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# Responsibility for boat crises in ASEAN: Potential means and methods for accountability

**Sangeetha Yogendran**

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Five years ago, in May 2015, the discovery of 26 bodies belonging to Rohingya and Bangladeshi men near a refugee camp along the Thai-Malaysia border set off a chain of events that would later become known as the Andaman Sea crisis. The Thai government's crackdown on a human trafficking route between Myanmar and Malaysia triggered a regional crisis, with up to 8,000 Rohingya and Bangladeshi migrants and refugees left stranded at sea in boats lacking adequate food, water and sanitation. Countries in the region played 'a three-way game of human ping pong' (/Sangeetha%20Yogendran%20%20Five%20years%20ago%2C%20in%20May%202015%2C%20the%20discov Malaysia%20border%20set%20off%20a%20chain%20of%20events%20that%20would%20later%20become%20 way%20game%20of%20human%20ping%20pong%E2%80%99%20with%20these%20boats%2C%20trying%20 19%29%20spreading%20around%20the%20world.%20Meanwhile%2C%20from%20January%20to%20March% 19%20pandemic%2C%20have%20resulted%20in%20boatloads%20of%20Rohingya%20seeking%20refuge%20

19. Meanwhile, xenophobic attacks and hate speech against Rohingya have ASEAN's attempts at accountability at the regional level for the events surrounding the And Chinese refugees in the late 1970s demonstrated a positive track record in responding to complex and refoulement are referenced by implication. Article 14 of the Human Rights Declaration encapsulates the refoulement in the same context as the Convention Against Torture and does so without qualification by led mechanism. While it is unclear what mechanism the Chairman's statement interference in internal affairs which hinders the establishment of supranational frameworks aimed at interference. Such a step would admittedly stand in radical contrast with the fundamental and core value productive to advocate for a separate accountability mechanism for the Rohingya in this situation, being of nearly 100 Rohingya refugees rescued by local fishermen. The Foreign Ministry has also said with these boats, trying to ensure none could enter their territorial waters and hence engage their international obligations. None of the countries in the immediate vicinity (Thailand, Malaysia and Indonesia) allowed the boats to land, although the Thai government did supply some of the boats with food and water (<http://thediplomat.com/2015/09/how-to-solve-southeast-asias-refugee-crisis/>).

Since 2015, the situation for Rohingya has developed both in horrific ways, because of mass displacement, and in encouraging ways, with multiple and promising attempts at international accountability for their plight. Since 2017 alone, more than 800,000 Rohingya refugees have fled persecution in Myanmar and crossed into Bangladesh (<https://www.nytimes.com/2020/02/11/world/asia/rohingya-refugees-boat-bangladesh.html>), where most now remain in camps in Cox's Bazaar. Yet just this year, international efforts towards accountability have achieved significant progress. From the genocide case before the International Court of Justice (</publication/rohingya-refugee-crisis-international-justice-and-rethinking-solutions>), to the possible case before the International Criminal Court (<https://news.un.org/en/story/2019/11/1051451>), to the universal jurisdiction case in Argentina (<https://www.aa.com.tr/en/americas/argentinian-court-decision-brings-hope-for-rohingya/1861967>), the international legal community is deploying multiple accountability measures to seek accountability for the persecution of the Rohingya.

Regrettably, though, efforts within the region remain painfully absent. And amidst this regional silence, refugees have again begun making dangerous journeys by boat to seek asylum elsewhere, leading to deaths at sea. This paper will look at possible avenues for accountability specific to the region, and specific to the crimes being committed that have led to these deaths at sea, both in 2015 and now. It also asks the broader question of whether this region is any more willing or better prepared to respond to mass displacement and forced migration. It is hoped that this analysis will not only have significance for the region, preventing future boat crises, but also for similar crises in other parts of the world. For example, at the time of writing, Greece was preventing asylum seekers from reaching shore (<https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html>). After a devastating fire in Moria camp on the Greek island of Lesbos, 12,000 migrants and asylum seekers are now homeless (<https://www.nytimes.com/2020/09/10/world/europe/lesbos-fires-coronavirus.html>) and could also turn to journeys over land and sea to seek refuge.

