

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

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29 June 2014

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Dear Minister and Ambassador,

Consular protection of human rights defender and UK citizen, Mr. Andy Hall: Judicial Harassment in Thailand; court hearing 2 July 2014

Lawyers' Rights Watch Canada (LRWC) is a committee of Canadian lawyers who promote human rights and the rule of law through advocacy, education and research. LRWC is an NGO in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN).

LRWC objects to the wrongful prosecution of Mr. Andy Hall, a human rights researcher and defender, who is a citizen of the United Kingdom (UK) and a resident of Myanmar. On 18 June 2014, Thailand's Attorney General and the Prakanong Court in Bangkok accepted charges of criminal defamation against Mr. Hall filed by Natural Fruit Co. Ltd. (Natural Fruit). The charges were filed as reprisals against Mr. Hall for exercising his freedom of expression to expose violations by Natural Fruit of the rights of migrant workers employed in Thailand's tuna and fruit export industry. As such, the prosecution is illegitimate and contravenes Thailand's domestic and international legal obligations to ensure that all persons within its territory can exercise their lawful right to freedom of expression without risk of criminal sanctions.

LRWC seeks the intervention of the UK government for protection of Mr. Hall's internationally protected rights, including his rights pursuant to the *International Covenant on Civil and Political Rights* (ICCPR), ratified by UK in 1976 and by Thailand in 1996, and the UN *Declaration on Human Rights Defenders* adopted by consensus of the member States of the UN General Assembly in 1999.¹ LRWC urges attendance and observation by UK officials at all proceedings, including a "reconciliation" hearing on 2 July 2014 at 8:30 am,

¹ UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: resolution / adopted by the General Assembly*, 8 March 1999, A/RES/53/144, available at: <http://www.refworld.org/docid/3b00f54c14.html>. The Declaration, while not in itself a binding instrument, is based on human rights standards enshrined in other international instruments that are legally binding including the ICCPR. The Declaration was adopted by consensus of the General Assembly and thus represents a unanimous commitment by States to its implementation.

Re: Thailand: Judicial harassment of human rights defender, Mr. Andy Hall

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Prakanong Court, Sunpawut Rd, Bangkok. LRWC also urges the UK to seek return of Mr. Hall's passport, which on 18 June was confiscated by the Prakanong Court in violation of the UK's rights under customary international law and Mr. Hall's fair trial rights and right to liberty pursuant to the ICCPR. In support of these requests, we provide background facts and discussion of relevant international law.

Background facts

The charges against Mr. Hall relate to a report published in January 2013 by Finnwatch, an independent research organization focused on global corporate responsibility issues. The report, *Cheap Has a High Price*,² produced as part of Finnwatch's Decent Work program, exposed serious violations of basic human and labour rights by Natural Fruit and other corporations producing food for global markets. Mr. Hall's research was included in the report.

The prosecution of Mr. Hall illustrates how Thailand's criminal defamation laws allow powerful corporations or individuals to criminalize and thereby silence the lawful exercise of freedom of expression guaranteed by the ICCPR. The prosecution is an example of a corporation's shielding itself from accountability for wrongdoing by initiating criminal proceedings against a person reporting on alleged corporate wrongdoing—in this case violation of labour standards.

On 22 May 2014, the National Council for Peace and Order (NCPO) took over all branches of the Royal Thai Government, unlawfully suspended the Constitution and nullified the independence of the judiciary. In these circumstances, Mr. Hall cannot be guaranteed "a fair and public hearing by a competent, independent and impartial tribunal established by law" as required by the ICCPR.

In January 2013, Natural Fruit, a corporation based in Thailand, launched a series of criminal and civil defamation actions against Mr. Hall after *Cheap Has a High Price* exposed serious labour violations in tuna and pineapple industries in Thailand, including at the Natural Fruit factory. Violations by Natural Fruit exposed by *Cheap Has a High Price* included:

- smuggling of undocumented migrant workers into the country;
- child labour;
- payment below the minimum wage required by the law;
- forced overtime;
- confiscation of migrant workers' passports and work permits; and
- violence against migrant workers.

