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ASYLUM ACCESS THAILAND  
ASIA PACIFIC REFUGEE RIGHTS NETWORK  
COALITION FOR THE RIGHTS OF REFUGEES AND  
STATELESS PERSONS  
FORTIFY RIGHTS

**Submission to the  
U.N. Committee on the  
Elimination of Racial  
Discrimination on  
Thailand's Compliance  
with the International  
Convention on the  
Elimination of All  
Forms of Racial  
Discrimination**



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Fortify Rights

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# Submission to the U.N. Committee on the Elimination of Racial Discrimination on Thailand’s Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination

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## Summary

Asylum Access Thailand (AAT), the Asia Pacific Refugee Rights Network (APRRN), the Coalition for the Rights of Refugees and Stateless Persons (CRSP), and Fortify Rights welcome the opportunity to provide input to the United Nations Committee on the Elimination of Racial Discrimination (CERD) with regard to the Government of Thailand's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

This report finds that, in law and in practice, refugees' and asylum seekers' rights in Thailand have been systematically violated. The issues discussed in the report center on the experience of refugees and asylum seekers and include: hate speech directed towards minority refugees, restrictions on movement, the criminalization of asylum seekers and refugees in Thai law, the practice of arbitrary and indefinite detention, the threat of forced returns, and discriminatory barriers to accessing health, education, and work. Beyond this, refugees' and asylum seekers' precarious legal status in Thailand discourages them from pursuing their rights through the judicial system.

Finally, we welcome the Royal Thai Government's (RTG) establishment of the National Screening Mechanism approved by the Thai cabinet on December 24, 2019. We note that this regulation, once implemented, has the potential to protect and fulfil a number of rights, such as the right to protection from *refoulement* and freedom of movement and access to socioeconomic rights for refugees. However, further clarification is needed to ensure that the National Screening Mechanism is implemented in line with international law.

# Recommendations

Given Thailand's obligations under ICERD, we recommend that the Committee ask the RTG to:

## Protect Against Hate Speech (General Recommendation XXX)

- Clarify what “resolute action” the Thai government has taken to censure, reprimand, or prosecute individuals, particularly politicians, who further negative stereotypes and prejudice against ethnic minorities, in particular non-national minorities.
- Provide data on actions the RTG has pursued to address and mitigate hate speech against non-national minorities.

## Ensure Freedom of Movement (Article 5(d)(i))

- Respect the freedom of movement of refugees and asylum seekers by refraining from conducting mass raids and arresting refugees and asylum seekers, which also serves as a barrier for refugees and asylum seekers to enjoy the other rights under the Convention on a non-discriminatory basis.
- Ensure that refugees and asylum seekers can equally access effective legal remedies with adequate procedural safeguards, regardless of their legal status under immigration law, either by enacting new legislation, or including additional provisions under the Immigration Act or National Screening Mechanism.
- Respect the freedom of movement of refugees and asylum seekers and grant refugees living in the camps on the Thailand-Myanmar border the right to move freely outside of camps without the need for permission.

## Prohibit Arbitrary and Indefinite Detention (General Recommendation XXX)

- Account for the detention of children in immigrant detention centers (IDCs) despite the *Memorandum of Understanding on the Determination Measures and Approaches to Alternative to Detention of Children in Immigration Detention Centers*.
- Cease the indefinite detention of refugees and asylum seekers and ensure detainees have access to administrative and judicial review of their detention under the Immigration Act or National Screening Mechanism.
- Clarify the policy of implementing alternatives to detention for refugees and asylum seekers in IDCs.

- Clarify what steps have been taken to improve and bring conditions in IDCs in line with international standards, including minimizing overcrowding and providing adequate water and food, and ensuring access to adequate physical and mental healthcare and other social services.

### **Prevent *Refoulement* and Forced Returns (General Recommendation XXX)**

- Enact legislation or include provisions in the Immigration Act and/or National Screening Mechanism to protect refugees and asylum seekers from forced return or *refoulement* to their home countries.
- Clarify its cooperation with foreign authorities to *refoul* refugees and asylum seekers.
- Respect the right to *non-refoulement* by refraining from forcibly returning refugees and asylum seekers, including the practice of “pushing back” by sea or land refugees and asylum seekers from neighboring countries.

### **Ensure the Right to Non-Discrimination (Article 1)**

- Respect the right to health and employment of refugees and asylum seekers.
- Ensure that public hospitals provide access to healthcare to all refugees and asylum seekers regardless of their documentation or legal status.
- Clarify the steps that can be taken to make healthcare financially accessible for refugees.
- Provide protections to ensure that refugees are able to hold employers accountable for exploitation, abuse, and dangerous working conditions.
- Respect and fulfil the right to education by ensuring that refugee and asylum-seeker children can enroll in public schools and to work more closely with humanitarian agencies in providing education to refugees.

### **Reform the National Screening Mechanism (Article 5)**

- Ensure the National Screening Mechanism is accessible to all potential refugees, including Rohingya, Uyghur, and North Korean asylum seekers, and remove ethnic- or nationality-based exclusions.
- Include in the National Screening Mechanism the right to appeal to review questions of both fact and law and the right to remain in Thailand until a final decision is made.

- Ensure that the National Screening Mechanism includes a provision explicitly clarifying that persons undergoing screenings and individuals determined to be in need of protection will be protected from arrest and detention.
- Ensure that the National Screening Mechanism includes a provision explicitly clarifying that the “national security” exception will be defined in line with human rights law and that persons pending deportation have the right to challenge expulsion orders.

# Issues under the International Convention on the Elimination of All Forms of Racial Discrimination

## Protect Against Hate Speech (General Recommendation XXX)

In its 2012 review of Thailand, the CERD raised concerns regarding negative stereotypes and prejudices against ethnic minorities in Thailand and called on the Thai government to “take measures to eliminate negative stereotypes about ethnic groups.”<sup>1</sup> In response, the government’s 2019 State Party report notes that media ethics are “governed largely by a self-regulation and self-disciplinary system in accordance with the laws, professional codes of responsibility and international standards.”<sup>2</sup> The report does not indicate how these self-regulating codes, or “criminal sanctions under criminal law,” treat either negative stereotypes or prejudices.

During the reporting period, Prime Minister of Thailand Prayuth Chan-o-cha has made several statements relating to Rohingya refugees that rely on negative stereotypes and prejudices. For example, at a parliamentary debate on July 25, 2019, in a response to a question related to how the government was handling issues related to migrants such as Rohingya, he said: “Speaking of the Rohingya, I am sympathetic. But their looks, their appearances are very different from us. If you can accept to have more of these people in Thailand, that is up to you.”<sup>3</sup>

The Thai Prime Minister made a similar comment in 2015 in response to a question from a journalist following the discovery of trafficked Rohingya along the Thai-Malaysian border. He said: “We need a place where we can detain them for legal prosecution, because there’s only limited space now. It’s a short-term measure. This will not be a permanent refugee center for ten or twenty years. Don’t hope that they can go back or someone would take them. We are looking for a place. Do you have any place near your

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<sup>1</sup> Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations on the First to Third Periodic Reports of Thailand*, U.N. Doc. CERD/C/THA/CO/1-3, November 15, 2012, [hereinafter “Concluding Observations of Thailand, 2012”], para. 19.

<sup>2</sup> CERD, *Combined Fourth to Eighth Reports Submitted by Thailand under Article 9 of the Convention*, U.N. Doc. CERD/C/THA/4-8, June 17, 2019, [hereinafter “State Party Report 2019”], para. 44.