## The Andaman Sea crisis – five years on

In the early months of 2020, the international community turned its attention to the arrival of a novel coronavirus (COVID-19) spreading around the world. Meanwhile, from January to March 2020, several boats carrying hundreds of Rohingya refugees left Bangladesh for Malaysia. Malaysian authorities responded by pushing boats back out to sea ([https://www.hrw.org/news/2020/06/26/asean-overhaul-regional-response-rohingya-crisis?mc\\_cid=d2ab1ff97c&mc\\_eid=f5833385ae](https://www.hrw.org/news/2020/06/26/asean-overhaul-regional-response-rohingya-crisis?mc_cid=d2ab1ff97c&mc_eid=f5833385ae)); more recently, in June 2020,

Malaysia detained nearly 300 Rohingya when their damaged boat arrived off the coast of Langkawi, while planning to send the boat back out to sea (<https://www.reuters.com/article/us-myanmar-rohingya-malaysia/malaysia-could-send-rohingya-detainees-back-out-to-sea-sources-idUSKBN23P1F7>) once it had been repaired and supplied with food and water. Also in June 2020, local fishermen and officials in the Indonesian province of Aceh rescued a stranded boat of 94 Rohingya refugees, including up to 30 children. As of September 2020, nearly 300 Rohingya have come ashore in Aceh after months at sea ([https://www.hrw.org/news/2020/06/26/asean-overhaul-regional-response-rohingya-crisis?mc\\_cid=d2ab1ff97c&mc\\_eid=f5833385ae](https://www.hrw.org/news/2020/06/26/asean-overhaul-regional-response-rohingya-crisis?mc_cid=d2ab1ff97c&mc_eid=f5833385ae)). It was also reported that at least one boat remained at sea after being pushed back several times by the Malaysian coast guard. Thailand has denied that any Rohingya boats were present in Thai waters in the Andaman Sea (<https://www.benarnews.org/english/news/malaysian/Rohingya-boats-06102020150325.html>).

Border and immigration controls, tightened in response to the COVID-19 pandemic, have resulted in boatloads of Rohingya seeking refuge being pushed back into the sea. Many Rohingya have died at sea. In Myanmar, dozens of Rohingya who were caught fleeing Rakhine state by sea have been arrested and detained (<https://www.france24.com/en/20200903-rohingya-arrested-at-sea-shunted-back-to-myanmar-camps>). They remain in overcrowded facilities in Rakhine state, further compounding the risk of COVID-19. Meanwhile, xenophobic attacks and hate speech against Rohingya have spread on social media, increasing discrimination and the risks of further physical violence.

Faced with these tests, both ASEAN and individual countries in the region have failed to show their commitment to human rights and accountability for the Rohingya. Although individual countries outside the region – such as the Gambia and, more recently, the Maldives – have chosen to support and back cases before international courts, Myanmar has not faced pressure of this kind from its immediate neighbours. Moreover, none of the initiatives to pursue accountability for the Rohingya plight has focused on accountability for those whose lives have been lost at sea. There should also be a push for an accountability mechanism that focuses on countries in the region which, by not respecting international law and the fundamental human right to seek asylum, are complicit in these deaths occurring at sea.

## **The importance of labelling and language**

Before the region can move towards potential accountability mechanisms, it first has to acknowledge, and appropriately label, the situation at hand. The labelling of the crisis is critical, as it can then shape the debate on what potential accountability mechanisms are most appropriate. ASEAN has consistently shied away from labelling the crisis as one of a refugee nature. Perhaps individual states in the region, and the regional bloc as a whole, are trying to avoid addressing the root causes of the issue (that is, the persecution of Rohingya in Myanmar) and thus any protection obligations owed to these refugees and asylum seekers under international law.

