Strengthening Our Response to the Regional Boat Crisis

Briefing Paper for Members of Parliament

The Migration Working Group (MWG)

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Purpose

The purpose of the briefing note is to demonstrate how Malaysia must respond to the ongoing regional humanitarian crisis of boats currently adrift at sea, as well as new boat arrivals, in compliance with Malaysia’s international obligations and national legal framework. The issue is complex, and requires a multi-dimensional approach with cooperation of numerous regional stakeholders. In light of the current situation, we set out recommendations for a humane local and regional response.

Key Messages

1. **Duty to assist and rescue at sea:** Malaysia has an obligation to rescue at sea wherever and whenever possible, and is always in breach of international customary law and international maritime law (to which Malaysia is a party) when it deliberately fails to do so.

2. **Determining status of rescued persons:** All persons on board the boats in distress have a right to be rescued. In addition to being survivors of human trafficking, the groups comprise a mix of refugees, stateless persons and migrants. Upon rescue, humanitarian assistance should be provided and screening procedures carried out to determine individual legal status, for an appropriate response to the protection needs of each group.

3. **Need for regional response:** A strong, multilateral co-operative approach in the region is needed for a satisfactory resolution to this humanitarian crisis, in line with ASEAN’s ‘people first’ policy – Malaysia as ASEAN Chair must be firmly committed to this policy. We acknowledge the complexity of the matter and that Malaysia alone cannot work through the issues. A regional framework of action is required for considering a range of humanitarian, political, legal and development initiatives involving governments, international organisations and civil society actors. The focus should be on enhancing the human security of individuals through preventive diplomacy and conflict management, addressing the root causes of conflict and promoting equitable economic development.
Background

In Myanmar, Rohingyas are subject to extreme oppression, discrimination and poverty. The United Nations considers them **one of the most persecuted groups in the world**.

The humanitarian condition of the Rohingya is worsened by their official statelessness in Myanmar. They have been deprived of citizenship as Myanmar considers the Rohingya to be immigrants from Bangladesh and West Bengal, even though they were present in Myanmar well before it became independent in 1948. In addition to denial of citizenship rights, they face restrictions on religious freedom, forced displacement and killings.

In October 2012, Rohingyas and other Muslims in Arakan State in Myanmar were subject to such widespread and systematic attacks that organisations such as Human Rights Watch determined that it constituted ethnic cleansing and crimes against humanity.

In desperation, Rohingyas have boarded boats in Bangladesh and Myanmar, hoping to reach safety and seek refuge. In doing so, they have fallen prey to human traffickers, who have extorted, abused, and tortured them.

Women have reported being raped on boats and in smuggler camps in Thailand. Many have died along way. In the past few weeks alone, Thai authorities have discovered dozens of bodies buried at traffickers’ jungle camps on Thailand’s border with Malaysia.

Current Situation

Since the crackdown on human trafficking syndicates in Thailand, around 1000 Rohingya and Bangladeshi nationals were abandoned by people smugglers off the coast of Langkawi. They are all now in immigration custody in Kedah.

Between 6,000 and 8,000 refugees, asylum seekers and economic migrants from Myanmar and Bangladesh, including women and children, are currently stranded in boats off the coasts of Malaysia, Thailand and Indonesia.

The governments of all three nations are refusing to allow the boats to land. As of Saturday, the Malaysian navy had reportedly turned away three boats carrying hundreds of refugees and migrants after supplying them with fuel and provisions.

The Prime Minister has said that “a solution of ASEAN member countries must be taken to deal with the Rohingya refugees issue before it becomes a more deadly humanitarian catastrophe”. The Prime Minister has contacted the Myanmar government through the Foreign Minister, and is awaiting their response. The Deputy Home Minister has also said that Malaysia would continue to turn back boats and return the Rohingya back to Myanmar.
The Way Forward

We recommend the following action be taken by the Malaysian government, in line with its obligations under international law and commitment to the pillars of the ASEAN Community in creating a stable, integrated and caring regional community to strengthen ASEAN nations:

1. **Immediately cease the pushback of boats and conduct search and rescue operations for boats still adrift at sea**

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<th>Recommended action:</th>
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<td>1.1. Malaysia should immediately cease the pushback of boats out into international waters and rescue those out at sea, many of whom are on the verge of death.</td>
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<td>1.2. Thailand, Malaysia and Indonesia need to share information, including satellite information to determine the location of these boats and points of disembarkation.</td>
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**Malaysia’s obligations:**

- Customary international law and international maritime law compels Malaysia to rescue those stranded at sea, regardless of their status in international law.

