

I. Context and Findings

(1)-Thailand hosts approximately 110,000 Burmese refugees in nine camps located along the Thai-Myanmar border.¹ In recent months in these camps, greater enforcement of restrictions on freedom of movement and the right to work, combined with decreases in resources and services, have created conditions which threaten to coercively return 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.

(2)-Despite hosting large numbers of refugees for decades, Thailand has no formal refugee law or asylum-seeking process,² nor does it provide humanitarian support for the nine refugee camps along its western border. The absence of this legal framework has exacerbated violations of international human rights law in Thailand, both inside and outside the camps.³ In addition to its failure to provide a process for asylum within domestic law, Thailand imposes harsh restrictions on Burmese refugees living within its borders. For example, all refugees are required to live within camps and are not allowed to leave without special permission.⁴ Thailand also prohibits

¹ THE BORDER CONSORTIUM (TBC), *Refugee and IDP Camp Populations: February 2015* (Feb. 2015), <http://www.theborderconsortium.org/media/58064/2015-02-feb-map-tbc-unhcr.pdf>. This figure 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, which is not officially recognized by Thailand. *Id.*

² See HUMAN RIGHTS WATCH (HRW), AD HOC & INADEQUATE: THAILAND'S TREATMENT OF REFUGEES & ASYLUM SEEKERS 1 (2012), <https://www.hrw.org/report/2012/09/12/ad-hoc-and-inadequate/thailands-treatment-refugees-and-asylum-seekers>; *see generally* Thai Immigration Act B.E. 2522 (1979) (codifying Thai law governing alien status).

³ *See generally id.* (describing Thailand's treatment of refugees).

⁴ INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), THAILAND MIGRATION REPORT 2011 120, 122 (Jerrold W. Huguet & Aphichat Chamratrithrong eds., 2011) [hereinafter 2011 IOM REPORT]. Camp passes are required for exit and may be issued for hospital visits, education, or NGO vocational training. *Id.*

refugees from working outside camps.⁵ Opportunities to work inside the camps are limited and generally do not generate enough income to allow for self-reliance.⁶

(3)-Thailand has never allowed UNHCR to have a formal role in operating the camps.⁷ Food, shelter materials, services, and other aid are provided by NGOs, which depend on donations from international funders to meet camp residents' needs.⁸ The restrictions and limitations Thailand imposes have made refugees in the camps highly reliant on humanitarian aid, and therefore particularly vulnerable to cuts in donor funding.⁹ Thailand itself has no government structure to provide humanitarian aid or refugee protection.¹⁰

(4)-Following the May 2014 coup and the enactment of the interim Constitution,¹¹ the situation for refugees on the ground has become strikingly less secure.¹² Since the coup, Thailand has more strictly enforced prohibitions on leaving the camps.¹³ Camp passes granting permission for temporary leave are more difficult to obtain and more limited in scope and duration.¹⁴ If any

⁵ HRW, *supra* note 2, at 5.

⁶ See 2011 IOM REPORT, *supra* note 4, at 121.

⁷ HRW, *supra* note 2, at 19.

⁸ *Id.*

⁹ *Id.*

¹⁰ See Adam Saltsman, *Beyond the Law: Power, Discretion, and Bureaucracy in the Management of Asylum Space in Thailand*, 27 J. REFUGEE STUD. 457, 462 (2014).

¹¹ The constitution was passed without public consultation and with widespread public condemnation. See *Thailand: Interim Constitution Provides Sweeping Powers*, HRW (July 25, 2014), <http://www.hrw.org/news/2014/07/24/thailandinterimconstitutionprovidesweepingpowers> (critiquing the 2014 interim constitution for granting too much authority to the Thai government); *Open Letter Condemning the Thai Junta's Interim Constitution*, PRACHATAI ENGLISH (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 *id.*

¹² THE BORDER CONSORTIUM (TBC), PROGRAMME REPORT: JANUARY–JUNE 2015 10 (2015) [hereinafter TBC JANUARY–JUNE 2015 PROGRAM REPORT].

¹³ See *id.* at 9.

