

Special Issue on the Rohingya and the Andaman Sea Crisis: Six Years On

Introduction

As this special issue goes to print, a boat believed to be carrying 81 stateless Rohingya refugees – including 23 children – is floating off the coast of India. It left Cox's Bazar in southern Bangladesh on 11 February 2021 destined for Malaysia, but quickly suffered an engine failure and was left adrift in the Andaman Sea. The United Nations issued an urgent call for nearby governments to find and rescue the vessel which was eventually detected by the Indian coastguard two weeks after setting out on its ill-fated journey. There were eight dead on board, and the surviving passengers were reported to be suffering from starvation, extreme dehydration and illness. Their plight did not end with this 'rescue', however. India provided food, water and medical supplies and repaired the boat, but refused to permit its entry to Indian waters or allow its passengers to disembark. India has claimed the Rohingya should return to Bangladesh, while Bangladesh argues they should be accepted by India or returned to Myanmar, from where they fled persecution.

India, the State closest in terms of geographical proximity and the one which located and provided assistance to the vessel, would appear to have the primary obligation to disembark the passengers to a place of safety. Bangladesh's resistance to reaccepting the group must be understood in the context of the almost one million Rohingya refugees it already hosts in the Kutupalong and Nayapara settlements in its southern Cox's Bazar district. Recent efforts to relocate refugees to the silt island of Bhasan Char and a fire, which destroyed thousands of shelters, the main hospital and other vital services in the Kutupalong settlement – home to more than 600,000 people – demonstrate the pressure on Bangladesh to accommodate the Rohingya. Return to Myanmar is the least plausible solution, not only because the conditions for repatriation in safety and dignity are not yet in place, but because Myanmar is facing its own new challenges. A military coup on 1 February 2021 led to the detention of Myanmar's elected leaders and a return to conflict. International condemnation is growing in response to the Tatmadaw's increasingly violent crackdown on pro-democracy protesters and civilians.

However the case of this most recent boat is resolved, so far the management of the situation and prospects for its resolution are emblematic of a broader crisis which has played out on the seas of South and Southeast Asia for more than a decade. States' attempts to deny and shift responsibility, as described above, have persisted over this period, and finding durable solutions remains an intractable problem. The turbulent history of the Rohingya people's relationship with the Myanmar State dates back at least to Myanmar's independence in 1948. Successive waves of conflict have driven large groups of Rohingya into neighbouring Bangladesh and further afield, particularly to Malaysia, a preferred destination for many of the displaced. In addition to the mass exodus of more than 700,000 Rohingya from Myanmar in 2017, other journeys through the Bay of Bengal and across the Andaman Sea, facilitated by an intricate network of trafficking syndicates and government officials, have periodically captured broader international attention and implicated States across the region. In 2008–9,¹ 2015² and 2020,³ stories and pictures have emerged of desperate Rohingya refugees stranded on boats at sea and denied entry to the States they encounter along the way.

The fate of Rohingya refugees adrift on the Andaman Sea has repeatedly thrown into sharp relief the limitations of the region's willingness and capacity to respond appropriately to the arrival of refugee boats. It also highlights the reluctance of States in the region to share in the challenges of meeting the protection and humanitarian needs arising from the Rohingya's protracted displacement from Myanmar. There have been several instances of States in the region pushing Rohingya vessels back to sea and refusing to allow them to disembark. At first, the 2015 Andaman Sea crisis seemed to be a turning point in the region's response to such situations, with numerous regional and international meetings convened, pledges made, and new initiatives launched in its aftermath.⁴ Yet on the fifth anniversary of this crisis, and with the added pressure of a global pandemic, the region failed to live up to its post-2015 promises and once more refused to come to the aid of Rohingya refugees packed onto crowded boats in

1 Human Rights Watch, 'Perilous plight: Burma's Rohingya take to the seas' (25 May 2009) <www.hrw.org/report/2009/05/26/perilous-plight/burmas-rohingya-take-seas> accessed 17 April 2021.

