

# Equal Rights Trust Advocacy

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*In the period since the publication of ERR Volume 2 (December 2008), ERT has been working to expose patterns of discrimination globally and to combat inequality and discrimination both nationally and internationally. A major component of all of ERT's advocacy work has been advocating for the Declaration of Principles on Equality by applying the Principles to real life scenarios in order to solve legal and policy questions which have arisen in this period. Below is a brief account of some of the most important ERT advocacy actions.*

## **ERT Contribution to Improving the UN Committee on Economic, Social and Cultural Rights' Draft General Comment on Non-Discrimination**

On 13 December 2008, The Equal Rights Trust (ERT) submitted written comments to the UN Committee on Economic, Social and Cultural Rights (the Committee) expressing concerns regarding the content of a draft General Comment on Non-Discrimination which was being developed by the Committee under Article 2(2) of the International Covenant on Economic Social and Cultural Rights. Article 2(2) states:

“The States Parties to the present Covenant undertake 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.”

ERT's main concerns regarding the draft General Comment included:

1. The draft General Comment mixed up two different sets of concepts, *de jure* and *de facto* discrimination on one hand and formal and substantive equality on the other. ERT explained that it is not the case that *de jure* discrimination overlaps with formal equality and *de facto* discrimination overlaps with substantive equality. *De jure* discrimination can be either formal or substantive, and so can *de facto* discrimination. In the first pair of concepts the question is *where* discrimination and inequality are found - in the law or in practice. In the second pair of concepts the question is different and relates to *how* equality itself is understood: is it understood as requiring identical treatment in identical circumstances (whether by law or in practice), or as requiring treatment of people as equal in their dignity, including differential treatment with a purpose to achieve effective equality of opportunity and participation in practice (substantive equality).

2. The draft General Comment, and para. 7 in particular, was not consistent with the understanding of direct and indirect discrimination in the growing number of jurisdictions where these concepts are defined. In the draft General Comment they were badly confused with the concepts of intentional and unintentional discrimination by identifying direct discrimination with intentional discrimination and indirect discrimination with unintentional discrimination. This was a gross misunderstanding of the concepts of direct and indirect discrimination. In all existing definitions of direct discrimination, it is accepted that it can be either intentional or not intentional, and the same can be said

of indirect discrimination. The concepts of direct and indirect discrimination, therefore, have nothing to do with the presence or absence of intent or purpose.

3. Paras. 8, 9 and 10 of the draft General Comment did not provide a clear interpretation of temporary special measures and differential treatment in the light of the substantive concept of non-discrimination and equality contained in the Covenant.

On the basis of these concerns and a number of others, ERT submitted amendments to the draft General Comment and made a number of recommendations to the Committee.

The UN Committee on Economic, Social and Cultural Rights (the Committee) adopted General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights at its 42<sup>nd</sup> session, which took place on 4 – 22 May 2009.<sup>2</sup>

The General Comment reiterates that discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population and that "[n]on-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights."

The General Comment contains many progressive elements, and has incorporated most though not all of ERT's concerns, including:

- An interpretation of the content and scope of the grounds of discrimination which are prohibited by Article 2(2). In addition to the grounds which are explicitly expressed in the text of Article 2(2), the Committee

emphasises that the nature of discrimination varies according to context and evolves over time, and that "a flexible approach to the ground of 'other status' is thus needed to capture other forms" of discrimination. The Committee therefore provides a non-exhaustive list of "other grounds" of discrimination prohibited by Article 2(2), including: disability, age, nationality (covering non-nationals such as refugees, asylum seekers and stateless persons, migrant workers and victims of international trafficking), marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation;

- An affirmation that incitement to discrimination and harassment constitute discrimination under Article 2(2);

- Definitions of direct and indirect discrimination for the purposes of Article 2(2);

- A recognition that multiple/cumulative discrimination has "a unique and specific impact on individuals and merits particular consideration and remedying";

- Confirmation that States Parties "must adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds";

- A reiteration that national legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights;

- An affirmation that States Parties have the obligation "to monitor effectively the

implementation of measures to comply with Article 2(2)” and that “[n]ational strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of prohibited grounds of discrimination”.