<sup>3</sup> “ปักตู๋” โต้ “ขอ” ปม โรฮิงญา ชี้ถ้าคนที่อึดลักษณะแตกต่างจากเราอยู่ วันหน้ามีมากขึ้นจะทำอย่างไร,” *Khaosod Online*, July 25, 2019, [https://www.khaosod.co.th/politics/news\\_2743621](https://www.khaosod.co.th/politics/news_2743621). See, Human Rights Watch, “Thailand Offers Persecuted Rohingya Little Hope,” July 31, 2019, <https://www.hrw.org/news/2019/07/31/thailand-offers-persecuted-rohingya-little-hope>.



house? (No). We are looking for a place. Thai people still have no place to live.”<sup>4</sup>

CERD’s General Recommendation XXX urges States to “take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of ‘non-citizen’ population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large.”<sup>5</sup> Prime Minister Prayuth’s comments contribute to a negative stereotype regarding Rohingya refugees and do so using his platform as a public official. As such, they run counter to the Committee’s recommendations.

### **Given Thailand’s obligations under ICERD, we recommend that the Committee ask the RTG to:**

- Clarify what “resolute action” the Thai government has taken to censure, reprimand, or prosecute individuals, particularly politicians, who further negative stereotypes and prejudice against ethnic minorities, in particular non-national minorities.
- Provide data on the number of prosecutions the RTG has pursued related to hate speech against non-national minorities.

### **Ensure Freedom of Movement (Article 5(d)(i))**

Under the Convention and the Committee’s recommendations, the RTG is obliged to respect everyone’s right to freedom of movement and residence in its territory and refrain from arbitrary arrest.<sup>6</sup> During the reporting period, Thai authorities regularly arrested refugees and asylum seekers for either overstaying a visa or entering Thailand without a visa. For example, in 2018, Thai authorities conducted raids on residential buildings and arrested more than 200 refugees—including more than 50 children—from Cambodia, Vietnam, and Pakistan over the course of two months.<sup>7</sup> Between 2018 and 2019, Thai authorities also arrested scores of Rohingya refugees—including at least 14 children—who were most likely survivors of human trafficking.<sup>8</sup>

<sup>4</sup> “Prayuth Rules Out Permanent Shelters For Rohingyas,” *Khaosod English*, May 14, 2015, <https://www.khaosodenglish.com/politics/2015/05/14/1431607628/>. The Prime Minister’s full remarks can be found at <https://www.youtube.com/watch?reload=9&v=9T9mJMoACOM>.

<sup>5</sup> CERD, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, October 1, 2002, para. 12.

<sup>6</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), U.N. Doc. A/6014, Art. 5 [hereinafter “ICERD”]. See also, CERD, *CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, U.N. Doc. A/60/18, 2005, para. 23.

<sup>7</sup> Fortify Rights, “Thailand: End Raids and Arbitrary Detention of Refugees,” October 12, 2018, <https://www.fortifyrights.org/tha-inv-2018-10-12/>. Some of the refugees were UNHCR-recognized persons of concern.

<sup>8</sup> “Rohingya Illegals Caught on Train to South,” *Bangkok Post*, January 18, 2018, <https://www.bangkokpost.com>.

Thai law does not currently provide sufficient legal protections for refugees. For example, Section 81 of the Immigration Act, B.E. 2522 states that anyone found in Thailand without proper permission is subject to up to two years' imprisonment and/or a fine not exceeding 20,000 Thai Baht (US\$617). The Thai government does not distinguish between refugees and other migrants and subjects both groups to criminal penalties for migration-related offenses.<sup>9</sup> Refugees and migrants alike are transferred to the custody of the immigration authorities and detained at an IDC for an indefinite period of time pending return.<sup>10</sup>

The RTG's practice of arresting refugees under Section 81 of the Immigration Act and restricting refugees from Myanmar to camps constitute restrictions to the rights to liberty and freedom of movement in contravention of the Convention because they are not reasonable, necessary, or proportionate.<sup>11</sup> States are forbidden from classifying or treating refugees as criminals for entering or staying in the country in an irregular manner.<sup>12</sup> The persistent fear of arrest and detention also serves as a barrier to the enjoyment of other rights, such as the right to work, education, and health.

Further, refugees do not have freedom of movement in Thailand and thousands of refugees from Myanmar are required to live in one of nine officially recognized camps along the border with Myanmar.<sup>13</sup> Refugees living in the camps are required to obtain permission to leave the camp, which can be obtained for official activities (e.g. a training organized by an NGO), but not for personal reasons, including work.<sup>14</sup> The camps' remote locations further restrict movement.<sup>15</sup>

### **Given Thailand's obligations under ICERD, we recommend that the Committee ask the RTG to:**

- Respect the freedom of movement of refugees and asylum seekers by refraining from conducting mass raids and arresting refugees and asylum seekers, which

[com/thailand/general/1398058/rohingya-illegals-caught-on-train](https://www.asia-pacific-refugee-rights-network.org/thailand/general/1398058/rohingya-illegals-caught-on-train). See also, for example, Asia Pacific Refugee Rights Network, the Coalition for the Rights of Refugees and Stateless Persons, and Fortify Rights, "Thailand: Ensure Refugee Rights and Protections Through Refugee Regulation," June 18, 2018, [https://www.fortifyrights.org/downloads/Joint\\_Statement\\_Thailand\\_Ensure\\_Refugee\\_Rights\\_and\\_Protections\\_Through\\_Refugee\\_Regulation\\_June\\_18\\_2018.pdf](https://www.fortifyrights.org/downloads/Joint_Statement_Thailand_Ensure_Refugee_Rights_and_Protections_Through_Refugee_Regulation_June_18_2018.pdf); Fortify Rights, "Thailand: End Child Detention, Protect All Children," November 5, 2018, <https://www.fortifyrights.org/tha-inv-2018-11-05/>.

<sup>9</sup> Thailand Criminal Code, B.E. 2499 (1956), Sections 29–30.

<sup>10</sup> Immigration Act, B.E. 2522 (2017), Section 54.

<sup>11</sup> U.N. Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, U.N. Doc CCPR/C/GC/35, December 16, 2014, para. 12.

<sup>12</sup> U.N. Human Rights Council, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/22/44, December 24, 2012, para. 10.

<sup>13</sup> While the RTG refers to these camps as "temporary shelters," we refer to them as camps because calling them temporary shelters would elide the fact that they have existed since the mid-1980s.

<sup>14</sup> APRRN interview with L.B., Bangkok, Thailand, May 11, 2020.

<sup>15</sup> Human Rights Watch, *Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers*, September 4, 2012, p. 15.

also serves as a barrier for refugees and asylum seekers to enjoy the other rights under the Convention on a non-discriminatory basis.

- Ensure that refugees and asylum seekers can equally access effective legal remedies with adequate procedural safeguards, regardless of their legal status under immigration law, either by enacting new legislation, or including additional provisions under the Immigration Act or National Screening Mechanism.
- Respect the freedom of movement of refugees and asylum seekers and grant refugees living in the camps on the Thailand-Myanmar border the right to move freely outside of camps without the need for permission.

## Prohibit Arbitrary and Indefinite Detention (General Recommendation XXX)

In responding to the Committee's letter dated August 29, 2014, the RTG highlighted in its 2019 periodic report the progress they had achieved in respecting refugee rights. In particular, they noted the *Memorandum of Understanding on the Determination Measures and Approaches to Alternative to Detention of Children in Immigration Detention Centers*, in which Thai authorities agreed to transfer children and their mothers out of IDCs upon the payment of 50,000 Thai Baht (US\$1,500) in bail per person.<sup>16</sup> The Government argued in its report that "The MoU reaffirms [the] Government's commitment in adhering to humanitarian principles."<sup>17</sup>

Under the MoU, the RTG committed to ensuring that children are detained only as a measure of last resort and for as brief a period as possible.<sup>18</sup> The MoU is a positive development in line with the RTG's obligation to "immediately end the practice of detaining minors."<sup>19</sup> However, it does not go far enough to fully bring Thailand's detention policies in line with the Convention because of: (1) the practice of indefinite detention; (2) failure to adequately consider alternatives to detention; and (3) the poor living conditions in IDCs.

