



International
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INTERNATIONAL
LAWYERS ASSISTING
WORKERS NETWORK



AMICUS CURIAE BRIEF

IN THE CASE OF THE DEFENDANT WIRUN SAKAEKUM, PRACHANIWAT BUASRI, NITTINAI CHAIYAPHUM, SORAWUT POTHONGKAM, THAWATCHAI BOONWISOOT, SAROJ RAKCHAN, SAWIT KAEWWAN, THARA SAWANGTHAM, LIAM MOKNGAM, PINYO RUENPHET, ARUN DEERAKCHAT, BUNJONG BUN-NET AND SUPICHET SUWANACHATRI, FORMER ELECTED LEADERS OF THE STATE RAILWAY UNION OF THAILAND

**(BLACK CASE NUMBER AOR TOR 151/2562
RED CASE NUMBER AOR TOR 173/2563)**

SUBMITTED BY:

**INTERNATIONAL LAWYERS ASSISTING WORKERS (ILAW) NETWORK
INTERNATIONAL TRANSPORT WORKERS FEDERATION (ITF)
INTERNATIONAL TRADE UNION CONFEDERATION (ITUC)
INTERNATIONAL COMMISSION OF JURISTS (ICJ)**

9 July 2021

I. Submitting Organizations

1. The International Commission of Jurists (ICJ), composed of 60 eminent judges and lawyers from all regions of the world, works to advance respect for the rule of law and the promotion and protection of human rights globally. The ICJ holds consultative status at the Council of Europe, the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization and the African Union. The ICJ also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Established in 1952, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political, and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
2. The International Trade Union Confederation (ITUC) represents 200 million workers in 163 countries and territories and has 332 national affiliates. The ITUC's primary mission is the promotion and defence of workers' rights and interests through international cooperation between trade unions, global campaigning, and advocacy within the major global institutions. Its main areas of activity include the following: human and labour rights; economic and social policy; equality and non-discrimination; and international solidarity. The ITUC adheres to the principles of trade union democracy and independence. It is governed by four-yearly world congresses, General Council, and Executive Bureau. The ITUC has close relations with the Global Union Federation and the Trade Union Advisory Committee to the OECD (TUAC). It works closely with the International Labour Organization and other UN Specialized Agencies.
3. The International Transport Workers' Federation (ITF) is an international federation of transport workers' trade unions. Around 700 unions representing over 18.5 million transport workers from some 150 countries are members of the ITF. The State Railway Union of Thailand (SRUT) has been an affiliate of the ITF since 1989. As members of the ITF, the SRUT and other transport unions in Thailand have formed a national coordinating committee, the ITF-Thai, and have implemented many ITF programmes successfully. The ITF exists to protect the rights of all transport workers through its network of affiliated trade unions worldwide. Detailed information pertaining to the ITF and all information relating to its goals and operations can be found at its website: <http://www.itfglobal.org>.
4. The International Lawyers Assisting Workers (ILAW) Network is a global network of legal academics and practitioners who represent workers and their representative organizations, including trade unions. The ILAW Network includes nearly 650 members in over 70 countries, including members in Thailand. The core mission of ILAW is to bring together legal practitioners and scholars in an exchange of ideas and information in order to best represent the rights and interests of workers and their organizations wherever they may be.

II. Introduction

5. This brief provides submissions in the context of criminal proceedings against 13 leaders of the State Railway Union of Thailand (SRUT) in the context of their involvement in carrying out a national rail safety campaign following a fatal train derailment in October 2009.
6. The appellants, former leaders of the SRUT, have been targeted through a series of legal actions by the Thai authorities since their conducting of a peaceful occupational health and safety initiative in October 2009. The State Railway of Thailand (SRT)¹ brought a lawsuit to the Central Labor Court against the 13 leaders alleging that they violated the State Enterprises

¹ The SRT is the state-owned rail operator. It was established by the State Railway of Thailand Act B.E.2494 (1951).

Labour Relations Act (SELRA), which prohibits strikes,² seeking their dismissal from their jobs with SRT and damages. In 2017, after years of litigation and negotiations, the Supreme Court ruled that, subject to section 23 and 40 of the SELRA, union leaders may not call on drivers and technicians to desist from operating trains which they alleged had faulty safety measures as part of their rail safety campaign. By doing so, the SRUT leaders intentionally caused damages to the SRT and violated the SRT Regulation No. 3.5 regarding the Discipline and Punishments of the SRT's Employees. The Court stated that the SRT had lawfully dismissed the SRUT leaders from their jobs. The union leaders were also fined 15 million Baht plus 7.5% interest per year (approx. USD 481,230).³ Their wages and pensions were subsequently garnished nearly to zero in order to collect that fine. In addition to this judicial action, the SRT filed a claim with the Office of the National Anti-Corruption Commission (NACC) against the SRUT leaders for alleged negligence of official duties under article 166 of Thailand's Criminal Code.⁴ The NACC was specifically formed to investigate corruption among politicians and government officials, including ministers. To our knowledge, no other union or non-State actors have been subject to the NACC's jurisdiction. It is evident that the government's use of the NACC to investigate union leaders amounts to a serious abuse of power, which, in turn, undermines legitimate trade union activities and the principles of freedom of association.

