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Equal Rights Trust

Suggestions for the list of issues to be adopted by the
Committee on Economic, Social and Cultural Rights
at its 54th Session (pre-sessional working group)
in relation to the initial and second periodic reports submitted by:

Thailand

October 2014

Statement of Interest

1. The Equal Rights Trust submits the following suggestions for questions to be adopted by the Committee on Economic, Social and Cultural Rights (the Committee) based upon the initial and second periodic reports submitted to the Committee by Thailand at the Committee's 54th session (pre-sessional working group).
2. The Equal Rights Trust is an international non-governmental organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. It focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. The Equal Rights Trust has been working in Thailand since 2011, in the context of a project aimed at strengthening the human rights of stateless Rohingya. The Rohingya, an ethno-religious minority group from the Rakhine region of Myanmar, are one of the most vulnerable communities in the world.¹ Over decades, the Rohingya have been stripped of legal identity, deprived of nationality and denied rights, resulting in a situation where at least 800,000 Rohingya have been rendered stateless.² As a result of the human rights abuses to which they have been subjected in Myanmar, hundreds of thousands of Rohingya have fled the country in search of safety, security and prosperity. It is estimated that there are over one million Rohingya living outside Myanmar, many with no legal status.³

¹ For a more detailed analysis of the situation of the Rohingya both within Myanmar and in the wider region, see: Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand*, 2014, section 1.3, pp. 5-13.

² UNHCR Myanmar, *2014 UNHCR Country Operations Profile*.

³ See above, note 1, p. 13.

4. Our project, implemented in partnership with the Institute of Human Rights and Peace Studies, Mahidol University, has involved research both in Myanmar and in five countries with large populations of Rohingya refugees: Bangladesh, Indonesia, Malaysia, Saudi Arabia and Thailand.

Introduction

5. In October 2014, the Equal Rights Trust published the report *Equal Only in Name: the Human Rights of Stateless Rohingya in Thailand*. The purpose of the report is to highlight and analyse the discrimination and inequality faced by the Rohingya in Thailand and recommend steps aimed at combating discrimination and promoting equality. The report is based on original testimony collected through semi-structured individual interviews with over 20 stateless Rohingya refugees living in Bangkok and the surrounding area and six Rohingya men who arrived in Kuala Lumpur, Malaysia, via Thailand in December 2012. It is also informed by a comprehensive literature review and consultation with experts and activists working on the Rohingya issue. The report presents evidence of a wide-range of human rights violations, including *refoulement*, arbitrary detention and discrimination in various areas of life. Among these human rights problems, the report highlights discrimination in respect to rights protected under the Covenant, notably the right to education, the right to the highest attainable standard of health and the right to work.
6. This submission focuses on the extent to which Thailand has met its obligations to respect, protect and fulfil the rights to equality and non-discrimination, with a particular focus on the situation of stateless Rohingya related to Covenant rights. The submission is concerned with Thailand's performance under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (the Covenant). In assessing Thailand's adherence to its obligations under Article 2(2), the submission relies on the interpretation of this Article which has been provided by the Committee in its *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*.⁴
7. The submission also relies upon the Declaration of Principles on Equality,⁵ a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as "the current international understanding of Principles on Equality".⁶ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.⁷
8. The submission has two parts. The first, based on the findings of our report on the treatment of Rohingya refugees in Thailand, presents information on the discriminatory denial or limitation of Covenant rights. It calls on the Committee to put questions to the state about the steps it has taken to ensure the enjoyment of Covenant rights by Rohingya refugees, without discrimination. The second part presents an independent analysis of

⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009.

⁵ *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

⁶ *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para 93.

⁷ Parliamentary Assembly of the Council of Europe, *Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380.

Thailand's legal framework on equality and non-discrimination undertaken by the Equal Rights Trust and makes recommendations for questions which we would urge the Committee to put to Thailand when it decides upon its list of issues.

