

Stranglehold Refoulment: Fear of
Constructively Forced Returns of Burmese
Refugees as Consequence of Thailand's
Combined Human Rights Violations

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ARTICLE
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OF BURMESE REFUGEES AS CONSEQUENCE OF
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VIOLATIONS

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I. INTRODUCTION

According to the United Nations High Commissioner for Refugees (“UNHCR”)—the UN agency tasked with protecting and assisting refugees around the world, global forced displacement increased in 2015 with record-high numbers.¹ Currently, there are 65.3 million individuals forcibly displaced worldwide—of which 12.4 million are newly displaced—as a result of persecution, conflict, generalized violence, and human rights violations.² The current number of displaced persons is the equivalent of the population of the twenty-first largest country in world—larger than the entire population of the United Kingdom.³ This total reflects 5.8 million more total displaced than in 2014, and the numbers are continuing to

1. U.N. HIGH COMMISSIONER FOR REFUGEES, GLOBAL TRENDS FORCED DISPLACEMENT IN 2015 2 (June 20, 2016), *available at* <http://www.unhcr.org/576408cd7.pdf>.

2. *Id.*

3. *Id.*

climb.⁴ In fact, right now twenty-four new people are being displaced every minute.⁵

Of the 65.3 million displaced worldwide:

- 21,300,000 are refugees who had to flee their own country;
 - 16,100,000 of which fall under UNHRC's mandate
 - 5,200,000 of which are Palestinian refugees registered under a separate mandate through the UN Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA")
- 40,800,000 are persons internally displaced within their own country; and
- 3,200,000 are asylum seekers.⁶

About fifty percent of the world's refugees can be found in Asia and some twenty-eight percent can be found in Africa.⁷ It is left up to the developing countries of the world to play host to most refugees—with eighty-six percent of all refugees living in developing regions.⁸

In general, refugees, asylum seekers, and internally displaced people face a number of human rights violations, including, but not limited to:

- restrictions on right to liberty of movement
- restrictions on right to liberty and security of person
- arbitrary arrest and/or detention
- restrictions on right, once deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the human person
- restrictions on freedom to choose one's residence
- restrictions on right to work
- restrictions on right to an adequate standard of living for oneself and one's family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions
- restrictions on right to access health care
- restrictions on right to education

4. *Id.*

5. *Id.*

6. *Id.* at 3.

7. *Id.*

8. *Id.* at 2.

- sexual and gender based violence
- forced labor
- trafficking
- recruitment of child soldiers
- torture and/or cruel or degrading treatment

Thailand is a host to a significant number of refugees. In its role as host, Thailand also provides some protection against refugee expulsion/return and allows persons fleeing conflict or other incidents of violence in neighboring countries to cross over the border into Thailand and remain until conflict ceases.⁹ The main population of concern in this report is Burmese refugees of mostly ethnic Kayin (formerly Karen) and Kayah (formerly Karenni) origin who are enduring one of the most protracted refugee situations in the world.¹⁰ Many arrived in temporary shelters on the Thai-Burma¹¹ border as early as 1984.¹² Other populations of concern in Thailand, outside the scope of this report, include urban refugees and asylum seekers from more than thirty different nationalities, mainly residing in Bangkok.¹³

Thailand is not a signatory to the 1951 Convention relating to the Status of Refugees nor its 1967 Protocol. Nevertheless, Thailand is bound by the many obligations attached to the several international human rights treaties to which it is a State party. With few exceptions, these human rights protections to which Thailand must adhere apply to everyone in its jurisdiction—including refugees.

9. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Thailand 2014 Human Rights Report 29 (2014).

10. U.N. HIGH COMMISSIONER FOR REFUGEES, 2014-2015 GLOBAL APPEAL: THAILAND 1 (2015), available at <http://www.unhcr.org/en-us/publications/fundraising/528a0a330/unhcr-global-appeal-2014-2015-thailand.html>. Others are of Bamar, Shan, and Mon descent.

11. This report uses the term *Thai-Burma border* to refer to the border between Thailand and Myanmar, as this is how the border is referred to by the refugees, NGOs, and officials whom we interviewed. [Burma was renamed Myanmar in 1989 by the military junta then in control of the government.] This report uses the term *Myanmar* to refer to the government or state of Myanmar generally, but uses the term *Burma* when referring to an occurrence that specially took place prior to 1989. Quoted interviewees may refer to either *Burma* or *Myanmar* interchangeably. Finally, this report uses the term *Burmese* to refer to any of the peoples of Burma, regardless of ethnic group.

12. See U.N. HIGH COMMISSIONER FOR REFUGEES, 2014-2015 GLOBAL APPEAL, *supra* note 10, at 1.

13. *Id.*

Thailand's domestic law does not provide for the granting of asylum or refugee status.¹⁴ Burmese refugees living outside official refugee camps are by law considered illegal migrants.¹⁵ If arrested, they are subject to indefinite detention at Immigration Detention Centers ("IDCs") and/or deportation.¹⁶ As this report describes, the human rights of the approximately 110,000 Burmese refugees living in the nine refugee camps along the border with Myanmar are routinely violated. In the past two years in these camps, greater enforcement of restrictions on freedom of movement and the right to work, combined with decreases in resources and services—including access to adequate food, shelter, health care, and educational services—have created conditions which threaten to coercively return these refugees to Myanmar. Repatriation in this manner is not truly voluntary, but is instead a form of constructively forced return. Due to the conditions that currently exist in Myanmar, many of these coerced returns would also constitute a violation of the principle of non-refoulement, in clear contravention of Thailand's treaty obligations and accepted norms of customary international law.

This Report represents the culmination of a two-year interdisciplinary project undertaken by the Leitner Center for International Law and Justice at Fordham Law School. A delegation from Fordham visited Thailand and Myanmar in May 2015 to conduct research and interviews. The Fordham delegation was led by the 2014–15 Crowley Fellow in International Human Rights, Zach Hudson. The delegation included Fordham Law School Professor James Kainen, Leitner Center Executive Director Elisabeth Wickeri, Leitner Center Program Assistant Elizabeth Gyori, and eight second-year law students: Rodrigo Bacus, Krista Hahn Bloomenberg, Thomas Callahan, Hailey Flynn, Stella Gilliland, Olivia Gonzalez, Christina Menga, and Celidon Pitt. Members of the Fordham delegation also traveled to Geneva in March 2016 to carry out follow-up research, and to conduct advocacy and present findings through the UN Human Rights Council's Universal Periodic Review ("UPR") process for Thailand.

14. See Immigration Act, B.E. 2522 (Thai.); Nationality Act, B.E. 2535 (Thai.)

15. See HUM. RTS. WATCH, AD HOC AND INADEQUATE 4 (2012), available at <https://www.hrw.org/sites/default/files/reports/thailand0912.pdf> [hereinafter AD HOC AND INADEQUATE].

16. *Id.*

Prior to conducting fieldwork in Thailand and Myanmar, the delegation participated in an intense program of study throughout the academic year, including a seminar led by Mr. Hudson and Ms. Wickeri that focused on the intersection of refugee protection issues and human rights in Thailand. During the visit to Thailand and Myanmar, the delegation conducted interviews with individuals in refugee camps, refugee committees, non-governmental organizations (“NGOs”), lawyers, academics, donor agencies, members of the government, and the United Nations. Members of the Crowley delegation traveled to three different areas along the Thai-Burma border encompassing the nine refugee camps housing Burmese refugees, in addition to traveling to both Bangkok and Yangon.

This Report presents the findings of this research effort. Part II describes the conditions in which Burmese refugees living in Thailand find themselves—and the conditions in Myanmar that serve as both the cause of their refugee status and the obstacle to their return. Part III sets out the international human rights legal framework governing refugee protection issues and provides an analysis of the conditions in which Burmese refugees find themselves through the lens of these international human rights legal frameworks. The Report then concludes with a series of recommendations aimed at ensuring that the human rights of Burmese refugees living in Thailand are protected—and that violations of their rights do not lead to constructive refolement to a place where their lives or liberty would be threatened.

II. STATUS OF BURMESE REFUGEES LIVING IN THAILAND

a. Overview of General Conditions for Refugees Living in Thailand

For decades, Thailand has been a “reluctant host” to large numbers of refugees fleeing persecution in neighboring countries.¹⁷ Following the establishment of camps for Cambodian, Lao, and Vietnamese refugees in the 1970s,¹⁸ the first camps for Burmese refugees were established along the Thai-Burma border in 1984.¹⁹

17. See AD HOC AND INADEQUATE, *supra* note 15, at 18 n.12.

18. See Hazel Lang, *The repatriation predicament of Burmese Refugees in Thailand: a preliminary analysis 2* (Austl. Nat’l Univ., Working Paper No. 46, 2001). The last of the non-Burmese camps was closed in 2009. *See id.*

19. Lang, *supra* note 18, at 1; *see also* AD HOC AND INADEQUATE, *supra* note 15, at 15.

While the numbers of camps and refugees have fluctuated over the last thirty years,²⁰ today the Thai government recognizes nine Burmese refugee camps along the Thai-Burma border.²¹ There is also a tenth camp—Kuang Jor—housing ethnic Shan from Myanmar.²² The refugees living in Kuang Jor receive humanitarian aid, but the camp is not formally recognized by either the Thai government or UNHCR.²³

As of December 2016, UNHCR and the Thai Ministry of Interior confirmed that there are a total of 102,607 Burmese refugees now living in the nine camps.²⁴ At the time this project began, there were 110,637 camp residents.²⁵ With some fluctuation, the general trend over the past six years has been a steady decrease in camp populations.²⁶ In addition to the refugees living in the camps, there are an estimated one to three million Burmese living in Thailand outside the camps.²⁷

The camps along the border are the only recognized asylum spaces for Burmese refugees in Thailand—those living outside the camps are generally considered “illegal” and, if caught, face deportation.²⁸ Thai officials have openly declared the government’s

20. See Adam Saltsman, *Beyond the Law: Power, Discretion, and Bureaucracy in the Mgmt. of Asylum Space in Thailand*, 27 J. REFUGEE STUD. 457, 462 (2014) (noting that in the 1980s, there were thirty open, informal, village-like Burmese refugee camps in Thailand, which lasted until 1984 when cross-border attacks by the Burmese Army prompted the Thai government to consolidate and regulate the camps).

21. See, e.g., BORDER CONSORTIUM, PROGRAMME REPORT JULY - DECEMBER 2014 (2014), available at <http://www.theborderconsortium.org/media/57485/2014-6-Mth-Rpt-Jul-Dec.pdf> [hereinafter TBC PROGRAM REP.]. The nine camps are (from north to south): Ban Mai Nai Soi, Mae Surin, Mae La Oon, Mae Ra Ma Luang, Mae La, Umpiem Mai, Nu Po, Ban Don Yang, and Tham Hin. See generally U.N. HIGH COMMISSIONER FOR REFUGEES THAILAND, <https://www.unhcr.or.th/en> (last visited Apr. 12, 2015).

22. See AD HOC AND INADEQUATE, *supra* note 15, at 18 n.12.

23. *Id.*

24. *Refugee and IDP Camp Populations: December 2016*, BORDER CONSORTIUM (2016), <http://www.theborderconsortium.org/media/76787/2016-12-dec-map-tbc-unhcr.pdf>.

25. *Refugee and IDP Camp Populations: February 2015*, BORDER CONSORTIUM (2015), <http://www.theborderconsortium.org/media/58064/2015-02-feb-map-tbc-unhcr.pdf>. This figure is calculated by The Border Consortium (“TBC”) and includes all persons confirmed to be living in the camps and eligible for rations, registered or not. *Id.* This total also includes the approximately 513 Shan refugees living in Kuang Jor camp.

26. AD HOC AND INADEQUATE, *supra* note 15, at 3. From 2005-2012, the total camp population held fairly steady at around 140,000. *Id.* at 5.

27. See AD HOC AND INADEQUATE, *supra* note 15, at 15. This figure includes both refugees and economic migrants, as well as individuals who may self-identify as economic migrants but who may fit the refugee definition as well.

28. See Saltsman, *supra* note 20, at 461.

desire to close the camps and return the refugees to Myanmar for at least the last fifteen years,²⁹ but as of yet there have been no mass repatriations. Nevertheless, recent ceasefires between the Burmese army and armed rebel groups in Myanmar and recent agreements between the governments of the two countries have sparked fears that forced repatriations may be forthcoming.³⁰

1. Refugee Management in Thailand

A. Government

A myriad of Thai authorities and other actors are responsible for refugee management in and outside of the refugee camps. Thailand is a constitutional monarchy, with the King as the head of state.³¹ Under the King, refugee management is primarily undertaken at the national level by the Ministry of Interior (“MOI”) and the Ministry of Defense (“MOD”) through the Royal Thai Army.³² As of 2013, the MOI and the Army affected management through five different security forces.³³ Despite the official government role in regulating various aspects of refugee life, there is no government structure for the provision of humanitarian aid or refugee protection.³⁴

The MOI is the ultimate authority over the nine recognized camps.³⁵ As such, the Ministry executes the policies set forth by the national government through its provincial and district authorities.³⁶ The top provincial authority appointed by the MOI is the district commander, or *nai amphur*.³⁷ The *nai amphur* is in charge of the

29. See Lang, *supra* note 18, at 2.

30. See, e.g., Thin Lei Win, *Thai military conducts refugee headcount, sparking fears of forced repatriation*, THOMSON REUTERS FOUND. (July 21, 2014, 9:41 AM), <http://www.trust.org/item/20140721092847-kd7i3/>.

31. See Rattha Thammanun Haeng Ratcha Anachak [CONSTITUTION] July 22, 2014, § 2 (Thai).

32. See Saltsman, *supra* note 20, at 462.

33. *Id.* It is unclear what changes, if any, have occurred with regards to the national legal framework for refugee management following the May 2014 coup.

34. *Id.*

35. See JULIE FRECCERO & KIM THUY SEELINGER, SAFE HAVEN: SHELTERING DISPLACED PERSONS FROM SEXUAL AND GENDER-BASED-VIOLENCE-CASE STUDY: THAILAND 30 (2013), available at <http://www.refworld.org/docid/51dc189d4.html>.

36. *Id.*

37. This is may also spelled “*nai ampur*”. See KIRSTEN MCCONNACHIE, GOVERNING REFUGEES: JUSTICE, ORDER, AND LEGAL PLURALISM 80 (2014); see also AD HOC AND INADEQUATE, *supra* note 15, at 42.

general administration of each district.³⁸ The MOI also appoints a camp commander (*palad*) and employs the Voluntary Defense Corps (*Or Sor*) for each camp.³⁹ The *palad* and *Or Sor* are responsible for regulating the camps, including perimeter security, headcounts, and camp entry and exit.⁴⁰ *Or Sor* members are generally poorly trained and underpaid and are recruited from local communities.⁴¹ The *Or Sor* unit in Mae La camp is particularly “notorious for corrupt and abusive practices.”⁴²

In the context of refugee management, the Royal Thai Army is chiefly responsible for Thai-Burma border security.⁴³ Together with its paramilitary proxy force, the *Tahan Phran* rangers, and the paramilitary Border Patrol police, the Army undertakes management of cross-border affairs and counter-narcotics work.⁴⁴ The Army is also involved in regulating and counting camp populations,⁴⁵ and sometimes completes initial assessments of arriving refugees as they cross the border.⁴⁶ Thai immigration police and the regular Thai police force also play a role in refugee management,⁴⁷ particularly outside the camps. These authorities are tasked with enforcing Thailand’s Immigration Law by identifying and arresting undocumented foreigners through checkpoints, raids, and street searches.⁴⁸

B. Refugee Committees

Although the MOI has ultimate authority over the camps, day-to-day operations are overseen by refugee committees, camp

38. CLARK D. NEHER, *MODERN THAI POLITICS: FROM VILLAGE TO NATION* 189 (1981). Each of Thailand’s provinces is subdivided into districts, of which the *nai amphur* is commander. See also JOHN WILLIAM HENDERSON, ET AL., *AREA HANDBOOK FOR THAILAND* 183 (3d ed. 1971). It has been difficult to find any up-to-date information about the *nai amphurs*’ role or specific information on the *nai amphurs*’ activities relating to refugee management.

39. MCCONNACHIE, *supra* note 37, at 30.

40. AD HOC AND INADEQUATE, *supra* note 15, at 42; see also *id.*

41. AD HOC AND INADEQUATE, *supra* note 15, at 42.

42. *Id.*

43. *Id.*; see also INT’L ORG. FOR MIGRATION, *THAILAND MIGRATION REPORT 2011* 120 (Jerrold W. Huguet & Aphichat Chamrathirong eds., 2011) [hereinafter IOM REPORT 2011].

44. AD HOC AND INADEQUATE, *supra* note 15, at 42; see also IOM REPORT 2011, *supra* note 43, at 120.

45. See AD HOC AND INADEQUATE, *supra* note 15, at 25.

46. See *id.*

47. See *id.* at 42.

48. See *id.* at 6.

committees, and community-based organizations.⁴⁹ The refugee committees are supra-camp bodies that coordinate with camp committees and liaise with the Thai government, UNHCR, donors, and NGOs.⁵⁰ The Karen Refugee Committee (“KRC”) manages the seven Karen-majority camps, and the Karenni Refugee Committee (“KnRC”) organizes between the two predominantly Karenni camps.⁵¹ There is also a refugee committee for Shan refugees.⁵² In the past, there has been evidence that the KRC and KnRC had ties to the armed ethnic groups fighting the Burmese army in Myanmar.⁵³ It is not clear how, if at all, the recent ceasefire agreements between the armed groups and the Burmese army have affected these ties.

The refugee committees do not work directly in the camps.⁵⁴ Rather, they operate through camp committees,⁵⁵ which oversee daily management and operations, camp justice systems, and refugee security.⁵⁶ Camp committees have also established subcommittees to manage health activities, education, camp affairs, and supply provisions.⁵⁷ The committees also play a major role in controlling distribution of rations and building materials.⁵⁸ Committees are drawn from the refugee populations through a selection process that involves at least an initial round of voting by the camp residents.⁵⁹

Food, shelter materials, services, and other aid are provided by NGOs, many of which are represented by The Border Consortium (“TBC”).⁶⁰ The Thai government does not provide humanitarian support for the camps, so TBC and other NGO providers are heavily

49. See IOM REPORT 2011, *supra* note 43, at 120.

50. *Id.* at 120-21; see also SUSAN BANKI & HAZEL LANG, PLANNING FOR THE FUTURE: THE IMPACT OF RESETTLEMENT ON THE REMAINING CAMP POPULATION 21 (2007).

51. FRECCERO & SEELINGER, *supra* note 35, at 30-31. Across all nine recognized camps, approximately seventy-nine percent of refugees are Karen, ten percent are Karenni, and the remainder is a mixture of other ethnic groups.

52. IOM REPORT 2011, *supra* note 43, at 120.

53. See AD HOC AND INADEQUATE, *supra* note 15, at 48-49.

54. See BANKI & LANG, *supra* note 50, at 21.

55. See IOM REPORT 2011, *supra* note 43, at 120-21.

56. FRECCERO & SEELINGER, *supra* note 35, at 30-31.

57. See IOM REPORT 2011, *supra* note 43, at 121.

58. See AD HOC AND INADEQUATE, *supra* note 15, at 28 (discussing the level of power committees hold over food distribution lists).

59. IOM REPORT 2011, *supra* note 43, at 121. At the time of this report, all camp residents over age twenty were eligible to vote.

60. AD HOC AND INADEQUATE, *supra* note 15, at 25.

dependent on donations from international donors in order to meet the needs of camp residents.⁶¹

C. UNHCR

UNHCR is an international organization “dedicated to saving lives, protecting rights and building a better future for refugees, forcibly displaced communities and stateless people.”⁶² UNHCR has had a presence on the Thai-Burma border since 1998, when it negotiated a Memorandum of Understanding with the Thai government⁶³; however, Thai authorities have never allowed the agency to have a role in the operation of the camps.⁶⁴ UNHCR is not permitted to provide assistance to the camps or to register refugees living there,⁶⁵ and it may only access the camps through the provision of a pass granted by permission of district-level MOI officials.⁶⁶

Limits to UNHCR’s role are not restricted to the camps. UNHCR has not been permitted to conduct refugee status determinations for Burmese refugees outside the camps since 2004, following the government’s mandate that all Burmese refugees should live in the camps.⁶⁷ The agency may only access IDCs on a “conditional” basis, meaning that it must submit an official request for permission to visit, and it may not conduct status determinations or registrations during the visit.⁶⁸

For non-Burmese, non-Lao, and non-North Korean asylum seekers, UNHCR conducts refugee status determinations and issues “Asylum Seeker Certificates” to those it determines qualify as refugees.⁶⁹ However, these certificates provide no employment authorization and have no legal weight if the holder is stopped by police.⁷⁰ UNHCR provides refugees (including Burmese refugees

61. *See generally id.*

62. *About Us*, UNHCR, <http://www.unhcr.org/pages/49c3646c2.html> (last visited Apr. 13, 2015).

63. Sally Thompson, *Community-based Camp Management*, 30 *FORCED MIGRATION REV.* 26, 26 (2008). The Memorandum of Understanding gave UNHCR a mandate for monitoring and protection of refugees on the Thai-Burma border. *See id.*

64. *AD HOC AND INADEQUATE*, *supra* note 15, at 19.

65. *See id.* at 88.

66. *See id.* at 19.