7. The NACC filed criminal charges against the 13 appellants in 2019 for alleged negligence of official duties under article 166 of Thailand's Criminal Code. On 21 October 2020, these 13 leaders of the SRUT were convicted and sentenced to three years in prison by the Central Criminal Court for Corruption and Misconduct Cases in Bangkok for "omission of official duties or commission to disrupt or cause damage" (article 166 of Thailand's Criminal Code). The charges stemmed from the fact that they refused to drive trains which they alleged had faulty safety measures and that they called on officials of the SRT to join their national rail safety campaign. The case is under the consideration of the Appeals Court.
8. The International Labour Organization (ILO) has repeatedly issued condemnations related to the allegations of judicial and disciplinary harassment against the union leaders.⁵ The United States has also instituted partial suspension of trade preferences,⁶ in part over this case. These actions by the authorities are part of a continuing pattern of attacks on the rights of labour unions and freedom of association.⁷

² Section 33 of the SELRA provides that "in any case whatsoever, neither the employer shall cause a lockout nor the employees shall strike."

³ Supreme Court, 'SRT v. Mr. Pinyo Ruenphet et al', 3 November 2017, at 27

⁴ Section 166 of the Criminal Code defines the offense in the following way: "Whoever, being an official, deserts work, or does any act so that the work is interrupted or damaged, by jointly participating with other persons numbering together from five persons upwards, shall be punished with imprisonment not exceeding five years or fined not exceeding ten thousand Baht, or both"

⁵ See, e.g., ILO Committee in Freedom of Association, 'Case No. 3022 (Thailand)', available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:20060:0:FIND:NO:20060:P20060_COUNTRY_ID,P20060_CO MPLAINT_STATU_ID:102843,1495811

⁶ USTR, 'Press Release, USTR Announces GSP Enforcement Actions and Successes for Seven Countries', 25 October 2019, available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement>. This decision was based in part on a 2015 petition by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which included the SRUT case as an emblematic example of Thailand's repeated refusal to guarantee worker rights to freedom of association and collective bargaining.

⁷ See also: CIVICUS, 'Freedom of association in Thailand: an assessment of the enabling environment for civil society', October 2020, at 22, available at: https://www.civicus.org/documents/reports-and-publications/eena-reports/thailand-CIVICUS-FOA-assessment_en.pdf.

9. This brief argues that based on Thailand's international human rights obligations as will be described below, the use of criminal sanctions under section 166 of the Criminal Code against union leaders for legitimate trade union activities constitutes a disproportionate and unnecessary restriction of the right to freedom of association, collective bargaining, rights at work and its interrelated rights. This has also been affirmed by the ILO, in relation to the section 166 charges filed against the 13 SRUT leaders. The ILO Committee of Experts on Freedom of Association reiterated that criminal sanctions should not be used to curtail the free exercise of trade union rights, and expressed its expectation that "the charges against the SRUT leaders will be dropped, should they in any manner relate to, or be motivated by, the exercise of legitimate trade union activities".⁸

III. Thailand's International Human Rights Obligations

10. Under the principle of *pacta sunt servanda* and general principles governing the law of treaties, Thailand is bound to apply in good faith all international treaties to which it is a party.⁹ Furthermore, Thailand may not rely on provisions of its internal law to justify a failure to meet a treaty obligation.¹⁰
11. Thailand is party to seven of the nine principal international treaties on human rights, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹ Thailand acceded to the ICCPR on 29 October 1996, and to the ICESCR on 5 September 1999. Thailand has also ratified 17 ILO Conventions, including 6 of the 8 fundamental conventions.¹² In addition to its treaty obligations, Thailand is bound to respect norms of customary international law, including any rules of customary international law that are reflected in the Universal Declaration of Human Rights (UDHR), and general principles of law recognized by UN member States.¹³

⁸ ILO, 'Effect given to the recommendations of the committee and the Governing Body - Report No 392, October 2020; Case No 3022 (Thailand) - Complaint date: 30 April 2013 - Follow-up', para. 170, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:4059432

⁹ United Nations, 'Vienna Convention on the Law of Treaties', 23 May 1969, United Nations, Treaty Series, vol. 1155, at 331, Article 26, available at: <https://www.refworld.org/docid/3ae6b3a10.html>; UN Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant', U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.3, available at: <https://www.refworld.org/docid/478b26ae2.html> ('General Comment No. 31').

¹⁰ Articles 26 and 27 of the Vienna Convention on the Law of Treaties; General Comment No. 31, para. 4.

¹¹ Others include: (i) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol; (ii) Convention on the Rights of the Child (CRC) and its two Optional Protocols; (iii) International Convention on the Elimination of All Forms of Racial Discrimination (CERD); (iv) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and (v) Convention on the Rights of Persons with Disabilities (CRPD).