First, despite providing alternatives to detention for some refugees, as of March 2020, more than 360 refugees, including 15 children, are being held in Thailand's IDCs.<sup>20</sup>

<sup>16</sup> *Memorandum of Understanding on the Determination Measures and Approaches to Alternative to Detention of Children in Immigration Detention Centers*, 2019 [hereinafter "MoU on Alternatives to Detention"]. See also, Amnesty International, Asia Pacific Refugee Rights Network, et. al., "Ensure New Refugee Regulation Meets International Standards", November 11, 2019, <https://www.fortifyrights.org/downloads/Joint-Statement-Thailand-Ensure-New-Refugee-Regulation-Meets-International-Standards.pdf>.

<sup>17</sup> State Party Report 2019, para. 94.

<sup>18</sup> *Ibid.*

<sup>19</sup> CERD, *Concluding Observations on the Combined Twenty-First to Twenty-Third Periodic Reports of Canada*, U.N. Doc. CERD/C/CAN/CO/21-23, September 13, 2017, para. 33(b).

<sup>20</sup> Asylum Access Thailand, Meeting Minutes UNHCR Protection Working Group, March 10, 2020 (on file with Asylum Access Thailand); Daron Tan and Manachaya Yankittikul, "A Looming Catastrophe: COVID-19,

Among those detained are 170 Rohingya refugees, who face protracted detention in Thailand.<sup>21</sup> No further information is available on whether this MoU will be extended to refugees and asylum seekers more generally.

Second, refugees and asylum seekers who fall outside the scope of the MoU are subject to indefinite detention in IDCs if arrested and detained because of the lack of non-custodial alternatives to detention. This is despite the fact that Thailand's immigration detention facilities are designed for stays of no longer than 15 days.<sup>22</sup>

Refugees and asylum seekers have three options to avoid indefinite detention: resettlement in a third country, release from detention on bail, and voluntary repatriation. Resettlement is not a realistic solution for most refugees as the possibilities of resettlement are limited and, even in these rare cases, the process can take years.<sup>23</sup>

The system of bail does not provide a realistic alternative to detention for refugees and asylum seekers due to the wide discretion immigration officials hold in granting or denying bail under Thailand's Immigration Act.<sup>24</sup> For example, starting in 2016, immigration officials generally stopped granting bail to refugees and asylum seekers according to Amnesty International, and in 2018, immigration officials reportedly started revoking the bail of refugees released from detention years earlier.<sup>25</sup> The 2019 MoU

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Urban Refugees, and the Right to Health in Thailand," *Refugee Law Initiative*, May 11, 2020, <https://rli.blogs.sas.ac.uk/2020/05/11/a-looming-catastrophe-covid-19-urban-refugees-and-the-right-to-health-in-thailand/>.

<sup>21</sup> *Ibid.*; Fortify Rights interview with Rohmad Rueangprach, Deputy Director of Sattachon Foundation, a member of Humanitarian Networking under Sheikhul Islam, April 21, 2020. Thai authorities often detain Rohingya refugees and survivors of trafficking in IDCs or in shelters run by the Ministry of Social Development and Human Security. See, Puttanee Kangkun and John Quinley III, "Mass Atrocities and Human Trafficking: Rohingya Muslims on The Move," *Humanitarian Exchange Magazine*, October 24, 2018, <https://www.fortifyrights.org/reg-inv-oped-2018-10-24/>. See also, Human Rights Watch, "Thailand: Let UN Agency Screen Rohingya," May 21, 2020, <https://www.hrw.org/news/2020/05/21/thailand-let-un-refugee-agency-screen-rohingya>

<sup>22</sup> Fortify Rights, *Thailand: One Year After the Andaman Sea Refugee Crisis, End Detention and Bring Justice to Survivors of Human Trafficking*, June 8, 2016, [http://www.fortifyrights.org/downloads/Remarks\\_20160608.pdf](http://www.fortifyrights.org/downloads/Remarks_20160608.pdf), p. 4.

<sup>23</sup> U.N. High Commissioner for Human Rights, "Thailand: Fact Sheet," March 31, 2020, <https://reporting.unhcr.org/sites/default/files/UNHCR%20Thailand%20Fact%20Sheet%20-%2031MAR20.pdf>; International Organization of Migration, "Refugee Resettlement Info Sheet," <https://thailand.iom.int/sites/default/files/Infosheets/IOM%20Infosheet%20-%20Refugee%20Resettlement.pdf>; Sansom Milton, "Arab Refugees in Bangkok Long for Home Amid Immigration Crackdown," *Al Jazeera*, November 13, 2018, <https://www.aljazeera.com/indepth/features/arab-refugees-bangkok-long-home-immigration-crackdown-18112214711007.html>.

<sup>24</sup> See, Immigration Act, Section 54, ("While waiting for the alien to be deported the competent official may order the alien to stay in any prescribed place or he may order the alien to report to him (competent official) according to a prescribed date, time, and place . . . The competent official may also detain the alien at any given place as may be necessary."). See also, Amnesty International, Asia Pacific Refugee Rights Network, et. al., "Thailand: Ensure New Refugee Regulation Meets International Standards," November 11, 2019, <https://www.fortifyrights.org/downloads/Joint-Statement-Thailand-Ensure-New-Refugee-Regulation-Meets-International-Standards.pdf>.

<sup>25</sup> Amnesty International, *Between a Rock and a Hard Place: Thailand Refugee Policies and Violations of the Principle of Non-Refoulement*, September 14, 2017, page 18.

made bail available to refugee mothers and their children. However, the exorbitantly high rate of bail of 50,000 Thai Baht (US\$1,500) renders such an option unattainable for refugees without outside support.<sup>26</sup> Additionally, for those not covered by the MoU, AAT observed that the bail amount has increased from 100,000 Thai Baht to 200,000 Thai Baht (about US\$3,000 to US\$6,000), in addition to the application fee. AAT is also aware of at least 11 cases of bribery of immigration authorities since January 2020 in order for individuals to be released on bail.<sup>27</sup>

Furthermore, the Thai immigration authorities have resisted calls to implement alternatives to detention for other groups of refugees and asylum seekers, such as refugees with serious medical conditions. For example, in 2019, the U.N. High Commissioner for Refugees—the U.N. agency mandated to protect refugees—advocated for the release on bail of 21 detainees with serious medical conditions. Out of the 21 detainees, 13 were AAT’s clients and, out of these 13 clients, the authorities released only one detainee based on AAT’s records.<sup>28</sup>

These practices contravene Thailand’s obligations under the Convention to protect refugees and asylum seekers from arbitrary detention.<sup>29</sup> The indefinite detention of refugees and asylum seekers in IDCs violates Thailand’s obligations under international law, which prohibits the detention of refugees solely due to their immigration status and requires states to minimize the period of time that asylum seekers spend in detention.<sup>30</sup> Thailand’s policy of not providing alternatives to detention for refugees and asylum seekers (besides mothers and children under the MoU) also violates its obligation to detain asylum seekers only as an exceptional measure of last resort following an individualized assessment and after the exhaustion of all alternatives to detention.<sup>31</sup> The

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<sup>26</sup> Asia Pacific Refugee Rights Network, Asylum Access Thailand, et. al., “Joint Statement: Thailand Government MOU on Alternatives to Detention for Children,” January 21, 2019, <https://aprrn.info/joint-statement-thailand-government-mou-on-alternatives-to-detention-for-children/>.