67. *Id.* at 1. UNHCR is also barred from performing refugee status determinations for Lao Hmong or North Korean refugees in Thailand.

68. *See id.* at 88.

69. *Id.* at 87.

70. *See id.*

outside the camps) with emergency phone numbers to call in case of arrest, though refugees and asylum seekers report that their calls often go unanswered.⁷¹

2. Treatment of Refugees in Thailand

Under national law, asylum seekers and refugees in Thailand are treated as illegal migrants.⁷² Burmese refugees are legally allowed to remain in the country as long as they stay within one of the nine camps, which Thailand maintains as “temporary shelters” for “displaced persons fleeing fighting” until the conditions in Myanmar allow for return.⁷³ This legal treatment underlies the government’s general policy that the country is “unwilling to remain an indefinite host” to the Burmese refugees currently residing within its borders, and that the sooner the refugees can return home, the better.⁷⁴

The treatment of refugees generally in Thailand is reflective of a popular perception that the refugees pose national security, economic, and cultural threats to Thai society.⁷⁵ This perception is heavily influenced by Thai political rhetoric and media reports,⁷⁶ and translates to a treatment of refugees that varies significantly between different refugee populations based upon ethnicity, location within Thailand, and country or province of origin. The government’s negative attitude toward refugees carries over to Thai society, where there tends to be an entrenched prejudice against immigrants and refugees, particularly among Burmese populations.⁷⁷ Burmese migrants are commonly seen as criminals, carriers of disease, and as a drain on the economy.⁷⁸ These perceptions are often reinforced by political rhetoric and media reports that frequently highlight any crimes committed by Burmese migrants.⁷⁹ In 2006, UNHCR reported that a rise in threats, harassment, and violence against refugees in urban centers had been fueled in part by media reports that refugees

71. *Id.* at 7.

72. Lang, *supra* note 18, at 3.

73. *Id.*

74. *Id.* at 2.

75. Inge Brees, *Burden or Boon: The Impact of Burmese Refugees on Thailand*, 11 WHITEHEAD J. OF DIPL. & INT’L REL. 1, 37 (2010).

76. *See id.*

77. Saltsman, *supra* note 20, at 461.

78. *Id.*

79. *See Brees, supra* note 75, at 37.

spread disease.⁸⁰ Media reports that perpetuate the idea that Thailand is being overrun by foreigners⁸¹ feed into fears that a change in Thailand's demographics will lead to a loss of Thai culture.⁸²

The treatment of refugees in Thailand may differ depending on a variety of factors. An individual who identifies as an economic migrant, for example, is generally treated differently from an individual who identifies as a refugee. Individuals labeled as "refugees" are not permitted to work in Thailand,⁸³ while individuals labeled as "economic migrants" are not eligible for refugee protection or resettlement.⁸⁴ This is the case even though a self-identified economic migrant may have experienced persecution (for example, by being forced into labor by the Burmese army or held as a political prisoner) that would qualify him or her as a *de facto* refugee.⁸⁵ An individual's "refugee" or "economic migrant" designation, thus, has a significant impact on how he or she is treated under Thai law and policies.

Refugees from certain ethnic groups also experience different treatment, both as a consequence of Thai law and policies and, unofficially, by camp committees. Perhaps most notably, ethnic Shan from Myanmar are categorically prohibited from registering as refugees in Thailand on the grounds that, given their linguistic similarity to the Thai, they are able to integrate into the Thai workforce more easily than other Burmese.⁸⁶ In another example, Rohingya refugees are generally not able to access refugee protections,⁸⁷ nor are they able to legalize their status in Thailand as migrant workers.⁸⁸

80. U.N. HIGH COMMISSIONER FOR REFUGEES, ANALYSIS OF GAPS IN REFUGEE PROTECTION CAPACITY: THAILAND 4 (2006).

81. See Brees, *supra* note 75, at 37.

82. Jeannie Rose C. Field, *Bridging the Gap Between Refugee Rights and Reality: A Proposal for Developing International Duties in the Refugee Context*, 22 INT'L J. REFUGEE L. 512, 521 (2010).

83. AD HOC AND INADEQUATE, *supra* note 15, at 79.

84. See *id.* at 68.

85. See Jackie Pollock, *What's In a Label?*, 37 FORCED MIGRATION REV. 46, 46 (2011); see also *id.* at 68.

86. See AD HOC AND INADEQUATE, *supra* note 15, at 71; see also Brees, *supra* note 75, at 37.

87. See AD HOC AND INADEQUATE, *supra* note 15, at 75.

88. See *id.* This is because legalized migrant worker status in Thailand requires a nationality verification process, and the Rohingya (who reside mostly in western Myanmar) are not recognized as citizens by the Burmese government. Thus, they lack the documentation necessary to verify their nationality.

In addition to these official differences in treatment, there have been reports of differential treatment of ethnic groups by camp committees. As discussed above, seven of the camps are predominantly Karen, and two are mostly Karenni. The committees in these camps sometimes have their own arrival assessment process: if the committee decides that a new arrival doesn't meet its "refugee" criteria, the committee may allow the individual to enter, but it may deny building materials or rations, such that the individual is essentially forced to leave and try to live elsewhere.⁸⁹ A camp committee leader from one Karen-majority camp indicated an assumption that only Karen were legitimate asylum seekers, and that all other groups were simply economic migrants.⁹⁰ Ethnic minority groups have reported prejudicial determinations by the committees as well as a general sense of being unwelcome in the camps.⁹¹

3. Thai Domestic Legal Framework Applicable to Refugees

The legal landscape in Thailand, as it relates to immigration, relies primarily on two statutory sources and the 2014 interim Constitution.⁹² These statutory sources include the Immigration Act, which controls the legal framework for Thai immigration, and the Nationality Act, which defines what it means to be a Thai national.⁹³

A. Thailand's Constitutional Framework

In the summer of 2014, Thailand's most recent military junta, the National Council for Peace and Order ("NCPO"), established its power legislatively by drafting the 2014 interim Constitution.⁹⁴ This resulted from the latest in a long line of military coups that began in 1932 as Thailand transitioned from an absolute monarchy to a constitutional democracy.⁹⁵ Thailand's constitutional history was

89. *Id.* at 28.

90. *See id.* at 50.

91. *See id.* at 73.

92. *See* Immigration Act, *supra* note 14; Nationality Act, *supra* note 14; Rattha Thammanun Haeng Ratcha Anachak [CONSTITUTION] July 22, 2014 (Thai).

93. Immigration Act, *supra* note 14; Nationality Act, *supra* note 14.

94. *Thailand profile timeline*, BBC NEWS (Oct. 13, 2016), <http://www.bbc.com/news/world-asia-15641745> (describing the timeline of events in Thai history).

95. *Id.*

shaped by these changes in power between factions. The coup in 1932 began a cycle of new factions legitimizing their power by suspending existing Constitutions and establishing new ones.⁹⁶ For instance, during the era following World War II (amidst the creation of international law), Thailand experienced an era of legal and governmental uncertainty following the assassination of King Ananda in 1946.⁹⁷ Here again, a military coup filled the power vacuum in Thailand until a new Constitution was promulgated in 1978.⁹⁸

The coup that produced the 2014 interim Constitution was brought about by the climax of tensions between the “Red Shirts” and the “Yellow Shirts,” two opposed political movements in Thailand.⁹⁹ The Red Shirts were populists who supported policies favoring rural villagers in Thailand’s north, while the Yellow Shirts represented Bangkok’s middle class urban elite.¹⁰⁰ Their tensions revolved around the removal of Prime Minister Thaksin Shinawatra, a divisive populist figure whose sister Yingluck Shinawatra later took power in 2011.¹⁰¹ In 2013, she proposed legislation that would have granted legal immunity to Thaksin Shinawatra and his affiliates.¹⁰² This triggered a wave of violence between the Red Shirts and the Yellow Shirts, where the Yellow Shirts wanted to end the involvement of the Shinawatra family in politics.¹⁰³ In 2014, Yingluck Shinawatra was removed from office by the Thai Constitutional Court, further angering the Red Shirts.¹⁰⁴ This brought about a peak in violence between the two groups that ultimately motivated the military to intervene.¹⁰⁵ The military began running the country in May 2014, after six months of political crisis.¹⁰⁶ The 2014 interim Constitution, problematic as it may be, was drafted in large part in response to the problems of political corruption that motivated the coup in the first

96. *Id.*

97. *Id.*

98. *Id.*

99. Catherine E. Shoichet, *Thailand Coup: A cheat sheet to get you up to speed*, CNN (May 23, 2014, 8:05 AM), <http://www.cnn.com/2014/05/21/world/asia/thailand-crisis-up-to-speed/> (describing the Thai coup).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *See id.*

106. *See id.*

place; however, it was always meant as a temporary framework.¹⁰⁷ Yet despite the junta leading several rounds attempting to broker a new permanent constitution, as of the date of publication, the 2014 interim Constitution has not been superseded and still remains the supreme law of Thailand.¹⁰⁸

B. Thai Government Structure

Thai government structure is considered to be a constitutional monarchy, meaning that the King is head of state, but the lawmaking power resides with an elected parliament.¹⁰⁹ At the time of the 2014 coup, the King of Thailand, Bhumibol Adulyadej, who passed away in October 2016, had been in power for nearly sixty-eight years and was the longest reigning monarch in the world.¹¹⁰ King Bhumibol Adulyadej had been a constant figure during Thailand's many past coups.¹¹¹ In fact, the only provision from the 2007 Constitution that carried over into the subsequent 2014 Constitution was Section 2, which establishes the monarchy and the King as head of state.¹¹² Otherwise, the 2014 interim Constitution repealed the preceding 2007 Constitution almost in its entirety.¹¹³ Thai reverence for the King is also embedded in the Thai Criminal Code, which contains *lèse*

107. *See id.*; see also Ankit Panda, *Thailand Establishes Interim Constitution*, The Diplomat (Jul. 24, 2014), <http://thediplomat.com/2014/07/thailand-establishes-interim-constitution/>.

108. Aukkarapon Niyomyat & Orathai Sriring, *New Thai constitution shot down, spelling prolonged military rule*, Reuters (Sept. 6, 2015, 5:44 AM), <http://www.reuters.com/article/us-thailand-politics-constitution-idUSKCN0R605H20150906>; see also Richard C. Paddock, *Thailand Junta Seeks to Extend Its Power With Constitutional Referendum*, New York Times (Aug. 4, 2016), <https://www.nytimes.com/2016/08/05/world/asia/thailand-referendum-constitution.html>.

109. *The World Factbook*, U.S. CENT. INTELLIGENCE AGENCY (Nov. 3, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/th.html> (describing the governmental structure of Thailand).

110. Dennis Lynch, *Thailand Monarchy Crisis 2014: Sickly King And Unpopular Heir Makes For An Uncertain Future*, INT'L BUS. TIMES (Dec. 5, 2014, 4:28 PM), <http://www.ibtimes.com/thailand-monarchy-crisis-2014-sickly-king-unpopular-heir-makes-uncertain-future-1736815> (discussing the role of the monarchy in Thai society).

111. *See id.*; see also Angela Dewan & Kocha Olarn, *Thai King Bhumibol Adulyadej dies at 88*, CNN (Oct. 14, 2016), <http://www.cnn.com/2016/10/13/asia/thai-king-bhumibol-adulyadej-dies/>.

112. Compare Rattha Thammanun Haeng Ratcha Anachak [CONSTITUTION] July 22, 2014 (Thai.) with Rattha Thammanun Haeng Ratcha Anachak Thai Phuttha Sakkarat Song Phan Ha Roi Ha Sip [CONSTITUTION], Aug. 24, 2007 (Thai.).

113. *See supra* note 110.

majesté laws that criminalize any critique of the King.¹¹⁴ Despite the King's prominence in Thai society, the 2014 interim Constitution allocates the majority of the administrative power to the military junta.¹¹⁵

There are four main branches of the Thai government, all of which are controlled by the military government ("NCPO"): the National Reform Council, the Constitution Drafting Committee, the National Legislative Assembly, and the Constitutional Court.¹¹⁶ The National Reform Council is charged with carrying out political reforms in Thailand after the 2014 coup.¹¹⁷ This includes devising national policies on economics, education, and public administration generally.¹¹⁸ The members of the National Reform Council are handpicked as representatives by the NCPO and they each represent their respective provinces.¹¹⁹ While technically, the members of the National Legislative Assembly are appointed by the King, the possible appointees are selected by the NCPO.¹²⁰ Likewise, the members of the Constitution Drafting Committee are also handpicked by the NCPO, and then appointed by the National Reform Council—which is itself comprised of a member pool selected exclusively by the NCPO.¹²¹ The National Legislative Assembly is a unicameral legislature composed of 220 appointees who are in charge of writing bills.¹²² However, the King retains the power to veto any bill, according to section fifteen of the 2014 interim Constitution.¹²³ While the King plays a political role in the governance process, the military junta is responsible for choosing the people who fill these government positions.¹²⁴ Taken together, these structural elements concentrate power in the hands of the military junta. This governmental structure

114. *Thailand's Lese Majeste Laws Explained*, BBC NEWS (June 10, 2016), <http://www.bbc.com/news/world-asia-15641745> (analyzing the laws that criminalize critique and defamation of the royal family).

115. *Thailand's new king rejects the army's proposed constitution*, ECONOMIST (Jan. 14, 2017), <http://www.economist.com/news/asia/21714298-all-wrong-reasons-thailands-new-king-rejects-armys-proposed-constitution>.

116. See Rattha Thammanun Haeng Ratcha Anachak [CONSTITUTION] July 22, 2014 (Thai).

117. See *id.* §§ 27, 31.

118. See *id.*

119. See *id.* §§ 28, 30.

120. See *id.* § 6.

121. See *id.* §§ 28, 32.

122. See *id.* §§ 28, 31.

123. See *id.* § 15.

124. See *id.* §§ 27, 31.

is one of the reasons why Thailand is unable to ensure the protection of rights in conformity with international standards.

The NCPO has the constitutional authority to curtail the protection of human rights as it sees fit absent of subsection to any judicial review.¹²⁵ Furthermore, the governmental structure laid out above impedes access to justice in Thailand because it establishes the military junta's stronghold over the legal system. The 2014 Constitution gives immunity to NCPO members, meaning that since they cannot be prosecuted for human rights abuses of any kind under Section 48 of the 2014 Constitution, the NCPO and its affiliates are immune from being held liable for any wrongdoing.¹²⁶ This provision applies to their actions before and after the passage of the 2014 Constitution.¹²⁷

C. Thai Immigration Law

Thai immigration law is controlled by the Thai Immigration Act, which regulates who may enter, exit, and reside in Thailand.¹²⁸ The Immigration Act defines an "alien" as "anyone who is not of Thai nationality."¹²⁹ The Nationality Act defines anyone born to Thai parents (*jus sanguinis*) or born on Thai soil (*jus solis*) as having "Thai nationality."¹³⁰ The Ministry of the Interior is the Thai authority responsible for regulating immigration flow.¹³¹ The Immigration Commission is the governmental body responsible for the approval of any petitions to enter or exit the country.¹³² Under Section 16 of the Immigration Act, the Ministry can decide to deny entry to anyone for a cause they determine to be appropriate.¹³³ Section 16 cites reasons like "national welfare or safeguarding the public peace, culture, morality, or welfare," but ultimately it is legal for an alien to be

125. *Thailand: Interim Constitution Provides Sweeping Powers*, HUM. RTS. WATCH (July 24, 2014, 10:57 PM), <https://www.hrw.org/news/2014/07/24/thailand-interim-constitution-provides-sweeping-powers> (critiquing the 2014 Interim Constitution for granting too much authority to the Thai government).

126. Rattha Thammanun Haeng Ratcha Anachak [CONSTITUTION] July 22, 2014, § 48 (Thai).

127. *See id.*

128. Immigration Act, *supra* note 14.

129. *See id.* § 4.

130. Nationality Act, *supra* note 14, § 7.

131. Immigration Act, *supra* note 14, § 5.

132. *See id.* § 6-10.

133. *See id.* § 16.

denied entry “when the Minister considers it improper to allow any alien or any group of aliens to enter into the Kingdom.”¹³⁴

In addition to these bureaucratic barriers to entry, the Ministry also imposes financial barriers.¹³⁵ The Ministry places significant economic burdens on all aliens seeking permission to live or work in Thailand. Applicants are required to pay fees when reapplying for temporary status,¹³⁶ when petitioning for reentry,¹³⁷ and when they are detained or deported.¹³⁸ Additionally, the cost of detention is paid for entirely by the detainee, according to Section 54 of the Immigration Act.¹³⁹

While the Immigration Act grants the Ministry the ability to detain violators of immigration law, it makes no mention of how Thailand will handle refugees.¹⁴⁰ Broadly speaking, Thailand has no formal refugee law or asylum seeking process at all.¹⁴¹ As a result, the Ministry can use its discretion to handle immigration detention, refugee flow, and refugee camp administration.¹⁴² Before refugees are even classified, counted, and moved into camps, they must proceed through parts of the Thai immigration bureaucracy described above. This sometimes results in the arbitrary detention of those who could potentially acquire refugee status.¹⁴³

4. Myanmar: Conditions in Country of Origin

Myanmar is the country from where these refugees in question originated, and the country to which they could presumably be returned by Thai authorities; because of this, conditions in Myanmar can be an important consideration in determining whether some human rights of some these refugees have been, or could be,

134. *See id.*

135. *See, e.g.*, Immigration Act, *supra* note 14, § 92 (listing fees related to immigration in Thailand).

136. *Id.* §§ 35, 36, & 92.

137. *Id.* § 39.

138. *Id.* § 54.

139. *Id.*

140. Immigration Act, *supra* note 14.

141. *See* AD HOC AND INADEQUATE, *supra* note 15 (describing Thailand’s treatment of refugees).

142. *See id.*

143. *See, e.g.*, Joshua Lipis, *Thai Court Rules Year-Long Detention of Suspected Uyghurs Is Legal*, RADIO FREE ASIA (March 27, 2015), <http://www.rfa.org/english/news/uyghur/ruling-03272015163643.html> (describing the detention of the suspected Uyghur group).

violated.¹⁴⁴ The armed conflict in Myanmar remains the “longest running civil war in the world.”¹⁴⁵ In terms of civil conflicts, the country was home to the most violence in the world between 1946 and 2008, averaging four conflicts per year for a total of 246 “conflict years” over that span.¹⁴⁶ Displacement due to violence, repression, and unacceptable living conditions has primarily affected two groups of Burmese people: ethnic minorities and political opponents of the military regime.¹⁴⁷

Following the 1962 coup d'état that placed Burma under permanent military control,¹⁴⁸ General Ne Win consolidated power by replacing regional, ethnicity-based state councils with a system directly under the control of the central Burmese government.¹⁴⁹ Ne Win's regime then pursued the “Four Cuts” counterinsurgency policy, isolating ethnic minorities by cutting off food, funding, recruits, and communications to targeted communities.¹⁵⁰ In 1984, the Burmese government launched a major offensive against the armed ethnic group Karen National Union (“KNU”) that eventually displaced 10,000 refugees into camps across the Thai border.¹⁵¹ These initial refugees were mostly civilians who had suffered human rights abuses by the Burmese military (and its local proxies) under the Four Cuts policy.¹⁵² Although many of them expected to return to Burma once the violence faded, tens of thousands more Burmese refugees soon joined them in Thailand after fleeing similar attacks throughout Karen and Karenni states.¹⁵³

144. See *infra*, Part III.

145. *History of Armed Opposition*, BURMA LINK, <http://www.burmalink.org/background/burma/dynamics-of-ethnic-conflict/history-of-armed-opposition/> (last updated Oct. 10, 2014).

146. HUMAN SEC. REPORT PROJECT, HUMAN SECURITY REPORT 2009/2010 13 (2011), available at <http://www.hsrgroup.org/human-security-reports/20092010/text.aspx>.

147. See AMNESTY INT'L, THE REPRESSION OF ETHNIC MINORITY ACTIVISTS IN MYANMAR 7-10 (Feb. 2010). See generally *id.*

148. See BURMA: A COUNTRY STUDY 58 (Frederica M. Bunge ed., 1983); see also CHISHAD LIANG, BURMA'S FOREIGN RELATIONS: NEUTRALISM IN THEORY AND PRACTICE 23–24 (1990).

149. See BURMA: A COUNTRY STUDY, *supra* note 148, at 63-64.

150. See EMMA LARKIN, FINDING GEORGE ORWELL IN BURMA 215–19 (2004); *History of Conflict and The Border*, BURMA LINK, <http://www.burmalink.org/background/thailand-burma-border/history-of-conflict-and-the-border/> (last updated May 1, 2015).

151. See *History of Armed Opposition*, *supra* note 145.

152. See *id.*

153. See *Refugee Camps*, BURMA LINK, <http://www.burmalink.org/background/thailand-burma-border/displaced-in-thailand/refugee-camps/> (last updated Apr. 27, 2015).