¹² These include: (i) Forced Labour Convention, 1930 (No.29); (ii) Equal Remuneration Convention, 1951 (No.100); (iii) Abolition of Forced Labour Convention, 1957 (No.105); (iv) Discrimination (Employment and Occupation) Convention, 1958 (No.111); (v) Minimum Age Convention, 1973 (No.138); and (vi) Worst form of Child Labour Convention (No. 182).

¹³ United Nations, 'Charter of the United Nations', 24 October 1945, 1 UNTS XVI, Article 92 and 93, available at: <http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html>; United Nations, 'Statute of the International Court of Justice', 18 April 1946, Article 38, available at: <http://www.refworld.org/docid/3deb4b9c0.html>; and Vienna Convention on the Law of Treaties, which treaty is generally considered to be customary international law. See Karl Zemanek, 'Vienna Convention on the Law of Treaties', UN Audiovisual Library of International Law, 23 May 1969, available at: <http://legal.un.org/avl/ha/vclt/vclt.html>.

12. The human rights treaties also established several supervisory bodies of independent experts to assess State parties' compliance with their treaty obligations, which elaborate General Comments as authoritative interpretations of treaties, addressing specific rights and provisions. The United Nations (UN) Human Rights Committee (HRC) is the supervisory body of independent experts established by the ICCPR. The Committee on Economic, Social and Cultural Rights (CESCR) is also the body of independent experts established by the ICESCR. In the exercise of its judicial functions, the International Court of Justice has held that it should ascribe "great weight" to the interpretations adopted by treaties' independent expert bodies – including the General Comments – that were established specifically to supervise the application of those treaties,¹⁴ and national courts would be well-advised to follow the approach of the International Court of Justice.
13. Given that the SRT is a State-owned enterprise, it is an organ of the State, and its conduct, including its acts and omissions are attributable to the State. This arises from a general principle of the law of State responsibility, as reflected in the International Law Commission's Articles of State Responsibility.¹⁵
14. Even if the SRT were a private entity, Thailand also has an obligation to protect the human rights of people under its jurisdiction from the conduct of businesses that leads to human rights abuses, which includes providing effective remedies for such conduct and holding such businesses accountable for wrongdoing. Articles 2 of ICCPR and ICESCR oblige Thailand to undertake to guarantee that the rights enunciated in these treaties will be protected without discrimination of any kind.
15. Furthermore, according to the UN Guiding Principles on Business and Human Rights,¹⁶ adopted by the UN Human Rights Council Resolution 17/4,¹⁷ States are required to take additional steps to protect against abuses by business enterprises that are owned or controlled by the State: "where a business enterprise is controlled by the State...an abuse of human rights by the business enterprise may entail a violation of the state's own international law obligations"¹⁸. Following the framework of the UNGPs, Thailand adopted its first National Action Plan on Business and Human Rights (2019-2022) on 29 October 2019.¹⁹
16. The judiciary also has a crucial role in ensuring that human rights are effectively implemented at the domestic level. It is a general principle of State responsibility that the "conduct of any State organ shall be considered an act of that State under international law, whether the organ

¹⁴ This principle has been affirmed by the International Court of Justice in Ahmadou Sadio Diallo Case. See International Court of Justice, "Ahmadou Sadio Diallo Case (Republic of Guinea v. Democratic Republic of the Congo)", Judgment, 30 November 2010, paras. 66-68, available at: <https://www.icj-cij.org/files/case-related/103/103-20101130-JUD01-00-EN.pdf>

¹⁵ As the International Law Commission has made clear, "The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law." See, Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 1, UN Doc. A/56/10, p. 39, available at: https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf

¹⁶ UN Guiding Principles on Business and Human Rights, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

¹⁷ UN Human Rights Council, 'Resolution adopted by the Human Rights Council 17/4: *Human rights and transnational corporations and other business enterprises*', UN Doc. A/HRC/RES/17/4, 6 July 2011.

¹⁸ UN Guiding Principles on Business and Human Rights, at 7

¹⁹ Available in Thai and English at: <https://globalnaps.org/wp-content/uploads/2017/11/nap-thailand-th.pdf> and <https://globalnaps.org/wp-content/uploads/2017/11/nap-thailand-en.pdf>.

