

Submission: Trafficking in persons and protection of refugees, stateless persons and internally displaced persons (IDPs)

Cover Note

This submission is divided into five sections, each highlighting an issue area critical to addressing forced displacement, smuggling, and trafficking of Rohingya in Asia.

1. Southeast Asian frameworks and mechanisms for anti-smuggling, anti-trafficking, and refugee protection
2. National-level policies and laws in Indonesia, Malaysia, and Thailand, and the accessibility of these protections to the Rohingya refugees
3. Alignment of policies and approaches with international / global frameworks and commitments
4. Connections between refugee protection, anti-smuggling and anti-trafficking policies across regional and national levels
5. Policies/mechanisms that have mutually reinforcing outcomes for Rohingya refugees

ADSP, its member organisations, and partners of the Protecting Rohingya Refugees in Asia (PRRiA) project welcome further engagement on areas presented in this Submission. PRRiA partners include the Mixed Migration Centre, Danish Refugee Council, Geutanyoe Foundation, HOST International, and Jesuit Refugee Service-Indonesia.

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Southeast Asia frameworks and mechanisms for anti-smuggling, anti-trafficking, and refugee protection

1. The ASEAN Human Rights Declaration (AHRD) is the main regional instrument in Southeast Asia promoting the safeguarding of human rights. The AHRD, however, does not make reference to refugees, asylum seekers, stateless persons, or IDPs.¹ Furthermore, the AHRD is non-binding and has had limited influence on member states. It is unlikely to be an avenue for expanding rights and protections for refugees in the region, particularly in member states with poor human rights records.
2. The Association of Southeast Asian Nations (ASEAN) does not have explicit policies related to refugee protection in the region. Left to their own accord, member states have tended to approach forced migration through the prism of national immigration law and policy, treating refugees as ‘irregular migrants’ or ‘illegal entrants’. Member states, too, have typically adopted securitized responses to refugee movement, treating refugees as threats to border management and national security.
3. The ASEAN Convention Against Trafficking in Persons (ACTIP) is the primary framework with the region for addressing human trafficking. Thailand, Malaysia, and Indonesia are parties to ACTIP and the 2015 ACTIP Plan of Action. ACTIP and the Plan of Action guide ASEAN member states on developing national anti-trafficking laws, but emphasize the criminalization of trafficking. As such, they provide less detailed guidance for distinguishing persons who have been smuggled or trafficked, for developing standardised screening mechanisms, or for providing appropriate support services to survivors.
4. National policies in Southeast Asia reflect ACTIP’s emphasis on criminalization and similarly under-consider impacts on survivors, critical distinctions between smuggling and trafficking, and the complexities of irregular movement. This includes the movement of Rohingya refugees to Malaysia and Indonesia, which often begins as smuggling but may become trafficking with subsequent acts of exploitation.
5. Decades of persecution, denial of basic human rights, abuse and violence targeting the Rohingya people in Myanmar and in countries of refuge have increasingly exposed Rohingya to risks of human trafficking. From Rakhine State in Myanmar and the refugee camps in Cox’s Bazaar, Bangladesh, Rohingya people are recruited and deceived into making perilous journeys—primarily towards Malaysia. They face abuse and violence along the way, often exploited as forced brides or abused in labour schemes. The fight against complex international trafficking networks requires comprehensive policies, at the national and international levels, that safeguard survivors’ rights and protect them against criminalization.

¹ Association of Southeast Asian Nations. 2012. ASEAN Human Rights Declaration. Association of Southeast Asian Nations. Retrieved from: [https:// asean.org/asean-human-rights-declaration/](https://asean.org/asean-human-rights-declaration/)

6. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime is a key platform for shaping regional anti-trafficking and anti-smuggling discourse. However, it has failed to facilitate significant regional coordination on responses to forced displacement and refugee movement, not least Rohingya displacement and the dangerous maritime movements of Rohingya from Myanmar and Bangladesh. Almost since its creation, there have been intermittent attempts to reshape the Bali Process into a forum for promoting regional responses to irregular and unsafe movements, the strongest of which followed the 2015 Andaman Sea Crisis. These have consistently failed, losing momentum as regional governments have stepped up efforts to discourage embarkation and interdict boats at sea.

