

Independent Trial Observer Report
International Centre for Trade Union Rights
Special Prosecution Office v Mr. Andrew Jonathan Hall
Criminal Defamation
Bangkok, Thailand
2 - 10 September 2014 and 29 October 2014

Introduction

1. This is the report of the trial of Mr. Andrew Jonathan Hall (Mr Hall) for criminal defamation from 2 to 10 September 2014 and 29 October 2014 at the Phrakanong Provincial Court, Bangkok, Thailand (the trial) by Australian lawyer Mr Mark Plunkett prepared for the International Centre for Trade Union Rights (ICTUR).

Thailand's Food Export Industry

2. Thailand is one of the world's largest producers of food products, ranking sixth among the world's top agri-food exporters. It is the largest food exporter in Asia with 60 per cent of exports to other Asian countries, 13 per cent to the European Union and 13 per cent to the United States of America.
3. By 2008 Thailand was the world's major exporter of canned tuna and canned pineapple and is ranked as the world's top pineapple exporting country with 40 to 50 percent of market share.
4. In 2014 Thai food exports are worth US\$31bn (a seven per cent increase from the previous year).

Thailand's Migrant Workforce

5. To achieve this extraordinary food production, Thailand is reliant on migrant workers, from neighbouring Laos, Cambodia and Myanmar (Burma).
6. Thailand has a national labour force of 33 million people. There are 2.5 million migrant workers (estimated 1.5 million unregistered), 80 per cent of whom come from Burma. Generally the migrant workers are engaged in physically demanding industries of agriculture and construction working for a minimum wage of 300 Baht (approx US\$10) per day.¹

The Natural Fruit Company Ltd

7. In 1967 the Thai pineapple processing industry commenced in the Prachuap Khiri Khan Province of Thailand.

¹ The US Department of State, *2014 Trafficking in Persons Report* stated there are an estimated two to three million migrant workers in Thailand, most of whom are from Burma. The majority of the trafficking victims within Thailand— tens of thousands of victims, by conservative estimates—are migrants from Thailand's neighboring countries who are forced, coerced, or defrauded into labour or exploited in the sex trade:
<http://www.state.gov/documents/organization/226849.pdf>

8. In this province located at Pranburi is a factory owned and operated by the Natural Fruit Company Ltd which produces canned pineapple and pineapple juice concentrate (the factory).
9. The Natural Fruit Company Ltd is one of the largest pineapple processors and wholesalers in Thailand. Its factory employs 854 workers consisting of 243 Thai citizens and some 610 migrant workers from Burma.

Mr Andy Hall

10. Mr Hall is a 34 year year old Lincolnshire-born citizen of the United Kingdom.
11. He is a graduate from University College London with a 1st Class Honours Bachelor of Laws degree and he studied for a PhD from the Centre for Business Relationships, Accountability, Sustainability and Society (BRASS) at Cardiff University, Wales and studied at the Criminology Department at the University of Melbourne. His thesis was on occupational health and safety (OHS) laws relating to organisational criminal responsibility for industrial deaths. For his studies, Mr Hall has been won several academic scholarships and prizes.
12. In 2004, while backpacking through northern Thailand, Mr Hall met Burmese construction workers who, after suffering workplace injuries, were left without medical or financial support.
13. Since then, Mr Hall has worked on workers' rights in Thailand and Burma, and is attached to Mahidol University as an Associate Researcher and Foreign Expert in the Institute for Population and Social Research. Mr Hall has published many learned articles in scholarly journals on migrant workers in Thailand.
14. As a migrant rights advocate, Mr Hall has conducted workplace audits on a range of Thai agribusinesses.

Finnwatch

15. Since 2002 Finnwatch, a Finnish based Non Government Organisation, has been concerned with global corporate responsibility seeking to promote ecologically, socially and economically responsible business. As a consumer watchdog, Finnwatch has researched the ethics of the global food supply chain.

Halvalla on hintansa

16. At the trial, the evidence from the prosecution and the defence established common ground between the parties about the events which gave rise to the criminal charges against Mr Hall.
17. In 2012, Finnwatch investigated the origins of food products sold under

private labels in Finnish grocery stores. This led Finnwatch to investigate the labor practices of two Thai tuna companies and one Thai pineapple company, which was the Natural Fruit Company Ltd.

18. In November 2012 Finnwatch engaged Mr Hall to conduct field research in Thailand involving the conduct of confidential interviews with employees of the factory. Finnwatch stated that 12 workers from the factory were interviewed.
19. On 21 January 2013, Finnwatch, published the results of its investigation in a report entitled “*Halvalla on hintansa*” (Cheap has a high price) *Responsibility problems relating to international private label products and food production in Thailand*” (the report).
20. Prior to publication Finnwatch shared its findings with the Thai and Finnish governments. The NGO also discussed its pre-publication findings with the two tuna companies, and included details of their responses in the final publication.
21. At the trial Finnwatch gave evidence that it had tried to obtain a response from the Natural Fruit Company Ltd. The Natural Fruit Company Ltd denied that it had received any prior notification from Finnwatch or from Mr Hall before the report was released.
22. At the trial evidence was given that the report alleged that in the tuna and pineapple industries of Thailand there were labour violations of:
 - (a) smuggling undocumented migrant workers;
 - (b) child labour;
 - (c) payment below the minimum wage required by law;
 - (d) forced and excessive overtime;
 - (e) confiscation of migrant workers’ passports and work permits;
 - (f) violence against migrant workers;
 - (g) deductions from wages for accommodation, water, electricity, work clothing resulting in debt bondage.²
23. Upon publication of the report and at the trial, The Natural Fruit Company Ltd denied these allegations stating that they were entirely false.
24. In January 2014 Finnwatch published a follow-up report which alleged the previously researched companies still failed to remedy alleged abuses reported in the original report.
25. At the trial the evidence from both the prosecution and the defence was that Finnwatch alleged at the factory of the Natural Fruit Company Ltd:

² Sonja Vartiola et al, Executive Summary, *Cheap Has a High Price* (Finland: Finnwatch, January 2013), <http://finnwatch.org/en/news/80-finnwatch-reveals-serious-human-rights-violations-behind-european-food-brands>; Sonja Vartiola, *Out of a Ditch, into a Pond: Follow-up Research on the Effects of the Finnwatch Report Cheap Comes with a High Price* (Finland: Finnwatch, February 2014), http://oppenheimer.mcgill.ca/IMG/pdf/Finnwatch_-_PLF_ENG.pdf.

- (a) there were labour violations (which is denied by the Natural Fruit Company Ltd);
 - (b) that workers said the company confiscated work permits, prevented workers from changing employer and made deductions from unlawful salaries (which is denied by the Natural Fruit Company Ltd);
 - (c) investigations by Thai officials confirmed that problems still persisted (which is denied by the Natural Fruit Company Ltd).
26. At the trial Finnwatch and Mr Hall gave evidence that had tried to contact the Natural Fruit Company Ltd during the course of the research to discuss preliminary findings, but the company did not respond to these requests.
27. At the trial representatives of the Natural Fruit Company Ltd gave evidence that it had not been invited to comment prior to publication.
28. On 28 January 2013 and 4 February 2013 the Thai Ministry of Labour conducted inspections at the factory and interviewed six Burmese workers.
29. By a letter dated 22 August 2013 the Royal Thai Embassy in London wrote to the Burma Campaign UK in London attaching a report entitled: “The outcome of the inspection by the Ministry of Labour of Thailand regarding the alleged human rights of violation by the Natural Fruit Company.”
30. After setting out the background of the investigation, the document in effect exonerated the Natural Fruit Company Ltd of nine allegations that were dealt with concerning the “hiring of illegal migrant workers and child labour”, “the payment of daily and monthly wages, as well as overtime payment, at the rates below the legal minimum requirements”; “workers are not given holidays or appropriate welfare”, “confiscation of passports and refusal to return them when the workers want to resign or change their employers”, “wage deduction for water and electricity fees, transportation fee, uniform, ID card and other items”, “workers losing the whole day’s pay when they are unable to work for the full day or when the company has no work for the workers”, “forced overtime work exceeding 36 hours per week”, “migrant workers do not possess social security card or health insurance in accordance with the law and are not allowed to choose hospitals of their choice, insufficient toilets and overtime pay deduction for extended toilet use” and the company “does not provide compensation for work-related accidents in accordance with the law (compensation fund)”.
31. By a letter dated 20 May 2013 in reply to the Ambassador of Thailand, Finnwatch challenged the validity of these findings. Finnwatch questioned the methodology and that it was limited to interviews with 6 workers. Finnwatch asked whether management was notified beforehand or was present during the interviews. Finnwatch argued that the Labour Department’s report failed to address all issues, and submitted that it did reveal labour irregularities.