exercises legislative, executive, judicial or any other functions”.²⁰

17. This principle in terms of human rights law is specifically reflected in the CCPR’s General Comment 31 and CESCR’s General Comments 3 and 24,²¹ which affirm that the obligations under the ICCPR and ICESCR are generally binding on every part of the State. The responsibility to ensure that the rights contained in the ICCPR and ICESCR are guaranteed and protected is not limited to the legislative and executive branches of government, but must also effectively be discharged by Thailand’s judiciary. In General Comment No. 31, the UN HRC also underscores that the enjoyment of the rights recognized under the ICCPR “can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law”.²² The CESCR, in its General Comment 3, highlights several provisions in the ICESCR “capable of immediate application by judicial and other organs in many national legal systems”, including the right to form and join trade unions and trade union federations, as well as the right to strike, as set out in article 8 of the ICESCR.²³ As noted above, under the general rules of State responsibility under international law, a failure by the judiciary, as an organ of the State, to act in compliance with the State’s international obligations, can itself constitute a violation of the States’ obligations under international law.²⁴
18. Although this case engages a range of human rights considerations, the interveners would call the Court attention to three human rights which are most central to the present case: the right to freedom of association (including the right to form and join trade unions, as well as the right to strike, and collective bargaining); the rights to/at work (including the right to health, and just and favourable conditions of work); and the right to a fair trial. These rights are contained in human rights treaties and non-treaty instruments, including the UDHR, ICCPR, ICESCR, and principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

Freedom of Association

UDHR

19. On 10 December 1948, the UN General Assembly adopted the *Universal Declaration of Human Rights* (UDHR). The UDHR is not a treaty, however, most if not all provisions of the UDHR are recognized today as reflecting customary international law.
20. The right to freedom of association is provided for in article 20 of the UDHR: “everyone has the right to freedom of assembly and association, and that no one may be compelled to belong to an association”. Article 23 also provides that: “everyone has the right to form and to join trade unions for the protection of his interests”.

²⁰ UN General Assembly, ‘Resolution 56/83. Responsibility of States for internationally wrongful acts: Annex’, 2001, article 4, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

²¹ CESCR General Comment No. 24, para 47. In CESCR General Comment No. 24, the CESCR recalls that “all government branches and agencies of States parties, including the judiciary ..., are bound by the obligations under the Covenant”, and “States parties should ensure that the judiciary, in particular judges and lawyers, are well informed of the obligations under the Covenant linked to business activities, and that they can exercise their functions in complete independence”.

²² General Comment No. 31, para. 15.

²³ Include articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3). See CESCR, “CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)”, E/1991/23, 14 December 1990.

²⁴ Article 4, Responsibility of States for internationally wrongful acts, 2001.

ICCPR

21. Article 22 of the ICCPR obliges Thailand to respect and ensure to all individuals under its jurisdiction the "right to freedom of association with others, including the right to form and join trade unions for the protection of his interest". The ICCPR further provides that any limitation that the State may place on the enjoyment of this right must be necessary for one of the legitimate purposes specified in article 22(3) and must be prescribed by law.²⁵ As with any ICCPR right, the State must guarantee freedom of expression without discrimination; the principle of non-discrimination also applies to any limitation of this right.²⁶ Article 26 of the ICCPR provides for the non-discrimination, equality and equal protection of the law.

ICESCR

22. Article 8 of the ICESCR provides for a number of labour rights, including the right to form and join trade unions and trade union federations, as well as the right to strike. It provides that States Parties to the Covenant, such as Thailand, shall undertake to ensure:

"(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

[...]

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country."

23. In clarifying the scope of labour rights protected under the ICESCR, the CESCR, in its General Comment No. 24 on State obligations under the ICESCR in the context of business activities, highlights that: "trade union leaders [...] are often subject to the risk of harassment. States parties should take all measures necessary to protect human rights advocates and their work. They should refrain from resorting to criminal prosecution to hinder their work, or from otherwise obstructing their work".²⁷

²⁵ General Comment No. 31, para. 6, available at: <https://www.refworld.org/docid/478b26ae2.html>. Article 22(2) of the ICCPR provides: "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

²⁶ Article 2 of the ICCPR states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See also, UN Human Rights Committee, 'General Comment No. 18 on Non-discrimination', 10 November 1989, para. 1, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGE C%2f6622&Lang=en

²⁷ CESCR General Comment No. 24, para. 48

ILO Conventions

24. As a member of the ILO, the Government of Thailand is obligated to abide by the principles embodied in the ILO Constitution and Declaration of Philadelphia, including freedom of association and collective bargaining.²⁸ The ILO Declaration on Fundamental Principles and Rights at Work and its Follow up, adopted in 1998,²⁹ also declares that all members, including Thailand, have obligations by virtue of their membership in the ILO to respect certain "fundamental rights" even if they have not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). These rights clearly include freedom of association and collective bargaining. The right to strike has also been recognized by the ILO as "an intrinsic corollary of the right to organize".³⁰ Thus, the fact that Thailand has not yet become party to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) does not absolve it from its obligation to respect the rights and principles in these conventions.
25. The ILO has provided interpretative guidance on the scope of the right to freedom of association and the right to strike, through decisions issued by the Committee on Freedom of Association. The Committee has unequivocally stated that allegations of "criminal conduct should not be used to harass trade unionists by reason of their union membership or activities".³¹ Further, the "criminal prosecution and conviction to imprisonment of trade union leaders by reason of their trade union activities are not conducive to a harmonious and stable industrial relations climate", and no one should be "deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike".³² Indeed, the Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests.³³
26. Further, the Committee has provided that the right to strike may only be restricted or prohibited in two limited circumstances: "(1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety

²⁸ ILO, 'Freedom of association: Digest of Decisions and Principles of the Freedom of Association, Committee of the Governing body of the ILO', 5th rev. ed. 2006, para. 15, available at <http://www.ilo.org/ilolex/english/23e2006.pdf>

²⁹ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, available at: <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>

³⁰ ILO, 'Chapter V: Substantive provisions of labour legislation: The right to strike', available at: <https://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm>

³¹ ILO, 'Compilation of decisions of the Committee on Freedom of Association: Trade union and employers organizations rights and civil liberties; General principles', para. 80, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3942676,2

³² ILO, 'Compilation of decisions of the Committee on Freedom of Association: Trade union and employers organizations rights and civil liberties; Bringing of charges and sentencing of trade unionists and representatives of employers organizations to imprisonment', paras. 154 - 157, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3943180,2

³³ ILO, 'Compilation of decisions of the Committee on Freedom of Association: Right to strike', para 752, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945366

or health of the whole or part of the population)".³⁴ The Committee has further clarified that transport generally does not constitute an essential service in the strict sense of the term.³⁵ With respect to Thailand, the Committee has expressly held that the state railway is **not** an essential service for purposes of this exception.³⁶

Right at Work and Fundamental Principles of Occupational Safety and Health

UDHR

27. The right to work and the rights at work are guaranteed in articles 23 and 25 of the UDHR. Article 23 provides that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment". Article 25 provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family".

ICESCR

28. Article 6 of the ICESCR protects the right to work. Article 7 of the ICESCR provides that everyone has the right to just and favourable conditions of work, and sets out a number of specific aspects of work conditions, which States must ensure. Among others, article 7(b) of the Covenant guarantees "safe and healthy working conditions".

29. The CESCR has clarified aspects of the right to work and the rights at work in its General Comments No. 18 and 23, which relate to articles 6 and article 7 of the ICESCR respectively.

30. In General Comment No. 18, the CESCR makes clear that protecting the right to work has several components, including the right of the worker to just and favourable conditions of work, in particular to "safe working conditions" and "the right to form trade unions".³⁷ The CESCR further acknowledges the fundamental role of trade unions "in ensuring respect for the right to work at the local and national levels and in assisting States parties to comply with their obligations under article 6". The Committee urges States parties, such as Thailand, to provide "an environment facilitating the discharge of these obligations".

31. In General Comment No. 23, the CESCR affirms that "trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work".³⁸ The Committee further states that:

³⁴ ILO, 'Compilation of decisions of the Committee on Freedom of Association: Right to strike; Cases in which strikes may be restricted or even prohibited, and compensatory guarantees' ("Committee on FoA Decisions on Restrictions on Right to Strike"), para. 830, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945663,2

³⁵ Committee on FoA Decisions on Restrictions on Right to Strike, para. 842.

³⁶ See, e.g., ILO. 'Report in which the committee requests to be kept informed of development - Report No 372', June 2014, para 164, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:317368_0

³⁷ CESCR, 'General comment No. 18 on the Right to Work (Art. 6 of the ICSECR)', U.N. Doc. E/C.12/GC/18, 6 February 2006, paras. 12, 48, 51, 52 and 54, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en

³⁸ CESCR, 'General comment No. 23 on the right to just and favourable conditions of work (article 7 of the ICSECR)', U.N. Doc. E/C.12/GC/23, 27 April 2016, para. 1, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f23&Lang=en ("CESCR General Comment No. 23")

“preventing occupational accidents and disease is a fundamental aspect of the right to just and favourable conditions of work, and is closely related to other Covenant rights, in particular the right to the highest attainable level of physical and mental health” (article 12, ICESCR).³⁹

32. The CESCR emphasized that while the full prevention of occupational accidents and diseases might not be possible, “the human and other costs of not taking action far outweigh the financial burden on States parties for taking immediate preventative steps that should be increased over time”.⁴⁰
33. The Committee further calls on States parties to “adopt a national policy for the prevention of accidents and work-related health injury by minimizing hazards in the working environment and ensuring broad protection in the formulation, implementation and review of such a policy”.⁴¹ Such a policy should address several issues, including the “maintenance of the material elements of work (workplaces, working environment, work processes, tools, machinery and equipment” and the “protection of workers and representative organizations from disciplinary measures when they have acted in conformity with the national policy, such as in response to imminent and serious danger”⁴² The policy should also indicate “specific actions required of employers in areas such as prevention and response to accidents”.⁴³ This directs States, when forming their national policies, to not only adopt safeguards in situations where a worker has had to remove themselves to protect their own safety, but also directs States to ensure that such a worker is protected in law from undue consequences.
34. Further, as part of this policy, workers should be “able to monitor working conditions without fear of reprisal”,⁴⁴ and the policy should incorporate “appropriate monitoring and enforcement provisions”, “provide adequate penalties in case of violations” and allow for “access to appropriate grievance mechanisms” for workers affected by a preventable occupational accident.⁴⁵ The Committee in setting out these State obligations in respect of safe and healthy working conditions referred to article 4(1) and other articles of the ILO Occupational Safety and Health Convention 1981 (No. 155).