- Malaysian is in breach of the **customary international law** duty to rescue if it deliberately fails to rescue in situations where it has clear knowledge of the stricken vessel’s distress and where mounting a safe rescue operation is practically feasible.

- **Article 98 of 1982 United Nations Convention on the Law of the Sea**, which Malaysian is a party, also sets out a duty to render assistance to persons in distress.

- The duty to render assistance applies in all maritime zones and to every person in distress without discrimination, including asylum-seekers and refugees.

- The duty to assist requires state parties to take the responsibility to care for the survivors, and allow individuals who are rescued at sea in such circumstances to be delivered promptly to a place of safety.

- As state party to the **1974 International Convention on the Safety of Life at Sea**, under Regulation V, Malaysia and other affected state parties (Thailand and Indonesia) have a complementary obligation to coordinate and cooperate so that persons rescued at sea are disembarked in a place of safety as soon as possible.
2. Provide immediate humanitarian assistance and protection to those disembarked

Recommended action:

2.1. Ensure access to Malaysian territory through the timely and safe disembarkation of boat persons and those in distress.

2.2. Ensure protection from return to Myanmar for Rohingya refugees while a longer-term solution is deliberated.

2.3. In cooperation with the UNHCR, develop a formalised identification, registration and documentation system that will help identify the legal status of arrivals (i.e. survivors of trafficking, refugees, stateless and migrants). Such a legal framework, as well registration and documentation of all persons in Malaysia will go some way in addressing national security concerns.

2.4. Develop a coordinated emergency humanitarian response plan and provide victim-focused assistance to meet immediate needs, including medical treatment, shelter, food and family tracing, with organisations such as IOM, ICRC, UNHCR and civil society.

Malaysia’s obligations:

- The principle of non-refoulement enshrined in customary international law prevents the return of persons who have the right to be recognised as refugees. It precludes any act of refoulement, of whatever form, including non-admittance at the frontier, that would have the effect of exposing a refugee or asylum-seeker to a threat of persecution, torture, life, physical integrity or liberty.

- As part of customary international law, this principle is applicable to all countries regardless of signatory status of the 1951 Convention Relating to the Status of Refugees.

- As a state party to the Convention on the Rights of the Child (CRC), Malaysia is bound by Article 22 to protect child asylum seekers and refugees in accordance with principles of human rights and humanitarian law.

- Malaysia has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which reinforces international refugee protection standards, including on admission. General Recommendation No. 32 calls upon state parties to recognise that women, girls and children who are victims of trafficking must have access to asylum procedures without discrimination or any preconditions.

- The act of turning away boats that include persecuted Rohingyas is a blatant violation of the afore-mentioned principles.
3. Implement a Regional Framework for Response

**Recommended action:**

3.1. With the cooperation of the authorities of Bangladesh and Myanmar, investigate and prosecute those involved in the crime of human trafficking, and protect victims of trafficking.

3.2. As the Chair of ASEAN, call for an emergency ASEAN meeting without delay to develop a mechanism at the regional level that allows ASEAN countries to oversee coordinated management of the population that has arrived temporarily. Reference can be made *The Model Framework for Cooperation in Rescue at Sea Operations involving Asylum-Seekers and Refugees* proposed by UNHCR on rescue at sea operations, and to the *UNHCR Guidelines on Temporary Protections or Stay Arrangements* to develop an overarching regional protection framework that requires implementation at the State level.

3.3. Work together with other ASEAN member states and the international community:

- To engage the Myanmar government in addressing the root causes of flight by the Rohingya, which include reducing ethnic violence, improving human rights standards and conferring citizenship rights;
- To raise awareness among the Rohingya of the dangers of putting their lives in the hands of smugglers and travelling by sea, as well as strict enforcement action in the region against persons engaging in human trafficking.

**Malaysia’s obligations**

- Anti-Trafficking in Persons and Anti-Smuggling in Migrants (Amendment) Act 2010.
- As the ASEAN Chair, it is Malaysia’s responsibility to lead member states into looking for solutions to this crisis.
- As a state party to the United Nations Convention on the Law of the Sea and the International Convention for the Safety of Lives at Sea, define the obligations of Malaysia, Indonesia and Thailand as state parties to both instruments to ensure cooperative arrangements for distress communication and coordination.