

# ISSUE BRIEF

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## Achieving Resolution in the Southeast Asian Migrant Crisis

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More than 4,800 Rohingya and Bangladeshi migrants have landed on the shores of Malaysia, Indonesia, Burma, and Thailand over the past several weeks.<sup>1</sup> The United Nations Refugee Agency (UNHCR) estimates that as many as 2,000 additional migrants may still need to be rescued.<sup>2</sup> While many migrants have safely reached shore, their journey is far from over.

Even after the migrant crisis exits the news cycle, the restitution and rehabilitation of migrants, prosecution of smugglers and traffickers, and fates of victims will remain undecided. Regardless of whether migrants are classified as “smuggled,” “trafficked,” “refugees,” “asylum seekers,” “economic migrants,” or a mix of classifications, the crisis is severe and in need of urgent resolution. In order to ensure resolution, the U.S. must work with the UNHCR and partner countries in Southeast Asia to identify, process, and resettle or repatriate migrants according to recognized international standards.

### Human Trafficking vs. Human Smuggling

The boat crisis, however grave, is not a cut-and-dried case of human trafficking. Many migrants are smuggled willingly. The distinction between human

trafficking and human smuggling is not inconsequential and has very significant legal ramifications. Which type of assistance victims receive, how traffickers or smugglers are prosecuted, and under whose jurisdiction they are prosecuted and rehabilitated are largely contingent on whether they are determined to be victims of trafficking or smuggled migrants.

The United Nations Office on Drugs and Crime (UNODC) defines migrant smuggling as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”<sup>3</sup> A smuggled migrant will usually pay a smuggler a sum of money to be transported from one country to another.

The State Department defines trafficking in persons as “the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion.”<sup>4</sup>

Human trafficking is distinguished from human smuggling in several ways:

- **Human trafficking requires the use of force, fraud, or coercion.** At some point in the process, a person must be deceived through the use of force, fraud, or coercion to be considered a victim of trafficking. If the victim is under age 18 and trafficked into sexual exploitation, consent is not relevant because the victim is deemed too young to grant consent. A smuggled migrant, on the other hand, always consents, at least initially.
- **Human trafficking produces profit through exploitation.**<sup>5</sup> Smugglers generate a

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profit through the fees they receive from smuggled migrants. Traffickers generate a profit by exploiting a victim—generally through forced labor or sex trafficking.

- **Trafficked persons are always victims of crime.** Smuggled migrants do not always experience violence or have a crime perpetrated against them. Exploitation of trafficked persons always constitutes a crime.
- **A person can be considered a victim of trafficking even if he never crosses an international border.**<sup>6</sup> Smuggled migrants always cross an international border and illegally enter a foreign country in contravention of the law. Victims of trafficking can be trafficked in their neighborhood, state, or country.

There are different legal structures that govern the treatment of trafficking victims as opposed to smuggled migrants, and different legal consequences for traffickers than for smugglers.<sup>7</sup> Since smuggled migrants are considered illegal immigrants, their complicity in a crime is usually addressed under domestic immigration, organized crime, or corruption laws, which vary according to country.

By contrast, trafficking victims receive legal protection and traffickers are prosecuted under anti-trafficking laws.

### **Migrant Crisis in Southeast Asia: Human Trafficking or Human Smuggling?**

The current crisis involves two groups: Burma's Muslim minority, the Rohingya, and Bangladeshi citizens. Due to the ongoing persecution of the Rohingya by the Burmese government, many Rohingya may be eligible for refugee and asylum status.<sup>8</sup> However, the majority of Bangladeshis are deemed economic migrants and can be repatriated to Bangladesh. In fact, as many as 800 Bangladeshis are registered to return to their home country.<sup>9</sup> It has been suggested, however, that many sea-faring Bangladeshi migrants later became victims of trafficking—promised equitable work abroad and later trafficked after fees for travel were altered and migrants were exploited for labor.<sup>10</sup>

Most Rohingya living in Burma today were born there, but discriminatory laws prohibit them from enjoying the legal privileges of citizenship.<sup>11</sup> Countless Rohingya have been forced into camps where they are deprived of proper food, medical attention, and access to schooling. The United States Holocaust Memorial Museum's Simon-Skjodt Center for