<sup>27</sup> This is based on AAT’s observations while providing legal advice and assistance for clients to access bail.

<sup>28</sup> *Ibid.*

<sup>29</sup> CERD, *General Recommendation XXX on Discrimination Against Non-Citizens*, October 1, 2002, para. 19 (“Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards.”)

<sup>30</sup> See, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Austria*, U.N. Doc. CERD/C/AUT/CO/17, September 22, 2008, para. 17; See also, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Greece*, U.N. Doc. CERD/C/GRC/CO/16-19, September 14, 2009, para. 12.

<sup>31</sup> U.N. Human Rights Committee, *A. v. Australia*, U.N. Doc. CCPR/C/59/D/560/1993, April 3, 1997, para. 9.4 (The Committee held that without factors particular to the individual, “such as the likelihood of absconding and lack of cooperation,” continued detention can be considered arbitrary, “even if entry was illegal.”) See also, U.N. Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, para. 15 (“The burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures.”) See also, U.N. Human Rights Committee, *F.J. et al v. Australia*, U.N. Doc. CCPR/C/116/D/2233/2013, May 2, 2016, para. 10.3 (The Committee held that detaining asylum seekers while their claims are being resolved is arbitrary “absent particular reasons specific to the individual” and the decision “must take into account less invasive means of achieving the same ends.”)

CERD has emphasized the obligation of States to develop and prioritize alternatives to detention for asylum seekers and ensure that detention is only used as a last resort.<sup>32</sup>

Third, the conditions in detention centers fail to meet international standards.<sup>33</sup> The conditions in Thailand's IDCs have been characterized as "appalling."<sup>34</sup> In 2015, Rohingya at the Songkhla IDC told Fortify Rights and the Burmese Rohingya Organization UK (BROUK) that they were confined 24 hours a day to a cell with inadequate personal space, where they sleep side-by-side on the floor and 40 people share one functioning toilet.<sup>35</sup> The immigration officials failed to arrange medical treatment for one Rohingya boy, Mohammed Amin, 16, who was coughing and shaking. They said authorities provided only paracetamol and only after "shouting and crying" by detainees, who feared that the boy might die.<sup>36</sup> According to a media report, Thai authorities reportedly detained one Pakistani Christian refugee with her two young sons and husband for four months in 2018.<sup>37</sup> In the article, the woman described her family's stay as "miserable" and said that the center was so crowded that people had to take turns laying down to sleep.<sup>38</sup> Other former detainees have also described "horrific sanitation conditions" and "inadequate medical care" in IDCs.<sup>39</sup> During the COVID-19 pandemic, in May 2020, 18 Rohingya from Songkhla IDC, including 17 women and one 10-year old boy, tested positive for the coronavirus.<sup>40</sup>

These conditions contravene Thailand's obligations under General Recommendation

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<sup>32</sup> See, CERD, *Concluding Observations on the Combined Eighteenth to Twenty-First Periodic Reports of Mexico*, U.N. Doc. CERD/C/MEX/CO/18-21, September 19, 2019, para 35(b), ("Develop alternatives to the detention of asylum seekers and migrants in an irregular situation."). See also, CERD, *Concluding Observations on the Combined Eighteenth to Twenty-Fifth Periodic Reports of Hungary*, U.N. Doc. CERD/C/HUN/CO/18-25, June 6, 2019, para. 23(a), ("Ensure that detention of asylum seekers is used as a measure of last resort and for the shortest period of time, and prioritize alternative measures to detention."). See also, CERD, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, U.N. Doc. CERD/C/AUS/CO/18-20, December 26, 2017, para. 33(a), ("Find alternatives to the detention of all migrants and asylum seekers arriving in Australia without a visa, ensure detention is used only as a last resort and ensure regular judicial review of detention decisions.").

<sup>33</sup> See, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted January 8, 2016, U.N. Doc. A/RES/70/175, rules 12, 15, 27, 42.

<sup>34</sup> Amnesty International, *Between a Rock and a Hard Place: Thailand Refugee Policies and Violations of the Principle of Non-Refoulement*, September 14, 2017, p. 7.

<sup>35</sup> Fortify Rights, *Everywhere is Trouble: An Update on the Situation of Rohingya Refugees in Thailand, Malaysia, and Indonesia*, March 2016, p.7.

<sup>36</sup> *Ibid.*

<sup>37</sup> Caleb Quinley, "Life in the Shadows: Thailand's Urban Refugees," *The New Humanitarian*, September 11, 2019, <https://www.thenewhumanitarian.org/news/2019/09/11/Thailand-refugee-policies-asylum-seekers-immigration-detention>. See also, for example, Fortify Rights, *Everywhere is Trouble*, March 2016, <https://www.fortifyrights.org/reg-inv-rep-2016-03-11/>.

<sup>38</sup> Caleb Quinley, "Life in the Shadows: Thailand's Urban Refugees," *The New Humanitarian*.

<sup>39</sup> Amnesty International, *Between a Rock and a Hard Place: Thailand Refugee Policies and Violations of the Principle of Non-Refoulement*, p. 7.

<sup>40</sup> "Thailand Logs 18 New Covid Cases, No Deaths Monday," *Bangkok Post*, May 4, 2020, <https://www.bangkokpost.com/thailand/general/1912404/thailand-logs-18-new-covid-cases-no-deaths-monday>.

XXX to ensure that conditions in centers holding refugees meet international standards.<sup>41</sup> The Committee has specified that international standards include respect for detainees' traditions regarding religion, culture, and food, and the right to relations with their families.<sup>42</sup> As such, the conditions fail to meet the standards articulated by the Committee and therefore are in violation of Thailand's obligations under the treaty.

### **Given Thailand's obligations under ICERD, we recommend that the Committee ask the RTG to:**

- Account for the detention of children in IDCs despite the *Memorandum of Understanding on the Determination Measures and Approaches to Alternative to Detention of Children in Immigration Detention Centers*.
- Cease the indefinite and arbitrary detention of refugees and asylum seekers and ensure detainees have access to administrative and judicial review of their detention under the Immigration Act or National Screening Mechanism.
- Clarify the policy of implementing alternatives to detention for refugees and asylum seekers in IDCs.
- Clarify what steps have been taken to improve and bring conditions in IDCs in line with international standards, including minimizing overcrowding and providing adequate water and food, and ensuring access to adequate physical and mental healthcare and other social services.

### **Prohibit *Refoulement* and Forced Returns (General Recommendation XXX)**

Under Thai law, refugees and asylum-seekers include individuals who may have entered or stayed in Thailand without proper permission and are therefore subject to return to their home country.<sup>43</sup> Thailand's legislation does not provide protections against *non-refoulement* nor does it provide for a judicial review of refugees' and asylum seekers' cases prior to return.<sup>44</sup> Under Thailand's Immigration Act, the deportation of individuals under Section 54 can be done as an administrative process without judicial oversight.<sup>45</sup>

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<sup>41</sup> CERD, *General Recommendation XXX on Discrimination Against Non-Citizens*, para. 19.

<sup>42</sup> *Id.*, para. 26.

<sup>43</sup> See, Immigration Act, Section 54 ("Any alien who enters or comes to stay in the Kingdom without permission or when such permission expires or is revoked, the competent official will deport such alien out of the Kingdom.").

<sup>44</sup> UNHCR, *Submission for the Office of High Commissioner for Human Rights' Compilation Report: Universal Periodic Review: 2nd Cycle, 25th Session, Thailand*, para. 20.