Various obstacles hindered the refugees' attempts to return to Myanmar—which officially changed its name from Burma in 1989, including the destruction of their villages, crops, and livestock, and the emplacement of landmines along the most accessible routes between the countries.¹⁵⁴ Additionally, several hundred thousand more Karens, Karennis, and Mons remained internally displaced during this time, leaving their homes for similar reasons as the refugees, but remained in Myanmar due to geographical or government barriers.¹⁵⁵ In the country's west, approximately 200,000 Rohingya Muslims also fled, seeking refuge in Bangladesh after the Burmese government employed similar tactics against them.¹⁵⁶

Beginning in 1995, the Burmese government used proxy militias to launch a series of cross-border offensives in areas around the Thai camps, forcing inhabitants to retreat within the camp confines and abandon any means of independently sustaining themselves.¹⁵⁷ No longer able to forage for food and shelter materials, refugees soon had to rely for survival on direct aid from the Thai government and other outside sources.¹⁵⁸ This dependency further restricted their ability—and desire—to return to Burma, where they still had no guarantee of protection, and camp conditions quickly deteriorated.¹⁵⁹

Much international attention has focused on the situation in Myanmar after the government transitioned to a civilian government with the election of the Union Solidarity and Development Party (“USDP”) in November 2010 and the swearing in of Thein Sein as then president in March 2011. This political transition and the granting of other civil and political rights engendered optimism about Myanmar's future where the international community has raced forward, lifting many sanctions against Myanmar, increasing international investment, and providing significant international

154. *See id.*

155. *See Displaced in Burma*, BURMA LINK, <http://www.burmalink.org/background/thailand-burma-border/displaced-in-burma/> (last updated Apr. 29, 2015); *see also* HUM. RTS. WATCH, THEY CAME AND DESTROYED OUR VILLAGE AGAIN: THE PLIGHT OF INTERNALLY DISPLACED PERSONS IN KAREN STATE (June 2005); HUM. RTS. WATCH, THE MON: PERSECUTED IN BURMA, PUSHED BACK FROM THAILAND (Dec. 1994).

156. *See* HUM. RTS. WATCH, THE ROHINGYA MUSLIMS: ENDING A CYCLE OF EXODUS (1996).

157. *See History of Armed Opposition*, *supra* note 145.

158. *See id.*

159. *See id.*

assistance funding.¹⁶⁰ Meanwhile, insurgency movements remain along the border and mass displacement continues.¹⁶¹ Sending signals of confidence to the Myanmar leadership could allow the government, even the currently democratically elected government, to continue to commit human rights abuses with impunity and prematurely indicate to the international community that conditions are ripe for refugees to return to Myanmar. Determining whether it is safe for a refugee to return needs to be an individuated process.¹⁶² Forcing refugees to return to Myanmar before it is safe to do so constitutes a violation of the non-refoulement principle under international law.¹⁶³

There are various ongoing insurgency movements that represent the Karen and Karenni ethnic groups and have varying degrees of resolution in their peace processes.¹⁶⁴ In January 2012, the Karen National Unity party signed a ceasefire with the government of Myanmar. Although signing this ceasefire agreement was a momentous occasion in the peace process,¹⁶⁵ there have been armed clashes reported intermittently since August 2013 alongside peace negotiations.¹⁶⁶ Conditions in Karen State remain tense and ongoing conflict in the area suggests that conditions may not yet be ripe for return.

The Karenni insurgency movements are not waging as active of a resistance role since the Karenni National Progressive Party

160. See PATRICK PIERCE & CAITLIN RIEGER, MYANMAR: NAVIGATING PATHS TO JUSTICE IN MYANMAR'S TRANSITION 1, 5 (June 2014), available at <https://www.ictj.org/sites/default/files/ICTJ-Myanmar-Development-Report-2014.pdf>.

161. See *Conflicts, Communal Violence and IDPs*, MYANMAR PEACE MONITOR <http://www.mmpeacemonitor.org/conflict/conflict-overview> (last visited Feb. 1, 2017); see e.g., TBC PROGRAM REP., *supra* note 21.

162. See U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, 3, ¶ 28 (Dec. 2011), available at <http://www.unhcr.org/en-us/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

163. U.N. HIGH COMMISSIONER FOR REFUGEES, CONVENTION RELATING TO THE STATUS OF REFUGEES, art. 33(1) (July 28, 1951) (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

164. See *Peace Process Overview*, MYANMAR PEACE MONITOR, <http://www.mmpeacemonitor.org/peace-process/peace-process-overview> (last visited Feb. 1, 2017).

165. See *Burma government signs ceasefire with Karen rebels*, BBC NEWS (Jan. 12, 2012), <http://www.bbc.com/news/world-asia-16523691>.

166. *Monitoring Archive*, MYANMAR PEACE MONITOR, <http://www.mmpeacemonitor.org/research/monitoring-archive> (last visited Feb. 1, 2017).

(“KNPP”) signed a ceasefire in July 2012 and has been consistently holding peace talks with the government.¹⁶⁷ Other Karenni movements are Border Guard Forces, co-opted by the Myanmar Government.¹⁶⁸ The fact that there is no ongoing conflict in Kayah State does not mean that the conditions are safe for the Karenni to return, particularly since the Border Guard Forces are under government control¹⁶⁹ and may require the Karenni people to work for defense services against their will.¹⁷⁰

Numerous other insurgency movements are operating along Myanmar’s borders,¹⁷¹ and the engagement of these groups will be critical for the achievement of a comprehensive peace process. One potential solution is a federalist system that reflects the inclusion of the demands of various ethnic minority groups in a revised Constitution. This could help to transition ceasefire agreements to long-term, sustainable peace.¹⁷² Even with various tenuous ceasefire agreements currently in place, until the Constitution has been revised to lessen military control, many Burmese people are likely to be wary for prospects of peace and will not likely feel safe returning home.¹⁷³

167. *See id.*

168. *See Armed Ethnic Groups*, MYANMAR PEACE MONITOR, <http://www.mmpeacemonitor.org/stakeholders/armed-ethnic-groups> (last visited Feb. 1, 2017) (these groups include: Karenni National People’s Liberation Front, Karenni National Peace and Development Party, Karenni National Development Party/Army, and Karenni National Unity and Solidarity Organization).

169. *Border Guard Force Scheme*, MYANMAR PEACE MONITOR <http://www.mmpeacemonitor.org/background/border-guard-force> (last visited Feb. 1, 2017).

170. *See* KAREN HUMAN RIGHTS GRP., *TRUCE OR TRANSITION: TRENDS IN HUMAN RIGHTS ABUSE AND LOCAL RESPONSE IN SOUTHEAST MYANMAR SINCE THE 2012 CEASEFIRE* 54 (2014), available at http://www.khrg.org/sites/default/files/khrg_-_truce_or_transition_-_english.pdf [hereinafter *TRUCE OR TRANSITION*].

171. *Conflict Alerts*, MYANMAR PEACE MONITOR <http://www.mmpeacemonitor.org/conflict> (last visited Feb. 1, 2017).

172. *See* Janelle Saffin & Nathan Willis, *The Need for a Constitutional Settlement to Further the Reform Process in Myanmar (Burma)*, 28 *TEMP. INT’L & COMP. L.J.* 253, 269-71, 276-84 (2014).

173. *See e.g.*, Marm Sart Khiang, *2008 Constitution: What Needs To Be Changed?*, *BURMA NEWS INT’L* (Mar. 29, 2012, 2:25 PM), <http://e-archive.bnionline.net/index.php/feature/bni/12892-2008-constitution-what-needs-to-be-changed.html>.

A. Conditions in Kayin (Karen) State

People in Kayin State are predominantly dependent upon animal husbandry and agriculture for their livelihoods.¹⁷⁴ Access to social services, including health and education, is poor and has declined with the reduction of KNU's territorial control over Kayin State.¹⁷⁵ Of major concern is the budding interest in development projects in the region for mining, dam construction, large-scale agricultural projects, rubber plantations, and army camps,¹⁷⁶ which will impede individuals from engaging in their own agricultural and animal husbandry practices.¹⁷⁷ In addition, these development projects will likely lead to widespread land grabs and displacement of Karen people without adequate compensation. A pattern has already been documented of confiscation of land by the Tatmadaw.¹⁷⁸

Although there are reports since the ceasefire that people in Kayin State feel somewhat safer to move around, it continues to be unstable.¹⁷⁹ Since the ceasefire, the Tatmadaw continues to build new—and bolster old—army bases. Troops rotate, skirmishes between armed groups continue, and weapons, ammunition, and rations are consistently resupplied.¹⁸⁰ These conditions have led to mistrust of the ceasefire and the Tatmadaw, as well as continued insecurity.¹⁸¹ There were reported instances of arbitrary arrest without a formal charge or access to due process as a result of acts such as suspected KNU collaboration, not having identification, running a business that competed with a Tatmadaw-run business, or traveling in a limited military operation area.¹⁸² Instances of torture, cruel,

174. See U.N. HIGH COMMISSIONER FOR REFUGEES, KAYIN STATE PROFILE 7 (2014), available at <http://data.unhcr.org/thailand/download.php?id=223> [hereinafter KAYIN STATE PROFILE].

175. See *id.* at 8.

176. See TRUCE OR TRANSITION, *supra* note 170, at 90 (noting that development projects include the Asian Development Bank's construction of the Asia Highway as part of the Greater Mekong sub-region initiative); see also KAYIN STATE PROFILE, *supra* note 174, at 8.

177. KAYIN STATE PROFILE, *supra* note 174, at 8.

178. See TRUCE OR TRANSITION, *supra* note 170, at 89; see generally KAREN HUMAN RIGHTS GRP., LOSING GROUND: LAND CONFLICTS AND COLLECTIVE ACTION IN EASTERN MYANMAR (Mar. 2013), available at <http://www.khrg.org/sites/default/files/losinggroundkhrg-march2013-fulltext.pdf>.

179. TRUCE OR TRANSITION, *supra* note 170, at 10, 106.

180. *Id.* at 106-17.

181. *Id.* at 116.

182. *Id.* at 32.

inhuman or degrading treatment, and sexual violence perpetrated by the Tatmadaw have been reported since the ceasefire was signed in 2012.¹⁸³ Although overall levels of forced labor have declined and are requested for shorter periods, this practice still continues.¹⁸⁴ Forced recruitment into the Tatmadaw and Border Guard Forces remains an issue where individuals are coerced to join these forces against their will, are required to remain enlisted for longer than their term, or are taxed in lieu of enlistment.¹⁸⁵ Furthermore, these demands to enlist are accompanied by implicit or explicit threats of violence, frequently compelling these individuals to comply with enlistment demands.¹⁸⁶ Taxes were also arbitrarily levied on people passing through military checkpoints with industrial, livestock, or agricultural products.¹⁸⁷

Landmines also pose significant threats to individuals' livelihood and security throughout Kayin State. Landmines remain planted throughout Kayin State, most frequently protecting current or former Tatmadaw camps, and occasionally around agricultural areas or water sources.¹⁸⁸ New mines have also allegedly been planted since the 2012 ceasefire, but with decreased frequency.¹⁸⁹ The prevalence of landmines throughout the region has widespread implications for the mobility of the Kayin people and their livelihoods due to the difficulty of farming or raising livestock.¹⁹⁰

B. Conditions in Kayah (Karenni) State

UNHCR estimates suggest that there are 15,000 Karenni refugees living in Thailand, and roughly ten percent of the population in Kayah State has been internally displaced from the conflict.¹⁹¹ Kayah State is a heavily forested, rural, mountainous state that is rich in natural resources, namely minerals, timber, and hydropower.¹⁹² Kayah State is one of the most heavily landmine contaminated areas

183. *Id.* at 32-42.

184. *Id.* at 46.

185. *Id.* at 54. Being required to pay a tax that may be prohibitively expensive still does not provide an individual with the choice of whether or not to enlist, meaning that this cannot constitute voluntary enlistment.

186. *Id.* at 55.

187. *Id.* at 78-86 (providing additional details on taxation related challenges).

188. *See id.* at 61-63.

189. *See id.* at 61.

190. *See id.* at 65-66.

191. *See* NINA SCHULER, *KAYAH STATE SOCIOECONOMIC ANALYSIS 9* (2013), available at www.data.unhcr.org/thailand/download.php?id=206.

192. *See id.* at 2, 19.

in Myanmar.¹⁹³ Despite terms in the KNPP's ceasefire agreement with the government, the government has not begun any surveys in the region to determine which communities are affected by landmines.¹⁹⁴ Although the landmine-related casualties have decreased since the ceasefire, any internally displaced persons or refugees returning home would be greatly at risk of incurring landmine-related injuries as a result of not knowing where landmines may be buried.¹⁹⁵

Within the international community, there has been much optimism for Myanmar's future prospects for peace as a result of the initial transition from military rule to Thein Sein's government and the subsequent transition to a democratically elected government. Although there has been notable reform in shifting the legal framework of civil and political rights, many of these changes ring hollow for Burmese citizens. Rights to assembly, freedom of expression, and the right to vote are largely unrealized. Prospects for constitutional reform are bleak. Due to the central role that constitutional reform occupies in ethnic insurgency movements, conflict within the Border States is likely to remain.¹⁹⁶ The ceasefire in Kayin State has not been respected, as evidenced by skirmishes, ongoing militarization, and forced conscription. Conditions in Kayah State are comparatively better, yet the State is still riddled with landmines and is likely to have its natural resources exploited for Myanmar's economic development.

Conditions in Kayin and Kayah States remain insecure. Until the peace process provides meaningful participation for diverse ethnic minority groups, it is unlikely that conditions will be sufficiently safe within Myanmar for refugees to return. A large influx of returning refugees could also exacerbate already unstable conditions, especially if that influx interferes with the extraction of valuable resources, or if it creates tension between competing land ownership claims. As a result, any country that begins to return refugees before conditions are

193. See *Ceasefire but No Demining in Myanmar's Kayah State*, IRIN ASIA (July 25, 2014), <http://www.irinnews.org/report/100404/ceasefire-but-no-demining-in-myanmar-s-kayah-state>.

194. *Id.*

195. *See id.*

196. *See Saffin & Willis, supra* note 172, at 253, 269-71, 276-84.

safe for return will be in violation of their international legal obligations of non-refoulement.¹⁹⁷

b. Research Findings

1. Access to Necessary Resources & Services

*“Everything is in a box. Access to services, including healthcare, education, food, and movement in and out of camps is very limited. I feel like everything is restricted. I feel like I am inside a box.”*¹⁹⁸

A. Food

Thailand’s tightening of its restrictions on freedom of movement and work has taken place immediately following significant decreases in donor funding for camp support.¹⁹⁹ Donor fatigue, the global financial crisis, and a perception by international funders that the situation in Myanmar is changing have led to both an overall decrease in funding and a shift of existing funding from camp support in Thailand to direct support for programs in Myanmar.²⁰⁰ Despite this

197. *See infra*, Part III. Even countries that have not signed the 1951 Convention and its 1967 Optional Protocol are required to respect the obligation of non-refoulement as a principle of customary international law. *See* Scott A. Vignos, *Pirate Trials: An Examination of the United States’ Non-Refoulement Duties Pursuant to the United Nations Convention Against Torture*, 17 U.C. DAVIS J. INT’L L. & POL’Y 193, 206 (2010).

198. Interview with refugee, Refugee Focus Group, in Thailand (Interviewee #13) (May 2015) [Interview records on file with Leitner Center].

199. Interview with NGO Staff Person, in Thailand (May 2015) [Interview records on file with Leitner Center] (“After the coup, the dependency on rations increased at a time when the rations are decreasing the most.”); *see* Leitner Ctr. for Int’l Law and Justice, 2015 Crowley Program Report (unpublished manuscript) (on file with author) [hereinafter 2015 Crowley Manuscript].

200. For example, as foreign attention shifts toward the Myanmar side of the border, donors have fewer resources to devote to those refugees who are unwilling or unable to return. *See* BORDER CONSORTIUM, PROGRAMME REPORT JANUARY-JUNE 2015 65 (2015) [hereinafter TBC JANUARY–JUNE 2015 PROGRAM REP.]; *See also* AD HOC AND INADEQUATE, *supra* note 15, at 18 & 29. Donor fatigue also increases with the intractability of the refugee crisis and apparent lack of political progress between minority groups and the Myanmar government. Moreover, the global financial crisis continues to impact state budgets for foreign

decrease in support to the camps, the Thai government has not supplemented its own funding, supplies, or services, but instead has moved in the opposite direction by selectively enforced unwritten policies that ultimately make it even more difficult for refugees to meet their most basic needs.

NGOs provide only limited resources in the camps, and the inability of refugees' ability to secure additional income and resources outside the camps due to Thai law and policies results in the negative impact on their fundamental rights in a variety of areas including food, shelter, healthcare, and education.²⁰¹ As one refugee commented, "Reductions are not only for rations. All services have been reduced. Health, rations, education, *everything*."²⁰² Many refugees have noted that these cuts in rations and decreases in essential services are among the major problems in the camps.²⁰³ When asked why the level of support has decreased, interviewees offered a number of conjectures. A Karenni refugee in Na Soi Camp reported, "One [reason] we have heard was because there is less interest by donors and also higher prices and poor exchange rates."²⁰⁴ Another said, "Also maybe the resettlement program, because donors and people think the camp populations should be smaller, but it's still the same population. Donors are focused on development, so funds for relief are reduced."²⁰⁵ Still another commented, "Because there are so many refugees around the world, so the money goes to them now instead of us."²⁰⁶ But for most, their explanation was echoed in the

assistance, as well as the political will to maintain them. See Era Dabla-Norris et al., *Will the Recent Economic Downturn, Large Shocks, and Debt Strains in Donor Countries Have a Ripple Effect on Bilateral Aid?*, VOX EU (Apr. 6, 2011), <http://www.voxeu.org/article/impact-global-crisis-aid-flows-it-over-yet>. Finally, emerging refugee and migrant crises around the world promise to further draw public attention away from Burmese refugees. See TBC JANUARY–JUNE 2015 PROGRAM REP., *supra*.

201. TBC JANUARY–JUNE 2015 PROGRAM REPORT, *supra* note 200.

202. Interview with refugee, Refugee Focus Group, in Thailand (Interviewees # 1, 4, & 12) (May 2015) [Interview records on file with Leitner Center].

203. Interview with multiple refugees in focus group, in Thailand (May 2015) [Interview record on file with Leitner Center].

204. Interview with refugee, in Thailand (May 2015) [Interview records on file with Leitner Center].

205. Interview with refugee, Refugee Focus Group, in Thailand (May 2015) [Interview records on file with Leitner Center].

206. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

reply of one refugee, which was simply, “I don’t know why . . . I just know there is not enough food.”²⁰⁷

i. Funding Shortfalls

As one NGO staff person reported:

Funding is quickly depleting . . . [we] might not be able to provide the required support in 2016. Eighty percent of our funding goes to food and [we are] the only food provider [in the camps], so this will be a significant problem. Long-term funders are committed, but this might not be enough.²⁰⁸

Most of the refugees we interviewed commented that lack of food was one of the biggest challenges they were facing.²⁰⁹ Camp residents suffered from chronic malnutrition and anemia even before NGOs announced in 2011 that they could no longer meet international minimum nutrition standards for Burmese refugees in the camps.²¹⁰ Typically, rations consist of some combination of rice, oil, salt, flour yellow bean, charcoal, Asia Mix (a vitamin supplement), and sometimes fish paste. Water is supplied from camp wells that environmental groups are responsible for keeping clean.²¹¹

However, beginning in 2012, the situation became even less tenable as rations began to be cut in the camps.²¹² Many refugees reported continuing decreases in food amounts.²¹³ In 2011, all refugees received at least fifteen kilograms of rice per month. Even those few refugees deemed vulnerable or most vulnerable now

207. *Id.*

208. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

209. Interview with multiple refugees in focus group, in Thailand (May 2015) [Interview records on file with Leitner Center].

210. *See* AD HOC AND INADEQUATE, *supra* note 15, at 35; *see also* *Food Assistance*, BORDER CONSORTIUM, <http://www.theborderconsortium.org/what-we-do/thailand/food-assistance/> (last visited Feb. 1, 2017) [hereinafter *Food Assistance*]; TBC JANUARY–JUNE 2015 PROGRAM REP., *supra* note 200; *id.* The “standard” rice ration for adult refugees was decreased to 9 kilograms (kg) per person, per month (pp/pm) from 10 kg pp/pm. Some refugees falling into the “vulnerable” category also saw a reduction to 11 kg pp/pm from 12 kg pp/pm.

211. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

212. Interview with refugee, Refugee Focus Group, in Thailand (May 2015) [Interview records on file with Leitner Center].

213. “For large families (ten or more people), there is not enough food to go around. And the ration is only rice, so we have to find other food on our own.” Interview with Camp Refugee, in Thailand (May 2015), *in* 2015 Crowley Manuscript, *supra* note 199.

receive only twelve or 13.5 kilograms per month, respectively—a significant reduction, especially considering that refugees were experiencing the effects of malnutrition even with the fifteen kilograms per month in 2011.²¹⁴ Leaving aside these reductions for most vulnerable populations, the decline in the standard allotment for the majority of the refugee population is even more substantial. For example, whereas a typical individual received fifteen kilograms of rice per month in 2011, in 2012 that individual received only 13.5 kilograms, and that amount soon declined to twelve kilograms and then to ten kilograms; some refugees have even reported that they now receive only eight or nine kilograms for the standard allotment.²¹⁵ In light of this succession of cuts, rations in 2015 amounted to no more than a standard per person allotment of 1505 kilocalories per day, 39.5 percent below the minimum international standard, with additional cuts to rice and charcoal occurring in September 2015 [following our May 2015 field research visit].²¹⁶ NGOs are concerned ration reductions will continue.²¹⁷

All of the refugees that we interviewed confirmed that current rations are not enough to sustain them, and many must look for other options to fill the gap—options that have been greatly curtailed given the new restrictions on movement into and out of the camps.²¹⁸ Some refugees noted that reduced rations have led to emotional stress among many in the camps.²¹⁹ In particular, one interviewee said, “After the reductions in rations, people started to have emotional issues, stress, depression, [especially] because they can’t go outside the camp to work.”²²⁰ NGO workers commented that now most refugees have issues with daily survival, including their access to

214. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

215. Interviews with staff members from two separate NGOs (May 2015) [Interview records on file with Leitner Center]; *see also* Interview with NGO staff person (May 2015) [Interview record on file with Leitner Center].