2 UN High Commissioner for Refugees, 'Abandoned at sea' (26 August 2015) <www.unhcr.org/en-au/news/stories/2015/8/56ec1eabd/abandoned-at-sea.html> accessed 17 April 2021.

3 Hannah Beech, 'Hundreds of Rohingya Refugees Stuck at Sea With "Zero Hope"' *New York Times* (1 May 2020) <www.nytimes.com/2020/05/01/world/asia/rohingya-muslim-refugee-crisis.html> accessed 17 April 2021.

4 Madeline Gleeson, 'Unprecedented but Unfulfilled: Refugee Protection and Regional Responses to the Andaman Sea "Crisis"' (2017) 38(1) *Antropologi Indonesia* 6–20; Travers McLeod, Peter Hughes, Sriprapha Petcharamesree, Steven Wong, Tri Nuke Pudjiastuti, 'The

the same waters. With global news cycles dominated by COVID-19, the recurrence of Rohingya push backs received brief attention but quickly receded from international headlines. Whereas the developments in 2015 generated relatively extensive legal, political and academic discourse about the maritime emergency, the situation in 2020–21 has garnered far less interest.

This special issue of the *Asia-Pacific Journal on Human Rights and the Law* seeks to explore how States in the region are responding to this ongoing crisis and help put the issue back on the agenda. While the current global preoccupation with COVID-19 is understandable, the Rohingya situation is one of the world's largest and most significant refugee crises and its prospects for resolution in the foreseeable future – already slim⁵ – have been shattered by the recent coup d'état in Myanmar.⁶ This special issue joins a series of recent efforts to raise international awareness and refocus attention on possible solutions.⁷ It comes more than 12 years after hundreds of Rohingya crammed into small boats washed up on Indian islands in the Andaman Sea with tales of torture and push backs,⁸ six years after the 2015 Andaman Sea crisis, and four years after the mass exodus of 2017 when thousands of Rohingya crossed into Bangladesh every day. With repatriation no longer viable in the near future,

Andaman Sea refugee crisis a year on: what happened and how did the region respond? *The Conversation* (26 May 2016) <<https://theconversation.com/the-andaman-sea-refugee-crisis-a-year-on-what-happened-and-how-did-the-region-respond-59686>> accessed 17 April 2021.

- 5 The International Court of Justice, the International Criminal Court, and the United Nations Human Rights Council have all initiated related legal and investigation processes. Although ongoing, these developments have thus far had negligible impact. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* <www.icj-cij.org/en/case/178>; International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar <www.icc-cpi.int/bangladesh-myanmar>; United Nations Human Rights Council, Independent Fact Finding Mission on Myanmar: <www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx> and Independent Investigative Mechanism for Myanmar <<https://iimm.un.org/>> all accessed 13 April 2021.
- 6 Ashley Westerman, 'What Myanmar's coup means for the Rohingya' *National Public Radio* (11 February 2021) <<https://www.npr.org/2021/02/11/966923582/what-myanmars-coup-means-for-the-rohingya>> accessed 13 April 2021.
- 7 Andrew & Renata Kaldor Centre for International Refugee Law, 'The Andaman Sea Crisis: 5 years on', Special series (online) (2020) <www.kaldorcentre.unsw.edu.au/andaman-sea-crisis-5-years>; 'The Rohingya refugee crisis: Reflections from the region', Global Conference: 70 Years of Protecting People Forced to Flee, convened by UNHCR and the Global Academic Interdisciplinary Network (21 January 2021) <www.youtube.com/watch?v=JcexqX3anDI&ab_channel=Andrew%26RenataKaldorCentreforInternationalRefugeeLaw> accessed 17 April 2021.
- 8 Human Rights Watch, 'Perilous plight: Burma's Rohingya take to the seas' (25 May 2009) <www.hrw.org/report/2009/05/26/perilous-plight/burmas-rohingya-take-seas> accessed 17 April 2021.

mass resettlement unrealistic, and the unsustainability of indefinite accommodation of hundreds of thousands of Rohingya in overcrowded camps in Cox's Bazar, new practical measures are urgently needed.