ASEAN's policy response to the Andaman Sea crisis involved labelling the problem as one of 'irregular migration', and by doing so it changed the narrative of the crisis such that refugees were seen 'solely as victims of smuggling and trafficking rather than of state persecution' (<https://thediplomat.com/2015/08/the-labeling-problem-in-southeast-asias-refugee-crisis/#:~:text=The%20Rohingya%20issue%20shows%20that,within%20their%20sphere%20of%20responsibility>). Although smuggling and trafficking were some very real outcomes of the refugee crisis that began in 2015, they were certainly not the root cause of the problem.

The term 'Rohingya' also continues to be left out of the conversation in the region, as does 'genocide'. Despite clear and consistent evidence to the point (<https://apnews.com/4f75583260ad421db7fcabaa2a126722>), the term 'genocide' has not been raised by any authority or government in the region in relation to the Rohingya. This is hardly surprising given the region's reluctance to address the situation as that of a refugee crisis. Many countries in the region, with the notable exceptions of Malaysia and Indonesia, hesitate to acknowledge the Rohingya community as a standalone ethnic community or group within Myanmar.

### **What does ASEAN accountability for boat crises look like?**

ASEAN's attempts at accountability at the regional level for the events surrounding the Andaman Sea crises have been limited, at best, and demonstrate the need for a regional mechanism capable of addressing such human rights issues. With only two out of ten ASEAN nations being States parties to the 1951 Refugee Convention, none of the existing mechanisms has been in a position to adequately respond to another crisis like this. However, prior to ASEAN, the region's collective commitment to provide temporary asylum to Indo-Chinese refugees in the late 1970s demonstrated a positive track record in responding to complex and highly politicised situations of forced migration, suggesting that ASEAN could, with political will, likewise take a common stance.

The ASEAN Charter (<https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf>) contains clear commitments to human rights. In 2009, ASEAN established the ASEAN Intergovernmental Commission on Human Rights. Following this, the Commission drafted the ASEAN Human Rights Declaration in 2012 (<https://asean.org/asean-human-rights-declaration/>), which was adopted unanimously by all ASEAN members, and details the regional body's commitment to human rights. In ASEAN, the rights of refugees and correspondingly the principle of non-refoulement are referenced by implication. Article 14 of the Human Rights Declaration encapsulates the principle of non-refoulement in the same context as the Convention Against Torture and does so without qualification by stating that 'No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.' Therefore, the region has mechanisms to 'promote and protect human rights and fundamental freedoms of the peoples of ASEAN' (<http://hrlibrary.umn.edu/research/Philippines/Terms%20of%20Reference%20for%20the%20ASEAN%20Intergovernmental%20CHR.pdf>), and these mechanisms should have been utilised to address refugee issues in the region by now.

Despite this broad human rights framework and these mechanisms, however, ASEAN has continued to respond to refugee issues on an ad hoc basis, as and when crises occur, and without always following through on commitments. For example, in response to the 2015 crisis, ASEAN agreed to set up a task force and trust fund to respond to the irregular movement of refugees and migrants, at the Special Meeting on Irregular Migration in the Indian Ocean (<https://www.mfa.go.th/en/content/5d5bcf0015e39c3060017e77?page=5d5bd3da15e39c306002aaf7&menu=5d5bd3dc15e39c306002ab1c>). Most of the recommendations from that and other meetings at the time have yet to be implemented. Moreover, in 2017, ASEAN made no mention of any of the regional mechanisms established after the 2015 crisis. The only statement issued by ASEAN, the Chairman's joint statement (<https://asean.org/asean-chairmans-statement-on-the-humanitarian-situation-in-rakhine-state/>) issued on behalf of the Foreign Ministers of ASEAN states, merely encouraged closer dialogue between Myanmar and Bangladesh 'so that the affected communities can rebuild their lives', and welcomed and supported humanitarian efforts from the ASEAN Coordinating Centre for Humanitarian Assistance and the Red Cross movement, both working with the 'Myanmar Government-led mechanism'. While it is unclear what mechanism the Chairman's statement ([<https://www.kaldorcentre.unsw.edu.au/publication/responsibility-boat-crises-asean-potential-means-and-methods-accountability>](https://asean.org/storage/2020/06/Chairman-</a></p>
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Statement-of-the-36th-ASEAN-Summit-FINAL.pdf) was referring to, it was most likely a reference to humanitarian assistance efforts led by the government. In 2020 there has been a continued reluctance on ASEAN's part to address the root causes of displacement in Myanmar, with the Chairman's statement continuing to frame the crises as one of ensuring safety and security for all communities in Rakhine state, with a focus on repatriation efforts between Bangladesh and Myanmar.