216. *See* TBC January–June 2015 Program Report, *supra* note 200, at 25; *see also* BORDER CONSORTIUM, PROGRAMME REPORT JUNE-DECEMBER 2015 17 (2015).

217. *See id.* at 26-28.

218. Interview with multiple refugees in all focus groups, in Thailand (May 2015) [Interview records on file with Leitner Center].

219. Interview with multiple refugees in focus group, in Thailand (May 2015) [Interview records on file with Leitner Center].

220. Interview with refugee, Refugee Focus Group, in Thailand (May 2015) [Interview record on file with Leitner Center].

coal, oil, rice, and fish paste.²²¹ This also has an attendant social impact: refugees feel restricted in their interactions (e.g., going to a friend's house for dinner).²²² One service provider said, "Essentially, no food security also means no mental security; the ration was never enough, but now it's even worse."²²³

ii. Need for Outside Sources

Refugees also reported that, while in critical need of supplemental food supplies, they are unable to provide for themselves because they cannot leave the camps to obtain needed resources.²²⁴ Traditionally, refugees were able to supplement their limited rations by gathering food in surrounding areas or working outside of the camps to gain income to purchase additional food items.²²⁵ As one refugee camp committee member told us:

They don't go far—and almost always for work with local Thais. There [was] an understanding with the Thai authorities about this, but refugees are also limited by the geography. They can't go very far because of all the mountains around here.²²⁶

In some cases, refugees continue to have tacit understandings with local Thai authorities, or they manage to find ways around camp entrances and exits.²²⁷ One refugee noted that "Thai authorities are sometimes not a problem close to the camp, but if we go farther than five villages away it becomes a problem. We avoid the official camp gates."²²⁸ Another said:

221. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

222. *Id.*

223. *Id.*

224. Refugees in Mae La camp report the need to leave the camps to acquire food from outside, but that doing so costs too much money or puts the refugee at risk of arrest. See *id.*, which contains one refugee's statement that "[t]he rations have decreased. Now you need to leave the camp to buy outside food, but to leave you need to get permission or pay the camp guard 500 baht. I was caught leaving by the police once. I had 400 baht with me, and he took 200. He let me keep going after he took 200."

225. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

226. Interview with refugee camp committee member, in Thailand (May 2015) [Interview record on file with Leitner Center].

227. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

228. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

As rations decrease, camp residents need to leave the camp to buy outside food, but to leave you need to get permission or pay the camp guard 500 baht. I was caught leaving by the police once. I had 400 baht with me, and he took 200. He let me keep going after he took 200.²²⁹

A third interviewee added, “[t]hey [Thai authorities] really want them [refugees] to return to Burma.”²³⁰ All of the interviewees agreed that, since the coup, movement in and out of the camps has been restricted. One interviewee explained:

This has impacted the economy inside the camps, especially because refugees now need to supplement their daily income, food, and resources outside. Refugees are now unable to access the economy outside the camps. After the coup, the dependency on rations increased at a time when the rations are decreasing the most. An informal economy was necessary after the reduction in rations. When the coup happened, they really had to depend on the rations more, just as they were being cut.²³¹

iii. Lack of Land Expansion & Arrest Penalties

Refugees risk punishment if they attempt to gather or grow food beyond camp perimeters.²³² One NGO staff person working in the camps noted that “[f]or Karen and Karenni refugees, the forest is their food source, but in Thailand, the Department of Forestry is strong and [refugees] can be punished for foraging or disturbing the forest.”²³³ Individual refugees are also not permitted to use land beyond camp borders for farming individual plots, nor are NGOs allowed to use non-camp land for growing food for refugees.²³⁴ As one NGO service provider described:

[A]ll produce from our agricultural program must be sold within the camps. Land cannot be expanded for agriculture or any other activity Any refugee caught farming beyond these boundaries would [also] be in violation of anti-deforestation laws and [would be] required to pay a fine. The government has set a boundary on camp land so it is very difficult to expand. Also,

229. *Id.*

230. *Id.*

231. *Id.*

232. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

233. *Id.*

234. *Id.*

boundaries are regularly patrolled, so refugees who farm beyond campgrounds are at risk of being arrested for deforestation. For instance, in April 2015, a refugee who expanded his farm beyond camp grounds was caught, and the area was closed leading to thirty people losing their farmland.²³⁵

B. Shelter

Refugee access to shelter has also diminished, beginning with a 2011 reduction in building materials.²³⁶ Thailand only allows refugees to build temporary shelters out of materials such as bamboo and grass thatching, and prohibits the construction of permanent structures made from more durable materials, limiting the integrity of the houses in which refugees can live.²³⁷ Because refugees are denied permission to leave the camps, refugees are prevented from acquiring additional outside repair materials²³⁸—posing particular difficulties during the rainy season when camp residents are prevented from adequately protecting themselves from inclement weather.²³⁹

All supplies in the camps come from NGO providers rather than from the Thai authorities, so refugees become completely dependent on NGOs for all materials and services. Before restrictions on freedom of movement and right to work took place, some refugees would periodically leave the camps to find supplies or sources of additional income to supplement resources.²⁴⁰ One refugee we interviewed noted, “Since 2011, aid has been reduced. We do not have enough supplies”²⁴¹ Another added, “At first, the support from [NGOs] was enough. But the last two to three years, supplies have started getting low, and in the future it looks like it will continue

235. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

236. See AD HOC AND INADEQUATE, *supra* note 15, at 31.

237. “They call the houses in the camps ‘temporary shelters’ and will not provide more durable roofs so that it does not turn into a long term stay.” Interview, 2015 Crowley Manuscript, *supra* note 199.

238. See AD HOC AND INADEQUATE, *supra* note 15, at 31–32.

239. “An informal economy was necessary after the reduction in rations. When the coup happened, they really had to depend on the rations more, just as they were being cut. The material to fix houses is a part of the rations, so rainy season became an issue.” Interview with NGO Staff Person, 2015 Crowley Manuscript, *supra* note 199.

240. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center]

241. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

to be low. This is a problem for refugees.”²⁴² A third summarized, “In general, camp conditions are getting worse.”²⁴³

Thai authorities will not allow NGOs to provide permanent materials to refugees for shelter construction. A UNHCR staff person reported the Thai government “call[s] the houses in the camps ‘temporary shelters’ and will not provide more durable roofs so that it does not turn into a long-term stay.”²⁴⁴ A local NGO also offered:

The material to fix houses is a part of the rations, and there are not enough housing materials. So the rainy season becomes an issue. Refugees are still forced to go outside the camps to find leaves, bamboo and unofficial work.²⁴⁵

When asked whether he built his own hut, one refugee living in Mae La Camp responded, “Yes. I go to the forest to get bamboo and then [an NGO] gives me leaves for roofing. Sometimes police catch you [and punish or fine you] for getting extra materials to build your house from the forest.”²⁴⁶ Another NGO staff person reported that now “small children are [now sometimes being sent by parents] to gather building materials outside the camps.”²⁴⁷

C. Health Care

The overall funding shortage has also negatively impacted Burmese refugees’ access to healthcare, as NGOs are no longer able to provide essential preventative and mental health services or hospital treatment.²⁴⁸ In Thailand, there is not free access to hospitals.²⁴⁹ If a Thai citizen has a medical card, a hospital visit is thirty baht, but refugees cannot acquire a medical card.²⁵⁰ Some interviewees reported that, while previously any sick camp resident

242. *Id.*

243. *Id.*

244. Interview with UNHCR officer, in Thailand (May 2015) [Interview record on file with Leitner Center].

245. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

246. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

247. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

248. See AD HOC AND INADEQUATE, *supra* note 15, at 30–33.

249. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

250. *Id.*

who was sick could be referred to a nearby hospital, now the individual is only referred if his or her case is “very serious.”²⁵¹ Camp health services are limited and several interviewees said the process is very slow and only remedial treatments are available.²⁵²

In general, there is less donor support for health services overall. “NGOs don’t want to send people to the hospital, because the expense is very high,” one camp resident told us.²⁵³ Another added:

They want to save the money for more patients instead of spending lots of money on one patient. Also, the decision to send someone to a hospital isn’t made by the clinic staff. The doctor from the NGO makes the decision, because the NGO pays for the transportation to the hospital.²⁵⁴

In parallel to declining rations and other services, camps have also seen an increase in mental health issues.²⁵⁵ One organization operating in the camps described the sharp increase in emotional stress and depression they have seen, with an even more noticeable effect on families with children.²⁵⁶ This organization reported that they have seen cases in which children start to hustle and steal because of constraints on provisions.²⁵⁷ This causes even greater stress for their parents. As one staff worker commented, “Because of the reduction [in services], there is a lot of emotional problems and depression. It is especially hard on the parents. There is [also now] more domestic violence in the camps.”²⁵⁸ Another camp service provider told us, “In 2014-15, there have been lots of issues linked with unnatural deaths [suicides]. This is linked to stress from daily life, including economic restrictions, and decrease in services.”²⁵⁹

251. *Id.*; see also 2015 Crowley Manuscript, *supra* note 199 (quoting an interview with a refugee in the camp saying, “[t]his situation changed recently. Before, if someone was sick, they were referred to the Mae Hong Son hospital. Now, people are only referred if their case is very serious (before, everyone could get referred)”).

252. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

253. *Id.*

254. *Id.*

255. Interview with two NGO staff people from separate organizations, in Thailand (May 2015) [Interview records on file with Leitner Center].

256. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

257. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

258. *Id.*

259. *Id.*

The lack of trained NGO health workers and services also creates higher dependency on Burmese doctors in the camps—a situation that often fuels ethnic tension.²⁶⁰ As one NGO staff worker explained:

Less money for health means you can't send people to hospitals in Thailand any more. [In the camps,] there are also many doctors from Burma who are [ethnically] Burman. They have replaced some of the international doctors. This has led to ethnic distrust because the patients are largely Karen. Most refugees are there because of conflict and don't feel safe with a Burman doctor.²⁶¹

D. Education

Finally, the refugee education system is no longer affordable for many families because of increased tuition fees.²⁶² In 2004, UNHCR coordinated the creation of an operational plan for refugee returns; as a part of this plan, while in the camps, refugees were to be sent to individual NGOs for health, livelihood, and educational services.²⁶³ As funding for the camps decreases, NGOs are unable to continue to provide these services for free, which means that refugees are forced to make up the difference in the funding shortfall. As one NGO reported, “The international community should balance its donations between the government and also local CBOs. There are services that need to be provided by CBOs and they have recently been reduced—for example, the decrease in teacher stipends.”²⁶⁴

Residents of Ban Mai Nai Soi and Mae La camps, for example, reported that funding cuts have meant that families must now pay school fees.²⁶⁵ As refugees in Na Soi reported:

There is now a registration fee. Before, there was no fee, but now it is about fifty baht. This goes toward the teacher stipend

260. *Id.*

261. *Id.*

262. See AD HOC AND INADEQUATE, *supra* note 15, at 33.

263. Interview with UNHCR officer, in Thailand (May 2015) [Interview record on file with Leitner Center].

264. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

265. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center] (“There is now a registration fee. Before, there was no fee, but now it is about 50 baht. This goes toward the teacher stipend. This change is because there is not now enough money for teachers’ stipends, and the parents want to keep the teachers.”).

This change is because there is not now enough money for teachers' stipends, and the parents want to keep the teachers.²⁶⁶

Refugees in other camps reported similar situations, with rates as high as 200 baht per student, and projected further increases.²⁶⁷

The quality of education in the camps has also suffered, as lower pay leads to higher turnover rates and inadequate training for teachers.²⁶⁸ Several refugees we interviewed reported that, in general, the quality of education in the camps has deteriorated because the services are not fully supported.²⁶⁹ For example, the variety of educational programming offered is decreasing.²⁷⁰ Some NGO educational programs are transitioning their curriculum to focus on more general principles.²⁷¹ The number of teachers available to teach has also been reduced due to resettlement of trained teachers or lowered teacher stipends.²⁷²

There is a limited amount of secondary education offered in the camps; one service provider reported that some post-tenth grade standard educational training for teachers and health medics has been allowed, but these programs are only limited to between thirty to forty people a year.²⁷³ Even when secondary educational programs are offered, certificates are not recognized outside the camps, and there are no employment opportunities.²⁷⁴ One NGO officer said, "The young people in the camps don't know what to do with their education. They also don't understand the importance of education."²⁷⁵

2. Ability to Move Freely & Work

As one refugee explained:

266. Interview with two separate refugees in focus group, in Thailand (May 2015) [Interview records on file with Leitner Center].

267. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

268. *See AD HOC AND INADEQUATE, supra* note 15, at 33–34; *see also* Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

269. Interview with four separate refugees in focus group, in Thailand (May 2015) [Interview records on file with Leitner Center].

270. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

I was born in Karen I am a camp resident, but I have to be able to take the risk of going outside the camp to be able to help the community. The government lets me leave sometimes if I provide a cash payment. But they know we are here [outside the camp], and so I can technically be arrested. Security in the refugee camp has been tightened [since the coup]. It is very difficult for people to leave when security is tight. When we are not able to leave, we must even close our assistance office, which is located just outside of the camp.²⁷⁶

Following the May 2014 coup and the enactment of the interim Constitution,²⁷⁷ the situation for refugees on the ground has become strikingly less secure.²⁷⁸ Since the coup, Thailand has more strictly enforced prohibitions on leaving the camps.²⁷⁹ Camp passes granting permission for temporary leave are more difficult to obtain and more limited in scope and duration.²⁸⁰ If any written policies ever existed detailing rules on refugee movement outside the camps, they have not been made available to the public. Previously, whatever prohibitions may have been in place were not enforced, allowing many refugees to find ways of securing outside employment, building supplies, and food.²⁸¹ However, since the coup, refugees have reported that egress has been tightly limited; many have even described instances where Thai authorities have set up surprise checkpoints at areas surrounding camp perimeters and arrested exiting refugees.²⁸²

276. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

277. The Constitution was passed without public consultation and with widespread public condemnation. See *Open Letter Condemning the Thai Junta's Interim Constitution*, PRACHATAI ENG. (Jan. 8, 2014), <http://prachatai.org/english/node/4262> (discussing the shortcomings of the 2014 Constitution and arguing that the document discounts human rights). The main critique of this Constitution is that it grants the military government immunity to such a degree that it sanctions human rights violations. See *Thailand: Interim Constitution Provides Sweeping Powers*, HUM. RTS. WATCH (July 25, 2014), <https://www.hrw.org/news/2014/07/24/thailand-interim-constitution-provides-sweeping-powers> (critiquing the 2014 interim constitution for granting too much authority to the Thai government).

278. See TBC JANUARY-JUNE 2015 PROGRAM REPORT, *supra* note 200, at 10.

279. See *id.* at 9.

280. Refugees in Mae La camp report that camp passes now cost 200 baht and are valid for only three days (whereas before the coup, they were valid for up to a month). See 2015 Crowley Manuscript.

281. See AD HOC AND INADEQUATE, *supra* note 15, at 31-36.

282. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center] (“I went out of the camp, and the police didn’t see me on my way out. I was going to the city center. I walked for three to four days. Then I got sick and I wanted to go back. But the police set up a checkpoint, and I was arrested on the way back to the camp. I

A. Changes in Thai Policies Regarding Movement

After the coup, Thai authorities began enforcing a number of camp policies, including severely restricting movement in and out of the camps.²⁸³ As one resident reported:

[There have been] lots of discussions about the return issue. Before the last few years, there was no talk about this. The Thai government is starting to enforce some policies. Once services are reduced, more people are cutting down trees to grow food. Then the law policy for deforestation started to be enforced. And there are more restrictions on movement.²⁸⁴

There are no public written records of these policies restricting movement.²⁸⁵ Thai authorities insist that these policies have always existed; it is just that now these policies are actually being enforced. While some camp leaders—who can sometimes be aligned with Thai political interests or who may feel the need to represent Thai authorities favorably in order to maintain power for themselves or rights for their represented communities—occasionally claimed in interviews that movement was not restricted,²⁸⁶ all of the evidence seems to point to the contrary. Right after the coup, reported restrictions on movement were at their most severe. Even now, restrictions are much more stringently enforced than prior to the coup.²⁸⁷ The actual flexibility of those restrictions still varies somewhat from camp to camp and in response to certain events that take place in camps—for example, restrictions are enforced more

didn't have my ID. I was detained for one day. I paid some money [3500 baht], and then I was released."); *see also* TBC JANUARY-JUNE 2015 PROGRAM REPORT, *supra* note 200, at 20.

283. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

284. Interview with two separate refugees in focus group, in Thailand (May 2015) [Interview record on file with Leitner Center].

285. In no interview conducted by the delegation with refugees, NGO staff workers, UNHCR officers, or Thai government officials were we able to secure, or even ascertain, the existence of official Thai written policies restricting movement in and out of the camps available to the public or even to refugee camp residents.

286. Interview with Saw Baw Poe, Camp Leader, in Mae Rama Luang (May 2015) [Interview record on file with Leitner Center] ("I can't say there have been changes here. There are rules that refugees cannot leave the camps but these rules are not enforced.").

287. Interview with UNHCR officer, in Thailand (May 2015) [Interview record on file with Leitner Center].

absolutely during periods when head counts of refugees are taking place.²⁸⁸

There are some very limited circumstances that will allow a refugee to gain official permission to leave the camp. One camp resident explained, “If people go out for farming, they cannot tell the authorities. If there is some special reason they must leave, they can ask for permission. This would be for a big gathering, like a dinner.”²⁸⁹ Staff at UNHCR clarified that, “refugees can request access to go outside for four limited reasons: medical referral from NGO; travel to another camp (NGO-facilitated); vocational training (most likely coordinated by Thai actors); and humanitarian reasons.”²⁹⁰

In general, refugees are aware that their ability to leave is not what it once was. As one interviewee said:

We cannot move as easily [as we could before the coup]. It is harder to get work. We also used to be able to visit people, but now we have to get permission from the camp commander. The permission is only for one week now. Before it was longer.²⁹¹

Even when camp passes are issued, they are now more expensive and allow fewer days outside the camp. As a refugee in another camp reported, “The camp pass is only three days now—down from one month, and the pass costs 200 baht. It is more difficult to go outside and work.”²⁹²

Sometimes the camp pass is less official. One refugee commented that, as for entry and exit to the camps, “you’ve got to grease the palms on the way in,” curiously adding, “It’s not corruption. It’s just business.”²⁹³ Another interviewee explained, “The camp policies have tightened up, by that I mean that the exchange between the guards and refugees is like this: ‘It’s more difficult to leave this month. How much more difficult? About 200 baht more

288. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

289. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

290. Interview with UNHCR officer, in Thailand (May 2015) [Interview record on file with Leitner Center].

291. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

292. *Id.*

293. *Id.*

difficult.”²⁹⁴ A third interviewee from another camp simply reported that, “since 2012, it has become more difficult for the refugees to move around without a camp pass. Normally, they could sneak out of the camps, but right now they cannot.”²⁹⁵ NGOs have reported that, where before there were unofficial openings, now fences are also physically closed off.²⁹⁶

Regardless of whether a refugee is given official permission to leave the camp for a temporary period, refugees are not technically allowed to work outside the camps, despite some pressure from NGOs and UNHCR to allow them to do so. Though many do actually secretly work outside the camps, the Thai government refuses to acknowledge that this takes place.²⁹⁷ Refugees caught outside the camps are subject to arrest, and many interviewees described such arrests happening to them or to others that they know.²⁹⁸ Some refugees have suggested that the rules are stricter now, “[m]aybe because MOI wants to restore order, maybe because it gets complaints from locals, or maybe because of bigger changes between Thailand and Burma.”²⁹⁹

B. Thai Policies Allowing Limited Movement

There seems to be some variance in how movements outside of camps are regulated. Aside from camp passes, the situations that seem the most advantageous for refugees are those where unofficial movement seems to be relatively tolerated. For example, in one camp an NGO staff worker reported, “There is a new policy that not more than 100 can leave per day. It is all unofficial. The camp doesn’t want to make a record, because if someone higher up sees the record, they

294. *Id.*

295. *Id.*

296. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

297. Interview with UNHCR officer, in Thailand (May 2015) [Interview record on file with Leitner Center].

298. *Id.*; *see also* Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center] (“It depends on the camp committee and Thai authorities whether someone can get in the camp. Sometimes we are allowed out if we have documents. Those who don’t have documents can go unofficially, but they will be arrested if they are caught outside.”).

299. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

might get in trouble.”³⁰⁰ Another account reflected similar information:

Since the coup, checkpoints have been put in place for anyone going in and out, but because there are no fences, people can still leave. The military wanted to set up proper checkpoints that monitor how many people leave and how many people return. District officers avoided this by guaranteeing that they can control the crowds and set a quota of 100 people.³⁰¹

In some of these cases, camp committees collect monthly data on who leaves or enters the camps.³⁰² If a person leaves the camp for a day, they are included in those numbers. Only those who leave the camps for a month or two are excluded.³⁰³ One camp committee noted, for example, that each month only about thirty refugees leave and thirty enter.³⁰⁴

Rules do vary to some degree from camp to camp. Depending on how isolated the camp is from populated areas, in some cases, authorities will allow camp residents to leave the camp as long as they stay within a certain proximity of camp boundaries. For example, when a refugee living in an isolated camp in the north of Thailand was asked whether refugees were allowed to leave the camp, he replied:

Yes, to supplement their rations. They don't go far and almost always to work with local Thais. There is an understanding with the Thai authorities about this, but refugees are also limited by the geography; they can't go very far because of all the mountains around here. Thai authorities are not a problem close to the camp, but if we go farther than five villages away it becomes a problem. We avoid the official camp gates.³⁰⁵

Another refugee likewise reported:

People can't go far, but we can do local farm labor. The Thai authorities are flexible, as long as everyone doesn't try to do it. Stay in small groups. Also, NGOs provide some farmable land

300. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

301. *Id.*

302. *Id.*

303. *Id.*

304. Interview with refugee camp committee member, in Thailand (May 2015) [Interview record on file with Leitner Center].

305. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

just outside the camp . . . [But] one day roundtrip—farther is not allowed.³⁰⁶

In some cases, it works differently, even with different Thai authorities within the same camp. As one refugee said:

Sometimes we just go through the checkpoint, no questions asked. Or, if there are questions, we just tell them the truth—that we’re going out to work on a farm. NGOs have explained to the guards and set up a relationship with them so that they understand the project.³⁰⁷

Another NGO worker explained:

Although the rule is that they are not allowed to work outside the camp, there is an understanding that they work in Mae Sot. There is usually some negotiation process with the Thai authorities or the camp commander—for example, for humanitarian reasons.³⁰⁸

In other cases, refugees might be arrested, but will be released shortly thereafter without further penalty. For example, a refugee from another remote camp explained:

Our camp is far from the towns and because most people around here are Karen Thai, we rarely have any issues. Refugees however might get arrested in Mae Sariang. There is an understanding between Thai authorities and refugees, but if arrested they are locked up in detention centers for a few days and then released to the camps.³⁰⁹

C. Penalties for Being Caught Leaving the Camps

However, these unofficial understandings are the exception rather than the rule. Many refugees noted that camp residents who wish to leave the camps for work or other purposes are forced to use points of entry and egress that are not monitored by camp authorities. For example, one resident reported, “I know of three [roads that go in and out of the camps], but there could be more. Local authorities are aware of some of these back roads. They just don’t do anything to

306. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

307. *Id.*

308. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

309. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

monitor them.”³¹⁰ Another told us, “If people go to look for work, they use the short cut in and out of the camp.”³¹¹ Using these “secret” shortcuts comes with risks. As one refugee described, “[S]ometimes the Thai authorities will conduct spot checks. Military, MOI, police, and immigration authorities make surprise stops at shortcut entrances and arrest refugees.”³¹² Refugees are aware that there can be serious consequences for sneaking out of the camps. One interviewee explained:

If a refugee gets caught outside the camp, sometimes they are simply forced to pay a bribe at the checkpoint of 50-200 baht, and if they can’t pay, they are then arrested or detained. Refugees know this and won’t leave if they don’t have the money to pay the bribes.³¹³

One refugee added, “If you come out of the camp, you become illegal. You can be arrested at any time. Once, the police came to the camp rear entrance and just made arrests”³¹⁴

UNHCR has also confirmed that there have been arrests for people trying to go out to work.³¹⁵ One refugee interviewee described a typical encounter:

I went out of the camp, and the police didn’t see me on my way out. I was going to the city center. I walked for three to four days. Then I got sick and I wanted to go back. But the police set up a checkpoint, and I was arrested on the way back to the camp. I didn’t have my ID. I was detained for one day. I paid some money (3,500 baht), and then I was released.³¹⁶

Another interviewee reported that, if detained, refugees would be required to pay a fine of 1,000 baht at a detention center or 2,500 baht at the immigration office.³¹⁷

When a refugee is arrested for being caught outside the camp perimeter, refugee committees oftentimes try to work with Thai

310. *Id.*

311. *Id.*

312. *Id.* (“If you go by the main road, the police will catch you but you can go through the back secretly.”).

313. *Id.*

314. *Id.*

315. Interview with UNHCR officer, in Thailand (May 2015) [Interview record on file with Leitner Center].

316. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

317. *Id.*

authorities to secure the release and return of the refugee to the camp. As one Committee Secretary described:

KNRC works with the Thai authorities. If [the camp resident] was only going to the village, it's usually okay—here there is an understanding with the Thai authorities. But if the refugee is going beyond Nai Soi, then it is unsure what will happen. Also, sometimes the Thai authorities pick up refugees, drive beyond the boundaries, and then arrest them there. The fine is between 2,000 and 4,000 baht, and they can spend up to thirty days in jail.³¹⁸

Once fines are paid and the refugee is released from jail, he/she can typically return to the camp.³¹⁹ However, the refugee may also be deported; this happened more frequently before camp refugee committees began negotiating with Thai authorities to let jailed refugees return to the camp.³²⁰ Often, if refugees are deported, they take advantage of the next opportunity to sneak back to the camps across the border. As one interviewee described:

One time I got sent back to Burma, but I just came back. I swam across the river. It's easy [to swim], but there are police there. I was put in jail for two days. The jail was difficult. It was like living in a toilet because it was so small.³²¹

D. Local Thai Attitudes

While Thai authorities may restrict movement in part to address Thai political concerns regarding protection of the domestic labor market, in reality, reactions of local Thai populations to Burmese refugees may be more nuanced. In general, popular attitudes in Thailand about refugees can be negative, often fueled by political rhetoric and media reports that can disproportionately highlight crimes linked to individuals from urban refugee communities, but Thai communities living in more rural areas near refugee camps may not react to refugees in the same way, and may sometimes even find

318. Interview with refugee committee member, in Thailand (May 2015) [Interview record on file with Leitner Center].

319. *Id.*

320. *Id.*

321. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

value in an alternative labor market.³²² For example, as one community member noted:

During the rainy season, the farmers start to plant. The refugees come out from the camps and help Thai farmers and earn daily wages. During the harvest season, it is the same. The refugees don't have money for their families, so they go out to look for work. Thais pay less [labor costs] for refugees than for other [local] Thai [workers], so the farmers want to [employ] more refugees.³²³

When asked whether Thai people in the communities around the camps are receptive or welcoming to refugees, we were told that “they don't really like them, but they also want them as workers.”³²⁴

But some refugees have reported that they do not feel welcome in the local community and that sometimes interactions with the Thai community can have negative consequences. One camp resident explained that, “Thai villagers complain that refugees are stealing and causing trouble” and “refugees get targeted by the locals.”³²⁵ An NGO worker further commented:

[The crackdown on movement and the work] is about a need for control on the part of the Thai government. It's also a cultural and political play. Thai society views migrants and refugees as a threat to jobs and are thus not welcoming to the refugees.³²⁶

Refugees attempt to leave the camp because they are unable to secure enough resources within the camp, especially as donor funded rations and supplies decrease. As one refugee described, “In the camp, supplies and schooling comes from [NGOs]. [Refugees] are dependent on [these NGO services]. There is not enough in the camps, so some people leave the camps to find jobs.”³²⁷

An NGO worker also explained how this situation has become untenable:

322. *See supra* Section II.a.2, *Treatment of Refugee Status in Thailand*

323. Interview with Thai citizen living nearby refugee camp, in Thailand (May 2015) [Interview record on file with Leitner Center].

324. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

325. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

326. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

327. Interview with refugee, in Thailand (May 2015) [Interview record on file with Leitner Center].

Since the coup, movement in and out of the camps has been restricted. This has impacted the economy inside the camps, especially because refugees now need to supplement their daily income, food and resources outside. Previously, each family got ten to twelve kilos of rice per month, but it has now been reduced to eight kilos per month. Refugees are now unable to access the economy outside the camps. After the coup, the dependency on rations increased at a time when the rations [were] decreasing the most. An informal economy was necessary after the reduction in rations. When the coup happened, they really had to depend on the rations more, just as they were being cut.³²⁸

Restrictions on movement and the right to work can be especially difficult for younger camp residents. A service provider reported, “The younger generation ...are [feeling] hopeless because they are stuck in camps and cannot work. They can see through technology that the world has more to offer than what they have.”³²⁹

But for both young and old, restrictions on movement have essentially turned these camps into *de facto* detention centers. As one NGO framed it, it’s as simple as: “[c]amp residents used to also be able to walk outside; now, they cannot.”³³⁰

III. APPLICATION OF RELEVANT INTERNATIONAL HUMAN RIGHTS LEGAL PROTECTIONS TO BURMESE REFUGEES LIVING IN THAILAND

While Thailand is not a party³³¹ to the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”)³³² and its 1967

328. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

329. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center]. (When asked what are some of the challenges that refugees are facing right now, interviewee replied, “Dealing with restrictions on our movement, the young people in the camps don’t know what to do with their education. They also don’t understand the importance of education.”).

330. Interview with NGO staff person, in Thailand (May 2015) [Interview record on file with Leitner Center].

331. See *Ratification of 18 International Human Rights Treaties*, UNOHCHR, <http://indicators.ohchr.org> (last visited Sep. 21, 2015).

332. Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S 137. [hereinafter *Refugee Convention*]

Optional Protocol,³³³ the rights of refugees living in Thailand are still protected by the many international human rights treaties to which Thailand is a State party.³³⁴ Critically, these treaties protect the rights of everyone living in the jurisdiction, not just the citizens of the State party. For refugees living in Thailand, these rights include the right to food, housing, health care, and education; freedom of movement; the right to work; and protection from refoulement.

a. Right to an Adequate Standard of Living (Food & Shelter), Health Care, & Education

1. Characterization of Rights to Adequate Standard of Living (Food & Shelter), Health Care, & Education

The right to an adequate standard of living (including food and shelter), health care, education, and other socio-economic rights are chiefly protected in the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), to which Thailand is a State party.³³⁵ These rights are also protected in a similar manner in three other derivative core human rights conventions to which Thailand is a State party: the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”),³³⁶ the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”),³³⁷ and the Convention on the Rights of the Child (“CRC”).³³⁸ In particular, as applies to all refugees living within Thailand’s jurisdiction, ICESCR Articles 11, 12, and 13 protect the rights to an adequate standard of living, access to health care, and education, respectively.³³⁹

333. Optional Protocol to the Convention Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

334. *See infra* Part III.

335. International Covenant on Economic, Social and Cultural Rights, art. 11, 12, 13, and generally, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

336. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter CERD].

337. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination against Women, art. 10-14, 18 Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

338. *See, e.g.*, Convention on the Rights of the Child, art. 20-32, Sept. 2, 1990, 1577 U.N.T.S. 3 [hereinafter CRC].

339. ICESCR, *supra* note 335, art. 11, 12, & 13.

A. Food

ICESCR Article 11 mandates:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.³⁴⁰

The Committee on Economic, Social, and Cultural Rights (“CESCR”), the treaty body mechanism for the ICESCR, has affirmed:

[T]he right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights[; the right to adequate food] is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.³⁴¹

The Committee considers that the core content of the right to adequate food implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, and that the accessibility of such food is secured in ways that are sustainable and that do not interfere with the enjoyment of other human rights.³⁴² *Dietary needs* means that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs.³⁴³ At a minimum, “every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”³⁴⁴ Furthermore, *accessibility* encompasses both economic and physical accessibility: “Economic accessibility applies to any acquisition pattern or entitlement through

340. *Id.*, art. 11..

341. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, ¶ 4, Gen. Comment 12, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

342. *Id.* ¶ 8.

343. *Id.* ¶ 9.

344. *Id.* ¶ 14.

which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food.”³⁴⁵ The Committee also notes that socially vulnerable groups, specially disadvantaged groups, and particularly impoverished segments of the population may need attention through special programs.³⁴⁶

Per ICESCR Article 11, Thailand has an obligation under international law to protect and take appropriate steps to ensure the realization of the rights for everyone within its jurisdiction to an adequate standard of living.³⁴⁷ As a component of this obligation, Thailand must provide or allow access to food within the refugee camps in a quantity and quality sufficient to satisfy the dietary needs of camp residents.³⁴⁸ The diet of camp residents must as a whole contain a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs.³⁴⁹ At a minimum, Thailand must provide access to an amount and type of food which is sufficient, nutritionally adequate, and safe to ensure freedom from hunger—even if this means Thailand is required to implement special programs to accommodate these vulnerable refugee populations.³⁵⁰ In contrast to fulfilling these obligations, in 2015, refugees were receiving only ten kilograms of rice per month—amounting to no more than a standard per person allotment of 1505 kilocalories per day—which is 39.5 percent below the minimum international standard.³⁵¹ As rations continue to decline, Thailand is neither supplementing additional food supplies, nor actively working with donor countries to increase funding to meet basic nutrition standards.³⁵²

345. *Id.* ¶ 13.

346. *Id.*

347. ICESCR, *supra* note 335, art. 11.

348. *Id.* ¶ 8.

349. *Id.* ¶ 9.

350. *Id.* ¶ 14.

351. See TBC JANUARY–JUNE 2015 PROGRAMME REPORT, *supra* note 200, at 25.

352. See *supra* Section II.b.1.A, *Food*.

B. Shelter

In terms of shelter, the Committee has stated that “the human right to adequate housing, which is thus derived from the right to an adequate standard of living, is [also] of central importance for the enjoyment of all economic, social and cultural rights.”³⁵³

The Committee also notes:

The right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This “the inherent dignity of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: “Adequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.”³⁵⁴

The Committee has highlighted habitability, as well as availability of services, materials, facilities, and infrastructure as key concepts in the evaluation of housing’s adequacy.³⁵⁵ In one Comment, the Committee noted, “Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors.”³⁵⁶ The Committee has gone on to stipulate that “[t]he physical safety of occupants must be guaranteed as well,” especially considering “inadequate and deficient housing and living

353. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Housing*, ¶ 1, Gen. Comment 4, U.N. Doc. E/1992/23 (Dec. 13, 1991).

354. *Id.* ¶ 7.

355. *Id.* ¶ 8.

356. *Id.*

conditions are invariably associated with higher mortality and morbidity rates.³⁵⁷ Additionally, “an adequate house must contain certain facilities essential for health, security, comfort and nutrition.”³⁵⁸ Finally, the Committee has stated:

All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.³⁵⁹

Per ICESCR Article 11, Thailand must also provide camp residents with appropriate materials for shelter.³⁶⁰ Providing shelter means more than simply supplying a roof; rather, Thailand is obligated to ensure that camp residents are able to live somewhere in security, peace, and dignity.³⁶¹ Accommodations must be habitable—meaning refugees must be able to access appropriate services, materials, facilities, and infrastructure.³⁶² To be habitable, camp housing must provide adequate space and protection from cold, damp, heat, rain, wind, and other threats to health, structural hazards, and disease vectors.³⁶³ Refugees must also have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.³⁶⁴ In contrast, Thailand will not allow camp residents to build shelters with more durable materials such as corrugated steel, but will only permit use of impermanent materials such as bamboo and leaf thatching.³⁶⁵ As available materials decline, authorities will also not allow refugees access to areas outside of camp to collect natural resources for building and repairs, possibly rendering these shelters neither safe nor habitable.³⁶⁶

357. *Id.*

358. *Id.*

359. *Id.*

360. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Housing*, Gen. Comment 4, *supra* note 353, ¶ 1.

361. *Id.* ¶ 7.

362. *Id.* ¶ 8.

363. *Id.*

364. *Id.*

365. *See supra* Section II.b.1.B, *Shelter*.

366. *Id.*

C. Health Care

ICESCR Article 12 mandates:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for . . . [t]he provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; . . . [t]he prevention, treatment and control of epidemic, endemic, . . . and other diseases; [and t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness.³⁶⁷

The Committee notes that “[h]ealth is a fundamental human right indispensable for the exercise of other human rights [and that e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”³⁶⁸ “The entitlements [protected by the Covenant] include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health,”³⁶⁹ and “the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realization of the highest attainable standard of health.”³⁷⁰

The Committee has also stated that the “[f]unctioning public health and healthcare facilities, goods and services, as well as programs, have to be *available* in sufficient quantity within the State party, and they have to be physically *accessible*.”³⁷¹ In terms of accessibility, relevant “health facilities, goods, and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups.”³⁷² Furthermore:

[A]s well as being culturally acceptable, health facilities, goods, and services must also be scientifically and medically appropriate

367. ICESCR, *supra* note 335, art. 12.

368. Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, ¶ 1, Gen. Comment 14, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

369. *Id.* ¶ 8.

370. *Id.* ¶ 9.

371. *Id.* ¶ 12 (citing World Health Organization, *Model List of Essential Drugs* (Dec. 1999)).

372. *Id.*

and of good *quality*; this requires skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.³⁷³

Thus:

[t]he Committee mandates that the creation of conditions which would assure to all medical service and medical attention in the event of sickness, both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services, and health education; regular screening programs; appropriate treatment of prevalent diseases, illnesses, injuries, and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care.³⁷⁴

Specifically, the Committee points out that the associated “right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics, and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations.”³⁷⁵ In its comment, the Committee states:

In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy³⁷⁶

Per ICESCR Article 12, Thailand must protect and take appropriate steps to ensure the right of refugees living within its jurisdiction to access adequate health care services.³⁷⁷ This right includes enjoyment of a variety of facilities, goods, services, and conditions necessary for the realization of the highest attainable standard of health.³⁷⁸ Camp residents must have access to a sufficient number of functioning health care facilities and practitioners.³⁷⁹ Facilities must be within safe physical reach for all sections of the

373. *Id.*

374. *Id.* ¶ 17.

375. *Id.* ¶ 16.

376. *Id.* ¶ 34.

377. ICSECR, *supra* note 335, art. 12.

378. *Id.* ¶ 9.

379. *Id.* ¶ 12 (citing World Health Organization, *Model List of Essential Drugs* (Dec. 1999)).

refugee population—either appropriate facilities within the camps themselves, or unfettered access to facilities in close proximity to the camps.³⁸⁰ Health facilities, goods, and services for refugees must also be scientifically and medically appropriate and of good quality; this requires skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.³⁸¹ Refugees must also have equal and timely access to basic preventive, curative, rehabilitative health services, and health education; regular screening programs; appropriate treatment of prevalent diseases, illnesses, injuries, and disabilities; the provision of essential drugs; and appropriate mental health treatment and care.³⁸² In particular, Thailand is required to provide access to these services to refugees as part of its obligations to provide disaster relief and humanitarian assistance in emergency situations.³⁸³ Thailand is under the obligation to respect the right to health by refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services and by abstaining from enforcing discriminatory practices as a state policy.³⁸⁴ In contrast, as health services provided by NGOs continue to decline due to funding shortages, Thailand is not supplying additional services or allowing refugees to access public resources outside the camps unless a medical emergency exists; nor is Thailand actively working with donor countries to increase funding to meet basic health standards; build new facilities within camps; or ensure that existing services are available, accessible, and of an appropriate quality.³⁸⁵

D. Education

ICESCR Article 13 mandates:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human

380. *Id.*

381. *Id.*

382. *Id.* ¶ 17.

383. *Id.* ¶ 16.

384. *Id.* ¶ 34.

385. *See supra* Section II.b.1.C, *Health Care*.

rights and fundamental freedoms. . . . The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right [that p]rimary education shall be compulsory and available free to all [and s]econdary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.³⁸⁶

As the Committee describes:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.³⁸⁷

The Committee has explicitly stated that functioning educational institutions and programs have to be *available* in sufficient quantity and have to be *accessible* to everyone, without discrimination.³⁸⁸ In terms of physical accessibility, “education has to be within safe physical reach.”³⁸⁹ In terms of economic accessibility, education in general has to be affordable to all, and primary education specifically must be *free* for all.³⁹⁰ Finally, the form and substance of education, including curricula, and teaching methods, must also be of an acceptable *quality*.³⁹¹

386. ICESCR, *supra* note 335, art. 13.

387. Comm. on Econ., Soc. and Cultural Rts., *The Right to Education*, ¶ 1, Gen. Comment 13, U.N. Doc. E/C. 12/1999/10 (Dec. 8, 1999).

388. *Id.* ¶ 6.

389. *Id.*

390. *Id.*

391. *Id.*

Per ICESCR Article 13, Thailand must also protect and take appropriate steps to ensure the right of refugees living within its jurisdiction to access adequate education services.³⁹² Camp residents must have access to a sufficient number of functioning educational facilities and educators.³⁹³ Schools must be within safe physical reach for all sections of the refugee population—either appropriate facilities within the camps themselves, or unfettered access to facilities in close proximity to the camps.³⁹⁴ In terms of economic accessibility, education in general has to be affordable, and primary education specifically must be *free* for all refugee children.³⁹⁵ The form and substance of education in the camps, including curricula, and teaching methods, must also be of an acceptable quality.³⁹⁶ In contrast, as educational services provided by NGOs continue to decline due to funding shortages, refugee educational needs must be met with fewer schools and fewer and less qualified teachers.³⁹⁷ Families of students, including primary students, are now often required to pay school fees.³⁹⁸ Thailand is not supplying additional services or allowing refugees to access public schools outside the camps; nor is Thailand actively working with donor countries to increase funding to meet basic education standards; build new facilities within camps; or ensure that existing services are available, accessible and of an appropriate quality.³⁹⁹

2. ICESCR Framework Underpinning Rights to Adequate Standard of Living (Food & Shelter), Health Care, & Education

A. Respect, Protect, Fulfill

The right to an adequate standard of living—including food and shelter, as well as the rights to access to health care and education—impose three types or levels of obligations on State parties: the

392. ICESCR, *supra* note 335, art. 13.

393. *Id.* ¶ 6.