Article 2(2): Enjoyment of Covenant Rights without Discrimination

9. Under Article 2(2) of the Covenant, state parties to the Covenant:

[U]ndertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

10. The Committee, in its General Comment 20, noted that “non-discrimination and equality are (...) essential to the exercise and enjoyment of economic, social and cultural rights”.⁸ It also clarified that:

*Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights.*⁹

11. The Committee has further noted that the obligation arising under Article 2(2) includes an obligation to prohibit both direct and indirect discrimination,¹⁰ in both the public and private spheres,¹¹ on an extensive list of grounds, including both those listed in the Covenant and those “implied” under “other status” in the text of the Article.¹²

12. Research undertaken by the Equal Rights Trust for the report *Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand* indicates that the Rohingya are subjected to a wide range of human rights abuses. These abuses include discrimination in respect of rights protected under the Covenant, notably the right to work, the right to the highest attainable standard of health and the right to education. This discrimination is a direct result of the status of Rohingya in Thailand as stateless persons, arising on grounds of ethnicity, religion and nationality.¹³ The Committee has noted that the grounds of race and colour, both explicitly listed in the Covenant include ethnic origin.¹⁴ Religion is listed among the grounds on which discrimination must be prohibited under Article 2(2). The Committee has also stated that “[t]he ground of nationality should not bar access to

⁸ See above, note 4, Para 2.

⁹ *Ibid.*, Para 7.

¹⁰ *Ibid.*, Para 10.

¹¹ *Ibid.*, Para 11.

¹² *Ibid.*, Para 15.

¹³ See above, note 1, pp. 19 and 20.

¹⁴ See above, note 4, Para 19.

Covenant rights” and that Covenant rights “apply to everyone including (...) stateless persons”.¹⁵

Article 2(2) and Article 6: Non-discrimination in Respect of the Right to Work

13. Under Article 6 of the Covenant, states recognise “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”. Article 7 provides “the right of everyone to the enjoyment of just and favourable conditions of work”, which includes fair wages and equal remuneration for work of equal value; remuneration which provides a decent living; safe and healthy working conditions; equal opportunity for promotions; and rest, leisure and reasonable limitation of working hours.
14. Despite these obligations, under the Immigration Act, the Rohingya have no right to work in Thailand, as a result of their immigration status. Under Section 9 of the Alien Working Act 2008, foreigners require a work permit and can only be employed in accordance with regulations issued by the Ministry of Labour.¹⁶ Any migrant applying for a work permit must either be a resident or authorised to enter Thailand,¹⁷ a requirement which excludes most irregular migrants, including the Rohingya.
15. Since 2009, irregular migrants from Myanmar have been able to regularise their status, obtain work permits and improve their access to other rights. This possibility arises in the framework of a memorandum of understanding agreed between the Thai and Myanmar governments, as part of the state party’s efforts to address the large number of irregular migrants from neighbouring countries. However, our research indicates that this process is discriminatory in its operation, as a result of problems in the process through which the nationality of the individual is verified by the state authorities.¹⁸ Prior to the introduction of this process, some Rohingya were able to obtain temporary work permits, allowing them to work legally in certain districts. Since December 2008, all migrant workers, including Rohingya, must go through a so called “verification process”, causing problems, such as those of one roti vendor interviewed by the Equal Rights Trust:

*I have had nearly 12 temporary work permit cards, lasting 6 months to one year each. When they expire, they are taken and I have to apply for another. Now when you apply for cards, they ask for a passport, but I can’t get a passport so I can no longer have a card.*¹⁹

16. Hundreds of thousands of migrants from Myanmar – including Rohingya – work in the informal economy in Thailand. Those working informally face specific barriers in complying with the requirements of the work permit scheme. For example, the scheme requires workers to have a specific employer, which is essentially impossible for the many Rohingya who are self-employed, selling roti or scavenging food to salvage and sell.

¹⁵ *Ibid.*, Para 30.

¹⁶ Alien Working Act, B.E. 2551 (2008), section 9.

¹⁷ *Ibid.*, section 10.

¹⁸ See above, note 1, p. 69.

¹⁹ Interview TH 12, with 53-year-old Rohingya man, 24 June 2012, Bangkok.

