



## ASIA JUSTICE COALITION SUBMISSION TO THE SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

1. In response to a [call for input](#) by the Special Rapporteur on trafficking in persons, especially women and children (Special Rapporteur), the Asia Justice Coalition (Coalition)<sup>1</sup> provides its observations on the prevention of trafficking in persons<sup>2</sup> (*hereinafter* trafficking) among internally displaced persons (IDP), refugees, asylum seekers and stateless persons. This input looks at the impact of armed conflict on trafficking within the context of the situation in Myanmar. The continued impunity of the military junta in Myanmar and the ongoing practice of pushbacks in the region in violation of the international legal obligation to prevent *refoulement* contribute to and further exacerbate the conditions enabling trafficking.
2. The submission argues that the protracted conflict and generalised violence facilitate the commission of serious violations of international humanitarian and human rights law including trafficking in persons. The growing insecurity, rising poverty, lack of employment opportunities, limited access to nutrition, healthcare, and education, and worsening economy and humanitarian crisis leave people more vulnerable to trafficking. The input builds on the Asia Justice

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<sup>1</sup> This submission shall be attributed to the Asia Justice Coalition secretariat; its contents may not necessarily reflect the position of a specific Member and/or all Members of this Coalition.

<sup>2</sup> Trafficking in persons mean 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs', Article 3, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000, supplementing the United Nations Convention against Transnational Organized Crime.

Coalition's firm belief that centring justice and accountability in Myanmar and the Asia-Pacific region would facilitate the protection of the most vulnerable populations, IDPs, refugees and stateless persons and consequently, have a role in the prevention of trafficking in persons.

***Five Years of Entrenched Impunity in Myanmar Contributing to Conditions for Trafficking***

3. In August 2017, more than 730,000 Rohingya were forced to flee the Myanmar military's so-called 'clearance operations' from Rakhine State to Bangladesh.<sup>3</sup> According to the UN's Fact-Finding Mission, the orchestrated campaign of violence including mass killings, rape, torture, and arson by the military witnessed no real accountability and entrenched impunity in Myanmar and may amount to genocide against the Rohingya people.<sup>4</sup>
4. On 1 February 2021, the military junta nullified the November 2020 election result alleging fraud and toppled the civilian government and detained the elected leaders. The military set up the so-called 'State Administrative Council' with Min Aung Hlaing (Commander-in-Chief) as Prime Minister.<sup>5</sup>
5. The forceful usurpation of power by the military witnessed large-scale peaceful public protests calling for democracy and the restoration of the civilian government. The military suppressed the civil disobedience movement with excessive force. Since then, the military has committed crimes against humanity and war crimes across the country.<sup>6</sup> Security forces under the command of General Min Aung Hlaing have killed over 3,071 civilians, including

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<sup>3</sup> See, for example, Human Rights Council, '[Report of the Independent International Fact-Finding Mission on Myanmar](#)' UN Doc A/HRC/39/64, paras. 31-35

<sup>4</sup> '[Statement to the 42nd session of the Human Rights Council: Marzuki Darusman, Chair of the Independent International Fact-Finding Mission on Myanmar](#)' (OHCHR, 17 September 2019); See, also, Melanie O'Brien, and Gerhard Hoffstaedter, "*There We Are Nothing, Here We Are Nothing!*"—*The Enduring Effects of the Rohingya Genocide* (2020) 9(11) social sciences 209

<sup>5</sup> See, Human Rights Council, '[Report of the United Nations High Commissioner for Human Rights: Situation of human rights in Myanmar since 1 February 2021](#)', 15 March 2022 UN Doc A/HRC/49/72, para 4

<sup>6</sup> '[Statement by Nicholas Koumjian, Head of the Independent Investigative Mechanism for Myanmar: Two more years of atrocities in Myanmar](#)' (IIMM, 1 February 2023)

295 children.<sup>7</sup> The military has weaponised sexual violence and torture against pro-democracy activists<sup>8</sup> and illegally arrested and detained over 19,936 people in Myanmar. In total disregard of the country's moratorium on the death penalty, the military executed four civilians in July 2022.<sup>9</sup> More than 144 people have been sentenced to death by military-controlled courts despite serious concerns regarding due process, independence, and impartiality.<sup>10</sup> The military has intensified its attacks against all those who oppose the military coup including civil society organisations, activists, lawyers, healthcare professionals, and teachers. According to the Independent Investigative Mechanism for Myanmar (IIMM), mass atrocities perpetrated by the military junta are severely affecting women and children.<sup>11</sup>

