



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

**Government of Thailand
&
Chaiwat Limlikhitaksorn
v.
Wuth Boonlert &
Samak Donnapee**

July 2020

*Lionel Blackman
Director
Solicitors International Human Rights Group
Expert for the Report*

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

ABOUT THE AUTHORS

The **Columbia Law School Human Rights Institute** works to advance human rights around the world and to train the next generation of strategic advocates for social justice. The Institute serves as the focal point of international human rights education, scholarship and practice at Columbia Law School.

Lionel Blackman, a member of the TrialWatch Expert Panel, is Director of the Solicitors International Human Rights Group, an NGO based in the United Kingdom. He is author of several comprehensive trial observation reports on trials in Kazakhstan, Egypt and Thailand and provides trial observer training in the UK and abroad. As a practicing advocate he specializes in criminal defense. He is a Visiting Fellow of London South Bank University.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.



TrialWatch Expert Lionel Blackman assigned this trial a grade of C:

While Mr. Boonlert’s trial on charges of criminal defamation was generally fair as a procedural matter, and while the Court’s decision to acquit Mr. Boonlert and his co-defendant is to be welcomed, we conclude that the decisions of the Public Prosecutor to charge the defendants and of the Court to accept the charges were a misuse of criminal law. First, the decision to prosecute was inconsistent with the defendants’ right to freedom of expression, given that Mr. Boonlert and his co-defendant’s speech was on a matter of public interest. Further, because the evidence in support of the charges against Mr. Boonlert was lacking (as the Court’s own findings show, as do the trial monitor’s notes and the trial record), there is a reasonable basis to infer that the bringing of the charges was an effort to deter and punish human rights activists—or at least a decision made in bad faith. Since the trial did not meet international standards, but the violations did not have an effect on the outcome and did not cause significant harm, this trial was given a “C” under the methodology set forth in the Annex to this report. In addition to an analysis of the trial’s procedural adherence to international fair trial standards, this grade is based upon an evaluation of the decision to prosecute these two individuals under human rights law.

While the Court appears to have acted competently and independently, carefully examined the evidence, and reached a reasoned decision, acquitting both defendants in this case, insofar as the Court could have dismissed the charges before trial for lack of evidence the Court was also in error. Criminal sanctions for defamation are, moreover, especially concerning where the charges appear to have been brought to punish legitimate free expression and censor a matter of public interest. It appears, in this case, that the charges were brought to chill an inquiry into alleged government corruption and to retaliate against an indigenous activist for sharing this information online. In addition to the immediate evidence concerning this particular trial, this opinion also is supported by the numerous reports from human rights organizations of other private parties’ misuse of the criminal justice system and the Thai government’s prosecution of human rights defenders and others for exercising their rights to freedom of expression.

In 2019, Samak Donnapee, a retired forestry officer, and Wuth Boonlert, an indigenous human rights advocate, were prosecuted and tried for criminal defamation. The charges, brought by a government officer, Chaiwat Limlikhit-aksorn, (in his private capacity) and the Public Prosecutor, relate to Facebook posts by Samak Donnapee. The Prosecution alleged that the Facebook posts suggested that government employee Chaiwat Limlikhit-aksorn owned land that unlawfully encroached onto a national park that is also

traditionally indigenous land. Wuth Boonlert was accused of sharing one of these posts with no further commentary. None of the posts named Chaiwat Limlikhit-aksorn.

Chaiwat Limlikhit-aksorn, a senior forestry officer, is known in Thailand for his 2011 role in forcibly removing the indigenous Karen community from land designated as national park land and burning down their homes and other property.¹ As testified to in this court action, Wuth Boonlert had previously testified to the National Human Rights Commission about the forced removal and the destruction of Karen homes at Chaiwat Limlikhit-aksorn's direction. Samak Donnapee testified in this action that he and Chaiwat Limlikhit-aksorn had also known each other professionally over the years and that, in 2014, Samak Donnapee (then a more senior forestry officer) had recommended that Chaiwat Limlikhit-aksorn be transferred to another district due to allegations he was involved in the disappearance of a Karen community activist. The criminal defamation charges in this case, particularly against Wuth Boonlert (who was only accused of sharing a Facebook post), appear to stem from this history. In accepting criminal charges from Chaiwat Limlikhit-aksorn and bringing its own criminal defamation charges as well, it appears that the State supported a prosecution that was intended to deter and punish rights activists.

Between September and November 2019, Columbia Law School's Human Rights Clinic monitored the trial of the two defendants as part of the Clooney Foundation for Justice's TrialWatch initiative.

While the trial itself was generally well conducted, the decision to bring charges was fundamentally flawed and inconsistent with the clear human rights law limits on prosecutions for defamation. In particular, the UN Human Rights Committee has stated that states should consider "the decriminalization of defamation" and that "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the [ICCPR] upon uninhibited expression is particularly high" and that therefore "a public interest in the subject matter of the criticism should be recognized as a defence." Here, the charges self-evidently had little basis—the Facebook posts never named Chaiwat Limlikhit-aksorn—and, importantly, constituted speech that was part of an important debate about government corruption and national land use, both matters of public interest. While the court's decision to acquit both defendants is to be welcomed, this is a case that should never have gone to trial.

¹ Bangkok Post, "Bigger damages for Karen people," June 12, 2020, *available at* <https://www.bangkokpost.com/thailand/general/1483629/bigger-damages-for-evicted-karen-people-but-land-rights-turned-down>; The Nation Thailand, "We Want our Homes Back, Not Money, Say Kaeng Krachan's Karen forest Dwellers," June 29, 2018, *available at* <https://www.nationthailand.com/news/30347602>; Bangkok Post, "Karen fear for safety in eviction case," May 19, 2014, *available at* <https://www.bangkokpost.com/thailand/politics/410489/karen-fear-for-safety-in-eviction-case>; Associated Press, "Thai court orders park chief arrested in activist's murder," Nov. 11, 2019, *available at* <https://apnews.com/8bda56d7c3024c829d803ad5ceb83090>.