This approach, which involves reacting to surges in refugee arrivals in an ad hoc manner, stands in contrast to the more coordinated responses to the Indochinese boat crisis in the 1970s and 1980s. It has proven neither sustainable nor effective when it comes to addressing the causes and experiences of flight by sea.

At the core of the problem is the lack of a regional agreement on forced migration. This lack reflects ASEAN's aversion to regional laws in general, with the exception of those concerning economic cooperation, and its 'primary commitment to the principle of non-interference in internal affairs (<https://thedi diplomat.com/2015/09/adrift-in-asean-tackling-southeast-asias-migration-challenge/>), which hinders the establishment of supranational frameworks aimed at addressing the region's transnational challenges'. This principle has allowed several ASEAN governments to deal with refugee issues as if they were matters of general migration. While the immediate resolution of the Rohingya crisis will require significant changes to Myanmar's laws and policies, the region would also benefit from clearly defined asylum procedures. Without such procedures, forced migrants will continue to fall victim to what have been described as (<https://thedi diplomat.com/2015/09/adrift-in-asean-tackling-southeast-asias-migration-challenge/>) 'instrumental approaches to irregular migration characterized by the power of states to detain and deport unauthorized populations when they see fit and otherwise tolerate their presence as cheap and exploitable workers'.

### **A way forward towards ASEAN accountability?**

An ASEAN redress mechanism that focuses on accountability for boat crises would send a clear message to the world and the region that inaction in the face of hundreds fleeing by boat to seek asylum will not be tolerated. This accountability can either focus on Myanmar, as a source country from which people are fleeing by boat, but given the international momentum on Myanmar already, accountability can also focus on States in the region that have failed to render assistance or to allow those seeking asylum from disembarking.

Southeast Asia would not be alien to such accountability mechanisms. The Extraordinary Chambers in the Courts of Cambodia, which was established to prosecute the crimes of the Khmer Rouge, and the UN Special Crimes Panel in East Timor, are the two most prominent legal redress mechanisms in ASEAN countries. Indonesia is also familiar with such mechanisms with its ad hoc human rights courts to deal with human rights violations (<http://www.humanrights.asia/news/alrc-news/ALRC-CWS-39-003-2018/>), although so far they have never been used.

A similar hybrid tribunal, as has been established in Cambodia and East Timor, could be established for boat crises, which have impacted not just Rohingya refugees but also migrants from Bangladesh. However, it would be important that such a mechanism not interfere with or contradict the efforts of the International Criminal Court and International Court of Justice. To ensure this outcome, the proposed hybrid tribunal should have a more specific mandate, focusing on the crimes related to not rendering assistance or allowing disembarkation for those fleeing by boat.

It is highly unlikely that Myanmar would accede to any request for such a tribunal to be situated in Myanmar itself. It could be situated in Bangladesh, which has already had its own International Crimes Tribunal set up in 2009 to investigate and prosecute suspects of the genocide committed in 1971 by the Pakistani Army and local collaborators. However, given Bangladesh's responsibilities in already hosting up to a million Rohingya refugees, it may be better situated in a neutral ASEAN country.