<sup>45</sup> See, Immigration Act, Section 54 ("The provisions of section 19 and 20 will be applied *Mutatis Mutandis* if in the case that investigation for deportation in reference to Para. 1 of this Section must be conducted.")

In responding to concerns raised by this Committee regarding the *refoulement* of refugees, the Thai government argued in its State Party 2019 Report that, “During 2013–2014, Thailand experienced a large influx of illegal migrants in the Indian Ocean reported towards Thailand, but since 2015 there has no longer been such irregular movement.”<sup>46</sup> However, the Thai government continues to implement a so-called “help-on” or “push-back” policy whereby ill-equipped boats carrying refugees and possible survivors of human trafficking are prevented from landing on Thai shores or are pushed back out to sea.<sup>47</sup> Thai authorities have provided minimal food and water to passengers on the boats before redirecting them.<sup>48</sup> For example, in April 2018, a boat of 56 Rohingya refugees reportedly arrived on the island of Lanta in Thailand’s Krabi Province following a heavy storm the night before.<sup>49</sup> Thai authorities confirmed that they sent the boat back out to sea as part of their “push-back” policy, putting the lives of the persons aboard at risk and failing to ensure the protection of possible survivors of trafficking.<sup>50</sup>

The Committee on Ending Racial Discrimination on multiple occasions has clarified that State parties are obliged to respect refugee rights in the administration of their borders and immigration policies. In particular, the Committee has noted that non-citizens are not to be “returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment.”<sup>51</sup> Flowing from this requirement, “States parties

<sup>46</sup> State Party Report 2019, para. 93.

<sup>47</sup> “Ranong Leverages The ‘Guardian Andaman’ Plan To Prevent Rohingya,” *Bangkok Biz News*, March 2013, <https://www.bangkokbiznews.com/news/detail/494215>. See also, Fortify Rights, *Crimes Against Humanity, Mass Graves, and Human Trafficking from Myanmar and Bangladesh to Malaysia from 2012 to 2015*, March 27, 2019, <https://www.fortifyrights.org/downloads/Fortify%20Rights-SUHAKAM%20-%20Sold%20Like%20Fish.pdf>; “One Year After the Andaman Sea Refugee Crisis End Detention and Bring Justice to Survivors of Human Trafficking,” June 8, 2016, [https://www.fortifyrights.org/downloads/Remarks\\_20160608.pdf](https://www.fortifyrights.org/downloads/Remarks_20160608.pdf).

<sup>48</sup> Fortify Rights, “Thailand, Malaysia, Indonesia: Coordinate Sea Rescues, Protect Asylum Seekers and Trafficking Survivors,” May 13, 2015, <https://www.fortifyrights.org/reg-inv-2015-05-13/>. See also, *ibid*.

<sup>49</sup> Fortify Rights, “Thailand/Malaysia: Protect Rohingya Refugees, Urge ASEAN to Take Action,” April 2, 2018, <https://www.fortifyrights.org/tha-mly-inv-2018-04-02/>.

<sup>50</sup> *Ibid*. See also, Fortify Rights, “Sold Like Fish”: *Crimes Against Humanity, Mass Graves, and Human Trafficking from Myanmar and Bangladesh to Malaysia from 2012 to 2015*, March 27, 2019, <https://www.fortifyrights.org/downloads/Fortify%20Rights-SUHAKAM%20-%20Sold%20Like%20Fish.pdf>. Fears of human trafficking are not without merit. In May 2015, Thai authorities found mass graves of more than 30 bodies in an abandoned human trafficking camp in Sadao District, Songkhla Province. During that period of time, more than 2,500 Rohingya and Bangladeshi refugees landed in Aceh, Indonesia and Langkawi, Malaysia. Human rights groups criticized the Thai government for using their “push-back” policy to return the boats to sea instead of letting them land and provide humanitarian assistance and human rights protection. See, Human Rights Watch, “Thailand: Mass Graves of Rohingya Found in Trafficking Camp,” May 1, 2015, <https://www.hrw.org/news/2015/05/01/thailand-mass-graves-rohingya-found-trafficking-camp>; “Over 2,500 Migrants Still Adrift, U.N. Says Ahead of SE Asia Meeting,” *Reuters*, May 27, 2015, <https://www.reuters.com/article/uk-asia-migrants-meeting/over-2500-migrants-still-adrift-u-n-says-ahead-of-se-asia-meeting-idUKKBN0OC0VW20150527>.

<sup>51</sup> CERD, *General Recommendation XXX on Discrimination Against Non-Citizens*, para. 27. See also, CERD, *CERD General Recommendation XXXI*, para. 40. See also CERD, *Concluding Observations on the Combined Eighteenth to Twenty-Second Periodic Reports of Lebanon*, U.N. Doc. CERD/C/LBN/CO/18-22,



are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of *non-refoulement* and *non-expulsion* of refugees.”<sup>52</sup> Furthermore, the Committee has emphasized that non-citizens “have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed to effectively pursue such remedies.”<sup>53</sup>

The RTG has demonstrated a willingness to *refoul* refugees and asylum seekers at the request of their home countries. In July 2015, Thailand reportedly refouled 109 detainees from the Uyghur community back to China, where they are known to face severe persecution.<sup>54</sup> In 2017, Amnesty International reported that Thai officials, in coordination with officials from Myanmar, forcibly returned longtime Myanmar resident Muhammet Furkan Sökmen to Turkey, where Turkish officials subsequently imprisoned him.<sup>55</sup> In January 2019, a Vietnamese dissident blogger reportedly disappeared in Bangkok and reemerged in a Vietnamese prison months later, where he was reportedly convicted of “defrauding the public” and sentenced to ten years’ imprisonment.<sup>56</sup> It is unclear whether the Thai government participated in his disappearance. However, Thailand’s willingness to cooperate with foreign governments in other cases to forcibly return foreign nationals exacerbates the risk of *refoulement* for refugees and asylum seekers.

Further, the Thai government has returned refugees and asylum seekers from neighboring countries, including Cambodia, Myanmar, and Laos. These returns were reportedly facilitated through MoUs signed between Thailand and its neighbors to facilitate labor migration.<sup>57</sup> According to AAT and the Center for Asylum Protection (CAP), at the time of writing, this practice is continuing, particularly for refugees and asylum seekers from Cambodia.

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October 5, 2016, para. 28 (in which the Committee makes clear the State’s obligation to provide a framework on asylum that respects the principle of *non-refoulement*.)

<sup>52</sup> CERD, *General Recommendation XXII: Article 5 and Refugees and Displaced Persons*, August 24, 1996, para. 2(b).

<sup>53</sup> CERD, *General Recommendation XXX on Discrimination Against Non-Citizens*, para. 25.

<sup>54</sup> Anneliese McAuliffe, “Will Thailand Deport Uighurs Who Fled China?,” *IRIN*, August 27, 2015, <https://www.refworld.org/docid/55e019da4.html>. For more information on the 2015 return of Chinese Uyghurs see, Amnesty International, *Between a Rock and a Hard Place: Thailand Refugee Policies and Violations of the Principle of Non-Refoulement*, pp. 23–26.

<sup>55</sup> Amnesty International, *Between a Rock and a Hard Place: Thailand Refugee Policies and Violations of the Principle of Non-Refoulement*, pp. 31–33.

<sup>56</sup> An Hai, “Hanoi Court Hands Vietnamese Blogger 10-year Prison Sentence,” *VOA News*, March 10, 2020, <https://www.voanews.com/press-freedom/hanoi-court-hands-vietnamese-blogger-10-year-prison-sentence>.

<sup>57</sup> For instance, Human Rights Watch found that the 2003 MoU between Thailand and Myanmar facilitated the return of 400 people a month, directly to the Myawaddy holding center in Myanmar. Human Rights Watch, *Out of Sight, Out of Mind: Thai Policy toward Burmese Refugees*, February 2004, <https://www.hrw.org/sites/default/files/reports/thailand0204.pdf>, p. 7.

