligations under Article 19 of the ICCPR. The cases repeatedly focus on the animating principle of a “chilling effect,” the idea that criminal defamation will dissuade lawful future expression. The legal rulings of the cases rely on the legal standards of legality, legitimacy and proportionality, applying the ICCPR in some cases, and applying other international instruments or national constitutions in other cases. The pattern from courts around the world shows criminal defamation as an unnecessary and disproportionate means of accomplishing any legitimate aim.

C. States must, at minimum, establish and robustly apply necessary defenses.

In the absence of repeal of criminal defamation, the Human Rights Committee has specified a number of defenses that should remain available to defendants, in light of the myriad dangers of criminal defamation laws. General Comment 34 states that a truth defense should be available to parties.³⁴ Furthermore, the Comment warns that information that is not falsifiable as true or false should not be subject to defamation claims.³⁵ The Committee also states that there should be a viable defense of public interest in the subject matter of the alleged defamation, and that this defense should apply even to statements made in error but without malice.³⁶

Although Thai criminal law already incorporates these defenses in Article 329, they must be robustly applied in cases like the present one in order to prevent the abusive use of criminal defamation.

³¹ *Zim., Madanhire v. Attorney Gen.*, ZWCC 2 (Jun. 12, 2014).

³² *Id.*

³³ *Gleaves v. Deakin*, AC 477 (1980).

³⁴ General Comment 34, *supra* note 4, at para. 47.

³⁵ *Id.*

³⁶ *Id.*

We would encourage the Court to take note of the trends away from criminal defamation and, at a minimum, ensure that the defenses identified by the Human Rights Committee are available to all victims of such claims.

IV. HUMAN RIGHTS DEFENDERS DESERVE PROTECTION AGAINST SLAPPS TO ENSURE THAILAND’S COMPLIANCE WITH THE ICCPR.

We are particularly concerned that the defamation suit at issue in this case exhibits exactly those signs of an effort to silence a migrant worker who exercised his right to protect his legitimate interest and a human rights defender who expressed criticism of the corporate practices that have violated labor protection laws. These types of lawsuits are typically referred to as SLAPPs. We thus urge the Court to recognize this in its judgment.

As a particularly nefarious kind of defamation suit, SLAPP lawsuits have at their core the intention of silencing or intimidating critics by burdening them with the cost of legal defense and lengthy court procedures. SLAPPs are often filed under the pretext of defamation, but their true purpose is to discourage the exercise of freedom of expression and chill public participation in matters of public concern, such as protections of labor rights and the rights to freedom of expression. SLAPPs generally have unreasonably expensive claims for damages and their allegations are designed to harass and overwhelm human rights advocates.³⁷ One research institute identified 355 cases brought from January 2015 to May 2021 globally as meeting the definition of SLAPPs.³⁸ A total of 224, nearly 63% of these SLAPP cases, were criminal cases involving libel or defamation.³⁹ A separate report found 212 SLAPP cases in Thailand from 1997 to 2019, 196 of which were criminal cases with potentially severe consequences including imprisonment.⁴⁰ UN experts, focused specifically on Thailand, have stated that “[t]he cases filed by companies, such as Thammakaset Company Limited, against human rights defenders are a clear example of businesses abusing the legal system in order to censor, intimidate, and silence criticism through SLAPPs as a method of judicial harassment.”⁴¹

According to a report on SLAPPs and Freedom of Assembly and Association by the former U.N. Special Rapporteur on freedom of peaceful assembly and association, “the vulnerability of an environment for SLAPPs depends on a variety of factors, including expense borne by defendants, private initiation of criminal defamation claims, vagueness of defamation

³⁷ Ciampi, Annalisa, *SLAPPs and FoAA Rights*, OHCHR, <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>.

³⁸ Business and Human Rights Resource Center, *SLAPPed but not Silenced*, June 2021), https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v51.pdf.

³⁹ *Id.*

⁴⁰ Bangkok Post, *Slapped into Silence*, (Jul. 20, 2020), <https://www.bangkokpost.com/business/1954199/slapped-into-silence>.