A. POLITICAL & LEGAL CONTEXT

Freedom of Expression and Human Rights Defenders in Thailand

In recent years, and in particular since the 2014 coup d'état, the Government of Thailand has frequently utilized laws criminalizing speech, such as criminal defamation, sedition, and the Computer Crimes Act, to prosecute journalists, human rights defenders, and activists.² In an October 2019 report on Freedom of Expression in Thailand, Human Rights Watch noted that criminal defamation in particular is a common charge used against those who raise corruption allegations or criticize the military.³

The defendants in this case were charged with defamation under the Thai Criminal Code (sections 326-333 of the code address criminal defamation). Defining criminal defamation, Section 326 states: “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.”⁴ Section 328, under which the defendants in this case were charged, further states: “If the offense of defamation be committed by means of publication of a document . . . or by propagation of other means, the offender shall be

² See, e.g. Fortify Rights, *Follow-up Submission to the U.N. Human Rights Committee on Thailand's Compliance with the International Covenant on Civil and Political Rights (ICCPR)*, July 2018, available at https://www.fortifyrights.org/downloads/Follow-up_Submission_to_the_UN_Human_Rights_Committee_on_Thailand's_Compliance_with_the_ICCPR_July_2018.pdf; Jayshendra Karunakaren, i-Law, “A Southeast Asian Chronicle: Internet Censorship and the Repression of Digital Democracy,” April 18, 2017, available at <https://freedom.ilaw.or.th/en/blog/southeast-asian-chronicle-internet-censorship-and-repression-digital-democracy>; Reporters Without Borders, “Thai Laws on Defamation and Computer Crimes Used to Deter Reporting,” March 1, 2017, available at <https://rsf.org/en/news/laws-defamation-and-computer-crimes-used-deter-reporting>; Bangkok Post, Editorial, “Weaponised Defamation,” December 1, 2018, available at <https://www.bangkokpost.com/opinion/opinion/1585570/weaponised-defamation>; Amnesty International, “Thailand: Defamation Charges Used To Silence Dissent,” July 5, 2019, available at <https://www.amnesty.org/en/documents/asa39/0422/2019/en/>; International Federation for Human Rights (FIDH), “Thailand: Drop Defamation Complaints Against Rights Defenders,” March 12, 2018, available at <https://www.fidh.org/en/issues/human-rights-defenders/thailand-drop-defamation-complaints-against-rights-defenders>; Human Rights Watch, “Thailand: Verdict Threatens Labor Abuse Reporting,” March 28, 2018, available at <https://www.hrw.org/news/2018/03/28/thailand-verdict-threatens-labor-abuse-reporting>; International Commission of Jurists & Thai Lawyers for Human Rights, *Joint Submission of the International Commission of Jurists and Thai Lawyers for Human Rights in Advance of the Examination of the Kingdom of Thailand's Second Periodic Report Under Article 40 of the International Covenant on Civil and Political Rights*, February 6, 2017, available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_CSS_THA_26602_E.pdf.

³ Human Rights Watch, *To Speak Out is Dangerous Criminalization of Peaceful Expression in Thailand*, October 2019, pg. 29, available at https://www.hrw.org/sites/default/files/report_pdf/thailand1019_web.pdf. For example, as documented by HRW, political activist Veera Somkwamkid was charged with criminal defamation after he filed a complaint with the national police chief accusing Police General Srivara Ransibrahmanakul of improperly damming a public canal; he was convicted in August 2018. *Id.* at pg. 56.

⁴ Thai Criminal Code, Section 326.

punished with imprisonment not exceeding two years and fined not exceeding two hundred thousand Baht.”⁵ Under section 330, truth is a defense to a charge of defamation, but a defendant is not allowed to prove the truth of the statement if “such imputation concerns personal matters, and such proof will not be benefit to the public.”⁶ Further, under Section 333, defamation is a compoundable offense, meaning if both parties could reach an agreement, the charge can be dropped at any time.

In 2016, staff at Cross Cultural Foundation (a non-profit organization that provided legal representation for Wuth Boonlert in the present case) were charged with criminal defamation for publishing a report online concerning allegations of torture committed by Thai military officials—a report partly funded by the United Nations Voluntary Fund for Victims of Torture.⁷ UN human rights experts wrote to the Thai Government expressing grave concern that these charges related to the organization’s work documenting human rights concerns and raised their alarm at the continued use of criminal charges to silence speech and human rights work:

We wish to underline our concerns regarding the increasing use of investigations, judicial proceedings, and criminal sanctions on acts that are legitimate under international human rights law. In particular, we are concerned at the use of criminal sanctions on cases related to defamation, which may have a chilling effect on the right to freedom of expression and association and the legitimate and peaceful work of civil society and human rights defenders. These actions seem to particularly target and criminalize individuals who express critical views and who promote human rights and government accountability.⁸

In recent years, human rights observers have noted that, in addition to the Thai government’s actions to police freedom of expression, private parties have also used Thai criminal law to silence their critics.⁹ In Thailand, private parties are authorized to bring criminal defamation charges, and corporations in particular have used such charges to

⁵ Thai Criminal Code, Section 328 amended by Section 4 of the Act Amending the Criminal Code (No. 11), B.E. 2535.

⁶ *Id.* Sec. 330.

⁷ OHCHR, Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Letter to the Government of Thailand, August 4, 2016, *available at* <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3300>.

⁸ *Id.* at pg. 3.

⁹ See OHCHR, “Thailand: UN Experts Condemn Use of Defamation Laws to Silence Human Rights Defender Andy Hall,” May 17, 2018, *available at* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23095&LangID=E>; Human Rights Watch, *To Speak Out is Dangerous Criminalization of Peaceful Expression in Thailand*, October 2019, pg.29, *available at* https://www.hrw.org/sites/default/files/report_pdf/thailand1019_web.pdf; Human Rights Lawyers Association, “Recommendations on the Protection of Those who Exercise Their Rights and Freedoms from Strategic Lawsuits Against Public Participations,” October 2019, *available at* http://naksit.net/wp-content/uploads/2019/10/Final_TRANS-report-SLAPP_A5.pdf.

prosecute and punish journalists and human rights defenders through Strategic Litigation Against Public Participation (SLAPP suits). Recently, the Thai government introduced legislation to curb these private-party suits. Article 161/1 of the Criminal Procedure Code, adopted by the National Legislative Assembly (NLA) in December 2018, states:

In a case filed by a private complainant, if it appears to the court – or through examination of evidence called at trial – that the complainant has filed the lawsuit in bad faith or distorted facts in order to harass or take undue advantage of a defendant, or to procure any advantage to which the complainant is not rightfully entitled to, the court shall order dismissal of the case, and forbid the complainant to refile such case again. The filing of a lawsuit in bad faith as stated in paragraph one includes incidents where the complainant intentionally violated a final court’s orders or judgments in another case without providing any appropriate reason.¹⁰