Regrettably, it appears that on several occasions, notably regarding the notions of formal and substantive equality, the General Comment uses complex and complicated language to frame concepts which have been well established in simpler and more accurate terms by earlier human rights jurisprudence.

### **ERT Urges Thai Prime Minister to Rescue 126 Rohingya Pushed Out to Sea by Thai Military**

On 23 January 2009, The Equal Rights Trust wrote to Prime Minister Abhisit Vejjajiva of Thailand expressing deep concern over the fate of 126 Rohingya who had been held incommunicado since 16 January 2009 and subsequently forcefully expelled by being put on a boat and cast adrift in international waters.<sup>3</sup> The victims of these abuses were stateless persons, members of a minority deprived of their Myanmar citizenship through discriminatory legislation in Myanmar, and did not have the protection of any state.

ERT urged Thailand to comply with its international law obligations, to immediately mount a rescue mission and bring all the Rohingya to safety; treat them humanely and with respect for their dignity; provide them, as a first step, with medical aid, adequate shelter, sustenance and access to immigration and asylum procedures. ERT further stated that Thailand must ensure that UNHCR is given full access to this group as well

as to any other stateless person or irregular migrants arriving in Thailand.

ERT explained that the conduct of the Thai authorities responsible for the incommunicado detention and forced expulsion of the 126 Rohingya, in the face of repeated requests by UNHCR to be given access to visit them, was a blatant and grave violation of the Thai Government’s obligations under international law to protect the right to life and other fundamental rights of all people on its territory without any discrimination.

In December 2008, around 1,000 Rohingya were forcefully expelled onto high seas in dangerously ill-equipped boats. Over 530 of these people are presumed dead or missing. According to survivor accounts, the Rohingya were placed in incommunicado detention by the Thai military for a few days, before being forced out to sea in boats which had no engines. Their hands were tied and they were towed into international waters where they were abandoned with hardly any food or water. As one group was forced onto the boat, four men were reportedly shot dead and a teenage boy was thrown overboard and drowned.

Furthermore, many of the victims may have been refugees fleeing persecution and acute discrimination in Myanmar, their homeland. The actions of the Thai authorities raised grave concerns regarding violations of the right to equality and non-discrimination, the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the right to seek and to enjoy asylum and not be subjected to *refoulement* and the rights to health, food and shelter under international law.

ERT also urged the Thai Prime Minister to establish and implement a new immigration policy which does not discriminate against the Rohingya or any other vulnerable group and which ensures that everyone is provided with effective access to lawful immigration procedures conducted by civilian authorities.

ERT stated that the Thai government's publicly pronounced commitment to investigate the December incidents was compromised by the new expulsions. ERT appealed to the Thai authorities to open an investigation which was prompt, impartial, thorough and independent. Such investigation should particularly focus on the full extent of the role of the Thai military, the alleged extrajudicial execution of five Rohingya and all conduct and instances which amount to torture or cruel, inhuman or degrading treatment or punishment. ERT stated further that the report of this investigation should be made public and anyone found responsible should be brought to justice.

Finally, ERT urged that Thailand accede to the 1951 Refugee Convention and its Protocol and establish a transparent system to process asylum applications in cooperation with the UNHCR.

On 26 January, Thailand promised a transparent investigation into allegations of army abuse of Rohingya boat people, but said the investigation would be led by the military unit at the heart of the scandal. Despite U.N. officials urging Bangkok to let them help with the Rohingya, Foreign Minister Kasit Piromyas said outsiders would not be asked to look into persistent reports of abuse. "It's our internal arrangement and if the military investigation is not satisfactory, we can set up another group to do it," he told reporters after a meeting with U.N. High Commissioner

for Refugees (UNHCR) representative Raymond Hall. "Don't doubt before the investigation is completed," he said. "This is a very transparent government."

ERT is looking forward to the results of the investigation and will continue to intervene as necessary.

### **ERT Action on World Day of Social Justice**

On 20 February 2009, on the inaugural World Day of Social Justice, The Equal Rights Trust (ERT) wrote to Ban Ki-Moon, Secretary-General of the United Nations, welcoming the event as an important step to raise awareness on social inequality, poverty and the widening gap between the most and the least advantaged globally. In the letter ERT appealed to the Secretary-General to promote the *Declaration of Principles on Equality* and to recommend it to relevant UN organisations and agencies.<sup>4</sup>

The World Day of Social Justice was declared by the UN General Assembly through Resolution A/RES/62/10 adopted on 19 November 2007. The resolution invites member states to promote, at the national level, concrete national activities in accordance with the objectives and goals of the World Summit for Social Development (the World Summit for Social Development and Beyond: Achieving Social Development for All in a Globalizing World).