In addressing certain gaps in the academic literature on the Rohingya refugee crisis and the Andaman Sea crisis in particular, this special issue is also sensitive to the growing consciousness in academia of historical and systemic imbalances in knowledge production. The *Asia-Pacific Journal on Human Rights and the Law* supports efforts to ensure scholarship is representative and inclusive, and recognises that diverse approaches foster richer understandings of complex issues. Accordingly, this special issue also aims to address a deficiency of academic literature by authors with regional expertise in South and Southeast Asia. It showcases research by both academics and non-traditional scholars, such as practitioners and representatives from civil society organisations and other bodies, and takes an interdisciplinary approach, bringing together legal, political and sociological perspectives.

The first article reflects on the evolution of national legislative and administrative policy frameworks in the region since 2017, and a more recent toughening of governmental positions towards refugees, migrants, and stateless persons. The authors point out the 'renewed urgency to consider possibilities for the extension of protection and access to rights and services to those normally excluded from them' in Bangladesh, India, Pakistan, Indonesia, Thailand, and Malaysia. Sumaiya Islam and Coline Schupfer from the Open Society Justice Initiative, and Zaid Hydari, Alexandra Zetes and Kevin Cole from the Refugee Solidarity Network go beyond trite observations that few States in South and Southeast Asia are parties to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol,⁹ and that there is no formal regional legal framework for refugee protection. They offer a full analysis of protection possibilities in these six national contexts. They argue that 'national legal frameworks have been and can be adapted and applied to recognise and grant refugee rights in the absence of formalised international or regional refugee protection frameworks'. In doing so, they draw out developments in national and sub-regional legislation, case law, policy and practice which may signal acceptance of key international norms and provide a basis for the progressive realisation of rights for displaced Rohingya communities. Gaps and deficiencies in national level responses remain, and the authors rightly critique the use of 'administrative discretion' or 'strategic ambiguity' in lieu of formal guarantees of rights and

9 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol relating to the Status of Refugees (adopted and entered into force 4 October 1967) 606 UNTS 267.

protection. Their analysis provides the building blocks for strategies that can be deployed to expand the protection capacity of States in the region.

The second article builds on the first, keeping its focus at the national (or 'local') level, but expanding its analysis beyond legal frameworks to the development of 'local protection capacity' – a concept which is larger than State-based efforts and includes civil society actors and refugees themselves. Brian Barbour, Lillian Fan and Chris Lewa have extensive collective experience working in local contexts in Asia. They argue that rather than focussing primarily on the law, the 'starting point' for long-term systemic change and improved protection outcomes in South and South-East Asia 'should be the development of local protection capacity among a diverse set of collaborating actors, including, but going well-beyond, the State'. They engage with some contentious issues. For example, should States remain the primary actors in international affairs? Do non-State actors 'let States off the hook' when delivering protection? And is it too simplistic to attribute failures in refugee protection to a lack of political will? They unpack the meaning of 'local protection capacity' and its specific requirements, delving deeper into the concept of a 'whole-of-society' or 'multi-stakeholder and partnership' approach endorsed in the 2018 United Nations Global Compacts on Refugees and on Safe, Orderly and Regular Migration. They conclude that the best path forward involves 'getting on with the work of protection in practice, identifying and understanding the needs of stateless Rohingya refugees and host communities, and involving diverse actors to meet those needs'.

The third article shifts the focus from the national to the regional. It acknowledges the legal, economic and political factors underpinning the failure of the Association of Southeast Asian Nations (ASEAN) to respond adequately to the Rohingya refugee crisis and considers prospects for a regional approach to refugees and asylum-seekers in Southeast Asia. Kate McMillan and Sriprapha Petcharamesree present the findings of interviews with 40 key ASEAN-based actors working on migration issues in Thailand, Indonesia, Malaysia and Singapore. The results reveal points of both contention and agreement amongst interviewees from government, inter-governmental and non-governmental agencies, civil society refugee advocacy groups, and academia about a number of issues. These include the meaning of 'responsibility-sharing', the factors inhibiting the development of regional and extra-regional cooperation to protect the rights and safety of refugees and asylum-seekers, and potential paths to such cooperation. This research has potential for more productive consideration of 'responsibility sharing' within ASEAN. While the lack of agreement as to what this concept entails 'is itself a barrier to the effective regional management of forced migration', there are important areas of consensus.