6. The military is in armed conflict with various ethnic armed groups, especially around the border areas like Kachin, Shan, and Kayin States. According to OHCHR, the violence between the Tatmadaw and the armed groups has met the threshold of non-international armed conflict as it satisfies the dual requirement of intensity of violence and organisation of the armed groups.<sup>12</sup>
7. The indiscriminate shelling and conduct of airstrikes using jets and helicopters by the junta have resulted in civilian casualties and destruction of civilian properties.<sup>13</sup> The military routinely attacks religious and ethnic minorities, torches educational and religious buildings, and conducts targeted killings and enforced disappearances.<sup>14</sup> Since the coup, more than 38,000 houses were

<sup>7</sup> ['Daily Briefing in Relation to the Military Coup'](#) (*Assistance Association for Political Prisoners (Burma)*, 28 February 2023)

<sup>8</sup> See, Human Rights Council, ['Report of the Independent Investigative Mechanism for Myanmar, 12 July 2022'](#) UN Doc A/HRC/51/4 paras. 13-15

<sup>9</sup> ['UN Special Rapporteurs appeal for strong international response in the wake of 'devastating' executions by Myanmar junta'](#) (*UN*, 25 July 2022)

<sup>10</sup> ['Myanmar: A year after military takeover, no rule of law or judicial independence'](#) (*International Commission of Jurists*, 10 February 2022)

<sup>11</sup> See, Human Rights Council, ['Report of the Independent Investigative Mechanism for Myanmar, 12 July 2022'](#) UN Doc A/HRC/51/4 paras. 13-15

<sup>12</sup> See, Human Rights Council, ['Report of the United Nations High Commissioner for Human Rights: Situation of human rights in Myanmar since 1 February 2021'](#), 15 March 2022 UN Doc A/HRC/49/72, para 15

<sup>13</sup> See, in general, Human Rights Council, ['Conference room paper of the Special Rapporteur on the situation of human rights in Myanmar: Enabling Atrocities: UN Member States' Arms Transfers to the Myanmar Military'](#) 22 February 2022 UN Doc A/HRC/49/CRP.1

<sup>14</sup> ['Statement by Nicholas Koumjian, Head of the Independent Investigative Mechanism for Myanmar: One year after the Christmas Eve attack near Moso Village, Myanmar'](#) (*IIMM*, 23 December 2022)

razed by the military across Myanmar<sup>15</sup> including destruction of over 150 civilian homes in Sagaing in a scorched earth campaign in December alone.<sup>16</sup> The military also deliberately uses internationally banned weapons like cluster munitions<sup>17</sup> and anti-personnel landmines<sup>18</sup> that kill indiscriminately and cause widespread human suffering.

8. In 2021, since the coup, the GDP shrunk by five times<sup>19</sup> and the inflation rate in Myanmar rose to approximately 20% in the last year.<sup>20</sup> The ongoing humanitarian crisis, food insecurity, COVID-19 pandemic, and Kyat's depreciation against the Dollar, all have impacted the economy.<sup>21</sup> The 2022-2023 budget allocation for health, education, and social protection has been reduced to 2.7 per cent, 7 per cent and 0.3 per cent respectively.<sup>22</sup> Nearly 50% of the country's population continues to be below the poverty line.<sup>23</sup> According to UNOCHA, more than 17.6 million people are expected to have humanitarian needs by the end of 2023.<sup>24</sup>
9. According to UN Special Rapporteur on the situation of human rights in Myanmar, ongoing violence and instability are the factors that make women vulnerable to trafficking.<sup>25</sup> This is because the precarious economic conditions in the country, when coupled with the lack of security, push people especially women to fend for themselves.<sup>26</sup> Likewise, the lack of regular income and employment opportunities has increased the prevalence of early marriages and increased domestic violence.<sup>27</sup> Further, the armed conflict and human rights violations have pushed tens of thousands of people including women and girls

<sup>15</sup> [‘Myanmar: Over 50,000 exposed to forced evictions and housing destruction, say UN experts’](#) (UN, 2 December 2022)

<sup>16</sup> [‘Myanmar Junta Forces Torch Nearly 150 Homes in Village in Sagaing’](#) (*The Irrawaddy*, 8 December 2022)

<sup>17</sup> [‘Deadly Cargo: Exposing the supply chain that fuels war crimes in Myanmar’](#) (*Amnesty International*, 3 November 2022)