Many observers remain skeptical of the efficacy of this law, however, because it: (1) provides no legal definition for terms like “bad faith,” (2) leaves significant judicial discretion in deciding whether a particular action constitutes a SLAPP suit, and (3) only addresses SLAPP suits brought by private plaintiffs and not public prosecutors.¹¹ Moreover, it is not necessarily activated in all cases; courts continue to accept charges brought by private parties even when, as in the present case, the charges appear unsubstantiated and based on suspect motivation. Indeed, as the International Commission of Jurists and the (Thailand-based) Human Rights Lawyers Association have observed, “Article 161/1 is likely only [to] be applied in exceptional circumstances.”¹² Indeed, in 2019, after this provision was added to the Criminal Procedure Code, Thailand’s courts nevertheless accepted numerous charges against journalists, human rights defenders, academics and others brought by a Thai poultry farm, Thammakaset Company Limited, without apparently applying the instructions of Article 161/1.¹³

¹⁰ Article 161/1 of the Criminal Procedure Code; see generally, *The Government of Thailand, Highlights of Thailand’s Implementation of Recommendations and Voluntary Pledges under the Second Cycle of the Universal Periodic Review 2016-2018 (Mid-term Update)*, para. 3.9.9, available at http://humanrights.mfa.go.th/upload/pdf/UPR_Midterm_2nd.pdf; International Commission of Jurists & Human Rights Lawyers Association, *Letter to the Rights and Liberties Protection Department (RLPD), Ministry of Justice Re Recommendations on Draft National Action Plan on Business and Human Rights*, March 15, 2019, available at <https://www.icj.org/wp-content/uploads/2019/03/Thailand-SLAPP-Analysis-Advocacy-Analysis-brief-2019-ENG.pdf>.

¹¹ See International Commission of Jurists & Human Rights Lawyers Association, *Re: Recommendations on draft National Action Plan on Business and Human Rights*, March 15, 2019, available at <https://www.icj.org/wp-content/uploads/2019/03/Thailand-SLAPP-Analysis-Advocacy-Analysis-brief-2019-ENG.pdf>; ARTICLE19, “Thailand: Open Letter on Lawsuits Brought by Thammakaset Company Against Human Rights Defenders,” February 14, 2019, available at <https://www.article19.org/resources/thailand-open-letter-on-lawsuits-brought-by-thammakaset-company-against-human-rights-defenders/>; Several human rights organizations in Thailand told TrialWatch that the new legislation has not stopped courts from accepting these private charges.

¹² International Commission of Jurists & Human Rights Lawyers Association, *supra* n.10, at para. 30.

¹³ See Amnesty International, “Letter to Prime Minister Payut (on Behalf of 89 Organizations) Regarding New Lawsuits from Thammakaset,” February 14, 2019, available at <https://www.amnesty.org/download/Documents/ASA3998672019ENGLISH.pdf>

Indigenous Rights in Thailand

The case examined in this report stems from a set of allegedly defamatory statements that a government forestry officer was corrupt and misused indigenous and national forestry lands. There are on-going disputes in Thailand between the State and indigenous communities like the Karen¹⁴ who are facing expulsion from their traditional lands, which the government has now listed as national forest lands.¹⁵ Soon after the coup, the new ruling National Council for Peace and Order (NCPO) instituted measures to protect forest lands, including NCPO Order Nos. 64/2557 and 66/2557 ('Return Forest Policy') and a reforestation 'Master Plan' (forest plan to suppress illegal logging and deforestation). These programs have resulted in a conflict between indigenous groups, who largely reside in the now-protected forests, and the State, resulting in forced evictions and legal actions (criminal and civil) against indigenous and other poor communities living in national forests.¹⁶

¹⁴ The Government of Thailand does not recognize Indigenous Peoples as a specific minority group. See *generally* Cultural Survival, Network of Indigenous Peoples in Thailand, and Asia Indigenous Peoples Pact, Observations on the State of Human Rights of Indigenous Peoples in Thailand in Light of the UN Declaration on the Rights of Indigenous Peoples September 2015, Joint Submission Prepared for 2nd Cycle of Universal Periodic Review of Thailand, 25th session of the Human Rights Council (April-May 2016), available at https://www.culturalsurvival.org/sites/default/files/media/thailandupr-sep2015-final_0.pdf; Micah F. Morton & Ian G. Baird, "From Hill Tribes to Indigenous Peoples: The Localisation of a Global Movement in Thailand," *Journal of Southeast Asian Studies* 50 no. 7 (March 2019); *Bangkok Post*, "Recognition fight continues for indigenous peoples," August 17, 2017, <https://www.bangkokpost.com/opinion/opinion/1307659/recognition-fight-continues-for-indigenous-peoples>; Minority Rights Group, "Thailand: Highland Indigenous Peoples," available at <https://minorityrights.org/minorities/highland-ethnic-groups/>.

¹⁵ Human Rights Committee, *Concluding Observations on the Second Periodic Report of Thailand*, CCPR/C/THA/CO/2, April 25, 2017; Reuters, "Thai Community Forest Bill Won't Benefit All, Campaigners Say," Feb. 21, 2019, available at <https://www.reuters.com/article/us-thailand-landrights-lawmaking/thai-community-forest-bill-wont-benefit-all-campaigners-say-idUSKCN1QA0QG>; Prachatai, "Investors In, Poor Out: Junta's Land Policy After 3 Years in Power," May 29, 2018, available at <https://prachatai.com/english/node/7169>; Paul Ehrlich, "'The Single Greatest Risk' for Thailand's Largest Ethnic Minority," *Wall Street Journal*, March 16, 2017, available at <https://www.wsj.com/articles/the-single-greatest-risk-for-thailands-largest-ethnic-minority-1489689023>.

