



INTERNATIONAL  
COMMISSION  
OF JURISTS



UNITED NATIONS COMMITTEE ON THE ELIMINATION OF ALL FORMS OF  
RACIAL DISCRIMINATION

**81<sup>st</sup> Session, Geneva**  
6 – 31 August 2012

**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) AND  
THE JUSTICE FOR PEACE FOUNDATION (JPF)  
TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL  
DISCRIMINATION (CERD)  
ON THE COMBINED FIRST TO THIRD PERIODIC REPORTS OF THAILAND  
UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL  
DISCRIMINATION**

Submitted August 2012

*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

**ICJ AND JPF SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF  
RACIAL DISCRIMINATION ON THE COMBINED FIRST TO THIRD PERIODIC REPORTS OF  
THAILAND**

The International Commission of Jurists (ICJ) and the Justice for Peace Foundation (JPF) welcome the opportunity to submit their comments to the Committee on the Elimination of all forms of Racial Discrimination (CERD, the Committee) in relation to the Committee's consideration of the combined first to third periodic reports of Thailand, submitted under article 9 of the Convention on the Elimination of all forms of Racial Discrimination (the Convention). In this submission, attention is paid to obstacles to justice which arise for certain groups of women in Thailand in the context of: (1) immigration laws and regulations affecting migrants from Burma/Myanmar, Cambodia and Laos; (2) the operation of plural justice systems in camps for displaced persons from Burma/Myanmar; and (3) the operation of formal and informal plural justice systems for Malayu Muslims in the Southern Border Provinces.

**INTRODUCTION**

Over the past decade, Thailand has taken a range of important and commendable steps to improve the ability of women to enjoy and exercise their rights on the basis of equality and free from discrimination. These have included measures intended to improve women's access to appropriate legal protection and remedy and reparation for a variety of human rights violations and abuses, including sexual and gender-based violence. Examples include the enactment of dedicated domestic violence legislation, improved criminal law provisions dealing with sexual violence, and Constitutional guarantees protecting women's rights in the context of criminal proceedings and cases of sexual violence.

Despite strong Constitutional guarantees of equality and non-discrimination, a range of factors appear to frequently undermine effective access to these protective and remedial avenues in practice by women from certain ethnic minorities and migrant communities. This exposes them to multiple and intersecting forms of discrimination and often results in a denial of their human rights in contravention of Convention and general international human rights law. Indeed as the Committee has underlined, "racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination ... affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life."<sup>1</sup> Similar statements have also been made by other international monitoring bodies.<sup>2</sup>

This submission is intended to provide the Committee with a brief summary of some of these issues. It particularly relates to the obligations on States Parties deriving from Articles 5(a) and (b) of the Convention. It is drawn from the forthcoming *ICJ & JPF Report on Women's Access to Justice in Thailand: Identifying the Obstacles and Need for Change*. That report synthesizes the results of a year-long process of research and consultation by the ICJ and JPF

---

<sup>1</sup> CERD, General Recommendation XXV, Gender Related Dimensions of Racial Discrimination, 2000, Para. 1

<sup>2</sup> For example CESCR has highlighted that "some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying" CESCR General Comment No. 20, Para. 17. CEDAW has held that "certain groups of women in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, case or other factors." CEDAW General Recommendation No. 25, Para.12. 77. Similarly the Human Rights Committee has noted that discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status, HRC General Comment No. 28, Para. 30.

exploring normative and practical obstacles to justice that women in Thailand, including women from migrant communities and ethnic minorities, continue to face.

## **I. ARTICLES 5(A) AND 5 (B) CERD: IMMIGRATION LAWS AND REGULATIONS AFFECTING MIGRANTS FROM BURMA/MYANMAR, CAMBODIA AND LAOS**

A great number of migrants in Thailand are from neighbouring countries, and specifically Burma/Myanmar, Cambodia and Laos. Many of these are low-wage migrant workers who are documented under Government registration, nationality verification or imported worker schemes for migrant workers.<sup>3</sup> Many also remain undocumented, without legal status to reside or work in Thailand. ICJ and JPF research and consultation indicates that, whatever their status, in practice a range of hurdles typically combine to limit the ability of migrant workers from these countries to seek legal protection or remedy and reparation when they face human rights abuses and violations. These barriers impact women from these communities in a number of specific ways.