In order to establish a tribunal or other similar legal mechanism, ASEAN would need to actively step away from its dominant principle of non-interference. Such a step would admittedly stand in radical contrast with the fundamental and core values of ASEAN. However, while radical in comparison to any past practice, the ineffectiveness of past efforts is reason to consider such an approach. It may seem counter-productive to advocate for a separate accountability mechanism for the Rohingya in this situation, but, given the focus on Myanmar in ongoing accountability measures, there is a gap for accountability for the boat crises. These ongoing accountability measures are limited to the responsibility of the state of Myanmar, and it is imperative that in the midst of the several global accountability measures that have been outlined earlier, ASEAN as a region does not absolve itself of any and all accountability. Ideally, true accountability would entail a mechanism established and funded by ASEAN itself, located alongside other ASEAN institutions in member states. Who should be charged or prosecuted is another issue that any legal mechanism would have to decide. An ad hoc tribunal could mean investigating the political and other governmental leaders from the region who have made decisions around disallowing asylum seekers to disembark, pushing boats back out to sea, or from providing essential assistance to those fleeing.

Meanwhile, the current or possibly future ASEAN chair could drive the regional grouping to commit to the organisation's purposes of adhering to the rule of law and protection of human rights enshrined in the ASEAN Charter. The Charter also mandates all ASEAN members to be collectively responsible for enhancing peace and security. As Chair, any of the member states would be in a unique yet strategic position to show to the international community that ASEAN's commitment to peace and security goes beyond words and translates into effective action, especially in light of ASEAN's telling silence in the face of these many other accountability initiatives. For example, Indonesia has on several occasions offered assistance to stranded Rohingya refugees arriving by boat. The government currently is working (<http://www.humanrights.asia/news/alrc-news/ALRC-CWS-39-003-2018/>) with civil society groups as well as the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) to ensure the well-being of nearly 100 Rohingya refugees rescued by local fishermen. The Foreign Ministry has also said that authorities were investigating whether the refugees could be victims of human trafficking, and Indonesia has discussed (<https://www.thejakartapost.com/news/2020/06/29/indonesia-draws-praise-for-assisting-rohingya-as-asean-fails-to-mitigate-crisis.html>) the issue of boat people with Australia, as part of the Bali process framework, which involves dozens of countries that make up the "supply chain" of irregular migration around the world.

While the global community has made immense strides for legal accountability for the Rohingya from the perspective of addressing Myanmar's responsibility for crimes committed within the state and that caused them to flee from there, a push for accountability from and within the region for a failure to respond appropriate to refugees fleeing by boat, would send an important signal, given the reality that such crises have already shown that they will continue to occur unless otherwise stopped.

Sangeetha is a PhD Research Fellow at the Human Rights Centre at Ghent University. She is a human rights and humanitarian professional from Singapore. She has worked in Cambodia at the Khmer Rouge Tribunal, and on representing a group of minority victims. Sangeetha has worked in the occupied Palestinian territories on humanitarian law, as well as with refugee communities in Malaysia and in Australia. She has also worked as a researcher on humanitarian assistance, rule of law, and business and human rights issues. Sangeetha is an Advocate & Solicitor in Singapore, holds an LL.M. in Public International Law from Melbourne, and an LL.B from Singapore. She is a member of the Emerging Scholars Network with the Kaldor Centre for International Refugee Law at UNSW.



*If you are interested in contributing to the Kaldor Centre's special series marking the five-year anniversary of the Andaman Sea crisis, either in a standalone piece or response to an existing contribution, please contact **Madeline Gleeson** at [madeline.gleeson@unsw.edu.au](mailto:madeline.gleeson@unsw.edu.au) (mailto:madeline.gleeson@unsw.edu.au).*

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