Al Jazeera interview of Mr Hall on YouTube

32. The centre piece of the prosecution case was an internet YouTube video interview of Mr Hall of 2 minutes and 12 second duration. Mr Hall is seen and heard to make the representations which were the basis of the criminal charge of defamation against him.
33. YouTube is a video-sharing website headquartered in San Bruno, California, USA, which allows registered users to upload an unlimited number of videos without a fee for viewing by anybody accessing the internet.
34. Al Jazeera Media Network (الجزيرة) is a Qatar broadcaster based at Doha owned by the Al Jazeera Media Network.
35. Mr Wayne Hay, was a Bangkok based Al Jazeera journalist.
36. My Hay interviewed Mr Hall at the Inya Lake Hotel, Yangon, Burma about the Finnwatch report.
37. In June 2013, an unknown person caused to be uploaded to YouTube the video of Mr Hay's interview of Mr Hall, which was entitled:
"Migrants work in poor conditions in Thailand. British human rights activist Andy Hall has worked to help improve conditions for migrant workers in Thailand for years."
38. In the YouTube interview, Mr Hay is shown outside the factory of the Natural Fruit Company Ltd referring to the Finnwatch report and naming the Natural Fruit Company Ltd.
39. In the YouTube interview, after My Hay's reference to the Natural Fruit Company Ltd, Mr Hall is show and heard to say:
 - (a) "They were not paying the minimum legal wage";
 - (b) "They had the confiscated all the workers' passports";
 - (c) "The workers reported there was forced overtime. There were many deductions from their salaries without reason"; and
 - (d) "They did not have any power to speak out and I mean that all the workers said to me said that working there was like hell."
40. These uttering of these words is said to be the commission of a criminal offence.

Legal Action against Mr Hall

41. As consequence of Mr Hall's using the words complained of, the Natural Fruit Company Ltd commenced legal action against Mr Hall.
42. On 4 February 2013 the Natural Fruit Co Ltd filed two criminal complaints of defamation under the *Thai Criminal Code* and the *Thai Computer Crimes Act* against Mr Hall.³

³ Case 517/2556 Bangkok South Criminal Court; No. 2051/2557 Prakanong Court

43. On 14 February 2013, the Natural Fruit Co Ltd filed a claim of civil defamation against Mr. Hall, claiming 300 million baht (approximately US\$10 million).⁴
44. In July 2013, the Natural Fruit Company Ltd filed a further criminal defamation complaint against Mr. Hall at Bangna Police Station arising out of the internet YouTube Al Jazeera video interview.
45. It is the last of these criminal complaint for defamation that was dealt with in the trial under observation.
46. The Thai Attorney-General authorized the police officers at Bang Na Metropolitan Police Station, Bangkok, to act as investigating officers to look into the complaint.⁵
47. Thailand, as in common law systems, the right of a suspect to remain silent when questioned by investigators is recognised.
48. On 28 September 2013, Mr. Hall voluntarily attended at the Bangna Police Station and meet with investigating police offices. Mr Hall refused to sign a document which Mr Hall was unable to read because it was in the Thai language script. Subsequently, Mr Hall accused the Bang Na police of malfeasance alleging that they tried to pressure him to sign a confession. As a result Mr Hall filed a complaint with the Royal Thai Police,
49. On 19 May 2014, Mr Hall voluntarily attended at the Bangna Police Station and met the investigating officers, who set out the complaint of criminal defamation charge. Mr Hall denied any wrong doing.
50. On 18 June 2014, Mr Hall voluntarily attended at the offices of the Prakanong Public Prosecutors Office, Bangkok. Mr Hall was informed that the Assistant Prosecutor of the Special Prosecution Office, Criminal Case Section, Bangkok South 7, Thailand, had commenced criminal proceedings against Mr Hall for an offence of defamation under Chapter 3 of the *Thai Criminal Code* because of the YouTube interview.
51. After pleading not guilty to the charge, Mr Hall was held in custody for two hours, before the court released him on bail supplied by the Thai Frozen Foods Association and Thai Tuna Industry Association.
52. Mr Hall's passport was confiscated and condition of the bail imposed was that he was not to leave Thailand without permission of the Court.

The criminal charge of defamation

53. Mr Hall was charged by the Special Prosecution Office with one offence of

⁴ Case 188/2556 Nakhon Pathom Provincial Court

⁵ In Thailand, public prosecutors are not allowed to institute a charge in court without previous investigation with regard to that charge: *Thailand Criminal Procedures Code*, s. 120.

criminal defamation under s. 326 of the *Thai Criminal Code*.

54. The particulars of the charge alleged that between an unspecified date at approximately the beginning of 2013 during the day and 8 July 2013 during the day, Mr Hall wilfully defamed and falsely accused the Natural Fruit Co Ltd, as the injured party, to third parties by speaking in an interview with a reporter where images and sound were recorded in Burma in order to disseminate the words of the defendant to the general public.
55. The particulars alleged that the publication falsely stated:
 - (a) “An NGO reported on a fruit producing company situated in the south of Thailand, Natural Fruit (meaning Natural Fruit Co Ltd) being accused of offences in violating basic human rights and using child labor.” (sic);
 - (a) “They did not receive wages at the legal minimum rate. They had the passports of workers seized. The workers were forced to work overtime. There were many times when money was deducted from their salaries without reason.”; and
 - (a) “They had no authority to speak out and I mean that all the workers that spoke to me said that working there was like falling into hell.”
56. The particulars alleged that the publication damaged the reputation of the Natural Fruit Company, as the injured party, having caused them to be held in contempt or hatred, after someone recorded the images and sounds of the interview given by Mr Hall on the YouTube website.
57. It was alleged that the offence occurred both in:
 - (a) an unspecified subdistrict, district, province or town in Burma (where the interview took place); and
 - (b) in Bang Na Subdistrict, Bang Na District, Bangkok (where the YouTube video was viewed).
58. The particulars further alleged that the actions of Mr Hall committed in Burma, which caused damage to the Natural Fruit Company, were made with “intention of the defendant to have the result occur in the Kingdom” and “the result was likely to occur in the Kingdom of Thailand and the defendant must have foreseen that the result would occur in the Kingdom of Thailand.”
59. On 2 July 2014, in an attempt to settle the dispute between the Natural Fruit Company Ltd and Mr Hall, the Court has ordered a “reconciliation” meeting, which did not resolve the matter.
60. The penalty for the offence is two years imprisonment and fines from 20,000 Baht (approximately US\$620) to 200,000 Baht (approximately US\$6,200).

Criminal Defamation in Thailand

61. In Thailand defamation is defined as a false statement that is intentional and harmful and made by a person against another whether orally or in writing.

62. In Thailand a person who commits defamation against another may be subjected to criminal prosecution, or civil prosecution, or both.
63. Under the *Thai Criminal Code*, defamation made negligently or without intent does not constitute a criminal offence. However, negligent defamation may be subject to a civil proceedings for damages under the *Thai Civil and Commercial Code*.
64. The criminal act of defamation is defined by the *Thai Criminal Code* as a statement made by a person who “imputes anything to another in a manner which is likely to impair the reputation of the latter or to expose him to hatred or contempt.”
65. Thai law provides defences of:
- (a) truth and the public interest;
 - (a) good faith, if the person believes others are entitled to such information, or have interest in the information; and
 - (a) a fair comment.
66. Once the defamation is established beyond a reasonable doubt, the burden of proof passes to the defendant to establish one or more of these defences.
67. Relevantly, the *Criminal Code* provides as follows:

“**Section 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.”