There are also concerns of reports that agents of foreign states are threatening forced return of refugees. While Thai authorities restrict access to Uyghur detainees, there have been reports that Chinese officials visit Uyghur detainees regularly, after Thailand forcibly repatriated 100 detained Uyghur detainees to China.<sup>58</sup> According to media reports, Xing Jian, a Chinese refugee reportedly arrested and detained in an IDC following cooperation between the Thai and Chinese police, was asked to sign a document saying that he would voluntarily return to China.<sup>59</sup> According to AAT, embassy officials sometimes visit high-profile, political refugees and asylum seekers detained in IDCs to convince them to return to their countries.

### **Given Thailand's obligations under ICERD, we recommend that the Committee ask the RTG to:**

- Enact legislation or include provisions in the Immigration Act and/or National Screening Mechanism to protect refugees and asylum seekers from forced return or *refoulement* to their home countries.
- Clarify its cooperation with foreign authorities to *refoul* refugees and asylum seekers.
- Respect the right to *non-refoulement* by refraining from forcibly returning refugees and asylum seekers, including the practice of “pushing back” by sea or land refugees and asylum seekers from neighboring countries.

## **Right to Non-Discrimination (Article 1)**

The Convention prohibits discrimination against non-nationals.<sup>60</sup> Differentiation between citizens and non-citizens in the enjoyment of rights is permitted only in limited circumstances and cannot detract from the rights or freedoms under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, or the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>61</sup> Thai authorities have violated this prohibition against discrimination in two respects.

<sup>58</sup> Pimuk Rakkanam and Nontarat Phaicharoen, “Thailand: 7 Uyghurs Sentenced for Detention Center Escape,” BenarNews, March 9, 2020, <https://www.benarnews.org/english/news/thai/prison-sentence-03092020150331.html>.

<sup>59</sup> New Tang Dynasty Television, “躲过中共跨国抓捕 邢鉴吁关注滞泰中国难民”, March 10, 2020,

<https://www.ntdtv.com/gb/2020/03/10/a102796153.html>. According to the article: “On 3 December 2019, someone allowed Xing Jian to sign a document indicating that he would voluntarily return to China. He said, the head of the room told him, ‘you have been given a ‘red card,’ similar to an Interpol notice, which means you can be handed over to China at any time.” (Unofficial translation).

<sup>60</sup> ICERD, Art. 1; CERD, *General Recommendation XXX on Discrimination against Non-Citizens*, para. 4.

<sup>61</sup> *Id.*, para. 2.

First, Thai authorities have violated the right of refugees to public health in Thailand through impermissible discrimination. Article 5 of the ICERD requires States to realize everyone’s right to “public health, medical care, social security and social services,” and the ICESCR requires States to guarantee the right of access to “health facilities, goods and services on a non-discriminatory basis.”<sup>62</sup> The Thai Constitution similarly seeks to ensure that “the people receive efficient public health services universally.”<sup>63</sup>

However, in practice, refugees and asylum seekers are often denied healthcare as non-Thai nationals. For example, in some cases, health facilities in Thailand reportedly turned refugees and asylum seekers away due to their lack of identification documents.<sup>64</sup> Additionally, the Thai health insurance scheme only covers Thai nationals and certain groups of migrant workers.<sup>65</sup> As a result, many refugees and asylum seekers reportedly have difficulties affording health insurance or healthcare costs.<sup>66</sup> Camp-based refugees, who rely almost entirely on humanitarian organizations to provide healthcare, similarly have reported difficulties accessing quality healthcare.<sup>67</sup> Restricting refugees’ and asylum seekers’ access to health care and health insurance is a breach of Thailand’s obligations under ICERD to realize everyone’s right to public health without discrimination.<sup>68</sup>

Second, Thai authorities have failed to prevent discrimination against refugees and asylum seekers in the enjoyment of their right to work. Article 5(e)(i) guarantees everyone’s—including non-citizens—“rights to work” and to “free choice of employment.”<sup>69</sup> This

<sup>62</sup> *Id.*, Art. 5. See also, CERD, *General Recommendation XXX on Discrimination against Non-Citizens*, paras. 29 and 36; See also, CERD, *Concluding Observations on the Combined Twenty-First to Twenty-Third Periodic Reports of Pakistan*, U.N. Doc. CERD/C/PAK/CO/21-23, October 3, 2016, para. 38 (“The Committee recommends that the State take effective measures to ensure the right of refugees to access healthcare and other public services”); U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, U.N. Doc. E/C.12/2000/4, August 11, 2000, para. 43. See also, U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No. 31: The Right to Health*, June 2008.

<sup>63</sup> Constitution of the Kingdom of Thailand, 2017, Art. 55.

<sup>64</sup> Daron Tan and Manachaya Yankittikul, “A Looming Catastrophe: COVID-19, Urban Refugees, and the Right to Health in Thailand,” *Refugee Law Initiative*, May 11, 2020.

<sup>65</sup> Health Insurance System Research Office, *Thailand’s Universal Coverage Scheme: Achievements and Challenges. An Independent Assessment of the First 10 years (2001-2010)*, May 2012, [http://www.hisro.or.th/main/download/10UCS\\_Eng.pdf](http://www.hisro.or.th/main/download/10UCS_Eng.pdf).

<sup>66</sup> Daron Tan and Manachaya Yankittikul, “A Looming Catastrophe: COVID-19, Urban Refugees, and the Right to Health in Thailand,” *Refugee Law Initiative*, May 11, 2020.

<sup>67</sup> This is discriminatory to the extent that the Thai authorities do not provide healthcare to camp-based refugees but rely instead on the goodwill of the international community to fill this gap. See, Joshua Carroll, “Stress of Return Stalks Myanmar Refugees in Thai Border Camps,” *Al Jazeera*, June 20, 2019, <https://www.aljazeera.com/news/2019/06/stress-return-stalks-myanmar-refugees-thai-border-camps-190620062852897.html>.

<sup>68</sup> CERD, *General Recommendation XXX on Discrimination against Non-Citizens*, para. 4. See also, for example, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/USA/CO/6, May 8, 2008, para. 32.

<sup>69</sup> ICERD, Art. 5(e)(i). See also, CERD, *General Recommendation XXX on Discrimination Against Non-*

obligation includes removing obstacles that prevent the enjoyment of the right to work.<sup>70</sup> The Committee has also underscored the obligation of States to put in place measures to ensure that non-citizens do not face discrimination in their working conditions or work requirements.<sup>71</sup>

Despite these obligations, refugees and asylum seekers are denied the right to work due to their lack of legal status in Thailand. Under Thai law, refugees and asylum seekers are not permitted to work in Thailand.<sup>72</sup> While the National Screening Mechanism is expected to provide certain rights for refugees, the right to work is not included.<sup>73</sup> Thus, refugees and asylum seekers are discriminatorily denied the right to work legally in Thailand.

The RTG's 2019 periodic report to the Committee highlights a number of services, legal aid, and remedies that are provided to all employees regardless of their legal status.<sup>74</sup> Although Thailand's Labor Protection Act and other domestic labor laws apply equally to non-nationals,<sup>75</sup> employers often take advantage of refugees and asylum seekers lacking legal status to withhold wages or arbitrarily terminate employment.<sup>76</sup> A lack of adequate monitoring and enforcement of Thailand's labor laws, particularly with regard to how these laws apply to refugees and asylum seekers, constitute violations of the RTG's obligations to protect refugees' and asylum seekers' right to work without

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*Citizens*, para. 29 (holding that States should “remove obstacles that prevent the enjoyment of economic, social, and cultural rights by non-citizens” including in the area of employment). See also CERD, *Concluding Observations of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Azerbaijan*, U.N. Doc. CERD/C/AZE/CO/6, September 6, 2009, para. 5 (in which the Committee urges the State to ensure that displaced persons have equal opportunity in accessing employment.).