¹⁶ Human Rights Watch, *Thailand: Two Months Under Military Rule, Deepening Censorship, Persecution, Draconian Orders*, July 21, 2014, available at <https://www.hrw.org/news/2014/07/21/thailand-two-months-under-military-rule>; MANYUSHA, "Thailand -End the Unfair Criminalisation of Land Rights Defenders in Sai Thong National Park," June 19, 2019, available at <https://www.manushyafoundation.org/single-post/sai-thong-np-news-release-19-June>; Cultural Survival, Network of Indigenous Peoples in Thailand, and Asia Indigenous Peoples Pact, "Observations on the State of Human Rights of Indigenous Peoples in Thailand in Light of the UN Declaration on the Rights of Indigenous Peoples September 2015, Joint Submission Prepared for 2nd Cycle of Universal Periodic Review of Thailand, 25th session of the Human Rights Council (Apr-May 2016)," September 2015, available at https://www.culturalsurvival.org/sites/default/files/media/thailandupr-sep2015-final_0.pdf; Franciscans International (FI) & Marist International Solidarity Foundation (FMSI), "Human Rights Situation in Thailand, Universal Periodic Review (25th Session, April/May 2016)," September 2015, available at <https://franciscansinternational.org/fileadmin/media/2016/UPR-Thailand-2016-joint-submission-Franciscans-International-and-FMSI.pdf>; Community Resource Centre, Northern Development Foundation, Thai Sea Watch Association, E-Sarn Human Rights and Peace Information Centre, Project for Campaign for Public Policy on Mineral Resources, "Assessment on Economic, Social and Cultural Rights In Thailand, Focusing on Natural Resources on Business and Human Rights And Cases of Trans-Boundary Impact, Joint Submission to the United Nations Committee on the International Covenant on Economic, Social and Cultural Rights (ICESCR)," May 8, 2015, available at

Although the 'Return Forest Policy' ostensibly mitigates this harm by excepting from Order No. 64/2557 poor and forest-dwelling families who lived on the land prior to the order, in reality, due both to the lack of land registration and apparently mounting political pressure to remove people from the forest, it has not protected indigenous groups from forcible removal and even arrest and prosecution.¹⁷ A new proposal to give Thai villagers more of a role in managing the forests excludes conservation areas such as national parks, where many indigenous communities (like the Karen) live.¹⁸

The conflict between the State and indigenous communities came to the fore in 2018 and 2019 with the Thai government's efforts to have UNESCO designate the Kaeng Krachan forest complex (KKFC), where many Karen live, as a World Heritage Site. According to some human rights groups, many Karen were classified as "encroachers" and forcibly evicted from the area in 2013-14, and the effort to obtain a World Heritage designation could result in many more such evictions; moreover, many of the villagers and indigenous groups have not been consulted or apprised of the proposal.¹⁹ At the request of UNESCO, several UN Special Rapporteurs commented on the implications of World Heritage designation on the Kaeng Krachan park/forest complex (KKFC), listing a number of concerning events from the harassment and disappearance of indigenous rights activists to the exclusion of Karen peoples from the UNESCO designation conversation, noting that, "The steps taken to criminalize and otherwise intimidate Karen community members and human rights defenders appear to constitute deliberate measures intended to restrict their peaceful and legitimate work in defense of human rights."²⁰

https://earthrights.org/wp-content/uploads/20150508_escr_pararell_report_for_thailand_by_crc_and_network_final.pdf.

¹⁷ Rina Chandra, Thomas Reuters Foundation, "Thai Minister Vows to Make Resolving Land Claims in Forests 'Top Priority,'" August 21, 2019, *available at* <http://news.trust.org/item/20190821104643-8ghv6>; Kongpob Areerat, *Prachatai*, "Junta's Attempt to 'Return Forest' Hurts the Poor," October 24, 2014, *available at* <https://prachatai.com/english/node/4441>; Voice of America, "Heritage Site or Home? Indigenous Thais Fight for Right to Forest," April 15, 2019, *available at* <https://www.voanews.com/east-asia/heritage-site-or-home-indigenous-thais-fight-right-forest>; Cultural Survival, "Network of Indigenous Peoples in Thailand, and Asia Indigenous Peoples Pact, Observations on the State of Human Rights of Indigenous Peoples in Thailand in Light of the UN Declaration on the Rights of Indigenous Peoples September 2015, Joint Submission Prepared for 2nd Cycle of Universal Periodic Review of Thailand, 25th session of the Human Rights Council (Apr-May 2016)," *available at* https://www.culturalsurvival.org/sites/default/files/media/thailandupr-sep2015-final_0.pdf

¹⁸ Rina Chandran, "Thai community forest bill won't benefit all, campaigners say," Feb. 21, 2019, *available at* <https://www.reuters.com/article/us-thailand-landrights-lawmaking/thai-community-forest-bill-wont-benefit-all-campaigners-say-idUSKCN1QA0QG>; Santisuda Ekachai, "More violence ahead for forest poor," *Bangkok Post*, July 17, 2019, <https://www.bangkokpost.com/opinion/opinion/1713840/more-violence-ahead-for-forest-poor>

¹⁹ Cultural Survival, Network of Indigenous Peoples in Thailand, and Asia Indigenous Peoples Pact, "Observations on the State of Human Rights of Indigenous Peoples in Thailand in Light of the UN Declaration on the Rights of Indigenous Peoples September 2015, Joint Submission Prepared for 2nd Cycle of Universal Periodic Review of Thailand, 25th session of the Human Rights Council (Apr-May 2016)," September 2015, *available at* https://www.culturalsurvival.org/sites/default/files/media/thailandupr-sep2015-final_0.pdf

²⁰ OHCHR, Special Rapporteurs Letter to Peter Shadie, Director of IUCN World Heritage Programme, UNESCO, Regarding the Nomination of KKFC as a UNESCO Site, pg. 6, February 28, 2019, *available at* <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24379>; see

B. CASE HISTORY

Public Prosecutor of the Office of the Attorney General of Thailand, plaintiff, and Chaiwat Limlikhit-aksorn, Co-Plaintiff v. Samak Donnapee and Wuth Boonlert

This case was brought both by the public prosecutor's office and a public official (acting in his private capacity), Chaiwat Limlikhit-aksorn (the "Co-Plaintiff"), against two individuals: Samak Donnapee, a retired national park employee, and Wuth Boonlert, an ethnic minority (Karen) farmer and community rights activist. The Co-Plaintiff is an employee of the National Parks Department, and previously head of Kaeng Krachan National Park. Both defendants were charged with criminal defamation "by publishing a libel"²¹ in relation to a Facebook post written by Samak Donnapee (and shared by Wuth Boonlert) and posted on August 28, 2016; the charges against Samak Donnapee also stem from three other Facebook posts, including an interview he gave to a journalist that he posted to Facebook. The Co-plaintiff filed charges against Boonlert and Donnapee at the Khan Na Yao Police Station, triggering a police investigation that culminated in the filing of charges. On October 22, 2018, Chaiwat Limlikhit-aksorn asked to be made a Co-Plaintiff with the State, requesting damages of 2,000,000 THB (approximately 60,600 USD) if the defendants were found guilty of libel per the Criminal Code's Section 328, which stipulates that libel is punishable by imprisonment of not more than two years and a fine of not more than 200,000 THB (approximately 6,060 USD).²²