<sup>18</sup> [‘Myanmar Junta Ramps Up Landmine Use’](#) (*Human Rights Watch*, 20 November 2022)

<sup>19</sup> [‘Riding a rollercoaster’ in Myanmar’s post-coup economy’](#) (*Al Jazeera*, 2 February 2023)

<sup>20</sup> [‘Myanmar Economic Monitor January 2023: Navigating uncertainty’](#) (*World Bank*, 30 January 2023)

<sup>21</sup> *Ibid*

<sup>22</sup> [‘Myanmar plunges deeper into economic crisis’](#) (*East Asia Forum*, 24 January 2023)

<sup>23</sup> [‘Myanmar economy remains fragile, with reform reversals weakening the outlook’](#) (*World Bank*, 21 July 2022).

<sup>24</sup> [‘Myanmar Humanitarian Update No.26’](#) (UN OCHA, 2 February 2023)

<sup>25</sup> See, Human Rights Council, [‘Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews’](#), 13 June 2022 UN Doc A/HRC/49/76 para 61

<sup>26</sup> [‘Employment in Myanmar in the first half of 2022’](#) (*ILO*, 1 August 2022)

<sup>27</sup> [‘Regressing Gender Equality In Myanmar: Women living under the pandemic and military rule’](#) (*UN Women and UNDP*, 8 March 2022)

into IDP camps. IDPs are more at risk of being trafficked, especially women and girls, who have been reported to be sold by fathers/husbands.<sup>28</sup>

10. The need to escape violence and armed conflict is often taken advantage of by traffickers. Since the coup, there has been an increase in the trafficking of women and girls from Myanmar to China, India, Thailand, Malaysia, and the UAE.<sup>29</sup> Children, especially those who are unaccompanied or separated remain disproportionately affected by trafficking, including bonded labour and recruitment as child soldiers.<sup>30</sup> Men remain vulnerable to sexual exploitation and forced labour as well.
  
11. The shift of focus by law enforcement in Myanmar from anti-trafficking activities to crushing pro-democracy protests has left a huge gap in crime monitoring.<sup>31</sup> This dereliction of duty contravenes the obligation Myanmar has under the Palermo Protocol.<sup>32</sup> The escalation of armed conflict has also led to the breakdown of rule of law and widespread insecurity. The capacity of State actors to prevent, monitor, and punish trafficking is severely hampered. Moreover, the inaction by the Myanmar government is also motivated by the profits it earns through trafficking and other transnational crimes.<sup>33</sup>
  
12. The coup widened the trust deficit between civilians and security forces and lowered the effectiveness of anti-trafficking operations. The reporting of crime becomes even more difficult when the perpetrator is a member of the military junta. The military junta-controlled courts do not inspire any confidence. The collapse of the judicial system further aids the impunity enjoyed by traffickers

<sup>28</sup> See, UN General Assembly, '[Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews](#)', 12 October 2022 UN Doc A/77/2955, para 68

<sup>29</sup> See, UN General Assembly, '[Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews](#)', 12 October 2022 UN Doc A/77/2955, para 69

<sup>30</sup> See, '[A World in Crisis: Global Humanitarian Crises and Conflicts Increase Human Trafficking Concerns](#)' (*The Inter-Agency Coordination Group against Trafficking in Persons*, December 2022); See, also, '[Submission to The Office of the High Commissioner for Human Rights on the Impact of Arms Transfer on Human Rights](#)' (*Asia Justice Coalition*, April 2022)

<sup>31</sup> See, '[2022 Trafficking in Persons Report: Burma](#)' (*Office to Monitor and Combat Trafficking in Persons, US Department of State*, 2023)

<sup>32</sup> Article 9, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000, supplementing the United Nations Convention against Transnational Organized Crime. Myanmar ratified the Protocol on 30 March 2004

<sup>33</sup> '[As Myanmar Coup Intensifies Regional Human Trafficking, How Will China Respond?](#)' (*The Diplomat*, 23 August 2022)

who benefit from the existence of a myriad of crises within the country. This includes, for example, an increase in drug and exotic animals smuggling to India following the coup in Myanmar.<sup>34</sup>