Despite these serious allegations and other reports of similar allegations, Thai authorities have apparently failed to investigate or otherwise remedy the alleged violations of the law by Natural Fruit. International concern with Thailand's inadequate response to reports of human trafficking and forced labour in several commercial sectors, including fruit manufacturing and fishing sectors, has resulted in Thailand's being downgraded to the lowest possible level in the United States (US) State Department's 2014 Trafficking in Persons report (TIP report).³

In response to *Cheap Has a High Price*, Natural Fruit filed the following actions against Mr. Hall:

- On 4 February 2013 Natural Fruit filed two criminal complaints of defamation under the *Criminal Code* and the *Computer Crimes Act* (Case 517/2556 Bangkok South Criminal Court). No summons has been served on

² Sonja Vartiala 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 Vartiala, *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://openheimer.mcgill.ca/IMG/pdf/Finnwatch_-_PLF_ENG.pdf.

³ US Department of State, Trafficking in Persons Report 2014, <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>

Mr. Hall in relation to these cases, so these criminal charges are still pending and await acceptance by the Bangkok South Criminal Court.

- On 14 February 2013, Natural Fruit filed a claim of civil defamation against Mr. Hall, claiming 300 million baht (approximately US\$10 million) (Case 188/2556, Nakhon Pathom Provincial Court).
- In July 2013, Natural Fruit filed another criminal defamation charge against Mr. Hall at Bangna Police Station in relation to comments allegedly made by Mr. Hall to Aljazeera in early 2013 during an interview in Myanmar. After learning of this charge from the British Embassy, Mr. Hall appeared at the Bangna Police Station on 28 September 2013 where a police officer attempted to persuade Mr. Hall to sign a Thai language document that Mr. Hall—who needs English-language translation of Thai-language legal documents and proceedings—later learned was a confession of guilt. Mr. Hall subsequently filed complaints about police misconduct to the Commander of the Thai Police Force, Thailand’s Minister of Foreign Affairs, Thailand’s National Human Rights Commission (NHRC) and the Foreign and Commonwealth Office in London. Bangna Police have denied misconduct. On 18 June 2014, this charge against Mr. Hall was confirmed by the Prakanong Prosecutors Office and the Prakanong Court. Prior to this court proceeding, officials at the Prakanong Public Prosecutors Office tried to convince Mr. Hall to plead guilty. When Mr. Hall advised that he would plead not guilty, court officials detained him for two hours in Prakanong Court cells. When Mr. Hall asked for a translator, he was told: “If you want a translator, it’s fine. We will imprison you in very bad conditions for a few days until we find one for you.” Mr. Hall’s lawyer was not present when the judge conducted the hearing, and no independent, court-certified translator was provided. The court released him on bail supplied by the Thai Frozen Foods Association (TFFA) and Thai Tuna Industry Association (TTIA) and ordered that Mr. Hall’s UK passport be confiscated as a condition of release; he is not permitted to leave Thailand to return to his residence in Myanmar without court approval. This travel ban is to be in effect until the resolution of the criminal proceedings against Mr. Hall, currently estimated to take several years. If convicted, Mr. Hall faces imprisonment for up to seven years on each charge and fines ranging from 20,000 Baht (approximately US\$620) to 200,000 Baht (approximately US\$6,200).

Violation of fair trial rights: Nullification of independence of the judiciary on 22 May 2014

The military leaders of the NCPO have rendered Thailand’s courts incapable of guaranteeing fair trial rights in accordance with the ICCPR by issuing orders prohibiting courts from making decisions that restrict the powers of, or are otherwise critical of the NCPO. On 22 May 2014, the NCPO issued Order No. 11/2557 which unlawfully suspended Thailand’s Constitution⁴ and ordered that “[a]ll 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”⁵ On 24 May 2014, pursuant to Order No. 33/2557, the NCPO clarified Order 11/2557, stating:

With regard to the Announcement of the NCPO (formerly NPOMC) No. 11/2557 dated 22 May 2557 on

⁴ Section 68 of the 2007 Constitution states: “No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of the State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution.” Section 69 confirms that “[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.” *Constitution of the Kingdom of Thailand, B.E. 2550 (2007)*, available:

http://english.constitutionalcourt.or.th/index.php?option=com_docman&Itemid=4&lang=en