The allegedly defamatory statements concerned private property that Donnapee suggested was unlawfully encroaching on a national park. The first Facebook post was posted on August 22, 2016 and, as reproduced in the indictment, read: "concerning the head of *Phraya Seam* squad, the owner of *Chai Rajapruk* ranch who have in his possession a land which encroaching into the national forest reserve in accordance with the *Sor Kor Tor* (land utilising right) scheme about a few hundred *Rai* [land measurement equal to 16 acres]."²³ According to the Prosecution, this pointed to Chaiwat Limlikhit-aksorn as the one who owned and profited from the land in question. According to defendant Samak Donnapee's testimony at trial, the post was instead meant to urge the forestry department to investigate the alleged unlawful encroachment and to make that investigation transparent.

also Voice of America, "Heritage Site or Home? Indigenous Thais Fight for Right to Forest," April 15, 2019, <https://www.voanews.com/east-asia/heritage-site-or-home-indigenous-thais-fight-right-forest>.

²¹ Annex B, Indictment.

²² Cross-Cultural Foundation, Press Release, "Chaiwat Limlikhit-aksorn to Testify in Court on 10 Sep as Co-Plaintiff in a Libel Suit Against Wut Boonlert, an Independent Expert on Human Rights for Indigenous Karen People," September 6, 2019, available at <https://voicefromthais.wordpress.com/2019/09/06/chaiwat-limlikhit-aksorn-to-testify-in-court-on-10-sep-as-co-plaintiff-in-a-libel-suit-against-wut-boonlert-an-independent-expert-on-human-rights-for-indigenous-karen-people/>

²³ Annex B, Indictment, para. 1.1.

The Co-Plaintiff, Chaiwat Limlikhit-aksorn, is not mentioned by name in any of the posts; nevertheless, the indictment states that:

The phrase the head of *Phraya Seam* squad is referring to the Victim who holds the position of the head of *Phraya Sua* squad under the Department of National Parks, Wildlife and Plant Conservation. This led a third person or others to misunderstand that the Injured Person encroached the national forest reserve. That he is an officer of the Department of National Parks, but he himself a wrong doer. The post was published in a manner likely to impair the Injured Person's reputation or place the Injured Person in contempt or hatred by others.²⁴

Samak Donnapee was also accused of defamation based on a quote he gave for an online magazine article (which he also posted online) and two further Facebook posts, which the Prosecution and Co-Plaintiff argued collectively established his libelous intent when read together with the first post. The magazine quote was to the effect that, "a 100 *Rai* ranch in Phetchaburi province is located in a national forest reserve. An investigation has not gone for [sic]. The land encroached is turned into a resort."²⁵ In posting the article on Facebook, Samak Donnapee allegedly also wrote: "Rajapruck Ranch is located in a national forest reserve having an area of 100 *Rai* ... about 73 *Rai* of the ranch has Mr. Pairote Limlikhit-aksorn [Chaiwat Limlikhit-aksorn's brother] as a possessor. The land shall be reclaimed by the Royal Forest Department but the reclamation is neglected."²⁶

According to the indictment (and confirmed during the trial), Pairote Limlikhit-aksorn is the Co-Plaintiff's brother. Again, acknowledging that the Co-Plaintiff is not mentioned in this post, the indictment stated:

The statement means that the Victim himself encroached the land located in the national forest reserve by letting his brother possessing [sic] the land for him. The statement was published in a manner likely to impair the Victim's reputation or place the Victim in contempt or hatred by others.²⁷

As reproduced in the indictment, a further Facebook post—and the only one that Wuth Boonlert shared—from August 28, 2016 stated the following:

The Chai Rajapruck Ranch is located [partly] in a national forest reserve area and [partly] in the area possessed in accordance with the resolution of the cabinet dated 30 June 1998, 100 *Rai* in total. An investigation following a complaint put forth by the Royal Forest Department has been going on since 2008 until now. Recently, on 24 June 2016, the director

²⁴ Annex B, Indictment, para. 1.1.

²⁵ Annex B, Indictment, para. 1.2.

²⁶ Annex B, Indictment, para. 1.2.

²⁷ Annex B, Indictment, para. 1.2.

of the Royal Forest Department (Mr. Chonlatit Surassawadi) issued a report [concerning] Chai Rajapruk ranch, an area of 100 *Rai*, located in a national forest reserve... and locate in the area under the survey conducted in accordance with the resolution of the cabinet dated 30 June 1998, about 73 *Rai* has Mr. Pairote Limlikhit-aksorn as its possessor. The [rest] of the land shall be reclaimed, but the director of the Royal Forest Department has been neglecting the reclamation.²⁸

The final post at issue, from September 22, 2016, was on a separate matter and included pictures of an official police document. The post stated:

[T]hese are photos of the document issued by *Kaeng Krachan* Police Station regarding the police's decision to present the results of the investigation to the prosecutor in a case concerning guns (magazines and bullets) something like that. Don't say that the bullets were belong to the state because the model [of the bullets] confiscated, they said, were not the type procured by the state. Read it and decide for yourselves who is the good or the bad guy.²⁹

There was no dispute that the posts were authored by Samak Donnapee, with one shared by Wuth Boonlert, and that none of the posts named the Co-Plaintiff, Chaiwat Limlikhit-aksorn; however, as detailed further below, the Co-Plaintiff claimed that all the posts and Samak Donnapee's quote for the magazine, read together, identify and accuse him.

As discussed at length during the trial, the Co-Plaintiff, Chaiwat Limlikhit-aksorn, had a long and antagonistic history with the primary defendant, Samak Donnapee. The second defendant Wuth Boonlert is an indigenous rights activist who, as testified to in court, previously had testified to the National Human Rights Commission about the Co-Plaintiff's role in forcibly removing and burning the houses of the indigenous Karen community. Wuth Boonlert was represented by a team of lawyers from Cross Cultural Foundation (CrCF), a non-profit organization focused on the human rights of ethnic minority groups, stateless people, migrant workers and the victims of conflict. While not directly related to this case, at the time of trial, the Co-Plaintiff, along with three subordinate officers, was being investigated for and was subsequently charged with the murder of a Karen activist, Porlajee "Billy" Rakchongcharoen, who disappeared in 2014 and whose body was recovered right before the instant case went to trial.³⁰ In January 2020, the prosecution

²⁸ Annex B, Indictment, para. 1.3.