¹⁴ 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). LEITNER CENTER FOR INTERNATIONAL LAW AND JUSTICE, 2015 CROWLEY PROGRAM REPORT [hereinafter 2015 CROWLEY REPORT] (unpublished manuscript) (on file with author).

written policies have 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.¹⁵ However, since the coup, refugees have reported to us that egress has been tightly limited; many have even reported instances where Thai authorities have set up surprise checkpoints at areas surrounding camp perimeters and arrested exiting refugees.¹⁶

(5)-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.¹⁷ 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 support for programs in Myanmar.¹⁸ In reaction, Thailand has not supplemented its own funding, supplies, or services, but instead has selectively enforced unwritten policies that ultimately make it even more difficult for refugees to meet their most basic needs. NGOs provide only limited resources, and the denial of refugees' ability to

¹⁵ See generally HRW, *supra* note 2, at 31-36.

¹⁶ "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 [3500 baht], and then I was released." Anonymous Interview with Camp Refugee, 2015 CROWLEY REPORT, *supra* note 14; see also TBC, PROGRAMME REPORT: JULY–DECEMBER 2014 20 (2015), <http://www.theborderconsortium.org/media/57485/2014-6-Mth-Rpt-Jul-Dec.pdf> [hereinafter TBC JULY–DECEMBER 2014 PROGRAM REPORT].

¹⁷ "After the coup, the dependency on rations increased at a time when the rations are decreasing the most." Anonymous Interview with NGO Staff Person, 2015 CROWLEY REPORT, *supra* note 14.

¹⁸ 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 TBC JANUARY–JUNE 2015 PROGRAM REPORT, *supra* note 12, at 65; HRW, *supra* note 2. Donor fatigue also increases with the intractability of the refugee crisis and apparent lack of political progress between minority groups and the Myanmar government. TBC JANUARY–JUNE 2015 PROGRAM REPORT, *supra* note 12, at 65. Moreover, the global financial crisis continues to impact state budgets for foreign 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?*, VOXEU (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 REPORT, *supra* note 12, at 70.

secure additional income/resources outside camp results in their fundamental rights being negatively impacted in a variety of areas including food, shelter, healthcare, and education.¹⁹

(6)-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.²⁰ Following a succession of cuts, rice rations were further reduced in 2015 to a standard per person allotment of 1505 kcal/day, 39.5 percent below the minimum international standard, with additional cuts to rice and charcoal set for September 2015.²¹ NGOs expect ration reductions to continue through the next year.²² The Leitner Center spoke with many refugees who reported continuing decreases in food rations.²³ 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.²⁴

(7)-Refugee access to shelter has also diminished, beginning with a 2011 reduction in building materials.²⁵ Thailand only allows refugees to build temporary shelters and prohibits the construction of permanent structures made from more durable materials, limiting the integrity of

¹⁹ TBC JANUARY–JUNE 2015 PROGRAM REPORT, *supra* note 12.

²⁰ See HRW, *supra* note 2, at 35; see also TBC, FOOD ASSISTANCE [hereinafter FOOD ASSISTANCE], <http://www.theborderconsortium.org/what-we-do/thailand/food-assistance/>; see also TBC JANUARY–JUNE 2015 PROGRAM REPORT, *supra* note 12. The “standard” rice ration for adult refugees was decreased to 9 kilograms (kg) per person, per month (pp/pm) from 10 kg pp/pm. *Id.* Some refugees falling into the “Vulnerable” category also saw a reduction to 11 kg pp/pm from 12 kg pp/pm. *Id.*

²¹ See *id.* at 25.

²² See *id.* at 26-28.

²³ “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.” Anonymous Interview with Camp Refugee, 2015 CROWLEY REPORT, *supra* note 14.

²⁴ 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. *Id.* (containing 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.”).

²⁵ See HRW, *supra* note 2, at 31.

the houses in which refugees can live.²⁶ Because refugees are denied permission to leave the camps, refugees are prevented from acquiring additional outside repair materials²⁷—posing particular difficulties during the rainy season when camp residents are prevented from adequately protecting themselves from inclement weather.²⁸

(8)-The 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.²⁹ Some interviewees reported that, while previously any camp resident who was sick could be referred to a nearby hospital, now they are only referred if their case is “very serious.”³⁰

(9)-Finally, the refugee education system is no longer affordable for many families because of increased tuition fees.³¹ Residents of Ban Mai Nai Soi and Mae La camps, for example, reported that funding cuts have meant that NGOs do not have enough money to pay teachers' stipends, and so families must now pay school fees.³² The quality of education in the camps has also suffered, as lower pay leads to higher turnover rates and inadequate training for teachers.³³

²⁶ “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.” Anonymous Interview, 2015 CROWLEY REPORT, *supra* note 14.