⁵ National Peace and Order Maintaining Council, “Announcement of the National Peace and Order Maintaining Council No. 11/2557: Subject: Termination of the Constitution of the Kingdom of Thailand,” available at <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>

the termination of the Constitution of the Kingdom of Thailand, which stipulates that all Courts are to continue to hear and adjudicate cases *according to the law and the Announcements of the NCPO*, and which requires all independent organizations and other agencies established under the Constitution B.E. 2550 (2007) to continue to function as usual; in order to ensure conformity of public understanding and unity in resolving the political conflict peacefully, the NCPO 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” (emphasis added)⁶

The NCPO has ordered that courts must hear and adjudicate cases according to NCPO announcements. The NCPO has also ordered the courts to avoid expressing opinions that could affect the functioning of NCPO. These orders effectively strip courts of the independence and impartiality required by the ICCPR and thereby nullify fair trial rights.

Even prior to the military take-over, Mr. Hall’s fair trial rights had already been violated when Bangna police reportedly attempted to trick Mr. Hall into signing a confession in violation of ICCPR Article 14.3 and Prakanong court officials reportedly attempted to coerce a guilty plea. Without evidence of flight risk, the confiscation of Mr. Hall’s passport pending resolution of the criminal defamation case is tantamount to a denial of Mr. Hall’s right to be presumed innocent and his right to liberty by means of pre-trial release pursuant to ICCPR Article 9.7.⁸ Mr. Hall resides in Myanmar and has voluntarily appeared before police, prosecutors and the court to address the charges against him. There is no evidence of any flight risk that would necessitate Mr. Hall’s confinement in Thailand. Furthermore, the confiscation of Mr. Hall’s passport by Thai authorities without the permission of the issuing country, the UK, encroaches on the jurisdiction of the issuing state and is a violation of customary international law.⁹

The court has ordered Mr. Hall to appear at a “reconciliation” meeting scheduled for 2 July 2014 for the purpose of attempting a settlement between Natural Fruit and Andy Hall. Any reconciliation meeting in the criminal courts must measure up to the UN *Basic Principles on the use of restorative justice programmes in criminal matters* (UN restorative justice Principles)¹⁰ which provide that restorative processes (such as reconciliation and mediation) should be used only “with the free and voluntary consent” of the parties. The UN restorative justice Principles require that the parties must be able to withdraw consent at any time during the process. Agreements should be made voluntarily and should contain only reasonable and proportionate obligations (Principle 7). Principle 8 provides that the parties “should normally agree on the basic facts of a case as the basis for their participation in a restorative process.” In this case, no such agreement on the facts exists.

⁶ National Peace and Order Maintaining Council, “Announcement of the National Peace and Order Maintaining Council No. 33/2557 Subject: Request for cooperation from the Courts, Independent Organizations and other Agencies,” available online: <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 International law on pre-trial release is based on the presumption of innocence and requires that the liberty of a person not be constrained beyond the limits demonstrated in evidence presented to the court by the prosecutor as being necessary and the only means of preventing flight, interference with the proceedings, or reoccurrence. For detail on the right to pre-trial release, see Lois Leslie, *Pre-trial release and the right to be presumed innocent: A handbook on international law rights to pre-trial release* (Vancouver, Canada: Lawyers’ Rights Watch Canada, 2013), available online: <http://www.lrw.org/handbook-pre-trial-release-and-the-right-to-be-presumed-innocent/>

⁸ For a discussion of relevant international law, see Richard A.C. Alton & Jason Reed Struble, “The Nature Of A Passport at the Intersection of Customary International Law and American Judicial Practice,” *Annual Survey of International & Comparative Law*, Vol. 16 [2010], Iss. 1, Art. 6, 9-18, available online: <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1138&context=annlsurvey>

⁹ For discussion of international law, see *Passport Seizure Case* (1972) 73 I.L.R. 372, Federal Republic of Germany, Superior Administrative Court (Oberverwaltungsgericht) of Münster, 12 July 1972.

¹⁰ UN Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Resolution 2002/12, available online: <http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>.

Given the serious violations of international human rights in Thailand since the military take-over on 22 May 2013, and given the treatment of Mr. Hall to date, the “reconciliation” meeting scheduled on 2 July 2014 may be an attempt to coerce Mr. Hall to settle the case by admitting guilt.