“**Section 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 an other 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.

“**Section 329** Whoever, in good faith, expresses any opinion or statement:

- (1) By way of self justification or defense, or for the protection of a legitimate interest;
- (2) In the status of being an official in the exercise of his functions;
- (3) By way of fair comment on any person or thing subjected to public criticism; or
- (4) By way of fair report of the open proceeding of any Court or meeting,

shall not be guilty of defamation.”

“**Section 330** In case of defamation, if the person prosecuted for defamation can prove that the imputation made by him is true, he shall not be punished. But he shall not be allowed to prove if such imputation concerns personal matters, and such proof will not be benefit to the public.”

“**Section 332** In case of defamation in which judgment is given that the accused is guilty, the Court may give order:

- (1) To seize and destroy the defamatory matter or part thereof;
- (2) To publish the whole or part of the judgment in one or more newspapers once or several times at the expense of the accused.”

The Military Junta and the Courts

68. It cannot pass without noting that the trial of Mr Hall took place under a period of military law in Thailand.
69. On 22 May 2014, a military junta calling itself the National Council for Peace and Order (NCPO) took over all branches of the Royal Thai Government and unlawfully suspended Thailand’s 2007 *Constitution*.⁶
70. The military coup was the 12th in Thailand’s modern history.
71. The coup purported to usurp the *Constitution of the Kingdom of Thailand, B.E. 2550 (2007) (the 2007 Constitution)*,
72. The *2007 Constitution* seeks to protect the integrity of the lawfully constituted State by making it a criminal offence to overthrow the democratic regime of government with the King as Head of the State under the Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in the Constitution: s. 68.
73. Further, by s. 69 of the *2007 Constitution* a “person shall have the right to resist peacefully any act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution.”
74. In overthrowing the *2007 Constitution*, the NCPO ordered that all:
“Courts shall continue to function and adjudicate on cases as prescribed by the law and the Announcement of the National Peace and Order Maintaining Council”.⁷
75. Further on 24 May 2014 the NCPO:

⁶ NCPO No. 11/2557: *Termination of the Constitution of the Kingdom of Thailand*: see <http://www.thaigov.go.th/announcement-2/item/83702-announcement-of-the-national-peace-and-order-maintaining-council-no-33/2557-subject-request-for-cooperation-from-the-courts-independent-organizations-and-other-agencies.html>

⁷ Ibid

- (a) “stipulated that all Courts are to continue to hear and adjudicate cases *according to the law and the Announcements of the NCPO*”;
- (b) “required all independent organizations and other agencies established under the Constitution to continue to function as usual;
- (c) “asked that all Courts, independent organizations and other agencies refrain from expressing opinions which might create misunderstanding, confusion and polarization among the public such that it affects the functioning of the officers of the NCPO” (“in order to ensure conformity of public understanding and unity in resolving the political conflict peacefully, the NCPO”) ⁸

76. On 22 July 2014, an Interim Constitution was introduced purporting to replace the *2007 Constitution*.
77. Under the s. 48 of the *Interim Constitution*, the junta has the authority to recommend the appointment of members of the national legislative assembly, reform council and constitution-drafting committee, which will be responsible for writing a new charter.
78. The *Interim Constitution* seeks to grant an amnesty for all past and future military actions concerning the coup and to invest the NCPO with vast powers, including the power by which the NCPO leader can issue any order at will for the sake of the reforms or security and all orders so issued are considered lawful and final.
79. Relevantly, s. 26 of the *Interim Constitution* recognises judicial independence and s. 45 allows the Constitutional Court to remain functional, but subject to the special power of the NCPO leader.
80. There was nothing to suggest that the trial was in anyway influenced by the circumstances of military law prevailing at the time in Thailand.

The Phra Khanong Provincial Court

81. Judges in the Courts of Justice are appointed and removed by the King with the approval of the Judicial Commission of the Courts of Justice. The Thai Courts have an independent secretariat with autonomy in personnel administration, budgeting and other activities.
82. In Thailand, Courts of Justice are classified into Courts of First Instance, Courts of Appeal and the Supreme Court. The Courts of First Instance are the trial Courts, which are categorized as general Courts, juvenile and family Courts and specialized Courts. The general Courts have the authority to try and adjudicate both criminal and civil cases.
83. The Phra Khanong Provincial Court is a Court of First Instance in the category of a general Court handling civil cases and criminal cases in Bangkok, being one of sixteen court districts of Bangkok. It has jurisdiction, if the accused person was arrested in the district, or the inquiry was

⁸ Order No. 33/2557, the NCPO clarified Order 11/2557

conducted in district, although the offence make have been alleged to have been committed elsewhere: *Statute of the Courts of Justice, BE 2543 (2000)*, s. 2.

84. The Court House is located at 379 San Phawut Rd, Bang Na, Bangkok 10260.
85. In Courts of general jurisdiction, except the Municipal Courts, at least two judges form a quorum: *Statute of the Courts of Justice, BE 2543 (2000)*, s. 26.
86. The Court room where the trial took place is one of many in the building. It is a dark wood paneled room with an ornate gold framed portrait of His Majesty the King of Thailand Phrabat Somdech Phra Chao Yu Hua Bhumibol Adulyadej, on wall high above the bench. On each hand side of the court room are bar tables facing each other, with the prosecution located on the left and the defence on the right. The bench, decorated with elaborate wood carvings, is adorned with a large gold symbol of the scales of justice.
87. The judges wore distinctive black and dark purple judicial robes with badges of justice and counsel for the prosecution and defence wore black silk barristerial robes.
88. The trial judges were Her Honour Justice Rotsawan Thapsuwan and His Honour Justice Sukhum Namvisel.
89. At all times the judges were courteous and considerate. Their Honours conducted the trial proceedings with excellent judicial demeanour, with good grace, with tolerance and in good humour.
90. Similarly, counsel from both sides conducted themselves with due professional decorum, courtesy and collegiality.

The format of the proceedings

91. Part 2 of Article 40 of the *2007 Constitution*, provides the rights of people in Thailand: “shall consist at least of the right to public trial; right to be adequately informed of the facts and to inspect documents, right to present one’s facts, defenses and evidence, right to object to judges, right to be considered by the full bench of judges, and right to be informed of the reasons for a ruling, judgment or order”.
92. The *Thai Criminal Procedure Code* provides that where the Court thinks fit, or upon a request by any party in the case, the court is empowered to order the trial to be held in camera, providing such measure will be for the benefits of public order, morality, or national security: *Criminal Procedural Code*, s. 177.
93. The trial of Mr Hall was conducted in open court with members of the public free to come and go as they pleased. The proceedings were well attended by

the public with supporters for both the Natural Thai Fruit Company and for Mr Hall. At most times there were present in the public gallery at least 20 to 30 members of the public and an occasional member of the press.

94. The conduct of the trial proceedings were adversarial in nature, with the judges adopting an inquisitorial approach questioning the witnesses, sometimes quite extensively, on relevant issues.
95. All evidence was received on oath. The prosecution presented its case followed by the defence. The defence had a full right of cross-examination of each witness called by the prosecution and the prosecution had a full right of cross-examination of each witness called by the defence.
96. The Court proceedings were conducted in the Thai language. A Court appointed interpreter was provided to Mr Hall. When early in the trial, Mr Hall complained that his first interpreter was not properly interpreting the evidence, the Court arranged for another interpreter, who translated the evidence given in Thai for Mr Hall and the evidence given in English into Thai for the Courts.
97. There was no stenographic records made of the trial, but the record was dictated by Her Honour during and after the testimony of each witness, which was then typed up by a Court clerk and read out in open Court, with an opportunity given to counsel and the witness to be heard, before the witness signed the record of their evidence.