²⁷ See HRW, *supra* note 2, at 31–32.

²⁸ “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.” Anonymous Interview with NGO Staff Person, 2015 CROWLEY REPORT, *supra* note 14.

²⁹ See HRW, *supra* note 2, at 30–33.

³⁰ See *id.*; see also Anonymous Interview with Camp Refugee, 2015 Crowley Report, *supra* note 14 (“This 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).”).

³¹ See HRW, *supra* note 2, at 33–34.

³² “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.” Anonymous Interview with Camp Refugee, 2015 CROWLEY REPORT, *supra* note 14.

³³ See HRW, *supra* note 2, at 33–34.

(10)-The combination of increased enforcement of restrictions and ongoing service cuts has caused concerns among refugees that forced repatriation may be following shortly, despite evidence that Myanmar is not safe for returns.³⁴ Although the international community has been optimistic about Myanmar's peace prospects due to the transition from military to civilian rule in 2011, conditions in Kayin and Kayah states—where most Burmese refugees in the Thai camps are from—remain insecure.³⁵ In July 2014, the Thai junta entered into an agreement with the Myanmar government to work together for the future repatriation of Burmese refugees.³⁶ Officials have stated that refugees will not be forced to return against their will.³⁷ Nevertheless, as we heard again and again during our research this past summer, “[e]veryone is worried about forced repatriation.”³⁸ NGOs and many refugees also expressed concerns that cuts to essential services compounded by Thailand's heightened restrictions will essentially coerce refugees to return to Myanmar before it is safe.³⁹

II. Analysis

(11)-While Thailand is not a party⁴⁰ to the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”)⁴¹ and its 1967 Optional Protocol,⁴² the rights of refugees living in

³⁴ See Thin Lei Win, *Thai Military Conducts Refugee Headcount, Sparking Fears of Forced Repatriation*, THOMSON REUTERS FOUND. (Jul. 21, 2014), <http://www.trust.org/item/20140721092847-kd7i3/>. See also *infra* Part II.C.

³⁵ See *infra* Part II.C.

³⁶ TBC JULY–DECEMBER 2014 PROGRAM REPORT, *supra* note **Error! Bookmark not defined.**, at 11.

³⁷ *The Tide Is Turning for Burmese in Thailand, But Which Way?*, REFUGEES INT’L BLOG (Aug. 29, 2014), <http://refugeesinternational.org/blog/tide-turning-burmese-thailand-which-way>; Naw Noreen & Dene-Hern Chen, *Thai Army Spokesman Says Refugee Return Will be a “Long Process”*, DVB (July 14, 2014), <http://www.dvb.no/news/thai-army-spokesman-says-refugee-return-will-be-a-long-process-burma-myanmar/42290>.

³⁸ 2015 CROWLEY REPORT, *supra* note 14.

³⁹ A directly impacted NGO described the false choice that refugees face by saying, “When you are put in a position with decreasing options—with less and less services—people will choose to go back.” However, they added, “It is not time for refugees to go back because it is not safe.” *Id.*

⁴⁰ See *Ratification of 18 International Human Rights Treaties*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), <http://indicators.ohchr.org> (last visited Sep. 21, 2015).

Thailand are still protected by the many international human rights treaties to which Thailand is a State Party.⁴³ 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, healthcare, and education; freedom of movement; the right to work; and protection from refoulement.

A. Rights to Adequate Standard of Living (Food, Shelter, Healthcare, & Education)

(12)-Worsening conditions in Thai refugee camps are leading to violations of the right to an adequate standard of living—including the interlocking rights to food, shelter, healthcare, and education.⁴⁴ These rights, guaranteed by Articles 11, 12, 13, and 14 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), are afforded to everyone “without discrimination of any kind as to . . . national or social origin . . . or other status.”⁴⁵ They therefore protect not just Thai citizens, but also refugees and asylum seekers living in Thailand.