394. *Id.*

395. *Id.*

396. *Id.*

397. *See supra* Section II.b.1.D, *Education*.

398. *Id.*

399. *Id.*

obligations to *respect*, to *protect*, and to *fulfill*.⁴⁰⁰ In turn, the obligation to *fulfill* incorporates both an obligation to *facilitate* and an obligation to *provide*.⁴⁰¹ The obligation to *respect* existing access to adequate food [shelter, health care, and educational services] requires States parties not to take any measures that result in preventing such access.⁴⁰² The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access.⁴⁰³ The obligation to *fulfill (facilitate)* means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure the protection of these rights.⁴⁰⁴ As the Committee has stated, "[W]henever an individual or group is unable, for reasons beyond their control, to enjoy these rights to adequate food [shelter, health care, and education] by the means at their disposal, States have the obligation to *fulfill (provide)* that right directly."⁴⁰⁵ The Committee has also noted:

The obligation to *fulfill (facilitate)* requires States . . . to take positive measures that enable and assist individuals and communities to enjoy...[their] right[s].... States parties are also obliged to *fulfill (provide)* a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.⁴⁰⁶

The Committee particularly emphasizes, especially in relation to securing appropriate food resources, that "[t]his obligation also applies for persons who are victims of natural or other disasters."⁴⁰⁷ These obligations include providing nutritiously safe food and potable

400. See Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 15; Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶¶ 46-47; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶¶ 33-37.

401. See *supra* note 400.

402. See *id.*

403. See *id.*

404. See *id.*

405. See *id.*

406. See Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 37; see also Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 15; Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶¶ 46-47.

407. See *supra* note 406.

drinking water, ensuring basic sanitation and adequate housing and living conditions, providing “a sufficient number of hospitals, clinics and other health-related facilities,” and “actively developing a system of schools, including building classrooms, delivering suitable programming, providing teaching materials, training teachers, and paying teachers them domestically competitive salaries.”⁴⁰⁸

The right to an adequate standard of living—including food and shelter, as well as the rights to access to health care and education, impose these three types or levels of obligations on Thailand regarding refugees within its jurisdiction.⁴⁰⁹ In particular, Thailand’s obligation to *fulfill* incorporates both an obligation to *facilitate* and an obligation to *provide*.⁴¹⁰ The obligation to *facilitate* requires that Thailand proactively engage in activities intended to strengthen refugee access to and utilization of resources and means to ensure the protection of these fundamental rights.⁴¹¹ The obligation to provide requires that, whenever an individual or group is unable for reasons beyond their control to enjoy these rights by the means at their disposal, Thailand has the obligation to provide that right directly.⁴¹² Especially in relation to securing appropriate food resources, Thailand’s obligation extends to particularly vulnerable populations, including populations such as refugees who are victims of emergency disasters.⁴¹³ These obligations include providing nutritiously safe food and potable drinking water; ensuring basic sanitation and adequate housing and living conditions; providing a sufficient number of hospitals, clinics and other health-related facilities; and actively developing a system of schools, including building classrooms, delivering suitable programming, providing teaching materials, training teachers, and paying teachers them

408. See Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶ 50; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 36.

409. See Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 15; Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶¶ 46-47; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶¶ 33-37.

410. See *id.*

411. See *id.*

412. See *id.*

413. See *id.*

domestically competitive salaries.⁴¹⁴ Not only has Thailand not met its obligations under international human rights law to *fulfill* these rights. Perhaps even more egregiously, Thailand has also failed to *respect* and *protect* existing access to adequate food [shelter, health care, and educational services] by taking measures such as restricting egress from the camps and by denying refugees the right to work that directly result in preventing such access.⁴¹⁵

B. How Violations Occur: Commission or Omission

Violations of these rights can occur through acts of commission—the direct action of States or other entities insufficiently regulated by States—or by acts of omission—the failure of a State to take steps required by the Covenant.⁴¹⁶ Examples of violations include adoption of legislation or policies that are manifestly incompatible with pre-existing legal obligations relating to protected rights; the prevention of access to humanitarian aid—particularly food aid—in internal conflicts or other emergency situations; failure to take measures that address *de facto* discrimination; denial of access to particular resources or services necessary to secure the right for individuals or groups, whether the discrimination is based on legislation or is proactive; and the failure of a State to take into account its international legal obligations regarding protected rights when entering into agreements with other States or with international organizations.⁴¹⁷

Thailand is violating the rights of these refugees under international human rights law by both its inaction (acts of omission)

414. See Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶ 50; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 36.

415. See *supra* note 404.

416. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 19; Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶ 59; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶¶ 48-52.

417. See *supra* note 416. Other notable examples of violations include formal repeal or suspension of legislation necessary for the continued enjoyment of a right and failure to regulate activities of individuals or groups so as to prevent them from violating the protected rights of others.

and by direct actions (acts of commission).⁴¹⁸ First, as resources to the camps provided by outside funders decline, Thailand is not filling those resource gaps to meet its international obligations under the ICESCR.⁴¹⁹ Second, in addition to this inaction, Thailand is also directly enforcing policies such as restrictions on the freedom of movement and the right to work.⁴²⁰ These direct actions [strategically] prevent refugees from accessing necessary foodstuffs, supplies, and services necessary for securing their rights to food, shelter, health care, and education—violations which include adoption of legislation or policies that are manifestly incompatible with pre-existing legal obligations relating to protected rights; the prevention of access to humanitarian aid, particularly food aid, in internal conflicts or other emergency situations; and denial of access to particular resources or services necessary to secure these rights.⁴²¹

C. Minimum Core & No Retrogressive Measures or Discrimination

In General Comment 3, the Committee confirms that States Parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee's view:

[T]hese core obligations include at least the following obligations:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;

418. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 19; Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶ 59; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶¶ 48-52.

419. *See supra* Section II.B.1, *Access to Necessary Resources & Services*

420. *See supra* Section II.B.2, *Ability to Move Freely & Work*.

421. *See supra* note 416.

- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services.⁴²²

The Committee also states that, “[s]hould a State party argue that resource constraints make it impossible to provide access to food, shelter, health care, or educational services for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.”⁴²³ The Committee also adds:

This follows from article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources. . . . A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary [resource].⁴²⁴

The Committee also confirms that “[a] State party cannot, under any circumstances whatsoever, justify its non-compliance with [these] core obligations, which are non-derogable.”⁴²⁵ Most especially, even under severe resource constraints, the right to adequate food must be fulfilled.⁴²⁶ As the Committee mandates:

Even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is

422. Comm. on Econ., Soc., and Cultural Rts., *The Nature of States Parties’ Obligations*, ¶ 10, Gen. Comment 3, E/1991/23 (Dec. 14, 1990); Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 43 (citing International Conference on Population and Development, *Report*, U.N. Doc. A/CONF.171/13/Rev.1, Ch. I, Resol. 1 (Sept. 5-13, 1994)) (“Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development, the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12.”).

423. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 17.

424. *Id.*

425. Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 47.

426. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 28.

especially fulfilled for vulnerable population groups and individuals.⁴²⁷

Furthermore, “as with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to [food, shelter, health, and education] are not permissible.”⁴²⁸ As the Committee states:

If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.⁴²⁹

Finally, per the prohibition contained in ICESCR Article 2, any discrimination in access to food, shelter, health care, and educational services—as well as to means and entitlements for its procurement—on the grounds of race, color, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social, and cultural rights, constitutes a violation of the Covenant.⁴³⁰ While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on State parties various obligations that are of immediate effect. The Committee specifically points out that, even in times of severe resource constraints, the vulnerable members of society must be protected.⁴³¹ State parties have *immediate* obligations in relation to the protection of these rights, such as the “guarantee” that the right “will be exercised without discrimination of any kind.”⁴³² The

427. *Id.*

428. Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 32 (referencing General Comment 3, ¶ 9 and General Comment 13, ¶ 45).

429. *Id.*

430. See Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶¶ 6, 18; Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶¶ 43-45; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶¶ 12, 18-19.

431. Comm. on Econ., Soc., and Cultural Rts., *The Nature of States Parties' Obligations*, Gen. Comment 3, *supra* note 422, ¶ 12.

432. See Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 30.

prohibition against discrimination enshrined in Article 2(2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of the protection of the right and encompasses all internationally prohibited grounds of discrimination.⁴³³

CESCR has made clear that State parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant for everyone within its jurisdiction.⁴³⁴ In terms of Thailand's positive core obligations, at least the following rights for refugees and asylum seekers living within its borders must be protected:

- Access in the camps to the minimum essential food that is nutritionally adequate, safe, and ensures freedom from hunger
- Access in the camps to basic shelter, housing, sanitation, and an adequate supply of safe and potable water
- Access for refugees to adequate health facilities, goods, and services
- Access of refugees to appropriate educational facilities and educators—as well as free primary education⁴³⁵

Furthermore, Thailand cannot argue that resource constraints make it impossible to provide access to food, shelter, health care, or educational services for those who are unable by themselves to secure such access without first demonstrating that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.⁴³⁶ These core obligations are non-derogable—especially the right to adequate

433. Comm. on Econ., Soc., and Cultural Rights, *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶¶ 43-45.

434. Comm. on Econ., Soc., and Cultural Rts., *The Nature of States Parties' Obligations*, Gen. Comment 3, *supra* note 422, ¶ 10; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 43 (citing International Conference on Population and Development, *Report*, U.N. Doc. A/CONF.171/13/Rev.1, Ch. I, Resol. 1 (Sept. 5-13, 1994)) (“Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development, the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12.”).

435. *See supra* note 344.

436. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 17.

food.⁴³⁷ Furthermore, CESCR's interpretation of the Covenant includes a strong presumption that retrogressive measures taken in relation to these rights are not permissible.⁴³⁸ While Thailand never itself funded the supply of food, goods, and services within these camps, with the decline in resource provision, Thailand has deliberately begun to enforce policies that cement refugees' inability to secure appropriate resources to fulfill their rights. With the enactment of these deliberately retrogressive measures, Thailand has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of Thailand's maximum available resources.⁴³⁹ Finally, per the prohibition contained in ICESCR Article 2, any discrimination in access to food, shelter, health care, and educational services—as well as to means and entitlements for its procurement—on the grounds of race, color, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social, and cultural rights, constitutes a violation of the Covenant.⁴⁴⁰ Thailand is clearly discriminating against this population due to their refugee status. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on State parties various obligations that are of immediate effect, in particular the prohibition against discrimination and the protection of vulnerable populations.⁴⁴¹

437. Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 28 & 47.

438. Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 32 (referencing General Comment 3, ¶ 9 and General Comment 13, ¶ 45).

439. *Id.*

440. See Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶¶ 6, 18; Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶¶ 43-45; Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶¶ 12, 18-19.

441. Comm. on Econ., Soc., and Cultural Rts., *The Nature of States Parties' Obligations*, Gen. Comment 3, *supra* note 422, ¶ 12.

D. National Strategy & International Cooperation

A State should have a margin of discretion in designing its own strategy to assure the guarantee of these fundamental rights, but the Covenant clearly mandates that each State party “take whatever steps are necessary to ensure that these rights to food, shelter, health care, and education are protected.”⁴⁴² This requires *some* adoption of a national strategy, based on human rights principles, and “the formulation of policies and corresponding benchmarks—including the identification of the resources available to meet the objectives and the most cost-effective way of using them.”⁴⁴³ The Committee specifically notes that appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy which draws on all available relevant domestic expertise, sets out the responsibilities and time-frame for the implementation of the necessary measures, and addresses intersectionality with other rights protections.⁴⁴⁴

This does not mean that it is up to the host state alone to fund or resource refugees in its jurisdiction. However, State parties must make efforts to facilitate the provision of resources through collaboration with other donor States, NGOs and civil society; even though it is States that are the legal parties to the Covenant, and are thus ultimately accountable for compliance with its provisions within their own jurisdiction, all members of society—including individuals, families, local communities, non-governmental organizations, as well as the private business sector and other donor States—can beneficially contribute to the process of the realization of the rights to adequate food and shelter, health care, and education. So, as the Committee notes, States “should provide an environment that facilitates implementation of services by these civil society actors.”⁴⁴⁵

The Committee has also noted, in terms of the reciprocal obligation of *donor countries*, most of which do not bear the burden of hosting large numbers of the world’s refugees, that these “States parties should recognize the essential role of international cooperation

442. Comm. on Econ., Soc., and Cultural Rights, *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 21.

443. *Id.*

444. *Id.* ¶¶ 24-25; *see also* Comm. on Econ., Social and Cultural Rights, *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 53.

445. Comm. on Econ., Soc., and Cultural Rights, *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 20.

and comply with their commitment to take joint and separate action to achieve the full realization of the right[s] protected in the Covenant].”⁴⁴⁶ As a component of implementing this commitment, State parties should take steps to respect the enjoyment of these protected rights in other countries, to protect those rights, to facilitate access to food, and to provide the necessary aid when required. The Committee emphasizes that “it is particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfill their core and other obligations.”⁴⁴⁷

States also have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.⁴⁴⁸ Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food, and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.”⁴⁴⁹

In contrast, Thailand has not articulated any national strategy to secure these rights for the refugees living within its border, nor, as is required by the Covenant, has Thailand attempted to provide an environment that facilitates implementation of services by other State

446. *Id.* ¶ 36 (“In the spirit of Article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit.”); *see also* Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 53 (citing Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, “Health for All” Series, No. 1, WHO, Geneva, 1978); Comm. on Econ., Soc., and Cultural Rts., *The Right to Education*, Gen. Comment 13, *supra* note 387, ¶¶ 43-45 (“[T]he right to education 28 Articles 2 (1) and 23 of the Covenant, Article 56 of the Charter of the United Nations, Article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action all reinforce the obligation of States parties in relation to the provision of international assistance and cooperation for the full realization of the right to education.”).

447. Comm. on Econ., Soc., and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 45.

448. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 38.

449. Comm. on Econ., Soc. and Cultural Rts., *The Right to the Highest Attainable Standard of Health*, Gen. Comment 14, *supra* note 368, ¶ 40.

parties or by civil society actors.⁴⁵⁰ Although Thailand is ultimately accountable for the protection of ICESCR rights within its jurisdiction, it is important to note here to recognize that the burden of humanitarian assistance should lie not just with Thailand, but with all other ICESCR State parties as well. For Thailand to meet its obligations under international law regarding the provision of food, shelter, health care, and education for refugees, other State parties have an obligation and responsibility to provide support, funding, resources, and services.⁴⁵¹ However, it is also incumbent upon Thailand to solicit support from donor States and civil society to ensure protection of basic rights if Thailand is unable to do so using its own available resources. Ultimately, as a State party, the obligation of protecting ICESCR rights within the jurisdiction attaches, not to donor States, but to Thailand itself.

3. Application of Rights to Adequate Standard of Living (Food & Shelter), Health Care, & Education to Non-Nationals

ICESCR Article 2(1) states that all State parties must take steps, individually and through international assistance and co-operation, by all appropriate means and to the maximum of its available resources, to progressively realize the rights in the Covenant.⁴⁵² The second paragraph of Article 2 then stipulates that States parties must guarantee those rights will be exercised without discrimination of any kind as to a number of enumerated categories including race, language, religion, political or other opinion, national or social origin, or other status.⁴⁵³ However, the third paragraph of Article 3 does allow for one small carve out: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”⁴⁵⁴

Article 2, paragraph 3, only applies to the *economic* rights in the Covenant, and not to social and cultural rights. While there is some

450. Comm. on Econ., Soc., and Cultural Rts., *The Right to Adequate Food*, Gen. Comment 12, *supra* note 341, ¶ 20.

451. *See, e.g., id.*

452. ICESCR, *supra* note 335, art. 2, ¶1.

453. *Id.* at art. 2, ¶2.

454. *Id.* at art. 2, ¶3.

question as to what actually differentiates a given right in the Covenant as exclusively economic, social, or cultural, it appears from the *travaux préparatoires* at the time of drafting paragraph 3, that economic rights refers to specifically employment-related rights.⁴⁵⁵ In fact, according to some scholars, the scope is even more limited, given the actual origins and meaning of Article 2, paragraph 3. According to the *Limburg Principles on the Implementation of the ICESCR*,⁴⁵⁶ “[a]s a general rule the Covenant applies equally to nationals and non-nationals,” and the original purpose of article 2(3) was actually only “to end the domination of certain economic groups of non-nationals during colonial times.”⁴⁵⁷

Another set of independent scholars, expounding on this, state:

Paragraph 3 was not included in the original text of Article 2 which was proposed by the Commission on Human Rights. Amendments to introduce the provision were first suggested by Indonesia and Burma. The purpose of doing so, according to the *travaux préparatoires*, was to allow former colonies which had recently gained independence, and whose economies were consequently dominated by the influence of non-nationals, to protect the position of their nationals. The intentions of those proposing the introduction of Article 2(3) is clear from their response to concerns that the provision would ‘give rise to all kinds of discrimination alien to the intentions of the sponsors’....

455. See Ben Saul, David Kinley, & Jacqueline Mowbray, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS*, pp. 214-215, (May 2014) (citing UNGA, Third Committee, A/5365 (17 December 1962), 21 & UNGA, Third Committee, A/5365 (17 December 1962), 20–21 (“The distinction between economic, social and cultural rights is not entirely clear. As the Committee has noted in relation to the right to education, for example: The right to education...has been variously classified as an economic right, a social right and a cultural right [citing CESCR, General Comment No. 11, Plans of action for primary education (Art. 14), E/C.12/1994/4 (10 May 1999)]. It is clear from the *travaux préparatoires*, however, that Article 2(3) was primarily intended to cover rights to participate in economic activity. This would include, in particular, rights to work under Articles 6 and 7 of the Covenant....”).

456. A group of experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg, and the Urban Morgan Institute for Human Rights met in Maastricht in 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights. The participants unanimously agreed on what have become known as the Limburg Principles, a reflection of the present state of international law. At a meeting on the tenth anniversary of the Limburg Principles, a similar group of experts agreed on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

457. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶¶42-44, UN doc. E/CN.4/1987/17, Annex; and Human Rights Quarterly, Vol. 9 (1987), pp. 122–135.

Far from opening the door to discrimination, the amendments were designed to restore the proper balance by enabling nationals to exercise their rights. In the developed countries which had not been subjected to colonial domination, on the other hand, immigration had always been controlled by the Government and non-nationals did not, as a rule, offer serious competition to the economic activities of nationals.⁴⁵⁸

A strong argument can be made, given this origin, that the exception in article 2(3) should be interpreted very narrowly.⁴⁵⁹

In its own interpretation of the intersection of these paragraphs within ICESCR Article 2, the ICESCR Committee specifically stated in its General Comment 20, “The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, [and] migrant workers...., regardless of legal status and documentation.”⁴⁶⁰ Within this statement, the Committee includes two footnotes. The first footnote concedes that the statement is “without prejudice to the application of art. 2, para. 3, of the Covenant.”⁴⁶¹ The second footnote points, for further clarification, to the Committee on the Elimination of All Forms of Racial Discrimination’s General Recommendation 30 on discrimination against non-citizens.⁴⁶² In CERD, another treaty to which Thailand is a State party, Article 5 protects against racial discrimination related to a number of rights including housing, health care, and education.⁴⁶³ CERD Article 1 stipulates that “the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic,

458. See BEN SAUL, DAVID KINLEY, & JACQUELINE MOWBRAY, *supra* note 455.

459. See, *supra* note 455.

460. Comm. on Econ., Soc. and Cultural Rts., *Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶30 1, Gen. Comment 20, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

461. *Id.* at footnote 22.

462. *Id.* at footnote 23.

463. CERD, *see supra* note 336, at art. 5.

social, cultural or any other field of public life.”⁴⁶⁴ The second paragraph of CERD Article 2 then clarifies, “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”⁴⁶⁵ However, the CERD Committee, in its General Recommendation 30 to which the ICESCR Committee points, notes that “although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons.”⁴⁶⁶ The CERD Committee further clarifies that “States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.”⁴⁶⁷ The CERD Committee then notes that State parties should “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.”⁴⁶⁸ Specifically, the Committee guides States to ensure that the right to housing is enjoyed equally by citizens and non-citizens; that non-citizens have access to an adequate standard of physical and mental health; that public educational institutions are open to non-citizens and children of undocumented immigrants; and that housing, health services, and schooling in general are not segregated.⁴⁶⁹ Similar provisions also exist in CEDAW and CRC—also treaties to which Thailand is a State party, protecting individuals from nationality-based discrimination related to fundamental economic, social, and cultural rights.⁴⁷⁰

The Special Rapporteur on the human right to safe drinking water and sanitation, in her report on Thailand, also found that, at a minimum, the nationality status cannot be used as a pretext to deny basic rights to refugees living in Thailand. In her report, she stated:

The marginalized people that the Special Rapporteur met during her mission represent a significant number of people living in Thailand. Every individual, regardless of national origin, race,

464. *Id.* at art. 1(1).

465. *Id.*, at art. 1(2).

466. Comm. on the Elimination of Racial Discrimination, *General recommendation XXX on discrimination against non-citizens*, ¶3, Gen. Recommendation 30, (Oct. 1, 2002).

467. *Id.*

468. *Id.* at ¶¶29-30.