²⁹ Annex B, Indictment, para. 1.4.

³⁰ United Nations Office of the High Commission for Human Rights, South-East Asia Regional Office, "UN Human Rights Office welcomes progress on Thai enforced disappearance case, urges government to do more," Nov. 13, 2019, available at <https://bangkok.ohchr.org/thailand-un-human-rights-office-welcomes-progress-on-enforced-disappearance-case-urges-government-to-do-more/>; Associated Press, "Thai court orders park chief arrested in activist's murder," Nov. 11, 2019, available at <https://apnews.com/8bda56d7c3024c829d803ad5ceb83090>; Bangkok Post, "Chaiwat surrenders to answer murder charge in Billy case," Nov. 12, 2019, available at <https://www.bangkokpost.com/thailand/general/1792599/chaiwat-surrenders-to-answer-murder-charge-in-billy-case>.

announced it was no longer pursuing charges against the co-Plaintiff due to insufficient evidence.³¹

C. TRIAL PROCEEDINGS

The trial of Samak Donnapee and Wuth Boonlert took place at Min Buri Criminal Court in Bangkok, Thailand, on September 10 and 11, 2019. The first day, September 10, centered on the examination of prosecution witnesses; on the second day, the two defendants presented their defense. Samak Donnapee and Wuth Boonlert were tried together but Samak Donnapee represented himself and Wuth Boonlert was represented by attorneys from Cross Cultural Foundation. The State was represented by the Public Prosecutor's office; the Co-Plaintiff had private counsel.

September 10, 2019: Prosecution Examination of Witnesses

The TrialWatch monitor and their interpreter arrived at the courthouse at 8am, one hour ahead of the trial start time. At approximately 9am, the clerk came into the courtroom and inquired if the defendants were present and noted there was press outside the courtroom. The clerk asked to see the monitor's accreditation letter and called down to the clerk's office to confirm it had been previously submitted. At 9:40am, the panel of three judges entered the courtroom. The presiding judge began by informing Samak Donnapee, who was unrepresented, that he was willing to move forward with the case even though Mr. Donnapee was not represented by an attorney but cautioned him that the legal language could be tricky. Nevertheless, the judge said he was willing to let Samak Donnapee proceed *pro se*. The judge then addressed the monitor's presence in court, had them announce themselves, and gave the monitor and the interpreter permission to remain in the courtroom so long as they did not use recording devices. A second judge on the panel then noted that the monitor and any non-parties in the courtroom could not take notes during the proceedings and, if they did so, could face contempt of court charges.

The Prosecution began with its examination of the Co-Plaintiff, Chaiwat Limlikhit-aksorn, who summarized the articles at the center of the case and testified that these articles had caused him and his reputation harm, causing the public to hate him and costing him a promotion after an investigation by the park office. He noted that he was exonerated by the park office's investigations into whether he had unlawfully owned land within the park (although, as emerged on cross-examination by Wuth Boonlert's attorneys, no evidence of this exoneration was ever provided to the court). He also admitted that his name is not in the Facebook posts but said that the posts read together pointed to him because of the similarity of his name to the ranch and because the magazine article in which Mr.

³¹ The Nation Thailand, "Billy Murder Case: DSI Studying Prosecutors' Decision to Drop Charges Against National Park Ex-chief," January 28, 2020, available at <https://www.nationthailand.com/news/30381174>; Human Rights Watch, "Thailand: Charges Dropped in Activist's Murder-- Ensure Full Prosecution of Billy's Killing," February 3, 2020, available at <https://www.hrw.org/news/2020/02/03/thailand-charges-dropped-activists-murder#>.

Donapee was quoted named the park team he led. Chaiwat Limlikhit-aksorn also testified that he knew both defendants; Samak Donnapee had been his senior in university and ahead of him in the Parks Department. Chaiwat Limlikhit-aksorn testified that he knew who Wuth Boonlert was because they had clashed in the past over land rights and the rights of the Karen community. Boonlert's attorneys further asked if Chaiwat Limlikhit-aksorn knew whether Wuth Boonlert had complained to authorities about the Co-Plaintiff with regard to the disappearance of Karen activist Porlajee "Billy" Rakchongcharoen. Here the presiding judge intervened and said he would permit this line of questioning to establish that there was a prior relationship between the two but cautioned the attorneys not to pursue it in detail as he wanted to focus on the instant case, not other cases or unrelated complaints. The judge further said that he had read the reports of Chaiwat Limlikhit-aksorn burning down Karen people's homes in the forest but just wanted to focus on the defamation case.

In the afternoon, the Prosecutor and Chaiwat Limlikhit-aksorn presented three more witnesses: a legal officer with the national park, an administrative assistant from the park who filed the charges on Chaiwat Limlikhit-aksorn's behalf with the police, and another park officer who also read the allegedly defamatory posts. These witnesses testified that they read the Facebook posts, recognized them to be about Chaiwat Limlikhit-aksorn, and that they gave a negative impression of the Co-Plaintiff as someone who misused his authority.

September 11, 2019: Defense Examination of Witnesses

On the second day, the Prosecution concluded its presentation and examination of its witnesses, beginning with the investigating police officer who charged both defendants. The officer testified that he had read the posts, determined them to be defamatory, and interviewed the defendants. He noted that originally, there were two charges presented to the prosecution--criminal defamation and introduction of fraudulent information into a computer system. The Prosecutor accepted the criminal defamation charge only.

From approximately 11am to 1pm, Samak Donnapee presented himself as his own defense witness, with the judge questioning him as he read through his prepared testimony. Samak Donnapee began by explaining his history of service in the park office and how he felt it was his mission to expose corruption in the park department. He went on to explain that since his retirement in particular, he has used his Facebook page to post about the forest and related issues, including land rights. Samak Donnapee then appeared to argue that truth was a defense to the alleged defamation, testifying that the Facebook posts were factual as they were based on government reports showing that the property encroached on the forest land. He also pointed out that they were about the Co-Plaintiff's brother, as only he was named in the posts. He further noted that he had published hundreds of posts on Facebook (which he entered into the record) but the only person to file charges against him was the Co-Plaintiff Chaiwat Limlikhit-aksorn, who had previously filed three (unrelated) criminal defamation charges against him. Samak

Donnapee further testified that one reason the Co-Plaintiff had a grudge against him was due to the fact that in 2015, he recommended Chaiwat Limlikhit-aksorn be transferred to another district due to his alleged involvement in the 2014 disappearance of indigenous activist Pholachi "Billy" Rakchongcharoen.³²

After lunch, the case resumed with defendant Wuth Boonlert on the stand. Wuth Boonlert testified that he is a farmer and also works for a commission set up by the government to look into the cultural and economic issues of minority communities, including the Karen and other forest-dwelling communities. Wuth Boonlert further testified that he had never met the other defendant, Samak Donnapee, before the court proceedings but that he followed Samak Donnapee on Facebook because of their shared interest in forest issues and land rights. Wuth Boonlert testified that he shared Samak Donnapee's August 28, 2016 post on his own Facebook page, without further commentary and making clear that it was Donnapee's post, both to give Donnapee credit and also to convey that he wasn't saying the allegation was true but rather wanted to show its provenance and encourage the government to investigate.