Recommendations:

- **ASEAN should prioritise the development of a regional refugee protection framework** to supersede the patchwork of national protection responses grounded in anti-human trafficking laws, shifting humanitarian policies, migration management, and qualified recognition of international obligations. Enhanced refugee protection at the regional level could reduce vulnerabilities and exposure of Rohingya refugees, as they weigh the risks related to push factors and embarking on exploitative and dangerous journeys. An ASEAN framework should be the goal; however, refugee-hosting governments must simultaneously explore unilateral approaches that promote coordination, resource sharing, protection outcomes, and accountability.
- **Bali Process Co-Chairs and member states should reorient the platform to make refugee protection a strategic priority.** This would require clarifying the Bali Process's mandate to include responses to forced migration, investing in technical capacities to support affected countries, and operationalising existing emergency response mechanisms.
- **Australia and Indonesia, as Co-Chairs of the Bali Process, should reinvigorate the Bali Process as a forum for influencing regional policy on forced migration and refugee protection.** This would include guiding the development of regional responses to irregular movements that comply with international law: the customary principle of non-refoulement, UNCAT, UNCLOS, SOLAS, the SAR Convention, and the Migrant Smuggling Protocol.
- **Regional governments should urgently develop a framework for coordinated responses to irregular boat movements,** which includes continuous monitoring of search and rescue (SAR) areas, establishes clear and efficient channels of inter-governmental communication when boats carrying refugees and migrants are identified, and coordinates rescue and disembarkation of passengers.

National-level policies and laws in Indonesia, Malaysia, and Thailand, and the accessibility of these protections to the Rohingya

7. The Thai government does not legally recognise refugee status and treats Rohingya refugees as illegal migrants under the Immigration Act of 1979. The Thai government typically places Rohingya men in immigration detention centres (IDCs), while women and children are held in closed shelters, with insufficient access to essential services, including health care.
8. Thailand's 2008 Anti-Trafficking in Persons Act in principle creates protections for survivors of trafficking. Those screened and determined to be survivors are entitled access to shelter, legal support, medical treatment, employment during the proceedings, and reintegration assistance. However, Rohingya and other groups have inconsistent access to the screening process. Data is not publicly available, but few if any Rohingya arrested in Thailand in 2022 are believed to have been screened or identified as survivors of human trafficking.
9. Of Rohingya identified as survivors, many are held indefinitely in closed government shelters. Survivors in shelters have limited mobility, although children may attend outside schools, and attendants facilitate occasional outings to local destinations. However, if the holding capacities of shelters are full, shelter staff coordinate with the Thai police to redirect survivors to IDCs. Trafficking shelters face budget limitations as well, sometimes relying on NGOs to cover the costs of basic items.
10. In Indonesia, PR No. 125/2016 forms the main protection policy for refugees.²³ It defines refugees' basic needs and sets criteria for the conditions of refugee shelters. It also outlines the overall process for refugee search and rescue, handling, and management; and charges the Indonesian Armed Forces, Indonesian National Police, and Maritime Security Agency with conducting search and rescue operations.
11. While PR No. 125/2016 specifies government agencies responsible for search and rescue, handling, and management, it is less comprehensive on interagency roles and coordination procedures. This lack of detail allows agencies the latitude to interpret their obligations, which complicates interagency cooperation, reduces operational efficiency, and negatively impacts refugees arriving irregularly.
12. The Malaysian government assumes unregistered refugees to be illegal migrants under Immigration Act 1959/63 and has not enacted any law recognising refugee status. It does allow temporary protection and stay to refugees registered with UNHCR's office in

² Mixed Migration Centre. 2021. A Transit Country No More: Refugees and Asylum Seekers in Indonesia. MMC. Retrieved from: https://mixedmigration.org/wp-content/uploads/2021/05/170_Indonesia_Transit_Country_No_More_Research_Report.pdf

³ Dewansyah, B., & Nafisah, R. 2021. The Constitutional Right to Asylum and Humanitarianism in Indonesian Law: 'Foreign Refugees' and PR 125/2016. *Asian Journal of Law and Society*, 8(3) 536-557. Retrieved from: <http://doi.org/10.1017/als.2021.8>

Malaysia; however, access to UNHCR registration is a key challenge for undocumented refugees, and since 2019, Malaysian authorities have not allowed UNHCR to enter IDCs.

13. The 2022 Trafficking Refugees Information System (TRIS) is a Malaysian government-run mandatory registration scheme to provide government 'MyRC' ID cards to refugees and asylum seekers living in Malaysia. Promises for better access to education, healthcare, and job opportunities under TRIS have not materialised.⁴
14. Under Section 25 of Malaysia's 2007 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM) and policies issued by the Attorney General and National Security Council, UNHCR-registered refugees and asylum seekers have immunity from trafficking charges. ATIPSOM prevents criminal prosecution of survivors of trafficking regardless of irregular entry into Malaysia, the period of unlawful residence in Malaysia, or procurement or possession of fraudulent travel or identification documents.
15. But inconsistent enforcement of ATIPSOM curbs access to legal protections for Rohingya survivors of trafficking. Rohingya have been charged with smuggling offences. Many are unable to afford legal representation and must seek pro bono legal services. The lack of compensation for lawyers and required travel to IDC courts in remote areas leads to a shortage of legal representation for Rohingya.

