

**THIRD PARTY SUBMISSION BY AMNESTY INTERNATIONAL TO THE SOUTH
BANGKOK CIVIL COURT**

in the case of

Smin Tit, Hoy Mai and Others v Mitr Phol Co. Ltd.

Reference:

Black case ID No. P.718/2561

Red case ID No. /25.....

Date: 21 August B.E 2562 (2019)

Case: Civil

With further reference to the case heard at the court of first instance:

Record No. 31305/2562, No. 185

Dated 04 July 2562 (2019)

Undecided Case No. Phor. 718/2561

Decided Case No. Phor. /2562

INTRODUCTION

1. Amnesty International is a worldwide movement of more than 7 million people working for the respect, protection and fulfilment of internationally recognized human rights. The movement has members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion. Amnesty International bases its work on international human rights instruments adopted by the United Nations and regional bodies. Amnesty International has intervened in many cases that have raised a wide range of human rights issues before national and international courts including the right to remedy.
2. Amnesty International released a video in 2011 documenting the land dispute which forms the basis of the substantive claims made by the plaintiffs (Smin Tit, Hoy Mai and Others) against the respondents (Mitr Phol Co. Ltd.).
3. The appeal concerns the decision of the court of first instance to deny (Class Action Lawsuit (CAL) status on the basis of a number of practical considerations including the villagers' lack of Thai language skills, their capacity to comprehend

court orders effectively, and the alleged practical difficulty of posting notices to the rural addresses of the concerned villagers in Cambodia.

4. This appeal raises critical questions in relation to the Kingdom of Thailand's obligations under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
5. This brief aims to assist the South Bangkok Civil Court in its consideration of this appeal by setting out the relevant international legal principles and standards regarding States parties' obligations in relation to the right to remedy and access to justice, including in the context of transnational corporate abuses of human rights. Specifically, the brief provides relevant material on access to justice for those seeking to use class actions to secure a right to remedy. It further outlines the requirement upon States to overcome practical hurdles associated with class actions and States' obligation to refrain from discriminatory decision-making in respect of the recognition of classes.

RIGHT TO REMEDY UNDER INTERNATIONAL HUMAN RIGHTS LAW

6. All victims of human rights violations and abuses have a right to an effective remedy. This right lies at the very core of international human rights law. It also stems from a general principle of international law that every breach gives rise to an obligation to provide a remedy.¹ The right to an effective remedy has been recognized under various international and regional human rights treaties and instruments, including those ratified by the Kingdom of Thailand,² and also as a rule of customary international law.³ The right to an effective remedy encompasses the victim's right to: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.⁴

¹ *Chorzów Factory (Germany v. Poland)*, 1928 PCIJ (ser A) No. 17, at para 73: ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.")

² Article 8, Universal Declaration of Human Rights; Article 2 (3), International Covenant on Civil and Political Rights; Article 2, International Covenant on Economic, Social and Cultural Rights; Article 6, International Convention on the Elimination of All Forms of Racial Discrimination; Article 2, Convention on the Elimination of All Forms of Discrimination against Women; Article 14, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 13, European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 25, American Convention on Human Rights, Article 7(1)(a), African Charter on Human and Peoples' Rights; Article 47, Charter of Fundamental Rights of the European Union; Articles 12 and 23, Arab Charter on Human Rights, and UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006 amongst others.

³ *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Appropriate Remedy, para 40 (31 January 2007); *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, paras 23-5 (13 September 2007); and *Cantoral-Benavides v. Perú*, 2001 Inter-Am. Ct. H.R. (ser.C) No. 88, at para 40.