***Pushbacks and Forced Return in Violation of Non-Refoulement, Contributing to Conditions for Trafficking***

13. Since the coup, the infamous ‘clearance operations’ carried out by the military have resulted in the systematic destruction of entire villages, forcing people to flee.<sup>35</sup> Targeted attacks against civilian properties by airstrikes and arson have led to the displacement of thousands of people. According to UNOCHA, more than 1.2 million people remain displaced since 1 February 2021, making the total figure of internally displaced persons over 1.5 million.<sup>36</sup>
14. Similarly, tens of thousands of individuals have crossed over to neighbouring countries to escape the escalating violence. The military takeover has pushed approximately 80,000 people into India, Thailand, Malaysia, and Indonesia.<sup>37</sup> Bangladesh hosts over 1 million Rohingya refugees in its territory and recognise Rohingya as ‘Forcibly Displaced Myanmar Nationals’.<sup>38</sup> More than 600,000 Rohingya continue to live in *de facto* internment camps in Rakhine State in Myanmar.<sup>39</sup>
15. The increasing gang violence, extortion by security forces, flood-prone territory, increasing funding cuts by international donors<sup>40</sup> and worsening living conditions in Bangladesh refugee camps are detrimental to the Rohingya.<sup>41</sup>

<sup>34</sup> [‘Myanmar coup to blame for increase in smuggling of drugs, exotic animals in India, officials say’](#) (*South China Morning Post*, 19 September 2022)

<sup>35</sup> [‘Myanmar: Over 50,000 exposed to forced evictions and housing destruction, say UN experts’](#) (*UN*, 2 December 2022)

<sup>36</sup> [‘Myanmar Humanitarian Update No.26’](#) (*UN OCHA*, 2 February 2023)

<sup>37</sup> [‘Situation in Myanmar’](#) (*UNHCR*, 23 February 2023)

<sup>38</sup> [‘“Comprehensive” solution needed to end mass displacement of Rohingya’](#) (*UN*, 25 August 2022); [‘“Forcibly displaced Myanmar nationals”](#) (*Daily Star*, 29 September 2017)

<sup>39</sup> [‘Myanmar: No Justice, No Freedom for Rohingya 5 Years On’](#) (*Human Rights Watch*, 24 August 2022)

<sup>40</sup> [‘Bangladesh: UN experts appeal for immediate funding to avert food ration cuts for Rohingya refugees’](#) (*OHCHR*, 16 February 2023)

<sup>41</sup> [‘“An Island Jail in the Middle of the Sea”: Bangladesh’s Relocation of Rohingya Refugees to Bhasan Char’](#) (*Human Rights Watch*, 7 June 2021); [‘Bangladesh: New Restrictions on Rohingya Camps’](#) (*Human Rights Watch*, 4 April 2022)



Likewise, increasing restrictions on movement, access to healthcare, and livelihood, coupled with arbitrary arrests and detention have pushed thousands of Rohingya in Rakhine State, including women and children, to flee by sea routes.<sup>42</sup> There has been a 360 per cent increase in such escapes from the year before. According to the UNHCR, at least 348 individuals died or went missing at sea in 2022.<sup>43</sup>

16. In their attempt to flee in desperation from the situation from Rakhine State and in Cox's Bazar camps, the Rohingya often become victims of trafficking.<sup>44</sup> These places are transit sites for traffickers to move individuals fleeing Myanmar to Malaysia, Indonesia, Thailand, and India.<sup>45</sup> In doing so, many are caught and convicted by the military court in Myanmar for travelling 'without legal documents' and violating the 1949 Registration Act or the 1947 Immigration Act and receive imprisonment.<sup>46</sup> In the past, Rohingya refugees found beyond camp boundaries in Bangladesh were also charged and punished under the 1946 Foreigners Act.<sup>47</sup>

17. When the traffickers are successful in evading security forces, they are reported to have forced women and girls into sex work, domestic work, and child marriages on the false pretext of a more secure life.<sup>48</sup> Similarly, traffickers often disembark Rohingya at nearby islands instead of the agreed destination country after accepting large amounts of money.<sup>49</sup> Owing to their status as stateless refugees, the Rohingya often don't possess any paperwork and remain identity less.<sup>50</sup> Consequently, it leaves them in a position of double vulnerability and at

<sup>42</sup> ['Prevent the Unthinkable: The International Community Must Leverage the International Court of Justice's Provisional Measures Order Before it's Too Late'](#) (*Burmese Rohingya Organisation UK*, 1 December 2022)

<sup>43</sup> ['UNHCR Seeks Comprehensive Regional Response to Address Rise in Deadly South-East Asia Sea Journeys'](#) (*UNHCR*, 17 January 2023)