⁴¹ 189 U.N.T.S 137 (entered into force Apr. 22, 1954).

⁴² 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

⁴³ See *infra* Part II.A–B.

⁴⁴ See International Convention on Economic, Social and Cultural Rights (ICESCR), 993 U.N.T.S 3 (entered into force Jan. 3, 1976). Thailand has been a party to ICESCR since September 5, 1999. OHCHR, *Status of Ratifications*, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=172&Lang=EN (last visited Sep. 21, 2015). Article 11 of ICESCR requires states to ensure the right to an adequate standard of living, which includes adequate food, housing, and the continuous improvement of living conditions. Under ICESCR Article 12, States Parties are also obligated to ensure everyone’s right to the highest attainable standard of health. Article 13 States Parties must recognize everyone’s right to education.

⁴⁵ ICESCR art. 2 (emphasis added); see also COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (CESCR), *General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights*, E/C.12/GC/20, ¶ 30 (2009) (stating that “Covenant rights apply to everyone including non-nationals, such as refugees [and] asylum-seekers . . . regardless of legal status and documentation.”).

(13)-Thailand’s actions—and inaction—constitute a violation of the right to adequate food.⁴⁶ As the Committee on Economic, Social, and Cultural Rights (“CESCR”) has noted, “[v]iolations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States . . . [including] denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is proactive[, such as] the prevention of access to humanitarian food aid in internal conflicts or other emergency situations.”⁴⁷ Thailand is bound under its treaty obligations to address worsening conditions of malnutrition and under-nutrition⁴⁸ in the camps due to decreases in funding.

(14)-In relation to shelter, CESCR has stated that “the right to housing should not be interpreted in a narrow or restrictive sense which equates it with . . . shelter provided by merely having a roof over one’s head . . . [r]ather it should be seen as the right to live somewhere in security, peace and dignity.”⁴⁹ Furthermore, the Committee has defined habitability as “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.”⁵⁰ Thailand not only does not supply materials for housing and repairs, but also prohibits refugees from building durable and protective housing—a clear violation of the right to adequate shelter.⁵¹

⁴⁶ ICESCR art. 11 (providing that “[t]he 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”) (emphasis added); *see also* CESCR, *General Comment No. 12 on The Right to Adequate Food*, E/C.12/1999/5, ¶ 15 (1999).

⁴⁷ CESCR, *supra* note 46, ¶ 15 (stating that “[t]he obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access” and that “[t]he obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.”).

⁴⁸ This issue was addressed by CESCR as early as 1999. *See id.* ¶ 5 (stating that “[t]he Committee observes that . . . malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from hunger, also exist”).

⁴⁹ *See* CESCR, *General Comment No. 4 on The Right to Adequate Housing*, E/1992/23, ¶ 7 (1991).

⁵⁰ *Id.* ¶ 8d.

⁵¹ ICESCR art. 11 (“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 . . . and housing . . .”).

(15)-The right to health issues is equally implicated.⁵² This right, in particular, contains a strong presumption against retrogressive measures.⁵³ Decreased resources and services in refugee camps have created declining conditions in the quality and availability of skilled medical personnel and equipment.⁵⁴ Thailand has made no effort to protect refugees from the retrogressive effect of decreased funding and/or implement alternative health facilities and services.⁵⁵

(16)-Finally, refugees are experiencing violations of the right to education.⁵⁶ Thailand does not provide educational services within the camps; as funding decreases for the NGOs that do provide services, Thailand must ensure—under its ICESCR Article 14 obligations—that free primary education is provided to everyone within its jurisdiction.⁵⁷

(17)-Although Thailand is ultimately accountable for the protection of ICESCR rights within its jurisdiction, it is important to note here that we recognize that the burden of humanitarian assistance should lie not just with Thailand, but with all other ICESCR States Parties as well. For Thailand to meet its obligations under international law regarding the provision of food,

⁵² *Id.* art. 12.

⁵³ CESCR, *General Comment No. 14 on The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, ¶ 32 (2000).

⁵⁴ *See id.* ¶ 12.