In the letter to the Secretary-General ERT highlighted the unique contribution the *Declaration of Principles on Equality* makes to combating inequality and promoting social justice. The *Declaration* integrates the notion of status-based equality such as gender or race and equality based on factors such as income and socio-economic status.

## **ERT Appeals to Asian Foreign Ministers to Put the Plight of the Rohingya on the ASEAN Agenda**

On 25 February 2009, The Equal Rights Trust and Refugees International wrote to the Foreign Ministers of ASEAN states urging them to address the plight of the Rohingya in the Arakan region of Myanmar.

In the letter ERT and Refugees International (RI) welcomed the important role that ASEAN has played in facilitating international efforts to aid the 2.4 million people of Myanmar affected by Cyclone Nargis. They recognised that this effort was an outstanding example of ASEAN's development into a regional organisation focused on aiding all the people of the region and in upholding humanitarian principles for international assistance.

The letter urged that the resolution of the citizenship of the Rohingya required the intervention of ASEAN. Many Rohingya were fleeing by boat to escape extremely difficult circumstances in their home state of Arakan in Myanmar. Stripped of their nationality in 1982 by the government of Myanmar, the Rohingya since then have been subject to severe governmental restrictions on their rights.

ERT and RI explained that reliable reports document wide ranging discrimination and arbitrary restrictions on Rohingya's rights including freedom of movement and association, confiscatory taxation and fines, arbitrary arrest and detention, extortion, and restrictions on their religious activities. To escape these difficult conditions, many Rohingya had taken dangerous journeys by boat in an attempt to find refuge abroad. While some of the boat people may seek only to better their economic prospects, many Rohingya seek the temporary protection of another state until such time as their

homeland is willing to permit them to enjoy their full human rights as citizens of Myanmar.

ERT and RI stated that the plight of the Rohingya boat people had become a regional problem and called for action by ASEAN Members which could help resolve this issue by urging improved conditions for the Rohingya in Arakan, the institution of fair refugee screening in the countries of arrival to determine if some of the Rohingya should be protected as refugees and agreement on protection from *refoulement*. ERT and RI appealed to Foreign Ministers to ask the government of Myanmar to decriminalise the act of flight.

In addition to this ERT and RI urged:

- ASEAN Members not to consider the repatriation of non-refugee Rohingya until such action has been taken.
- ASEAN to use its good offices in seeking ways to encourage Myanmar to reconsider its policies towards the Rohingya, restore their citizenship, and accept humanitarian assistance if needed to increase the ability of this group of persons within the ASEAN community to live in peace and dignity in their country.
- ASEAN Member states to consider the merit of refugee status for Rohingya and allow the UN Refugee Agency to assist states in this process and provide temporary aid to the asylum seekers.

## **The Equal Rights Trust Calls for a Unified Approach to Equality at the Durban Review Conference**

Between 20 and 24 April 2009, ERT circulated a written statement to the UN and state delegates at the Durban Review Conference

(DRC),<sup>5</sup> and also addressed the UN and state delegates in an oral statement during the plenary session of the conference.

In the written statement, on which the oral representation was based, ERT called to the attention of states and stakeholders the *Declaration of Principles on Equality* as an instrument of international best practice which formulates comprehensive progressive standards on equality and non-discrimination, from a unified perspective which views racial discrimination in its relatedness to all other forms of discrimination and to the overarching right to equality.

ERT maintained that the *Declaration* establishes a new paradigm on equality, the most important features of which include:

- defining equality as a basic human right, and construing it as autonomous rather than subsidiary to any other right set forth by law, fusing approaches from human rights law and equality law;
- redefining positive action - departing from the concept of formal equality and interpreting positive action (affirmative action) as inherent in substantive equality rather than as an exception or a temporary special measure;
- ensuring consistency in dealing with different types of discrimination, across grounds and areas of activity - facilitating stakeholders in all nations to enshrine the right to equality in a way that eliminates the gaps, inconsistencies and hierarchies of current equality regulations;
- creating a basis, at the level of legal principle, for integrating the two historically segregated notions of equality: identity-based equality (non-discrimination on grounds of sex, race, religion, disability,

sexual orientation, etc.) and equality in terms of social class, economic status, or income.