<sup>44</sup> ['Bangladesh: Protect victims of trafficking, especially within the country, says UN expert'](#) (*UN*, 9 November 2022)

<sup>45</sup> ['Situation in Myanmar'](#) (*UNHCR*, 23 February 2023)

<sup>46</sup> ['More than 100 Rohingya refugees jailed for trying to flee Myanmar camps'](#) (*The Guardian*, 11 January 2023)

<sup>47</sup> ['Talk about Malaysia in the sea around Chittagong!'](#) (*Dhaka Tribune*, 31 May 2021)

<sup>48</sup> See, Human Rights Council, ['Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews'](#), 13 June 2022 UN Doc A/HRC/49/76 para 61

<sup>49</sup> ['Police probe dumping of 59 Rohingya on island off Satun'](#) (*Bangkok Post*, 5 June 2022)

<sup>50</sup> ['The Displaced and Stateless of Myanmar in the Asia-Pacific Region'](#) (*UNHCR*, January 2021)

the mercy of traffickers.<sup>51</sup> However, the Rohingya and others move despite such risks to flee from violence by the military junta.

18. Increasingly, countries in the region are not allowing boats carrying the Rohingya and others to land on their shores.<sup>52</sup> Boats are prevented from reaching territorial waters or, on reaching territorial waters, passengers are detained as ‘illegal immigrants’.<sup>53</sup> Likewise, countries in the region are detaining and deporting on land persons likely owed protection—including many who may be victims of trafficking—in violation of the international principle of *non-refoulement*. In addition, in 2021, UNICEF argued that the practice of ‘pushbacks’ and forced return only exacerbates the conditions for trafficking.<sup>54</sup>

19. As an example, in the past year, Thailand has repeatedly sent back thousands of refugees to Myanmar, in violation of domestic and international law.<sup>55</sup> In the past, Rohingya fleeing to Thailand became victims of trafficking after being refused entry, increasing the likelihood of being trafficked.<sup>56</sup> Thai security forces actively stop people fleeing from Myanmar from reaching Thailand by carrying out arbitrary arrests and detention, extortion, and destroying cross-border bridges.<sup>57</sup> Thailand is not a signatory to the 1951 Refugee Convention or its 1967 Protocol and continues to treat refugees as ‘illegal immigrants’ under the 1979 Immigration Act. The Thai Cabinet is working on a ‘National Screening Mechanism’ that will set regulations for the protection of refugees but there are serious concerns about it already, such as rejection on national security grounds, lack of access to the appellate procedure, etc.<sup>58</sup>

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<sup>51</sup> [‘Rohingya risk death, rape at hands of smugglers to escape ‘open-air prison’ in Myanmar, Bangladesh’](#) (*South China Morning Post*, 28 February 2023)

<sup>52</sup> [‘UNHCR Seeks Comprehensive Regional Response to Address Rise in Deadly South-East Asia Sea Journeys’](#) (UNHCR, 17 January 2023); [‘Thailand: Allow Newly Arrived Rohingya Access to Asylum’](#) (*Human Rights Watch*, 7 June 2022); [‘Indonesia rejects Rohingya refugees, sends boat to Malaysia’](#) (*Al Jazeera*, 28 December 2021)

<sup>53</sup> See, for example, [‘Myanmar Reportedly Jailed Malaysia-bound Rohingya Refugees for Traveling ‘Without Official Documents’](#) (*Voice of America News*, 13 January 2023)

<sup>54</sup> [‘Pushback Practices and their Impact on the Human Rights of Migrants’](#) (UNICEF, February 2021)

<sup>55</sup> See, [‘Despite risk of death, Thailand sends Myanmar refugees back’](#) (*AP News*, 7 February 2022)

<sup>56</sup> [‘Thailand secretly dumps Myanmar refugees into trafficking rings’](#) (*Reuters*, 5 December 2013)

<sup>57</sup> [‘Thailand: Video Reveals Thai Soldiers Destroying Cross-Border Footbridge Used by Myanmar Refugees’](#) (*Fortify Rights*, 3 May 2022)

<sup>58</sup> [‘Thailand: Ensure “National Screening Mechanism” is Accessible to All Refugees’](#) (*Fortify Rights*, 15 December 2022)