⁴ Principle 11, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of

7. The right to remedy was first enshrined in Article 8 of the UN Universal Declaration of Human Rights (UDHR) and the ICCPR, which has been ratified by the Kingdom of Thailand, gives particular effect to the general rights of individuals to an effective remedy under Article 2(3). The right to an effective remedy has also been guaranteed under all the core international and key regional human rights treaties.⁵
8. The right to an effective remedy has both procedural and substantive elements. In order for a remedy to be effective, **a victim must have practical and meaningful access to a procedure that is capable of ending and repairing the effects of the violation.**⁶ Where a violation is established, the individual must actually receive the relief needed to repair the harm.⁷
9. The UN Human Rights Committee (HRC) has also emphasized that where investigations reveal violations, States parties must ensure that those responsible are brought to justice. The failure to investigate allegations or failure to bring to justice perpetrators of such violations could in itself give rise to a breach of the ICCPR.⁸
10. The Committee on Economic, Social and Cultural Rights (CESCR) has clarified the obligation of States parties to ensure an effective remedy for violations of the ICESCR stating that “[t]he Covenant norms must be recognized in appropriate ways within the domestic legal order, **appropriate means of redress, or remedies, must be available to any aggrieved individual or group**, and appropriate means of ensuring governmental accountability must be put in place”.⁹ The CESCR has also emphasized that any person **or groups** who are victims of a violation “should have access to effective judicial or other appropriate remedies at both national

Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” UN Doc A/RES/60/147 (21 March 2006).

⁵ Article 2, International Covenant on Economic, Social and Cultural Rights; Article 6, International Convention on the Elimination of all Forms of Racial Discrimination; Article 2, Convention on the Elimination of All Forms of Discrimination against Women; Article 14, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Articles 3–8, International Convention for the Protection of All Persons from Enforced Disappearance; Articles 12, 19(2), 37 and 39, Convention on the Rights of the Child; Article 13, Convention on the Rights of Persons with Disabilities; Article 83, International Convention on the Protection of

the Rights of All Migrant Workers and Members of Their Families; Article 13, European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 25, American Convention on Human Rights; Article 7(1)(a), African Charter on Human and Peoples’ Rights; Article 47, Charter of Fundamental Rights of the European Union; Articles 12 and 23, Arab Charter on Human Rights.

⁶ Principles 2(b), 3(c), 11(a), 12, 19, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law , UN Doc A/RES/60/147, 21 March 2006.

⁷ Principles 2(c), 3(d), 11(b), 15-23, 19 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

⁸ Human Rights Committee, General Comment 31: Nature of the general legal obligation imposed on States parties to the covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 18.

⁹ CESCR, *General Comment No. 9. The domestic application of the Covenant*, UN Doc. E/C.12/1998/24 (1 December 1998), para. 2.

and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.”¹⁰

THE RIGHT TO REMEDY FOR CORPORATE HUMAN RIGHTS ABUSES

11. The duty to provide remedy is one element of the broader duty to protect human rights from abuses committed by non-State actors, including corporate actors. Under the duty to protect human rights, States are required to take appropriate measures to prevent human rights abuses by private actors and to respond to these abuses when they occur by investigating the facts, holding the perpetrators to account and ensuring effective remedy for the harm caused.
12. The duty to regulate the conduct of non-State actors in order to protect human rights is well established in international human rights law. The CESCR recently highlighted the importance of access to remedy for abuses committed by companies. In a statement addressing State obligations in the context of corporate activity, the CESCR stated: “It is of utmost importance that States Parties ensure access to effective remedies to victims of corporate abuses of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means.”¹¹
13. The **UN Guiding Principles on Business and Human Rights**,¹² in Guiding Principle 25, specifically address the duty of the State to provide remedy for corporate human rights abuses: As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.¹³ **Principle 26 refers to the need for States to ensure effective judicial mechanisms to hear claims of business-related human rights abuses, including through the reduction of barriers to remedy.** Principle 27 in turn refers to the need for States to provide effective non-judicial mechanisms

¹⁰ CESCR, *General Comment No. 14. The right to the highest attainable standard of health (Article 12)*, UN Doc. E/C.12/2000/4 (11 August 2000), para. 59.

¹¹ Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc E/C.12/2011/1, 20 May 2011, para 5.

¹² The Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

¹³ Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011, p22.

alongside the courts as part of a comprehensive State-based system for the remedy of business-related human rights abuses.