Thai Criminal Law procedure

98. Thailand is civil law country with systematic and diversified codes of law, but nevertheless has strong common law influences.
99. The Thai judiciary has the exclusive power to determine both questions of fact and of law in criminal cases, as there is no jury system in Thailand.
100. A decision of the Court is based upon a majority of votes of the judges constituting the quorum, but if a majority cannot be reached, because there are two or more conflicting opinions amongst those judges, the opinion most favourable to the defendant prevails: *Code of Criminal Procedure*, s. 184.
101. The decisions of the Court can be appealed to the Court of Appeal, which is a court of second instance: *Code of Criminal Procedure*, s. 193.
102. In Thailand judicial precedent of the Courts is not binding on lower Courts. The Supreme Court of Justice is not bound to follow its own decisions, and lower Courts are not bound to follow precedents set by higher Courts. In practice, however, the decisions of the Supreme Court of Justice do have significant influence on the Supreme Court of Justice itself and on lower Courts.
103. Under Thai law an “injured person is a person who has received injury through the commission of any offence, including any other person who has

the power to act on his behalf”: Section 2, and (4) *Thai Criminal Procedure Code*.

104. Hence a victim or injured person may institute their own prosecution. In this case the prosecution will not proceed through the ordinary criminal process, as does the public prosecutor.
105. Under the *Thai Criminal Code*, there are two types of specific offences (crimes), namely, compoundable and non-compoundable offences.
106. The compoundable offences are regarded as more in the nature private wrongs under the criminal law, such as for example, assault, mischief, fraud, defamation, embezzlement, and offences relating to trade.
107. However, most offences are not compoundable offences as they are categorised as purely offences against the state.
108. The police by their own initiative can make an investigation or inquiry into a case.
109. However, the police have no power to initiate or conduct an investigation into a compoundable offence without an allegation made by the injured person.
110. In general, most criminal cases (both compoundable and non-compoundable) come to the police in the form of a complaint either made by the injured person (victim) or by the denunciation (witness).⁹
111. Relevantly, for a criminal prosecution instituted by the public prosecutor, the injured person may apply by motion to associate himself as prosecutor at any stage of the proceedings before the pronouncement of judgment by the Court of First Instance: *Thai Criminal Procedure Code*, s. 30.
112. Accordingly, a feature of this trial was that the prosecution was conducted by two teams of lawyers, one consisting of the Special Prosecutors Officer and the other by the Natural Fruit Company Ltd.
113. Relevantly, it is this aspect of the trial upon which both the verdict and the assessment of this trial report turned.

The Issues

114. As in most countries, in Thailand a defendant is guaranteed under the constitution the presumption of innocence.
115. The burden proof is on the prosecution, who has the onus of proving guilt to

⁹ see Prathan Watanavanich, *The Emergence Of Victims’ Rights In Thailand: Twenty Years After The U.N. Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power*, Resource Material Series No.70, 131st International Training Course Visiting Experts Papers: www.unafei.or.jp/english/pdf/RS.../No70_05VE_Watanavanich.pdf

standard of proof of beyond reasonable doubt: s. 227 paragraph 2 of the *Thai Criminal Procedure Code*.

116. At the trial there was no dispute that:
- (a) the YouTube interview was published on the internet and seen in Thailand;
 - (b) Mr Hall made the words (shown in the interview) in Burma;
 - (c) the words referred to the Natural Fruit Company Ltd; and
 - (d) the words were harmful of the reputation of the Natural Fruit Company Ltd.
117. The Natural Fruit Company Ltd set out to prove:
- (a) Mr. Hall's statements were willfully false or negligently made with intent to cause injury to the Natural Fruit Company Ltd; and
 - (b) The Natural Fruit Company Ltd had been publically vilified and harmed in its reputation resulting in a loss of business profits.
118. Ordinarily at a Criminal trial in Thailand, an accused is very rarely put to proof. However, in this case the burden of proof shifted to Mr Hall to make out the defences to defamation under the *Criminal Code*.
119. Mr. Hall set out to prove that his statements were true, his intent was not to harm Natural Fruit Company Ltd, but rather he was honestly motivated made in the public interest to help migrant workers and prevent labour abuses in Thailand (s. 330) and as an act of good faith in an expression of an opinion or statement for the protection of a legitimate interest, namely workers rights, and by way of fair comment about the Natural Fruit Company: s. 329.

Summary of Evidence

120. On Tuesday 2 September 2014, the first day of the trial, the proceedings were well attended, with representation by the embassies of the United Kingdom, Finland and Australia, the ILO, NGOs, and members of the international and local press who the judges asked to introduce themselves and their presence was recorded.
121. The first prosecution witness was the Deputy President of the Natural Fruit Company Ltd who produced a CD Recording of the YouTube video which was played to the Court. The witness on behalf of the Natural Fruit Company denied all of the allegations made in the interview. In particular, the witness strongly protested the characterization of the factory as being like "hell."
122. The Deputy President testified that as a result of the defamation many customers no longer trusted the Natural Fruit Company Ltd, the management has received abusive emails and threats, and there had been a drop in purchasing orders. He stated that exports worth 1 billion baht had dropped to 7-850 million baht.
123. An issue arose whether the witness had notes written on his hand, which upon examination was shown to be the case. His Honour ordered that the

witness attend at the wash room to remove any notes written on his hand.

124. The second witness was the investigating police officer who visited the factory and did not observe any labour violations. He could not say where the interview took place or who put the interview on the internet.
125. The cross-examination sought to argue that the extra-territorial reach of the Thai laws could not apply because, if there was defamation then it was committed where the representations were made, that is in Burma and not in Thailand. The cross examination sought to establish that the interview was put on YouTube by a person or persons unknown and there was no evidence that it was caused to be published by Mr Hall.
126. Later in the day, after carefully examining the financial statements, His Honour recalled the Vice-President and put to him that the exhibit revealed the loss in 2013 was only 29 million baht, the volume of total sales had increased, but there was a drop in price. The judge remarked: "If you want us to give an accurate verdict, you need to give us accurate information."
127. On Wednesday 3 September 2014, the second day of the trial, the prosecution called Mr Wirat Piyapornbaiboon, President of the Natural Fruit Company Ltd who denied the allegations and testified that there were no labour abuses at the factory. He also stated that the company had suffered loss of reputation and profit by reason of the defamation.
128. Mr Hall complained to the Court that he had been given a large number of documents from the prosecution which were in the Thai language which had not been translated into English. Mr Hall said he had little sleep overnight as he tried to translate documents with a dictionary. Mr Hall also complained that his interpreter was not competent and pointed to various errors in translation. The Court adjourned the proceedings for a couple of hours to find another interpreter. When another interpreter could not be found the proceedings were adjourned for the remainder of the day.
129. On Thursday 4 September 2014, the third day of the trial, another interpreter had been located, about whom there was no complaint. The proceedings commenced with Her Honour raising the issue of the posting of images of the Court room on social media which was prohibited. Her Honour questioned Mr Hall and the Finnwatch representative and warned against this conduct but observed that those who may have been responsible may not have been familiar with Thai law and left the matter as a general warning.
130. The prosecution called a Thai University Professor who said he was an expert in research methodology. He gave evidence that Mr Hall's approach was not in accordance with proper statistical sampling methodology. He criticised the general research technique used in the making of the report questioning the validity of its conclusions.
131. The factory head of the production was called as a witness who refuted all allegation of labour violations. The male judge invited Mr Hall to personally

question the witness, since the research project did not have this opportunity during his research. Although taken by surprise, Mr Hall took up the invitation and explored issues about wage deductions. Eventually His Honour ruled some of the issues he sought to pursue were beyond the scope of the trial.