⁴¹ Article 19, *UN Experts concerned by systematic use of SLAPP cases against human rights defenders by businesses*, (Dec. 16, 2022), <https://www.ohchr.org/en/press-releases/2022/12/un-experts-concerned-systematic-use-slapp-cases-against-human-rights>.

law, and limited safeguards.”⁴² Each of these elements has been at issue in the instant case, in which the defendants have borne significant costs, faced with a privately initiated criminal case under vaguely-worded defamation laws and with limited safeguards actually applied by courts. We believe there is scope for this Court to limit the harms in these kinds of abuses.⁴³

A. SLAPPs are inconsistent with international human rights norms.

SLAPPs chill freedom of expression by imposing excessive costs and lengthy proceedings on journalists, human rights defenders, and others who are attempting to impart information as guaranteed under international human rights law. As a result, courts should be particularly mindful of the harassing uses of defamation claims that powerful entities often bring against journalists, critics, human rights defenders and others who are participating in public discourse. According to the U.N. Special Rapporteur’s report, “SLAPPs aim to shut down freedom of expression by intimidating critics into silence and draining their resources. They resort to motions, injunctions, and other procedurally onerous processes (particularly the expensive and resource-intensive discovery/disclosure process) to impose heavy burdens on activists and civil society organizations.”⁴⁴

B. States should be vigilant against SLAPP suits and disallow them in order to comply with their international obligations.

As noted above, states have a positive obligation under ICCPR Article 2 to ensure enjoyment of all of the rights guaranteed under ICCPR.⁴⁵ In this context, courts and legislatures should be particularly mindful of how SLAPPs interfere with fundamental rights and thus may take positive measures – for instance, adopting rules to limit the availability of such claims, or subjecting such onerous and abusive claims to sanction – in order to fulfill the State’s obligations to promote and protect, in this context, freedom of expression.

In recent years, there has been a growing recognition of the harmful effects of SLAPPs, and many countries have taken steps to curb their use. Some have enacted laws to protect individuals and organizations from SLAPP suits, while others have strengthened existing laws to provide greater protection. For example, in the United States, several states have enacted anti-SLAPP laws that allow defendants to seek quick dismissal of such lawsuits and recover their

⁴² Ciampi, Annalisa, *SLAPPs and FoAA Rights*, OHCHR, <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>.

⁴³ Thailand has safeguards in anti-SLAPP provisions enshrined in Section 161/1 and 165/2. Section 161/1 provides courts the power to dismiss cases filed by private parties with the intention to “harass or take undue advantage of a defendant, or to procure any advantage to which the complainant is not rightfully entitled.” Section 165/2 allows defendants to submit evidence during a preliminary hearing showing that a case “lacks merit.”

⁴⁴ *Supra* note 42.

⁴⁵ General Comment 34, *supra* note 4, at para. 8.

legal fees.⁴⁶ According to one assessment, although anti-SLAPP protections vary significantly from state to state, the common protections are broad enough to cover SLAPP suits aimed at silencing or retaliating against journalists or news outlets for critical reporting.⁴⁷ This includes protections for comments of public interest, such as reporting on human rights violations.

Other countries have also adopted anti-SLAPP provisions. In 2010, the Philippines passed an anti-SLAPP law.⁴⁸ The Supreme Court of the Philippines enacted Rules of Procedure for Environmental Cases, and in those rules, define SLAPP as “legal action[s] filed to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights.”⁴⁹ The law gives plaintiffs the opportunity to bring cases that they believe are SLAPPs, and the court shifts the burden on the defendants to demonstrate the lawsuit is not a SLAPP.⁵⁰

In 2015, the legislature of Ontario, Canada adopted a law to deal with SLAPPs.⁵¹ The law was interpreted by the Ontario Superior Court in 2016, adopting a three-part test to address SLAPPs.⁵² First, the Court said, the plaintiff must show that “there is credible and compelling evidence supporting the claim as being a serious one with a reasonable likelihood of success.”⁵³ Second, the Court must find that “there is a reasonable probability that none of the defences [proffered by the Defendant(s)] would succeed...[at] Trial.”⁵⁴ Third, the plaintiff must “produce credible and compelling evidence of harm that appears reasonably likely to be proven at trial.”⁵⁵