20. In 2021, the Malaysian High Court granted a temporary stay on the deportation of 1,200 Myanmar refugees. But the government went ahead with the deportation of 1086 people in contravention of the judicial order.<sup>59</sup> Thereafter, the court lifted the stay and government forcibly returned the remaining 114 asylum seekers to Myanmar in January 2023.<sup>60</sup> Previously, in 2022, Malaysian authorities deported over 2000 Myanmar nationals without screening their asylum claims.<sup>61</sup> These deportations heighten the risks of trafficking as those returned are vulnerable and wish to flee Myanmar.<sup>62</sup> Like Thailand, Malaysia is not a party to either the 1951 Refugee Convention or its 1967 Protocol. Malaysia does not have a national policy on refugees and accepts refugees on an ad-hoc basis. Anyone who enters the country without proper documentation is treated as an ‘illegal immigrant’, even if fleeing persecution.<sup>63</sup>

21. It is of concern that pushbacks and forced returns in both Thailand and Malaysia have occurred due to trafficking from Myanmar and Bangladesh even before the 2021 Myanmar coup. In 2015, around 28 trafficking camps and 139 mass graves of Rohingya and Bangladeshi victims of trafficking were found at Wang Kelian, a village near the Thai-Malaysian border.<sup>64</sup> In 2019, the Royal Commission of Inquiry (RCI) was opened by Malaysia to investigate the situation and attach criminal accountability, but the report was made confidential without actual accountability.<sup>65</sup>

22. Even if pushbacks or forced returns do not occur, States without formal refugee status determination process and rights enshrined in law for persons owed refugee protection leave trafficked persons vulnerable to further exploitation and violence. For example, in Malaysia, no refugee is entitled to seek formal

<sup>59</sup> [‘Defying court order, Malaysia deports more than 1,000 Myanmar nationals’](#) (Reuters, 22 February 2021)

<sup>60</sup> [‘Malaysia court lifts stay on deportation of 114 Myanmar nationals’](#) (Reuters, 13 December 2022); [‘Amnesty International Malaysia condemns deportation of more Myanmar nationals, including children’](#) (Amnesty International Malaysia, 23 February 2023)

<sup>61</sup> [‘Malaysia: Surge in Summary Deportations to Myanmar’](#) (Human Rights Watch, 24 October 2022)

<sup>62</sup> See, in general, [‘Malaysia: “Heinous” plan to send Rohingya people back to sea’](#) (Amnesty International, 19 June 2020)

<sup>63</sup> Section 6(1) r/w 6(3), Immigration Act 1959/63 (Act 155)

<sup>64</sup> [“‘Sold Like Fish’: Crimes Against Humanity, Mass Graves, and Human Trafficking from Myanmar and Bangladesh to Malaysia from 2012 to 2015’](#) (Fortify Rights and SUKHAM, March 2019)

<sup>65</sup> [‘Malaysia: Prosecute Officials Involved in Rohingya Trafficking and Mishandled Investigation’](#) (Fortify Rights, 18 October 2022)

employment. Rohingya, in particular, have limited access to formal education and healthcare. Consequently, it pushes Rohingya to undertake odd jobs and expose themselves to exploitation, including forced labour and trafficking.<sup>66</sup> In 2022, as a result of indefinite detention and dehumanising living conditions, over 500 Rohingya refugees detained in the immigration centre escaped (with six deaths) and were later apprehended by the police.<sup>67</sup>

23. Despite many States in the region not being signatories to the 1951 Refugee Convention, the principle of *non-refoulement* is still applicable customary international law.<sup>68</sup> In other words, States are under international legal obligation to *not* forcibly remove, return, expel, extradite, or deport an individual to a State in which they will be at risk of a specific type of harm.<sup>69</sup> States have a duty to protect individuals in their territory from any harm that could occur to them if they are refouled. This legal obligation to uphold the principle of *non-refoulement* applies to the territorial sea as well. Wherever a State can exercise its effective control—for example, either actively (such as boarding or seizing a boat) or passively (such as warning boats or ordering a change of route)—the obligation against *non-refoulement* is binding.