132. An official from the Thai Government Department of Labour was called. He stated he had inspected the Natural Food Company factory in question. He stated that he and his staff performed random inspections of the 4000 factories in the province, either on a random basis, following complaints, or as otherwise may come to their attention. He stated that he did not detect any labour problems at the factory of the Natural Fruit Company. He found no child labour, over working, underpayments, or any abuse of the workers among any of the 700 workers Burmese migrant workers.
133. The local head of the Thai Government Department of Social Security was called who said she had visited the factory and believed all of the employment records and 5% social security deductions were in order.
134. In cross-examination, both government witnesses acknowledged that their assessments was based on the assumption that the information supplied by the company was accurate. They also relied upon the factory provided interpreters to be accurate translators of the conversations with the Burmese workers.
135. The records did show that there were a few workers who had not registered for social security and there were a few children working there. However the official considered that the discrepancy for registration was due to a small number waiting registration and that the children may have been in authorised positions and notified as required. But about this they could not be sure. The witness also agreed that the figures were dependent on accurate reporting by the factory.
136. The two government officials said they did not see any labour breaches at the factory and expressed the opinion that Mr Hall's reference to "hell" was not correct.
137. His Honour made extensive inquiries of both witnesses looking carefully at the government files and questioning the witnesses about apparent discrepancies in the files including blank columns in the records in the social security records for the factory for which it was said to relate to workers not yet registered.
138. Just before the luncheon break Her Honour addressed a member of the public gallery calling for the notes that he was taking which she examined. Her Honour also asked a woman about the notes she was taking. The judge said that she followed the news and had seen on the media a picture of the inside of the court room. Her Honour said that this was forbidden and also warned that any evidence taken word for word in the Court was also forbidden. The rationale appeared to be that the official record of a witness's testimony is

that which is transcribed by the judge, read out in Court to the witnesses and signed by the witness. The judge said any other account of evidence could not be published. Her Honour made a pronouncement that note taking of the words of the witnesses was forbidden.

139. The prosecution called business persons who testified that the Natural Fruit Company's reputation was harmed by Mr Hall. One witness admitted that workers at the factory had told her conditions were "like hell." A factory supervisor was called who said that the factory was a great place to work. Under questioning she gave different accounts about the deductions from the workers salary and admitted that she was underpaid when the factory was closed.
140. On Friday 5 September 2014, the fourth day of the trial, began with Her Honour reminding the members of the public against note taking. The factory accountant was called who attempted to explain the reason for the blank portions in the social security records.
141. The President of the Natural Fruit Company Ltd was called who gave evidence about the economic cost caused by the publication. He was very critical of Al Jazeera journalist, Mr Hay who he said had photographed the factory covertly and had run away like a criminal. Under cross-examination he said he would only allow investigators into the factory if ordered by a court and would not be interviewed by journalists about the factory.
142. In the morning after the prosecution closed its case, the first defence witness to be called by the defence was Al Jazeera journalist, Mr Hay. The prosecution protested, arguing that Mr Hall should be required to give evidence first. The Court ruled that Mr Hay, who had travelled from New Zealand should be allowed to give evidence first as a matter of convenience.
143. Mr Hay explained how he went about preparing the Al Jazeera story based on the Finnwatch report. Mr Hay said that Mr Hall was not involved in production or editing of the story as shown in the video. Mr Hall was not involved in the introductory observations made by Mr Hay standing outside the front gates of the Natural Fruit Company factory. He stated that the interview with Mr Hall was made in Burma. In effect, by giving this evidence Mr Hall admitted to the same criminal offence of defamation, but the authorities chose not to prosecute.
144. The next witness for the defence was Ajahn Kritaya from Mahidol University, who set out the scholarship on critical research for change, detailing the validity of the science of qualitative research as compared to quantitative research giving the example of police and football betting corruption. She said the naming of offending companies was usual practice for consumer organisations, even in Thailand, which she said was protected by Thai Constitution and Thai consumer law. She said as long as more than 3 or 4 workers were interviewed, research could be considered valid, even 1 person, although ideally a score of interviewees would be ideal.

145. The trial was adjourned to the following Tuesday to give more time to Mr Hall to prepare his defence.
146. On Tuesday 9 September 2014, the fifth day of the trial commenced with Mr Hall being given back passport, following representations of the UK Government and the Court ruling that Mr Hall was not a flight risk, even though he proposed to travel to England after the trial, but undertook to return for the verdict.
147. Mr Hall was sworn in and gave his account. He outlined his expertise his involvement in labour relations research, corporate responsibility and his campaign for Burmese migrant workers in Thailand.
148. Mr Hall explained how he was engaged by Finnwatch and how he gathered his information from confidential interviews with factory employees.
149. He stated that his representations in the interview did relate to the Natural Fruit Company and were about the employees at the factory. Mr Hall stated that his interview merely recounted what he had been told by the workers.
150. Mr Hall stated his motives in making the statements in the interview, was not to gratuitously besmirch the Natural Fruit Company, but rather was to prevent the continuation of the labour abuses of the workers at the Natural Fruit Company.
151. Mr Hall testified that he had no interest in harming the reputation of the company or causing it to lose money. Mr Hall stated that what he had said in the interview was the truth and he had acted in the public interest, was made in good faith and as fair comment.
152. Ms Sonja Vartiala the Executive Director of Finnwatch was called to give evidence explaining why and how the research project was commenced, the terms of reference, how Mr Hall came to be commissioned and what he was asked to do.
153. Ms Vartiala evidence was that the pineapple concentrated juice supply chain to Finland was from a Dutch company through Israel buyers with its source in Thailand such that the Natural Fruit Company was selected for inquiry at random.
154. She said Mr Hall was contracted to conduct research on work practices at the factories including to interview Burmese workers of the Natural Fruit Company.
155. Ms Vartiala said the Natural Fruit Company would not respond to the draft report which had been forwarded to the factory. The other companies investigated did respond. The final report set out what the other factories had done, what they had not done and why. Finnwatch decided it was fairer to name the Natural Fruit Company Ltd rather than leaving a cloud hanging over all of the other Thai pineapple processors.

156. The prosecutor cross-examined Ms Vartiala for publishing the adverse material about the Natural Fruit Company when there was no response. He questioned her about the ethics of publishing given the confidentiality of sources and the unfairness of naming the Natural Fruit Company.
157. The key witness for the defence was a former long term Burmese worker of the Natural Fruit Company. He said he was from Burma and had obtained employment at the factory without a passport or work permit. He testified that he had worked on the cannery line and later as a forklift driver. He said he was paid at rates under the minimum award, worked for greater than 8 hours, worked without overtime payment, was a captive at the factory, had suffered deductions from his wages for passport application costs, work permit costs, cost of uniforms and gloves, and the cost of water, electricity, and accommodation (where there were housed 5 workers to a room). He stated that he saw workers beaten at the factory by supervisors. Also he testified there were children illicitly working at the factory.
158. After cross-examination, His Honour examined the witness at some length. The judge called for the witness's passport, which was produced and carefully examined by the judge. The judge went through the entire work history of the witness in Thailand generally and at the factory in particular. He admitted to currently working in Thailand as a truck driver without a Thai drivers licence.
159. While the worker was still in the witness box, the judge asked the factory manager to stand up and asked whether it was true that the witness was a former employee.
160. The factory manager confirmed that the witness was a former employee and she knew him well. The judge then called on other factory senior staff to stand up. He called for the Human Resources Manager. She came forward and stood in front of the bench. The judge then asked her, if there was any part of the witnesses account of the abuses at the Natural Fruit Company which she was incorrect. She said that she could not disagree with the evidence of the witness. The Human Resources Manager conceded that the deductions from wages were contrary to law.
161. The prosecutor indicated the manager of all of the Burmese workers was present, who came forward and told the Court that there was no abuse of the workers and the supervisors tried to lead by example.
162. This concluded the evidence of the trial. The prosecution and the defence were required to submit final submissions in writing. The trial was adjourned for a verdict on 29 October 2014.

The non-delivery of witness statements, the provision to the defence of prosecution documents as trial unfolded.