Thailand’s criminal defamation legislation fails to meet international human rights standards

The criminal charges against Mr. Hall have been brought under defamation legislation that fails to measure up to international human rights standards. Thailand’s criminal defamation laws provide opportunities for malicious prosecution by persons and corporations wishing to silence critics and thereby continue possibly unlawful activities with no accountability. This view is affirmed by the recent US TIP report which states that use of Thailand’s criminal defamation laws “to prosecute individuals for researching or reporting on human trafficking may have discouraged efforts to combat trafficking.”¹¹

In 2005, the UN Human Rights Committee expressed concern about intimidation and restrictions on freedom of expression through defamation lawsuits in a number of countries.¹² In 2000, the UN Special Rapporteur on access to information, criminal libel and defamation, the police and the criminal justice system, and new technologies stated that:

Criminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction. It will be recalled that a number of international bodies have condemned the threat of custodial sanctions, both specifically for defamatory statements and more generally for the peaceful expression of views...¹³

The Special Rapporteur recommended that criminal defamation laws “should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations.”¹⁴

The case of Andy Hall exemplifies a misuse of criminal sanctions to punish “the peaceful expression of views.” Five UN Special Rapporteurs sent a communication to Thailand on 26 April 2013 expressing concern that:

... the criminal charges against Mr. Andy Hall may be the result of his legitimate and peaceful actions gathering and publishing evidence of facts which, if accurate, would amount to serious human rights violations that warrant investigation by the authorities without delay. Further concern is expressed at the possibility that the charges against Mr. Hall may have a chilling effect on other human rights defenders and civil society activists working in Thailand and elsewhere to expose human rights violations perpetrated by non-State actors, including business enterprises.¹⁵

In response, Thailand’s Ambassador to the UN stated on 3 May 2013 that Thailand was a “democratic country that respects the promotion and protection of human rights,” that the “criminal charges brought against Mr. Andy Hall by Natural Fruit Company are between two private entities and is now being considered by the Court,” and that he had “full confidence in our [Thailand’s] justice system in delivering justice to both

¹¹ US Department of State, Trafficking in Persons Report 2014, at p. 376, available online:

<http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>

¹² UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Thailand*, 8 July 2005, CCPR/CO/84/THA, available at: <http://www.refworld.org/docid/43f2ff76a.html>

¹³ UN Human Rights Council, *Report of the Special Rapporteur on access to information, criminal libel and defamation, the police and the criminal justice system, and new technologies*, E/CN.4/2000/632000, para. 48, available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2000/63&Lang=E>

¹⁴ UN Human Rights Council, *Report of the Special Rapporteur on access to information, criminal libel and defamation, the police and the criminal justice system, and new technologies*, E/CN.4/2000/632000, para. 52, available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2000/63&Lang=E>

¹⁵ https://spdb.ohchr.org/hrdb/24th/public - AL_Thailand_26.04.13_%284.2013%29.pdf

parties.”¹⁶

Criminal charges are not matters “between two private entities” when an accused person is subject to restrictions on his liberty through bail requirements and a travel ban imposed through confiscation of his passport, and when the disposition of the case could result in lengthy jail sentences.

Violation of the right of human rights defenders to be protected from retaliation

Human rights defenders are entitled to conduct peaceful human rights advocacy and to be protected from retaliation including malicious prosecution and judicial harassment. The *Declaration on Human Rights Defenders*, adopted 9 December 1998 by consensus of the member States of the UN General Assembly,¹⁷ states that:

- “everyone has the right, individually or in association with others, to promote the protection and realization of human rights and fundamental freedoms at the national and international levels” (Article 12.1);
- “everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms” (Article 1);
- “the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration” (Article 12.2); and
- “[i]n the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject *only to such limitations as are in accordance with applicable international obligations* and are established by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” (Article 17, emphasis added).

Both the criminal defamation law and the processes by which Mr. Hall is being prosecuted fall conspicuously short of Thailand’s international obligations. This is a clear case of *de jure* and *de facto* retaliation against Mr. Hall for his legitimate human rights work by the Natural Fruit Co. Ltd in cooperation with police and prosecutors and judges in courts that are now subject to the dictates of the military junta. Both Thailand and the UK have a duty to ensure the protection of Mr. Hall as a human rights defender.