24. Moreover, in these specific examples, Thailand is a party to the 1984 Convention Against Torture<sup>70</sup> and the Convention on the Rights of Child<sup>71</sup> has been ratified by both Thailand and Malaysia. Both treaties codify the international legal obligation of *non-refoulement* and mandate protection of individual from forcible expulsion and removal to a country where there is a potential for any harm. Further, the recently promulgated domestic law entitled *Prevention and Suppression of Torture and Enforced Disappearance*

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<sup>66</sup> [“We are just surviving on our own”: the plight of Rohingya in Malaysia](#) (Frontier Myanmar, 7 September 2022)

<sup>67</sup> [“Six killed as hundreds of Rohingya flee Malaysia detention”](#) (Al Jazeera, 20 April 2022)

<sup>68</sup> Article 33(1), The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, entered into force 22 April 1954

<sup>69</sup> See, in general, [“Primers for International Accountability in Asia: Non-Refoulement and International Law”](#) (Asia Justice Coalition, April 2022)

<sup>70</sup> Article 3, The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, entered into force 26 June 1987

<sup>71</sup> Article 6 r/w 37, The 1989 United Nations Convention on the Rights of the Child, 1577 U.N.T.S. 3, entered into force 2 September 1990

Act also affirms the same principle and mandates the Thai government to not deport any individual at risk of torture or cruel treatment.<sup>72</sup>

***Opportunities to Reduce or Prevent Trafficking by Addressing Impunity and Refoulement***

25. In the past, the Security Council has expressed deep concerns about protracted conflict, the consequent deterioration of respect for human rights and rule of law, negative implications on humanitarian assistance, and trafficking in persons. The Security Council in its resolutions has recognised the nexus between refugees/IDPs and trafficking and has regularly called on States to work towards combating trafficking in persons during conflict.<sup>73</sup> The Security Council also recognises ‘trafficking in persons in the context of armed conflict may constitute war crimes’ and obliges States to undertake investigation and prosecution to end impunity. In 2022, the Security Council imposed sanctions on Haiti and demanded cessation of all violence including direct or indirect assistance in trafficking in compliance with international refugee and human rights law.<sup>74</sup>

26. Despite binding legal obligations to prevent trafficking and protect victims of trafficking, UN Member States have frequently increased the risks of trafficking by refusing refugees and other vulnerable populations entry into the country. The ongoing proceedings at the International Court of Justice (ICJ) instituted by The Gambia against Myanmar under the Genocide Convention have limited scope of addressing trafficking in persons.<sup>75</sup> However, the crime of trafficking in persons *may* be relevant for the ongoing International Criminal Court investigation into the situation of Myanmar/Bangladesh. In 2019, the Pre-Trial Chamber authorisation allowed the Prosecutor to investigate not just the crime against humanity of deportation, but *any* crime provided it is within the

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<sup>72</sup> Section 13

<sup>73</sup> See, for example, [S/RES/2331 \(2016\)](#), Security Council resolution 2331 (2016); [S/RES/2388 \(2017\)](#) Security Council Resolution 2388 (2017)

<sup>74</sup> See, [S/RES/2653 \(2022\)](#) Security Council Resolution 2653 (2022)

<sup>75</sup> During the preliminary objections’ proceedings, the agent for The Gambia highlighted the fact that Rohingya women and girls are regularly trafficked in Rakhine State to establish the alleged genocidal intent of the Myanmar military. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Verbatim Record) 23 February 2022 < <https://www.icj-cij.org/sites/default/files/case-related/178/178-20220223-ORA-01-00-BI.pdf>>

jurisdiction of the Court and sufficiently linked to the Prosecutor's request covering the 2016–2017 violence against the Rohingya.<sup>76</sup>

27. In the region, the Association of Southeast Asian Nations (ASEAN) has had trafficking on its agenda since 1997. Before the adoption of the 2015 ASEAN Convention Against Trafficking (ACTIP)<sup>77</sup>, the regional bloc had several non-legally binding instruments governing trafficking, including the Declaration on Transnational Crime which established the ASEAN Ministerial Meeting on Transnational Crime. The 2004 Mutual Legal Assistance in Criminal Matters (MLAT) cemented the intra-ASEAN obligations to coordinate on the matters of criminal investigation and prosecution of trafficking. ACTIP calls upon the ASEAN States to prevent, criminalise, and combat trafficking while ensuring protection and assistance to victims and survivors.<sup>78</sup> In short, States in this region understand how, and have the tools to combat trafficking.

