



Rohingya refugees from Myanmar at the “gates of hell” International law duties of neighbouring States to refugees and asylum seekers

Briefing note

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9 November 2017

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The catastrophic exodus of Rohingya people from Myanmar's Rakhine State is being compared to the massive² flight from Rwanda at the time of its 1994 genocide. Since 25 August 2017, an estimated 613,000³ of Rakhine's 1.1 million Rohingya have surged across the Bangladesh border to Cox's Bazar to join 213,000 already encamped there after earlier waves of displacement. Numbers increase by thousands each day. Fifty-four percent of those fleeing are children.⁴ The world is transfixed by shocking descriptions of the suffering of children, women and men at the “gates of hell”⁵ at Cox's Bazar, but there is comparatively little focus on other potential destinations for Rohingya refugees. This briefing note summarizes the international law obligations of neighbouring States regarding refugees and asylum seekers with reference to Thailand and Malaysia, significant destinations for Rohingya refugees until 2015.

Brief background: Rohingya refugees have been fleeing Myanmar for decades

For decades, Myanmar's policies and practices of discrimination, exclusion and violence against Rohingya people have led them to flee in massive numbers.⁶ Waves of Rohingya people have fled violence in Myanmar in 1978 (200,000), 1991-1992 (250,000), 2012 (100,000), 2015-2016 (tens of thousands), and since late August 2017 (613,000).⁷ Bangladesh has been the main destination, but Rohingya people have also sought asylum in other countries in the region, including Malaysia, Thailand, Indonesia and India.⁸

Myanmar has long applied its discriminatory 1982 Citizenship Law in violation of international human rights standards so as to effectively deny citizenship rights to Rohingya people,⁹ which group is not recognized among Myanmar's official ethnic minorities.¹⁰ This renders most Rohingya people stateless, including persons whose families have lived in Myanmar for generations. Myanmar also refuses to recognize the group's self-identified name, “Rohingya,” referring to them instead as “Muslims,” “Muslim groups”¹¹ or illegal “Bengali” migrants.¹² The violence leading to 2012's wave of Rohingya refugees led human rights groups to describe the situation as “ethnic cleansing” and “crimes against humanity.”¹³

On 25 August 2017 attacks by about 20 members of the Arakan Rohingya Salvation Army (ARSA) killed 12 officers at 30 Rakhine State police and military posts.¹⁴ This triggered a retaliatory military “clearance operation” marked by reported burnings of entire Rohingya villages,¹⁵ killing of civilian men, women, and children, and sexual violence against fleeing girls and women.¹⁶

In September 2017, the UN Secretary General and the UN High Commissioner for Human Rights classified the forced displacements and atrocities as “ethnic cleansing” and “crimes

against humanity.”¹⁷ Increasingly, human rights experts have been using the term “genocide.”¹⁸ Yet, on 6 November the Security Council was able to prevent China’s veto¹⁹ only by resorting to a non-binding Statement²⁰ that avoids all these terms. Instead, the unanimous Statement “strongly” condemns the “violence” and expresses “grave concern over reports of human rights violations and abuses.”

Duties of Myanmar’s neighbours towards Rohingya refugees

The Security Council’s Statement stresses Myanmar’s primary responsibility to protect the human rights of its population, and joined the world’s commendation of the Bangladesh government for sheltering the refugees. The Statement urges the Bangladesh government to continue to do so until the refugees can return voluntarily and safely to Myanmar.

Bangladesh has not ratified the UN Refugee Convention²¹ which forbids States from involuntarily returning any persons to any places where they would be subjected to indefinite detention, torture and ill-treatment or other persecution (“refoulement”²²). Nor have any other countries in the region with Rohingya refugees within their territories ratified the Refugee Convention.

As a matter of overriding norms of customary international law (CIL),²³ all States are forbidden from denying temporary asylum to refugees who arrive at their borders, whether or not the States have ratified the Refugee Convention. This is a corollary of the CIL duty of non-refoulement.²⁴ The Security Council Statement urges Bangladesh to “give due regard to the principle of non-refoulement.” While the Security Council applauds other States for their humanitarian assistance, its Statement says nothing about the application of the principle of non-refoulement to all potential destination States for Rohingya asylum seekers.