Recommendations:

- **National responses should leverage existing frameworks on anti-trafficking to promote protection outcomes for refugees who are survivors of human trafficking.** There should be increased focus on reinforcing and improving protections within existing mechanisms.
- **Thailand, Indonesia, and Malaysia should integrate refugee protection and national anti-trafficking policies,** and improve resourcing for implementation.
- **ASEAN-ACT, IOM, UNHCR, and relevant INGOs and bilateral partners should support national governments to build capacity** at the subnational level on trafficking screening, survivor identification, and protection services.

⁴ [UNHCR cardholders urged to register with gov't's TRIS to get benefits | Free Malaysia Today \(FMT\)](#)

Alignment of policies and approaches with international / global frameworks and commitments

16. In Indonesia, PR No. 125/2016 aligns in part with the 1951 Convention Relating to the Status of Refugees (1951 Convention), including by adopting the Convention definition of a refugee.
17. Beyond broad commitments to respect the principle of non-refoulement, the governments of Thailand and Malaysia have incorporated few elements of the 1951 Convention and its 1967 Protocol into domestic law and policy. Refugee responses have instead been securitized, with national security and political expediency eclipsing refugee protection, as evidenced by both countries' intermittent practice of refoulment and deportation.⁵⁶
18. Thailand, Indonesia, and Malaysia are states parties to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo Protocol). Indonesia is also party to the 2000 Protocol Against the Smuggling of Migrants by Land, Sea, and Air (Smuggling Protocol). Thailand has not enacted anti-smuggling legislation, instead addressing smuggling cases under the Immigration Act of 1979. Indonesia processes smuggling cases under its 2011 Immigration Law, and Malaysia applies the Immigration Act of 1959/63 and ATIPSOM Act. The enforcement of national policies on anti-trafficking and smuggling does not align with the Palermo Protocol.

Recommendations:

- **Indonesia, Malaysia, and Thailand should strengthen domestic approaches to refugee protection that promote inter-ministerial coordination, resource sharing, accountability, and protection outcomes that align with international legal standards.** Moreover, they should engage in whole-of-society approaches that include civil society actors, refugee and host communities, donors, and UN agencies in the development and implementation of national policies that recognise the legal status of refugees and enable refugees to access social services and economic opportunities.

⁵ Equal Rights Trust. 2014. The Human Rights of Stateless Rohingya in Thailand. Equal Rights Trust. Retrieved from: <https://www.equalrightstrust.org/ertdocumentbank/The%20Human%20Rights%20of%20Stateless%20Rohingya%20in%20Thailand%28small%29.pdf>

⁶ Sulaiman, S. et.al. 2021. Non-refoulement and Right of Entry for Asylum-seekers. *Petrinka Journal of Social Sciences & Humanities*, 29(S2) 75-87. Retrieved from: <https://doi.org/10.47836/pjssh.29.S2.06>

Connections between refugee protection, anti-smuggling, and anti-trafficking, across regional and national levels

19. Trafficking and smuggling are frequently conflated in Indonesia, Malaysia, and Thailand making minimal distinctions between consent, exploitation, and the transnationality of the crime as clarified in the Palermo Protocol and Smuggling Protocol. The lack of distinction between domains impedes law enforcement and survivor identification efforts, and has fuelled unjust accusations toward and punishment of Rohingya.
20. Thailand does not have specific legislation on smuggling, defaulting to the 1979 Immigration Act to penalise smuggling offences. The blurring of smuggling and trafficking undermines anti-trafficking law enforcement efforts, survivor identification, and application of legal protections.
21. In Malaysia, under ATIPSOM and the Immigration Act of 1959/63, smuggling is criminalised, creating penalties for both smugglers and smuggled persons. This presents risks for Rohingya who predominantly (estimated 94%) enter Malaysia through smuggling. Although refugees registered with UNHCR have immunity from trafficking charges, the 2022 US TIP Report indicated that Malaysian police insufficiently screen refugees and asylum-seekers for signs of trafficking. While in detention, the government elicits self-incriminating testimony from detainees to use as evidence against the defendant during trial.
22. Malaysian policies also do not account for the often complex journeys of Rohingya refugees, which may begin voluntarily as situations of smuggling, but change while enroute as ostensible smugglers subject Rohingya to violence, forced labour, financial entrapment, and other abuses.
23. In Indonesia, in February 2022, the government charged and sentenced three Indonesian fishermen to five years in prison for accepting payment (USD 487) from smugglers to help disembark a boat carrying 120 Rohingya.⁷ Criminalisation of this kind has had a chilling effect on civil society organisations, making them more wary of aiding arriving Rohingya lest they be prosecuted for supporting smuggling. There are fears the case above may set a legal precedent that discourages future, live-saving efforts to rescue and disembark refugees and migrants.