The DRC process reaffirmed the demand for strong substantive guarantees to equality in national, regional and international law. Despite the positive strides made by the Preparatory Committee, ERT considered that there were a number of limitations to the draft outcome document. In the hope of addressing some of these shortcomings and achieving an outcome which is consistent with the highest standards contained in the *Declaration of Principles on Equality*, ERT urged the adoption of a number of recommendations to the Drafting Committee preparing the DRC outcome document.

In addition, ERT urged the UN High Commissioner for Human Rights:

- In accordance with paragraph 191 (d) of the Durban Programme of Action and paragraph 49 of the “revised version of the draft outcome document” presented by the Chair of the DRC Preparatory Committee on 15 April 2009 the Office of the High Commissioner for Human Rights should support the *Declaration of Principles on Equality* as an instrument of best practice through publicising and disseminating the *Declaration* on the OHCHR website.
  - The High Commissioner for Human Rights should encourage, in her work, the application and implementation of the *Declaration of Principles on Equality*, through her reporting and policy mandate.
- ERT called upon State Delegates to undertake the following:
- All States, in particular those under Universal Periodic Review or reporting to treaty body mechanisms, should acknowledge the *Declaration of Principles*

on *Equality* as a benchmark for equality and accordingly should self-evaluate their laws, policies, procedures and human rights safeguards against the principles contained in the *Declaration* when reporting to UN mechanisms.

- In order to promote the right to equality and combat racism, racial discrimination, xenophobia and related intolerance nationally, States should implement the principles contained in the *Declaration* in national legislation and policy and promote the use of these principles within national court systems.

In relation to civil society, ERT:

- Appealed to international and national NGO's as well as civil society activists to formally endorse the *Declaration of Principles on Equality*.
- Recommended the use of the *Declaration of Principles on Equality* as a reference mechanism to evaluate whether State performance is in accordance with the most progressive equality standards, in particular those in States under Universal Periodic Review or reporting to treaty body mechanisms.
- Called on NGO's to advocate for the principles contained in the *Declaration* to be recognised in national courts and legal policy development, in order to promote the right to equality and combat racism, racial discrimination, xenophobia and related intolerance nationally.

### **ERT Joins Appeal for Human Rights Council Special Session on Sri Lanka**

On 13 May 2009, The Equal Rights Trust joined 129 other NGOs from around the world in calling upon the UN Human Rights

Council (UNHRC) to hold a Special Session on the current human rights catastrophe in Sri Lanka, as a matter of urgent concern.

In the letter ERT along with the other 129 NGO set out their concerns regarding the situation in Sri Lanka. The UN had estimated that more than 6,400 people had been killed since the beginning of 2009 in the fighting between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), and many thousands had been severely injured; at the time of writing the letter 50,000 people remained trapped in the tiny area of land controlled by the LTTE, in danger of death and injury from the ongoing fighting and suffering from a desperate shortage of medical supplies, food and water; 170,000 people who had fled from LTTE controlled areas to camps operated by the Government face dire conditions.<sup>6</sup>

The concerns expressed in the letter regarding the human rights situation in northern Sri Lanka included core problems of discrimination against minorities and impunity for human rights abuses, including by the security forces. On the basis of these concerns and the Human Rights Council's role and responsibility, pursuant to its mandate, to monitor the implementation of human rights in situations of armed conflict, ERT joined 129 other NGOs in strongly urging the Human Rights Council to: (1) uphold its mandate with urgent and concrete actions; (2) hold a special session on Sri Lanka; (3) include the human rights situation of Sri Lanka into its agenda on a regular basis; and (4) immediately send an international mission to assess the needs of those civilians in the conflict affected areas with any unhindered access.

On 26 and 27 May, the UN Human Rights Council held a Special Session on Sri Lanka,

but with very disappointing results. ERT is currently engaged in follow-up advocacy.