469. *Id.* at ¶¶30-32 & 36.

470. See CEDAW, *supra* note 337; See also CRC, *supra* note 338.

language and status, is equally entitled to the human rights to water and sanitation. The Committee on the Economic, Social and Cultural Rights noted that: 'The ground of nationality should not bar access to Covenant rights... The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.' People's status cannot be used as a pretext to deny them access to water and sanitation.

In particular, as discussed in Sections III.a.2.A-D, especially vulnerable populations such as refugees and those fleeing disasters are due protections and must be assured access to the means and resources necessary to secure their fundamental rights.

In sum, the carve out in ICESCR Article 2, paragraph 3, should be treated as a very narrow construction. At most, it should be read to affect exclusively employment related economic rights—and even these limitations should be subject to further narrowing, an issue to be discussed in greater detail in the *Right to Work* section below. Thus, the rights to food, shelter, health care, and education would remain outside the carve out of paragraph 3. Furthermore, in addition to the protections provided under ICESCR, several other core human rights treaties to which Thailand is a State party also protect these rights and do not allow discrimination in these areas based on nationality.⁴⁷¹ Various Committees have pointed out that vulnerable refugees are due protections to ensure their rights are secured. Given these various treaty obligations, Thailand is required to protect the rights to food, shelter, health care, and education equally for non-nationals residing in their jurisdiction.

b. Freedom of Movement

1. Characterization of Right to Freedom of Movement

Just as many socio-economic rights are protected through ICESCR, other civil and political rights are protected through another key convention to which Thailand is a State party: the International

471. *Id.*

Covenant on Civil and Political Rights (“ICCPR”).⁴⁷² Specifically, freedom of movement is protected under ICCPR Article 12, which mandates:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. . . . [This right] shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant⁴⁷³

The ICCPR’s Human Rights Committee, in its General Comment 27 addressing freedom of movement, notes that “[l]iberty of movement is an indispensable condition for the free development of a person.”⁴⁷⁴ Freedom of movement guarantees that a person is able to move throughout the jurisdiction. Allowing movement, but only within a designated area, or allowing movement into other areas, but only with government permission, does not meet the necessary threshold for the protection of this right.⁴⁷⁵ This freedom pertains not just to temporary movement, but also to the choice of one’s residence.⁴⁷⁶ For example, without a reason for allowable derogation, forcibly restricting areas of settlement would constitute a violation.⁴⁷⁷

472. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

473. *Id.*, at art. 12.

474. Hum. Rts. Comm., *Freedom of Movement*, ¶1, Gen. Comment 27, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999) (citing Hum. Rts. Instruments, ¶ 8, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.3, 15 August 1997, 20).

475. *Id.* ¶ 5 (“The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another, and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.”).

476. ICCPR, *supra* note 472, art. 12

477. *See, e.g.*, Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 7 (citing Communication No. 138/1983, *Mpandajila v. Zaire*, ¶ 10; Communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, ¶ 10; Communication Nos. 241 and 242/1987, *Birhashwirwa/Tshisekedi v. Zaire*, ¶ 13) (“Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one’s choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory. Lawful detention, however, affects more specifically the right to personal liberty and is covered by article 9 of the Covenant. In some circumstances, articles

As protected under Article 12 of the ICCPR, Thailand is required to protect the right of everyone lawfully within its jurisdiction to liberty of movement and freedom to choose one's residence.⁴⁷⁸ Any restriction by Thailand of this fundamental right must be explicitly provided for in law and must be necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others.⁴⁷⁹

Only allowing refugee movement within a designated area, or allowing movement into other areas only with government permission, does not meet the necessary threshold for the protection of this right.⁴⁸⁰ This freedom also pertains not just to temporary movement, but also to the choice of one's residence.⁴⁸¹ Forcibly restricting areas of settlement also constitutes a violation.⁴⁸² Thailand is violating these refugees' rights to freedom of movement by forcing

12 and 9 may come into play together."); *id.* ¶ 17 ("A major source of concern are the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications.").

478. ICCPR, *supra* note 472, art. 12.

479. *Id.*

480. *Id.* ¶ 5 ("The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another, and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.").

481. ICCPR, *supra* note 472, art. 12

482. *Citing, e.g., Hum. Rts. Comm., Freedom of Movement, Gen. Comment 27, supra* note 474, ¶ 7 (Communication No. 138/1983, *Mpandajila v. Zaire*, ¶ 10; Communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, ¶ 10; Communication Nos. 241 and 242/1987, *Birhashwirwa/Tshisekedi v. Zaire*, ¶ 13) ("Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory. Lawful detention, however, affects more specifically the right to personal liberty and is covered by article 9 of the Covenant. In some circumstances, articles 12 and 9 may come into play together."); *id.* ¶ 17 ("A major source of concern are the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications.").

them to reside within closed camps and not allowing free entry and egress from camp boundaries.

2. ICCPR Framework Underpinning Right to Freedom of Movement

There are some limited allowable derogations from the protection of freedom of movement.⁴⁸³ First, any derogation must be detailed in writing in domestic law—and the law must also clearly outline the conditions under which the right may be limited.⁴⁸⁴ Second, the right can only be derogated for one of the specific, enumerated, and exhaustive reasons: national security; public order; public health or morals; or to protect the rights and freedoms of others.⁴⁸⁵

Finally, the permissible limitations that may be imposed on the rights protected under Article 12 must be narrowly tailored—meaning they “must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in Article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.”⁴⁸⁶ In other words, as the Committee notes:

In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. The Committee states, “[Finally, t]he principle of proportionality has to be respected not

483. Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 3.

484. *Id.* ¶¶ 3, 12.

485. ICCPR, *supra* note 472, art. 12.

486. Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 2.

only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.⁴⁸⁷ In general, the application of any permissible restrictions must also be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination; thus, it would be a clear violation of the Covenant if the rights enshrined under Article 12 were restricted by making distinctions of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.⁴⁸⁸

Even when derogations could be justified under certain circumstances, the Committee requires the parameters of these derogations to be outlined in national reports to the Human Rights Committee during the ICCPR periodic review process.⁴⁸⁹ The Committee stipulates:

States parties should provide the Committee in their reports with the relevant domestic legal rules and administrative and judicial practices relating to the rights protected by this article, taking into account the issues discussed in this General Comment. They must also include information on remedies available if these rights are restricted.⁴⁹⁰

In terms of limited allowable derogations, these are only permissible in extremely limited circumstances.⁴⁹¹ First, any derogation must be detailed in writing in domestic law—and the law must also clearly outline the conditions under which the right may be limited.⁴⁹² No legislation in Thailand exists that limits the residence and movements of refugees or asylum seekers. Thai authorities have claimed that a policy has always existed that limits the movement of refugees in the nine camps; however, no such written policy is available either to the public or to refugees.⁴⁹³

Second, the right can only be derogated for one of the specific, enumerated, and exhaustive reasons: national security; public order; public health or morals; or to protect the rights and freedoms of

487. *Id.* ¶¶ 13-15.

488. *Id.* ¶ 18.

489. *Id.* ¶ 3.

490. *Id.*

491. Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 3.

492. *Id.* ¶¶ 3, 12.

493. *See supra*, note 285.

others.⁴⁹⁴ Thailand has offered no such rationale for restricting the freedom of movement of refugees. While it is unclear how any of these reasons could be applicable in this case, even if Thailand was to try and offer one as justification for camp closures, the Committee would also require that the limitation imposed on the right to freedom of movement be necessary and narrowly tailored.⁴⁹⁵ The Committee explains that any law authorizing the application of restrictions must use precise criteria and may not confer unfettered discretion on those charged with their execution.⁴⁹⁶ Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.⁴⁹⁷ Thailand has no written law, let alone a law that details any reasoning (necessary or otherwise) for a restriction of movement; a process to evaluate and limit which refugees should be included in the restriction; or a process by which the effects of this restriction could be best curtailed. Finally, it is clear that these restrictions as they stand are based solely on the affected individuals' national or social origin, race, or political or other opinion—discriminatory restrictions all obvious violations of Article 12.⁴⁹⁸

3. Application of Right to Freedom of Movement to Non-Nationals

Each State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction.”⁴⁹⁹ In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.⁵⁰⁰ Subsequently, freedom of movement is a right guaranteed by the Convention to both nationals and non-nationals who are legally within the territory of the State. As the Committee says, “Everyone lawfully within the territory of a State enjoys, within

494. ICCPR, *supra* note 472, art. 12.

495. Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 2.

496. *Id.*

497. *Id.*

498. *Id.* ¶ 18.

499. ICCPR, *supra* note 472, art. 2(1).

500. Hum. Rts. Comm., *The Position of Aliens Under the Covenant*, ¶ 1, Gen. Comment 15, U.N. Doc. HRI/Gen/1/Rev.9 (April 11, 1986).

that territory, the right to move freely and to choose his or her place of residence.”⁵⁰¹

The legality of a non-national’s presence is determined by the State’s domestic law.⁵⁰² While a State can subject entry of non-nationals to certain restrictions, these restrictions must be in compliance with the State’s treaty and other obligations under customary international law.⁵⁰³ Furthermore, even a non-national who enters the State illegally, but whose status is then subsequently regularized by the State, would be deemed under the ICCPR to be lawfully within the jurisdiction.⁵⁰⁴ As the Committee notes:

Once a person is lawfully within a State, any restrictions on his or her rights . . . , as well as any treatment different from that accorded to nationals, have to be justified under the rules [i.e., allowable derogations] provided for by article 12, paragraph 3.⁵⁰⁵

The general rule is that all rights in the ICCPR must be guaranteed without discrimination between citizens and aliens.⁵⁰⁶ This pertains to both legislation and implementation and practice.⁵⁰⁷ While the ICCPR does not recognize the right of someone who is a non-national to move to or enter that State, and/or initial consent for entry in some cases may be given subject to conditions relating, for example, to employment, once that alien has entered the State, the ICCPR

501. Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 4 (citing Communication No. 456/1991, *Celepli vs. Sweden*, ¶ 9.2; citing also General Comment No. 15, ¶ 8, in HRI/GEN/1/Rev. 3, 15 August 1997, 20).

502. *Id.*

503. *Id.* at ¶4 & 11-18,

504. *Id.* at ¶4

505. Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 4 (citing Communication No. 456/1991, *Celepli vs. Sweden*, ¶ 9.2; citing also General Comment No. 15, ¶ 8, in HRI/GEN/1/Rev. 3, 15 August 1997, 20). In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is “lawfully” within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of Article 12. Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by Article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by Article 12, paragraph 3. It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard, and how they justify this difference in treatment.

506. Hum. Rts. Comm., *The Position of Aliens Under the Covenant*, Gen. Comment 15, *supra* note 500, ¶ 2.

507. *Id.* ¶ 4.

guarantees that they are entitled to all of the rights in the convention.⁵⁰⁸ The Committee has noted, for example, that aliens have an inherent right to life, protected by law, and may not be arbitrarily deprived of life; they must not be subjected to torture or to cruel, inhuman, or degrading treatment or punishment, nor may they be held in slavery or servitude; they have the full right to liberty and security of the person; if lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person; they may not be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence; they have the right to freedom of thought, conscience, and religion, and the right to hold opinions and to express them; they receive the benefit of the right of peaceful assembly and of freedom of association; they are entitled to equal protection by the law; and, of course, they have the right to liberty of movement and free choice of residence.⁵⁰⁹ There can be no discrimination between aliens and citizens in the application of these rights, and these rights may be qualified only by such limitations as may be lawfully imposed under the Covenant.⁵¹⁰

Freedom of movement is a right guaranteed by the Convention to both nationals and non-nationals who are legally within the territory of the State.⁵¹¹ As the Committee has stated, even a non-national who enters the State illegally, but whose status is then subsequently regularized by the State, would be deemed under the ICCPR to be lawfully within the jurisdiction.⁵¹² Camp residents are asylum seekers seeking refugee status—and thus are legally within Thailand's jurisdiction. Thailand cannot deny the legality of their presence simply by discontinuing refugee status determination processes.

508. *Id.* ¶¶ 5-6.

509. *Id.* ¶ 7.

510. *Id.*

511. Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 4 (citing Communication No. 456/1991, *Celepli vs. Sweden*, ¶ 9.2; citing also General Comment No. 15, ¶ 8, in HRI/GEN/1/Rev. 3, 15 August 1997, 20).

512. *See id.* at ¶ 4.

c. Right to Work

1. Characterization of Right to Work

Like the rights to food, shelter, health care, and education, the right to work is also protected through the ICESCR—specifically under ICESCR Article 6, which mandates:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right⁵¹³

As the ICESCR Committee states in General Comment 27:

The right to work is a fundamental right, recognized in several international legal instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR), as laid down in article 6, deals more comprehensively than any other instrument with this right. The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.⁵¹⁴

513. ICESCR, *supra* note 335, art. 6.

514. Comm. on Econ., Soc., and Cultural Rts., *The Right to Work*, ¶ 1, Gen. Comment 18, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006) (citing also preamble to ILO Convention No. 168, 1988, “. . . the importance of work and productive employment in any society not only because of the resources which they create for the community, but also because of the income which they bring to workers, the social role which they confer and the feeling of self-esteem which workers derive from them”); *see also id.* ¶ 3 (“[A]t the universal level, the right to work is contained in article 8, paragraph 3 (a), of the International Covenant on Civil and Political Rights (ICCPR); in article 5, paragraph (e) (i), of the International Convention on the Elimination of All Forms of Racial Discrimination; in article 11, paragraph 1 (a), of the Convention on the Elimination of All Forms of Discrimination against Women; in article 32 of the Convention on the Rights of the Child; and in articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Several regional instruments recognize the right to work in its general dimension, including the European Social Charter of 1961 and the Revised European Social Charter of 1996 (Part II, art. 1), the African Charter on Human and Peoples’ Rights (art. 15) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 6), and affirm the principle that respect for the right to work imposes on States parties an obligation to take measures aimed at the realization of full employment. Similarly, the right to work has been proclaimed by the United Nations General Assembly in the Declaration on Social Progress and Development, in its resolution 2542 (XXIV) of 11 December 1969 (art. 6).”).

The right to work, as guaranteed in the ICESCR, affirms the obligation of State parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.⁵¹⁵ The Committee notes, “This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.”⁵¹⁶ The right to work includes the right of every human being to decide freely to accept or choose work.⁵¹⁷ This implies not only being forced to exercise or engage in employment, but also the right of access to a system of protection guaranteeing each worker access to employment.⁵¹⁸ It also implies the right not to be unfairly deprived of employment.⁵¹⁹

Thailand is also required to protect refugees’ right to work under Article 6 of the ICESCR. The right to work, as guaranteed in the ICESCR, affirms the obligation of State parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.⁵²⁰ The right to work includes the right of every human being to decide freely to accept or choose work.⁵²¹ This implies not only being forced to exercise or engage in employment, but also the right of access to a system of protection guaranteeing each worker access to employment.⁵²² It also implies the right not to be unfairly deprived of employment.⁵²³ By prohibiting refugees from leaving camp boundaries and not allowing them to secure gainful employment, Thailand violates this right to work.

515. Comm. on Econ., Soc., and Cultural Rts., *The Right to Work*, Gen. Comment 18, *supra* note 514, ¶ 4.

516. *Id.*

517. *Id.* ¶ 6.

518. *Id.*

519. *Id.*

520. Comm. on Econ., Soc., and Cultural Rts., *The Right to Work*, Gen. Comment 18, *supra* note 514, ¶ 4.

521. *Id.* ¶ 6.

522. *Id.*

523. *Id.*

2. ICESCR Framework Underpinning Right to Work

The right to work is supported by the same ICESCR framework described in Section II.a.2. Like all human rights, the right to work imposes three types or levels of obligations on State parties: the obligations to *respect*, *protect*, and *fulfill*.⁵²⁴ The obligation to *respect* the right to work requires States parties to refrain from interfering directly or indirectly with the enjoyment of that right.⁵²⁵ In particular, as the Committee states:

States parties are under the obligation to *respect* the right to work by . . . refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers⁵²⁶

Violations of this right can occur through acts of commission—the direct action of States or other entities insufficiently regulated by States—or by acts of omission—the failure of a State to take steps required by the Covenant.⁵²⁷ The Committee has cited several examples of these types of violations, including “the formal repeal or suspension of legislation necessary for continued enjoyment of the right to work; denial of access to work to particular individuals or groups, whether such discrimination is based on legislation or practice; and the adoption of legislation or policies which are manifestly incompatible with international obligations in relation to the right to work.”⁵²⁸

As with other ICESCR rights to food, shelter, health care, and education discussed earlier, State parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights covered by the Covenant.⁵²⁹ In the context of Article 6, this “core obligation” encompasses the obligation to ensure non-discrimination and equal protection of employment.⁵³⁰ States must ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting

524. *Id.* ¶ 22.

525. *Id.*

526. *Id.* ¶ 23.

527. *Id.* ¶ 32.

528. *Id.*

529. *Id.* ¶ 31.

530. *Id.*

them to live a life of dignity.⁵³¹ As the Committee notes, the exercise of work in all its forms and at all levels requires the existence of interdependent and essential elements, including accessibility—i.e., the labor market must be open to everyone under the jurisdiction of State parties.⁵³² As stated previously, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social, or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.⁵³³ The Committee notes:

The principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families. In this regard the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise.⁵³⁴

Per the terms of the Covenant, State parties must also ensure the progressive realization of the exercise of the right to work.⁵³⁵ The Committee points out that such retrogressive measures include “denial of access to employment to particular individuals or groups, whether such discrimination is based on legislation or practice, abrogation or suspension of the legislation necessary for the exercise of the right to work[,] or the adoption of laws or policies that are manifestly incompatible with international legal obligations relating to the right to work.”⁵³⁶ State parties must therefore adopt, as quickly as possible, measures aiming at achieving *full* employment.⁵³⁷ While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes

531. *Id.*

532. *Id.* ¶ 12 (“Only some of these topics feature in articles 2.2 and 3 of the Covenant. The others have been inferred from the practice of the Committee or from legislation or judicial practice in a growing number of States parties.”).

533. *Id.*

534. *Id.* ¶ 18.

535. *Id.* ¶ 19.

536. *Id.* ¶ 34.

537. *Id.* ¶ 19.

on State parties various obligations that are of immediate effect.⁵³⁸ As the Committee describes:

States parties have immediate obligations in relation to the right to work, such as the obligation to ‘guarantee’ that it will be exercised ‘without discrimination of any kind’ (art. 2, para. 2) and the obligation ‘to take steps’ (art. 2, para. 1) towards the full realization of article 6. Such steps must be deliberate, concrete and targeted towards the full realization of the right to work.⁵³⁹

Furthermore, as with all other rights protected in the Covenant, retrogressive measures should not be taken in relation to the right to work.⁵⁴⁰ If any deliberately retrogressive steps are taken, State parties have the burden of proving that they have been introduced after consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State parties’ maximum available resources.⁵⁴¹

Like other rights protected under ICESCR, the right to work imposes three types or levels of obligations on Thailand: the obligations to *respect*, *protect*, and *fulfill*.⁵⁴² These obligations require Thailand to refrain from interfering directly or indirectly with the enjoyment of the right to work.⁵⁴³ In particular, the Committee notes that State parties may not deny or limit equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups—groups such as refugees.⁵⁴⁴ Denial of access to work to particular individuals or groups, whether such discrimination is based on legislation or practice, is clearly a violation of this right.⁵⁴⁵

As with other ICESCR rights to food, shelter, health care, and education discussed earlier, Thailand has a core obligation to ensure

538. *Id.*

539. *Id.* ¶¶ 19-20 (“The fact that realization of the right to work is progressive and takes place over a period of time should not be interpreted as depriving States parties’ obligations of all meaningful content. It means that States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 6.”).

540. *Id.* ¶ 21.

541. *Id.*

542. *Id.* ¶ 22.

543. *Id.*

544. *Id.* ¶ 23.

545. *Id.*

the satisfaction of minimum essential levels to the right to work.⁵⁴⁶ In the context of Article 6, this “core obligation” encompasses the obligation to ensure non-discrimination and equal protection of employment.⁵⁴⁷ Per the terms of the Covenant, State parties must also ensure the progressive realization of the exercise of the right to work.⁵⁴⁸ The Committee points out that such retrogressive measures include “denial of access to employment to particular individuals or groups, whether such discrimination is based on legislation or practice, abrogation or suspension of the legislation necessary for the exercise of the right to work, or the adoption of laws or policies that are manifestly incompatible with international legal obligations relating to the right to work.”⁵⁴⁹ During some periods, Thailand has allowed refugees to leave the camps and secure gainful employment. Restricting this right now is a retrogressive measure tied to an impermissible distinction based on national or social origin, race, or political or other opinion.⁵⁵⁰ Even if this deliberately retrogressive step was not based on an impermissible distinction, Thailand would still have the burden of proving that these measure were introduced or enforced only after consideration of all other alternatives, and that the restrictions are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the Thailand’s maximum available resources—none of which Thailand has done.⁵⁵¹

3. Application of Right to Work to Non-Nationals

The 1951 Refugee Convention and its 1967 Optional Protocol directly and explicitly protects the rights of refugees to work.⁵⁵² Refugee Convention Article 17, paragraph 1, mandates that State

546. *Id.* ¶ 31.

547. *Id.*

548. *Id.* ¶ 19.

549. *Id.* ¶ 34.