Thailand: Invisibility, push-back, deportation, risk of exploitation, and indefinite detention

Until 2015, many Rohingya refugees not fleeing to Bangladesh sought boats to Thailand as a first destination on their way to Malaysia or Indonesia. While there are more than a million people from Myanmar living in Thailand, they are mainly from Myanmar’s officially recognized ethnic minorities (e.g. Karen, Karenni, Mon and Shan). Of approximately 102,000 refugees from Myanmar residing in refugee camps along the Thailand-Myanmar border, few in those camps are Rohingya.²⁵ There appears to be no available estimate of numbers of Rohingya refugees or migrants.²⁶

Thailand reportedly has not cooperated with the efforts of the UN High Commissioner for Refugees (UNHCR) to conduct refugee status determination for Rohingya people.²⁷ The official invisibility of smuggled or trafficked Rohingya people contributes to lack of transparency of numbers of Rohingya landing in Thailand. In 2013 an estimated 1,700 Rohingya men, women and children were detained in Thailand in extremely overcrowded and inhumane conditions.²⁸ As of September 2017, 121 Rohingya migrants were in detention.²⁹

In 2013, some 40,000 Rohingya people were smuggled through human traffickers’ camps in Thailand.³⁰ Traffickers attempted to extort ransoms from migrants’ families to secure their freedom and subjected their human “cargo” to severe forms of torture and ill-treatment.³¹ These trafficking routes were reportedly established in approximately 2006³² but were disrupted in 2015 after mass graves of unidentified Rohingya people were discovered in Thailand close to the

Malaysia border. Thailand responded to the news of the atrocities by pushing away boatloads of Rohingya migrants, leaving them stranded at sea.

The international outcry led Thailand to prosecute a number of traffickers, including several senior Thai military officers, one of whom was convicted in July 2017.³³ As this year's "sailing season" approaches, it is reported that some Rohingya people may again be attempting voyages from Sittwe in Rakhine State or from Bangladesh,³⁴ paying smugglers approximately 400,000 or 500,000 kyat (US \$300 or \$US 350). So far there are no news reports about Rohingya refugees disembarking in Thailand after 25 August 2017.

Thailand has not been welcoming of Rohingya migrants and refugees and since 2008 has had a policy of pushing back boatloads of Rohingya migrants to prevent them from landing.³⁵ On 29 August 2017, Thailand's Prime Minister stated that Thailand would accept Rohingya refugees and send them back "when they are ready."³⁶ At the Third Committee of the General Assembly on 1 November 2017, Thailand's representatives affirmed that Thailand would "continue to improve the situation of migrants and displaced persons" noting that "Thailand's Constitution guaranteed all persons were equal before the law and the Government was committed to implementing obligations under the International Convention."³⁷

Thailand's record of implementation of its treaty obligations in national laws, courts or administrative practice is inconsistent,³⁸ and there is serious, longstanding, and ongoing concern about discrimination, exploitation, indefinite detention, and ill-treatment of refugees.³⁹ Thailand's practice of deporting unregistered migrant workers puts migrants in precarious and often exploitive conditions.⁴⁰ A number of registered migrant workers complaining of labour rights violations are currently facing charges of criminal defamation and other offences.⁴¹ Human rights defenders and journalists reporting on human trafficking and human rights violations against migrant workers have been subjected to threats and prosecutions.⁴²

