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*By Louise Colletet*¹

Introduction

Under Thai law, all ‘illegal immigrants’ – meaning all non-Thai nationals who have entered Thailand or are staying in the country unlawfully – are subject to arrest and detention (Immigration Act 1979). In Bangkok, arrested immigrants are detained in the Bangkok Immigration Detention Centre (IDC). Among them are refugees and asylum seekers, who are often considered to be in the country unlawfully, as Thailand is not a signatory to the 1951 Convention Relating to the Status of Refugees (Refugee Convention).

Immigration detention is by no means a policy unique to Thailand. Indeed, there has been significant academic scrutiny of, and litigation around, this issue in Europe, the United States, and Australia. However, far less attention has been brought to bear on such detention in countries where the Refugee Convention is not in force, including South East Asia generally, and Thailand in particular.

The aim of this article, therefore, is to question provisionally whether Thailand’s immigration detention policy is in breach of international law. Specifically, using personal accounts of detention conditions in IDC as reported by the detainees themselves, this article asks whether these conditions amount to cruel, inhuman or degrading treatment.

Research Methodology

In June 2011, 96 Pakistani nationals (94 refugees recognised by UNHCR and 2 asylum seekers), a third of whom were children, were released from IDC on bail after months in detention. The author, along with two colleagues,² interviewed all of these 25 families about their detention conditions following their release.

Interviews took place over three separate occasions between June and August 2011. An Urdu interpreter was provided for those who did not speak English³ and set questions were agreed upon in advance by the interviewing team⁴. At the beginning of each interview, the interviewees were explained the aim of the research and were told that they were under no obligation to answer any questions. The identities of the interviewees will remain confidential for ethical and security reasons.

Refugee Law Framework: The Refugee Convention

Article 31 of the Refugee Convention is the most cited provision in relation to the detention of asylum seekers and refugees. The provision provides that refugees should not be penalised for

¹ The author is very grateful to the Pakistani community released from the Bangkok Immigration Detention Centre (IDC) on bail for sharing their difficult experiences with her, and to Michael Timmins, Legal Services Manager of Asylum Access Thailand, for his help and support on this project.

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³ The author is very grateful to this interpreter (whose name will not be disclosed for reasons of confidentiality) for his great help with this project.

⁴ The author holds these questions on file and these can be obtained upon request.

illegal entry or presence,⁵ and has been interpreted as meaning that the detention of asylum seekers shall only be used when it is necessary, reasonable, and proportionate to the objectives pursued (UNHCR 1999). According to UNHCR Executive Committee⁶ Conclusions No. 44, ‘detention [of refugees and asylum seekers] should normally be avoided’ and ‘may be resorted to’ only on a few specific grounds (UNHCR 1986). Clearly, Thailand’s policy and practice of detaining asylum seekers and refugees is contrary to the object and purpose of Article 31. However, given that Thailand is a non-signatory, the obligation does not apply.

What is thus more pertinent is the state’s obligation of *non-refoulement* enshrined in Article 33(1),⁷ a provision which is generally considered by international refugee law scholars to be binding to all states as customary international law (Goodwin-Gill 1983; Helton 1989; Lauterpacht and Bethlehem 2003).⁸ As articulated by Helton, the principle of *non-refoulement* extends beyond the obligation to refrain from expelling refugees to countries where they will be in danger; it also requires states to provide protection amounting to ‘temporary asylum under humane and tolerable living conditions’ (Helton 1989: 40). Thus, even as a non-signatory to the Refugee Convention, Thailand remains obliged under customary international law to ensure that refugees and asylum seekers are not *refouled* to states where they may face cruel, inhuman or degrading treatment, and accordingly to provide temporary asylum free from these forms of irreparable harm.

Beyond its obligations under customary international law, Thailand is also bound to the key human rights documents it has ratified.⁹ The testimonies of former detainees indicate that the conditions in IDC may amount to violations of many of these ratified human rights provisions including (but not limited to): freedom from arbitrary detention, the right to privacy, and rights of children. However, as this is a preliminary report, this note will focus specifically on whether the conditions in IDC amount to cruel, inhuman or degrading treatment.

Conditions of Detention

The primary concern reported was overcrowding. The interviewees indicated that, for females, 300 to 400 persons had to stay in a room built for 40 to 50 persons. Some young men also

⁵ Article 31 of the Refugee Convention states: ‘1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.’

⁶ It is worth noting that while Thailand is not a signatory to the Refugee Convention or its 1967 Protocol, it is a member of the UNHCR Executive Committee, an international body that plays a significant role in establishing standards and guidelines for refugee protection.

⁷ Article 33 (1) of the Refugee Convention states: ‘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.’

⁸ See also Hong Kong Court of Appeal, *C, AK, KMF, VK, BF, and YAM v. Director of Immigration and another*, 2011; for a contrary view, see Hathaway (2010).