### Undocumented Women Migrants: A Climate of Impunity:

According to Thai immigration law, undocumented migrants brought to the attention of the authorities should be arrested and deported.<sup>4</sup> Except in trafficking cases the terms of the law do not specify that undocumented migrants who have faced human rights abuses in Thailand may be enabled to remain, even for the duration of relevant legal proceedings or investigations.<sup>5</sup> ICJ and JPF research and consultations indicate that, due to fears of arrest and/or deportation, many undocumented women migrants in Thailand simply may not seek legal protection, or remedy and reparation in relation to the gendered rights abuses and violations they face, including for example equality rights infringements, sexual violence and harassment or domestic violence. Those consulted by the ICJ and JPF indicated that although undocumented migrant women who have faced abuses often wish to seek remedy and reparation and the accountability of the perpetrators, they do not consider that they can approach the relevant authorities without risking arrest and deportation. In the rare cases where undocumented women migrants do seek help or make a complaint, it appears they may often be arrested and deported, or released following the payment of a bribe. Priority may often be given to the application of immigration law above and beyond laws on rights protection and access to justice. Meanwhile, in those few cases where, despite a woman's deportation the human rights abuse does become the subject of legal proceedings, in the experience of those consulted by the ICJ and JPF, the case will often end in settlement due to the length of the process and the difficulties the woman will face in travelling back to Thailand to give evidence.

As a consequence of these obstacles, the prevailing view that emerged from ICJ and JPF research and consultations is that gender-based violence and equality rights abuses against undocumented women migrants regularly remain unpunished and may therefore be perpetrated with impunity. As a number of organizations have documented, this places undocumented women migrants in an extremely precarious situation, continuously at risk of serious violence and human rights abuses.<sup>6</sup> In the words of one organization working extensively with migrant communities, many live "in a constant state of insecurity in all

---

<sup>3</sup> Thailand Migration Report 2011, IOM Thailand.

<sup>4</sup> Immigration Act B.E.2522 (1979), Section 54.

<sup>5</sup> The Anti Trafficking in Persons Act B.E 2551 (2008), Section 37. Section 17 of the Immigration Act B.E.2522 (1979) does specify that the Government may decide on exceptions to the Immigration Act, allowing a migrant or group of migrants to remain in Thailand.

<sup>6</sup> For comprehensive analysis, overview and testimonies see: *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme (MAP) (advance copy shared with ICJ & JPF). See also Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010.

aspects of their lives: in public spaces, in the workplace, and in the home”.<sup>7</sup>

#### Documented Women Migrants:

Unlike undocumented migrants, migrant women workers from Burma/Myanmar, Cambodia and Laos – who are legally working in Thailand – will not necessarily be at risk of arrest and deportation upon contact with officials. However, it appears that in practice a number of other official requirements, related to their status as migrant workers, limit the extent to which they will seek legal protection and remedies. For example, their legal status will often be linked to their employer and regulations do not allow for a change of employer, except in a small number of situations.<sup>8</sup> Meanwhile, recently introduced systems assign migrant workers to a particular category and nature of work on registration and do not permit movement to another sector, or even type of work within the same sector or for the same employer.<sup>9</sup> In addition, in certain instances migrant workers are prohibited from travelling outside a specific province.<sup>10</sup> As a result of these restrictions, migrant women facing gender-based violence at home or in the workplace may simply be unable to physically leave abusive situations without breaching the terms of their work permit and thereby losing legal status and becoming undocumented. Meanwhile, many women who do leave abusive situations and therefore breach the terms of their work permit may not subsequently seek legal assistance, remedy and reparation or the accountability of the perpetrators due to fears of arrest and deportation.

#### Recommendations:

The ICJ and JPF call on the Committee to urge the Government of Thailand to:

- i) Initiate a process to identify and thereafter implement effective legal measures to ensure that migrants' immigration status in Thailand does not continue to impede access to legal protection and remedies when they face human rights abuses in Thailand. This process should involve significant consultation with civil society organizations and representatives of migrant communities as well as recourse to best practice models and experience sharing with experts from relevant countries. It should specifically address the legal protections and remedies, among others, available under the Domestic Violence Victim Protection Act, the Penal Code, the Labour Protection Act and any new gender equality legislation that is adopted.*

*Effective measures may include:*

- The short-term establishment of legal 'firewalls' between immigration law enforcement and rights protection mechanisms. This would involve ensuring through relevant safeguards, including law reform, Ministerial Regulations and other Government orders and directives, that where a woman reports or seeks protection in relation to instances of gender-based violence her immigration status will not come under scrutiny by officials and authorities and she will not be subject to arrest or deportation. Section 17 of the Immigration Act clearly enables the establishment of*

---

<sup>7</sup> *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme, p. 82 (advance copy shared with ICJ & JPF). See also Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010.