14. A number of other UN bodies and texts have also noted that effective remedy for abuses by non-State actors includes two components – an obligation on the State to provide remedy **and also to enable the victim to make claims against the perpetrator**. For example, the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation expressly indicate that non-State actors found to be responsible for human rights abuses should provide reparation to the victims: in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.¹⁴ The CESCR has also indicated that States should facilitate legal claims directly against the perpetrator of an abuse, such as in relation to the protection of the right to adequate housing. This might include the ability to complain against illegal actions by private or public landlords concerning rent levels, dwelling maintenance, racial or other forms of discrimination or unhealthy or inadequate housing conditions.¹⁵

THE EXTRATERRITORIAL DIMENSION OF THE STATE DUTY TO PROTECT FROM CORPORATE HUMAN RIGHTS ABUSES INCLUDING BY TRANSNATIONAL ACTORS

15. Corporate entities operate across State borders with ease, but State borders often present institutional, political, practical and legal barriers both to corporate accountability and to redress for the victims of corporate human rights abuses. So, in the context of business activity, the State duty to protect human rights and ensure effective remedy if abuses occur must include an extraterritorial dimension. Again, this principle is now widely recognized in international law.¹⁶
16. A home State's obligations – or the obligations of States other than the host State – are parallel and complementary to those of the host State and respond to different rationales. Whereas the obligations of a host State correspond to their

¹⁴ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principle 15), UN Doc A/RES/60/147, 21 March 2006. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that preceded the Principles and Guidelines had similarly contemplated reparation for abuses committed by private parties, and established in Principle 8: "Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitutions to victims, their families or dependants." UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/RES/40/34, 29 November 1985.

¹⁵ Committee on Economic, Social and Cultural Rights, General Comment 4: The right to adequate housing (Article 11 (1)), UN Doc E/1992/23, 13 December 1991, para 17.

¹⁶ The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 37, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

ability to exercise effective control over their national territory, the obligations of other States are based on, and will be shaped by, other factors, such as their ability to take action, in both legal and practical terms, under the circumstances.

17. Regarding corporate actors in particular, international human rights law has been increasingly interpreted as requiring States in whose territory or jurisdiction corporations are domiciled or headquartered to take measures to ensure that these corporations do not cause or contribute to human rights abuses abroad.¹⁷ The CESCR has highlighted, for instance, that in order to comply with their international obligations in relation to the right to health, States parties “have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.”¹⁸

The view of the UN human rights treaty bodies is clear about the obligations of home States to regulate the conduct of multinational companies outside the State’s borders domiciled or headquartered in their territory in order to protect human rights in other States.¹⁹

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a group of experts on international law and based on existing international law, aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights. The principles highlight that: **States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially.** The responsibility of States

¹⁷ This has been affirmed by several commentators: “[T]he state is under a duty to control the activities of private persons within its state territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another state.” Ian Brownlie, *System of the Law of Nations: state responsibility* (Part 1), York 1983, Clarendon Press, p165; Nicola M C P Jägers, *Corporate Human Rights Obligations: in search of accountability*, Antwerp 2002, Intersentia, p172 (deriving from “the general principle formulated in the Corfu Channel case - that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States - that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control”).

¹⁸ Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4, 11 August 2000, para 39.

¹⁹ Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations, Canada, UN Doc CERD/C/CAN/CO/18, 25 May 2007, para 17 and UN Doc CERD/C/CAN/CO/19-20, 9 March 2012, para 14; Concluding Observations, United States of America, UN Doc CERD/C/USA/CO/6, 8 May 2008, para 30; Concluding Observations, Australia, UN Doc CERD/C/AUS/CO/15-17, 13 September 2010, para 13; Concluding Observations, Norway, UN Doc CERD/C/NOR/CO/19-20, 8 April 2011, para 17 and Concluding Observations, United Kingdom, UN Doc CERD/C/GBR/CO/18-20, 14 September 2011, para 29. The extraterritorial application of the Convention was affirmed by the International Court of Justice in its Provisional Measures decision on Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Order (Provisional Measures) of 15 October 2008. The Court observed that there was no restriction of a general nature in the Convention relating to its territorial application; and that neither Article 2 nor Article 5 of the Convention contained a specific territorial limitation. The Court consequently found in the case that “these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory” (para 109).

is engaged where such nullification or impairment is a foreseeable result of their conduct.²⁰

18. A consequence of the extraterritorial dimension of the State's obligation to protect human rights includes an obligation to ensure remedy for abuses that occur outside its territory – where these abuses were reasonably foreseeable and the State has the legal capacity to act to prevent the abuse. The Maastricht Principles clarify that “where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, any State concerned must provide remedies to the victim”.²¹
19. The Principles also state that to give effect to this obligation, States should: a) seek cooperation and assistance from other concerned States where necessary to ensure a remedy; b) **ensure remedies are available for groups as well as individuals**; c) **ensure the participation of victims in the determination of appropriate remedies...**²²