<sup>70</sup> CERD, *General Recommendation XXX on Discrimination Against Non-Citizens*, para. 29.

<sup>71</sup> *Id.*, para. 33. See also, CERD, *Concluding Observations on the Tenth to Thirteenth Periodic Reports of Israel*, U.N. Doc. CERD/C/ISR/CO/13, June 14, 2007, para. 26.

<sup>72</sup> Immigration Act, B.E. 2522, 2017, Section 34. See also, Human Rights Watch, *Thailand: Implement Commitments to Protect Refugee Rights*, July 6, 2017, <https://www.hrw.org/news/2017/07/06/thailand-implement-commitments-protect-refugee-rights>.

<sup>73</sup> Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B E 2562, December 25, 2019.

<sup>74</sup> State Party Report, para. 21 (These include a hotline with interpreters for migrant workers, centers on Thailand's borders to screen migrant workers and reduce the risk of malpractice by recruitment agencies, and collaboration with and funds for NGOs working with migrant workers.) See also, *id.* para. 67 (“All migrant workers, including illegal migrant workers, have access to legal aid throughout remedy mechanisms under Labor Protection Act B.E. 2541 (1998).”)

<sup>75</sup> See, “Labor Protection for Illegal Foreign Workers in Thailand,” <https://www.hg.org/legal-articles/labor-protection-for-illegal-foreign-workers-in-thailand-36722> (listing a number of cases in which Thai Labor Court rulings indicate that undocumented migrant workers are protected under Thailand's labor laws.)

<sup>76</sup> AAT regularly assists clients facing legal issues with their employers, which include the withholding of wages or arbitrary termination of employment. Asylum Access, *Refugee Work Rights Report: Refugee Access to Fair and Lawful Work in Asia*, October 2019, [https://asylumaccess.org/wp-content/uploads/2019/11/Asia-RWR\\_FINAL.pdf](https://asylumaccess.org/wp-content/uploads/2019/11/Asia-RWR_FINAL.pdf), p. 34.

discrimination.

Third, the RTG fails to ensure equal access to education for refugees and asylum seekers in Thailand. Thailand's National Education Act entitles every person to free and quality public education for at least 12 years.<sup>77</sup> However, AAT has observed that public school officials refuse to enroll refugee and asylum-seeker children.<sup>78</sup> Further, the RTG has not taken steps to provide education and has relied on humanitarian agencies to oversee the educational system in refugee camps.<sup>79</sup> These actions constitute violations of the RTG's obligations to respect and protect refugees' and asylum seekers' right to education on a non-discriminatory basis.

### **Given Thailand's obligations under ICERD, we recommend that the Committee ask the RTG to:**

- Respect the right to health and employment of refugees and asylum seekers.
- Ensure that public hospitals provide access to healthcare to all refugees and asylum seekers regardless of their documentation or legal status.
- Clarify the steps that can be taken to make healthcare financially accessible for refugees.
- Provide protections to ensure that refugees are able to hold employers accountable for exploitation, abuse, and dangerous working conditions.
- Respect and fulfil the right to education by ensuring that refugee and asylum-seeker children can enroll in public schools and to work more closely with humanitarian agencies in providing education to refugees.

## **National Screening Mechanism (Article 5)**

The Committee recommended in 2012 that Thailand “adopt appropriate legislation and procedures for the protection of refugees and asylum seekers, in line with international human rights standards.”<sup>80</sup> Pursuant to this recommendation, on December 24, 2019,

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<sup>77</sup> National Education Act, 1999, Art. 10.

<sup>78</sup> Even when AAT staff have accompanied refugee children to enroll in the Non-Formal and Informal Education Center, the Center's staff refused to enroll the students without information regarding their legal status. This is despite the fact that the Head Office of Non-Formal and Informal Education confirmed with AAT in advance of their visit that their forms were correct.

<sup>79</sup> However, budget cuts further stretch the ability to provide a quality education to students. The EU reduced education funding for all the camps in Thailand by 25 percent, putting strain on the agencies' ability to provide stipends to teachers and purchase textbooks for students. APRRN, email correspondence with L.B., May 28, 2020.

<sup>80</sup> *Concluding Observations of Thailand*, 2012, para 25. This has been echoed by the Committee in other

the RTG approved the Regulation of the Prime Minister’s Office On the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562.<sup>81</sup>

## Non-discriminatory access to the screening mechanism (Article 5(a))

In order for individuals to have “equal treatment before the tribunals and all other organs administering justice” under Article 5(a) of ICERD, groups of individuals cannot be excluded from accessing the screening mechanism.<sup>82</sup> While the language of the mechanism does not exclude entire groups of persons, its drafting history indicates that the RTG may in practice exclude “people fleeing fighting from Myanmar, Rohingya, Uighur, and North Koreans”; individuals who seriously impact “international relationships”; and individuals with “special security issues.”<sup>83</sup> Such exclusions are consistent with Thailand’s current practices of reportedly restricting UNHCR from registering Lao Hmong, Vietnamese nationals, Rohingya, and Uyghur asylum seekers.<sup>84</sup>

## Impartiality and fairness of the screening (Article 5(a))

Under Article 5 of the Convention, Thailand must ensure that its screening mechanism is independent and impartial, with applications receiving individualized determinations with due consideration.<sup>85</sup> As such, the composition of the screening committee and

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countries: in Iraq, the Committee recommended that the government expedite “the adoption of the draft refugee law and implement it.” CERD, *Concluding Observations on the Combined Twenty-Second to Twenty-Fifth Periodic Reports of Iraq*, U.N. Doc. CERD/C/IRQ/CO/22-25, December 14, 2018, para 38(a).

<sup>81</sup> Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562, December 25, 2019.

<sup>82</sup> CERD, *Concluding Observations on the Combined Seventeenth to Nineteenth Periodic Reports of the Republic of Korea*, U.N. Doc. CERD/C/KOR/CO/17-19, January 10, 2019, para. 14.

<sup>83</sup> Waritsara Rungthong and Caroline Stover, “Thailand’s National Screening Mechanism: Key Issues,” *Opinio Juris*, January 28, 2020, <http://opiniojuris.org/2020/01/28/thailands-national-screening-mechanism-key-issues/>. This information is available from the Letter from the Office of the Council of State to the Secretariat of the Cabinet, December 18, 2019, [http://www.cabinet.soc.go.th/doc\\_image/2562/9933420829.pdf](http://www.cabinet.soc.go.th/doc_image/2562/9933420829.pdf), p. 3.

<sup>84</sup> Amnesty International has documented UNHCR’s past practice of not registering Lao Hmong and Vietnamese nationals. Amnesty International, *Between a Rock and a Hard Place: Thailand Refugee Policies and Violations of the Principle of Non-Refoulement*; Human Rights Watch, “Thailand: Let UN Refugee Agency Screen Rohingya,” May 21, 2020, <https://www.hrw.org/news/2020/05/21/thailand-let-un-refugee-agency-screen-rohingya>; The New Humanitarian, “Will Thailand deport Uighurs who fled China?” August 28, 2015, <https://www.thenewhumanitarian.org/feature/2015/08/27/will-thailand-deport-uighurs-who-fled-china>.