163. There is no practice of pre-trial directions hearings to facilitate or expedite the trial process among the judge, public prosecutor and defence lawyer as seen in some other countries. Before the trial, public prosecutors are not required to disclose their evidence to the defence. Generally they have to provide only a list of witness and documents to the court and the defence.¹⁰
164. In this trial there was no pre-trial disclosure of the documents presented, although by the terms of the indictment, except for the Al Jazeera YouTube video interview.
165. At trial the prosecution introduced witnesses, without notice, and without prior delivery of statements. Mr Hall complained that he was not given a reasonable opportunity to meet the case put against him, because he did not receive a brief of evidence in advance of the trial. Critical documents were provided to Mr Hall as the trial unfolded, when prosecution witnesses gave their evidence.
166. The economic loss evidence and the extracts from government files was produced on the first day of the trial. These documents included the financial reports of the Natural Fruit Company prepared by the financial staff. These documents consisted of about 30 to 40 pages was in the Thai language script. Mr Hall was not provided with copies of this evidence which translated into the language understood by the accused, ie. English.
167. Mr Hall protested that it would take him many days to translate and analyze these records and he was not afforded a reasonable opportunity to have his own expert review the financial material.
168. Counsel prosecuting for the Natural Fruit Company tendered without notice documents selected from Government files. Mr Hall was not given an opportunity to inspect the entire file from which the documents were selected.
169. Further, Mr Hall had subpoenaed files from the Thai government about labour practices at the factory, however the Government was unresponsive to the defence subpoenas and did not produce the documents.
170. Mr Hall complained that by the late delivery of this material was in effect an ambush by the prosecution case and had prevented him from properly preparing in advance for the trial.
171. Article 14, 3(b) of the *International Covenant on Civil and Political Rights* provides that in reference to an accused:
- “in the determination of any criminal charge against him, everyone is entitled to have adequate time and facilities for the preparation of his

¹⁰ Somjai Kesornsiricharoen, *The Role And Function Of Public Prosecutors In Thailand* , 107th International Training Course Participants Paper, Resources Materials Series no. 53 at 288 http://www.unafei.or.jp/english/pdf/RS_No53/No53_28PA_Kesornsiricharoen.pdf

defence”.¹¹

172. The term “facilities” has, among other things, been interpreted to mean that the accused and defence counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defence and that the defendant must be provided with facilities enabling communication, in confidentiality, with defence counsel.¹²
173. The right to adequate facilities to prepare a defence requires that, in addition to information about the charges, the accused and their counsel should be granted timely access to relevant information, which includes witness lists and information, documents and other evidence on which the prosecution intends to rely (inculpatory material) and information that might lead to the exoneration of the accused (exculpatory material), which affect the credibility of evidence presented by the prosecution, which support a line of argument of the defence or otherwise may help the accused prepare their case or mitigate a penalty.¹³
174. The *Basic Principles on the Role of Lawyers*, Principle 21 provides:
“It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.”
175. Disclosure provides the defence with an opportunity to learn about and prepare comments on the observations filed or evidence to be adduced by the prosecution. When necessary, the information should generally be translated into a language the accused understands. Oral translation (by the lawyer or an interpreter) may suffice.¹⁴
176. The right to adequate time and means to prepare a defence:
“binds the state to allow the accused access to the record of the case and to the evidence gathered against him.”¹⁵
177. The information should be provided in a time frame which allows the

¹¹ See also European Convention, supra note 8, Article 6(3)(b); *American Convention*, supra note 8, Article 8(2)(c); *African Commission Resolution*, supra note 13, Article 2(E)(1); and ICC Statute, supra note 10, Articles 67(1)(b) and 67(2).

¹² General Comment 13, supra note 16, para 9. *Basic Principles on Lawyers*, supra note 6, Principle 21. The European Commission has stated that this right permits the defense to have reasonable access to the prosecutions files (*X v Austria* (7138/75), 5 July 1977, 9 DR 50) but this may be subject to reasonable security restrictions (*Haase v Federal Republic of Germany* (7412/76, 12 July 1977, 11 DR 78).

¹³ *Fair Trial Manual*: 8.4, *Disclosure*, referring to principle 21 of the *Basic Principles on the Role of Lawyers*, Principle 12 § 36 of the *Principles on Legal Aid Principles on Fair trial in Africa*, Article section N (3)(d) and (e) (iii) – (vii) of the 67 (2) of the *ICC Statute*, Rules 68 to 66 of the *Rawanda Rules* 66, 67(b)(ii) and 68 of the *Yugoslavia Rules*

¹⁴ *Ibid* referring to See *Foucher v France* (22209/93), European Court (1997) §§36-38.

¹⁵ The Inter-American Court in *Leiva v Venezuela*, Inter-American Court (2009) §54

accused adequate to properly and fairly prepare their defence.¹⁶

178. The Human Rights Committee has clarified that the right to adequate facilities to prepare a defence must be understood as a guarantee that individuals cannot be convicted on the basis of evidence to which the accused or their counsel do not have full access.¹⁷
179. In this regard it was a significant feature of Mr Hall's trial that counsel for the Natural Fruit Company Ltd played the major prosecuting role, with counsel for the Special Prosecutor's Office participating in subsidiary prosecution role.
180. Counsel for the Natural Fruit Company Ltd called the prosecution witnesses, conducted most of the examination of prosecution witnesses and cross-examination of the defence witnesses.
181. After the investigating police officer completed his evidence the police officer was seen to be in deep conference going through documents with the legal team for Natural Fruit Company Ltd, rather than the prosecutor's office.
182. As observed above, an injured party is perfectly entitled to apply by motion to the trial court to be a joint prosecutor in the case (*Thai Criminal Procedure Code*, s. 30), however "they are prevented from doing or omitting to do any act causing detriment to the case of the public prosecutor or else the public prosecutor may request the court to order the injured party to do or not to do such acts."¹⁸
183. The requirements of a fair trial recognise that:
"the duty on the prosecution to disclose information that might assist the defence is broad and continues throughout the trial proceedings (before and after witnesses testify) and the prosecution must monitor the testimony of witnesses and disclose information relevant to the credibility of witnesses."¹⁹
184. The proper role of the prosecutor, contrary to popular perception, is not that of a partisan persecutor, bent on securing the conviction of an accused person, but rather a prosecutor is a quasi-judicial "minister of justice" whose detached function is to seek justice and to ensure fairness.

¹⁶ The Inter-American Court *Castillo Petruzzi et al v Peru*, (1999) §141.

¹⁷ *Onoufriou v Cyprus*, HRC, UN Doc. CCPR/C/100/D/1636/2007 (2010) §6.11, HRC Concluding Observations: Canada, UN Doc. CCPR/C/CAN/CO/5 (2006) §13; See *Prosecutor v Katanga and Ngudjolo* (ICC-01/04-01/06-2681-Red2) ICC Pre-Trial Chamber, Decision on the Prosecution's Request for the Non-Disclosure of Information, a Request to lift a Rule 81(4) Redaction and the Application of Protective Measures pursuant to Regulation 42 (14 March 2011) §27; Principle 20(i) of the Johannesburg Principles.

¹⁸ See *Somjai Kesornsiricharoen, The Role And Function Of Public Prosecutors In Thailand*, Ibid at 285

¹⁹ *Prosecutor v Blaškić*, (IT-95-14-A), ICTY Appeals Chamber (29 July 2004) §§263-267; See *Prosecutor v Lubanga Dyilo* (ICC-01/04-01/06), ICC, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses (12 November 2010) §§12-16.

185. This principle is recognized in Thailand where it has been observed:
“Principally, public prosecutors are presumed impartial throughout the criminal trial. The true aim of the prosecution should be to seek the truth rather than merely seek a conviction. Practically, this is highly possible in exercising a prosecution function stage.”²⁰
186. To this end prosecutors are under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor, that is possibly relevant to any issue in a case, or to a new issue that might emerge from the material that may be relevant.
187. The Natural Fruit Company Ltd was the complainant and victim at the trial.
188. Further the Natural Fruit Company Ltd is the complainant and alleged victim in two future criminal prosecutions and the plaintiff in a future civil claim against Mr Hall for similar defamations.
189. Under Thai law counsel for the Natural Fruit Company Ltd was entitled to act as a co-prosecutor.
190. On the one hand, a prosecutor who acts for an injured party and complainant has a duty to that client to act in the best interests of the client and as instructed by the client.
191. On the other hand, a prosecutor has the duties as set out above.
192. For the prosecutor for an injured party, there may be tension between these two duties.
193. No such tension faces the Special Prosecutor’s Office who should have an uninhibited duty to make full disclosure.
194. When Mr Hall complained about the late receipt of the evidence, the Court granted a half a day’s adjournment on the Friday and a full day on the following Monday to give Mr Hall more time to prepare his defence case. Mr Hall did not make any further applications for an adjournments.
195. In relation to the failure of the government to respond to the subpoenas requiring the production of the full Department of Labour files for the factory, Mr Hall resiled from pursuing the matter, when asked by the Court.
196. Plainly, this was a tactical decision reluctantly made under pressure by the defence.
197. Nevertheless, there was no equality of access by the defence to evidence held

²⁰ *Somjai Kesornsiricharoen, The Role And Function Of Public Prosecutors In Thailand* , 107th International Training Course Participants Paper, Resources Materials Series no. 53 at 288: http://www.unafei.or.jp/english/pdf/RS_No53/No53_28PA_Kesornsiricharoen.pdf289 observed of prosecutors in Thailand

by the government in the Department of Labour records, which may have assisted the defence, to establish the truth of the allegations the subject to the defamation charges.