ILO Conventions

35. Thailand is one of the founding members of the ILO, the Constitution⁴⁶ of which sets forth the principle that workers must be protected from sickness, disease and injury arising from their employment. The obligation of the ILO to promote safe working conditions was re-affirmed in

³⁹ CESCR General Comment No. 23, para. 1, 25.

⁴⁰ Ibid

⁴¹ CESCR General Comment No. 23, para. 25.

⁴² CESCR General Comment No. 23, para. 27

⁴³ CESCR General Comment No. 23, para. 28

⁴⁴ CESCR General Comment No. 23, para. 26.

⁴⁵ CESCR General Comment No. 23, para. 29.

⁴⁶ ILO Constitution, preamble, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO. See also: ILO, ‘International Labour Standards on Occupational Safety and Health’, available at: <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm> .

the Declaration of Philadelphia (1944).⁴⁷ The Declaration on Social Justice for a Fair Globalization (2008)⁴⁸ also recognizes healthy and safe working conditions as a key element of the Decent Work Agenda. Occupational Safety and Health (OSH) has also been identified as an important component of the 2030 Agenda for Sustainable Development.⁴⁹

36. The ILO Governing Body adopted an action plan on Occupational Safety and Health (OSH) in 2010 and subsequently issued the Convention 155 on Occupational Safety and Health,⁵⁰ the Protocol⁵¹ to Convention 155, and Convention 187 on Promotional Framework for Occupational Safety and Health⁵² as the key OSH instruments, the promotion and implementation of which should be supported.⁵³
37. On 21 June 2019, at its 108th Session, the International Labour Conference declared the Centenary Declaration for the Future of Work,⁵⁴ and highlighted that “safe and healthy working conditions are fundamental to decent work”.⁵⁵ The Conference adopted a resolution requesting the Governing Body “to consider, as soon as possible, proposals for including safe and healthy working conditions in the ILO’s framework of fundamental principles and rights at work”.⁵⁶ In this context, it is widely envisaged that OSH-related Conventions, including Convention 155, could eventually be recognized as a fundamental Convention.
38. The ILO also stated that the three Conventions, namely Convention 155, Convention 161 (Occupational Health Services),⁵⁷ and Convention 187, together define the fundamental principles of occupational safety and health (OSH).⁵⁸

⁴⁷ ILO Declaration of Philadelphia: Declaration Concerning the Aims and Purposes of the International Labour Organisation, see in particular III(g), available at <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf>.

⁴⁸ ILO Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference at its ninety-seventh session, 10 June 2008, see in particular I.A(ii), available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf.

⁴⁹ Target 8.8, 2030 Agenda for Sustainable Development, available at: <https://sdgs.un.org/2030agenda>

⁵⁰ ILO Convention 155 on Occupational Safety and Health Convention, 1981 (No. 155), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C155.

⁵¹ ILO Protocol 155 of 2002 to the Occupational Safety and Health Convention, 1981, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312338.

⁵² ILO Convention 187 on Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C187

⁵³ ILO, ‘ILO Plan of action (2010-2016) to achieve widespread ratification and effective implementation of the occupational safety and health instruments (Convention No. 155, its 2002 Protocol and Convention No. 187)’, adopted by the Governing Body at its 307th session, March 2010, https://www.ilo.org/global/standards/WCMS_125616/lang--en/index.htm

⁵⁴ ILO Centenary Declaration on the Future of Work, adopted by the Conference at its 108th session, 21 June 2019, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711674.pdf

⁵⁵ Ibid, II.(D)

⁵⁶ Resolution on the ILO Centenary Declaration for the Future of Work, adopted on 21 June 2019, available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711659.pdf

⁵⁷ ILO Convention 161 on Occupational Health Services Convention, 1985 (No. 161), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312306

⁵⁸ See ILO, ‘Convention 155 and World Day for Safety and Health at Work’, available at:

39. Thailand has not ratified ILO Convention 155, which enshrines in its article 13 that: "A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice". The ILO's Committee of Experts has also stated that the right of workers to remove themselves from situations when there is a reasonable justification to believe that there is a serious and imminent danger remains an essential foundation for the prevention of occupational accidents and diseases and must not be undermined by any action by the employer.⁵⁹
40. The Thai government, however, ratified the ILO Convention 187 on 23 March 2016. The Convention obliges Thailand to "promote and advance...the right of workers to a safe and healthy working environment."⁶⁰ It also requires its Parties to develop a national preventative safety and health culture "in which the right to a safe and healthy working environment is respected at all levels, where government, employers and workers actively participate in securing a safe and healthy working environment through a system of defined rights, responsibilities and duties, and where the principle of prevention is accorded the highest priority".⁶¹ This is to be carried out "in consultation with the most representative organizations of employers and workers, shall promote basic principles such as assessing occupational risks or hazards; combating occupational risks or hazards at source; and developing a national preventative safety and health culture that includes information [and] consultation".⁶² This Convention expressly "notes" Convention 155 and other "instruments of the International Labour Organization relevant to the promotional framework for occupational safety and health".⁶³ Convention 187 also refers to Convention 155 for the definition of "national policy" in article 1(a).⁶⁴
41. The interwoven nature of these three core OSH standards further indicates the importance of Convention 155. Further, a key goal of Convention 187 is to help member States ratify and implement other relevant ILO instruments, including Convention 155. At the same time, the ILO also estimates that nearly half of its Conventions and other labour standards either directly or indirectly relate to occupational safety and health standards.⁶⁵ In the context where the above-named three Conventions act as 'core' OSH conventions and key international labour standards in this regard, it is clear that Convention 155 has normative force in Thailand, even if the entirety of its provisions are not strictly binding to non-ratification.
42. In addition, as noted in paragraph 34, the CESCR in its General Comment No. 23 adopts the key language of ILO Convention 155 in interpreting the ICESCR rights. Therefore, certain key principles of Convention 155, including the requirement of protection where workers have been

http://www.oit.org/century/history/iloandyou/WCMS_211520/lang--en/index.htm

⁵⁹ ILO, 'General Survey on the occupational safety and health instruments concerning the promotional framework, construction, mines and agriculture', 8 February 2017, at 103, available at: https://www.ilo.org/ilc/ILCSessions/previous-sessions/106/reports/reports-to-the-conference/WCMS_543647/lang--en/index.htm

⁶⁰ Article 3(2), Convention on the Promotional Framework for Occupational Safety and Health Convention (2006) ('Convention 187')

⁶¹ Article 1(d), 3 and 4, Convention 187

⁶² Article 3(3), Convention 187

⁶³ Preamble, Convention 187

⁶⁴ Article 1, Convention 187

⁶⁵ ILO, 'International Labour Standards on Occupational Safety and Health', accessed on 31 May 2021, available at: <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm>

forced to remove themselves due to imminent serious danger, do not depend on or require the separate ratification of ILO Convention 155. Rather, the ICESCR, which is legally binding on Thailand, already effectively incorporates some of its key provisions.

Right to a Fair Trial

43. The right to a fair trial by a competent, independent and impartial tribunal established by law is provided for by article 14 of the ICCPR, and also reflected in UDHR article 10.
44. Article 14(1) protects the right to a fair trial: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 14(2) states that "everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law". Critical aspects of the right to a fair trial under international law include, among others, the presumption of innocence, the right to test evidence, the right of defence and especially the right to effective legal counsel and the right of judicial appeal. The scope of article 14 obligation is set out in the HRC's General Comment No. 32. The HRC has also made clear in its General Comment 29 that "the fundamental principles of fair trial, including the presumption of innocence" may never be the subject of limitation or derogation, even in times of public emergency.⁶⁶ In respect of the presumption of innocence, the HRC affirms that article 14 "imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle".⁶⁷

IV. Submissions

45. It is respectfully submitted that to ensure good-faith adherence to Thailand's international human rights obligations, Thai law must be interpreted so as to ensure conformity with international human rights law, including the rights to freedom of association, collective bargaining, right at work, and its interrelated rights as well as the right to a fair trial and due process of law that are guaranteed in the ICCPR, the ICESCR, ILO Conventions and under general international law, as summarized above. It is incumbent of all branches of government, including the judiciary, to ensure respect for these obligations. Thai court should thus interpret Thailand's laws in ways that ensure conformity with international human rights law.

Freedom of Association

46. The use of criminal sanctions under section 166 of the Criminal Code against union leaders for their legitimate trade union activities are to be avoided, as they contravene the right to freedom of association, collective bargaining, rights at work and its interrelated rights guaranteed by international human rights law.
47. Pursuant to the right to freedom of association (articles 20 and 23 of the UDHR, article 22 of the ICCPR, article 8 of the ICESCR, and by virtue of Thailand's membership in the ILO), no one should be subject to penal sanctions solely for organizing or participating in a peaceful strike. Any actions that impede the right to freedom of association must be deemed unlawful where they are not strictly necessary for a legitimate purpose set out in ICCPR's article 22, such as public health, public order or national security, and proportionate to that end. Any such

⁶⁶ UN Human Rights Committee, 'General Comment No. 29, States of Emergency (article 4)', UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

⁶⁷ CESCR, 'General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial', U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 30 ("General Comment No. 32").

restrictions that do not comply with the strict requirements of legality, legitimate purpose, necessity and proportionality are non-compliant with Thailand's international legal obligations.