In 2022, the South African Constitutional Court provided protections for activists against SLAPP suits.⁵⁶ After a five-year court battle arising from defamation claims against five activists and public interest lawyers, a ruling handed down by the South African Constitutional Court “recognise[d] SLAPP as an abuse of process, and carve[d] out a limitation to trading corporations’ ability to claim damages for reputational harm.”⁵⁷

⁴⁶ Public Participation Project, *State Anti-SLAPP Laws*, <https://anti-slapp.org/your-states-free-speech-protection>.

⁴⁷ Reporters Committee for Freedom of the Press, *Anti-SLAPP Legal Guide*, <https://www.rcfp.org/anti-slapp-legal-guide/#::~:~:text=Anti%20DSLAPP%20laws%20provide%20defendants,%2C%20petition%2C%20or%20association%20rights>.

⁴⁸ OHCHR, *Philippines Rules of Procedure in Environmental Cases*, https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/GoodPractices/E/National%20courts/Philippines_-_rules_of_procedure_for_environmental_cases.docx.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Cambridge LLP, *Ontario Anti-SLAPP Law*, <https://www.cambridgellp.com/publications/ontario-anti-slapp-law-2/>.

⁵² *Id.*

⁵³ *Able Translations Ltd. v. Express International Translations Inc.*, O.J. No. 5740 (2016).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *South African Constitutional Court provided new protections for activists against SLAPP suit*, Centre for Environmental Rights, (Nov. 15, 2022),

<https://cer.org.za/news/south-african-constitutional-court-provides-new-protection-for-activists-against-slapp-suits>.

⁵⁷ *Id.*

Additionally, in 2022, the European Commission presented a proposal for “a directive aimed at protecting persons who engage in public participation against manifestly unfounded or abusive civil court proceedings.”⁵⁸ The proposal aims to tackle the issue of SLAPPs surrounding the deteriorating situation about the protection of journalists by offering “a non-binding recommendation setting out guidance for Member States to take effective measures to address purely domestic SLAPPs.”⁵⁹ The proposal “calls on Member States to remove prison sentences for defamation from their legal framework, favour the use of administrative or civil law to deal with defamation cases, strike a fair balance between data protection rules and the protection of freedom of expression and information, and ensure that deontological rules for legal professionals discourage SLAPPs.”⁶⁰

We urge this Court to consider this trend and the approach taken against SLAPPs in other courts globally in order to restrict the availability of SLAPPs such as the one involved in this case.

C. Thailand’s 2019 National Action Plan on Business and Human Rights provides a roadmap from which this Court may draw in developing a response to this case.

The Government of Thailand has, to its credit, acknowledged the problem posed by abusive criminal defamation suits. Its landmark adoption of a National Action Plan on Business and Human Rights in 2019 set a precedent for human rights standards in the Asia-Pacific region.⁶¹ The Action Plan “acknowledged that plaintiffs have often filed cases in bad faith in an attempt to ‘bully’ human rights defenders and others.”⁶² Protecting human rights defenders is one of the priority areas in Thailand’s National Action Plan on Business and Human Rights. However, Thailand’s actions taken to date, including those cited in the National Action Plan, have been insufficient in stemming the tide of criminal defamation SLAPPs.⁶³ As such, during the 2021 and 2022 annual forums on Business and Human Rights, noting that Thailand was the first country in the Asia-Pacific region to publish a National Action Plan on Business and Human Rights, UN experts have urged the Thai Government to implement the guidance of the Working Group on Business and Human Rights to ensure and respect the rights of human rights defenders.⁶⁴

⁵⁸ European Parliament, *Strategic Lawsuits Against Public Participation*, (Sept. 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI\(2022\)733668_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI(2022)733668_EN.pdf).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Supra* note 41.

⁶² Article 19, *Thailand: Decriminalise Defamation*, (Mar. 31, 2021), <https://www.article19.org/resources/thailand-decriminalise-defamation/>.