⁹ These include: the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1984 Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child, the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

reported that, in their cell ‘while some were sleeping, others had to stand’. Due to overcrowding and the absence of a proper ventilation system, people complained of suffocation. In the room for the men, the interviewees reported that there was no window.

A detainee also described her cell as ‘an extremely filthy place’. Another explained that ‘there were many insects in the blankets and everywhere’. Most interviewees complained of the dirtiness of the bathrooms as well. Women also mentioned that there were only two washrooms and toilets in their cell for 300 to 400 persons. For the males and due to overcrowding, ‘ten persons took a bath at the same time’. Some men recounted: ‘we used the same water to take a bath, for the toilets and to drink We shouldn’t drink the water from the toilets!’.

Essential goods were not provided by the IDC staff: ‘even simple things like tissues were very hard to get inside’. There were no beds or mattresses in the cell, and detainees slept ‘on the dirty floor’ or on blankets provided by the Jesuit Refugee Service (JRS). JRS also reportedly provided soap, tooth brushes, fruits – all things not provided by the IDC.

Interviewees reported that they ‘used to be hungry’ because the food was ‘insufficient’. Some reported that it was ‘harmful for us, for our health’ and ‘there were insects inside the soup’. For the men, at least initially, there was reportedly no clean, drinking water.

It appeared that everyone, especially the children, suffered physically from these detention conditions. Detainees also complained of skin allergies, itching, asthma, fever, and other ailments, stating they were not properly medicated. While a nurse came to the cells once a week, ‘she was only looking at us through the window [and] wrote down the symptoms according to her own mind’. Most of the time, detainees were only taken to hospital in extreme circumstances: ‘Some ladies had miscarriages in the cell. They were only taken to hospital after they lost lots of blood’.

Some detainees also reported that guards were abusive. One man explained: ‘At night...several guards were drunk...They came to our cell and asked who wanted to fight. They took my son (who was 17 years old), clipped his hands and beat him’. Women also reported that ‘the body searches were done sometimes by males and sometimes by females. It was disgusting, we felt ashamed. The guards stood and watched during the body search and laughed. We felt insulted’.

Cruel, Inhuman or Degrading Treatment?

In considering this question, it is constructive to look at European human rights law by way of analogy and the interpretation of Article 3 of the European Convention on Human Rights (ECHR). Article 3 of the ECHR prohibits inhuman and degrading treatment and there is a significant developing body of jurisprudence from the Strasbourg court.

In *MSS v. Belgium and Greece*, the Grand Chamber of the European Court of Human Rights reviewed conditions of detention for asylum seekers and refugees in Greece (ECtHR 2011). In paragraph 230, the Court described the conditions of detention as follows:

The detainees...were obliged to drink water from the toilets...In a number of cells there was only one bed for fourteen to seventeen people...A number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot...There was no soap or toilet paper...sanitary and other facilities were dirty...the sanitary facilities had no doors...

This description is strikingly similar to the conditions described in Bangkok. In the *MSS* case, the Court held that the conditions amounted to a breach of Article 3.¹⁰

Further, in *Kupczak v Poland* the European Court also found that lack of adequate health care in detention constituted inhuman and degrading treatment (ECtHR 2011).¹¹ *Popov v France* found that detaining children in immigration detention, as was reported in Bangkok, was a breach of Article 3 (ECtHR 2012).

Accordingly, noting that this is a preliminary and necessarily tentative analysis, there is nevertheless a strong argument that the conditions of detention in IDC amount to inhuman and degrading treatment. This assessment is compounded by potential breaches relating to arbitrary detention,¹² indefinite detention,¹³ and children in detention.¹⁴

There is no information, at present, that the detention conditions in IDC have improved. As this report has demonstrated, current practice has given rise not only to tangible concerns from the detainees themselves, but also serious questions under international law. Thailand should therefore promptly take steps to ensure the conditions faced by refugees and asylum seekers are consistent with international legal norms.

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¹⁰ See also ECtHR: *Kalashnikov v Russia* 2002, *Modarca v Moldova* 2007, *Florea v Romania* 2010, *Pavalache v Romania* 2011, *Mandic and Jovic v Slovenia* 2011, *Struel and others v Slovenia* 2011.

¹¹ See also ECtHR, *Scoppola v Italy*, 2008.

¹² See Goodwin-Gill 1986; England and Wales High Court, R (*on the application of Suppiah and Others*) v Secretary of State for the Home Department, 2011.

¹³ See UN Human Rights Committee, *C v Australia*, 2002.

¹⁴ See 1989 Convention on the Rights of the Child, articles 3, 9, 22, 27.

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Interviews

Interviews with 25 Pakistani families bailed out of IDC in June 2011.