Interviewees agreed the Andaman Sea crisis of 2015 and its ongoing iterations are humanitarian disasters and there is an urgent need for greater collective action to meet the challenges of displacement. By identifying major barriers to the development of regional refugee solutions, as perceived by regional actors, McMillan and Petcharamee offer policy makers and practitioners a better sense of how to improve coordination in State responses.

The fourth article adds to the growing literature on regional dynamics and responses to mass displacement in Southeast Asia by analysing Indonesian foreign policy with respect to Myanmar and the Rohingya. It looks first at the impact of political pressure applied by Indonesia's majority Muslim civil society organisations, and second at the 'quiet diplomacy' approach taken by Indonesia in its bilateral relations with Myanmar. Yunizar Adiputera and Antje Missbach bring their expertise in Indonesian society and politics to this analysis, situating Indonesian humanitarian relief and diplomatic efforts with respect to the Rohingya in their broader historical, political and social contexts. They conclude that despite Indonesia's attempts to act as a 'peacemaker', the actual impact of these efforts on the attitudes of the leadership in Myanmar (and thus on protection outcomes for the Rohingya) has been negligible. This begs the question: was the generous humanitarian aid and 'shuttle diplomacy' of recent years all in vain? The authors' findings are now particularly relevant given the military coup of February 2021 and could shed light on Indonesia's responses to the new leadership in Myanmar as the conflict unfolds in the coming months.

The fifth article in this special issue takes a different approach. Whereas the other authors focus on developments in and between States in the region, Natasha Yacoub, Nikola Errington, Wai Wai Nu and Alexandra Robinson share the lived experiences of Rohingya women fleeing by sea. Based on interviews with survivors of these journeys and those who assisted them, the authors provide one of the first scholarly accounts of the sexual violence experienced by Rohingya women at the hands of State and non-State actors. As they note, the violence experienced by women fleeing on the Andaman Sea in 2015 is absent from most of the academic literature and reporting on the crisis, as well as from the discourse of States when interpreting international law designed to protect people at sea. The authors analyse the relevant law from a feminist legal theory perspective, explaining why States in Southeast Asia have not interpreted their legal obligations in a manner which would protect women from the specific harms they face at sea. Drawing from both their legal expertise and experience working with disembarked Rohingya women, the authors provide a set of recommendations for a 'gendered' interpretation of the law by relevant States to better protect women. Although limited to the Andaman

Sea context, these recommendations have immediate, broader relevance. For example, they could inform other situations in which women flee persecution and violence by sea, and the factors which receiving, rescuing and intercepting States should consider when determining how to respond to such flight in accordance with their international obligations.

Although the authors of these five articles have diverse experiences and approaches to the issues, certain common themes emerge. The Andaman Sea crisis of 2015 was not the only time Rohingya refugees have been left adrift at sea. That crisis, however, was a catalysing moment for the region, resulting in a flurry of activity and commitments. As a result, and in light of the more recent Rohingya boats in 2020–21, many now better appreciate that the complexity of the issues demands an analysis beyond merely considering applicable law. State responses to, and protection of, the Rohingya require a much more nuanced and multi-faceted analysis, taking account of the critical roles that civil society and non-state actors, local and national governments, regional and global organisations, and refugees themselves, play in finding solutions. The articles in this special issue are, in various ways, critical of existing legal and policy frameworks. Yet they are also constructive with a focus on potential pathways forward. They are cognisant of regional and national political dynamics that affect the likelihood of effective solutions. They also highlight the issue's location at the intersection of complex overlapping challenges involving migration, security, and the environment. Ultimately the articles in this special issue reaffirm the need for a human-rights based approach when addressing the Rohingya situation at all levels – local, national, regional and global – and involving all actors.

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