17. In addition, those working in the informal economy are vulnerable to extortion by the police, arrest, detention and deportation. Such work includes domestic work, work on farms and construction sites, cleaning and carrying goods at markets and selling tea. According to interviewees who spoke with the Equal Rights Trust, one of the common means of making a living for Rohingya in Bangkok is selling roti (a fried South Asian bread). The report states:

According to one Rohingya community leader, starting an individual roti business was relatively easy in the past. Newly arrived Rohingya could procure a cart and basic materials from an established Rohingya vendor and immediately begin selling, paying off the cart after earning 3,000 baht (approximately 90 USD). In turn, they would be in the position to help another Rohingya in the future. Now, with fewer Rohingya in the city, there are fewer people selling roti, and this system has been replaced by one in which a new vendor must work in a designated area to pay his 'boss' 10,000 baht for the cart before being able to choose where he can operate.²⁰

18. Our research found that, while roti vendors can generally earn enough to survive, they are vulnerable to harassment, extortion, arrest and deportation. The report concludes that “extortion is a common problem for Rohingya roti sellers, and most have to pay regular bribes to local police in order to avoid arrest”.²¹ Such bribers can account for as much as 30% of a roti vendor’s income. One roti vendor told our researchers:

Tourist police from another area arrested me last year. They demanded 5,000 baht and I tried to offer 3,000. I was then taken to the police station and then to the court and spent 5 days in jail. I was released, then was arrested again and put in jail again. I was not deported because I had the pink card (migrant work permit) at the time.²²

19. As these findings indicate, many Rohingya in Thailand are unable to exercise their right to work without discrimination, as provided by Articles 6 and 2(2) of the Covenant. In particular, the legal regime effectively bars many Rohingya, as irregular migrants, from securing a work permit and therefore working legally. For those who are able to find a means of securing a livelihood, this is often in the context of informal, irregular employment, which cannot afford them the just and favourable conditions guaranteed by Article 7, including remuneration which provides a decent living and safe and healthy working conditions.

Article 2(2) and Article 12: Non-discrimination in Respect of the Right to the Highest Attainable Standard of Physical and Mental Health

20. Article 12 of the Covenant guarantees the right of all persons to “the enjoyment of the highest attainable standard of physical and mental health”. The Committee, in its consideration of Article 12 in its *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social*

²⁰ See above, note 1, p. 71, presenting information from interview TH 4, with Rohingya community leader, 18 May 2012, Bangkok.

²¹ *Ibid.*

²² Interview TH 7, with 52-year-old Rohingya man, 27 May 2012, Bangkok.

and Cultural Rights) emphasised the importance of non-discrimination and equality in access to health care:

*With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.*²³

21. Thailand's healthcare system ensures free medical treatment for most diseases to all Thai nationals. There is also a special budget allocated to ensure healthcare coverage for people with unclear legal status.²⁴
22. In practice, however, refugees, including Rohingya, face difficulties accessing healthcare. The UN High Commissioner for Refugees, working in partnership with Thai organisations, provides some health assistance to refugees and asylum seekers through a partner organisation in Bangkok. Some non-governmental organisations also provide limited support and help to negotiate treatment with hospitals, but only some of the Rohingya interviewed by the Equal Rights Trust had received such assistance. Our researchers were informed that normally, when a family member is sick, Rohingya rely on pharmacy treatment or pay for private health services. Our research found that one of the reasons for poor access to healthcare was the fear of being arrested upon admission to hospital.
23. These findings raise clear concerns about the extent to which stateless Rohingya are able to access health services without discrimination, and the potential for this to have an adverse impact on their health. The Equal Rights Trust is therefore concerned that Thailand is failing to meet its obligations under Article 12, when taken in conjunction with Article 2(2) of the Covenant; we urge the Committee to question the state on these matters.

