

Access to justice and the rule of law

Joel Harding, Shane Scanlon, Sean Lees, Carson Beker and Ai Li Lim

Due to the nature of displacement and encampment – entailing resource scarcity, geographic isolation, restricted mobility and curtailed legal rights – refugee victims of crime often have inadequate legal recourse.

Historically, Thai officials overseeing the refugee camps on the Thai-Burma border have assigned a fairly high degree of responsibility for handling

some crimes or civil disputes to the refugee leadership. This excludes serious crimes, such as murder, rape, drug offences and human

trafficking (although even in these categories in practice many cases to date have not been referred or reported to Thai police by refugee leaders, except where Thai citizens are involved). Whilst this approach may be seen as laudable in terms of empowerment, the dispute resolution mechanisms that have emerged in the camps are less than perfect.

Camp justice officials are influential in their communities and often have significant practical experience in dispute resolution through their work in camp. Under the overall authority of the Ministry of Interior, refugee leaders have, generally speaking, tried to administer camp affairs fairly and, considering the scale of the challenge, have done a great deal with limited resources. However, they themselves agree that they often lack the capacity to administrate justice effectively in the camps.

Against this backdrop, in 2005-06 UNHCR and the International Rescue Committee (IRC) developed a legal assistance project.¹ The Royal Thai Government saw merit in the proposed project and played an important role in establishing an advisory board to oversee implementation and provide support to activities. In August 2006, a Working Committee, including relevant Thai government departments, UNHCR and IRC, approved a comprehensive assessment of the administration of justice in three pilot project sites in order to better understand a) the security and protection-related concerns of camp residents and b) access to justice and the rule of law as experienced by the refugee community and leadership. This Access to Justice Survey involved 2,299 respondents, with in-depth interviews and focus group discussions.

Key protection concerns that emerged were: alcohol and drug abuse; fear of the Burmese military; inability to access food entitlements; physical violence in the community in general and rape specifically; lack of proper documentation; deportation; inability to access justice; and incidents involving Thai security volunteers (Or Sors). These protection and security concerns are not particularly surprising as they reflect concerns common to protracted, closed camp situations where movement and work are restricted.

Some groups, those usually designated as vulnerable, feel less confident in the ability of camp institutions to resolve disputes fairly. Although consensus building and support from the community can be strengths of the dispute resolution

methods applied by some camp institutions dealing with justice, community-driven outcomes can put weaker residents at a disadvantage.

Women are significantly more threatened by violence in the camp, and in particular by gender-based violence. Marital status has a strong impact on the security of refugees in the camp. Divorced, separated and unmarried refugees feel more vulnerable to certain risks, particularly exploitation for goods and services and physical abuse. Widowed respondents also reported more difficulties in the camp; they are more concerned, for example, about access to food rations than their married counterparts.

Access to justice

Contrary to popular belief, the majority of respondents want a criminal justice system capable of a vigorous response to, punishment of and prevention of actual crime, rather than a focus on compromise, financial compensation or mediation. There are manifold barriers to achieving this, however.

Many people do not know whether and when Thai law applies to them, or do not clearly understand the rules applied by camp justice or have confidence in them. This lack of knowledge acts as a barrier to accessing justice for three main reasons. Firstly, it makes it difficult for refugees to regulate their behaviour according to the law and to know what kind of judicial response to expect. Secondly, refugees have little idea of the legal procedures they should follow inside or outside the camp, resulting in the choice of inappropriate fora for pursuing justice. Finally, their lack of knowledge of basic legal rights also means that refugees are more vulnerable to abuse or exploitation in the system and are less likely to receive a fair trial, whether as victim or defendant.

A major barrier in the camp justice system is the institutions' lack of capacity to deliver appropriate judicial processes and outcomes to complainants and defendants, particularly in relation to more serious crimes. Camp justice officials are easily pressured by influential refugees. They lack

training and their task is made more difficult by confusing and inappropriate laws. Camp justice officials are unanimous that there is an urgent need for legal reform.

The constraints of encampment often do not allow justice officials to deliver the outcomes expected by the community. Camp detention facilities are more like holding cells, inappropriate for long-term detention. Heavy fines or compensation orders are not realistic in the camp context as few have the capacity to pay.