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1. UNHCR, "UNHCR Launches US \$13 Million Appeal for Southeast Asia Boat Crisis Response," June 5, 2015, <http://www.unhcr.org/557175819.html> (accessed June 12, 2015).
  2. News release, "U.S. Refugee and Migration Policy and Programs in Southeast Asia," U.S. Department of State, June 3, 2015, <http://www.state.gov/j/prm/releases/remarks/2015/243186.htm> (accessed June 12, 2015).
  3. UNODC, "Migrant Smuggling," <http://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html> (accessed June 12, 2015).
  4. U.S. Department of State, "Trafficking in Persons Report," June 2013, p. 29, <http://www.state.gov/j/tip/rls/tiprpt/2013/210543.htm> (accessed November 19, 2013).
  5. UNODC, "Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications," 2011, [https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling\\_of\\_Migrants\\_A\\_Global\\_Review.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling_of_Migrants_A_Global_Review.pdf) (accessed June 12, 2015).
  6. U.S. Department of State, "Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking 2006," January 1, 2006, <http://www.state.gov/m/ds/hstcenter/90434.htm> (accessed June 12, 2015).
  7. See the Palermo Protocol, and Trafficking Victims Protection Act in the U.S.
  8. UNHCR, "2015 UNHCR Country Operations Profile-Myanmar," <http://www.unhcr.org/pages/49e4877d6.html> (accessed June 12, 2015).
  9. U.S. Department of State, "Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking 2006," January 1, 2006, <http://www.state.gov/m/ds/hstcenter/90434.htm> (accessed June 12, 2015).
  10. Private meeting at The Heritage Foundation with Greg Wilcock, High Commissioner, Australian High Commission, Dhaka, Bangladesh.
  11. Olivia Enos, "Desperate Migrants in Southeast Asia Point to Problems in Burma," *The Daily Signal*, May 15, 2015, <http://dailysignal.com/2015/05/15/desperate-migrants-in-southeast-asia-point-to-problems-in-burma/>.
  12. United States Holocaust Memorial Museum, Simon-Skjodt Center for the Prevention of Genocide, "They Want Us All to Go Away: Early Warning Signs of Genocide in Burma," May 5, 2015, <http://www.ushmm.org/m/pdfs/20150505-Burma-Report.pdf> (accessed June 12, 2015).
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the Prevention of Genocide believes that the Rohingya are currently vulnerable to genocide.<sup>12</sup> About 150,000 Rohingya are internally displaced and another 500,000 are refugees and asylum seekers living in refugee camps in Bangladesh.<sup>13</sup> These factors form the basis for Rohingya asylum and refugee claims and raise concerns that many Rohingya are being trafficked out of the camps.

Even if the Rohingya are considered refugees or asylum seekers, and Bangladeshis are considered economic migrants, each person should be evaluated to determine whether they were victims of human trafficking.

Some countries in Southeast Asia prefer that the crisis be labeled a human trafficking problem in the hopes that they will receive additional international assistance, and can then possibly seek an upgrade in their status on the State Department's Trafficking in Persons (TIP) report. Other countries prefer the crisis be labeled as smuggling in order to conceal inadequacies in their own anti-trafficking policies. Human rights organizations are pushing for the migrant crisis to be called a human trafficking situation because they believe it will draw greater attention to the already severe human rights crisis facing the Rohingya.

The reality is that the situation is severe and urgent regardless of what it is called. It need not be called human trafficking to garner international attention, and it should not be called human trafficking if it is not.

### **Achieving Resolution in the Migrant Crisis**

Solutions to the migrant crisis will have to come, in large part, from Burma: The government must address the domestic challenges facing the Rohingya. But a solution will also require other Southeast Asian countries to mobilize a coordinated response. The governments of other Southeast Asian countries will need to:

- **Develop a humanitarian action plan to quickly identify victims of trafficking from the migrant crisis.** While migrants are still at sea, the goal is to get them to shore and ultimately save their lives, but after they are rescued, the truly difficult work begins. Most of the migrants are likely smuggled, but those who are victims of trafficking are eligible for special protections. Southeast Asian nations should not treat all migrants as victims of trafficking as this will strain the already limited pool of resources available to combat human trafficking and deprives true victims of the restitution and rehabilitation they deserve. Equally important: Traffickers and smugglers must be prosecuted for their crimes.
- **Evaluate country efforts during the Southeast Asia migrant crisis as a part of the State Department's annual review process for the 2016 Trafficking in Persons report.** The reporting period for the 2015 TIP report closed in March, but how countries handle the crisis now should have implications for the 2016 report rankings.<sup>14</sup> State Department officials should thoroughly review the handling of the crisis and consider whether current anti-trafficking best practices were applied and, if so, whether they were effective.
- **Press the Burmese government to recognize Rohingya as citizens.** Burma refuses to acknowledge that its policy toward the Rohingya has exacerbated and, in large part caused, the migrant crisis. Identification cards—the last shred of identification afforded to the Rohingya in Burma—were recently revoked by the Burmese government. Burma should legalize the Rohingya, especially Rohingya who already legally qualify as citizens.<sup>15</sup>

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13. Matthew Smith, "Accountability and Transformation: Tier Rankings in the Fight Against Human Trafficking," testimony before the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations, Committee on Foreign Affairs, U.S. House of Representatives, April 22, 2015, [http://www.fortifyrights.org/downloads/FR\\_TIP\\_Testimony\\_April\\_2015.pdf](http://www.fortifyrights.org/downloads/FR_TIP_Testimony_April_2015.pdf) (accessed June 12, 2015).

14. Ram Anand, "Rohingya Crisis Won't Affect Malaysia's 2015 Human Trafficking Report, Says US," *The Malaysian Insider*, June 1, 2015, <http://www.themalaysianinsider.com/malaysia/article/rohingya-crisis-wont-affect-malysias-2015-human-trafficking-report-says-us> (accessed June 12, 2015).

15. Olivia Enos, "U.S. Should Not Stand By While Government in Burma Undermines Religious Liberty," *Heritage Foundation Issue Brief* No. 4373, April 3, 2015, <http://www.heritage.org/research/reports/2015/04/us-should-not-stand-by-while-government-in-burma-undermines-religious-liberty>.

## Conclusion

It is crucial that smuggled migrants be distinguished from trafficking victims. If all migrants are treated the same, and smuggled migrants receive the same legal rights as victims of trafficking, limited resources designated to combat human trafficking will be even more strained—thereby denying true victims of trafficking the resolution they deserve.

The U.S. must encourage partners in Southeast Asia to acknowledge the severity and complexities of the migrant crisis, and to use this time to shore up their anti-trafficking measures.

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