⁵⁵ *See id.* (stating that “[t]he obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.”).

⁵⁶ ICESCR arts. 13 & 14.

⁵⁷ *See id.* art. 14.; *see also* CESCR, *General Comment No. 13 on The Right to Education*, ¶¶ 6b, 10, & 47 (1991).

housing, healthcare, and education for refugees, other States Parties have an obligation and responsibility to provide support, funding, resources, and services.⁵⁸

B. Freedom of Movement and Right to Work

(18)-Under Article 12 of the International Covenant on Civil and Political Rights (“ICCPR”)⁵⁹ and ICESCR Article 6,⁶⁰ Thailand is also obligated to ensure the freedom of movement and the right to work, respectively, for refugees within its territory. First, Thailand’s strict confinement of refugees to camps contravenes the right to freedom of movement. In particular, under ICCPR Article 12(3), freedom of movement “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 ICCPR.]” The Human Rights Committee has also stated that Article 12(3) “clearly indicates that it is not sufficient that the restrictions serve the permissible purposes [, but] they must also be necessary to protect them.” This means that any “[r]estrictive measure[] must conform to the principle of proportionality . . . [;] must be appropriate to achieve [its] protective function; . . . [and] must be the least intrusive instrument amongst those which might achieve the desired result”⁶¹ Thailand’s unwritten policy not allowing refugees to leave

⁵⁸ See, e.g., CESCR, *supra* note 46, ¶ 20; see also ICESCR, art. 11 (clarifying that protection of the right to food and housing explicitly recognizes “the essential importance of international co-operation based on free consent,” and that the same is true for the right to health and education); CESCR, *supra* note 49, ¶ 19; .

⁵⁹ 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), art. 12 (guaranteeing that “[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”).

⁶⁰ ICESCR arts. 6 & 7 (protecting not only the right to work, but also providing for requirements of fair wages, healthy working conditions, and equal opportunities for employment in freely accepted work).

⁶¹ HUMAN RIGHTS COMMITTEE (HRC), *General Comment 27: Article 12 (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, ¶ 14. (1999); see also *id.* ¶ 4 (“Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence.”)

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. In fact, these restrictions are especially egregious in light of the resulting further violations of the rights to standard of living—including food and housing, healthcare, and education.⁶²

(19)-Thailand is also obligated to guarantee the right to work under Article 6 of ICESCR, which recognizes the individual’s right to work and “gain his living wage” by work that he “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 [ICESCR] 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.”⁶³ Not only is Thailand not meeting its minimum core requirements under ICESCR in terms of the rights to food, housing, healthcare, and education; 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.⁶⁴

⁶² *Id.* ¶¶ 2 & 14.

⁶³ CESCR, *General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, ¶ 30 (2009).

⁶⁴ HRC, *supra* note 61, ¶ 2 (“The permissible limitations which may be imposed on the rights protected under article 12 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.”). For the right to food to have any meaning, the food must be actually made “available” to the people, and “availability” is defined as “the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning [sic] distribution, processing and market systems that can move food from the site

C. Coerced Returns & The Principle of Non-Refoulement

(20)-While the principle of non-refoulement is most clearly articulated in Article 33 of the Refugee Convention,⁶⁵ to which Thailand is not a State Party, this same non-refoulement language is echoed in several other treaties to which Thailand is a signatory, including the ICCPR, CAT, and CED.⁶⁶ 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.⁶⁷ 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 States Parties to either recognize refugee rights in general, accede to the Refugee Convention, or both.⁶⁸

of production to where it is needed in accordance with demand.” *Id.* ¶ 12.; *see also* ICESCR art. 2; CESCR, *General Comment No. 3 on the Nature of States Parties' Obligations*, ¶ 10 (1990) (stating that failing to establish minimum core obligations would deprive ICESCR of its “raison d’être.”); *id.* 9; *id.* ¶ 33. (stating that “[t]he obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health.”); CESCR, *supra* note 57, ¶ 47.

⁶⁵ *See* Refugee Convention, *supra* note 41, art. 33 (“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.”).

⁶⁶ For example, both Article 3 of the Convention against Torture (CAT) and Article 16 of the Convention on Enforced Disappearances (CED) 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].” HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* ¶ 12 (2004).