Some refugees complain that camp justice institutions do not satisfactorily protect vulnerable groups such as women, the poor and ethnic minorities. In most instances, survivors of crimes have no choice but to continue sharing the same neighbourhood as the perpetrators, months and years after the criminal incident. In many cases, perpetrators are not prosecuted for the crimes they commit or may be released without significant punishment. In some cases, due to a lack of capacity on the part of camp leaders to handle violent criminals, and a preference for dealing with them within the refugee community, cases have been referred to representatives of ethnic opposition groups in camps. These groups sometimes also act as an ad hoc appeal forum for camp residents who are dissatisfied with the decisions made by leaders in camp.

The camp institutions struggle to deliver justice to their constituents while judicial institutions provided by the host government remain, in practice, difficult to access. Refugee respondents to the survey report that they are deterred from accessing the Thai legal system for various reasons, such as language, lack of transport, fear of reprisal, concern about the police reaction and ignorance of the system. They may also fear shame or community rejection if they report a crime outside the camp. Moreover some camp officials may be reluctant to allow cases to go outside the camp. Some Thai officials may be reluctant to assert jurisdiction due to resource or workload implications.

The roles and responsibilities of the various camp authorities dealing with these issues are ill-defined and in some respects overlapping. Camp

Awareness-raising session on legal assistance centre services and Thai law, Mae La camp, Thailand.



IRC staff

residents are also unclear about the demarcation between the jurisdiction of the camp and Thai judicial systems. Following discussion of this issue in various meetings and conferences, the Thai authorities have indicated that the national justice system would focus on prosecuting serious crimes, with the camp justice systems continuing to deal with civil disputes and minor crime (although exact distinctions between these have still to be clarified).

There is a gap, however, between desired outcomes and what is feasible. Camp residents overwhelmingly prefer camp justice structures to resolve disputes, even for serious crimes such as murder. But for murder, most respondents felt that the appropriate penalty was 10 years or more in prison – or the death penalty. Neither of these punishments can be delivered by the camp fora – but they are within the legal power of Thai authorities and the de facto power of the ethnic military groups across the border.

Camp governance structures are ill-equipped to deal with children in conflict with the law – although children feel more susceptible to violence and a substantial majority of all rape and attempted rape victims are minors. GBV survivors

generally are often denied justice or dissuaded from accessing justice because of camp officials' lack of sensitivity and/or capacity, and the community emphasis on reconciliation and compromise that puts pressure on women to accept inadequate judicial outcomes.

Ethnic minorities in the camps can also have different experiences of the overall accessibility, efficacy and fairness of camp justice and security institutions, and some have voiced less confidence in camp structures that are commonly dominated by members of majority ethnic groups.

Conclusion

The survey results should not be interpreted as a failure of refugee leaders in their efforts to administer justice in camps. Indeed, there are many examples where mediation has been conducted adeptly using an impressive range of techniques to help parties reach mutual understanding. However, without clear guidelines or standards, this varies greatly from case to case and between different mediators and justice officials. Bearing in mind that refugee leaders have previously had very few external resources, either technical or material, to support them in the administration of justice inside the camp, and

given the size of the communities, they have done their utmost to cope in an extremely complex and sensitive protection environment.

Since the assessment, IRC has been able to implement activities focused on addressing gaps identified in the survey, such as: direct service provision of legal advice assistance; mediation and arbitration training for leadership; training and awareness on Thai law; civic education for youth; material and technical support to justice and security officials; legal and rights training for Thai security volunteers; and the development of community service orders with justice committees in camp. Thus far, stakeholders are highly engaged in the project and have received it with enthusiasm and support.

Joel Harding (joel.harding@theirc.org) is Legal Assistance Project Coordinator. Shane Scanlon (shane.scanlon@theirc.org) is Legal Assistance Manager for the International Rescue Committee, Thailand (www.theirc.org/where/the_irc_in_thailand.html). Sean Lees, Carson Beker and Ai Li Lim were all project fellows during the assessment and survey phase.

1. Previously funded by the Italian government and UNHCR, now co-funded by UNHCR and Austcare/DIAC, the Australian Department of Immigration and Citizenship.