Article 2(2) and Article 13: Non-discrimination in Respect to the Right to Education

24. Article 13 of the Covenant guarantees the right of everyone to education and imposes an obligation on the state to provide free primary education and progressively to provide free secondary education. In its General Comment 20, the Committee has expressly recognised that nationality should not present a barrier to the enjoyment of the right to education, stating that "all children within a State, including those with an undocumented status, have a right to receive education".²⁵
25. The Education for All policy of 1999 in Thailand allows all children to access primary and secondary education free of charge. A 2005 Cabinet Resolution on Education for

²³ Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2000/4, 2000.

²⁴ Promphat, S., *Ministry of Social Development and Human Security in Thailand's presentation of the country report*, available at: <http://www.unog.ch/>

²⁵ See above, note 1, Para 30.

Unregistered Persons allows children who do not have a legal status to enrol at public schools certified by the Ministry of Education.²⁶

26. Despite this, Rohingya children who lack birth registration and/or citizenship face difficulties in accessing education. This is due, in part, to the policy's condition that asylum seekers and refugees children can only enrol at the discretion of local schools which then often impose documentation requirements on all applicants, undermining the policy's objective. One interviewee told the Equal Rights Trust:

*None of my four children got birth certificates, no documentation. We have tried to get birth certificates but are always rejected. My first two children went to school for 3 years, but the younger kids couldn't go to school because both parents are from Burma. Instead, they work in a market, informal labour that is not consistent, and sometimes they get arrested.*²⁷

27. Another gave a similar account:

*My children cannot attend school. I have tried, but since they don't have birth certificates they were not accepted. The kids stay at home. They want to go to school but there is no way. They were born at home, so there was no way to get documents. The only documentation we have for them are the UNHCR slips for two of the four children.*²⁸

28. Of those interviewed by the Equal Rights Trust, some had children who were able to attend primary and secondary schooling, but access was inconsistent and usually obtained through the intervention and financial assistance of NGOs.
29. It is clear from these findings that the Thai government is failing to meet its obligations to ensure the enjoyment of the right to education by stateless Rohingya, contrary to its obligations under Article 2(2) and Article 13. We call upon the Committee to seek information from the state on the measures which it has taken or is taking to address these shortcomings.

Suggested Questions

- What steps, if any, has the state party taken to ensure the enjoyment, without discrimination, of the rights to work, to the highest attainable standard of health and to education, by Rohingya refugees?
- What plans, if any, does the state party have to review the Alien Working Act and the associated work permit scheme, to ensure that it is consistent with the requirement to guarantee the enjoyment of the right to work without discrimination on the basis of nationality, as required by Article 7 of the Covenant, in conjunction with Article 2(2)?
- What plans, if any, does the state party have to review the effectiveness of its healthcare policies, regulations and rules, to ensure the enjoyment of the right to the highest

²⁶ Social Division, Department of International Organisations, Ministry of Foreign Affairs, Kingdom of Thailand, *Right to Education for migrants, refugees and asylum seekers*, 2011.

²⁷ Interview TH 9, with 54-year-old Rohingya man, 27 May 2012, Bangkok.

²⁸ Interview TH 13, with 43-year-old Rohingya man, 24 June 2012, Bangkok.

attainable standard of health without discrimination on the basis of nationality, as required by Article 12 of the Covenant, in conjunction with Article 2(2)?

- What plans, if any, does the state party have to review the effectiveness of its Education for All policy of 1999 and the 2005 Cabinet Resolution on Education for Unregistered Persons, in ensuring the enjoyment of the right to education without discrimination on the basis of nationality, as required by Article 13 of the Covenant, in conjunction with Article 2(2)?
- To what extent does the state party believe that its legal and policy framework is adequate to ensure that Rohingya refugees and other immigrants can enjoy the economic, social and cultural rights provided by the Covenant without discrimination?

Article 2(2): The Legal Framework on Discrimination and Inequality

30. The Committee has noted that under Article 2(2) of the Covenant “[n]on-discrimination is an immediate and cross-cutting obligation in the Covenant” which requires that discrimination “must be eliminated both formally and substantively”.²⁹ One pre-condition for delivering this obligation is the comprehensive prohibition of discrimination in law.
31. Protection from discrimination in Thailand is extremely limited in the domestic legal framework, if not non-existent. Until July 2014, the sole provision prohibiting discrimination in Thailand’s domestic legal framework was Article 30 of the Constitution which provided:

All persons are equal before the law and shall enjoy equal protection under the law.