28. Likewise, States in the region including Thailand, Malaysia, and Indonesia have ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (Palermo Protocol) which calls for a passing of enabling legislation to criminalise and punish trafficking.<sup>79</sup> The protocol mandates the State to give 'due regard for the safety of that [trafficked] person' before sending them back to the State where they have nationality or permanent residence.<sup>80</sup> The risk assessment is an obligatory duty put on the State receiving trafficked victims and survivors as asylum seekers before repatriation. In addition to regional and domestic interests, trafficking destination States in the region have international obligations to better address trafficking victims and especially those who may also be owed protection from persecution. In the discharge of such obligations, all anti-trafficking measures must be consistent with obligations under the 1951 Convention including *non-*

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<sup>76</sup> *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation) 14 November 2019 <[https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF)>

<sup>77</sup> The ASEAN Convention Against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force March 2017

<sup>78</sup> *Ibid*, Article I(2)

<sup>79</sup> Article 5

<sup>80</sup> Article 8(2)

*refoulement*. The saving clause of the Palermo Protocol provides for a symbiotic relationship with the Refugee Convention.<sup>81</sup>

29. It provides so because generalised violence in the country may make it difficult for a trafficked person to return. The threat of trafficking on return and reprisals against the victim and their family members by the traffickers may constitute persecution and warrant protection under the refugee regime. Similarly, the fear of abandonment, discrimination, and ostracization by family and community members may lead to internal displacement and further heightens the risk of re-trafficking. The lack of State protection could be due to incapacity or unwillingness to protect victims of trafficking, especially in a situation of armed conflict. This highlights, instead of deportation, the harm caused by trafficking may amount to persecution and call for protection under the 1951 Convention.

30. Thailand's 2008 Anti-Trafficking in Persons (ATIP) Act provides for status determination of trafficked persons. It allows victims to seek compensation for the trafficking and testify as a witness in a criminal proceeding. Additionally, the survivors have the right to access rehabilitation, medical treatment, and protection. Similarly, the Malaysian government promulgated the 2007 Anti-Trafficking in Persons and Smuggling of Migrants (ATIPSOM) Act that provides for protection to the trafficked persons and exempts them from criminal prosecution under the Immigration Act for their status as 'illegal immigrants'. The trafficked person can seek refuge in a government shelter, medical examination under Malaysian law and can testify to the crime of trafficking before the court. While both the laws provide for protection and status determination of trafficked victims, these laws do not appear to be used in reference to particular groups of persons including potentially trafficked Rohingya.

31. In summary, armed conflict exacerbates the threat of trafficking of persons. Entrenched impunity in Myanmar will continue to accelerate conditions conducive to trafficking in persons. Deporting and returning the victims of

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<sup>81</sup> Article 14(1), Palermo Protocol

human trafficking in violation of international law further push them into a situation of uncertainty and instability. In the absence of early detection of victims of trafficking and access to protection, the risk of re-trafficking and continued exploitation increases. The abject failure and/or refusal to address the ongoing commission of mass atrocities by the military junta in Myanmar exacerbates the vulnerability of potential victims and increases the market for traffickers.

### **Recommendations**

- A. International community to put pressure on the Myanmar military to immediately end all violations of international law including killing, torture, abduction and arbitrary detention, and sexual violence, as well as to release all arbitrarily detained and to quash wrongful convictions.
- B. Myanmar military to prevent trafficking in conflict and protect victims of trafficking including Rohingya and other refugees and IDPs.
- C. The military junta to facilitate safe, rapid, and unimpeded humanitarian access to everyone including refugees, IDPs, and stateless persons.
- D. Myanmar military to end recruitment and use of children and ensure their systematic identification, swift release, and safe socio-economic reintegration.
- E. UN Security Council to refer the situation in Myanmar to the International Criminal Court for a full investigation of crimes including trafficking in persons and forced recruitment of children and other forms of sexual exploitation.
- F. UN Security Council to impose sanctions on Myanmar demanding cessation of all violence including trafficking in persons under Chapter VII.
- G. ASEAN States to utilize existing tools for regional cooperation to improve mutual legal assistance and undertake effective investigation and prosecution to combat trafficking in persons.
- H. Neighbouring States to extend humanitarian protection to all individuals crossing the international border, respect their freedom of movement, livelihood, and education, thereby mitigating vulnerability to traffickers.



- I. Neighbouring States to uphold their international, regional, and domestic responsibilities to protect victims of trafficking, especially women and girls, without discrimination.
- J. Neighbouring States to uphold their regional and international responsibilities to promptly detect, search and rescue, ensure timely disembarkation, and extension of humanitarian aid to the refugees on boats in distress according to the 2016 Bali Declaration.
- K. Neighbouring States to protect the rights of trafficking victims through effective identification, and gender-sensitive and child-responsive support measures, with adequate and sustained resourcing.