198. For this reason the prosecution of Mr Hall was not fair.

Lack of Witness Protection

199. Another feature of the trial was the issue of witness protection which Mr Hall was unable to access for migrant worker witnesses.

200. There is scope in Thai law for the making of “special measures for witness protection”, including the relocation or provision of suitable accommodation for a witness, change of identification, and provision of government officials to ensure the witness’ safety during necessary period of time: *Witness Protection in Criminal Cases Act 2003*, Sections 8 and 10.

201. Mr Hall was faced with a dilemma not being able to disclose the identity of the Burmese workers who have given him information in confidence. Further, after Mr Hall had made a complaint about the investigating police, he felt he was left with no alternative but to make his own arrangements for witness protection.

The Thai criminal law of defamation does not apply extraterritorially

202. As generally speaking, the primary and most widely accepted form of jurisdiction for prosecuting crimes is territorial jurisdiction, which implies that a State may prosecute crimes committed on its territory irrespective of the nationality of the offender and/or victim.²¹

203. Usually as the territorial State is the one in which the accused, the victim, witnesses, written and material evidence and are usually located, it constitutes the most appropriate forum for investigation and prosecution.²²

204. It is a longstanding principle of law that the laws passed by a nation, unless contrary authority appears, is meant to apply only within the territorial jurisdiction of that nation.

205. The term “extraterritoriality” is generally understood to refer to the exercise of jurisdiction by a nation state over conduct occurring outside its borders.²³

206. The policy underpinning this presumption is to protect against unintended

²¹ Vander Beken, Tom. *The Best Place for Prosecution of International Corruption Cases. Avoiding and Solving Conflicts of Jurisdiction*. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed from: <http://www.ircp.org/uploaded/I-1%20Tom%20Vander%20Beken.pdf>

²² Amnesty International. *Universal Jurisdiction: the duty of states to enact and enforce legislation* – Chapter One. AI Index: IOR 53/003/2001, 1 September 2001. Accessed from: <http://web.amnesty.org/library/index/engior530032001?OpenDocument>

²³ Deborah Senz and Hilary Charlesworth, ‘Building Blocks: Australia’s Response to Foreign Extraterritorial Legislation’ (2001) 2(1) Melbourne Journal of International Law 69, 3

clashes between one nation's laws and those of other nations which could result in international discord.

207. The prosecution could be construed as an infringement of Burmese sovereignty and an affront to Burmese national pride in much the same way that Thailand took offence at unequal treaties imposed by Western military powers which permitted colonial regimes to apply their own laws on their own nationals on Thai soil.²⁴
208. Generally, "extraterritoriality" for criminal prosecution is supported by an international treaty dealing with the subject matter of the offence such as by way of example those dealing with child sex exploitation, parental child abductions, people smuggling, terrorism and international fraud and currency offences.
209. In this case the interview shown on the YouTube video took place in Burma, but the viewing of the video took place at the police station and elsewhere in Thailand.
210. The prosecution sought to call into aid the exercise of extraterritorial jurisdiction, because while the alleged criminal conduct occurred outside the territory of the Thailand, as the regulating state, and in Burma, the conduct was alleged to have caused damage within the Thailand.²⁵
211. However, the alleged offence could hardly be characterised an international crime for which extraterritoriality is warranted or justified or for which support is provided by any international treaty.²⁶
212. Further, it is incongruent to argue for the expansion of the power of the nation state by providing a constitutional justification to legislate extraterritorially for a criminal offence of defamation, when such a contention in defiance of international law recognising freedom of speech.²⁷
213. It is not open for a nation state to call in aid international law as means of violating a fundamental human right recognized under international law.²⁸
214. Accordingly, the prosecution was fundamentally flawed at the threshold as the acts complained of, and said to constitute a criminal offence of defamation under Thai law, were beyond the jurisdictional reach of Thai law

²⁴ Chin Kim, *The Thai Choice-of-Law Rules*, *The International Lawyer*, Vol. 5, No. 4 (October 1971), pp. 709-721

²⁵ David J Gerbert, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, *Yale Journal of International Law*, Vol 10:185, 1984, p190.

²⁶ Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) 14/02/2002 at 73; *The S S Lotus (France v Turkey)*, 1927 PCIJ, ser A, No 10 (Judgment of Sept 7)

²⁷ Anthony Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law* (2007) 48 *Harvard International Law Journal* 121, 122

²⁸ Mark Gibney, Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligations*, (University of Pennsylvania Press, 2010) 4.

and not punishable by a Thai court.

There was no prima facie case against Mr Hall

215. There was no prima facie case as all of the conduct complained of took place outside of the territorial limits of Thailand.
216. Further, there was no evidence of a critical element of the offence, namely identification by Mr Hall of the National Fruit Company Ltd.
217. Nowhere in the interview does Mr Hall make reference to the National Fruit Company Ltd.
218. While elsewhere in the interview the Al Jazeera journalist Mr Hay identifies the National Fruit Company Ltd, this was not Mr Hall's doing.
219. In the interview Mr Hall spoke generally about labour violations for migrant workers in Thailand and did not mention or refer to the National Fruit Company Ltd.
220. There no evidence that Mr Hall identified the National Fruit Company Ltd when he uttered the words complained of. As such there was no evidence that the words used were about the National Fruit Company Ltd for which it claims damage.
221. Hence the prosecution did not make out a prima facie case against Mr Hall and the case warranted dismissal from the outset without the defence being required to give evidence.

The Criminalisation of Free Speech in Thailand

222. The real unfairness of Mr Hall's trial is with the law which criminalises free speech in Thailand which enabled Mr Hall to be charged with a criminal offence and exposing him to harsh penal sanctions for an internet YouTube video interview made in Burma where he did not even identify the injured party.
223. Thailand's 2007 *Constitution* guarantees free speech: s. 26, 28, 29, 34, 36, 45, 46.
224. Freedom of expression is a right guaranteed by Article 19 of the *Universal Declaration of Human Rights* which provides:
"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."
225. In Thailand there has been a long history of the suppression of free speech by the use of the blunt instrument of the criminal defamation prosecutions with increasing frequency over recent decades: see Streckduss D, *Truth on Trial in Thailand*, Routledge, 2010.

226. It is a well settled view in international law that criminal defamation is not a justifiable restriction on freedom of expression and that all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws”.²⁹
227. In particular, the United Nations Human Rights Council has sought to lift restrictions and legal inhibitions on the reporting of human rights.³⁰
228. In most jurisdictions, criminal defamation is now an obsolete and a redundant law serving no purpose other than:
 “as a convenient tool for members of the state apparatus and other elites to protect their power and chill critical opinion [where] the vast majority of offences prosecuted under criminal libel law are subject to a number of other laws, most notably the remedy of its tort law cousin, civil libel.”³¹
229. Criminal prosecutions seek to punish the defendant, and are not designed to remedy the injury to the victim’s reputation in terms of compensation. Civil proceedings are better equipped to remedy the harm caused by libel and slander. Further, where speech may pose a legitimate threat to societal well-being, prosecutors have recourse to incitement, hate speech, or disorderly conduct laws.
230. Moreover, while Mr Hall is required to prove innocent intent, honest motivations, truth and the public interest, the Natural Fruit Company Ltd as the injured party, cannot be challenged on its motivations for bringing the prosecution.
231. The criminal law of Thailand poses a grave risk to journalists, researchers, politicians, social activists and public commentators. For the exercise of a fundamental right of free speech, whether in Thailand or outside of Thailand any person who causes offence for saying something risks in Thailand arrest by the police, detention, prosecution and imprisonment.