### **ERT Submits Written Comments to the UK Government Calling for Improvements to the Equality Bill**

On 24 April 2009 the UK government published the Equality Bill. The Bill is currently in the process of undergoing detailed scrutiny by a Parliamentary Public Bill Committee. The Equality Bill seeks to “simplify the law which, over the last four decades, has become complex and difficult to navigate”, by replacing 9 different acts and 100 other measures with a single act.

Aside from unifying existing legislation, the bill, introduced by Minister for Women and Equality, Harriet Harman, contains a number of progressive measures, including:

- **Socio-economic duty:** a duty on public bodies to consider what action can be taken to reduce socio-economic inequality;
- **Gender pay gap reporting:** a requirement for employers with more than 250 employees to report on the gender pay gap, to be introduced in 2013;
- **Age discrimination ban:** a ban on all forms of age discrimination, extending the ban from discrimination in employment to cover the receipt of goods and services;
- **Positive action:** a provision allowing employers to take positive action to increase opportunities for those from under-represented groups.

ERT has been actively involved in the consultation and evidence gathering stages of the Bill’s amendment and scrutiny processes. On 19 May 2009, ERT responded to the Bill Committee’s request for evidence,

welcoming the Bill’s attempt to establish a unified approach and address inconsistencies, but drawing attention to some key gaps and inconsistencies in the legislation.<sup>7</sup> Drawing on the *Declaration of Principles on Equality*, ERT focussed on three areas which were viewed to be of primary importance:

- 1. Unprotected grounds:** The failure to protect people who are discriminated against because of characteristics other than those listed in the Bill. ERT proposed the adoption of a “test-based approach” to including new grounds, as used in South Africa and endorsed in the *Declaration*.
- 2. Multiple discrimination:** The failure to protect from indirect discrimination and harassment people who face discrimination because of more than one characteristic. ERT recommended amendments to include adequate protection.
- 3. Positive action:** The decision to make positive action permissible. ERT proposed that positive action, being necessary to address past disadvantage should be required as part of realising equality.

On 5 June 2009, ERT also responded to the government’s consultation on Multiple Discrimination, welcoming the proposals as a positive step, but calling for more to be done. ERT’s response called on the government not to limit protection to cases involving only two grounds, saying that fears of undue burden on employers and other organisations to be bound by the law were unfounded given the current duties under UK law. ERT also called for the provisions to be extended to include protection from indirect discrimination and harassment, citing the number of multiple discrimination cases already brought under UK law which had involved these types of discrimination.<sup>8</sup>

Over the summer of 2009 the government is launching a number of further consultations on age discrimination and on public sector equality duties that will influence the final scope of the Equality Bill. ERT will continue to work on this agenda to secure the highest possible standards on equality, as contained in the *Declaration of Principles on Equality*.

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<sup>2</sup> The text of the UN Committee on Economic, Social and Cultural Rights General Comment No. 20 is available at: <http://www2.ohchr.org/english/bodies/cescr/docs/gc/E.C.12.GC.20.doc>.

<sup>3</sup> The text of the ERT letter to Prime Minister Abhisit Vejjajiva is available at: <http://www.equalrightstrust.org/ertdocumentbank/Letter%20to%20Prime%20Minister%20of%20Thailand.pdf>.

<sup>4</sup> The text of the ERT letter to UN Secretary General Ban Ki-Moon is available at: <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20World%20Social%20Justice%20day%20letter%20JC.pdf>.

<sup>5</sup> The text of ERT written statement to the Durban Review Conference is available at: <http://www.equalrightstrust.org/newsstory200409/index.htm>.

<sup>6</sup> The text of the joint letter is available at: <http://www.equalrightstrust.org/ertdocumentbank/Appeal%20Letter-SS%20on%20Sri%20Lanka-090513-FINAL-130%20Signatories.pdf>.

<sup>7</sup> The text of Memorandum submitted by ERT to the Public Bill Committee for the Equality Bill is available at: <http://www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20Memorandum%20to%20the%20Committee%20on%20the%20Equality%20Bill.pdf>.

<sup>8</sup> The text of the ERT response to the United Kingdom Government Equalities Office consultation on multiple discrimination is available at: <http://www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20Multiple%20discrimination%20Consultation%20Response.pdf>.