Even though Thailand has not ratified the Refugee Convention, it has a duty under CIL to give temporary asylum to refugees.⁴³ In addition, all refugee and migrant children, women and men located within Thailand's territory are entitled to all internationally protected rights enumerated in international human rights conventions to which Thailand is party, including the *International Covenant on Civil and Political Rights* (ICCPR),⁴⁴ the *International Covenant on Economic and Social Rights* (ICESCR),⁴⁵ the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD),⁴⁶ the *Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment* (CAT),⁴⁷ the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),⁴⁸ the *Convention on the Rights of the Child* (CRC) and its optional protocols on children in armed conflict (OP-CRC-AC) and on the sale of children (OP-CRC-SC),⁴⁹ the *Convention on the Rights of Persons with Disabilities* (CRPD),⁵⁰ and the *Convention against Transnational Organised Crime* (UNTOC) and its Trafficking and Smuggling protocols.⁵¹ Thailand also has an international law obligation to provide assistance to people at sea pursuant to the *UN Convention on the Law of the Sea* (UNCLOS).⁵²

Malaysia: Indefinite detention and exploitation

Prior to 25 August 2017, there were reportedly approximately 59,100 Rohingya refugees in Malaysia.⁵³ On 1 September 2017, Malaysia's Maritime Enforcement Agency was reported as stating that despite Malaysia's push back policy, they would not turn back Rohingya refugees but would give them temporary shelter, probably in immigration detention centres.⁵⁴

Until 2015, the porous border between Thailand and Malaysia allowed traffickers to transport migrants from south Thailand into jungle camps in northern Malaysia and from there to crowded compounds in border towns.⁵⁵ As in Thailand, traffickers extorted ransoms from families of victims. In March 2015, the UN Special Rapporteur on trafficking in persons noted that Malaysia has the “institutional and legal framework to prevent and combat trafficking” but needs to make mechanisms “more effective and able to deal with the ever changing features of trafficking, especially concerning its labour dimension, and its connection with migration policies.”⁵⁶

Malaysia has not ratified the Refugee Convention and considers refugees to be illegal migrants. As of May 2016, Malaysia was holding 340 Rohingya in indefinite detention.⁵⁷ Refugees not in detention face obstacles for education and work and are vulnerable to exploitation and trafficking.⁵⁸ In addition to its obligations to refugees and asylum seekers under CIL, Malaysia is bound by the CEDAW, the CRC, the OP-CRC-AC, the OP-CRC-SC, the CRPD, the UNTOC Trafficking Protocol, and UNCLOS. However, Malaysia has not ratified a number of core human rights treaties such as the ICCPR, the ICESCR, the ICERD, or the CAT.

Recommendations

Thailand and Malaysia (and all other States to which refugees from Myanmar are fleeing, including Bangladesh) are urged to:

- ensure the safety of Rohingya refugees, ensuring that they are not returned involuntarily to Myanmar to the likelihood of violations of their right to life, liberty and freedom from torture and ill-treatment and other grave human rights violations;
- adhere to international human rights law, including the *Universal Declaration of Human Rights* (UDHR),⁵⁹ CIL, and all multilateral human rights treaty obligations in relation to migrants and refugees fleeing Myanmar;
- ensure adequate domestic legal frameworks to prevent, investigate and prosecute all those involved in violations of CIL and human rights treaties;
- ratify the *Refugee Convention* of 1951 and other unratified core human rights treaties;
- ensure protection of human rights defenders and journalists in conformity with the *UN Declaration on Human Rights Defenders*.⁶⁰

Myanmar is urged to immediately:

- allow and ensure access for all necessary humanitarian aid including provision of necessities of food, water, medical care, housing and transportation to all Rohingya people in Myanmar negatively impacted by Myanmar’s policies and actions against them in violation of their internationally protected human rights;
- facilitate all necessary humanitarian assistance to Rohingya people who have fled to Bangladesh and other neighbouring countries until such time as the refugees can safely and voluntarily return to Myanmar;
- cease all military action and use of force against Rohingya people and their dwellings, property and communities;
- adopt the recommendations of the Advisory Commission on Rakhine State;
- fully cooperate with the UN Independent International Fact Finding Mission (IFFM), and grant the IFFM unrestricted access to all areas of Myanmar, pursuant to UN Human Rights Council Resolutions of 22 March 2017⁶¹ and 27 September 2017,⁶² and
- uphold the UDHR, CIL and all human rights treaty obligations under the ICESCR, CEDAW, CRC, OP-CRC-AC, OP-CRC-SC, and the CRPD.

References

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