<sup>8</sup> Alien Work Act B.E. 2551 (2008), Section 26; Handbook for Employers on Migrant Registration B.E.2554 (2011), Conditions and Responsibilities of Employer Page 30, Ministry of Labor. An exception to the prohibition on changing employers specifies that where making a complaint against the employer migrants will not lose legal status or face arrest and deportation if they find a new employer within seven days. However ICJ & JPF research and consultations indicate that this may not always increase the extent to which migrant workers are willing to make complaints and pursue remedies, reparation and accountability in cases of workplace abuse by their employers, because in practice it can be very difficult to find a new employer within the designated period.

<sup>9</sup> Alien Work Act B.E. 2551 (2008), Section 26.

<sup>10</sup> Interior Ministerial Declaration (issued by the Cabinet Resolution 26 April B.E.2554 (2011)) 25 May B.E.2554 (2011), Section 4(3), allowing some migrant workers to travel in particular cases.

*such exceptions.*

- *The introduction of provisions into legal frameworks dealing with gender-based violence and immigration to provide undocumented women migrants pursuing legal protection and remedies in respect of gender-based violence with the right to receive residence and work permits and pursue longer-term regularization of status.*
- *Changes to migration registration so as to separate a migrant's legal status from their employment with a specific employer.*
- *The significant extension from the present seven-days of the time period for migrants to find a new employer in cases where they wish to complain about employee abuses.*
- *The revocation of provincial orders restricting the movement of migrant workers in certain provinces.*

## II. ARTICLES 5(A) AND 5(B) CERD: THE OPERATION OF PLURAL JUSTICE SYSTEMS IN CAMPS FOR DISPLACED PERSONS FROM BURMA/MYANMAR

A series of additional hurdles confront migrant women from Burma/Myanmar resident in displaced persons camps when they seek legal protection, remedies or accountability in respect of gendered rights abuses they face, and in particular gender-based violence. In each camp<sup>11</sup> an internal camp justice system operates and 'Camp Committees' administer justice in a wide range of cases, considering incidents and outlining remedies and imposing sanctions. The applicable rules are largely unwritten and appear to be drawn on a discretionary basis from a mix of sources including Burmese law, traditional community practices, Thai law and international standards. A process of 'reform' conducted by international civil society organizations and the Refugee Committees is ongoing with the purpose of improving, synthesizing and codifying the applicable rules. Simultaneously the Government has also specified that certain crimes denoted as "absolute jurisdiction offences" may not be dealt with by the camp justice systems and Camp Committees, but must instead be referred to the Thai justice system and dealt with under the Thai Criminal Code and Criminal Procedure Code. In such cases UNHCR or 'legal assistance committees' established by international civil society liaise with Thai officials. Such offences include non-compoundable rape, murder, assault resulting in grievous bodily harm, and sexual offences against children. It appears that if the victim so wishes, other crimes may also be dealt with by the Thai justice system, but this is not mandatory.

ICJ and JPF research indicates that for many camp residents there is significant uncertainty as to the divisions of jurisdiction between the internal camp system and the Thai system. Although clear divisions may exist in terms of the delineation of absolute jurisdiction offences, in practice the lines remain blurry and confusing. This can cause particular difficulties for those subjected to gender-based violence. For instance, non-compoundable rape is included in the list of absolute jurisdiction offences, but other sexual offences are not. Neither are other forms of gender-based violence. Yet the only existing written list of Camp Committee rules specifies that a Committee should deal with all forms of sexual and gender-based violence in the following way: "turn over to Thai authorities". As a result, in practice many women in the camps find it difficult to identify which justice system is applicable when they are subjected to different forms of gender-based violence.

Where cases of gender-based violence are brought to the attention of relevant international organizations for referral to the Thai justice system as absolute jurisdiction offences, those consulted by the ICJ and JPF expressed the view that clear processes, support structures and coordination are often absent from the way in which the cases are handled. In addition, there may often be minimal resources or support services for those victims of crime whose cases

---

<sup>11</sup> These camps for refugees from Burma/Myanmar are supervised by the Thai government, with basic material assistance (food, shelter, medicines) and protection assistance being provided by international civil society organizations and UNHCR, and with Refugee Committees, comprising representatives of camp residents, running the daily affairs of the camps and acting as liaison with the Government and international organizations.

are referred to the Thai justice system and who may require support throughout each step of a justice-seeking process. For example, it is unclear whether any counsellors are in place to support women interacting with the Thai justice system. In addition, practical needs that arise for women whose case is being dealt with by the Thai justice system are often overlooked. These needs include translation help, financial assistance, and safe and private accommodation when outside the camps.