²⁹ Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation of Security and Cooperation in Europe and the Representative on Freedom of the media the Organisation of American States Special Rapporteur on Freedom of Expression (2002). A 2010 joint declaration by the special rapporteurs or representatives for freedom of expression of the United Nations (UN), the Organisation for Security and Co-Operation in Europe (OSCE), the Organisation of American States (OAS) and the African Commission on Human and Peoples’ Rights (ACHPR) that identified criminal defamation a key challenge to freedom of expression. In a landmark opinion in February 2012, the UN Human Rights Committee, studying the case of a Philippine journalist charged with criminal libel, found that the sections of the Philippine criminal code that establish defamation offences were incompatible with the Universal Declaration of Human Rights and unreasonably infringed upon the journalist’s right to free speech.

³⁰ Human Rights Council Twelfth session, Agenda item 3, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development and Expression, October 2009* : A/HRC/RES/12/16

³¹ IPI White Paper: *Our Stand on Criminal Defamation*
http://www.freemedia.at/fileadmin/resources/application/IPI_White_Paper_Website_Version_Final.pdf

232. Such a law not only violates a fundamental human right it also prevents from being discussed and debated important matters of general importance, for example, a serious social wrong, the exposure of a case of high-level corruption and the need for social reform, but also such a draconian law stifles the market place of ideas necessary to the evolution of a mature state.
233. Accordingly, the prosecution of Mr Hall was not fair and reasonable because defamation in Thailand remains a criminal offence punishable by imprisonment.

The Verdict

234. On 29 October 2014, the Court reconvened and delivered its verdict of not guilty relying on a breach by the prosecutors who acted contrary to s. 120 of the *Thai Criminal Procedure*.
235. The Court found the police did not sufficiently involve the Thai Attorney General's office or Mr Hall's defense team during their investigation and the interrogation of Mr Hall.
236. A public prosecutor may not enter a charge against any offence in court without having conducted an inquiry as to such offence: s. 120.
237. An inquirer may not hold inquiry as to a compoundable offence, save where a regular complaint is made: s. 121.
238. An inquirer may not conduct an inquiry when the victim institutes a prosecution by himself without having made a complaint: s. 122 (2).
239. The judgment noted that:
 "Hall gave the interview outside of the Kingdom of Thailand therefore the investigation into the case had to include a team of police and officials from the attorney-general's office.

 "However, there was only one police officer at the time of his interrogation therefore we deem the investigation to be incomplete."
240. The Court ruled that the prosecution was flawed as it did not involve a Thai state prosecutor from the start such that the investigation was "unlawful" because "the plaintiff has no legal right to file a complaint... so the court dismisses the case."

Conclusion

241. In summary:
- (a) the judges conducted the trial of Mr Hall fairly with good grace, dignity and discernment and reached a just result by dismissing the charges against Mr Hall;
 - (b) the laws which permitted the criminal prosecution of Mr Hall for

criminal defamation are not fair and are in violation of international norms because Thai law makes the exercise of a fundamental right of free speech a crime punishable by imprisonment;

- (c) it is not a fair system of law that permitted Mr Hall to be charged in Thailand with a criminal offence and exposing him to harsh penal sanctions for exercising his right of free speech by giving a press interview in Burma where he did not even identify the injured party;
- (d) the Thai Courts had no jurisdiction to try Mr Hall for the acts complained of which were completed outside the jurisdictional limits of the Kingdom of Thailand;
- (e) the Thai criminal laws of defamation do not have extraterritorial reach and cannot seek to punish a person for acts committed outside of Thailand;
- (f) there was no prima facie case made out against Mr Hall because Mr Hall had not identified the Natural Fruit Company Ltd in the interview;
- (g) the laws which prohibited the making of notes by members of the public and the press at the trial are not fair because such a prohibition is in breach of the requirement of open justice;
- (h) the prosecution was not fair because of:
 - (i) the failure to make full disclosure to Mr Hall of all evidence available to the prosecution before the trial including the complete Department of Labour files for the factory;
 - (ii) the failure of the Thai authorities to respond to the defence subpoenas and provide critically relevant files to Mr Hall concerning the labour conditions at the factory.
- (i) Mr Hall had a complete defence to the charges and deserved to be acquitted on the merits.

About the Trial Observer

Mark Plunkett is an International Lawyer who attended as an Independent Trial Observer at the trial of all proceedings of *Special Prosecution Office v. Andrew Jonathan* held at the Phrakanong Provincial Court, Bangkok, Thailand from 2 September to 10 September 2014 and on the day of the verdict, 29 October 2014.

Mr Plunkett is independent, neutral, impartial, objective and passive, with a role solely to observe the trial, by paying close attention, taking careful notes, documenting the trial and to prepare a comprehensive final report as to fairness of the proceedings in accordance with the *International Commission of Jurists Trial Observers Manual*.

He reports to the London based *International Centre for Trade Union Rights* (ICTUR): see <http://www.ictur.org/Eng/Lawyers.html>.

For over 32 years Mr Plunkett has practised law as a *Barrister* at the Private Bar throughout Australia and the Asia-Pacific region. He is a *Court Accredited Mediator* and *Specialist Negotiator*.

He graduated with a *Bachelor of Arts* and a *Bachelor of Laws* from the *University of Queensland* and completed the Negotiation Training and the Advanced Negotiation Training Course at the *Harvard Law School*, Boston, MA., USA.

From 1982-1992 he practiced as a *Defence Counsel* in criminal jury trials instructed by the Queensland Public Defender, and from 1988-1990 he was appointed Counsel Assisting the *Royal Commission of Inquiry into Aboriginal and Torres Strait Islander Deaths in Custody*.

From 1992 to 2014 he has specialised in *Administrative Law* and *Industrial Law* in particular *Judicial Review* of Government decision-making, serving as Counsel Assisting Coronial Inquiries and has representing many parties, including governments, in other Royal Commissions of Inquiry.

He has served as Chair of a *Ministerial Inquiry* into a public health scare reporting to Parliament, Chairman of the *Queensland Sugar Tribunal*, Chair of the *Queensland Dairy Tribunal*, Chair of the *Great Barrier Reef Ministerial Council Independent Assessment Committee*, Deputy President of the *Brisbane Corrections Board* and as a member of the *Queensland Civil and Administrative Tribunal*.

He served with the *United Nations* peacekeeping mission in Cambodia (1992 - 1993) (UNTAC) and in 1993 was appointed the *United Nations* first ever *UN Special Prosecutor*.

Mark initiated negotiation training and peacekeeping planning in the Papua New Guinea-Bougainville armed conflict (1996-1997), served as a UN Observer in East Timor as (1999-2000) and in the Solomon Islands peace operation (2004).

In 2007 the Australian Government awarded him the prestigious *Australian Humanitarian Overseas Service Medal* for his legal work serving overseas in

hazardous circumstances to resolve armed conflicts in international peacekeeping operations.

From 2011-2012 Mr Plunkett led the legal initiatives leading to the release of over 100 Indonesian children being held in Australian detention and adult goals for crewing boats bringing asylum-seekers to Australia.

He is a member of Australian Bar Association. Since 2007, each year for last seven years, he has been elected by his peers to the Bar Council of the *Queensland Bar Association*.

In 2014 he was made a director of the governing Board of the *Queensland Irish Association*.

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About ICTUR

The International Centre for Trade Union Rights ('ICTUR') is a London-based international NGO, established in 1987 and accredited to the UN ECOSOC and the ILO Special List of international NGOs. ICTUR is the publisher of *International Union Rights* journal. The NGO conducts a wide-ranging programme of actions to defend, extend, and raise awareness of the rights of trade unions and trade unionists internationally. ICTUR's programme of activities includes the observation of key trade union and labour related trials around the world.

ICTUR expresses thanks to the international transport workers' union ITF for their contribution towards the costs of this observation:

<http://www.itfglobal.org/en/global/>

For more about ICTUR's trial observer programme, please see the online guide to: www.ictur.org/Eng/Lawyers.html

More information about ICTUR and its current activities is set out in the organisation's Annual Review:

http://www.ictur.org/pdf/ICTUR_annual_report_2014.pdf

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