Recommendations:

- **Indonesia, Malaysia, and Thailand should address protection needs by establishing clarity between smuggling and trafficking** including through stronger policies with consistent messaging, implementation, and enforcement.

⁷ Radio Free Asia. 2022. Indonesian fisherman seek leniency for 3 jailed over assisting stranded Rohingya. Radio Free Asia. Retrieved from: <https://www.rfa.org/english/news/myanmar/indonesia-rohingya-02022022161228.html>

- **Regional bodies should promote alignment of national-level anti-human trafficking and refugee response laws, policy frameworks,** and approaches to ensure survivors of trafficking, including Rohingya, have effective access to national protection and support services.
- **The Bali Process, specifically, should ensure that national approaches to trafficking, smuggling, and related transnational crime account for the intersections between these phenomena and refugee movement** and other forms of forced migration, and do not penalise refugees for enlisting smugglers to transport them to countries of refuge.
- **Indonesia, Malaysia, and Thailand should be supported to build capacity at the subnational level on trafficking screening, survivor identification, refugee protection, and support and rehabilitative services.**

Policies/mechanisms that have mutually reinforcing outcomes for Rohingya refugees

24. Thailand has not enacted reinforcing policies that produce beneficial outcomes for Rohingya refugees. The Thai government separates Rohingya refugees from other Myanmar refugees and subjects them to harsher living conditions, less access to health care and education services, and restrictions on mobility. The Rohingya are generally regarded as ‘illegal immigrants’ and face stricter policies than other communities from Myanmar: for example, indefinite detention in IDCs and exclusion from border camps. Nor are Rohingya expected to have access to Thailand’s forthcoming National Screening Mechanism (NSM), a quasi-asylum screening process. The NSM is primarily designed for urban-based refugees, including refugees from countries such as Afghanistan, Somalia, Syria, and Cambodia who live in urban areas of Thailand. While the Thai government has not yet clarified, individuals who hold an MOI-issued ‘pink card’—an identification document for persons with ‘alien’ status, including Rohingya – will likely be prohibited from applying for protection under the NSM.
25. In Indonesia, certain government policies have mutually reinforcing outcomes for refugee protection. PR No. 125/2016 includes guidelines for: the search and rescue, handling, and management of refugees; creates standards for shelter conditions; explicitly authorises UNHCR and other organisations to assist in coordination, protection and management; and includes a requirement for removing refugees and asylum seekers from smuggling operations.⁸⁹

⁸ Republic of Indonesia. 2016. Indonesia: Regulation of the President of the Republic of Indonesia No. 125 Year 2016 Concerning the Handling of Foreign Refugees. Retrieved from: <https://www.refworld.org/docid/58aeee374.html>

⁹ UNHCR. 2020. Indonesia Factsheet (April 2020). UNHCR. Retrieved from: <https://www.unhcr.org/id/wp-content/uploads/sites/42/2020/08/Indonesia-Fact-Sheet-April-2020-FINAL.pdf>

26. In Malaysia, there is evidence that some national policies produce complimentary outcomes for Rohingya survivors of trafficking. ATIPSOM and National Security Council Directive No. 23 expand access to temporary stay and legal protections. While the ATIPSOM penalises persons who have been smuggled, it grants immunity to survivors of trafficking regardless of irregular entry and unlawful residence, which prevents survivors from incarceration in IDCs. This is critical, as UNCHR cannot access IDCs or conduct ‘refugee status determination’ (RSD) for detainees. In effect, protection from detention under the ATIPSOM enables undocumented survivors of trafficking to seek and request UNHCR RSD that can yield ID cards authorised by Directive No. 23 to provide temporary stay and legal protection. However, conflation in practice of trafficking and smuggling means that officials sometimes wrongly charge Rohingya survivors of trafficking with smuggling—and offence punishable by up to seven years imprisonment.

Recommendations:

- **Regional and national responses should leverage existing frameworks surrounding anti-trafficking and child protection, which may have complementary outcomes for the protection needs of refugees and trafficking survivors.**
- **Thailand, Indonesia, and Malaysia should integrate protections into national anti-trafficking policies, develop refugee protection policies, and improve resourcing to implementation.**