The final witness in the case, called by Wuth Boonlert's team, was an academic expert on the Karen community who testified that Wuth Boonlert had previously testified to the national human rights commission about the Co-Plaintiff's 2011 order to burn down Karen homes and that this hearing had led to an official investigation into Chaiwat Limlikhit-aksorn and his activities.

November 18, 2019: Judgment

The TrialWatch monitor and their interpreter attended the judgment on November 18, 2019 at 9:00am; both defendants were present, but the Co-Plaintiff was not.

The Court found both defendants not guilty on all charges and thus declined the Co-Plaintiff's request for damages. The Court applied the reasonable person standard in evaluating the posts and noted that it was not convinced by the prosecution and Co-Plaintiff's argument that the three different posts (and the article in which Samak Donnapee was quoted) should be read together, observing that readers could have seen one but not all of the pieces and thus the public could not have been expected to be able to identify and also form a negative opinion of the complainant. Analyzing the statements in turn, the Court held that none of them directly stated something defamatory about the

³² At the time of this trial, Billy's body had recently been recovered and a murder investigation, conducted by the Justice Ministry's Department of Special Investigation (DSI), was underway. Chaiwat Limlikhit-aksorn was arrested on suspicion of murder on November 12, 2019. However, on January 27, 2020, DSI announced the murder and other charges against Chaiwat Limlikhit-aksorn and three other park officers had been dropped.

Plaintiff, noting that the Plaintiff's name was not mentioned at any point in any of the posts or the article.³³

The Court further stated that the Prosecution's witnesses (all employees or colleagues of the Co-Plaintiff) were duplicative, their testimony was conclusory as to the finding of defamation, and the testimony was not persuasive given who the witnesses worked for ("[t]he Court is of the opinion that caution must be taken when weighting the testimonies of these three witnesses because all of them work at the same place as the Co-Plaintiff.")³⁴

³³ Public Prosecutor & CL vs. SD & WD, Judgment, November 18, 2019, Annex C ("even when considering both the statement and the interview, it could not be understood as saying that the Co-Plaintiff is the owner of Chai Rajapruk ranch as the name of the Co-Plaintiff was not mentioned anywhere nor were there any word or phrase in both the statement and the interview of the first Defendant that could be understood as referring to the Co-Plaintiff. On the contrary, the statement of the first Defendant stated clearly that the owner of Chai Rajapruk ranch was Mr. Pairote Limlikhit-aksorn, and not the Co-Plaintiff.")

³⁴ Public Prosecutor & CL vs. SD & WD, Judgment, November 18, 2019, Annex C.

METHODOLOGY



A. THE MONITORING PHASE

The Columbia Law School Human Rights Clinic monitored the two-day trial and judgment as part of CFJ's TrialWatch initiative. In advance of the monitoring mission, Columbia informed the defense attorney of its intention to monitor the case and procured the indictment. The Human Rights Clinic also informed the Min Buri Court in advance of the trial of its intention to monitor the trial, providing a letter by facsimile two weeks in advance of the trial's start date. During the trial, Columbia worked with a local translator, who was permitted to simultaneously translate during the proceedings.

None of the monitors experienced any impediments to their entry into the courtroom; however, the monitor was not permitted to take any notes during the trial. Upon the judges' entry to the courtroom, the monitor and translator were asked to introduce themselves and were permitted to stay in court. However, within minutes of the start of the proceeding, one of the three judges said that no one in the courtroom would be permitted to take notes or else would be held in contempt of court. The monitor recorded their observations during the breaks and each night, working to recall and summarize as accurately as possible what transpired in court.

The monitor used a standardized CFJ TrialWatch questionnaire to record and track what transpired in court and the degree to which the defendants' fair trial rights were respected in the proceedings.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, Lionel Blackman, the member of the CFJ TrialWatch Experts Panel responsible for evaluating the fairness of the trial, reviewed materials provided by the trial monitors, including answers to a standard set of questions (collected via the CFJ TrialWatch App), notes taken during the proceedings and related meetings, and court documents related to the case.

These materials provided the expert with a factual record to review in order to evaluate the trial's fairness under human rights law. The expert then evaluated the trial against the following components of the right to a fair trial: the right to be presumed innocent; right to be informed of the charges; fitness to plead; the right to interpretation; the right against double jeopardy; the right to a speedy trial; the right to be tried by a competent, independent and impartial tribunal established by law; the right to counsel; the right to adequate time and facilities to prepare a defense; the right to a public hearing; the right to be tried in one's presence; the right not to incriminate oneself; the right to call and examine witnesses; the right to fairness; and the right to appeal, including the right to a public, reasoned judgment.

A grade was then assigned using the methodology in the Annex to this report.

ANALYSIS



During the trial proceedings, the Court provided, as it should, a fair trial for both Defendants, and no breaches of standards of international law on fair trials of any significance were apparent in this case, based on the monitor's reporting and available case documents.³⁵ The lengthy and detailed reasoned judgement demonstrates that the judges were fully engaged during the trial, very familiar with the evidence, and adopted a proper and fair approach to the evaluation of witnesses and documents.

Of concern, however, was the decision of the Court to accept the private party's criminal charges and of the Public Prosecutor to charge both defendants with criminal defamation in the first place. First, the UN Human Rights Committee has made clear defamation charges must not be used to suppress speech.³⁶ Further, the evidence and reasoning in the final judgement suggests that the decision of the State to prosecute the Defendants was reached without a proper, fair, or balanced consideration of the merits of the case. Indeed, given the background to this matter and the baselessness of the charges, we are of the opinion that the State supported a prosecution that was intended to deter and punish rights activists.