⁶³ Article 19, *Thailand: Act to prevent spurious lawsuits against human rights defenders*, (Jun. 12, 2020), <https://www.article19.org/resources/thailand-act-to-prevent-spurious-lawsuits-against-human-rights-defenders/>.

⁶⁴ *Supra* note 41.

In practice, human rights defenders who have been subjected to SLAPP suits by private companies have filed the motion to the court to consider these preventative provisions under the Thai Criminal Procedure Code.⁶⁵ However, Thai courts have rejected their motions and, to this date, no SLAPPs lawsuits have been dismissed early based on these provisions.⁶⁶ In a case involving a group of Thammakaset’s former employees, the court acknowledged the receipt of the request for an application of Article 161/1, but never referenced the request afterwards.⁶⁷ In another case concerning three female human rights defenders, the court reviewed the request for applications of Article 161/1 and decided not to dismiss the case, continuing on to preliminary hearings.⁶⁸ These cases demonstrate an emerging pattern where lower courts fail to apply the anti-SLAPP provisions, making them unable to address the existing issue of SLAPPs.

As part of the National Action Plan, Thailand cited the importance of amendments to the Thai Criminal Procedure Code as demonstrating the government’s commitment to addressing this problem. The amendments of December 2018 were in regard to Sections 161/1 and 165/2 of the Thai Criminal Code, which adopted provisions for judges that could be used to dismiss criminal cases against those acting in public interest. Section 161/1 provides the Court with tools to dismiss lawsuits that “arise from ill intentions to harass or take advantage over a person.”⁶⁹ This tool is important because SLAPPs are specifically intended to burden defendants with the litigation process itself. Subjective intent and motive of the plaintiff would inform the Court of whether or not the lawsuit was intended to harass or take advantage of the human rights defender. Section 165/2 “allow[s] the accused to present legal and evidentiary arguments during the preliminary examination of the Court where they previously could not.”⁷⁰ This amendment allows for the Court to dispose of cases early in the process.

We would urge this Court to recognize in its judgment that SLAPPs are meant to burden human rights defenders with time and expense in court. Where SLAPPs are not rejected and penalized in the earliest phases of litigation, their nefarious purpose is already achieved. Allowing the court to dispose of cases early in the process helps human rights defenders curb the arduous process of litigation for exercising their freedom of expression.

⁶⁵ International Commission of Jurists, *Thailand: ICJ submits recommendations to strengthen Thailand’s Anti-SLAPP Law*, (Mar. 20, 2020), <https://www.icj.org/thailand-icj-submits-recommendations-to-strengthen-thailands-anti-slapp-law/>.

⁶⁶ *Id.*

⁶⁷ *Thammakaset Co. Ltd. v. Ms. Ka Thway Soe et al* (Black Case Number Aor. 667/2562).

⁶⁸ *Thammakaset Co. Ltd. v. Ms. Puttanee Kangkun* (Black Case Number Aor. 2876/2562); *Thammakaset Co. Ltd. v. Ms. Angkhana Neelaphaijit* (Black Case Number Aor. 2492/2562); *Thammakaset Co. Ltd. v. Ms. Ngamsuk Ruttanasatian* (Black Case Number Aor. 1133/2562).

⁶⁹ UPR Info, *Highlights of Thailand’s implementation of recommendations and voluntary pledges under the second cycle of the Universal Periodic Review 2016-2018 (Mid-term update)*,

<https://www.upr-info.org/sites/default/files/documents/2019-08/thailandimplementation2ndcycle.pdf>.

⁷⁰ *Id.*

V. CONCLUSION

This case presents an opportunity for the Court to address the continuing threat of litigation against workers, human rights defenders, journalists and others operating in promoting and protecting the public interest in Thailand. Drawing from Thailand's international obligations under the ICCPR, the global trend moving away from criminal defamation, and Thailand's commitment to implement the UN Guiding Principles on Business and Human Rights and the development of its own National Action Plan on Business and Human Rights, this Court has ample bases to reject criminal defamation in this case and to lay down human rights-compliant standards for the future.