⁶⁷ *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).

⁶⁸ 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

(21)-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 returning 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.⁶⁹ In Kayin (Karen) 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.⁷⁰ Among refugees, these actions have led to a general distrust of the ceasefire.⁷¹ 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.⁷² 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.⁷³ There is a looming threat of conflict, which could be exacerbated by an influx of returning refugees.

system within Thailand resulting in constructive refolement. HRC, *Report of the Working Group on the Universal Periodic Review*, ¶¶ 89.70, 89.71, 89.15, 89.16, 89.68, and 89.69.

⁶⁹ BURMA P'SHIP, *More Clashes, More Talks, No Protection* (Aug. 31, 2015), <http://www.burmapartnership.org/2015/08/more-clashes-more-talks-no-protection/>.

⁷⁰ KAREN HUMAN RIGHTS GRP. (KHRG), *TRUCE OR TRANSITION? TRENDS IN HUMAN RIGHTS ABUSE AND LOCAL RESPONSE IN SOUTHEAST MYANMAR SINCE THE 2012 CEASEFIRE* (2014) [hereinafter *TRUCE OR TRANSITION?*], <http://www.khrg.org/2014/05/truce-or-transition-trends-human-rights-abuse-and-local-response#sthash.a3mh65dK.dpuf>.

⁷¹ *Id.* at 106–17.

⁷² *Id.* at 32–46.

⁷³ *Id.* at 89–90; see generally KHRG, *LOSING GROUND: LAND CONFLICTS AND COLLECTIVE ACTION IN EASTERN MYANMAR* (2013), <http://www.khrg.org/sites/default/files/losinggroundkhrg-march2013-fulltext.pdf>; KHRG, 'WITH ONLY OUR VOICES, WHAT CAN WE DO?': *LAND CONFISCATION AND LOCAL RESPONSE IN SOUTHEAST MYANMAR* (2015) [hereinafter *WITH ONLY OUR VOICES, WHAT CAN WE DO?*], http://www.khrg.org/sites/default/files/full_with_only_our_voices_-_english.pdf; see generally Nina Schuler, *Kayah State Socioeconomic Analysis*, MERCY CORPS (Sept. 2013), http://www.mercycorps.org/sites/default/files/251013_Kayah%20SEA%20Main%20Report%20FINAL%20.pdf.

Furthermore, landmines are scattered all over Kayin and Kayah (Karenni) states, posing significant threats to individuals' physical security.⁷⁴

(22)-If refugees are coerced to return to Myanmar before conditions are safe, Thailand may have violated the principle of non-refoulement. Beyond direct refoulement, refugees are also protected from *indirect* refoulement; states cannot coerce refugees to return through a deprivation of basic needs.⁷⁵ 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.⁷⁶

⁷⁴ TRUCE OR TRANSITION?, *supra* note 70, at 61–63, 65–66; *see also Ceasefire but No Demining in Myanmar's Kayah State*, IRIN (July 25, 2014), <http://www.irinnews.org/report/100404/ceasefire-but-no-demining-in-myanmar-s-kayah-state>; Guy Dinmore, *Three Years, Zero Landmines Cleared*, MYAN. TIMES (July 14, 2015), <http://www.mmtimes.com/index.php/home-page/142-in-depth/15497-three-years-zero-landmines-cleared.html>.

⁷⁵ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), NOTE ON THE PRINCIPLE OF *NON-REFOULEMENT* (1997), <http://www.refworld.org/docid/438c6d972.html>; *see also Report of the Special Rapporteur on the Human Rights of Migrants*, A/HRC/20/24 (Apr. 2, 2012), ¶ 65 (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).

⁷⁶ *Id.*; *see also* Vignos, *supra* note 67, at 206; *see also* HRC, *supra* note 66, ¶ 12. Thailand has signed, but not ratified, the 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, the Committee Against Torture expressed concerns about the Thai government's possible *refoulement* of Burmese refugees and asylum seekers. The Committee reminded Thailand that enabling or executing *refoulement* violates the country's obligations under Article 3 of CAT, and it urged Thailand to accede to the Refugee Convention and its Protocol. The Committee 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.

III. 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, healthcare, 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.