Under the International Covenant on Civil and Political Rights, which the Government of Thailand has signed and ratified, restrictions on the right to freedom of expression must be prescribed by law, necessary to meet a legitimate state interest, and proportionate to that interest.³⁷ The UN Human Rights Committee, recognizing the chilling effect of criminal sanctions upon legitimate exercise of free expression, has found that States should consider "the decriminalization of defamation" and that for such offenses, "imprisonment is never an appropriate penalty."³⁸

In a Joint Declaration in 2002, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, and the Organization of American States Special Rapporteur on Freedom of Expression stated: "Criminal defamation is not a justifiable restriction on

³⁵ For example, it does not appear that the Court informed the defendants of their right to silence but this was not prejudicial to the defendants.

³⁶ UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 47.

³⁷ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, para. 12.2, (1999) (noting that "[a]ny restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.")

³⁸ UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 47.

freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”³⁹

Criminal defamation laws are concerning because they can chill and penalize legitimate expressions of free speech. Moreover, such laws have been weaponized to silence individuals raising issues of public concern, including government corruption and human rights abuses. As the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression observed in 2008, while defamation laws may not have had nefarious goals in the beginning, nevertheless:

[T]he subjective character of many defamation laws, their overly broad scope and their application within criminal law have turned them into a powerful mechanisms [sic] to stifle investigative journalism and silent criticism.⁴⁰

The UN Human Rights Committee has previously raised concerns with the application of criminal defamation laws in Thailand against human rights defenders, journalists, and private individuals for speech protected by human rights law.⁴¹

Thailand has taken a preliminary step to limit the use of criminal defamation laws against those exercising their right to free expression by adopting the earlier-discussed Article 161/1 of the Criminal Procedure Code.⁴² While this provision only applies to those claims brought by a private party, public prosecutors in Thailand are permitted to use their

³⁹ Joint Declaration by the UN Special Rapporteur on freedom of opinion and expression, the OSCE Representative on freedom of the media, and the OAS Special Rapporteur on freedom of expression, “International Mechanisms for Promoting Freedom of Expression,” December 10, 2002.

⁴⁰ UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Ambeyi Ligabo, A/HRC/7/14, Feb. 28, 2008, para. 39.

⁴¹ See UN Human Rights Committee, Concluding Observations on the Second Periodic Report of Thailand, CCPR/C/THA/CO/2, April 25, 2017, para. 35 (“The Committee is concerned about reports of the severe and arbitrary restrictions imposed on the right to freedom of opinion and expression in the State party’s legislation, including in the Criminal Code, the Computer Crimes Act (2007), Order 3/2015, and the restrictions imposed through section 44 of the interim Constitution. It is also concerned about criminal proceedings, especially criminal defamation charges, brought against human rights defenders, activists, journalists and other individuals under the above-mentioned legislation, and about reports of the suppression of debate and campaigning, and criminal charges against individuals during the run-up to the Constitutional referendum in 2016 (arts. 19 and 25).”); OHCHR, “Thailand: UN Experts Condemn Use of Defamation Laws to Silence Human Rights Defender Andy Hall,” May 17, 2018, *available at* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23095&LangID=E> (“Worryingly, we are seeing the use of defamation cases as a tool to undermine the legitimate rights and freedoms of communities and rights holders, who are often from some of the most vulnerable groups in society. Criminal defamation charges against human rights defenders serve only to criminalise their legitimate human rights work and may violate their right to freedom of expression.”)

⁴² Article 161/1 of the Criminal Procedure Code; *see generally*, The Government of Thailand, *Highlights of Thailand’s Implementation of Recommendations and Voluntary Pledges under the Second Cycle of the Universal Periodic Review 2016-2018 (Mid-term Update)*, para. 3.9.9, *available at* http://humanrights.mfa.go.th/upload/pdf/UPR_Midterm_2nd.pdf; International Commission of Jurists & Human Rights Lawyers Association, “Letter to the Rights and Liberties Protection Department (RLPD), Ministry of Justice Re Recommendations on Draft National Action Plan on Business and Human Rights,” March 15, 2019, *available at* <https://www.icj.org/wp-content/uploads/2019/03/Thailand-SLAPP-Analysis-Advocacy-Analysis-brief-2019-ENG.pdf>.

discretion and decline to prosecute a case that would not serve the public interest.⁴³ Had either the Public Prosecutor or the Court conducted an appropriate, early examination of the Facebook posts in question, they should have been able to dismiss the matter without a full-blown trial.

Although the Court did appropriately dismiss the charges against both defendants, observing that the allegedly defamatory articles did not mention the private plaintiff by name, could not be reasonably read together to give the general public the impression they referred to the Co-Plaintiff, and thus were not defamatory, it is concerning that the Public Prosecutor accepted the charges in the first place. Indeed, the facts in this trial were not in dispute and the articles available to the Prosecutor from the outset, and it should have been clear to the Prosecutor that this case was not appropriate to bring forward to trial. Moreover, the second defendant in this case, indigenous activist Wuth Boonlert faced charges simply for sharing an article on Facebook, which suggests an expansive understanding of criminal defamation charges by the Prosecution. Furthermore, assuming Wuth Boonlert was not the only individual who shared this article, the decision of the Public Prosecutor to accept and add criminal charges against this activist may appear politically motivated or at least a decision made in bad faith.

Finally, the decision in this case appropriately found that the articles were not defamatory on their face and based on the standard in Thai law, as the public would have had to read all of the posts to identify who they referred to. But the Court did not reject the charges outright even though the charges themselves applied to protected speech and appeared to be politically motivated; and a conviction for speech protected under international human rights law would have violated the defendants' rights and effectively punished activists and members of the public for commenting on a matter of public interest.

⁴³ Public Prosecutor Organization and Public Prosecutors Act B.E. 2553 (2010), Section 21 ("Should a public prosecutor find that a criminal prosecution will be of no use to the general public, will affect the national safety or security, or will impair significant interest of the State, he shall refer his opinion to the Attorney General who may then render an order of non-prosecution. This shall be subject to the rules laid down by the Office of the Attorney General, with the approval of the PPSC.").

CONCLUSION AND GRADE



The trial of Samak Donnapee and Wuth Boonlert merits a grade of C. Although the proceedings did not appear to include any significant violations of international human rights law at the procedural level, the charges themselves and the Thai government's decision to pursue the prosecution violate international human rights law on the right to freedom of expression.

GRADE:

C

ANNEX



- A. TrialWatch Grading Methodology**
- B. Indictment**
- C. Judgment**

ANNEX A



Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”⁴⁴ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

⁴⁴ ICCPR, Article 26.