THE RIGHT TO AN EFFECTIVE REMEDY IN THE CONTEXT OF CLASS ACTIONS

20. In the Kingdom of Thailand, class actions are enabled under a 2015 amendment to the Code of Civil Procedure (CCP). Article 222/12 of the CCP states, *inter alia*:

“(T)he court may allow the class action lawsuit... **if the class action lawsuit would reflect more justice and more efficiency in comparison to the situation where the case is going through the ordinary civil case...**”²³

21. Since the 2015 amendment to the CCP enabling class actions, a number of class action suits have been heard before the Thai courts on public interest and human rights grounds.²⁴ It is understood that the present case is the first case in which a

²⁰ The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 13, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

²¹ The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 37, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

²² The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 37, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

²³ Civil Code of Procedures of the Kingdom of Thailand, Article 222/12.

²⁴ See, for example: Case No. Por. Bor. 492/2560, Southern Bangkok Civil Court; and ‘Akara faces B500m lawsuit over gold mining toll’, Bangkok Post, 28 May 2016, <https://www.bangkokpost.com/thailand/general/991641/akara-faces-b500m-lawsuit-over-gold-mining-toll>.

transnational class action suit has been filed before the Thai courts since the 2015 amendment.

22. Class actions have been increasingly recognized in many jurisdictions as an effective means of securing justice for a large number of victims. The UN Special Rapporteur on Adequate Housing in her report on access to justice has articulated key principles of access to justice for the right to housing. **Principle 3 recognizes that violations of the right to adequate housing can be seen at the individual as well as community level.** Forced evictions in particular can impact entire communities or villages. **As the Special Rapporteur has noted, “Access to justice must therefore extend to both individuals and groups.** Support should be available for them to participate in all stages of rights claims and in the implementation of remedies. Groups with interest and expertise in systemic issues being addressed should be provided with amicus or public interest standing in hearings and be permitted to participate in the implementation of remedies.”²⁵

23. The commentary to Principle 26 of the UN Guiding Principles on Business and Human Rights explicitly addresses the issue of access to justice in the context of class actions. It states:

"States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable ...

Practical and procedural barriers to accessing judicial remedy can arise where, for example ... There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants."²⁶

24. The denial of recognition of a class on the basis of language, national or social origin could amount to a violation of States' obligation to ensure access to justice in addition to a failure to ensure non-discrimination and equality before the law. In its General Comment 32 on Access to Justice, the Human Rights Committee has stated:

²⁵ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/HRC/40/61, para 15.

²⁶ Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011, Commentary to Principle 26, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds.

The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁷

25. There is no prohibition on transnational class actions or the recognition of classes of non-nationals under the CCP.²⁸ Furthermore, Thailand's binding international human rights obligations require that all applicants before the courts be treated equally and without discrimination, including on the basis of nationality, race, language, or social origin. Non-discrimination and equality are overarching principles of international human rights law and essential to the enjoyment of all human rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".²⁹
26. International standards, human rights bodies and jurisprudence have increasingly underscored the duty of States and courts to respect and protect the rights of victims and other witnesses. The standards require the authorities to ensure that all, including victims, have **equal access to courts without discrimination**.³⁰ The Human Rights Committee in the context of Article 14 of ICCPR on the right of access to courts and tribunals and equality before them has explained, "[t]his guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. **The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status**".³¹

²⁷ Human Rights Committee, General Comment 32 on Access to Justice, para 9.

²⁸ Civil Code of Procedures of the Kingdom of Thailand, Article 222.

²⁹ See CESCR General Comment 20, para 2.

³⁰ See HRC General Comment 32.

³¹ See HRC General Comment 32, para 9.

CONCLUSION

27. The decision as to whether a group of persons should be admitted as a class (as regulated under Article 222 of the CCP) must be guided by the Kingdom of Thailand's binding international human rights obligations, in particular the obligation to ensure access to justice without discrimination on the basis of language and national or social origin. Furthermore, the good faith application of Thailand's binding international legal obligations entails an obligation upon the Thai courts to meaningfully facilitate access to justice by seeking to overcome any practical hurdles which may arise in respect of the recognition of a class of affected persons in class action lawsuits.