Meanwhile, beyond absolute jurisdiction offences, the facilities in the camps to effectively enforce decisions by the internal camp justice system give rise to concern. There is often a lack of appropriate detention facilities in which to detain suspects or perpetrators. This can give rise to particularly extreme situations for women who are subjected to gender-based violence as a result of the nature of life in the camps where women cannot leave the vicinity of an alleged perpetrator. This can deter women from reporting incidents or seeking protection or remedies, as they will have significant fears of retribution and repeat violence from perpetrators who remain in proximity. In addition, it is unclear to what extent there is oversight of internal camp decisions and a meaningful possibility to appeal or seek review.

#### Recommendations:

The ICJ and JPF call on the Committee to urge the Government of Thailand to:

- ii) Establish an effective process by which to ensure meaningful and ongoing consultation with women and representative organizations regarding access to justice in camps for displaced persons.*
- iii) Establish an oversight body comprising important and relevant representatives, including of women's organizations and international organizations, to monitor case referrals from such camps to the Thai justice system.*
- iv) Expedite the preparation of a cohesive set of rules to govern internal camp justice processes and in this context ensure meaningful consultation with women's representatives on draft rules. Develop interim guidelines and rules to be applied in the meantime. Ensure transparency and awareness raising initiatives regarding the development of new rules.*
- v) Provide training and ongoing education on women's rights and justice requirements to relevant actors in the camps, including Camp Committees, security officers and section leaders.*
- vi) Increase the financial and human resources available to support victim's engagement with the Thai justice system. Improve the facilities available in camps to enforce decisions and detain perpetrators.*

### **III. ARTICLES 5(A) AND 5(B) CERD: THE OPERATION OF FORMAL AND INFORMAL PLURAL JUSTICE SYSTEMS FOR MALAYU MUSLIMS IN THE SOUTHERN BORDER PROVINCES**

Since 1946, Thai law has specified that in the Southern Provinces of Pattani, Narathiwat, Yala and Satun, in the determination of civil cases concerning family and inheritance matters, and where both parties are Muslim, Courts of first-instance shall apply Islamic family and inheritance law, instead of the relevant provisions of the Thai Civil & Commercial Code.<sup>12</sup> It establishes a system whereby Datoh Justices join the Court of first-instance for consideration and determination of the case and provide the Court with an interpretation of relevant Islamic law principles and their application to the circumstances at hand.<sup>13</sup> As a result,

---

<sup>12</sup> The Act of Implementation of Islamic laws in Pattani, Narathiwat, Yala and Satun Provinces B.E. 2489 (1946), Section 3

<sup>13</sup> The Act on the Implementation of Islamic laws in Pattani, Narathiwat, Yala and Satun Provinces B.E. 2489 (1946), Section 4.

Islamic law principles, rather than the provisions of the Thai Civil & Commercial Code, apply in relation to matters such as marriage, divorce, determinations of personal status and inheritance.

In this context, ICJ and JPF research indicates that women members of the Malayu Muslim ethnic minority face certain specific difficulties in seeking to enforce their rights or access legal protection and remedies.

For example, different rules regarding marriage, divorce and inheritance are currently applied to men and women under the system which may result in gender inequality and discrimination. Many of those consulted by the ICJ and JPF indicated that when Malayu Muslim women in the provinces wish to seek a divorce, they typically do not pursue an application for divorce. Rather, they will ask male relatives to encourage their husbands to divorce them, will pay their husbands to do so or will seek to provoke their husbands to divorce them at their own initiative. This is because prevailing interpretations grant men a unilateral right to pronounce a divorce, whereas women must seek dissolution of marriage in Court and only with reference to certain limited grounds. It is unclear whether there have been any instances where, following divorce, women have sought to claim or enforce maintenance rights in Court. In addition, the regular denial of equal inheritance rights to wives and daughters can have significant repercussions in a society where many women are the primary family caregivers and breadwinners, often due to “disappearances”, killings and detentions of male relatives.