550. *Id.* ¶¶ 19-20 (“The fact that realization of the right to work is progressive and takes place over a period of time should not be interpreted as depriving States parties’ obligations of all meaningful content. It means that States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 6.”).

551. *Id.*

552. *See* Refugee Convention, *supra* note 332, at art. 17.

parties “accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment,” and Article 17, paragraph 2 clarifies that, “[i]n any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who...has completed three years’ residence in the country.”⁵⁵³ Thailand is not a party to the Refugee Convention, and is therefore not bound by its provisions, but this language is still important because it is indicative of the international standard regarding the right to work for refugees. Even though to date Thailand has not joined the Refugee Convention, Thailand is still bound by the other core human rights treaties to which it *is* a State party, several of which address the right to work.⁵⁵⁴

As discussed previously in Section III.a.3, ICESCR Article 2(1) states that all State parties must take steps, individually and through international assistance and co-operation, by all appropriate means and to the maximum of its available resources, to progressively realize the rights in the Covenant.⁵⁵⁵ The second paragraph of Article 2 then stipulates that States parties must guarantee those rights will be exercised without discrimination of any kind as to a number of enumerated categories including race, language, religion, political or other opinion, national or social origin, or other status.⁵⁵⁶ However, as noted earlier, the third paragraph of Article 3 does allow for one small carve out: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”⁵⁵⁷

Again, from the *travaux préparatoires* at the time of drafting paragraph 3, it does seem that *economic rights* refers to the right to work, although according to some scholars, the scope might really only apply to states that are former colonies, recently having gained independence, and whose economies were consequently dominated by the influence of non-nationals—i.e., a provision designed to enable

553. *Id.*

554. ICESCR, *supra* note 335, art. 6; CERD, *see supra* note 336, at art. 5; and CEDAW, *see supra* note 337, at art. 11.

555. *See supra*, Section III.a.3.

556. ICESCR, *supra* note 335, at art. 2, ¶2.

557. *Id.* at art. 2, ¶3.

nationals to exercise their rights in limited circumstances where a national economy is dominated by non-nationals from the former colonial power.⁵⁵⁸ According to this perspective, this provision was never intended to apply generally to other developing countries that had not been subjected to colonial rule; the carve out would not be applicable in the context where immigration had always been controlled “by the Government[,] and non-nationals did not, as a rule, offer serious competition to the economic activities of nationals.”⁵⁵⁹

While the ICESCR Committee does not address this issue directly, nor clarify specifically to which rights in the Covenant Article 2, paragraph 3, applies, the Committee does refer to the requirement that State parties ensure that vulnerable population such as refugees are able to access resources and services to secure their fundamental rights, and they do make reference in General Comment 20 to this carve out as it applies to refugees. The Committee notes that in general the “Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, [and] migrant workers..., regardless of legal status and documentation,” and the Committee also comments that, specifically for some non-employment related rights, “[t]he ground of nationality should not bar access to Covenant rights,”⁵⁶⁰ Again, within this statement, the Committee includes two footnotes. The first footnote concedes that the statement is “without prejudice to the application of art. 2, para. 3, of the Covenant.”⁵⁶¹ The second footnote points, for further clarification, to the Committee on the Elimination of All Forms of Racial Discrimination’s General Recommendation 30 on discrimination against non-citizens.⁵⁶² In CERD, Article 5 protects against racial discrimination related to a number of rights including the right to work.⁵⁶³ As discussed in Section III.a.3, the CERD Committee, found that while Article 1, paragraph 2, stipulates that “[CERD] shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party...between citizens and non-citizens,”⁵⁶⁴ and even though “some of these rights, such as the right

558. See BEN SAUL, DAVID KINLEY, & JACQUELINE MOWBRAY, *supra* note 455.

559. *Id.*

560. See Comm. on Econ., Soc. and Cultural Rts., *Non-discrimination in economic, social, and cultural rights*, Gen. Comment 20. *supra* note 460.

561. *Id.* at n.22.

562. *Id.* at n.23.

563. CERD, *see supra* note 336, at art. 5.

564. *Id.*, at art. 1(2).

to participate in elections, to vote and to stand for election, may be confined to citizens,” it is still true that “human rights are, in principle, to be enjoyed by all persons.”⁵⁶⁵ The Committee further clarifies that “States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.”⁵⁶⁶ Specifically regarding the right to work, the CERD Committee, while recognizing that, while States parties may refuse to offer jobs to non-citizens without a work permit, those individuals are still entitled to labor and employment rights, including the freedom of assembly and association.⁵⁶⁷ The Committee then also mandates that State parties “[t]ake measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.”⁵⁶⁸ The Committee also recognizes that “in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention’s anti-discrimination principles.”⁵⁶⁹

In sum, the Refugee Convention standard would suggest that, at a minimum, refugees living in Thailand for more than three years should be entitled to work.⁵⁷⁰ Although Thailand, not having joined the Refugee Convention, is not bound by this requirement, the other human rights conventions to which Thailand is a State party would create some obligations for Thailand regarding the right to work.⁵⁷¹ In general, the rights protected in these conventions to which Thailand is a State party apply to everyone in Thailand, including refugees.⁵⁷² Thailand is also under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of employment-related rights to the extent recognized under international law.⁵⁷³ Regarding

565. Comm. on the Elimination of Racial Discrimination, *supra* note 466.

566. *Id.*

567. *See id.* at ¶ 35.

568. *Id.* at ¶ 33.

569. *Id.* at ¶ 15.

570. *See* Refugee Convention, *supra* note 332, at art. 17.

571. ICESCR, *supra* note 335, art. 6; CERD, *see supra* note 336, at art. 5; and CEDAW, *see supra* note 337, at art. 11.

572. *See* Comm. on Econ., Soc. and Cultural Rts., *supra* note 460.

573. Comm. on the Elimination of Racial Discrimination, *supra* note 466.

the right to work specifically, some limitations not applicable to citizens may be allowable in the short-term (e.g., initial work permits administered on a non-discriminatory basis).⁵⁷⁴ However, some of these refugees have been living in Thailand for many years—some for even thirty years or more.⁵⁷⁵ Thailand cannot continue to block paths to citizenship, and/or refuse to continue refugee status determinations, and then use non-citizenship or undetermined legal status as a justification for continued violations of the right to work.⁵⁷⁶

d. Coerced Returns & Principle of Non-Refoulement

The principle of non-refoulement is most clearly articulated in Article 33 of the Refugee Convention: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁵⁷⁷ While Thailand is not a State party to the Refugee Convention, this same non-refoulement language is echoed in several other treaties to which Thailand is a signatory, including the ICCPR, Convention Against Torture (“CAT”), and Convention on Enforced Disappearances (“CED”).⁵⁷⁸ Customary international law also binds states to the principle of non-refoulement, demanding that, just as is stated in the Refugee Convention, refugees not be returned to their country of origin if there is a concern that their life or liberty would be at risk.⁵⁷⁹ During Thailand’s 2011 UPR cycle, more than one State party addressed Thailand’s duty to respect the customary international norm of non-refoulement, in addition to the calls by several other State parties to

574. *See id.* at ¶ 35.

575. *See* U.N. High Commissioner for Refugees, 2014-2015 Global Appeal, *supra* note 10, at 1.

576. *See* Comm. on the Elimination of Racial Discrimination, *supra* note 466, at ¶ 15.

577. REFUGEE CONVENTION, *supra* note 332, at art. 33.

578. For example, both CAT Article 3 and CED Article 16 stipulate that a State Party is not allowed to refouler a person “where there [is a] substantial ground for believing” that he/she will be subjected to torture or enforced disappearance, respectively. The Human Rights Committee has also explained that non-refoulement is entrenched in ICCPR Article 2, which obligates States Parties to ensure all ICCPR rights for all persons within the country’s territory or under its control, including “an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as [deprivation of life or liberty].” *See* Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 12.

579. *See* Vignos, *supra* note 197.

either recognize refugee rights in general, accede to the Refugee Convention, or both.⁵⁸⁰

Thailand's recent increased enforcement of restrictions on movement and work in the camps, coupled with decreases in essential resources and services, has placed refugees in a type of stranglehold—forcing them to choose between unacceptable and unsustainable living conditions in Thailand or to return back to Myanmar, where their life or liberty may be threatened. Despite Myanmar's democratic transition, conditions in the country are unstable and not yet conducive for returns. Fighting between the Tatmadaw and armed ethnic groups continues in many states.⁵⁸¹ In Kayin State, from where the vast majority of Burmese refugees in Thailand originate, the Tatmadaw has been building new—and bolstering old—army bases and resupplying weapons, ammunition, and rations since the 2012 ceasefire agreement.⁵⁸² Among refugees, these actions have led to a general distrust of the ceasefire.⁵⁸³ Instances of arbitrary arrest, torture, sexual violence, forced labor, military conscriptions, and lack of access to legal due process have also been reported since the ceasefire went into effect.⁵⁸⁴ Moreover, development projects in Kayin, Kayah, and Mon States have led to land grabs, displacement without adequate compensation, and an increasing militarization throughout the region.⁵⁸⁵ There is a looming

580. Brazil and Canada made specific recommendations with respect to non-refoulement. France, Switzerland, New Zealand, and Slovakia called on Thailand to address refugee rights in general. In particular, Canada's recommendation to "[b]ecome a party to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol; ensure respect for the principle of non-refoulement with respect to asylum seekers and refugees; avoid a premature move to close camps on the Western border while conditions for voluntary, safe and dignified return do not exist; and meet the protection needs of vulnerable peoples, such as the Rohingya, in accordance with international law" needs to be revisited given the worsening conditions in camps and the changes in the legal system within Thailand resulting in constructive refoulement. Hum. Rts. Council, ¶¶ 89.15-16, 89.68-69, 89.70-71, *Report of the Working Group on the Universal Periodic Review: Thailand*, U.N. Doc. A/HRC/19/8 (Dec. 8, 2011).

581. *More Clashes, More Talks, No Protection*, BURMA PARTNERSHIP (Aug. 31, 2015), <http://www.burmapartnership.org/2015/08/more-clashes-more-talks-no-protection/>.

582. TRUCE OR TRANSITION, *supra* note 170, at 106.

583. *Id.* at 106–17.

584. *Id.* at 32–46.

585. *Id.* at 89–90. See generally KAREN HUMAN RIGHTS GRP., *LOSING GROUND: LAND CONFLICTS AND COLLECTIVE ACTION IN EASTERN MYANMAR* (2013); KHRG, 'WITH ONLY OUR VOICES, WHAT CAN WE DO?': LAND CONFISCATION AND LOCAL RESPONSE IN SOUTHEAST MYANMAR (2015); NINA SCHULER, *KAYAH STATE SOCIOECONOMIC ANALYSIS*

threat of conflict, which could be exacerbated by an influx of returning refugees. Furthermore, landmines are scattered all over Kayin and Kayah States, posing significant threats to individuals' physical security.⁵⁸⁶

If refugees are coerced to return to Myanmar before conditions are safe, Thailand may have violated the principle of non-refoulement.⁵⁸⁷ Even if some refugees may be able to return safely to Myanmar, at least some other refugees would not be able to return safely to a location where their life or liberty would not be threatened.⁵⁸⁸ It is key to note that this status determination is an individuated process, and Thailand cannot claim that some amount of stabilization in Myanmar equates to a justification for wholesale removal of refugee status for all Burmese refugees living in the camps; in other words, Thailand must conduct an individual refugee status determination for each refugee to determine whether or not he/she could return without experiencing a threat to her/his life or liberty.⁵⁸⁹

Furthermore, beyond direct refoulement, refugees are also protected from *indirect* refoulement: States cannot coerce refugees to return through a deprivation of basic needs.⁵⁹⁰ Although Thailand may not be physically returning refugees across the border, their failure to provide basic necessities, or the means to obtain them by restricting freedom of movement and right to work, would amount to indirect refoulement—which would be a violation under both Thailand's treaty obligations and under accepted norms of customary international law.⁵⁹¹

(Sept. 2013), available at https://www.mercycorps.org/sites/default/files/251013_Kayah%20SEA%20Main%20Report%20FINAL%20.pdf.

586. See *Ceasefire but No Demining in Myanmar's Kayah State*, *supra* note 193; Guy Dinmore, *Three Years, Zero Landmines Cleared*, MYANMAR TIMES (July 14, 2015), <http://www.mmtimes.com/index.php/home-page/142-in-depth/15497-three-years-zero-landmines-cleared.html>.

587. See, e.g., REFUGEE CONVENTION, *supra* note 332, at art. 33.

588. See Section II.A.4.

589. *Id.* See also REFUGEE CONVENTION, *supra* note 332, at art. 33.

590. Note on the Principle of Non-Refoulement, U.N. HIGH COMMISSIONER REFUGEES, <http://www.refworld.org/docid/438c6d972.html>. (last visited Nov. 14, 2016); see also Hum. Rts. Council, ¶ 65, *Report of the Special Rapporteur on the Human Rights of Migrants*, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) (stating that return programs must ensure that returns are “fully voluntary and a result of a genuine, informed choice,” and that conditions are such that the return is sustainable long-term).

591. See *supra* note 590; see also Vignos, *supra* note 197; Hum. Rts. Comm., *Freedom of Movement*, Gen. Comment 27, *supra* note 474, ¶ 12. Thailand has signed, but not ratified,

IV. CONCLUSION & KEY RECOMMENDATIONS

Several fundamental human rights of Burmese refugees living in the nine border camps along the Thai-Burma border are being violated by Thailand, including the rights to an adequate standard of living (food and shelter), health care, and education; freedom of movement; and the right to work. The combination of these rights violations also threaten to constructively refole these refugees in violation of Thailand's obligations under several core international human rights treaties as well as principles of customary international law.

Worsening conditions in Thai refugee camps are leading to violations of the interlocking rights to food, shelter, health care, and education, which are guaranteed by Articles 11, 12, and 13 of the ICESCR. Thailand's obligations extend to everyone in its jurisdiction, and in particular, Thailand is required to ensure access to resources and services needed to secure these rights for especially vulnerable populations such as refugees. These obligations include providing safe and nutritious food in appropriate amounts, and yet the current ration amount refugees receive is far below international minimum nutritional standards. Refugees also have a right to adequate shelter, but Thailand not only does not supply materials for housing and repairs, but also prohibits refugees from building housing from durable and protective materials. Refugees have a right to health care, but decreased resources and services in refugee camps have created declining conditions in the quality and availability of skilled medical personnel and equipment, and Thailand has made no effort to implement alternative health facilities and services. Refugees are also

the International Convention for Enforced Disappearances ("CED"). As a signatory, Thailand must not act contrary to the purpose and principles of the Convention. Because non-refoulement is a principle expressed in the CED, Thailand is therefore prohibited from violating the principle, despite the fact that it has not ratified the Convention. Additionally, in its 2013 report on Thailand, CAT expressed concerns about the Thai government's possible refolement of Burmese refugees and asylum seekers. The Committee reminded Thailand that enabling or executing refolement violates the country's obligations under Article 3 of CAT, and it urged Thailand to accede to the Refugee Convention and its Protocol. CAT also recommended that Thailand work with UNHCR to amend the Thai Immigration Act and reevaluate its national asylum and refugee determination systems to bring them in line with international standards.

experiencing violations of the right to education. Thailand does not provide educational services within the camps; as funding decreases for the NGOs that do provide services, Thailand must ensure that free primary education is provided, and that refugees maintain access to available and quality educational services.

There are several components of the ICESCR framework that underpin these protections. Most importantly, these rights are afforded to *everyone* without discrimination of any kind as to race, color, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status. They therefore protect not just Thai citizens, but also refugees and asylum seekers living in Thailand. Treaty provisions allowing developing countries to determine to what extent they would guarantee economic rights to non-nationals are inapplicable here because the rights to food, shelter, health care, and education are not economic, i.e., employment-related rights, in the meaning of ICESCR Article 2, paragraph 3. Thailand has an obligation to respect, protect, and fulfill these rights protections, and both its actions and inactions constitute violations of these rights. Thailand has a core, non-derogable obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant for everyone within its jurisdiction, and Thailand cannot argue that resource constraints make it impossible to provide access to food, shelter, health care, or educational services for those who are unable by themselves to secure such access without first demonstrating that every effort has been made to use all the resources at Thailand's disposal in an effort to satisfy, as a matter of priority, those minimum obligations. Nor are retrogressive measures taken in relation to these rights permissible; while Thailand never itself funded the supply of food, goods, and services within these camps, with the decline in resource provision, Thailand has deliberately begun to enforce policies that cement refugees' inability to secure appropriate resources to fulfill their rights. With the enactment of these deliberately retrogressive measures, Thailand has the burden of proving that they have been introduced after the most careful consideration of all alternatives, and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of Thailand's maximum available resources. While Thailand is not expected to solely shoulder the responsibility for funding and resourcing this refugee population, Thailand is ultimately accountable

for the protection of ICESCR and other treaty rights within its jurisdiction; therefore, Thailand is required to request and facilitate cooperation of NGOs, civil society, businesses, and/or other State party donors to ensure that Thailand meets its treaty obligations. In turn, other State parties have an obligation and responsibility to provide support, funding, resources, and services.

Under ICCPR Article 12, Thailand is also obligated to ensure the freedom of movement for refugees within its territory. Thailand's strict confinement of refugees to camps contravenes the right to freedom of movement. Thailand's unwritten policy to not allow refugees to leave camps is not recorded in law; neither is the policy available in written documentation to refugees or to the public. Aside from this, these blanket restrictions on movement are far too broad to meet any of the tests—proportionality, necessity, or most narrow tailoring—to be allowed as an acceptable derogation.

Thailand is also obligated to guarantee the right to work under ICESCR Article 6, which recognizes the individual's right to work and gain his living wage by work that he/she freely chooses. The scarcity of work within the camps means that any prohibition on leaving the camps is effectively a prohibition on work. Asylum seekers and refugees are not excluded from these protections; CESCR has stated that the ground of nationality should not bar access to rights, and that these rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, and migrant workers regardless of legal status and documentation. The Committee has also stated that State parties must ensure that vulnerable populations such as refugees are able to secure their rights. The Refugee Convention standard mandates that, at a minimum, refugees living in the host country for more than three years should be entitled to work. Although Thailand, not having joined the Refugee Convention, is not bound by this requirement, the other human rights conventions to which Thailand is a State party would create some obligations for Thailand regarding the right to work. For example, Thailand is under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of employment-related rights to the extent recognized under international law. In light of ICESCR Article 2, paragraph 3, some limitations not applicable to citizens may be allowable in the short-term for refugees (e.g., initial work permits administered on a non-discriminatory basis). However, Thailand cannot continue to block paths to citizenship, and/or refuse to

continue refugee status determinations, and then use non-citizenship or undetermined legal status as a justification for continued violations of the right to work.

Not only is Thailand not meeting its minimum core requirements under ICESCR in terms of the rights to food, housing, healthcare, and education, but their policies restricting movement and work are actually exacerbating worsening conditions in the camps by eliminating potential income earning opportunities which could otherwise be used to supplement declining resources. These restrictions are especially egregious in light of the resulting further violations of the rights to an adequate standard of living—including food and housing, health care, and education. Thailand also has an obligation under various treaties to which Thailand is a State party—including the ICCPR, CAT, and CED, as well under customary international law, to not return, or *refouler*, refugees to a location where there is a concern that their life or liberty would be at risk. Thailand's recent increased enforcement of restrictions on movement and work in the camps, coupled with decreases in essential resources and services, has placed refugees in a type of stranglehold—forcing them to choose between unacceptable and unsustainable living conditions in Thailand or to return back to Myanmar, where their life or liberty may be threatened. Despite Myanmar's democratic transition, conditions in the country are unstable and not yet conducive for returns. A large influx of returning refugees might also exacerbate already unstable conditions, leading to even greater risk of violence or unsafe conditions. Even if some refugees may be able to return safely to Myanmar, at least some other refugees would not be able to do so. Thailand must conduct an individual refugee status determination for each refugee to determine whether or not he/she could return without experiencing a threat to her/his life or liberty. Refugees are also protected from indirect, or constructive, *refoulement*. Thailand cannot coerce refugees to return through a deprivation of basic needs. Although Thailand may not be physically returning refugees across the border, their failure to provide basic necessities, or the means to obtain them by restricting freedom of movement and right to work, would amount to indirect *refoulement*—which would be a violation under both Thailand's treaty obligations and under accepted norms of customary international law.

KEY RECOMMENDATIONS

- Accede without delay to the 1951 Refugee Convention and its 1967 Optional Protocol.
- Amend the Thai Immigration Act to establish a national asylum mechanism in line with international standards.
- With the support of the international community, establish a mechanism and funding for the provision of resources and services to ensure refugees' rights to food, shelter, health care, and education.
- In keeping with Thailand's international obligation to afford freedom of movement to all people lawfully within its borders, eliminate restrictions that prohibit Burmese refugees from transiting camp boundaries.
- In keeping with Thailand's international obligation to afford all people within its borders the opportunity to work, eliminate employment restrictions that prohibit Burmese refugees from gaining access to meaningful employment in Thailand.
- To ensure refugee access to durable solutions, permit UNHCR entry to refugee camps to conduct individualized refugee status determinations and facilitate third country resettlement as appropriate.
- Consult with refugee communities to address concerns of forcible repatriation while ensuring that all returns are voluntary and not coerced.
- In accordance with treaty obligations and customary international law, ensure that all policies, laws, and government actions do not directly or indirectly violate the principle of non-refoulement.