Men and women shall enjoy equal rights.

Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted.

Measures determined by the State in order to eliminate obstacle to or to promote persons’ ability to exercise their rights and liberties as other persons shall not be deemed as unjust discrimination under paragraph three.

32. Following the coup d’état in May 2014, however, the National Council for Peace and Order replaced the 2007 Constitution with an Interim Constitution. This Interim Constitution provides, in Section 4, that:

Subject to the provisions of this Constitution, human dignity, rights, freedoms and equality of all Thais, which have been protected under the customary practices of the government of Thailand under the democratic regime with the King as Head of State and under existing

²⁹ See above, note 4, Paras 7 and 8.

international obligations of Thailand, shall remain protected under this Constitution.

33. However, this provision is overshadowed by other authoritative provisions within the Interim Constitution as well as the imposition of martial law. The interim Constitution contains no provisions protecting the right to equality or prohibiting discrimination. The closest apparent protection is that contained within Section 4.
34. It is not clear to what extent this provision guarantees the rights to equality and non-discrimination for persons in Thailand. Nor is it clear to what extent, if at all, the provision is enforceable by individuals who have been victims of discrimination.
35. In addition to any constitutional provisions providing protection from discrimination, Thailand has an obligation, as a party to the Covenant, to provide effective protection from discrimination through law, which necessitates the enactment of legislation. As the Committee has stated in its General Comment No. 20:

Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights.³⁰

36. The report submitted by Thailand to the Committee (and the Common Core document prepared by the state) indicate that there is only one legislative provision prohibiting discrimination in Thai law. Information provided by the state indicates that Thailand does not have specific anti-discrimination legislation. As noted in paragraph 22 of the state's report to the Committee, some protection from discrimination in employment is offered by the Thai Labour Standard (TLS 8001-2010), Article 5.6 of which provides:

5.6.1 An establishment shall not engage in or support any discrimination in respect of employment, payment of wage and remuneration, providing welfare and opportunity for training and development, promotion, termination of employment or retirement and so on, due to national extraction, race, religion, language, age, sex, marital status, personal attitude on gender or sexual orientation, invalidity, HIV/AIDS, AIDS patients, trade union membership, employees committee, political affiliation or other personal opinions.

5.6.2 An establishment shall not obstruct, interfere, or perform any action affecting the use of the employees' rights, exercise of their practices related to nationality, race, religion, language, age, sex marital status, sexual orientation, disability, trade union membership, political affiliation or personal opinion, as far as the employees' activity does not cause any damage to the business.

37. Article 5.6 of TLS 8001-2010 thus goes somewhat in meeting the requirement in Article 2(2) of the Covenant when taken in combination with Article 7 (the right of everyone to the enjoyment of just and favourable conditions of work). However it contains many obvious gaps including a lack of definitions of different forms of discrimination such as direct discrimination, indirect discrimination and a failure to make reasonable accommodation, and a lack of clarity as to how it can be utilised by victims of discrimination.

³⁰ *Ibid.*, Para 37.

38. Overall, therefore, there is extremely limited protection from discrimination in Thailand. The limited provisions that do exist fall far short of the requirements of Article 2(2) of the Covenant.

Suggested Questions

- To what extent does the state party believe that section 4 of the Interim Constitution meets its obligations to ensure non-discrimination in the enjoyment of the economic, social and cultural rights protected, as required by Article 2(2) of the Covenant?
- How does the state party intend to ensure that the new, permanent Constitution will protect all persons in Thailand from discrimination in the enjoyment of all economic, social and cultural rights, as required by Article 2(2) of the Covenant?
- What plans, if any, does the state party have to introduce specific and comprehensive anti-discrimination which prohibits discrimination in the enjoyment of all economic, social and cultural rights protected under the Covenant?
- What assessment has the state party made of the effectiveness of the non-discrimination provisions of Thai Labour Standard 8001-2010?