In addition there appears to be a lack of objective, transparent, and accessible information as to the content of relevant legal rights and obligations. It is unclear whether there exists any official codification of the relevant tenets and rules of Islamic law and the way in which they will be interpreted and applied in the provinces. This means that in practice the interpretation of what the applicable principles are and what remedy they dictate in a particular situation is based solely on the discretion and relevant interpretation adopted by an individual Justice Datoh. As a result, basic rule of law requirements and general principles of law regarding legality and legal certainty appear to be absent. Such requirements necessitate that legal obligations and entitlements are delineated in a manner which is sufficiently accessible, precise and foreseeable, such as to enable individuals to foresee the consequences of their action. The guiding principle is that individuals must be able to regulate their conduct with a reasonable degree of certainty as to the legal consequences of acting one way rather than another. In addition, although once a case has been dealt with by the Court of first instance the matter may be appealed to the Thai Court of Appeal, it does not appear such appeals are regularly approved. As such it appears that crucial oversight mechanisms, involving scrutiny by senior Courts, are not felt to be available in practice.

ICJ and JPF research points to significant levels of confusion as to the limits of Islamic law jurisdiction in the provinces. The distinctions between what is required as a matter of law and what is simply a prevailing religious or social approach to a particular issue appear to be blurred in some instances. This appears to carry significant adverse impacts for women's access to legal protection and remedies beyond civil law matters, for example in relation to domestic violence and marital rape. In many instances it appears from ICJ and JPF consultations that many women who have suffered domestic violence were unaware of legal remedies available to them under the Thai Criminal Code or the Domestic Violence Victim Protection Act. In addition, prevailing interpretations of religious principles in the provinces appear to be that women cannot refuse to have sex with their husbands and that sexual violence in marriage is not a matter that can be addressed by external interlocutors. As a result, there is often a mistaken assumption that such instances are outside the protection of the law or that Islamic law is applicable in such cases. In fact, domestic violence and instances of marital rape are crimes subject to Thai criminal law. Often, in order to escape domestic violence, Malayu Muslim women in the provinces appear to either physically leave the area or seek to convince their husband to divorce them.

A proposal to update the Act on the Implementation of Islamic laws in Pattani, Narathiwat, Yala and Satun Provinces is now under consideration. It does not appear that a human rights analysis, including in respect of gender equality principles, has been carried out in relation to the way in which Islamic law principles are interpreted and applied in the Southern Border Provinces and Malayu Muslim women's ability to access justice under the current system. Such a process is vital at this juncture in order to ensure that any law reform process does not perpetuate or entrench obstacles facing women but instead meaningfully addresses and responds to the specific needs of women and risks they face.

Recommendations:

The ICJ and JPF call on the Committee to urge the Government of Thailand to:

- vii) *Ahead of adopting new legislation to update the Act on the Implementation of Islamic laws in Pattani, Naarathiwat, Yala and Satun Provinces ensure that:*
- *A comprehensive human rights analysis, including in respect of gender equality principles, is carried out in relation to the way in which the law is interpreted and applied and the system in which it operates;*
  - *Meaningful consultations are undertaken with diverse groups of Malayu Muslim women from the relevant provinces; and*
  - *The draft legislation is revised in order to allow it respond to difficulties identified in relation to its human rights compliance.*
- viii) *Ensure that the draft legislation proposed for adoption incorporates human rights-protection safeguards and oversight mechanisms, including:*
- *Specification that the legislation is subject to the Thai Constitution and Thailand's international legal obligations and must be applied and interpreted in a manner that complies with Constitutional rights protections, including those relating to gender equality and non-discrimination;*
  - *Clarification that the legislation will only be applied when both parties to a case agree and specification that the Civil and Commercial Code shall apply when one party wishes;*
  - *Clarification of processes for review and appeal of first instance decisions;*
  - *Clarification of the jurisdiction of the legislation and specification of those matters in relation to which it is not applicable;*
  - *Specification that before entry into force of the legislation an official codification will be developed outlining the applicable tenets and rules of Islamic law and the relevant interpretation that will be given to them; and*
  - *Explicit direction in relevant provisions that such codification must comply with the human rights and gender equality principles under international law and standards and enshrined in the Thai Constitution and must subject to review by the Supreme Court.*
- ix) *Work with human rights and gender equality experts and the Islamic Council of Thailand, to provide ongoing and regular training on legal requirements regarding human rights, gender equality and non-discrimination to Datoh Justices, Court of First Instance Judges, and other court officials in the Southern Border Provinces.*