48. The interveners recall that in 2015 the CESCR, in its concluding observations on the combined initial and second periodic reports of Thailand, expressed concern that under the State Enterprise Labour Relations Act, "all public sector employees do not enjoy the right to strike." The CESCR indicated that for Thailand to bring itself into compliance with its legal obligations under the ICESCR, it should "ensure that public sector employees who do not provide essential services are entitled to their right to strike in line with the Covenant and relevant International Labour Organization (ILO) standards".⁶⁸ In this regard, the ILO's Committee on Freedom of Association had clarified, as above noted, that transport generally does not constitute essential services where the right to strike can be restricted or prohibited. Indeed, with particular respect to Thailand, the Committee has expressly held that the state railway is not an "essential service" for such purposes.

Right at Work and Fundamental Principles of Occupational Safety and Health

49. Rather than resorting to criminal prosecution, Thailand is required to discharge its obligation to take all measures necessary to protect the appellants' advocates and their work as they sought to assist Thailand in complying with its obligations under international human rights law by defending just and favourable conditions of work and preventing occupational accidents, as guaranteed in articles 23 and 25 of the UDHR, articles 6, 7 and 12 of the ICESCR and the ILO Convention 155 and 187. Thailand has an obligation to ensure that workers should be able to monitor working conditions without fear of reprisal and are protected in law from undue consequences.
50. The call on drivers and technicians to desist from operating trains with faulty "dead man's switches" and/or vigilance control equipment amounted to action that is protected under international law and standards permitting workers to remove themselves from dangerous work without fear of retaliation in accordance with the ILO Convention 155 and 187. Workers were arguably fulfilling their duties within its national preventative safety and health culture by assessing and combating risks at source.⁶⁹
51. Following the enactment of the Occupational Safety, Health and Environment Act B.E. 2554 (2011), the Thai Government stated that it would focus on the development of OSH consistent with international standards. The Government indicated to the ILO that its OSH laws would be reviewed and renewed as necessary in order to enhance their effectiveness.⁷⁰ However, to date, the Government has failed to respect its commitment to review and renew the law. The 'right to refuse' dangerous work without fear of retaliation has not explicitly been guaranteed in the OSH law and nowhere is it expressly prohibited.

⁶⁸ CESCR, 'Concluding observations on the combined initial and second periodic reports of Thailand', U.N. Doc. E/C.12/THA/CO/1-2, 19 June 2015, para 24

⁶⁹ Article 3(3), ILO Convention 187

⁷⁰ ILO, 'LEGOSH Occupational Safety and Health, Thailand 2014', available at: https://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO::P1100_ISO_CODE3,P1100_SUBCODE_CODE,P1100_YEAR:THA,,2014. See also: Ministry of Labour's Occupational Safety and Health Division, 'Occupational Safety and Health Division organized a meeting to review the Occupational Safety, Health and Environment Act', 13 August 2020, available at: http://osh.labour.go.th/index.php?option=com_content&view=article&id=2550%3A-2554-&catid=4%3Anews&Itemid=192

Right to a Fair Trial

52. The Corruption Court relied on a passage in the Supreme Court decision in a labour law case regarding the same defendants in determining the criminal character of their act: “after hearing such behaviors of 13 defendants, in combination with the two aforementioned Supreme Court judgments - which ruled that all 13 defendants, [...], deserted the official duty, thus constituted the deliberate criminal offences against the employer, which is an unlawful act; it can be established that all 13 defendants had committed the offense of being an official, deserts work or does any act so that the work is interrupted or damaged, by jointly participating with other persons numbering together from five persons upwards, which is an offense under the Criminal Code, Section 166, first paragraph, as per the plaintiff’s plea”.⁷¹ The Court further stated that the arguments made by the defendants “did not conform to the Supreme Court verdicts binding all 13 defendants, [...] thus, all 13 defendants’ plea cannot refute the prosecutor’s witness”.⁷²
53. It is respectfully submitted that the Corruption Court’s reference to criminal offences in the Supreme Court’s labour case *in passing* is not a judicial determination of criminal guilt as required by international law. The Corruption Court and prosecution authorities have the burden of proving the charges beyond a reasonable doubt. The Court, in order to carry out a criminal prosecution under the rule of law, was bound to carry out a full criminal trial with all the requisite elements for a fair trial, and to conclude beyond a reasonable doubt that the acts of the accused fall within all the elements of offense, and that their responsibility could be established beyond a reasonable doubt. It failed to do so. For instance, it did not establish beyond reasonable doubt that the accused had the criminal intent to cause damage to the employer or to the public, but simply referred to the judgments of another court to disregard their arguments. The conviction of defendants therefore violated the principle of presumption of innocence, provided by article 14 of the ICCPR.
54. For the reasons stated above, this submission respectfully requests that the Court overturn the decision of the Central Criminal Court for Corruption and Malfeasance in Office and ensuring that the rights contained in the UDHR, ICCPR, ICESCR, ILO Conventions and customary international laws are guaranteed and protected.

⁷¹ Central Criminal Court for Corruption and Malfeasance in Office, ‘Attorney General v. Mr. Wirun Sakaekhum et al’, 21 October 2020, at 18-19.

⁷² *Ibid*, at 19