Duty of the UK to intervene for protection of Andy Hall

Consular officials of the United Kingdom (UK) have reportedly advised Mr. Hall that the embassy is “unable to interfere in the judicial process.” This statement is at odds with international law.

The International Court of Justice (ICJ) stated in 1924 that:

“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right — its right to ensure, in the person of its subjects, respect for the rules of international law.”¹⁸

¹⁶ Statement of the Permanent Mission of Thailand, Geneva, No. 52101/ May BE. 2556 (2013), available at [https://spdb.ohchr.org/hrdb/23rd/Thailand_03.05.13_\(4.2013\).pdf](https://spdb.ohchr.org/hrdb/23rd/Thailand_03.05.13_(4.2013).pdf).

¹⁷ *Supra* note 1.

¹⁸ (Greece v UK) 1924 P.C.I.J., Series A, No. 2, p. 12. This dictum was repeated by the Permanent Court of International Justice in the *Panevezys Salduiskis Railway* case (Estonia v Lithuania)

While general principles of international law and customary international law¹⁹ generally require exhaustion of local remedies as a pre-condition for the exercise of diplomatic protection, there is no requirement that local remedies be exhausted when remedies available to the complainant would be ineffective or futile.²⁰ In Thailand, the NCPO formally abrogated judicial independence on 22 May 2014, and accordingly Thailand's courts cannot guarantee fair trial rights in accordance with international human rights standards. Mr. Hall has already been subject to violations of his fair trial rights through attempts to coerce a confession and guilty plea. Mr. Hall has been charged with an offence that itself violates Thailand's legal obligations to protect the exercise of freedom of expression and other internationally protected rights for all persons within its territory. If convicted, Mr. Hall faces lengthy arbitrary detention. This means there are no remedies available for Mr. Hall in Thailand that comply with international human rights standards.

The UK has a right to engage with the NCPO to protect Mr. Hall's rights; it also has a duty to do so. Such a responsibility stems from the advancement over the past century of the human rights of the individual rather than the sovereign powers of the State. There is clear recognition of the duty of States to protect their citizens from violations of *jus cogens* norms such as, freedom from arbitrary detention and torture.²¹ Mr. Hall is at risk of violation of the *jus cogens* norm protecting individuals from arbitrary detention.

A second reason the UK should intervene in this case stems from Mr. Hall's status as a human rights defender who is experiencing reprisals for doing work that is internationally praiseworthy.

LRWC urges the government of the United Kingdom to:

- send embassy representatives to attend and observe all court appearances and hearings Mr. Hall is required to attend, beginning with the "reconciliation" hearing scheduled for 2 July 2014 at 8:30 am, Prakanong Court, Sunpawut Rd, Bangkok;
- seek the return to the UK of Mr. Hall's passport and support any concomitant application by Mr. Hall for amendment of his pre-trial release, making arguments as necessary to the court based on international law that the UK does not consent to the impoundment of the passport by Thailand authorities and insisting that all of Mr. Hall's rights as a human rights defender be fully respected;
- advocate that the NCPO:
 - withdraw Orders 11/2557 and 33/2557, restore the Constitution and the independence of prosecutors and judges;
 - protect all other international human rights binding on Thailand, including fair trial rights, the presumption of innocence and international standards of pre-trial release.
 - restore democratic rule through free and fair elections;
- advocate that Thailand and the Natural Fruit Co. Ltd.:
 - immediately cease all reprisals against Mr. Hall, including the dropping of all criminal charges against him;
 - address and remedy all concerns raised in *Cheap Has a High Price*;
 - comply with the UN *Guiding Principles on Business and Human Rights*²² by respecting human rights including the UN *Declaration on Human Rights Defenders*.

P.C.I.J. Reports, Series A/B, No. 76, p. 12.

¹⁹ *Interhandel*, 1959 I.C.J. Reports 27.

²⁰ *Ibid* at para. 23.

²¹ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, Part VI. The Law. Page 55. Section B. Paragraph 144, available at: <http://www.unhcr.org/refworld/docid/40276a8a4.html>

²² UN Human Rights Council, UN *Guiding Principles on Business and Human Rights Implementing: the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/RES/17/4 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

We look forward to your early reply.

Sincerely,

A blue ink handwritten signature, appearing to be 'Gail Davidson', written over a light green grid background.

Gail Davidson, Executive Director, LRWC

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