<sup>85</sup> See, CERD, *Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of China (including Hong Kong, China and Macao, China)*, August 30, 2018, U.N. Doc. CERD/C/CHN/CO/14-17, para. 36 (“All asylum-seekers have the merits of their individual cases considered by an independent and impartial authority.”) See also, CERD, *Concluding Observations on the Combined Tenth and Eleventh Periodic Reports of Japan*, U.N. Doc. CERD/C/JPN/CO/10-11, September 26, 2018, para. 36 (“All applications for asylum status receive due consideration.”); Human Rights Committee, *Concluding Observations on the*

the manner in which “experts” are appointed must ensure that refugee rights and protections are properly prioritized by other considerations.<sup>86</sup> For example, Clause 5 of the regulation provides for the establishment of a screening committee comprised of representatives from the National Intelligence Agency, National Security Council, and the Special Branch Bureau of the Royal Thai Police, among other agencies, raising concern that protection considerations may be deprioritized in the refugee determination process.<sup>87</sup> Furthermore, while the regulation includes four experts with “expertise and experience in human rights or other fields” in the Protected Person Screening Committee, the regulation does not provide clear criteria, standards, or procedures for their appointment under Clause 5(4).<sup>88</sup> The fact that these experts will be “appointed by the Commissioner-General of the Royal Thai Police” may also raise concerns of the impartiality of these experts.<sup>89</sup>

## Right to appeal (General Recommendation XXII)

The Committee has observed that the screening mechanism should provide procedural safeguards for refugees and asylum seekers and “ensure judicial appeals procedures for asylum seekers,” in particular those whose applications are denied.<sup>90</sup> At present, the National Screening Mechanism regulation only includes a right to appeal during the “pre-screening” portion of the application to determine eligibility to apply, but not during the merits phase.<sup>91</sup> The regulation provides that after registering, an official would decide whether the applicant would be eligible to file a request to be a “Protected Person.” This pre-screening result can be appealed. However, decisions by the Committee determining whether the applicant meets the criteria to be considered a “Protected Person” are final under Clause 20 of the regulation.<sup>92</sup>

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*Second Periodic Report of Thailand*, April 25, 2017, U.N. Doc. CCPR/C/THA/CO/2, para. 28.

<sup>86</sup> See, Thai Royal Gazette, Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562, Clause 5. The Committee also comprises no more than four experts with “expertise and experience in human rights or other fields”, but does not stipulate clear criteria, standards, or procedures under Clause 5(4). A “Protected Person” under the regulation is “any Aliens who enters into or resides within the Country, and is unable to, or unwilling to, return to the country of such person’s Origin due to a reasonable cause that such person will suffer danger due to the persecution as determined by the Committee, and that such person was granted status of Protected Person under this Regulation.” *Ibid.*, Clause 3.

<sup>87</sup> Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562, December 25, 2019, Clause 5.

<sup>88</sup> *Id.* Clause 5(4).

<sup>89</sup> *Ibid.*

<sup>90</sup> CERD, *Concluding Observations on the Combined Fourteenth to Seventeenth Reports of Cambodia*, U.N. Doc. CERD/C/KHM/CO/14-17, January 30, 2020, para. 36.

<sup>91</sup> Thai Royal Gazette, Regulation of the Office of the Prime Minister On the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562.

<sup>92</sup> *Id.*, Clause 20.

## Protection from arrest and detention

The RTG is obliged to respect everyone's right to freedom of movement and residence in its territory and refrain from arbitrary arrest under the Convention.<sup>93</sup> It is unclear from the regulation whether: (1) persons undergoing screening; and (2) persons deemed to be "Protected Persons" are protected from arrest and detention for immigration-related offenses. The regulation does not explicitly guarantee persons undergoing screening the right to stay in Thailand while undergoing the screening process.<sup>94</sup> Rather, the regulation permits "Protected Persons" to stay in Thailand under special circumstances or temporarily.<sup>95</sup> The regulation also provides that individuals undergoing the screening process are permitted to "reside at an appropriate location, provided that guarantee is made that he/she will report to the competent official," which may constitute custodial detention.<sup>96</sup> As a result, "Protected Persons" may remain at risk of arrest and detention under the Immigration Act.<sup>97</sup> The regulation falls short of meeting its obligations under the Convention by failing to ensure persons undergoing screening and "Protected Persons" are protected from arrest and detention.

## Protection from expulsion, deportation, and *refoulement* (General Recommendation XXX)

Under General Recommendation XXX, individuals pending expulsions and deportations should have access to effective remedies, "including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies."<sup>98</sup> This guarantee must be provided pursuant to Thailand's obligation of *non-refoulement*, which requires Thailand to not return or remove non-citizens "at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment."<sup>99</sup>

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<sup>93</sup> ICERD, Art. 5(d)(i). See also, CERD, *General Recommendation XXXI*, para. 23.

<sup>94</sup> The regulation is silent on the legal status of persons undergoing screening, in contrast to its explicit language that "Protected Persons" have the right to stay temporarily or under special circumstances under Clause 25 of the regulation. The absence of this language for "Persons under Screening" strongly suggests that they do not have this similar right.

<sup>95</sup> *Id.*, Clauses 20 and 25.

<sup>96</sup> Thai Royal Gazette, Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562, Clause 19.

<sup>97</sup> According to a Memorandum of the Office of the Council of State received by CRSP: "The Prime Minister Regulation draft is a form of subordinate legislation which cannot prevail over the Immigration Act. In order to legally stay in Thailand, all aliens must be considered under the Section 17 (in a special case, the cabinet may permit any alien or any group of aliens to enter and remain in the Kingdom under certain conditions, or may grant exemption from complying with this Act in any case), 34 (the person who can be allowed to temporary stay in Thailand), 35 (The Director-General or the competent official designated by the Director-General shall have power to permit an alien, who has entered the Kingdom for) of the Immigration Act." (Unofficial translation).

<sup>98</sup> CERD, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, para 25.

<sup>99</sup> *Id.*, para 27.



While Clause 15 of the regulation protects individuals “claiming to have a reasonable ground to be a Protected Persons” from being forcibly returned, an exception is provided “where national security is threatened.”<sup>100</sup> To prevent the *refoulement* of refugees, the RTG should bring this exception in line with international standards.<sup>101</sup> Further, the regulation is unclear as to whether individuals can challenge deportation orders.<sup>102</sup> The RTG must also avoid the blanket categorization of a particular group of people as “national security threats” based on their ethnicity, religion, or nationality.

### **Given Thailand’s obligations under ICERD, we recommend that the Committee ask the RTG to:**<sup>103</sup>

- Ensure the National Screening Mechanism is accessible to all potential refugees, including Rohingya, Uyghur, and North Korean asylum seekers, and remove ethnic- or nationality-based exclusions.
- Include in the National Screening Mechanism the right to appeal to review questions of both fact and law and the right to remain in Thailand until a final decision.
- Ensure that the National Screening Mechanism includes a provision explicitly clarifying that persons undergoing screenings and individuals determined to be in need of protection will be protected from arrest and detention.
- Ensure that the National Screening Mechanism includes a provision explicitly clarifying that the “national security” exception will be defined in line with human rights law and that persons pending deportation have the right to challenge expulsion orders.

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<sup>100</sup> Thai Royal Gazette, Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562, Clause 15 and Clause 25.

<sup>101</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, <https://www.unhcr.org/4d9486929.pdf>, para 20.

<sup>102</sup> CERD, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, para 25. The current regulation provides that any decision of the screening committee regarding the declining of “Protected Person” status is “final,” which will result in the declined person being processed “in accordance with immigration and other relevant laws”, under Clause 21.

<sup>103</sup> See, Amnesty International, Asia Pacific Refugee Rights Network, et. al., “Thailand: Ensure New Refugee Regulation Meets International Standards,” November 11, 2019.